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6 BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

7 In the Matter of the Appeals of:) Hearing Examiner File:
8)
9 **SEATTLE FOR GROWTH AND SEATTLE) W-18-012 & W-18-013**
MOBILITY COALITION,)
10 Appellants.) CITY’S MOTION TO DISMISS
)
11 From a Determination of Non-Significance issued)
by the Seattle City Council.)

12 **I. INTRODUCTION AND RELIEF REQUESTED**

13 Respondent Seattle City Council (City) respectfully moves the Hearing Examiner to
14 dismiss Appellants Seattle for Growth (SFG) and Seattle Mobility Coalition (SMC) (together
15 Appellants) for failure to establish standing to bring an appeal under the State Environmental
16 Policy Act (SEPA). Appellants have not, and cannot, establish concrete and particularized injury-
17 in-fact for this non-project action (here, proposed Comprehensive Plan amendments) as required
18 under SEPA.

19 The proposed Comprehensive Plan amendments would (1) add a new policy and amend an
20 existing policy that establishes a methodology for determining deficiencies in the transportation
21 system necessary to create a Transportation Impact Fee (TIF) program; (2) incorporate a list and
22 map of transportation infrastructure projects that would be eligible to receive transportation impact
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1 fee funds, when a TIF Program is established. Appellants’ claims that the proposed Legislation
 2 will result in loss of housing due to increased fees is totally conjectural because the fees have not
 3 even been established, nor has it been determined what types of development will be subject to the
 4 TIF Program. Therefore, Appellants should be dismissed due to lack of SEPA standing.

5 **II. STATEMENT OF FACTS**

6 **a. The proposal.**

7 The City has prepared proposed Comprehensive Plan amendments¹ that would:

- 8 (1) add a new policy and amend an existing policy in the Transportation Element of
 the Comprehensive Plan and related appendix that establishes a methodology for
 9 creating a transportation impact fee program consistent with RCW 82.02.050-090;²
 and
- 10 (2) incorporate a list of transportation infrastructure projects and a corresponding
 map of the location of these projects that would be eligible to receive transportation
 11 impact fee funds.³

12 The proposed amendments to the Comprehensive Plan (Comp. Plan) would not, in and of itself,
 13 create a Transportation Impact Fee Program (TIF Program) but, if adopted by the City Council, would
 14 be the first step toward authorizing the program by determining the methodology used to evaluate
 15 impacts on the transportation system and to identify a list of transportation system improvement
 16 projects that would be eligible to receive some TIF Program funds in the future when a TIF Program
 17 is adopted by Council.⁴ If the City Council adopts the Legislation, the next step in creating a
 18 Transportation Impact Free (TIF) program would be City Council consideration of Legislation in the
 19 Seattle Municipal Code of the parameters of such a program, including applicability of the program,
 20 the cost of the fees and management of the program consistent with RCW 82.02.050-.110.⁵

21 ¹ Exhibit A to Declaration of Ketil Freeman in Support of City’s Motion to Dismiss (Freeman Dec.)(Proposed
 Comprehensive Plan Amendment Legislation, hereafter the Legislation).
 22 ² *Id.* at “Attachment 1: Amendments to the Transportation Element and Attachment 2: Amendments to the
 Transportation Appendix”.
 23 ³ *Id.* pages 2-3 of Attachment 2: Amendments to the Transportation Appendix”.
⁴ Exhibit C to Freeman Decl. (Determination of Non-Significance) at p. 1 (“Proposal Description”).
⁵ *See Id.* at p. 2, first full paragraph; Freeman Decl. at ¶¶ 9-10.

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b. SEPA analysis.

As part of the City's environmental review of the Legislation, the City reviewed the proposed Legislation and the environmental checklist prepared for the Legislation and determined that the checklist contained sufficient information to make the threshold determination.⁶ The City needed no additional information to make its threshold determination so it requested no additional information under SMC 25.05.335 before issuing the threshold determination.⁷

The Legislation is a non-project action under SEPA.⁸ The City issued the DNS on October 25, 2018.⁹ The DNS stated "The [Legislation] would accomplish the procedural requirements of RCW 82.02.050(5)(a) for establishing a transportation impact fee program.... The amendments would not in themselves create a transportation impact fee program."¹⁰

C. Seattle for Growth's Appeal to Hearing Examiner.

On November 14, 2018, Seattle For Growth (SFG) appealed the DNS to the Hearing Examiner.¹¹ In the SFG Notice of Appeal, the authorized representative is Roger Valdez.¹² SFG is identified as an "organization that advocates for policies to increase housing supply and meet demand for housing created by new jobs."¹³ SFG states further: Members of SFG "develop housing in the City, as well as living in housing in the City and use the City's transportation system."¹⁴ SFG states further:¹⁵

Seattle for Growth's members are adversely affected by this proposal because it will increase the costs of housing and therefore lead them to build less housing or different

⁶ Exhibit B to Freeman Decl. (Environmental Checklist).

⁷ *Id.*

⁸ Exhibit C to Freeman Decl. (DNS).

⁹ *Id.*

¹⁰ *Id.* at p. 2, first full paragraph.

¹¹ See *Seattle For Growth* Notice of Appeal (SFG Appeal), on file with the Examiner.

¹² *Id.*, at, p. 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

1 kinds of housing in different places than they would build without the distorting effect on
2 the market created by impact fees. The proposed changes to the transportation system that
3 will result from impact fees will also adversely affect the housing they own because impact
4 fees fund capacity for growth instead of addressing existing deficiencies in the
5 transportation system, which is seriously overburdened and will become more so in the
6 near future with the closing of the viaduct and the closing of the bus tunnel to buses.

D. Seattle Mobility Coalition’s Appeal to Hearing Examiner.

7 Appellant Seattle Mobility Coalition (SMC) filed its appeal to the Examiner on November
8 15, 2018.¹⁶ Like SFG, SMC also alleges that its “members” own and develop property and live in
9 Seattle.¹⁷ SMC alleges members of “the Coalition” are adversely affected by the proposal because
10 “they own property or live near street improvement projects which will proceed as a direct result
11 of the Proposal and will impact them” including “noise, dust and congestion” as well as “long term
12 noise, traffic and aesthetic impacts.” Further, SMC also alleges, like SFG, that its coalition
13 members also own property on which “development projections must be physically modified or
14 are rendered infeasible as a direct result of the proposal.”¹⁸ SMC also alleges that its members are
15 “prospective residents of these projects and neighbors who will be impacted by loss of housing
16 that would have been projected by these provided but for the Proposal.”¹⁹ SMC claims that “these
17 projects would be prevented or altered due to addition fees effected by the Proposal.”²⁰ SMC
18 claims that the Proposal will cause specific and perceptible harm to the Coalition members ability
19 to contribute to Seattle’s housing supply.”²¹

20 At the prehearing conference, the Examiner determined that any motions to dismiss should
21 be filed by January 14, 2019.

22 ¹⁶ SMC’s Notice of Appeal, on file with the Hearing Examiner .

¹⁷ *Id.* at p. 2:24-26.

¹⁸ *Id.* at p. 3:5-19.

¹⁹ *Id.* at p. 3:8-11.

²⁰ *Id.* at p. 3:14-15.

²¹ *Id.* at p. 15-19.

1 Further, Associations like SFG or SMC have no more standing than that provided by one
2 of their members.²⁵ Washington courts have rejected the idea that SEPA standing can be based
3 purely on citizen status.²⁶

4 **1. SFG lacks standing under SEPA.**

5 The paragraph in SFG’s Notice of Appeal addressing its interests cannot establish standing
6 under the *Trepanier* test.

7 SFG asserts standing by alleging Mr. Valdez is a resident of the City of Seattle.²⁷ This
8 allegation cannot and does not establish SEPA standing. To grant SFG standing based solely on
9 the fact that Mr. Valdez lives in Seattle would provide no meaningful limitation on standing to
10 appeal.

11 SFG fails to establish standing under the first prong of the standing test - that SFG’s alleged
12 injuries are within the zone of interest protected by SEPA. SFG’s Appeal fails to demonstrate
13 SEPA standing based on purported injuries to Mr. Valdez or one of its “members” flowing from
14 the DNS. SFG asserts that its “members” will be “adversely affected” because:²⁸

15 this proposal will increase the cost of housing and therefore lead them to build less
16 housing or different kinds of housing in different places than they would build
17 without the distorting effect on the market created by impact fees.

18 In *Snohomish County Property Rights Alliance v. Snohomish County*, the court held that
19 citizens lacked standing because they lacked sufficient proof they would suffer specific injury and
20 their injuries asserted were economic, which are not within the zone of interests protected by

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22 ²⁵ *Concerned Olympia Residents for the Environment v. City of Olympia*, 33 Wn. App. 677, 684, 657 P.2d 790 (1983).

23 ²⁶ *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 54, 882 P.2d 807 (1994), *review denied*, 125 Wn.2d 1025 (1995).

²⁷ SFG’s Notice of Appeal.

²⁸ SFG’s Notice of Appeal, p. 2.

1 SEPA.²⁹ Similarly, in *Harris v. Pierce County*, the court denied standing where the Petitioner’s
2 interest alleged- owning property that could be condemned- because such injury was economic
3 and not within the zone of interest protected by SEPA.³⁰ There was no showing of sufficient
4 “immediate, concrete, and special” injury to even this economic interest.³¹

5 SFG’s allegation of standing, like that in *Snohomish County* and *Harris*, is based on
6 economic injuries, which are not within the zone of interest protected by SEPA. These alleged
7 injuries are conjectural and speculative where the non-project action simply sets some parameters
8 of a program and incorporates a list of transportation system improvement projects that would be
9 eligible for TIP Program funds.³² SFG is not even sure what the effect will be:

10 this proposal will increase the cost of housing and therefore lead them to build less
11 housing or different kinds of housing in different places than they would build
12 without the distorting effect on the market created by impact fees.

13 Second, SFG alleges no concrete and particularized injuries to its members from the DNS.
14 Courts have denied standing where the petitioner does not allege facts showing that the challenged
15 land use decision would lead to any specific injury.³³ Standing is also lacking when it is unclear
16 that the ultimate land use action will lead to the impacts alleged by the plaintiff.³⁴

17 Here, SFG fails to allege any real, direct injury that would result from the Legislation. As

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²⁹ 76 Wn. App. at 53-54.

³⁰ 84 Wn. App. 222, 230-33, 928 P.2d 1111 (1996).

³¹ *Id.*

³² Ex. A to Freeman Decl., at Attachment 1 and 2.

³³ *Trepanier v. City of Everett*, 64 Wn. App. 380, 383-84, 824 P.2d 524 (holding that petitioner did not have standing where he offered only bare assertions that new zoning code reducing allowable densities in some parts of city would force new development into the unincorporated county), *review denied*, 119 Wn.2d 1012 (1992); *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53-54, 882 P.2d 807 (1994) (organization’s affidavits offered only speculative conclusions regarding anticipated future effects of county-wide planning), *review denied*, 125 Wn.2d 1025 (1995).

³⁴ *Harris v. Pierce County*, 84 Wn. App. 222, 231-32, 928 P.2d 1111 (1996)(holding that property owner did not have standing to challenge adoption of plan for trails where allegedly injurious exercise of eminent domain would not be certain until a final engineering plan was approved).

1 stated explicitly in the DNS, the proposed Comprehensive Plan amendments will not create a TIF
2 program without a bill that adopts the TIF program that sets rates and affected areas. However,
3 even if it did create a program, which it does not, Appellant SFG failed to establish that the
4 proposed Legislation will result in any concrete and particularized injuries to Mr. Valdez or any
5 of SFG's "members". SFG's allegations do not establish the "immediate, concrete, and specific
6 injury required to meet the second prong of the standing test, that of "injury in fact." To the
7 contrary, these allegations are examples that are "merely conjectural or hypothetical."

8 Significantly, SFG attempts to allege injury to its "members"; alleged injury of another
9 cannot establish "injury in fact" standing under SEPA;³⁵ SFG has failed to show it will personally
10 suffer any injury from the Legislation apart from alleged economic injuries that are speculative
11 and conjectural. STG has failed to establish standing and its Notice of Appeal must be dismissed.

12 **2. SMC also lacks standing under SEPA.**

13 SMC alleges in its Notice of Appeal that its "members" own and develop property and live
14 in Seattle.³⁶ As noted above, simply being a citizen and living in Seattle does not confer SEPA
15 standing. Likewise, owning and developing property in Seattle does not confer SEPA standing
16 particularly where the Proposal is a non-project action that sets the groundwork in the
17 Comprehensive Plan to create a TIF Program.

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³⁵ See, e.g., *KS Tacoma Holdings LLC v. Shorelines Hearing Board*, 166 Wn. App. 117, 272 P.3d 876, 138, where the court states "Generally, a party cannot rely on injuries to third parties to establish standing. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985).

³⁶ *Seattle Mobility Coalition* (SMC) Notice of Appeal. at p. 2:24-26.

1 Moreover, economic impacts to property owners is not an element of the environment that
2 is required to be studied under SEPA³⁷ and therefore, SMC’s interest is not within the SEPA zone
3 of interest. The Legislature limited study of “the environment” to the “natural” and carefully-
4 delineated aspects of the “built” environment. State SEPA statute provides:

5 The *elements of the built environment shall consist of* public services
6 and utilities (such as water, sewer, schools, fire and police
7 protection), transportation, environmental health (such as explosive
8 materials and toxic waste), and land and shoreline use (including
9 housing, and a description of the relationships with land use and
10 shoreline plans and designations, including population).³⁸

11 The City’s SEPA ordinance follows the legislative directive by limiting “environment” to
12 elements of the *physical* environment.³⁹ The narrow scope of the “built environment” is reflected
13 in the list of elements of the environment the Legislature directed Ecology to produce.⁴⁰ Economic
14 impacts are not listed as an element of the environment that must be studied.⁴¹

15 Numerous cases have recognized that alleged economic impacts due to an action are not
16 subject to environmental review unless the economic impacts will cause a probable significant
17 adverse environmental impact to one of the elements of the environment. In *West 514, Inc. v.*
18 *County of Spokane, et al.*,⁴² Appellants alleged economic impacts to existing businesses must be
19 evaluated under SEPA. The court held that “economic competition, in and of itself, is not an

20 ³⁷ Seattle Municipal Code (SMC) 25.05.444; WAC 197-11-444(2).

21 ³⁸ RCW 43.21C.110 (f).

22 ³⁹ SMC 25.05.444 and WAC 197-11-444(2). “Environment” means, and is limited to, those elements listed in WAC
23 197-11-444, as required by RCW 43.21C.110 (1)(f). Environment and environmental quality refer to the state of
the environment and are synonymous as used in these rules and *refer basically to physical environmental quality.*
WAC 197-11-740 (emphasis added); SMC 25.05.740. *See, also* WAC 197-11-440(6)(e) (study “impacts upon and
the quality of the *physical* surroundings, whether they are in wild, rural, or *urban* areas” (emphasis added)).

⁴⁰ SMC 25.05.444. *See, also* WAC 197-11-444(2) & RCW 43.21C.110(1) (authority for Ecology to promulgate this
list).

⁴¹ SMC 25.05.444 and WAC 197-11-444(2).

⁴² *West 514, Inc. v. County of Spokane*, 53 Wn. App. 838, 847, 770 P.2d 1065 (1989).

1 environmental effect and need not be discussed in an EIS. WAC 197-11-448(3).”⁴³ Similarly, in
2 *Indian Trail Property Owner’s Association v. City of Spokane, et al., (ITPOA)*, when Appellants
3 alleged that the agency failed to consider adverse impacts on the physical environment due to
4 economic competition, the Court stated:

5 [I]f the probable effect of competition is such that the ‘built
6 environment’ is affected, review is called for by WAC 197-11-
7 444(2). West 514 (citations omitted). However, economic
8 competition, in and of itself, is not an element of the environment
9 under WAC 197-11-448 (3). SEPA review was not inadequate on
10 this basis.

11 *ITPOA*, 76 Wn. App. 430, 444, 886 P.2d 209 (1994).

12 Here, there can be no concrete and particularized injury to any of SMC’s members based
13 on this Proposal. It is not even known what the rates will be or what types of development will be
14 subject to Transportation Impact fees under the Program. SMC’s claims that its members
15 development projects will be prevented or altered”⁴⁴ due to the proposal is totally speculative and
16 conjectural.

17 Likewise, SMC alleges that its members are “prospective residents of these projects and
18 neighbors who will be impacted by loss of housing that would have been provided but for the
19 Proposal.”⁴⁵ SMC claims that it has members who are “in the process of developing projects that
20 would increase the supply of housing in Seattle” and “these projects would be prevented or altered
21 due to addition fees effected by the Proposal.”⁴⁶ Such claims are equally speculative and
22 conjectural because the Proposal simply makes it possible to create a Transportation Impact Fee
23 Program; however, the Program would require legislation to create the TIF Program which

24 ⁴³ *Id.*

25 ⁴⁴ *Id.* at p. 3:12-14.

26 ⁴⁵ *Id.* at p. 3:8-11.

27 ⁴⁶ *Id.* at p. 3:10-15.

1 determines applicability and sets fees. It is impossible to establish any concrete and particularized
2 injury based on the Proposal.

3 Moreover, STC's claims that its members are adversely affected by the proposal because
4 "they own property or live near street improvement projects which will proceed as a direct result
5 of the Proposal and will impact them" also fails to establish SEPA standing. The Proposal does
6 not authorize or permit any transportation projects- rather, it simply makes these projects eligible
7 to receive TIF Program funds when the Program is established and implemented.⁴⁷ There can be
8 no concrete and particularized injury to STC's unnamed members based on the proposed
9 Legislation.

10 Finally, injury-in-fact is extremely difficult to establish for a non-project action.⁴⁸ The
11 Legislation would amend the Comprehensive Plan to authorize creation of a TIF Program city-
12 wide.⁴⁹ SMC has identified no particular development location where impact fees will be imposed
13 that will result in loss of development. That is because the Legislation does not even create a TIF
14 Program that sets the rates or establishes what types of development will be subject to payment of
15 Transportation Impact Fees.⁵⁰ Many factual links are missing making SMC's claim of injury
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⁴⁷ Freeman Decl.

18 ⁴⁸ As the Central Puget Sound Growth Management Hearings Board observed in a recent case involving SEPA
19 standing: "Frequently, GMA challenges involve broad general planning and zoning enactments. In such cases, harm
20 may be merely speculative, as the development allowed [or restrictions imposed] under the plan may never occur or
21 may be mitigated during subsequent project-specific review." *Davidson Serles, et al. v. City of Kirkland*, Central
22 Puget Sound Growth Management Hearings Board Case No. 09-3-0007c (Order on Motions, June 11, 2009), 2009
23 WL 3309100 at *12-13. The Board noted that, in "many cases," it has found that no "immediate" harm resulted from
a "non-project" action. *Id.*; see also *Everett Shorelines Coalition, et al. v. City of Everett and Washington State
Department of Ecology*, Central Puget Sound Growth Management Hearings Board Case No. 02-3-0009c (Order on
Motions, October 1, 2002), 2002 WL 32062379 at p. 22 ("The Board has acknowledged that it will be difficult for
any petitioner to demonstrate the 'specific injury' required by Leavitt and Trepanier when challenging the SEPA
sufficiency of non-project actions, such as local government legislative actions adopting amendments to
comprehensive plans and development regulations.").

⁴⁹ See, e.g., p. 1 of Ex. C to Freeman Decl. (DNS).

⁵⁰ Freeman Decl. at ¶¶ 4, 9-10.

1 completely conjectural and speculative.⁵¹ Washington courts have declined to find “injury in fact”
2 for SEPA standing under such circumstances.⁵² Here, SMC fails to allege any real, direct injury
3 that would result from the Legislation. That is because no direct injury will result from the Proposal.
4 Failing to identify any basis for SEPA standing, SMC should be dismissed as a party from the
5 appeal.

6 VI. CONCLUSION

7 The Examiner should dismiss both SFG and SMC as parties because neither appellant has
8 demonstrated SEPA standing by a single member of its coalition because both Notices of Appeal lack
9 a scintilla of evidence that the Proposal will result in specific and concrete injury. Rather, both SFG
10 and SMC’s claims are purely conjectural and speculative. Therefore, both appeals must be dismissed.

11 DATED this 14th day of January 2019.

12 PETER S. HOLMES
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14
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21 ⁵¹ The foregoing is not meant to be an exhaustive list of the links in the factual chain that would be required for
Appellants to establish SEPA standing, but it is sufficient to demonstrate the very conjectural nature of any injury in
this case.

22 ⁵² See *Harris v. Pierce County*, 84 Wn. App. 222, 231-32, 928 P.2d 1111 (1996) (rejecting SEPA standing for property
owner in case of trail proposal where locations of trail acquisitions had not yet been determined); *Snohomish County*
23 *Property Rights Alliance v. Snohomish County*, 76 Wn. App. at 53-54 (property owners’ organization failed to show
injury in fact where affidavits merely asserted conclusions as to anticipated future effects of county-wide planning).

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of Respondent City’s Motion to
3 Dismiss and the Declaration of Ketil Freeman In Support of City’s Motion to Dismiss with
4 Exhibits A-C with the Seattle Hearing Examiner using its e-filing system.

5 I also certify that on this date, a copy of the same documents were sent to the following
6 parties listed below in the manner indicated:

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16 DATED this 14th day of January 2019.

17 *s/Alicia Reise*
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