BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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

I. INTRODUCTION

Respondent Seattle City Council (City) respectfully moved the Examiner to dismiss Appellants Seattle for Growth (SFG) and Seattle Mobility Coalition (SMC) (together Appellants) for failure to establish standing to bring a State Environmental Policy Act (SEPA) appeal. Appellants failed to establish concrete and particularized injury-in-fact for the non-project Legislation that proposes narrow amendments to the Comprehensive Plan that (1) direct the methodology for evaluation of impacts as part of a transportation impact fee program (TIF Program) and that (2) identify a handful of projects as eligible to receive TIP funds if Council creates a TIF Program. The Legislative proposal, if adopted, would set the groundwork for the Council to consider a TIF Program and set the rates for such a program. Appellants' failed to establish either prong under the SEPA standing test. SFG allegations of "builders loss of profit

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and decreased housing supply is based on speculation because no actual fee rate has been set to date, nor has it been determined where the fee will apply or to what types of development. Speculative and conjectural "injury" is insufficient to establish SEPA standing. As is reliance on alleged injury to a third party. Arguing that the proposed Legislation will result in loss of housing due to increased fees is totally conjectural because the fees have not been established, and it has not been determined what types of development will be subject to the TIF Program. Mr. Valdez has failed to carry his burden to establish that he will suffer an immediate and concrete injury due to the proposed Legislation. Therefore, Mr. Valdez should be dismissed due to lack of SEPA standing.

Likewise, Seattle Mobility Coalition (SMC) failed to meet the two-prong test to establish SEPA standing. SBC relies on declarations from two members, both of who rely almost exclusively on the claim that several of their projects would be impacted by the construction of "Eligible Projects"; however, this Proposal does not authorize or fund the Eligible Projects identified on Transportation Appendix A-18. The Proposal only identified these projects in the Comp Plan as required by Chapter 82.02. Therefore, these alleged injuries are irrelevant and cannot establish standing for the present appeal. Further, SMC relies on claims that the TIF fees will injury two developers, Onni and ALMI, by increases in housing affordability and decreases in housing units to tenants. However, Onni and ALMI cannot rely on injury to third parties to establish a concrete injury to itself. And finally, Onni and ALMI's claim that it may need to reduce the number of parking stalls for some of its projects is conjectural and does not establish "injury" in a way that is anything other than economic injury, which does not establish SEPA standing. SMB has failed to establish a concrete and particularized injury to any of its members. For these reasons, both SFG and SMC should be dismissed for lack of SEPA standing.

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II. ANALYSIS & ARGUMENT

A. Appellants Should Be Dismissed as a Party from the SEPA Appeal.

Associations like SFG or SMC have no more standing than that provided by one of their members.[1]

1. SFG lacks standing under SEPA.

SFG failed to meet either prong of the SEPA standing requirement in its notice of appeal or in its response to the City's Motion to Dismiss. Therefore, SFG must be dismissed from this appeal.

Under the first prong of the SEPA standing test, Mr. Valdez failed to establish his interest or that of his nonprofit, Seattle For Growth, falls within the SEPA zone of interest. In his response, he states only that he is the "Director of Seattle For Growth". He does not provide a single statement in his response or associated declaration establishing how he or his non-profit falls within the zone of interest of SEPA. Instead, he argues that SFG's interest is not economic but rather based on "the broader impact on people who will have to make different decisions when housing is scarce and expensive."[2] Other people's decisions do not confer standing to Mr. Valdez. Just like alleged injury of another cannot establish "injury in fact" standing under SEPA[3], allegations of how other people must make decisions about housing does not in any way establish that the interests of Mr. Valdez or his non-profit fall within SEPA's zone of interests. His claim is inadequate to establish his interests or that of his nonprofit fall within SEPA's zone of interest.

Under the second prong needed to establish SEPA standing, 'injury in fact', Mr. Valdez

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[1] *Concerned Olympia Residents for the Environment v. City of Olympia*, 33 Wn. App. 677, 684, 657 P.2d 790 (1983).
[2] SFG Response at p. 7, line 28.
[3] *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).

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failed to establish that he will personally suffer any concrete and particularized injury from the Legislation. In its Response, Mr. Valdez argues alleged injury to "the people who produce the housing".[4] Yet, he does not produce a declaration from any developer or builder who is a member of his nonprofit, he claims that obtaining such a declaration was "impossible."[5] SFG has provided no evidence that he or any member of SFG would be specifically and perceptibly harmed by the proposal.

Rather, he relies entirely on unsupported claims of "lost profit" and "decreased housing supply" to these unnamed builders or developers.[6] Such speculative claims are not bound in facts and are insufficient to establish SEPA standing for Mr. Valdez. First, the proposed legislation does not set a TIF fee or establish affected areas or types of development that are subject to the TIF Program. It is hard to contemplate how this legislative proposal could possibly result in lost profit leading to decreased housing supply without these critical details yet determined for the City's TIF program. Moreover, even if these alleged injuries were documented, which they were not, these were not injuries to Mr. Valdez. He cannot rely on injures to third persons. Roger Valdez is not a developer or builder. Here, SFG fails to allege any real, direct injury to Mr. Valdez that would result from the Legislation.

SFG argument that the "uncertainty created by new fees" is an "'immediate, concrete and special impact" being felt by these (unnamed) builders and developers.[7] These bald assertions also do not establish an immediate, concrete and specific injury to Mr. Valdez. Nor do they establish an immediate, concrete and specific injury to some "member" of SFG because Mr. Valdez did not

[4] SFG Response at p. 2:4.
[5] *Id.* at p. 5:11-13.
[6] *Id*. at p. p. 2: 1-3; p. 7: 4-11; and p. 8:24-28.
[7] *Id.* at p. 7:4-7.

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identify any member of SFG other than himself. Courts have denied standing where the petitioner does not alleged facts showing that the challenged land use decision would lead to any specific injury.[8] Here, Mr. Valdez has failed to establish the proposal will result in his immediate, concrete and specific injury. For these reasons, he cannot establish SEPA standing and he must be dismissed from this appeal.

2. SMC also lacks standing under SEPA.

As already noted, a two-prong inquiry is used to determine if a petitioner has standing to bring an appeal to the Examiner. Under the first prong of the SEPA standing test, SMB must establish that its interest falls within the SEPA zone of interest And under the second prong needed to establish SEPA standing, 'injury in fact', the challenged action, here Legislation, must have caused injury in fact to the person seeking standing. Where the alleged harm is threatened but has not yet occurred, the petitioner must show that "the injury will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing."[9]

Where a corporation or nonprofit organization is the party challenging the action (here Legislation), the organization must demonstrate that at least one of its members has been or will be specifically and perceptibly harmed by the challenged action.[10]

The issue here is whether Seattle Mobility Coalition members have alleged sufficient injury due to the proposed Legislation to establish standing. SMC failed to establish sufficient injury.

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[8] *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).

[9] *Knight v. City of Yelm*, 173 Wn.2d. 325, 341, 267 P.3d 973 (2000).

[10] *See Chelan Basin Conservancy v. GBI Holding Co*., 190 Wn.2d 249, 272-73, 413 P.3d 549 (2018).

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Before addressing SMC's insufficiency in meeting the two-prong standing test in detail, it is key to address SMC's inference that the proposed Legislation has some "substantive effect" to construct the transportation projects listed in Transportation Appendix A-18. This claim serves as the basis for much of their Response. Yet, it completely misses the mark. The Legislation only sets the groundwork for the Council to create a TIF program. And the inclusion of the list of TIF eligible projections in Transportation Appendix A-18 identifies certain projects as eligible to receive TIF funds. The Legislation does not, as suggested by SMC, authorize construction of any transportation projects referenced in Appendix A-18. The proposed Legislation only identifies projects eligible to receive TIF moneys as required by RCW 82.02.050(5)(a) and WAC 365-196-850(4). The proposal is a non-project action that contains proposed Comprehensive Plan amendments to lay the groundwork for creation of a TIF program. SMC's attempt to characterize the action as a project action is off-base and misses the mark. Likewise, SMC's claim that the Amendment "will fund the construction of these projects resulting in significant construction impacts to members' projects and properties" also misses the mark. SMC hangs it hat on the proposed amendment to one of the funding polices, T10.7, which removes the term "consider":

> ~~Consider~~ ~~u~~Use ~~of~~ transportation-impact fees to help fund transportation system improvement needed to serve growth.

The proposal does not authorize construction of any projects listed in Transportation Appendix A-18. Rather, it provides that if a TIF program is created, the projects on the list are eligible to received TIF funds. The projects listed in the Transportation Appendix are already contained in the City's modal plans, as acknowledged by SMC, and the SEPA checklist acknowledges that additional environmental review would occur for potential future development

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of identified projects. The proposed Legislation does not mandate the project construction, as argued by SMC, the Council has not even established a TIF program.

Washington courts have held that impact fee programs and imposing impact fees on development under RCW Chapter 82.02 do not limit land use or affect physical aspects of development.[11] Here, like in *New Castle* and *Pavlina*, the legislative proposal does not limit land use or affect physical aspects of development. In fact, as stated previously, the Legislation simply sets the groundwork for creation of a TIF Program. Thus, SMC's copious argument and numerous declarations outlining "impacts resulting from Eligible Projects" also misses the mark and fails to establish how SMC's members are specifically and perceptibly harmed by the Legislation.

Moreover, contrary to SMC's request, the Examiner should not simply assume SMC members have standing, like in *Leavitt* and *Kucera*. SBC Response at p. 17. In *Leavitt*, Appellant lived next to approximately 500 acres of undeveloped land.[12] And the Proposal contemplated a concentration of five dwelling per acre so for a total of approximately 2,500 potential residences and their stormwater discharge and traffic impacts. Here, this non-project action will not result in likely modifications to the environment. Rather, the construction of the transportation projects set out at Transportation Appendix A-18 is contemplated at some point in the future. However, this proposal does not authorize the construction of those projects. Nor does the Proposal fund those transportation projects. It only makes the projects eligible to receive some TIF funds if and when a TIF program is adopted. However, these projects may not be exclusively funded by TIF fees[13] and the rates have not even been set. Therefore, the claim that the Proposal will create actual injury

[11] *Pavlina v. City of Vancouver* , 122 Wn. App. 520, 529, 94 P.3d 366 (2004) citing to *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999), review denied, 140 Wash.2d 1019, 5 P.3d 9 (2000).
[12] 74 Wn. App. 668, 679.
[13] RCW 82.02.050(2).

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to adjacent property owners based on impacts from alleged construction of the transportation projects is simply speculation. This includes much of the Declaration of Scott Koppelman and Dave Evans, alleging injury based on these transportation projects.[14] In *Kucera*, the Proposal was the "deployment and operation of a single vessel on an established route between established terminal facilities". Unlike *Kucera*, the Proposal is a non-project action to amend the Comprehensive Plan.

Moreover, SMC argues that even if technical standing requirements are not met, the Examiner can take a less rigid and more liberal approach to standing for matters of substantial public interest. [15] The only public interest identified by SMC is that it is a fee being adopted for the first time that will affect a significant number of people. Actually, the Proposal does not adopt a TIF Fee or adopt a TIF program. It lays the groundwork to do that in the Comprehensive Plan. Further, SMB's general interest should not serve as the bases for the Examiner to ignore the requirements of representational standing.

Here, because standing is disputed, SMC must demonstrate standing by its members to proceed with the administrative appeal.

i. Under the first prong of the SEPA standing test, SMC failed to establish its interest falls within the SEPA zone of interest.

In *Snohomish Cty. Prop. Rights All. v. Snohomish Cty.*, a challenge to adoption of county-wide planning policies asserting that a submission of an EIS Addendum in lieu of a supplemental EIS failed to meet requirements of SEPA.[16] In evaluating whether petitioners had standing, the court

[14] Declaration of Scott Koppelman at p. 2:7-14, detailing three projects that "would be directly impacted by the construction of Eligible Projects" from p. 2:7-p. 7:22. And Declaration of David Evans at p. 2:1-7, "I have identified three ongoing Onni projects in Seattle that would be impacted y the construction of Eligible Projects", including p. 2:8-8:2.

[15] SMC Response at p. 18.

[16] 76 Wn. App. 44, 882 P.2d 807 (1994).

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held that economic interests such as "property values, property taxes, restrictions on the use of property as affecting property value, and the cost of transportation facilities" were not within the "zone of interests" that SEPA protects.[17] Likewise, SMC attempts to cast its members interest as environmental, not economic, noting its member's physical properties will be impacted- "both by direct effects of construction and altered traffic patterns as well as by the economic effects of the fees on elements of the built environment such as housing."[18] As discussed above, there are no direct effects of construction and altered traffic patterns to this Proposal. This Proposal does not authorize or fund the transportation improvement projects set out in Appendix A-18. So, SMC's claims that the Proposal will physically affect their member's properties based on the list of projects that are eligible to be funded from TIF funds lacks merits and does not establish a basis its members interest to fall within the SEPA zone of interests. All that is left then is the "economic effect of the fees" on elements of the built environment. And as noted in the City's Motion, economic injuries do not fall within the SEPA zone of interest.

SMC attempts to argue that its members interest fall within the zone of interest of SEPA because the fees may impact housing affordability. However, both AMLI and Onni entire business is built on developing commercial and residential development. Their interest is purely economic. To argue otherwise, flies in the face of logic. These members will be injured in the pocketbook, which is why they have filed the present appeal. Further, their claim of injury due to loss of housing affordability relies on injury to third parties- that of residential tenants. This does not establish standing for Onni or AMLI.

[17] *Id.* at 52.
[18] *Id.* at p. 5:18-21.

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Likewise, SMC's claim that they will be injured based on how the Proposal will affect their physical properties.[19] In particular, they allege that "they would likely need to mitigate the costs of paying the fees by passing them along to residential tenants (impacting housing affordability) and reducing available parking (impacting nearby traffic and parking availability)."[20] Passing on costs to residential tenants is again economic interest that does not fall within the zone of interests under SEPA.

In order to fall within the zone of interests under SEPA, the economic injury must be probable and must also result in impacts to the environment. As stated several times, without knowing what the TIF fee would be, it's hard for SMC to allege an actual concrete injury that would result in an impact on the environment. Plus, a generalized statement that it will need to reduce onsite parking, even if this claim was true, is not a concrete injury to AMLI or Onni that is anything other than economic. Further, is speculative to allege that a reduction in parking would have an effect on the built environment at this point. How many stalls would be reduced? What would in parking impact be, if anything, and if so, would the code or substantive SEPA require modifications to AMLI or Onni's proposal? This has yet to be seen because we are only at the very early stages of creation of a TIF Program. SMC has failed to establish that AMLI or Onni's interests are anything other than economic, which is not within the zone of interest of SEPA.

ii. Under the second prong needed to establish SEPA standing, 'injury in fact', SMC failed to establish that he will personally suffer any concrete and particularized injury from the Legislation.

Appellant SMC failed to demonstrate that is members are subject to a specific and immediate threat of harm flowing from the Comprehensive Plan amendment.

[19] SMC Response at p. 23:18-20
[20] SMC at p. 24:14-19

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Numerous cases have recognized that alleged economic impacts due to an action are not subject to environmental review unless the economic impacts will cause a probable significant adverse environmental impact to one of the elements of the environment. In *Indian Trial Property Owner's Association v. City of Spokane, et al., (ITPOA)*, the Court stated:

> [I]f the probable effect of competition is such that the 'built environment' is affected, review is called for by WAC 197-11-444(2). West 514 (citations omitted). However, economic competition, in and of itself, is not an element of the environment under WAC 197-11-448 (3).

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

Here, there is concrete and particularized injury to any of SMC's members based on this Proposal. It is not even known what the rates will be or what types of development will be subject to Transportation Impact fees under the Program. Even with the declarations from David Evans and Scott Koppelman, their reliance on alleged injury is based almost exclusively on construction of "Eligible projects"; however, the Proposal does not authorize, approve or fund these transportation projects- it simply makes these projects eligible to receive some TIF Funds if/when the program is adopted.

Likewise, in its NOA, SMC alleges that its members are "prospective residents of these projects and neighbors who will be impacted by loss of housing that would have been provided but for the Proposal." [21] SMC claims that it has members who are "in the process of developing projects that would increase the supply of housing in Seattle" and "these projects would be prevented or altered due to addition fees effected by the Proposal."[22] However, in its response, the claims are more nuanced, though still speculative. SMB relies on a declaration from Morgan

[21] *Id.* at p. 3:8-11.
[22] *Id.* at p. 3:10-15.

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Shook who states very generally that increased fees will decrease developers profits and increase construction costs and result in fewer units constructed. However, SMB also argues it will pass on these fees to tenants so maybe Mr. Shook's broad claim does not apply here. Mr. Shook also makes general claims that are nothing other general concepts of supply and demand. Such a declaration does not establish an injury to Onni or AMLI here. Without having more details about the scope of the program, the fee range, the application of the program to what types of development, it is almost impossible to establish concrete injury at this point. SMB's claims to the contrary are equally speculative and conjectural because the Proposal simply makes it possible to create a Transportation Impact Fee Program; however, the Program would require legislation to create the TIF Program which determines applicability and sets fees. It is impossible to establish any concrete and particularized injury based on the Proposal.

Finally, injury-in-fact is extremely difficult to establish for a non-project action.[23] The Examiner recognized this in proposals that are non-project actions that propose Code amendments.[24] Like those appeals that were challenged a non-project Legislative action, the Legislation here would amend the Comprehensive Plan to authorize creation of a TIF Program city-wide. As already noted, the Comprehensive Plan amendment only sets the groundwork for

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[23] As the Central Puget Sound Growth Management Hearings Board observed in a recent case involving SEPA standing: "Frequently, GMA challenges involve broad general planning and zoning enactments. In such cases, harm may be merely speculative, as the development allowed [or restrictions imposed] under the plan may never occur or may be mitigated during subsequent project-specific review." *Davidson Serles, et al. v. City of Kirkland*, Central Puget Sound Growth Management Hearings Board Case No. 09-3-0007c (Order on Motions, June 11, 2009), 2009 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.*; s*ee 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.").

[24] In the matter of the appeals of Keep Washington Beautiful & Total Outdoor Corp. from a DNS, HE File W-13-003 and W-13-004 and In the matter of the appeals of Steady Floats & Land Union Liveaboard Association from a DNS, HE File W-18-006 and W-18-007.

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the TIF Program; it does not establish what types of development will be subject to payment of Transportation Impact Fees or determine what types of development the fee rates will apply to or determine when the Program will be effective. Even after SMC provided three declarations establishing injury, the vast bulk of the declaration of Scott Koppelman and David Evans both rely almost exclusively on the claim that their projects would be impacted by the construction of Eligible Projects. However, the Proposal does not authorize or fund these Eligible Projects. Thus, claims made by Evans and Koppelman as to these alleged injuries must be disregarded.

Moreover, the claimed injury to AMLI and Onni due to the increased fees is speculative and conjectural and does not establish actual injury to AMLI and Onni.[25] Washington courts have declined to find "injury in fact" for SEPA standing under such circumstances.[26] Here, SMC fails to allege any real, direct injury that would result from the Legislation. That is because no direct injury will result to AMLI or Onni from the Proposal. Failing to identify any basis for SEPA standing, SMC should be dismissed as a party from the appeal.

III. CONCLUSION

The Examiner should dismiss both SFG and SMC as parties because neither appellant has demonstrated SEPA standing by a single member of its organization. Therefore, both appeals must be dismissed.

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[25] 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.

[26] *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 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).

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CERTIFICATE OF SERVICE

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

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

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