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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
POST-HEARING BRIEF

I. INTRODUCTION

The City of Seattle (“City”), as part of a proposal to establish a transportation impact fee program (“Proposal”), has introduced a set of amendments (“Amendments”) to its Comprehensive Plan (“Plan”). At the hearing in this appeal, City witness Ketil Freeman – who authored the Amendments and issued the Determination of Nonsignificance (“DNS”) – testified that when the City Council considers the Amendments, it will be making a “go-no/go decision” on whether to move forward with an impact fee program. *Ketil Freeman Testimony* (“Freeman”), Day 1, Part 3, 56:45-50.¹ This is because if the Amendments are adopted, the City Council would need to implement an impact fee program because the City “would need to have

¹ For the Examiner’s convenience, along with this brief, Appellant is filing an unofficial verbatim transcript of portions of Mr. Freeman’s testimony that include the excerpts cited in this paragraph.

1 second component of the Proposal is the adoption of development regulations imposing the fee.
2 *Freeman*, Day 1, Part 3, 54:50-55:05 (“A general practice in the City is that initially a policy
3 proposal is adopted; after that policy proposal is adopted, implementing regulations are
4 adopted.”).

5
6 **A. The Amendments**

7 The Amendments include changes to the Comprehensive Plan Transportation Element
8 and Transportation Appendix. The amendments to the Transportation Element include the
9 following:

- 10 • An amendment to the Transportation Element’s discussion of measuring level of
11 service that states: “For the purposes of establishing a transportation impact fee
12 program, the City will identify the demands placed on the system by new
13 development by establishing the future cost per person trip of capacity-related
14 improvements to the transportation system relative to the value of the existing system.
15 This existing-system value methodology complements the level of service by
16 focusing on person trips, regardless of mode.” The amendment also states that a more
17 detailed description of the “existing system-value methodology” is in the
18 Transportation Appendix. Ex. 2, Att. 1, p. 1.
- 19 • The addition of Transportation Goal 10 (“TG 10”), stating: “Base transportation
20 impact fees on the difference between the value of the existing transportation system
21 and the cost of identified capacity-related improvements needed to address the
22 impacts of growth.” *Id.*, p. 2.
- 23 • The amendment of Transportation Policy 10.7 (“T 10.7”), which now reads “Consider
24 use of transportation-impact fees to help fund transportation system improvements
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1 needed to serve growth,” so that it will read “Use transportation-impact fees to help
2 fund transportation system improvements needed to serve growth.” *Id.* (emphasis
3 added).

4 The amendments to the Transportation Appendix include the following:

- 5 • Adoption of a new heading, “Transportation Impact Fees,” under which there is a
6 description reading, “A transportation impact fee program partially addresses service
7 needs by helping to fund capacity improvements to existing facilities and new capital
8 projects. The program identifies projects needed to address demands on the
9 transportation network associated with growth and new development. In determining
10 existing deficiencies, the City utilizes a methodology based on a quantification of the
11 value of the existing transportation system.” *Id.*, Att. 2, p. 1.
- 12 • Adoption of a new heading, “Existing System Value Methodology,” under which
13 there is a description stating: “The existing system value methodology establishes a
14 maximum allowable impact fee rate. This is a method of determining existing
15 deficiencies which establishes that the City cannot charge an impact fee rate that
16 exceeds the value of the system that exists today. First, the existing value of the
17 transportation system is calculated using both the value of existing infrastructure and
18 land in the right-of-way. This value is then divided by the number of current PM
19 peak hour person trips to establish a current value per person trip. An impact fee rate
20 cannot exceed this value. Next, the total cost of impact-fee eligible capacity
21 improvements are calculated based on a list of projects required to serve new
22 development. That total amount is then divided by the number of new person trips
23 forecast over a twelve year period, the timeframe for improvements listed in the

1 impact fee program, to establish the cost per person trip of needed capacity
2 improvements. Impact fee rates by land use are calculated based on that cost.” *Id.*
3 (emphasis added).

- 4 • Adoption of a new heading “Facility Improvements to Serve New Development,”
5 under which there is a description stating: “The City has identified multiple projects
6 serving all modes that are needed to address demands on the transportation network.
7 The projects are drawn from multiple sources including the City’s modal plans and
8 are intended collectively to improve the performance and efficiency of the
9 transportation network. Projects are listed in Transportation Appendix A-18 and most
10 project locations are shown on Transportation Appendix A-19. Projects included in
11 the list are eligible for expenditures using revenue from the transportation impact fee
12 program.” *Id.*
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14 • Adoption of new Transportation Appendix Figures A-18 and A-19, which are a list
15 and map, respectively, of the projects referenced in the preceding amendments that
16 are eligible for expenditures using revenue from the transportation impact fee
17 program (“Eligible Projects”). *Id.*, pp. 2-3.
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20 **B. The DNS**

21 The City Council purported to review the environmental impacts of the Amendment in an
22 environmental checklist (“Checklist”). Ex. 7. The Checklist is bare bones. Section B of the
23 Checklist, which asks for information on impacts to each element of the environment under the
24 State Environmental Policy Act (“SEPA”), is left entirely blank. The discussion of potential
25 environmental impacts is limited to cursory responses to the questions posed in the Supplemental
26 Sheet for Nonproject Actions. In these responses, the City asserts several times that “the current
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1 action is not sufficient to implement a program, in and of itself” and therefore does not affect the
2 environment. *Id.*, pp. 14-17. Among other things, the City inaccurately states, “[b]ecause the
3 current action is not sufficient to implement a program, in and of itself, it makes no changes to
4 land . . . use.” *Id.*, p. 16.

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6 The Checklist admits that construction of the Eligible Projects is an intended effect of the
7 Amendment, stating: “Future implementation, should it occur, would facilitate improvements to
8 transportation facilities in existing rights-of-way.” *Id.* Yet, the Checklist fails to provide an
9 analysis of the impacts of these transportation projects. Instead, the Checklist dismisses
10 construction impacts of these projects in one sentence, stating, “Any construction-related impacts
11 associated with potential future development of identified projects would be mitigated by
12 existing environmental protection regulations and, for those projects that are not categorically
13 exempt from SEPA, additional environmental review.” *Id.*, p. 15.

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15 Ultimately, based on this scant and inadequate review, the City Council issued a
16 Determination of Nonsignificance (“DNS”). Ex. 8. The DNS repeats the fundamental error of
17 the Checklist, stating the Amendment is “necessary, but not sufficient” to establish an impact fee
18 program and inaccurately characterizing it as “primarily procedural.” *Id.*, p. 1.

20 **C. Appeal**

21 The City issued the DNS on October 25, 2018. The Coalition submitted a timely
22 comment letter on November 8, 2018. The Coalition then timely appealed on November 15,
23 2018. The City moved to dismiss the Coalition’s appeal for lack of standing. The Examiner
24 denied the motion. A full hearing was held on June 10, 12, and 18, 2019.

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26 The Coalition offered the expert testimony of George Steirer, who has worked as a
27 planner in the State of Washington for more than 15 years, nearly nine of which were as
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1 principal planner for the City of Mercer Island. As an expert on SEPA, Mr. Steirer testified that
2 analysis of the impacts described in Part B of the Checklist would “provide meaningful
3 information for the decisionmakers” considering the Amendments, particularly with regard to the
4 Proposal’s potential impacts on “affordable housing, housing productivity, and the impacts from
5 the construction of the transportation improvement projects.” *George Steirer Testimony*
6 (“*Steirer*”), Day 1, Part 3, 22:15-40. However, the City’s failure to analyze the impacts of a fee
7 program created an “artificial separation” between the Amendments and other elements of the
8 Proposal. *Id.*, 22:40-23:00. This was incorrect, because the Amendments are “clearly link[ed]”
9 to funding and construction of the Eligible Projects, and because “there are changes to future
10 policies that are required” by the Amendments. *Id.*, 20:50-24:00. Based on this “inadequate
11 information in the Checklist,” Mr. Steirer testified that “SEPA calls for the SEPA responsible
12 official to ask for additional information from the applicant; in this particular case the City
13 should have done that.” *Id.*, 24:00-15. Mr. Steirer testified that, based on the information
14 provided by other Coalition experts, the Amendments would have significant adverse
15 environmental impacts under SEPA and that issuance of a DNS was inappropriate.
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19 Coalition expert witness Morgan Shook, an economic consultant who has experience
20 with multiple impact fee programs, testified that the “Proposal will have a significant adverse
21 impact on housing production and housing affordability.” *Morgan Shook Testimony* (“*Shook*”);
22 Day 1, Part 1, 17:45-18:00. Mr. Shook explained that he did not need to know the exact fee
23 amount in order to reach this conclusion but that available information, including academic and
24 professional literature, his own professional experience, research and analysis, and information
25 generated by the City’s consultant is sufficient to enable him to determine the direction and scale
26 of the impact. *Id.*, 16:20-21:30. Specifically, he testified that the literature has demonstrated a
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1 range of issues with fee programs that “requires governments to think about multiple issues of
2 their broader need to deliver infrastructure balanced against the need to provide housing, and
3 also to be thinking about the potential distribution of those effects.” *Id.*, 45:20-45.

4 Mr. Shook explained that transportation impact fees are least likely to negatively affect
5 housing affordability when rates are calculated on a “marginal” cost basis, meaning that the fee
6 is specifically allocated to new users imposing capacity costs on a transportation system – for
7 example, residents in a building whose commutes are shortened by a project that lowers
8 congestion. *Id.*, 28:45-30:30. This type of fee is likely to be “efficient” – even though the
9 impact fee makes development more expensive, if the additional costs lead directly to a benefit
10 for residents, the residents will be willing to pay more for housing where they receive that
11 benefit. *Id.* Thus, the fee can be accurately priced into land markets, and the rate of
12 development is unlikely to be affected. *Id.*

15 In practice, however, municipalities have generally calculated rates on an “average” or
16 “cost-allocation” basis, rather than a marginal basis. *Id.*, 31:15-40. That means they base fees
17 not on analyzing where additional system capacity is needed specifically to accommodate
18 growth, but on the total cost of a set of pre-planned projects that will benefit the transportation
19 system as a whole. These are “inefficient” fees. Inefficient fees still make development more
20 expensive, requiring developers to charge higher rents in order to be able to build a project, but
21 they fail to provide a benefit that actually benefits the potential project’s residents and makes
22 them willing to pay. When a fee rate does not specifically “price the impact that additional users
23 have on the system in terms of the need for new capacity, what happens is we actually can
24 overcharge projects.” *Id.*, 29:45-30:15. In that case, because the fee hasn’t “solved the actual
25 underlying mobility challenge,” but has nonetheless “created a charge on the other side that then
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1 is not able to be supported at market rents,” the result can be that “therefore you don’t have a
2 project.” *Id.* Mr. Shook noted a “strong correlation between jurisdictions within the Central
3 Puget Sound” in terms of “the rate at which they charge those fees, relative to how much
4 multifamily and dense housing they have produced.” *Id.*, 48:40-48:55.

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6 Mr. Shook then testified that the Proposal will have a probable significant impact on
7 housing production and affordability because the existing system value methodology required by
8 the Amendments would require rates to be set on a cost-allocation basis rather than a marginal-
9 cost basis. *Id.*, 37:40-38:30. When fees are set in this manner, “it becomes more and more
10 difficult” for projects to “price those in within the marketplace for the additional rents to support
11 those additional costs that the fees will be a part of in terms of a construction budget.” *Id.* This
12 effect is exacerbated because the City’s fees will be “collected in advance of any improvement
13 ever being constructed,” meaning developers “already have priced in the amount of the fee”
14 before a fee-funded improvement’s effectiveness in mitigating growth can be observed. *Id.*,
15 33:50-34:10. The efficiency of a fee is further attenuated when a fee is “paid not by the actual
16 users of the system,” but instead by “proxy,” meaning “by the developer at the time of
17 development. *Id.*, 34:10-25.

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20 Mr. Shook also prepared a written analysis that analyzes the impacts of the proposed
21 transportation impact fee on development, focusing on the rents per square foot (*i.e.* revenues)
22 that different types of housing products would need to charge in order to be financially feasible
23 based on development and construction costs. Ex. 36; *Shook*, Day 3, Part 1, 16:20-17:40. The
24 analysis reflects that in Urban Centers and Urban Villages – where the Plan directs the City’s
25 future growth – adding a transportation impact fee would increase development costs for housing
26 of all densities, resulting in some of the densest possible projects becoming infeasible. *Id.*,
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1 17:40-25:40. Because of the inefficient methodology that would be established by the
2 Amendments, which would not require a relationship between the residents of new housing units
3 and the transportation improvements funded by the fee, it is unlikely that housing developers
4 could charge higher rents to reflect the “amenity value” of the fee. *Id.*, 1:06:45-1:08:00. In
5 addition, although Mr. Shook’s analysis isolated the effect of an impact fee from the fees that
6 have been added through the Mandatory Housing Affordability (“MHA”) program, he noted that
7 the affordability effects of impact fees may be magnified because the City has typically kept
8 development fees low but is now “changing the environment” with MHA and with an impact fee
9 program added “cumulatively on top of that.” *Shook*, Day 1, Part 1, 48:15-49:30. And these
10 effects are particularly likely to be significant in the City because its “housing affordability
11 problem has really been driven by housing shortages,” creating an environment where “the
12 market responds [] by bidding up prices,” putting housing further out of reach for lower-income
13 populations. *Shook*, Day 1, Part 2, 9:00-30.

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16 The Coalition next called Mike Swenson, a traffic and transportation expert who
17 discussed the components and characteristics of the Eligible Projects and the reasons he believes
18 the Proposal will lead to probable significant impacts from construction of those Projects. Mr.
19 Swenson testified that he reviewed the descriptions of the Eligible Projects that were included
20 with the Amendment as well as in other publicly available information. Although final plans for
21 the Projects are not yet available, Mr. Swenson found it “reasonable to identify and assess” the
22 potential impacts from construction based on the available descriptions. *Mike Swenson*
23 *Testimony* (“Swenson”), Day 1, Part 2, 34:20-35. The Proposal divides the Eligible Projects into
24 three groups – those originally proposed as part of the City’s Capital Improvement Program,
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1 those proposed in conjunction with the MOVE Seattle Levy, and those proposed as part of the
2 city’s “modal plans” to improve bicycle, pedestrian, and freight infrastructure. Ex. 7, Att. A.

3 Mr. Swenson then described the construction impacts that are likely to result from the
4 types of improvements listed in the project descriptions. He testified that he was aware of the
5 different methods of (non-impact fee) funding available for these programs, as well as the fact
6 that the modal plans are citywide plans involving lists of multiple planned projects. He also
7 stated that although each project is unique, the descriptions indicate that a number of specific
8 improvements, or components of improvements, are set to be included in multiple projects,
9 allowing him to conclude that “construction impacts . . . are likely to occur based on the elements
10 that were noted in [each] project description.” *Swenson*, Day 1, Part 3, 8:15-8:30. These
11 impacts include:
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14 • For transit lane construction and bike lane construction, typically on-street
15 parking is removed, lanes are restriped, and pavement is restored or enhanced.
16 During construction, there may be lane closures leading to construction traffic
17 impacts and displacement of parking “24-7.” There is also the potential for loss
18 of long-term parking. *Swenson*, Day 1, Part 2, 47:00-48:00; 51:30-52:00.
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20 • Transit stock removal and transit route relocation will have similar impacts, with
21 the addition of closed or rerouted transit stops. *Id.*, 52:10-53:00.
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23 • When a roadway needs to be widened, in addition to these effects, there is a
24 “more extensive impact” from constructing and/or moving new sidewalks, street
25 lighting, utility poles, or storm conveyance. In addition, pedestrian traffic is
26 affected, and typical construction effects such as increased dust, increased noise,
27 and glare from construction lighting will also occur. *Id.*, 48:00-50:40.

- Constructing new sidewalks and bus bulbs requires grading, as well as rerouting pedestrian traffic. Moreover, City standards may require new sidewalks to include curbs and gutters, requiring “roadway improvements, the loss of parking during the construction of that, and additional construction vehicles removing the dirt and bringing in the construction materials.” *Id.*, 55:40-57:30.

Mr. Swenson testified that the Eligible Projects would be more likely to be constructed if they are funded by impact fees under the Proposal. *Swenson*, Day 1, Part 3, 14:15-15:00. He testified that even a subset of the projects could create significant cumulative impacts from construction. *Id.* 15:00-16:00. Construction of multiple Projects would have probable significant impacts due to “the combination of all of the activity overlapping in sequence with each other, or overlapping that creates that constant level of construction activity which creates those impacts.” *Swenson*, Day 1, Part 2, 1:22:00-1:24:30. He testified that although mitigation measures could be imposed for construction, such as limiting hours or planned phasing, this mitigation was not required by the Amendments: “[T]here wasn’t any information around saying that the construction would be staged or that this would be the process to review those construction activities and make sure that they’re not overlapping – that information was not in the checklist or the DNS.” *Id.* Mr. Swenson concluded: “You really need to understand what that cumulative impact is so mitigation measures could be identified that deal with that cumulative impact. . . . [E]specially given the magnitude, the number of projects that have been identified in these modal plans, to understand how this could all happen because this amendment basically says go forth and produce an impact fee that makes all of these plans happen. So I think we need to understand what those impacts are if all of these plans happen as directed through the impact fee.” *Id.*, 1:24:40-1:26:00.

1 The City’s witnesses did not dispute the fundamental premise of any of the Coalition’s
2 witnesses’ testimony – that the Amendments will require the establishment of a fee program that
3 is reasonably likely to have the impacts discussed. Instead, the City’s presentation focused on
4 establishing that these impacts cannot or do not need to be analyzed now, primarily because of
5 uncertainties in the legislative process. Mr. Freeman testified that he did not analyze the impacts
6 that a transportation impact fee would have because “there are some future steps that would be
7 needed to implement a transportation impact fee program, but [] whether those steps occur and
8 how they occur remain to be seen, and it’s essentially speculative to guess what that might be.”
9 *Freeman*, Day 1, Part 3, 1:19:00-1:21:00. Kendra Breiland, the City’s consultant, testified that
10 she used the existing system value methodology to create the draft fee rate table in Exhibit 4, but
11 that the table was not “final” because the Council will ultimately decide which Projects to fund
12 and what rates to adopt. *Kendra Breiland Testimony (“Breiland”)*, Day 1, Part 4, 1:22:00-
13 1:26:00. Andrew Bjorn, the City’s housing expert, stated: “My testimony is that this proposal in
14 and of itself is not going to have an impact on housing prices or housing supply in that the source
15 of the effects will be the final parameters of an impact fee program.” *Andrew Bjorn Testimony*,
16 (*“Bjorn”*), Day 2, Part 1, 1:13:00-1:15:00. Mark Mazzola testified that the Eligible Projects will
17 be subject to environmental review when they occur. *Mark Mazzola Testimony (“Mazzola”)*.
18 For the reasons explained in this brief, the City’s justifications are unavailing.
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22 The Coalition now files this post-hearing brief seeking reversal and remand of the DNS
23 to the City for compliance with SEPA.
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III. ARGUMENT

A. Standard of Review

In a DNS appeal, “[t]he record must demonstrate that ‘environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA,’ and that the decision to issue the DNS was based on ‘information sufficient to evaluate the proposal’s environmental impact.’” *Appeal of Queen Anne Community Council*, City of Seattle Hearing Examiner Case No. W-16-004, Findings and Decision, p. 9 (Dec. 13, 2016) (quoting *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997)). “‘The burden is on the body subject to SEPA’” – in this case, the City – “to make this showing.” *Id.* (quoting *City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978)). If the City makes this *prima facie* showing, then the burden is on the Coalition to show that the City’s DNS is clearly erroneous and that there are significant adverse impacts that were not analyzed.

Here, the City cannot make the required showing, because the record demonstrates it conducted no analysis whatsoever of impacts to housing production or affordability or of the impacts of constructing the extensive transportation projects to be funded by the impact fees. Further, at the hearing in this matter, the Coalition presented expert testimony that demonstrated significant, adverse impacts in these areas.

B. The DNS must be reversed because it was based on erroneous legal conclusions rather than information or analysis.

The City was required to “make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of [the] proposal.” SMC 25.05.335; *see also PT Air Watchers v. Dep’t of Ecology*, 179 Wn.2d 919, 927, 319 P.3d 23, 27 (2014) (“[A] DNS must be based upon information reasonably sufficient to evaluate the environmental

1 impact of a proposal.”). The City, however, did not issue the DNS based on “information
2 reasonably sufficient to evaluate the environmental impact” of the Proposal. Indeed, it did not
3 “evaluate the environmental impact” at all. Instead, it determined that it was not required to
4 discuss environmental impacts, based primarily on two erroneous legal propositions. First, the
5 City asserts that because the Amendments “are of a non-project nature, primarily procedural, and
6 have a citywide effect, rather than a site-specific effect,” they inherently cannot “affect the
7 extent, intensity or rate of impacts to the built and natural environments.” Ex. 8, p. 1. Second,
8 because the Amendments, if adopted, “would not in themselves create a transportation impact
9 fee program,” *id.*, p. 2, the City believes that any impacts of such a program are too speculative
10 to be analyzed in any way.
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13 Both of these propositions are incorrect. They are at odds with SEPA, with well-
14 established caselaw, and with City law, policy, and practice. None of the reasons proffered by
15 the City in the DNS or on appeal justify the City’s conclusion. Nevertheless, the City’s
16 fundamental mischaracterization of the requirements of environmental review resulted in its
17 failure to base the DNS on *any* environmental information or analysis. This alone requires
18 reversal. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137, 141-42 (2002)
19 (quoting *Lassila v. Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54, 59-60 (1978)) (“For the MDNS
20 to survive judicial scrutiny, . . . the record must demonstrate that the City adequately considered
21 the environmental factors ‘in a manner sufficient to be a prima facie compliance with the
22 procedural dictates of SEPA.’”).
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25 **1. Adoption of the Amendments is an action that requires SEPA review.**

26 The City’s first justification for its failure to engage in any actual analysis is what it
27 deems the “primarily procedural” and “non-project” nature of the Amendments and of the
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1 broader Proposal. SEPA, of course, requires a threshold determination for “any proposal which
2 meets the definition of action.” SMC 25.05.310.A. The definition of “action” includes
3 “nonproject actions,” which generally encompasses “legislation,” “rules,” and “polic[ies]” and
4 specifically includes “amendment of comprehensive land use plans.” SMC 25.05.704.B.2. The
5 nonproject nature of an action has nothing to do with whether that action will have “effects or
6 consequences” that can be analyzed under SEPA. *See* SMC 25.05.752. Likewise, the City’s
7 statement that the Proposal will “have a citywide effect, rather than a site-specific effect” is
8 irrelevant. Washington courts have long recognized that “the fact that a proposed action will not
9 cause an immediate land use change or that there is no specific proposal for development does
10 not vitiate the need for an EIS.” *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d
11 648, 663, 860 P.2d 1024, 1032-33 (1993). Instead, “an EIS is required if, based on the totality of
12 the circumstances, future development is probable following the action and if that development
13 will have a significant adverse effect upon the environment.” *Id.* Clearly, the City does not
14 actually believe that citywide policies are not or cannot be subject to SEPA, as reflected in its
15 issuance of a detailed EIS for the last revision of its Comprehensive Plan. *See* Ex. 16.

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19 Nonetheless, the City concluded that because of the nonproject nature of the Proposal, it
20 was not required to engage with any potential impacts discussed in Part B of the Checklist. Ex.
21 7, p. 4 (“This is a non-project proposal with no particular development site. This section is left
22 blank pursuant to WAC 197-11-315(1)(e).”). The City’s assertion misstates the requirements of
23 WAC 197-11-315(1)(e), which provides an exception to the requirement to “use the
24 environmental checklist substantially in the form found in WAC 197-11-960” in the case of
25 “[n]onproject proposals where the lead agency determines that questions in Part B do not
26 contribute meaningfully to the analysis of the proposal.” The regulation does not say that
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1 agencies considering nonproject proposals may simply ignore any impacts discussed in Part B.
2 Instead, it allows agencies to determine that certain “questions” (notably, the provision does not
3 say “the questions” or “all questions”) are not relevant to a particular proposal. Any ambiguity is
4 resolved by the second sentence of the provision, which states: “In such cases, Parts A, C, and D
5 at a minimum shall be completed.” WAC 197-11-315(1)(e). The description of the other three
6 portions of the checklist as a “minimum” necessarily implies that completion of certain questions
7 in Part B is required when relevant for nonproject actions.
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9 The City’s own SEPA regulations are even clearer, directing agencies to a statement
10 allowing them to “exclude any question for the environmental elements (Part B) which they
11 determine do not contribute meaningfully to the analysis of the proposal.” SMC 25.05.960
12 (citing WAC 197-11-960). This language emphasizes the necessity of individually considering
13 the relevance of each impact listed in the questions in Part B. None of the applicable regulations
14 allows Part B to simply be “left blank” – or, more to the point, for potential environmental
15 impacts to be ignored merely because they are listed only in Part B and not in Part D.
16 Nonetheless, that is what the City did. *Freeman*, Day 1, Part 3, 1:03:00-30.
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19 Here, consideration of housing-affordability and construction impacts would provide
20 “meaningful information” for the Council to consider. *Steirer*, Day 1, Part 3, 22:20-23:00. This
21 conclusion is also supported by the City’s own testimony. As Mr. Freeman testified, the
22 methodology established by the Amendment allows a “maximum defensible fee” that “may
23 make development infeasible,” thereby impacting housing affordability and “thwart[ing]” Plan
24 goals to accommodate growth because, as Appellant’s expert testified, “it may have a negative
25 effect on development, make development infeasible.” *Freeman*, 23:30-25:15; Ex. 4, pp. 1, 5.
26 Indeed, these statements by Mr. Freeman indicate that the City *already has an understanding of*
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1 the potential impacts of the Proposal, further belying its assertion that no substantive analysis can
2 be conducted at this point. That these impacts depend on how the Proposal is implemented does
3 not support the City’s argument, it undermines it. Before committing the City to a fee program,
4 the Council should understand what Mr. Freeman already knows: that a program that sets fees
5 too high may negatively impact housing affordability. It cannot reasonably be argued that this
6 potential adverse effect would not be “meaningful information” for the Council to possess when
7 it considers and acts on the Amendments.
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9 This information must be provided now – not after the Council takes action on the
10 Amendments. SEPA compels policymakers to ensure the analysis of all probable impacts related
11 to an action. “A major purpose of the environmental review process is to provide environmental
12 information to governmental decisionmakers for consideration *prior to* making their decision on
13 any action.” SMC 25.05.055.B.2 (emphasis added). Courts recognize that initial policy actions,
14 even if “no land use changes would occur as a direct result,” can “begin a process of government
15 action which can ‘snowball’ and acquire virtually unstoppable administrative inertia.” *King*
16 *County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1032-33
17 (1993). Indeed, this is arguably even more important in the case of nonproject actions like
18 comprehensive plan amendments and other policies, which will affect development and land use
19 not just in one location but across the city. “The snowballing metaphor is powerful because it
20 embodies the fundamental idea of SEPA: to prevent government agencies from approving
21 projects and plans before the environmental impacts of doing so are understood.” *Int’l*
22 *Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 522, 309 P.3d
23 654, 659 (2013). Thus, “SEPA review must precede approval of . . . an action . . . that will have
24 impacts on the environment down the road.” *Id.*; see also, e.g., *Columbia Riverkeeper v. Port of*
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1 *Vancouver USA*, 188 Wn.2d 80, 92, 392 P.3d 1025, 1030 (2017) (“SEPA's primary focus is on
2 the decision-making process.”); *Lassila v. Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54, 59
3 (1978) (SEPA analysis “must precede governmental action.”).

4 This was error, as is the City’s general assertion that its nonproject actions are subject to
5 a lesser standard of environmental review.

6
7 **2. As a determinative step in the larger Proposal, the Amendments must be
8 fully analyzed.**

9 The City’s second justification for the DNS is the argument at the heart of its case: its
10 assertion that the Amendments’ impacts cannot be analyzed because they are not the final step in
11 adopting a fee. *See, e.g.*, Ex. 8, p. 2 (analysis not required because amendments “accomplish the
12 procedural requirements of RCW 82.02.050(5)(a) for establishing a transportation impact fee
13 program” and “would not in themselves create a transportation impact fee program”); Ex. 7, p. 1
14 (the Amendment is a “necessary, but not sufficient step” to establish a fee program); *id.* at 1-2
15 (“For a program to be fully established, the City must take future action to amend the municipal
16 code.”). This mischaracterizes the nature and effect of adopting the Amendments within the
17 City’s broader Proposal to adopt a transportation impact fee program.

18
19 **i. The Amendments involve significant policy decisions.**

20 The Council is being asked to make at least three significant policy decisions in voting on
21 the Amendments. First, the Amendments, if adopted, will require the Council to implement a
22 transportation impact fee program – *i.e.* to adopt development regulations that are consistent with
23 the amended Plan’s mandate to “use,” rather than “consider use of,” transportation impact fees.”
24 Ex. 2, Att. 1, p. 2; *see also Freeman*, Day 1, Part 4, 17:30-50 (responding to the question “[T]his
25 particular language would require the Council to adopt impact fees?” by stating “Yes, we would
26 need to have consistent development regulations with our polices at some point in the future.”);
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1 *id.*, 58:00-59:00 (only remaining question was “under what timeframe” Council would
2 implement program); *see also* RCW 36.70A.040(3) (development regulations must be consistent
3 with and implement the comprehensive plan); RCW 36.70A.120 (city must perform its activities
4 in conformity with comprehensive plan). Considering the Amendments therefore amounts to
5 considering whether to adopt impact fees at all. In Mr. Freeman’s words, “[T]here’s a threshold
6 question about whether or not the Council wants to implement an impact fee program, and that
7 would be answered by Council deliberations on this policy choice for the Comprehensive Plan.”
8 *Freeman*, Day 1, Part 3, 1:23:30-1:24:30. Mr. Freeman also testified that he believed the
9 Council faces a “go/no-go decision here when it comes to transportation impact fees.” *Id.*
10 56:45-57:00.

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13 Second, the Amendments would enshrine the existing system value methodology in the
14 Comprehensive Plan, designating the methodology as the only permissible way of calculating
15 transportation impact fees. Ex. 2, Att. 1, p.1 (“For the purposes of establishing a transportation
16 impact fee program, the City *will* . . . [use the] existing-system-value methodology.”) (emphasis
17 added); *Id.*, p. 2 (adding policy TG 10: “Base transportation impact fees on the difference
18 between the value of the existing transportation system and the cost of identified capacity-related
19 improvements needed to address the impacts of growth.”). The Amendments therefore require
20 the Council not just to adopt a fee program but to set the rates on the basis of a specific
21 methodology that has only been used previously in large cities outside of Washington. *Breiland*,
22 Day 1, Part 4, 1:10:30-1:12:00.

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25 Third, the Amendments would adopt the list of Eligible Projects, which will significantly
26 affect both the amount of the fee and the construction impacts the Proposal will cause.
27 Formalizing this list will affect the built environment by making it more likely that these projects
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1 will be constructed. The Eligible Projects are not just projects that might or might not receive
2 funding one day. Instead, they are fundamental to the Amendments. The Amendments describe
3 them as “identified capacity-related improvements needed to address the impacts of growth.”
4 Ex. 2, Att. 1, p. 2. The Amendment then mandates that the City “use transportation-impact fees
5 to help fund transportation system improvements needed to serve growth.” *Id.* The Amendment
6 requires that the amount of the impact fee be based on the cost of these needed improvements.
7 Specifically, the “total cost of impact-fee eligible capacity improvements are calculated based on
8 a list of projects required to serve new development. That total amount is then divided by the
9 number of new person trips forecast over a twelve year period . . . to establish the cost per person
10 trip of needed capacity improvements. Impact fee rates by land use are calculated based on that
11 cost.” *Id.*, Att. 2, p. 1. Thus, the funding of the Eligible Projects is not only a probable result of
12 the Amendment – it is mandated by the Amendment. *See Breiland*, Day 1, Part 4, 1:03:00-
13 1:03:30 (stating that a “premise” of the existing system value methodology is that transportation
14 impact fees in Washington must be calculated “based on . . . the eligible infrastructure”).

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18 **ii. As important parts of the larger Proposal, these policy decisions can –
and must – be analyzed now.**

19 The Amendments are determinative of three things– whether to adopt a program, what
20 rate methodology to use, and what projects to fund – a fact that directly contradicts the City’s
21 assertion that it is too early to engage in environmental review. To the contrary, the inclusion of
22 these determinations in the Amendments indicates definitively that substantive review at this
23 stage is required. *See Concerned Taxpayers v. Dep’t of Transp.*, 90 Wn. App. 225, 231 n.2, 951
24 P.2d 812, 815 (1998) (“Piecemealing” review by looking only at “current segments” of a project
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1 “is disfavored because the later environmental review often seems merely a formality, as the []
2 later segments of the project [have] already been mandated by the earlier [segments].”).

3 The City has not tried to hide the fact that the Amendments are intended to lead to the
4 implementation of a transportation impact fee program – in its own words, the Amendments are
5 a “necessary” component of implementing the broader Proposal. Ex. 8, p. 1. But the fact that
6 the Amendments are a first and not a final step – that they do not create a full program “in and of
7 [themselves],” Ex. 7, p. 14 – in no way prevents review of the Proposal at this stage. To the
8 contrary, the Proposal can be analyzed because the City “has a goal” (implementing a fee
9 program); the City “is actively preparing to make a decision on one or more alternative means of
10 accomplishing that goal” (the three policy decisions); and “the environmental effects can be
11 meaningfully analyzed” (because meaningful analysis of a fee program does not require knowing
12 the exact rate). *See* SMC 25.05.784. The Code provides that “[a]ppropriate consideration of
13 environmental information *shall* be completed *before* an agency commits to a particular course
14 of action.” SMC 25.05.055.B.3 (emphasis added). It also expressly includes within the
15 definition of nonproject action a “policy . . . that will govern the development of a series of
16 connected actions.” SMC 25.05.704.B.2.b. That is exactly what the Amendments will do in
17 relation to subsequent steps in implementing the Proposal. Indeed, the Examiner has already
18 recognized that SEPA requires the City to “consider impacts *reasonably related to or deriving*
19 *from* the [Amendments].” *Appeal of Seattle Mobility Coalition*, City of Seattle Hearing
20 Examiner Case No. W-18-013, Order on Motion to Dismiss, p. 2 (Apr. 10, 2019) (“Order on
21 Motion to Dismiss”) (emphasis added).

22 More generally, SEPA has never required exact specification of every detail of an action
23 before analysis is required. Instead, it requires preparation of a threshold determination “at the
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1 earliest possible point in the planning and decisionmaking process, when the principal features of
2 a proposal and its environmental impacts can be reasonably identified.” SMC 25.05.055.A.
3 “The fact that proposals may require future agency approvals or environmental review shall not
4 preclude current consideration, as long as proposed future activities are specific enough to allow
5 some evaluation of their probable environmental impacts.” SMC 25.05.055.B.1.a. That is
6 particularly true when an action involves the type of threshold, “go/no-go” decision on a
7 proposal. *See Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619,
8 643, 860 P.2d 390, 402 (1993) (noting that future site-specific issues did not preclude
9 consideration of earlier nonproject plan when “[o]ne of the primary purposes of the 1990 Plan
10 Update is to make an initial evaluation of whether the County wants to [take the action] at all”).
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13 Mr. Freeman testified that he did not consider environmental impacts because “the
14 Council could either amend this proposal or reject this proposal,” *Freeman*, Day 1, Part 3, 56:30-
15 57:00; and because any environmental analysis would be “speculative” because “we don’t know
16 who the decisionmakers will be when the time comes for a decision on a future implementation
17 step . . . and also we don’t really know what the regulatory environment will be like either.” *Id.*,
18 1:14:00-1:16:00. This reasoning is without merit. The suggestion that the environmental
19 impacts of a legislative proposal cannot be analyzed because legislators might amend or reject
20 the proposal turns SEPA on its head. The entire purpose of the law is to inform legislators’
21 decision *whether* to adopt, amend, or reject the proposal. *See Magnolia Neighborhood Planning*
22 *Council v. City of Seattle*, 155 Wn. App. 305, 316, 230 P.3d 190, 195 (2010) (rejecting City’s
23 argument that approval of a “binding” site plan was not a SEPA “action” because of the
24 “possibility that the City might not follow through with the intent stated in the” plan”). Indeed,
25 Mr. Freeman agreed that SEPA review may be conducted even when a project may not move
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1 forward, and that review is conducted based on the environment at the time a proposal is made
2 even if that environment may change in the future. *Freeman*, Day 1, Part 4, 26:00-30:00.

3 There is no legal basis for the City’s assertion that it need not analyze the impacts of the
4 Proposal before adoption of the Amendments.

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6 **3. The City’s failure to analyze environmental impacts requires remand.**

7 The City, as “the governmental body subject to SEPA,” cannot meet its burden to “show
8 that it made a threshold determination which demonstrate[s] that environmental factors were
9 considered in a manner sufficient to be a prima facie compliance with the procedural dictates of
10 SEPA.” *Bellevue v. King Cty. Boundary Review Bd.*, 90 Wn.2d 856, 867-68, 586 P.2d 470, 477
11 (1978). The City’s failure to engage in any substantive review of the Proposal’s environmental
12 impacts thus requires reversal of the DNS. *See, e.g., id.* (vacating DNS where the record “fails to
13 show sufficient deliberation and consideration and contains little other than the conclusion that
14 an EIS is unnecessary.”); *Lassila*, 89 Wn.2d at 817 (vacating comprehensive plan amendment for
15 “serious noncompliance with SEPA’s mandate” where “we cannot tell whether the
16 environmental significance of the [amendment] was even considered by the commissioners”); *PT*
17 *Air Watchers*, 179 Wn.2d at 929 (upholding DNS based on checklist reflecting “a reasoned
18 assessment of the environmental impacts of the proposed project,” but noting that if the agency
19 had “entirely ignored the impact . . . we might reach a different result.”).

22 Although the DNS adopts six environmental documents that were prepared for previous
23 actions, its statement that the “information in these documents is reasonably sufficient to
24 evaluate whether the proposal will have probable, significant adverse impacts” does not bring the
25 DNS into compliance with SEPA. *See Ex. 8, p. 2.* Nothing in the DNS or the Checklist
26 remotely reflects substantive consideration of the adopted documents in the context of deciding
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1 whether to adopt a transportation impact fee program. Instead, the only references to the
2 documents' contents are statements that the Draft EIS for the Seattle Comprehensive Plan
3 Update "identifies implementation of a transportation impact fee program as a potential
4 mitigation measure," that the modal plans identify "actions" (not including impact fees) to
5 "improve . . . transportation networks," and that the Final EIS for the Plan "also identifies
6 implementation of the modal plans as a potential mitigation measure." *Id.* These statements
7 have nothing to do with the question at issue in the DNS: whether the fee program *itself* will
8 have environmental impacts. The City's own SEPA regulations expressly establish that even
9 "proposals designed to improve the environment . . . may also have significant adverse
10 environmental impacts," which the threshold determination "shall consider" and "shall not
11 balance [with] beneficial aspects." SMC 25.05.330.E. Whether the fees or the projects they will
12 fund could mitigate the impacts of other programs is therefore completely irrelevant. The
13 documents thus could not provide a basis for the Examiner to uphold the DNS even if they
14 contained analysis of the environmental of transportation impact fees (which they do not). In
15 addition, as is explained in more detail in the following section, the documents contain no
16 analysis of the probable significant impacts the Proposal will have on housing affordability and
17 from construction of the Eligible Projects.

21 For the same reason, the cursory responses to the questions in Part D are not, and do not
22 purport to be, actual analysis of environmental impacts. These responses state first that analysis
23 of the program's impacts is not required. Ex. 7, pp. 14-17. Certain responses also make general
24 statements about the potential benefits of the Proposal, such as "improving the efficiency of the
25 transportation network." *Id.*, p. 15. Any such benefits, however, are irrelevant under City law,
26 which expressly provides that a threshold determination "shall not balance whether the beneficial
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1 aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal
2 has any probable significant adverse environmental impacts.” SMC 25.05.330. No other
3 analysis is provided – in particular, no analysis of the Proposal’s potential impacts on housing
4 affordability and due to construction.

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6 This is not consistent with the purpose of SEPA, which “*mandates* governmental bodies
7 to consider the total environmental and ecological factors to the fullest in deciding major
8 matters.” *Eastlake Cmty. Council v. Roanoke Assocs.*, 82 Wn.2d 475, 490, 513 P.2d 36, 46
9 (1973) (emphasis in original). “*At minimum* SEPA requires a threshold determination . . . *and an*
10 *actual consideration of potential environmental significance.*” *Lassila*, 89 Wn.2d at 817
11 (emphasis in original); *see also Anderson v. Pierce Cty.*, 86 Wn. App. 290, 301, 936 P.2d 432,
12 438 (1997) (“[A] DNS means that no EIS will be required; [i]t does not mean, however, that
13 environmental review will not be undertaken.”). The City’s failure to engage with any impacts
14 of its Proposal violated both these requirements and its own policy that “[a]gencies shall *to the*
15 *fullest extent possible* . . . [p]repare environmental documents that . . . are supported by evidence
16 that the necessary environmental analyses *have been made.*” SMC 25.05.030.B (emphasis
17 added). The City’s DNS must be reversed for its inadequate analysis alone.

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20 **C. The Proposal will have significant environmental impacts.**

21 Evidence introduced at the hearing demonstrated that the City’s decision to implement a
22 transportation impact fee program will have probable, significant environmental impacts. An
23 impact is probable if it is “reasonably likely to occur” rather than “remote or speculative.” SMC
24 25.05.782. An impact is “significant” if it would have a “more than moderate adverse impact on
25 environmental quality.” SMC 25.05.784.A. An EIS is required ““whenever a more than
26 moderate effect on the quality of the environment is a reasonable probability.” *Chuckanut*
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1 *Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 285 n.14, 232 P.3d 1154, 1159 (2010)
2 (quoting *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 278, 552 P.2d
3 674 (1976)).

4 **1. The Proposal will have probable, significant impacts to housing.**

5 City of Seattle policy states: “SEPA provides that each person has a fundamental and
6 inalienable right to a healthful environment. Affordable housing is a critical component of a
7 healthful environment.” SMC 25.05.675. As the Examiner has recognized, SEPA requires
8 analysis of impacts to housing affordability. Order on Motion to Dismiss, p. 2.

9 Uncontested evidence at the hearing established a reasonable probability that the City’s
10 imposition of an impact fee will have a more than moderate effect on housing affordability.
11 Morgan Shook supported his conclusions with documentation of the effect that fees can have on
12 housing product and affordability, which is more likely when fee rates are set based on a cost-
13 allocation basis such as the existing system value methodology. *Shook*, Day 1, Part 1, 29:45-
14 30:15. Mr. Shook also explained that the proposed impact fee is likely to impact housing
15 affordability because it will lead to less-dense housing than would otherwise be constructed – an
16 effect that will be especially significant in many areas of the City that have been designated to
17 “accommodate future housing growth.” *Shook*, Day 3, Part 1, 22:50-25:30. Mr. Shook prepared
18 a written analysis that analyzes the impacts of the proposed transportation impact fee on
19 development. The analysis focuses on development in Urban Centers and Urban Villages, areas
20 where the Comprehensive Plan directs future growth. The analysis determines that, in many of
21 these areas, the transportation impact fee alone would reduce housing densities. Specifically, the
22 fee would cause the most feasible housing type to be reduced in density. Ex. 36. Particularly
23 given the recognized regional housing crisis, these impacts are both “adverse” and “more than
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1 moderate.” See SMC 25.05.675.2.e (“Because affordable housing is in short supply in the City
2 and newly constructed housing is generally not affordable, lower-wage employees may be forced
3 to live in less than adequate housing within the City, pay a disproportionate share of their
4 incomes to live in adequate housing in the City, or commute ever increasing distances to their
5 jobs from housing located outside the City when they are unable to locate adequate housing
6 within the City.”).

8 Neither Mr. Freeman nor the City’s expert, Mr. Bjorn, disputed that the proposal could
9 have these effects or that these effects would be significant. To the contrary, Mr. Freeman
10 agreed that the Amendment requires the Council to adopt a fee and use the existing system value
11 methodology to calculate it. He agreed with Mr. Shook that a fee set at the maximum level
12 supported by that methodology could “have a negative effect on development, make
13 development infeasible” and “might thwart achieving [the City’s] comprehensive plan objectives
14 like accommodating 70,000 new households and 115,000 new jobs.” *Freeman*, Day 1, Part 4,
15 23:30-25:15. To be sure, Mr. Freeman also stated that he believed it unlikely that the Council
16 would impose a fee at such a level. However, there is no condition in the DNS requiring a lower
17 fee rate. Ex. 7. Mr. Freeman’s testimony represents several important concessions by the City:
18 that the methodology required by the Amendment could permit fees to be set at a level that
19 makes development “infeasible”; that a maximum supportable fee of \$11,380 would be such a
20 level; and that an overly high fee’s negative development impacts could affect other elements of
21 the environment to such a degree as to “thwart” the City’s ability to accommodate growth.
22 Likewise, Mr. Bjorn agreed “that impact fees may have an effect on elements of the market.”
23 *Bjorn*, Day 2, Part 1, 19:30-50. Mr. Bjorn could hardly have disagreed with that proposition, as
24 a report prepared for the City by his firm notes that impact fees “can raise the cost of housing,
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1 and these costs can be passed on to individual households in the form of increased housing
2 costs.” Ex. 31, p. 24. Mr. Bjorn also agreed with Mr. Shook that “average cost impact fees can
3 have inefficiencies” and that “the typical approaches that are used for developing impact fees are
4 reasonably consistent with the average cost approach.” *Bjorn*, Day 2, Part 1, 17:00-18:00. In
5 sum, the City has not contested, but instead has largely agreed with, the evidence establishing
6 that the Proposal’s impacts to housing affordability would be adverse and significant.
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8 The City essentially concedes that impacts to housing affordability could be adverse and
9 significant; it disputes only that such impacts are probable. The evidence, however, establishes
10 otherwise. Again, Mr. Freeman stated that a fee of \$11,380 per PM peak hour trip would “make
11 development infeasible.” But the actual fees this trip rate would impose on particular types of
12 projects – between \$6,000 and \$10,000 per dwelling unit for single- and multi-family housing,
13 *see* Ex. 4, p. 5 – are squarely in line with fees imposed by neighboring jurisdictions. *See* Ex. 26,
14 p. 35. The City’s effort to minimize the likelihood of a fee at this level is undermined by the
15 centrality of the Project list – which would be set definitively by the Amendments – in
16 calculating the fee rate. Given all these factors, there is a more than “reasonable likelihood” that
17 the Proposal will result in a fee that has a “more than moderate” impact on housing affordability.
18 Moreover, SEPA requires analysis of the proposal itself, not some other proposal. *See Freeman*,
19 Day 1, Part 4, 26:00-30:00. The proposal on the table includes a methodology that leads to the
20 “maximum defensible fee.” The fact that the City might adopt a lower fee is not something the
21 City can consider in evaluating impacts. If the City wanted to limit its analysis to a lower fee, it
22 needed to put a dollar limit in the Amendment, or adopt a mitigation measure in the DNS
23 limiting the fee amount, but it did neither. The Council should therefore have the opportunity to
24 fully consider the Proposal’s potential effects before deciding on it.
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1 The City's assertions to the contrary do not concern the substance of this evidence.
2 Instead, the City states in myriad ways that the issue is inherently speculative because the exact
3 amount of the rate is not yet known. But as described earlier, the Coalition's evidence has
4 shown that there is a "reasonable likelihood" that a fee at a level that would create a "more than
5 moderate" impact would be imposed. *Steirer; Shook; Swenson*. Other reasoning advanced by
6 City witnesses is similarly unavailing. For example, Mr. Bjorn testified repeatedly that he
7 disagreed that impact fees would have a probable, significant adverse impact because impact fees
8 could also have benefits. *Bjorn*, Day 2, Part 1, 18:15-19:00. Again, that is irrelevant under City
9 law, which expressly provides that a threshold determination "shall not balance whether the
10 beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a
11 proposal has any probable significant adverse environmental impacts." SMC 25.05.330.
12 Likewise, Mr. Bjorn testified that although the average-cost basis for setting a fee rate can have
13 inefficiencies, it can be improved – "there are instruments by which it can get closer to the actual
14 impacts that are associated with that development" – and the subject of an incorrect fee
15 determination can appeal. *Bjorn*, Day 2, Part 1, 42:20-45:30. But again, this is actually an
16 argument *for* additional SEPA analysis, which would provide information to the Council
17 regarding potentially beneficial mitigation elements that could be included in a fee program.

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21 As the City has admitted, and as none of its evidence or argument has countered, the
22 Proposal will have probable, significant, adverse impacts on housing affordability. These
23 impacts require disclosure and, if not mitigated to a less than significant level, preparation of an
24 EIS.
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1 **2. The Proposal will have probable, significant impacts from construction.**

2 In his decision denying the City’s Motion to Dismiss, the Examiner recognized that
3 “SEPA encompasses construction impacts related to noise, dust, traffic and parking.” Order on
4 Motion to Dismiss, p. 2; *see also* SMC 25.05.675 (City SEPA policy recognizes that construction
5 often “creates temporary adverse impacts on the site and the surrounding area,” that the Code
6 “may not . . . adequately address all construction impacts,” and that “[i]t is the City’s policy to
7 minimize or prevent adverse parking impacts associated with development projects” and
8 “minimize or prevent adverse traffic impacts.”).

9 Uncontested evidence established a reasonable probability that the City’s imposition of
10 an impact fee program that includes the Eligible Projects will have a more than moderate effect
11 on the environment due to construction of the projects. Mr. Swenson established that the
12 impacts to the environment from project construction include vehicular, pedestrian, and transit
13 traffic disruptions; alterations to the earth; and the creation of dust, noise, and lighting. Mr.
14 Swenson also testified that even if the impact of constructing any one of the Eligible Projects
15 might not rise to the level of significance, multiple factors – including the Projects’ geographic
16 scope and the tendency of traffic and parking impacts to extend beyond an individual
17 development site – meant that simultaneous construction of some or all of the Projects could
18 easily have a more than moderate impact on the environment. *Swenson*, Day 1, Part 2, 1:22:00-
19 30. Moreover, depending on the nature of the Projects and the length of the corridor involved,
20 individual construction could potentially lead to significant construction impacts as well.
21 *Swenson*, Day 1, Part 3, 15:30-16:00. Mr. Swenson also noted the lack of mitigation requiring
22 phasing or sequencing of the projects, or any other steps that would minimize construction
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1 impacts – meaning that there is nothing to prevent a significant number of the Eligible Projects,
2 if funded, from being constructed at the same time. *Swenson*, Day 1, Part 2, 1:22:30-1:26:30.

3 As with the Proposal’s impacts on housing, the City did not dispute the nature of the
4 physical effects of the Eligible Projects or the significance of the impacts they could cause.
5 Instead, the City again focused only on asserting that the impacts were not “probable,” primarily
6 because the Proposal does not itself “fund” or “authorize construction” of the Projects but instead
7 “makes them eligible” for future funding from a fee program. *Freeman*, Day 1, Part 3, 1:06:55-
8 1:08:00. The City also continually asserted that some Projects could be constructed without
9 revenue from a fee program and that all Projects will be subject to individual environmental
10 review when that occurs. *Freeman, Mazzola*.

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13 However, the City conceded that many Eligible Projects, considered individually at the
14 construction permit stage, will be categorically exempt from future SEPA review under SMC
15 25.05.800. These include a large range of projects. For example, “arterial reconstruction
16 projects,” which involve “shutting down portions of a street” to both put in “new asphalt” and
17 “reconstruct the concrete base of the roadway,” which Mr. Mazzola stated “can be pretty
18 substantial construction,” are categorically exempt. *Mazzola*, Day 2, Part 3, 28:45-30:00.
19 Exempt projects also include all bicycle and pedestrian facilities, including sidewalk
20 reconstruction and addition/expansion (as well as associated landscaping); traffic signs and
21 signals; lighting; and adding transit-only lanes. *Id.*, 28:45-34:40. This proves the Coalition’s
22 point. If these Projects are exempt, then their impacts – individually or cumulatively – will never
23 be addressed under SEPA. The analysis of the Projects’ impacts must occur now, so that their
24 cumulative impacts are disclosed and mitigation identified.
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1 These statements do nothing to counter the evidence of the reasonable likelihood that the
2 Proposal will result in significant adverse impacts caused by the construction of the eligible
3 Projects. Mr. Freeman agreed that the Projects would be “more likely to be developed if they
4 were funded.” *Freeman*, Day 1, Part 3, 38:50-39:10. The City’s contention that the Proposal
5 does not fund or authorize the projects is simply another assertion that the Proposal’s nonproject
6 nature insulates it from review, which is contrary to SEPA. *See Boundary Review Board*, 122
7 Wn.2d at 663 (rejecting arguments that EIS cannot be required when “a proposed action will not
8 cause an immediate land use change or [] there is no specific proposal for development”).
9 Indeed, the Examiner has already recognized that “the Eligible Projects . . . are a later phase of
10 implementing the [Amendments].” Order on Motion to Dismiss, p. 2; *see also Cougar Mt.*
11 *Assocs. v. King County*, 111 Wn.2d 742, 751, 765 P.2d 264, 269 (1988) (“[W]e have found
12 significant impacts in cases wherein there was . . . the perceived beginning of accelerating
13 development.”); *Concrete Nor'West v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 185 Wn. App. 745,
14 762, 342 P.3d 351, 358 (2015) (“Late consideration may also threaten principled review if
15 impacts cannot be considered at the plan- or policy-making stage, but those plans or policies are
16 then used at the permitting stage to conclude that the impacts are allowable.”).

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20 As the evidence makes clear, it is not just “more likely” but “reasonably likely” that the
21 Proposal will result in additional funding for, and therefore construction of, the Projects. The
22 Projects are not just the only projects that will be eligible for impact fee funding, they are the
23 reason the City is making the Proposal in the first place. *Freeman, Breiland*. It is therefore
24 much more than “reasonably” likely that once the City implements a transportation impact fee
25 program (at is required to do) and sets a fee rate (which will take into account the total cost of the
26 Eligible Projects divided by future trips, *Breiland*, Day 1, Part 4, 1:02:00-1:03:30), the City will
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1 take steps to construct the Projects. It is also “reasonably likely” that several or many of the
2 Projects will be constructed at once, creating construction impacts throughout the City. Thus, it
3 is “reasonably likely” that the Proposal will lead to significant, adverse construction impacts.

4 Finally, the limited discussion of potential construction impacts that appears in some of
5 the documents incorporated into the DNS cannot save the DNS from reversal. The documents
6 contain very little information about construction impacts of transportation improvements and
7 generally defer analysis of these impacts to the construction stage. *See, e.g.*, Ex. 18, p. 3
8 (“SDOT will consider the potential effects of development proposals on Bicycle Master Plan
9 projects during the development and environmental review of individual projects.”). The
10 statements about the types of impacts that may generally be caused by construction are limited to
11 the proposals addressed in each of those documents. *See, e.g.*, Ex. 20, p. 8 (“During construction
12 of [Pedestrian Master Plan] projects there would be dust, odors, and exhaust emissions from
13 construction equipment.”). The adopted documents do not consider the cumulative effects
14 caused by constructing projects that cover large parts of the City, nor of the effects of
15 constructing several of these projects simultaneously. And because the most recent of these
16 documents was completed nearly two years before the City issued the DNS (and the oldest was
17 completed nearly five years before that), *see* Ex. 8, p. 2, they do not consider newly available
18 information. Thus, they would not constitute sufficient information even if the City had admitted
19 environmental analysis was required.
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23 This insufficiency is magnified by the fact that although the DNS purports to adopt these
24 documents, it does not quote, discuss, or in any way discuss them, further indicating the absence
25 of any review related specifically to the Proposal. Indeed, the City’s legal position – that the
26 environmental effects of the Proposal are too remote to be analyzed – is directly at odds with the
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1 assertion that it considered the impacts discussed in these documents. The City based its
2 determination not on the information in the documents but on instead on its erroneous legal
3 conclusions about the nature of the Amendments. Any assertions by the City that it actually
4 engaged in this review are unsupported and belied by the statements in the DNS and the
5 Checklist.
6

7 In sum, evidence at the hearing demonstrated that the Proposal will have probable,
8 significant, adverse impacts caused by construction of the Eligible Projects. The City's
9 presentation established neither that these impacts would not occur nor that they have been
10 adequately considered. Instead, they must be considered by the City on remand in an EIS.
11

12 IV. CONCLUSION

13 The Coalition respectfully asks the Examiner to reverse the DNS and remand to the
14 Director with instructions to comply with SEPA. Based on the evidence at hearing, the Proposal
15 will result in significant adverse impacts to housing and construction impacts. These impacts
16 must be disclosed in an EIS that also considers mitigation and alternatives.
17

18 Dated this 19th day of July, 2019.

19 MCCULLOUGH HILL LEARY, PS
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