BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	Hearing Examiner File:
SEATTLE MOBILITY COALITION,	**W-18-013**
Appellants.	CITY'S CLOSING BRIEF
From a Determination of Non-Significance issued by the Seattle City Council.	

I. INTRODUCTION

After conducting environmental review of the project pursuant to the State Environmental Policy Act (SEPA)(RCW 43.21C), the City of Seattle (City) Council Central Staff Division of the City Council, an independent arm of the legislative branch, issued a determination of non-significance (DNS) in October 2018, for a non-project legislative proposal to modify the Comprehensive Plan as follows:

(1) to establish a methodology to evaluate "existing system deficiencies" in the City's transportation system as required by RCW 82.02.050(5)(a) and WAC 365-196-850,

(2) to adopt a list of City transportation projects into the Comprehensive Plan (Comp. Plan) to make them Transportation Impact Fee (TIF) eligible (meaning, these projects would be eligible to receive TIF funds if and when a TIF program is adopted).

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Ex. 2 (draft ordinance).

The City issued a DNS because, based on its evaluation, it had concluded that the draft ordinance would not result in probable significant adverse impacts to the environment.

With respect to its SEPA claims, Appellant alleged but failed to prove through affirmative evidence that the City did not conduct a thorough review of environmental impacts; in fact, the evidence in the record establishes that the City evaluated the direct and indirect impacts of the legislative proposal. Ex. 7 (SEPA checklist). Appellant failed to prove that the City did not rely on reasonably sufficient information.

Moreover, with respect to the substantive component of SEPA, Appellants failed to carry its burden by providing affirmative evidence that the City's decision regarding environmental impacts was clearly erroneous. The Coalition's housing witness, Morgan Shook, based his opinion and Exhibits 5 and 36 on "abstractions" divorced from the zoning code or land prices and that required significant speculation. The Coalition's transportation witness, Mike Swenson, based his opinion on the assumption that all of the projects in the TIF-eligible project list would occur at the same time and he assumed there would be no mitigation imposed. To the contrary, the evidence in the record establishes that the proposal will not result in probable, significant adverse impacts to the environment.

Appellant's primary argument is that the City "piecemealed" its environmental review by failing to evaluate the environmental impacts of the proposal in the same environmental document as legislation to adopt a Transportation Impact Fee (TIF) Program. Appellant's claim fails, however, because the proposal here, proposed Comp. Plan amendments, are a precondition to the City adopting a TIF program. Legislation outlining the substance of a TIF program has not been developed and will depend on the Council adopting the current proposed Comp. Plan amendments.

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While Appellant's desire for the Comp. Plan amendments to be evaluated in the same environmental document as TIF legislation, SEPA does not require that unless the two proposals of are interdependent and the first will not proceed without the second, which is not the case here. The proposed legislation lays the groundwork for Council to adopt a TIF program. Further, the proposal before the Examiner does not in any way authorize the construction or funding of the TIF eligible projects proposed to be added to the Comp. Plan. The City acted consistently with SEPA's mandate for the lead agency to prepare its threshold determination "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." For these reasons, Appellant failed to carry its burden here and its appeal must be denied.

II. STANDARD OF REVIEW

a. Appellant Seattle Mobility Coalition ("Coalition") cannot overcome the high burden to establish clear error as required by the Code.

The DNS in this case is entitled to substantial weight.[1] In order for the Coalition to prevail, it has the burden of proving clear error, which requires the Examiner to be left with a definite and firm conviction that a mistake has been committed.[2] It is not enough that the reviewing tribunal may disagree with a particular determination, the Examiner must only find clear error when it is "left with a definite and firm conviction that a mistake has been committed."[3] The Examiner has recognized that in order for an appellant to overcome this standard, the appellant has the burden

[1] RCW 43.21C.090; SMC 25.05.680.B.3. *Accord* HER 3.17(a).
[2] *Id.*, *Cougar Mt. Assoc. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988); *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981).
[3] *Moss v. Bellingham*, 109 Wn. App 6, 13, 31 P.3d 703 (2001); *In the Matter of the Appeal of George W. Recknagel*, W-13-002 and *In the Matter of the Appeal of Ballard Business Appellants*, **W-12-002.**

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of establishing that the City's decision is clearly erroneous.[4] The appellant must carry its burden on the issues it raises in its Notice of Appeal or its appeal fails; however, here the appellant failed to carry its burden.[5]

b. Appellant bears the burden to demonstrate the non-project action will have probable significant adverse environmental impacts.

In general, appellant failed to prove that the subject DNS was clearly erroneous, therefore, appellant's appeal must fail and the Determination of Non-Significance (DNS) must be affirmed.

In order to prevail in its SEPA claims that the Council Central Staff Division erroneously issued a DNS and that an Environmental Impact Statement must be prepared, the Appellant bears the burden of providing affirmative evidence of likely significant environmental impacts.[6] *Boehm* and *Moss* make clear that the Appellant has the duty to actually prove, through affirmative evidence, that a municipality's determination was clearly erroneous and that a proposal will result in probable significant adverse environmental impacts. It is not enough for appellant to merely assert, without proving through evidence at hearing that the proposal would result in probable significant adverse environmental impacts.

III. ARGUMENT

a. Council Central Staff did not have a conflict of interest in acting as the lead agency and legislative proponent.

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[4] *In re. Madrona Elementary School,* MUP-00-029 stating: The burden is on an appellant to overcome substantial weight by proving that the decision is "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). A decision is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ancheta v. Daly*, 77 Wn.2d 255 (1969), *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L.Ed 746, 68 S.Ct. 525 (1948).

[5] [5] Several appeal issues raised by appellants were abandoned. This is consistent with land use case law including *City of Olympia v. Drebick*, 156 Wn.2d 289, 311, 126 P.3d 802 (2006); *City of Medina v. T-Mobile USA*, 123 Wn. App. 19, 29, 95 P.3d 377 (2004).

[6] *Boehm v. City of Vancouver,* 111 Wn. App. 711, 719-720 (2002); *Moss v. City of Bellingham,* 109 Wn. App. 6, 23-24, 31 P.3d 703 (2001). The court stated "although appellants complain generally that the impacts were not adequately analyzed, they have failed to cite any facts or evidence in the record demonstrating that the project as mitigated will cause significant environmental impacts warranting an EIS" at pp. 23-24.

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The Coalition asserts that the DNS is flawed because the same agency staff acted as both the Project proponent and the SEPA lead agency, in violation of WAC 197-11-926(2).[7] This claim has no merit.

First, by its plain language, WAC 197-11-926(2) is not mandatory. WAC 197-11-926(2) provides "Whenever possible, agency people carrying out SEPA procedures should be different from agency people making the proposal." Thus, it is acceptable under SEPA for the same staffers who are acting as a proposal proponent to also be the agency people making the proposal. As a reminder, under SEPA there are "project actions" and "non-project actions."[8] "Non-project actions involve decisions on policies, plans, or programs."[9] For example, the adoption of a comprehensive land use plan or policies are non-project actions.[10] A "project action," on the other hand, must involve "a decision on a specific project such as a construction or management activity located in a defined geographic area."[11] Here, the proposal is a non-project action that is based on proposed Comprehensive Plan amendments.

Regardless, the SEPA rule unambiguously directs the agency to serve as both project proponent and lead agency. WAC 197-11-926, which is identical to SMC 25.05.926, directs Council to act as the SEPA lead agency for its proposals.[12] *See also* R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 10.01[1] (2016) ("The 'lead agency' has 'main responsibility for complying with SEPA's procedural requirements' and sole responsibility for the threshold determination ….The fact that the lead agency is responsible for

[7] *Id.*, p. 3:22-4:14.
[8] WAC 197–11–704(2).
[9] WAC 197–11–704(2)(b).
[10] WAC 197–11–704(2)(b)(ii),(iv).
[11] WAC 197–11–704(2)(a).
[12] WAC 197-11-926 ("Lead agency for governmental proposals" "When an agency initiates a proposal, it is the lead agency for that proposal").

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SEPA review of its own proposal does not in itself violate the appearance of fairness doctrine or other conflict of interest laws.").

Moreover, the Examiner has concluded previously that it was not a SEPA error or a conflict of interest for a city staffer to have issued both the environmental checklist and a DNS when SDOT was the project proponent and lead agency for a proposal, based on SMC 25.05.926, which is identical to WAC 197-11-926.[13] Therefore, the Coalition's claim of a SEPA error or a conflict of interest are both incorrect and such claim must be denied.

b. **Appellant's claim that city staffer lacked the authority to serve as SEPA Responsible Official is meritless and must be denied.**

The Coalition's claim that Council Central Staffer who issued the DNS, Mr. Ketil Freeman, has not been delegated lawful authority to serve as the SEPA responsible official lacks merit. The Coalition failed to cite any code, regulation or case that would serve as basis for its claim. As noted above, Seattle City Council is lead agency for the proposal because it initiated the legislative proposal.[14] The SEPA regulations provide that "The responsible official of the lead agency shall make the threshold determination."[15]

SMC 25.05.910.C provides that the responsible official is "responsible for making the final recommendation or report on the first major action of the proposal or on the first action which would result in irreversible commitment to the proposal. The department head shall designate for each proposed action, or for classes of actions, the responsible official."[16] In this case, Council Central Staff, which is a division of the Legislative Branch and is separate and independent from

[13] In the matter of the appeal of Ballard Business Appellants from a Determination of Nonsignificance, W-11-002, Conclusion of Law No. 10 at p. 10.
[14] SMC 25.05.926.
[15] SMC 25.05.310.B.
[16] SMC 25.05.788 -"Responsible official" means that officer or officers, committee, department, or section of the lead agency is designated by agency SEPA procedures to undertake its procedural responsibilities as lead agency (Section 25.05.910).

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Councilmembers, has been charged with performing SEPA environmental review. Ketil Freeman Testimony and Ex. 23 (Freeman Resume, "Acted as SEPA responsible official and prepared SEPA threshold determinations for Council-generated legislation"). SEPA permits a lead agency to designate a person or section of the agency to undertake its SEPA procedural responsibilities. Here, Council has done that through an implied delegation of SEPA responsibilities to the Council Central Staff Division. Ketil Freeman, a Council Central staffer, is the SEPA responsible official in this case. Id. Mr. Freeman has a master's degree in planning and had worked as a planner for the City's planning department for several years where he reviewed and issued SEPA checklists and SEPA threshold determinations for non-project and project proposals. Id. In his current role as an Analyst for Council Central Staff, he has previously issued SEPA threshold determinations in his role as a Council Central Staffer. Id.

Further, as discussed in detail above, it is allowable under SEPA for Mr. Freeman to have assisted the proposal proponent here, Councilmember O'Brien, by drafting legislation based on CM O'Brien's policy direction and while also developing a draft SEPA checklist, which was independently reviewed and signed by Council Central Staffer, Lish Whiston. It is also allowable under SEPA for Mr. Freeman to have issued the DNS here.[17]

c. The proposal was properly defined and no piecemealing occurred.

The entire basis of the Coalition's case is rooted in the incorrect assumption that the City improperly piecemealed the proposal. The Coalition claims this occurred by segmenting the

[17] *Supra*, footnote 11; *See also* R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 10.01[1] (2016) ("The 'lead agency' has 'main responsibility for complying with SEPA's procedural requirements' and sole responsibility for the threshold determination ….The fact that the lead agency is responsible for SEPA review of its own proposal does not in itself violate the appearance of fairness doctrine or other conflict of interest laws.").

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environmental review of the Comp. Plan amendments separately from (1) any TIF program legislation and (2) the TIF-eligible project list contained in the proposal (Attachment 2 to Ex. 2).

The Coalition's contention that the City's action here constituted "piecemeal review" in violation of SEPA lacks merit and must be disregarded.

The prohibition on piecemealing stems from WAC 197-11-060(3)(b), which provides:

> Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. . . . Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
>
> (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
>
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

And as noted in *Murden Code Pres. Ass'n v. Kitsap County*:

> Piecemeal review is permissible if the first phase of the project is independent of the second and if the consequences of the ultimate development cannot be initially assessed. *Cathcart v. Snohomish Cy.*, 96 Wash.2d 201, 210, 634 P.2d 853 (1981).
>
> Piecemeal review is impermissible where a "series of interrelated steps [constitutes] an integrated plan" and the current project is dependent upon subsequent phases. *Cheney v. Mountlake Terrace*, 87 Wash.2d 338, 345, 552 P.2d 184 (1976). Further, the assessment of a proposed action's environmental effects must include its direct as well as "reasonably anticipated indirect impacts";
>
> subsequent development of a similar nature, however, need not be considered in the threshold determination unless there will be some causal connection between this development and one or more of the governmental decisions necessary for the proposal in question.
>
> WAC 197–10–060(3).

The prohibition against piecemealing under SEPA focuses on whether a project has been segmented to avoid full environmental review.[18] The City has been unable to find any piecemealing case law that determines improper segmentation occurred between Comp. Plan

[18] *See Merkel v. Port of Brownsville*, 8 Wn. App. 844, 851-52, 509 P.2d 390 (1973); WAC 197-11-060(3)(b).

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amendments and code regulations. Regardless of how prior courts may have analyzed such a situation, no improper segmentation occurred here. The Coalition failed to provide any affirmative evidence that the Comp. Plan amendments and any code regulations to create a TIF program cannot or will not proceed unless both are implemented simultaneously. Rather, totality of the testimony of the Coalition's SEPA witness provided on this point is set out below:

> Ms. Kaylor: "And have you reached a conclusion about whether the checklist and DNS adequately described the proposal here?"
>
> George Steier: " I have reached a conclusion on that."
>
> Ms. Kaylor: "And what is that conclusion?"
>
> Mr. Steier: "Conclusion is that the SEPA checklist states that there is a separation between the proposed Comprehensive Plan amendment and the impact fees that are required under the Comprehensive Plan amendment. This is an artificial separation between the two because under SEPA you are required to review the proposals that are dependent upon each other. So since the Comprehensive Plan amendment mandates the impact fees, they are dependent upon one another. They are not separated out. That should've been included. A review of the impact fee should've been included with the Comprehensive Plan amendment and the SEPA analysis."

On cross-examination, I asked Mr. Steier "whether or not the proposal – it's your testimony -- that the proposal is dependent upon the project list noted as attachment 2 to Exhibit 2?" and his response was "yes". This testimony does not constitute affirmative evidence necessary to carry the Coalition's burden. The plain language of the proposal does not "mandate the impact fees." Rather, it lays the foundation for and is a pre-condition to the City Council taking up the policy

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considerations associated with Transportation Impact fees and to consider a proposal or several proposals related to creation of a TIF program.

The proposed Comp. Plan amendment language that the Coalition relies on is at Funding Policy T10.7:

> T10.7 ((~~Consider~~)) ((~~u~~)Use ((~~of~~)) transportation-impact fees to help fund transportation system improvements needed to serve growth.

Attachment 1 to Exhibit 2 (Amendments to the Transportation Element). This proposed amendment does not "mandate impact fees" as testified to by George Steier. The Comp. Plan clearly states:[19]

> **Policies** should be read as if preceded by the words It is the City's general policy to. A policy helps to guide the creation of or changes to specific rules or strategies (such as development regulations, budgets, or program plans). City officials will generally make decisions on specific City actions by following ordinances, resolutions, budgets, or program plans that themselves reflect relevant Plan policies, rather than by referring directly to this Plan. Implementation of most policies involves a range of actions over time, so one cannot simply ask whether a specific action or project would fulfill a particular Plan policy. For example, a policy that states that the City will give priority to a particular need indicates that the City will treat the need as important, not that it will take precedence in every City decision.

The proposed change from "consider use of" to simply "use" does not mandate impact fees" as argued by the Coalition.

Moreover, Ketil Freeman testified that the City typically proposes Comp. Plan amendments as stand-alone legislative proposals, separate and distinct from code regulations that may implement Comp. Plan policies. Freeman Testimony. And while the Coalition casts such a claim as a violation of SEPA, nothing in SEPA mandates concurrent review of a Comp. Plan legislation with code regulations. In addition, Kendra Breiland who has overseen or advised on at least twenty

[19] *See* footnote 23.

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TIP programs throughout Washington testified that it is commonplace for Comp. Plan amendments laying the groundwork for consideration of a TIF program to be adopted in advance of and independent from code regulations that create a TIF program. Breiland Testimony.

Contrary to the Coalition's argument, the subject proposal and legislation to create a TIF program are not a "single course of action" that cannot or will not proceed unless both are implemented simultaneously. Nor is the Comp. Plan legislation an interdependent part of a larger proposal that depends on the larger proposal as its justification. The Comp. Plan proposal lays the groundwork for Council to consider adoption of a TIF program. The Comp. Plan proposal, if adopted, does not guarantee adoption of a TIF program, nor does it establish the critical components of the program such as determining fee amounts, determining exemptions, individualized determinations and other policy decisions related to the program. Freeman Testimony. Consequently, the Comp. Plan amendments and any subsequent TIF program legislation are separate pieces that involve the same subject matter- TIFs- but, aside from that, they are different proposals and need not be implemented simultaneously.

Finally, it would be speculative for the Council Central Staff Division to attempt to evaluate the environmental impacts of potential fee amounts as an indirect environmental impacts of the current proposal. As testified to by Mr. Freeman, there is no TIF program legislation developed at this time. Freeman testimony. And he was aware of general support for the concept of consideration of transportation impact fees by only three of nine Councilmembers. Freeman testimony.

Further, the Coalition's claim that the Council Central Staff Division improperly piecemealed the proposal by excluding review of the list of "TIF eligible" transportation projects to the Comp. Plan is also baseless and must be rejected. As noted above, George Steier simply

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states that it is his opinion that the Comp. Plan proposal (Ex. 2) is dependent upon the project list, his testimony is only "yes". And similarly, the Coalition's traffic witness, when asked by Courtney Kaylor "Based on your review of the proposal, would the Comprehensive Plan amendment fund those projects?" his response was " Comprehensive Plan amendment directs staff to develop a program to fund those projects." Swenson testimony. Even the Coalition's own expert doesn't testify that the proposal funds the TIF-eligible project list. Moreover, Ketil Freeman and Mark Mazzola testified that proposal does not fund the TIF eligible project list. The plain language of the proposal does not mandate the funding of the TIF-eligible projects. Many of the TIF eligible projects are based on the Comp. Plan and modal plans that are adopted by the City. Ex. 12 (City of Seattle Pedestrian Master Plan, 6/2017); Ex. 13 (PIN and UV network map from Pedestrian Master Plan); Ex. 14 (SDOT Seattle Bicycle Master Plan, 2/2014), Ex. 15 (City of Seattle Freight aster Plan, 9/2016); Ex. 17 (DNS for Seattle Bicycle Master Plan); Ex. 19 (DNS for Freight Master Plan); Ex. 20 (DNS for Pedestrian Master Plan); Ex. 21 (DNS Seattle Transit Master Plan).

The manager of SDOT's environmental services division, Mark Mazzola, testified that all of the projects on the TIF-eligible list are expected to be reviewed by SDOT's environmental services division for project-level SEPA compliance and that the projects on the TIF-eligible project list are in the planning stages. Mazzola testimony. See also Ex. 35 (a draft list of the status of environmental review of the project list).

It is critical to recall that the proposal does not authorize construction of any of the projects on the list, nor does it fund the projects on the list. Freeman Testimony. Mr. Mazzola testified that the transportation projects on the project list at Attachment 2 to Ex. 2 will undergo environmental review when the projects are more refined and environmental impacts can more readily be evaluated. Mazzola testimony. However, it would be speculative for the City to have attempted

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to identify the environmental impacts of the TIF-eligible projects because the project proposals are not sufficiently defined at this point. This is consistent with SEPA. SEPA requires consideration of likely environmental impacts, not those that are merely speculative.[20]

Moreover, in Mark Mazzola's expert opinion, it would have been speculative to conduct SEPA on the list of TIF eligible projects when reviewing the Comp Plan proposal. Mazzola Testimony. For these reasons, the Coalition's claim of piecemealing must fail.

c. Council Central Staff Division had reasonably sufficient information to evaluate the proposal and its environmental impacts of the non-project proposal.

The Coalition has alleged that the DNS is based on inadequate information, pointing to WAC 197-11-335.[21] SMC 25.05.335, which mirrors WAC 197-11-335, provides that when conducting a SEPA review, the lead agency "shall make its threshold determination based upon information *reasonably sufficient* to evaluate the environmental impact of a proposal." Here, the Council Central Staff provided evidence that the proposal was based on reasonably sufficient information to evaluate the environmental impacts of the proposal- proposed Comp. Plan amendments that lay the groundwork for the adoption of a TIF program.[22]

i. The Coalition's attempt to recast its piecemealing argument as a different claim that the City lacked sufficient information to evaluate the proposal's environmental impacts must fail.

The Coalition claims the City had insufficient information to evaluate the environmental impacts of the proposal stems from its argument that the proposal was piecemealed and that the City should have evaluated the environmental impacts of a TIF program and of the construction

[20] SMC 25.05.060 D.1; WAC 197-11-060.4.A; *see, also Boehm v. City of Vancouver*,111 Wn. App. 711, 47 P.3d 137 (Div. 3, 2002) and *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 108 Wn. App. 836, 988 P.2d 27 (Div 1., 1999).

[21] The Coalition's Notice of Appeal (NOA) at p. 4:15-5:4 and p. 8:14-10:7.

[22] As noted below, the proposal was not improperly piecemealed as argued by the Coalition.

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of the "TIF eligible" projects identified in the Comp. Plan amendment.[23] The City has the discretion to determine the scope of its proposal; here, a TIF program and construction of the list of TIF eligible projects are separate and distinct actions under SEPA and are not interdependent such that the Comp. Plan amendment cannot go forward without the two subsequent actions.

In fact, both Mr. Freeman and Ms. Breiland testified that the proposal here, the proposed Comp. Plan amendments, simply lay the groundwork to allow the Council to consider adoption of a TIF program (including a whole host of policy decisions including setting fees, determining exemptions and other program components). Freeman testimony; Breiland testimony. Ms. Breiland also testified that it is typical for a municipality to take this first step in advance of development of an actual TIF program. Breiland Testimony.

This is consistent with the Comprehensive Plan [24] and case law regarding Comprehensive

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[23] Coalition's Notice of Appeal, Section B, p.4:16-5:4; p. 8:15-9:9.

[24] *See Seattle 2035 Comp. Plan, p.17 (Introduction),* "Application and Implementation of the Plan" which provides:
The principal purpose of this Comprehensive Plan is to provide policies that guide the development of the city in the context of regional growth management. Community members and officials from all levels of government can look to these policies when planning for growth. The City will use the Plan to help make decisions about proposed ordinances, capital budgets, policies, and programs. Although the City will use the Plan to direct the development of regulations that govern land use and development, it will not use the Plan to review applications for specific development projects, except when an applicable development regulation expressly requires reference to this Comprehensive Plan.
Each element of this Plan generally presents goals followed by policies related to those goals and may also include a discussion about the goals and policies. Some chapters also have appendices. Each of these components is defined as follows.
Goals represent the results that the City hopes to realize over time, perhaps within the twenty-year life of the Plan, except where interim time periods are stated. Whether expressed in terms of numbers or only as directions for future change, goals are aspirations, not guarantees or mandates.
Policies should be read as if preceded by the words It is the City's general policy to. A policy helps to guide the creation of or changes to specific rules or strategies (such as development regulations, budgets, or program plans). City officials will generally make decisions on specific City actions by following ordinances, resolutions, budgets, or program plans that themselves reflect relevant Plan policies, rather than by referring directly to this Plan. Implementation of most policies involves a range of actions over time, so one cannot simply ask whether a specific action or project would fulfill a particular Plan policy. For example, a policy that states that the City will give priority to a particular need indicates that the City will treat the need as important, not that it will take precedence in every City decision.
Some policies use the words shall, should, ensure, encourage, and so forth. In general, such words describe the emphasis that the policy places on the action but do not necessarily establish a specific legal duty to perform a particular act, to undertake a program or project, or to achieve a specific result.
A link to the Comp. Plan can be found here:

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Plans.[25]

Appellant's claim next that errors in the SEPA checklist should lead to the conclusion that Mr. Freeman did not have reasonably sufficient information to evaluate the environmental impacts of the proposal. In particular, the Coalition argues that the SEPA checklist should have identified and evaluated the environmental impacts of the "Transportation Impact Fee (TIF) Eligible" projects. This claim also fails.

As discussed above, the proposal before the Examiner does not in any way authorize the construction or funding of the TIF eligible projects. Nor does it authorize setting a particular fee schedule or set policy for the contours of a TIF program. The Coalition's attempt to recast their piecemealing argument into a new claim that the City had insufficient information to evaluate the proposal's environmental impacts fails.

ii. The City carefully evaluated the environmental impacts of the proposed Comp. Plan amendments.

The City carefully disclosed the scope of the proposal and properly evaluated its environmental impacts. The proposed Comp. Plan amendment sets forth an existing-system value methodology and proposes to amend Funding Policy T10.7 as follows:

> T10.7 ((~~Consider~~)) ((~~u~~)Use ((~~of~~)) transportation-impact fees to help fund transportation system improvements needed to serve growth.

Attachment 1 to Exhibit 2 (Amendments to the Transportation Element).

The Comp. Plan amendment contains a list of TIF-eligible transportation projects that may

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https://www.seattle.gov/Documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/CouncilAdopted2019.pdf
The Examiner can take judicial notice of the City's adopted Comprehensive Plan.

[25] In Washington, a comprehensive plan is only a general guide and not a document designed for making specific land use decisions. The zoning code controls and trumps inconsistent provisions of the comprehensive plan. *See, e.g., Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997).

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receive some TIF funds if a TIF program is adopted. Ketil Freeman testified that the proposal does not authorize or fund the TIF Eligible projects, it simply makes them eligible to receive funds if a TIF program is adopted. Freeman testimony. And Mark Mazzola also testified that the TIF eligible project list identified in the proposal are still in the early planning stages and will have independent SEPA review. Mazzola testimony. This is consistent with the table he prepared. Ex. 25 (City of Seattle TIF-Eligible projects Status).

The scope of the proposal is also outlined in the DNS, which states:

> The amendments to Seattle 2035 are a necessary, but not sufficient, step to establish an impact fee program under RCW 82.02.050.[26]
> …
> The amendments would accomplish the procedural requirements of RCW 82.02.050(5)(a) for establishing a transportation impact fee program to help mitigate a portion of the impacts attributable to planned residential and employment growth….The amendments would not in themselves create a transportation impact fee program. For further development of an impact fee program and a fee schedule, estimates for growth in trips on the transportation network would be based on growth estimates for Seattle 2035. [27]

Mr. Freeman testified that he carefully reviewed the SEPA checklist, and the proposal before issuing the DNS. Freeman Testimony. Mr. Freeman had reasonably sufficient information to evaluate the environmental impacts of the proposed Comp. Plan amendments. The Coalition's SEPA witness, Mr. George Steier, did not provide any evidence to the contrary and focused his testimony on the alleged piecemealing of the project, including alleged errors in the SEPA checklist due to the alleged piecemealing.

iii. The SEPA checklist was completed consistent with SEPA requirements.

The Coalition further alleged that the SEPA checklist contains various other errors; these

[26] Last sentence to the second paragraph under "Proposal Description".
[27] First paragraph of page 2.

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claims are also meritless. George Steier testified that the City erred in not including in the SEPA checklist the information testified to by Morgan Shook and Mike Swenson.

As to the testimony provided by Mike Swenson, Mike testified about what he thinks the probable construction and traffic impacts of the TIF-eligible projects will create; however, the proposal does not fund or authorize the construction of those projects. The City was therefore not required to evaluate the construction and traffic impacts of the TIF-Eligible project list.

Likewise, as to the testimony of Morgan Shook, Morgan testified about what he things the probable housing impacts of a TIF program will cause, assuming a $5,000 fee per multi-family unit; however, the proposal does not adopt a TIF program, nor does it set a TIF amount for a single residential or commercial unit in the City. The City was therefore not required to evaluate the housing impacts of the proposal.

According to the SEPA desk book by Mr. Settle, "In these few instances of judicial review of environmental checklists as part of the threshold determination process, the courts have not been inclined to strictly scrutinize checklist responses. If the overall process is credible, specific statutory and administrative requirements are plausibly satisfied, and the determination itself seems intuitively correct, judicial interference is unlikely." Moreover, SEPA does not require an agency to have perfect information before acting. It must simply have "reasonably sufficient" information, which the Council Central Staff Division had here. Therefore, the Coalition did not establish the Council Central Staff Division did not have reasonably sufficient information to evaluate the environmental impacts of the non-project proposal.

iv. ***The Coalition abandoned claims that the SEPA checklist contained errors by failing to put forth any affirmative evidence of such errors.***

The Coalition abandoned several arguments that the SEPA checklist contained errors by

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failing to provide any affirmative evidence at hearing of such errors including:

*the claim that the proposal is "likely to facilitate an increased volume of cars on the road" which will be "likely to increase emissions to air... or production of noise" or "increased use of energy or natural resources" and the claim that "the projects proposed by the City would increase the number of car trips in the City, depleting energy more than alternative approaches"[28]

None of appellant's experts including its transportation expert, Mike Swenson, provided evidence at hearing that the proposed Comprehensive Plan amendment will increase the volume of cars on the road or increase the number of car trips in the City, depleting energy more than alternative approaches.

* Moreover, the Coalition's argument that the "Project list proposed by the city would increase demands on transportation"[29] also falls fails based on the evidence before the Examiner.

* Further, the "tendency of the fees to decrease development will similarly decrease density, requiring greater expenditures for transportation to the City center."[30]

This line of argument assumes the occurrence of a long chain of events that would have to occur before environmental impacts could be established; this chain of assumptions in insufficient to provide affirmative evidence required for the Coalition to carry its burden under SEPA. A decrease in the scale of development will not necessarily result in a decrease in residential development density, as testified to by Ketil Freeman. Freeman testimony. Plus, "greater expenditures for transportation to city center" sound like an increase in cost, which is not an element of the environment. The testimony provided at hearing make clear that the TIF eligible transportation project list does not authorize construction, nor does it fund these projects.

[28] The Coalition's Notice of Appeal at p. 9:10-24.
[29] The Coalition's Notice of Appeal at p. 10:1-7.
[30] Id. at Lines 23-27.

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Washington Courts have held for many years that the purpose of SEPA is to facilitate the decision-making process; it need not list every remote, speculative, or possible effect.[31] SEPA requires consideration of "environmental impacts that are likely, not merely speculative"; speculative impacts need not be evaluated under SEPA.[32]

The Coalition failed to carry its burden by providing any affirmative evidence at hearing of any of these claims. These claims are therefore abandoned.

d. Appellants failed to provide affirmative evidence of likely significant Adverse Construction Impacts due to the proposed Comp. Plan Amendments.

The Coalition argues that the list of TIF-eligible transportation projects identified in Attachment 2 of Ex. 2 would create likely significant construction impacts. However, as discussed in detail above, the proposal at hand does not in any way authorize the construction or funding of the list of TIF-eligible projects. Freeman Testimony. Nor does it authorize the construction or funding of housing that would be subject to application of TIF. Therefore, Mr. Freeman properly did not evaluate the likely construction impacts of the list of TIF-eligible projects.

Only if the Examiner finds the Council Central Staff Division improperly piecemealed the proposal, which did not occur here, would this issue be viable.

In an abundance of caution, the City will briefly address the Coalition's claim related to likely significant adverse construction impacts. Based on the evidence presented, the Examiner should find that the Appellant failed to provide affirmative evidence of likely significant adverse impacts for the construction of any transportation projects on the TIF-Eligible list at Attachment 2 of Ex. 2. The planning level review and a threshold determination (DNS) has been issued for

[31] *Gebbers v. Okanogan Cnty. Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 379, 183 P.3d 324, 328 (2008).
[32] SMC 25.05.060 D.1; WAC 197-11-060.4.A; *see, also Boehm v. City of Vancouver*,111 Wn. App. 711, 47 P.3d 137 (Div. 3, 2002) and *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 108 Wn. App. 836, 988 P.2d 27 (Div 1., 1999).

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each of the following: the Pedestrian Master Plan, the Freight Master Plan, the Bike Master Plan and the Transit Master Plan occurred previously.[33] The Coalition did not timely appeal the DNSs of each of those plans and cannot now attempt to collaterally attack those threshold determinations.

As testified to by Mark Mazzola, the construction level planning is underway and, once it is at approximately 30% design, it will be reviewed the SDOT's environmental services division to determine if it is SEPA exempt or whether environmental review must occur. Mazzola testimony. If all of the work is exempt, the project will proceed without additional environmental review. Id. If only portions of the project are exempt, then environmental review must still occur. Id.

Moreover, Mike Swenson reached his opinion that the projects identified on the TIF-eligible project list would result in likely significant construction impacts based on his assumption that all or some of projects would occur at the same time. He had no idea what the planning horizon for any of the modal plans is (the pedestrian, bike, transit and freight master plans). Mark Mazzola testified that the TIF-eligible projects would not, in part or in total, be constructed at the same time given practical limitations such as the limited SDOT staff to review the environmental work, the number of SDOT staffer and contractors to construct the transportation projects, among other things. Further, the map at Ex. 2 identifies the project areas where the TIF-project work is thought to occur. There are a few areas where the transportation project may touch another transportation project area; however, to the project location.

[33] E.g., Ex. 20 Ex. 20 (DNS for Pedestrian Master Plan) and Ex. 12 (City of Seattle Pedestrian Master Plan, 6/2017) and Ex. 13 (PIN and UV network map from Pedestrian Master Plan); Ex. 17 (DNS for Seattle Bicycle Master Plan) and Ex. 14 (SDOT Seattle Bicycle Master Plan, 2/2014); Ex. 19 (DNS for Freight Master Plan) and Ex. 15 (City of Seattle Freight Master Plan, 9/2016); and Ex. 21 (DNS Seattle Transit Master Plan).

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For these reasons, the Coalition failed to carry its burden that this non-project proposal will result in probable significant adverse construction impacts.

e. The Coalition provided no affirmative evidence of likely significant transportation impacts due to the proposed Comp. Plan amendments.

Likewise, the Coalition argues that the list of TIF-eligible transportation projects identified in Attachment 2 of Ex. 2 would create likely significant transportation impacts. However, the proposal at hand does not in any way authorize or fund the list of TIF-eligible projects. Freeman Testimony. Mr. Swenson testified that, in this opinion, the construction of the TIF-eligible projects would result in significant impacts to pedestrian access based on "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."; he testified that such impacts could be mitigated through sequencing and that "happens all the time downtown". However, he stated that the City is required to conduct a "cumulative impacts" analysis to look at all the construction work at once. This could have been raised when the DNS for the pedestrian Master Plan DNS was issued, or when the Transit Master Plan DNS was issue but it was not and cannot be raised now. In addition, the Coalition has failed to establish the basis in SEPA for arguing that the City failed to conduct a "cumulative impacts" analysis of all the projects in the project list at Att. 2 of Ex. 2. The proposal does not authorize the construction or funding of the TIF-eligible projects that Mr. Swenson spent so much time discussing. Under SEPA, the City was not required to analyze the environmental impacts of the transportation projects on the TIF-eligible project list. Further, he could only give testimony about the type of impacts he would expect for a particular type of project; this is because the actual project and design documents have not been prepared yet!

George Steier did not conduct his own assessment of construction impacts associated with this proposal so his opinions should be disregarded. His testimony provided no actual affirmative

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evidence of any likely transportation impacts that will result due to the adoption of the Comp. Plan amendments, as is required for the Coalition to carry its burden here.

Both Ketil Freeman and Mark Mazzola testified that the Comp. Plan amendment would not result in any likely transportation impacts because the legislative proposal will not result in any authorization or funding of any transportation projects on the ground. Freeman and Mazzola testimony. Further, Mark Mazzola, SDOT head of environmental services, which is tasked with environmental review of transportation projects for SDOT concluded that this proposal would not result in any likely significant transportation impacts. He based his opinion on the fact that the proposal here- a non-project action that was based on Comp. Plan legislation- would not result in any on-the ground construction or modification to the environment. Mazzola testimony. He conducted research into the TIF-eligible project list and concluded that each project in that list was in the early planning stages and that SEPA could not be conducted at this early stage. Id. In fact, it was his opinion that it would be speculative to attempt to conduct SEPA on the project list without more detail about the particular proposal. Mazzola Testimony. In particular, Ex. 11 is a "typical example" of a "Complete Street" concept but none of the project on the project list have proposed all these components. In fact, its not clear where Ex. 11 came from.

The proposal is a non-project action that amends the Comp. Plan to adopt policies that set forth a methodology for evaluating existing transportation deficiencies and sets forth a list of projects that would be eligible to received TIF if a TIF program is adopted. Ex. 2. The Coalition failed to carry its burden to provide affirmative evidence of likely significant transportation impacts due to the proposed Comp. Plan amendments.

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f. The Coalition provided no affirmative evidence of likely significant housing impacts due to this proposed Comp. Plan amendments.

Economic impacts to housing are not an element of the environment that is required to be studied. The Legislature limited study of "the environment" to the "natural" and carefully-delineated aspects of the "built" environment. State SEPA statute provides:

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

The City's SEPA ordinance follows the legislative directive by limiting "environment" to elements of the physical environment. The narrow scope of the "built environment" is reflected in the list of elements of the environment the Legislature directed Ecology to produce. Economic impacts are not listed as an element of the environment that must be studied.

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.[34] In *Indian Trial Property Owner's Association v. City of Spokane, et al., (ITPOA),* when Appellants alleged that the agency failed to consider adverse impacts on the physical environment due to economic competition, 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). SEPA review was not inadequate on this basis.

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

[34] In *West 514, Inc. v. County of Spokane, et al.,* Appellants alleged economic impacts to existing businesses must be evaluated under SEPA. The court held that "economic competition, in and of itself, is not an environmental effect and need not be discussed in an EIS. WAC 197–11–448(3)."

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SEPA defines "probable" as "likely or reasonably likely to occur... 'Probable' is used to distinguish likely impacts from those that merely have a possibility of occurring but are remote or speculative."

The Examiner has also consistently refused to review the economic impacts of a proposal under SEPA. In the *Appeal of Robert Goodwin, et al.,* the Examiner held that economic impacts, rather than environmental impacts, are not evaluated under SEPA. Further, in *Ballard Business,* Appellants argued the impacts of a trail project would cause maritime businesses to close and the City failed to consider those impacts. The Examiner concluded that:

> [E]conomic concerns are not included in SEPA's list of the elements of the environment. See SMC 25.05.444. SEPA contemplates that the general welfare, social, economic and other requirements and essential considerations of state policy will be taken into account by the decision-maker. SMC 25.05.448. Even an "environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision." Id. SDOT was not required to consider potential economic impacts of the proposal as part of its SEPA process.

Here, the Coalition alleges that the yet-proposed TIF will result in some properties remaining underutilized, some projects will be rendered infeasible therefore reducing the housing supply and increasing the cost of housing.

1. The City was not required to evaluate the impacts of housing based on the maximum defensible fee.

The Coalition argues that the proposed Comp. Plan legislation was improperly piecemealed and that the yet-to-be proposed TIF program will result in likely significant impacts to housing due to the increased cost of the TIF. The Coalition further argues that the increased costs to development based on yet-developed TIF fees will result in likely significant impacts to housing production and housing affordability. As noted repeatedly, the proposed Comp. Plan legislation does not propose a TIF program, nor does it propose any TIF amount. Ex. 2. The Coalition may

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argue that the City was required to evaluate the impacts of the maximum defensible fee to housing, under SMC 25.05.080. In the event that a municipality has incomplete or unavailable information to evaluate environmental impacts of the proposal, SMC 25.05.080 sets out how a municipality may proceed to obtain such information or proceed without it. The maximum defensible fee is not the same as a TIF amount or amounts that may be selected as part of a TIF program. The information would not help evaluate impacts to housing.

It is undisputed that the proposed legislation does not result in the loss of a single housing unit. As testified to by City witnesses Ketil Freeman and Andrew Bjorn, the proposed legislation does not propose a certain TIF amount, nor does it propose exemptions for certain types of development or create a mechanism to challenge a fee. Without this key information, it is not possible to evaluate the impacts to housing, if any, due to a TIF program. The Coalition wants the Examiner to rely on a number of dubious assumptions and theoretical conclusions about the impacts to housing supply based on a TIF program that has yet to be developed. These assumptions and theoretical conclusions are not affirmative evidence that is required under SEPA for the Coalition to carry its burden here.

2. Any increase in the cost to develop housing is unlikely to lead to a probable significant impact to housing and housing affordability.

Claims that the proposal is likely to result in a likely significant reduction to the housing supply is inconsistent with the evidence. Mr. Andrew Bjorn concluded that there is insufficient information to evaluate the effects of a TIF program. Ex. 32, p. 2. He concludes that without a proposed impact fee schedule or other program details that would allow for an assessment of the actual charges on individual development project, the expected impacts are impossible to evaluate

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quantitatively. Id. It is not possible to conduct this analysis of impacts to housing and housing affordability without a proposed TIF program. Bjorn Testimony.

In addition, Mr. Shook's opinion that the proposal would result in significant impacts to housing and housing affordability was based on a number of significant errors or omissions and an analysis of economic feasibility that Mr. Shook candidly admits is an "abstraction." Shook testimony Day 3. First, Mr. Shook, who was presented at an expert on housing impacts, was really a witness who fundamentally disfavors use of impact fees. Expert testimony should come from disinterested experts seeking to assist the tribunal to better understand a technical issue. ER 702. Mr. Shook admits his personal bias in his report and on the stand, when he repeatedly notes his objection to impact fees because they can be "inefficient" fees that "overcharge" land development. Ex. 5, p.4. Shook Testimony. As stated above, without a TIF program proposal to evaluate, it is impossible to conclude that the City's program, if developed, would be inefficient. Regardless, "inefficiency" from an economic perspective is unrelated to the evidence that the Coalition must product in order to carry its burden in the present appeal.

Second, Mr. Shook failed to take into account the benefit or offset provided to development with access to transportation improvement projects like the list proposed to be added to the Comp. Plan. Bjorn Testimony. This omission is significant and goes to the heart of his opinion that impact fees will likely result in a reduction to housing supply that is significant. In fact, several articles directly contradict Mr. Shook's testimony that impact fees will result in a reduction to housing supply.

In particular, see articles by Shishir Mathur (Ex. 28, with Bjorn highlighting), Burge and Ihlanfeldt (Ex. 29, and Vicki Been (Ex. 30) . In Ex. 30, it was found that nonwater and nonsewer impact fees, like those that provide multimodal transportation infrastructure are found to expand

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the stock of multifamily housing construction in inner suburban areas. Elements in a neighborhood such as transportation accessibility, walkability, and transit access are generally shown to be strong amenities in property price modeling in the literature. Bjorn Testimony. The literature also recognizes "overshifting", where people are even willing to pay more for the amenity than what is charged by the impact fee because of demand for the amenity versus restrictions in supply and increases in costs. Note the example in Mathur (2013) where park impact fees increase property values by $4 for every $1 of the fee. Ex. 28. Therefore, literature about impacts fees do not provide affirmative evidence that any transportation impact fee will necessarily result in reduced housing supply or increased impacts on housing affordability.

Additionally, without extensive program details, it would not be reasonable to calculate full impacts, especially because a program could be developed that would likely have net positive impacts in the housing market given the amount of detail provided. Bjorn testimony. Analysis would be dependent on a fee structure and project schedule that have not been determined at this point, nor something that would be reasonable to calculate given the scope and nature of this proposal. Bjorn testimony.

Third, Mr. Shook concluded that adoption of a TIF program with an assumed TIF amount of $5000 per multi-family unit would affect the feasibility of development Shook testimony. As noted immediately above, the proposal does not contain a fee schedule or other program details including applicability. Further, even with a proposed TIF amount for housing units, Mr. Shook was unable to quantify the effects of a TIF program on market supply, only on development feasibility under current market conditions. Mr. Shook admitted that the factors that drive housing production are complex and include market prices, construction costs, land use regulations, other

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development fees, and that he did not account for those other factors when conducting his analysis to reach his conclusion for the present appeal. Shook testimony.

Fourth, Mr. Shook admitted that a developer could make changes to a development proposal other than removing housing units to make a proposal feasible, such a removal of non-required off-street parking. Shook testimony.

Fifth, Mr. Shook's opinion assumed that developers will produce a less-dense development "prototype," if a TIF is adopted, that contains fewer units than it would have without the TIF. Ex. 36. Ketil Freeman and Andrew Bjorn both testified that such as assumption was speculative and inaccurate. Mr. Shook's analysis of a reduction in feasibility relies on assumptions about developability that are divorced from the limitations of existing zoning. Mr. Shook admitted that in his testimony. In reaching his conclusion, he also incorrectly assumed that tower development can occur in areas of the city where it is not currently allowed by code and he also relied on floor area ratio density assumptions that are unconstrained by existing zoning regulations. Mr. Shook's analyses that assess the cumulative impacts of Mandatory Housing Affordability (MHA) fees on residential feasibility are similarly speculative and abstract. For the purposes of assessing development feasibility, he assumes an MHA fee that is found nowhere in the Seattle Municipal Code and has no association with any existing zone where MHA applies. This also assumes that there is no amenity value associated with transportation improvements constructed with funding from TIF, which could also impact rents and sale prices.

Finally, Mr. Shook admitted that his conclusions related only to market rate housing and did not factor in low-income housing at all. Shook testimony.

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For these reasons, the Coalition failed to provide affirmative evidence that the proposed legislation will result in likely significant impacts to housing. The Coalition failed to carry its burden in this appeal and for that reason its appeal must be denied.

g. The City was not required to study how impact fees would combine with already proposed MHA fees.

As noted above in Section 2, the fee amount has not been set nor has it been determined what types of development will be subject to fees. Therefore, to claim that the City failed to look at the fees- alone or together with other fees- when evaluating environmental impacts misses the mark and is not a viable SEPA claim. The City is not required to analyze remote and speculative impacts. Here, the Coalition's claim that the yet-undetermined fees will increase housing costs so much that housing will not be built or will be built in a different location relies on remote and speculative impacts, which are not to be studied under SEPA. This claim fails.

To the extent that the Coalition argues that the City failed to conduct a "cumulative impacts" analysis of the MHA fees and the yet-undermined TIF fees, this argument also fails. At the time the DNS was issued, the MHA fee amounts had not been decided for city-wide application. Freeman testimony. Therefore the City could not have evaluated the MHA fee amount.

DATED this 19th day of July 2019.

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CERTIFICATE OF SERVICE

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

I also certify that on this date, a copy of the same document was sent to the following party listed below in the manner indicated:

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