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 RESPONSE BRIEF**

I. INTRODUCTION

The evidence introduced at the hearing unambiguously establishes four propositions, none of which the City has countered – or, for the most part, even disputed.

First, the City understands that if it passes the Amendments, it will be required to establish an impact fee program. Indeed, it has proposed the Amendments because that is what it seeks to do. The City has never hidden this goal. The DNS and the SEPA Checklist alone state in myriad ways that the Amendments are the first step towards implementing a program. And as Mr. Freeman testified several times, a straightforward application of RCW 36.70A.040(3) and

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RCW 36.70A.120 will "require" the City Council to "implement an impact fee program." *Freeman*, Day 1, Part 4, 16:30-17:50.[1]

Second, the City has not performed any substantive analysis showing the Amendments will not have probable significant adverse impacts. It certainly has not provided any analysis demonstrating the transportation impact fee program required by the Amendments is not "reasonably likely" to have environmental impacts related to housing affordability, construction, or anything else. *See* WAC 197-11-782; SMC 25.05.782. Instead, the City simply decided that because the Amendments do not set fee rates or authorize specific construction projects – in other words, because it incorrectly claims the Amendments are "primarily procedural" and do not have a "site-specific effect" – it was "not required to evaluate" any impacts that might result. City's Closing Brief ("City Br."), p. 17; Ex. 8, p. 1. This legal conclusion was the sole basis for the DNS.

Third, the Amendments require the City to implement an impact fee program using the existing system value methodology, which sets fee rates based on the total cost of a list of pre-planned projects eligible for funding ("Eligible Projects"), not on the actual transportation needs of new development. Ex. 2, Att. 2, p. 1. The City admits this methodology would allow rates to be set at a level that would "make development infeasible." *Freeman*, Day 1, Part 4, 23:30-25:15. Moreover, because it does not require a nexus between fee-paying users and fee-funded improvements, it is likely to overcharge projects by requiring them to pay more in development fees than they receive in amenity value. This inefficiency will limit housing supply by raising development costs to a level that prevents some projects from moving forward or requires them

[1] A partial transcript of Mr. Freeman's testimony was submitted concurrently with Seattle Mobility Coalition's ("Coalition's") Post-Hearing Brief.

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to become less dense. *Shook*, Day 3, Part 1, 16:00-26:00. The City's witnesses did not disagree with this framework or say that the Amendments could not or would not affect housing affordability.

Fourth, the Amendments require the City to collect fees in an amount that will substantially fund the Eligible Projects. Fee rates will be set based on the total cost of the Eligible Projects (with minor exclusions) divided by the number of trips expected. Ex. 2, Att. 2, p. 1. Thus, based on the methodology set out in the Amendment, revenue from the fee program will fund a very substantial portion of the Eligible Projects. The City did not dispute Mr. Swenson's testimony that this makes the Eligible Projects more likely to be constructed or that simultaneous construction of some of the Eligible Projects would create significant adverse construction impacts. Instead, the City, again, argues only that no significant impacts can be considered to exist because the Eligible Projects themselves have not yet been authorized or funded.

Each of these propositions invalidates the DNS. First, because the Amendments are an inextricable part of the City's broader proposal to establish an impact fee program ("Proposal"), environmental review of the Proposal has been improperly piecemealed. Second, the City's failure to engage in any actual environmental review violates the requirement to base threshold determinations on sufficient information, as well as other regulations. Third, the Amendments will have probable significant adverse impacts to housing affordability because they will require the City to use a methodology that will inefficiently increase development costs. Fourth, the Amendments will have probable significant impacts from construction because they will result in substantial funding for a list of projects the City has planned for and prioritized. For each of these reasons, the Examiner should reverse the DNS.

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II. ARGUMENT

A. Environmental review of the Proposal was improperly piecemealed.

The City asserts that environmental review was not improperly piecemealed. City Br., pp. 7-13. The City also makes the unsupported and incorrect statement that the Coalition's case is entirely "rooted in the incorrect assumption that the City improperly piecemealed the proposal." *Id.*, p. 7. This is wrong, because the other claims asserted in the Coalition's Notice of Appeal provide independent bases on which to invalidate the DNS. However, even if invalidation of the DNS did depend on establishing improper piecemealing, the Coalition would still prevail. Under the plain language of WAC 197-11-060(3)(b), the City improperly disregarded its obligation to consider the effects of its entire Proposal to establish a transportation impact fee in the same environmental document.

WAC 197-11-060(3)(b) requires "proposals or parts of proposals" to be "evaluated in the same environmental document" if they (i) cannot proceed unless they are implemented simultaneously, or (ii) are "interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation." The City argues at length that the Amendments and later development regulations do not need to be implemented simultaneously under WAC 197-11-060(3)(b)(i) (City Br., pp. 10-11), but the Coalition has never suggested that they do. Instead, the Coalition's position is that environmental review of the Proposal must occur before a part of it – the Amendment – is adopted. When it refused to conduct this environmental analysis in connection with the Amendment, the City improperly piecemealed environmental review of the Proposal under WAC 197-11-060(3)(b)(ii): the Amendments, and the subsequent implementing regulations they require, are "interdependent parts" of the City's

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Proposal to establish an impact fee program and depend on that program for justification and implementation.

The City's own statements have repeatedly established the interdependence of the phases of the City's Proposal. The implementing regulations depend on the Amendments, which are "necessary" and "provide the procedural basis for establishing a transportation impact fee program." Ex. 7, pp. 1-2. Indeed, the City's own witness testified that the Amendments will "require" the City Council to "implement an impact fee program." *Freeman*, Day 1, Part 4, 16:30-17:50. Thus, the City's statements that the Amendment does not "mandate fees" (City Br., p. 10) is contradicted by its own testimony. Likewise, the Amendments depend on the implementing regulations because they alone are "not sufficient . . . [f]or a program to be fully established." *Id*; *see also Freeman,* Day 1, Part 3, 51:30-52:00 (describing the Amendments as "what's necessary to implement an impact fee program"); Ex. 8, p. 2 ("The amendments would accomplish the procedural requirements of RCW 82.02.050(5)(a) for establishing a transportation impact fee program."). When a proposal requires amendments to both a comprehensive plan and development regulations, as is the case here, those two actions are interdependent. *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 571-72, 309 P.3d 673, 681 (2013) (when a "rezone required a comprehensive plan amendment," this "inexorably intertwined the rezone and the comprehensive plan amendment, making them interdependent" and established that "the rezone was premised on and carried out the comprehensive plan amendment"); *Chrobuck v. Snohomish Cty.*, 78 Wn.2d 858, 864, 480 P.2d 489, 493 (1971) (statute that "contemplate[s] separate proceedings" for plan amendments and implementing regulations is intended for development regulations that are "not necessarily dependent upon the amendment of an established comprehensive plan").

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The City's own statements likewise establish that the Amendments and future regulations depend on the larger Proposal for both their justification and their implementation (though either factor alone would be sufficient to establish piecemealing). Page 1 of the City's Brief states that the purpose of the Amendments is compliance with RCW 82.02.050, a section that is solely and entirely about impact fees. Likewise, there is no reason other than the adoption of fees for the City to make a "go/no-go" decision on a program, *see Freeman*, Day 1, Part 3, 56:45-50; to take an action that "provide[s] the procedural basis" for that program, Ex. 7, p. 1; or to consider a proposal that "lays the foundation for and is a pre-condition to the City Council" adopting the program, City Br., p. 9. The only reason for the Amendments is to enable the City to establish an impact fee program. The same is self-evidently true of implementing regulations. And finally, that both the Amendments and later regulations depend on the larger Proposal for full implementation is abundantly clear. The regulations cannot be enacted without the "procedural requirements" of the Amendments, which are not themselves "sufficient" to establish a fee program. Ex. 8, p. 1. Indeed, the City does not bother arguing that the Amendments do not depend on the remainder of the Proposal for their implementation, likely because essentially every other argument in its brief is that the Amendments *do* depend on later steps. *E.g.*, City Br., p. 11 ("The Comp. Plan proposal, if adopted, does not . . . establish the critical components of the program such as determining fee amounts, determining exemptions, individualized determinations and other policy decisions."). Thus, the Amendments and subsequent fee ordinance are an "interdependent part of a larger proposal," and the City's own statements belie the argument to the contrary in its briefing. City Br., p. 11.[2]

[2] The City's assertion that the Eligible Project list is not an interdependent part of the Proposal fails. City Br., pp. 11-12. Under the existing system value methodology established in the Amendment, the fee is determined based on the cost of the Eligible Projects, and goes to fund them. They are an integral part of the Proposal.

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The City's arguments under WAC 197-11-060(3)(b) fail.

B. The City did not rely on sufficient information to make its threshold determination.

Piecemealing was not the City's only fatal procedural error. As the Coalition explained in its opening brief, the City's failure to conduct any environmental analysis itself invalidates the DNS because a threshold determination must be "based upon information reasonably sufficient to evaluate the environmental impact of [the] proposal." WAC 197-11-335; SMC 25.05.335. When making a threshold determination, the SEPA responsible official must consider whether there will be any probable significant adverse environmental impacts. WAC 197-11-330(1)(b); *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137, 141-42 (2002) (quoting *Lassila v. Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54, 59-60 (1978)) ("[T]he record must demonstrate that the City adequately considered the environmental factors 'in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA.'"). The City does not claim to have engaged in this consideration; it argues only that it did not need to do so because the Amendments are not themselves an impact fee program, and thus that the DNS was based on sufficient information. City Br., pp. 13-15. This claim fails.

The City first reasserts its piecemealing argument, maintaining that it "has the discretion to determine the scope of the proposal" and conclude that the Amendments are "separate and distinct" from every other component of a fee program. City Br., p. 14. It is not clear what the City means by "discretion" in light of WAC 197-11-060(3)(a), which requires the City to "make certain that the proposal that is the subject of environmental review is properly defined," and WAC 197-11-060(3)(b), which requires that the entire Proposal be evaluated in one document as explained above.

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Moreover, regardless of whether the DNS was improperly piecemealed under WAC 197-11-060(3)(a), the City's analysis was deficient under WAC 197-11-335. Even if the "proposal" the City must analyze is defined as the Amendments alone, the DNS is still invalid because it does not consider the "*impact* of the proposal." WAC 197-11-335 (emphasis added). The City repeatedly insists that the Amendments cannot have any impacts because they do not implement a program, do not set rates, and do not authorize improvement projects. *See* City Br., pp. 15-17. But that argument is contradicted by the SEPA regulations, which define "impacts" broadly as "the effects or consequences of actions," WAC 197-11-752, and require consideration of both "direct and indirect" impacts." WAC 197-11-060(4)(d); *see King Cty. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 663, 860 P.2d 1024, 1032 (1993) ("[A]n EIS is required if, based on the totality of the circumstances, future development is probable following the action and if that development will have a significant adverse effect upon the environment."); *Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wn. App. 787, 804, 309 P.3d 734, 743 (2013) (quoting WAC 197-11-055(2)(a)(i)) ("The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow *some* evaluation of their probable environmental impacts.'") (emphasis added). As explained fully at pages 14-24 of the Coalition's Posthearing Brief, the plain text of the Amendments demonstrates that perceivable, foreseeable "effects" and "consequences" *will* follow if the Council decides to enact them, and thus that the City is obligated to engage in genuine consideration of these impacts.

Adopting the Amendments in their current form would involve at least three significant policy decisions. Most significantly, as Mr. Freeman testified multiple times, enacting the amendments will require the City to establish a fee program; the City cannot seriously contend

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that implementation of a program is not an "effect" or "consequence" of passing the Amendments. *See Freeman*, Day 1, Part 4, 16:30-17:50; *Freeman*, Day 1, Part 3, 58:00-59:00. Enacting the Amendments will also require the program to use the existing system value methodology, as well as establishing the list of projects that will both determine the fee amount and receive the entirety of its revenue. Ex. 2, Att. 2, p. 1. Thus, because the City "is actively preparing to make a decision on one or more alternative means of accomplishing [its] goal" of adopting an impact fee program, *see* WAC 197-11-784; SMC 25.05.784, "[a]ppropriate consideration of environmental information *shall* be completed *before* an agency commits to a particular course of action." WAC 197-11-055(2)(c); SMC 25.05.055.B.3 (emphasis added). Particularly for this type of "go/no-go" decision, *see Freeman*, Day 1, Part 3, 56:45-57:00, SEPA does not require impacts to be precisely quantified, but does require that some environmental analysis be conducted. *See, e.g.*, SMC 25.05.055.A (review required at "earliest possible point" when "impacts can be reasonably identified"); SMC 25.05.055.B.1.a (consideration required when "*some* evaluation of [] probable environmental impacts" is possible) (emphasis added); WAC 197-11-330(3)(d) (directing agencies to recognize that for "some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified"); WAC 197-11-782 (determination of "probable" impacts is "not meant as a strict statistical probability test"). Here, there was none.

Notably, the City provides no argument whatsoever supporting its failure to complete any question in Section B of the SEPA checklist. WAC 197-11-315(1)(e) requires completion of Section B unless it would not "contribute meaningfully to the analysis of the proposal." Notably, the City does not claim that it would not be useful for the Council to know about adverse impacts to housing production and affordability, for example, prior to making its decision. Instead, the

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City takes a position that analysis cannot be performed in the absence of a full proposal to implement a fee. The City's position defies logic, directly contradicts SEPA regulations and caselaw, and is belied by its own past practice. In particular, Mr. Freeman's repeated insistence that he could not evaluate the impacts of the Amendments because the Council might amend or reject them, *e.g. Freeman*, Day 1, Part 3, 56:30-57:00, advances an interpretation of SEPA that would completely nullify environmental review. If the Council adopts the Amendments as written, it will have obligated itself to impose a fee that uses the existing system value methodology to fund the Eligible Projects. If the Council has no access to environmental analysis of the consequences of these choices until it considers implementing regulations, it will have no way to understand the consequences of the policy decisions embodied in the Amendments until it is too late to reconsider those decisions. This is contrary to the purpose of SEPA: "to provide environmental information to governmental decisionmakers for consideration *prior* to making their decision on any action." SMC 25.05.055.B.2 (emphasis added); *see also Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 522, 309 P.3d 654, 659 (2013) ("[T]he fundamental idea of SEPA[is] to prevent government agencies from approving [] plans before the environmental impacts of doing so are understood."); *Bjorn*, Day 2, Part 2, 18:45-19:30 ("I believe it's useful for Council to have information about the tangible effects, that there can be a wide variety of potential outcomes from an income fee program.").

The City, of course, understands this, as demonstrated most clearly by the environmental analysis it prepared when adopting the Plan these Amendments would alter. The City's Final Environmental Impact Statement ("FEIS") for the Seattle 2035 Comprehensive Plan Update recognizes that the Plan is a "policy document" that "lays out general guidance for future City

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actions" and must be "implement[ed] . . . through development and other regulations." Ex. 16, p. 2-10. As such, the Plan does not fully enact any of the policies it sets out, does not set zoning regulations, and does not authorize any construction projects. Nonetheless, the FEIS describes the potential housing-affordability- and construction-related impacts of establishing Plan policies. Ex. 16, pp. 1-22 – 1-23 (identifying "housing affordability" as a "probable significant impact" from how the plan "guide[s] growth"); *id.*, pp. 1-14 – 1-17, 1-24 – 1-25 (considering whether Plan policies and resulting construction could increase traffic and parking problems, dust, and noise).[3] Some of these statements are general and conditional, but that does not make them "speculative." Instead, they are consistent with SEPA regulations requiring consideration of both "direct and indirect impacts" and "short-term and long-term effects." WAC 197-11-060(4)(c), (d). These regulations do not limit analysis to policies specifically enacted or projects specifically approved in the action at issue; instead, they provide that impacts include more general considerations such as "effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions" – for example, a zoning ordinance that will "encourage or tend to cause particular types of projects." WAC 197-11-060(4)(d). The regulations controvert the City's assertion that it was not required to evaluate the impacts of the Proposal, and the FEIS completely disproves its assertions that it could not do so without knowing every detail of the proposed fee program.

If the City really thought it lacked sufficient information to make any statement regarding the potential impacts of the Amendments, SEPA regulations provide that it should require the

[3] As explained in the Coalition's Posthearing Brief, the analysis of general housing-affordability and construction impacts that may be caused by the land-use changes in the Plan does not include any analysis of the specific effects of a transportation impact fee program, the existing system value methodology, or creating a significant new revenue source for the Eligible Projects. Discussion of these issues in the FEIS and the other documents incorporated into the DNS does not satisfy the City's SEPA obligation with regard to its impact fee Proposal.

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applicant (here, the City) to submit additional information or make its own further study. WAC 197-11-335; WAC 197-11-080(1) ("If information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies shall obtain and include the information in their environmental documents."). The agency cannot defer analysis to some later date when, as here, environmental impacts can be reasonably identified and meaningfully evaluated; "appropriate consideration of environmental information shall be completed *before* an agency commits to a particular course of action." WAC 197-11-055(2)(c) (emphasis added). If "information relevant to adverse impacts is important to the decision and the means to obtain it are speculative" – as the City claims here – the remedy is not for the City to ignore the impact. Rather, it must conduct a worst-case analysis and "generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence." WAC 197-11-080(3)(b). Indeed, the "worst case" scenario here – setting fee rates at a level that would "make development infeasible" and "thwart" Plan goals to accommodate growth – is both known to the City and allowed by the Amendments. *See Freeman*, Day 1, Part 4, 23:30-25:15. The choice the City made, however – declaring that the Amendments will have no impacts and that it was not required to evaluate them – violated SEPA and requires reversal of the DNS.[4]

[4] The City incorrectly asserts at page 18 of its Brief that the Coalition has abandoned its arguments about increases to volume of car and car trips, emissions, and uses of energy. Mr. Swenson testified to the construction activity that would be a consequence of the Amendments, leading among other things to "[a]ddition of construction traffic." *Swenson*, Day 1, Part 2, 48:00-49:00. Mr. Shook testified that as the City's own policy goals reflect, "placing people and employment in dense areas" will "limit" the "environmental and transportation costs on the system." *Shook*, Day 3, Part 1, 23:00-24:30. Because, as he explained, the Proposal will make dense housing less feasible, it will increase those environmental and transportation costs. This "impact at the margins will be wide" regarding "geography and with respect to city policy to accommodate future housing growth." *Id.*, 24:30-25:30.

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C. The Proposal will have probable, significant adverse impacts to housing affordability.

The City argues that the Proposal will not result in significant adverse housing impacts. City Br., pp. 23-29. The City is incorrect.

Initially, the City repeats an argument that has already been addressed and rejected by the Examiner. The City asserts that "economic impacts to housing" are not cognizable under SEPA, but this statement has nothing to do with this case. City Br., pp. 23-24. The Coalition is not alleging purely economic impacts. Rather, the Coalition alleges – and has demonstrated – that there will be significant adverse impacts to housing production and affordability. Housing is an element of the built environment under SEPA. In addition, as the Examiner recognized when the City raised this argument in its Motion to Dismiss, the City's own SEPA policy provides that "[a]ffordable housing is a critical component of a healthful environment." SMC 25.05.675.

The City then claims that it was not required to analyze the impacts of the Proposal based on the "maximum defensible fee." City Br., pp. 24-25. But it is uncontested that the Amendment requires a fee and requires the use of the existing system value methodology. It is also uncontested that the maximum defensible fee was calculated using this methodology and that the Amendment allows the Council to adopt the maximum defensible fee. Finally, it is uncontested that neither the Amendment nor DNS require the Council to set a lower fee if there are impacts to housing or any other element of the environment. *Freeman*, Day 1, Part 4, 30:00-32:30. The law is clear that, if "information relevant to adverse impacts is important to the decision and the means to obtain it are speculative" – as the City claims here – the City must conduct a worst-case analysis and "generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence." WAC 197-11-080(3)(b).

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The worst-case analysis here would involve adoption of the maximum defensible fee and SEPA required the City to examine the impacts of this action.

Next the City claims "an increase in the cost to develop housing is unlikely to lead to a probable significant impact to housing and housing affordability." City Br., pp. 25-29. Yet the evidence in this case shows otherwise. As the Coalition explained in the first paragraph of its Posthearing Brief, three statements by Mr. Freeman – that the Amendments require a "go/no-go" decision on an impact fee, that if adopted they will require the Council to implement a fee, and that they require the use of a methodology that allows a fee to be set at a level that would make development "infeasible" – are sufficient in and of themselves to demonstrate that the Amendments will have probable significant adverse impacts to housing affordability and thereby resolve this appeal.

The additional evidence provided by Mr. Shook (which the City largely did not dispute, relying primarily on its incorrect argument that no analysis of housing impacts is possible or required at this stage of the Proposal) renders this conclusion even more inescapable. Neither Mr. Freeman nor Mr. Bjorn disagreed with Mr. Shook's fundamental premise: setting impact fees that are overly high is likely to raise overall development costs to the point where projects become less dense or infeasible, limiting housing supply. Nor did they disagree with Mr. Shook's explanations of why "average cost" fees are likely to be "inefficient," why the fees imposed under the existing system value methodology are "average cost" fees, why any reduction in the City's housing supply will have significant impacts on housing affordability, and why analysis that can be conducted prior to a proposal of the full details of the fee program can provide useful information for the Council. Neither the City's arguments in its brief nor the statements of its witnesses disprove any of Mr. Shook's points.

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Instead, the City launches a baseless attack on Mr. Shook's credibility, alleging that his statement that impact fees can be "inefficient" evinces personal bias. City Br., p. 26. The City fails to explain why the Examiner should see such a statement as discrediting Mr. Shook when the City's own expert testified that he "would agree that average cost impact fees can have inefficiencies." *Bjorn*, Day 2, Part 1, 16:00-17:00. Nor did anything in Mr. Shook's testimony indicate a personal "objection to impact fees." *See* City Br., p. 26. To the contrary, Mr. Shook recognized that impact fees can, for example, "in some cases . . . address needs for mobility and accessibility," *Shook*, Day 1, Part 1, 27:30-28:00, but that the Council should understand the adverse impacts that are reasonably likely to occur if it enacts the Amendments and thereby requires the implementation of a fee program. *Id.*, 45:20-46:00.

The City's statements that "'inefficiency' from an economic perspective is unrelated to the evidence that the Coalition must produce," as well as its arguments that three articles contradict Mr. Shook's testimony because they show that impact fees can have beneficial effects on housing, simply demonstrate a lack of understanding of Mr. Shook's testimony. *See* City Br., p. 26. Mr. Shook did not state that impact fees are "inefficient" in general, but rather that a particular type of efficiency – the nexus between an amenity funded by an impact fee and the person who pays that fee – is crucial in understanding the effects a fee will have. If prospective housing developers are required to pay a transportation impact fee, but the prospective residents of their buildings will not have easy access to the transportation amenities those fees will fund, the residents are less likely to be willing to pay more in rent to reflect the additional development cost of the fee. *Shook*, Day 1, Part 1, 29:45-30:15.

The City did not dispute this point, and the studies it cites actually support it. As described by the City, the studies indicate that certain amenities "*in a neighborhood*" can

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increase property values – for example, park impact fees in single-family neighborhoods, as discussed in the Mathur study. City Br., pp. 26-27 (emphasis added); Ex. 28, p. 11. But this only underscores Mr. Shook's testimony about the importance of a nexus between the people who pay the fee and the amenities the fee will fund. When impact fees *not* linked to a neighborhood – when they will not provide amenities that will provide a particular benefit to the people who are paying the fee – they are likelier to have disruptive effects on the housing market. *Shook*, Day 1, Part 1, 28:30-32:00. Moreover, the City's argument that Mr. Shook improperly "assumes that there is no amenity value," City Br. at 28, like Mr. Bjorn's testimony that impact fees could have benefits as well as adverse effects, is irrelevant under City law, which expressly provides that a threshold determination "shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts." SMC 25.05.330.

The City next asserts that the Amendments do not set a specific fee schedule and that housing affordability depends on multiple variables, not all of which Mr. Shook was able to quantify precisely. City Br., 27-28. But Mr. Shook testified that sufficient information exists today to determine the direction and scale of these impacts, that they are "reasonably likely" to occur, *see* WAC 197-11-782, and thus that they should be made known to the Council before they consider the Amendments. Therefore, Mr. Freeman's statement that the Proposal will "not necessarily" result in reduced density, *Freeman*, Day 1, Part 1, 7:30-8:30, and Mr. Bjorn's statement that impact fees do not "always have a negative impact on the market," *Bjorn*, Day 2, Part 1, 18:00-20:00, are irrelevant. The Coalition need only establish that significant adverse effects are probable, which it has done. Indeed, contrary to the City's position, SEPA requires the City to examine the probable worst-case impacts of the Proposal. *See Heritage Baptist*

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Church v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 2 Wn. App. 2d 737, 752, 413 P.3d 590, 598 (2018) (quoting *Ullock v. City of Bremerton,* 17 Wn. App. 573, 581, 565 P.2d 1179 (1977)) (SEPA review of nonproject action must consider the "maximum potential development" scenario).

The City's additional arguments that developers might be able to compensate for the effects of a fee and that certain types of development may be exempt from a fee, once again, only prove Mr. Shook's point. This is all information that should be made available to the Council so that they can use it to avoid enacting a program that will adversely impact housing affordability. That a future impact fee program might include mitigation measures is irrelevant to current SEPA analysis of the Amendments, which does not include any such measures. The same is true of what Mr. Bjorn described as "instruments by which [the average-cost calculation method] can get closer to the actual impacts that are associated with development" and thereby reduce inefficiencies, *Bjorn*, Day 2, Part 1, 42:30-45:30, which are not included in the Amendments either. If the City believes these measures are important to an understanding or mitigation of the potential effects of the fee, as its witnesses state, it should discuss them in the analysis provided to the Council.

Finally, the City's unsupported and unexplained contention that Mr. Shook's analysis did not properly consider the impacts of zoning or MHA fees is flatly contradicted by Exhibit 36 and Mr. Shook's discussion of it, which analyzed both of these points. Ex. 36, pp. 1, 3; *Shook*, Day 3, Part 1, 1:05:30-1:07:00. Mr. Shook analyzed the impacts of the proposed transportation impact fee in isolation and determined that it, alone, would result in significant adverse impacts. Ex. 36; *Shook*, Day 3, part 1, 16:20-19:10. He also opined that these impacts would be even greater in combination with MHA fees. Ex. 36; *Shook*, Day 1, Part 1, 48:15-49:30. Despite the

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City's claim to the contrary (City Br., p. 29), the City's own failure to consider the effects of MHA combined with the transportation impact fee was error, because MHA fees are an important aspect of the City's development fee scheme – the overall nature of which both Mr. Shook and Mr. Freeman cited as important for development feasibility. *Shook,* Day 1, Part 1, 48:15-49:30; *Freeman*, Day 1, Part 4, 24:00-25:00. For purposes of SEPA, since MHA fees have been adopted and are being implemented, they are part of the existing environment and must be considered.

The City has neither disproven any of the Coalition's affirmative evidence of probable, significant housing-affordability impacts nor provided legally valid reasons for its failure to analyze those impacts. The DNS must be remanded for evaluation of these impacts in an EIS.

D. The Proposal will have probable, significant adverse impacts from construction.

The City argues that the Proposal will not result in significant adverse construction or transportation impacts. City Br., pp. 19-22. The City is incorrect. The City's entire argument regarding construction impacts depends on its assertion that because the Amendments do not themselves fund or authorized individual transportation improvement projects, it need not and cannot evaluate the impacts from constructing those projects. *See* City's Br., pp. 11-13, 19. For the reasons the Coalition has explained, this argument is unavailing. As the City has itself demonstrated, most notably at pages 1-14 – 1-17 and 1-24 – 1-25 of Exhibit 16, it is not only possible but the City's practice to analyze the aggregate impacts of constructing improvements that will be furthered or enabled by comprehensive plan amendments. The City's FEIS for the full Plan likewise disproves any assertion that such analysis is impossible in the absence of specific designs or timelines for project construction.

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Moreover, contrary to the City's argument (City Br., pp. 11-12, 22), the text of the Amendments demonstrates that construction of the Eligible Projects is a more than reasonably likely "effect" or "consequence" of the Proposal. That is because the fees to be imposed under the Proposal are not simply additions to a general transportation fund. Instead, they are intended and specifically directed to fund the Eligible Projects – the list of which will itself be adopted into the Plan. Under the existing system methodology, the relationship between the Amendments and the Eligible Projects is a particularly close one: the Amendments will require the City not just to collect fees but to set rates that will substantially fund the Projects and make it much more likely that they will be constructed. The Amendments require fee rates to be calculated based on the total cost of the Eligible Projects, divided by the number of new peak-hour trips expected in the next 12 years, and allocated among new development based on trip generation. Under the existing system methodology, collection of impact fees will essentially run this equation in reverse: the number of trips generated by new development, multiplied by the fee rate, will equal the total cost of the Eligible Projects. Even with minor exclusions for repaving and pass-through trips, revenue the fee program will nearly equal that total cost. Ex. 2, Att. 1, p. 1; *Breiland*, Day 1, Part 4, 1:18:00 – 1:22:30. On top of that, the Plan, if Amended, will direct the City to "[u]se transportation impact fees" to fund system improvements, and the City is required to "make capital budget decisions in conformity with its comprehensive plan." RCW 36.70A.120. The Proposal will therefore not just provide the City with additional revenue, it will require the City to use that revenue for the Eligible Projects.

This makes it more than "reasonably likely" that the Projects will be fully funded, and therefore constructed. The City did not dispute Mr. Swenson's testimony on that point. Nor did it dispute his testimony that simultaneous construction of the projects could have significant

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adverse construction and transportation impacts, and that some of the projects could create significant impacts on their own. The City's assertion that Mr. Swenson's opinion was "based on his assumption that all or some of the projects would occur at the same time" (City Br., p. 20) mischaracterizes his testimony. Mr. Swenson testified there were no mitigation measures in the DNS requiring phasing or precluding simultaneous construction, which would result in significant adverse impacts. *Swenson*, Day 1, Part 3, 15:00-16:00 ("[D]epending on the nature of the projects, a subset certainly . . . could create those and would create those significant impacts."). Likewise, the City's statement that these issues should have been raised when the DNS for each modal plan was issued (City's Br., pp 19-20, 21) is incorrect. The DNSs for the modal plans do not consider the impact of increasing funding and raising the likelihood of simultaneous construction of the projects within each modal plan, let alone all the modal plans together with the numerous other Eligible Projects. In addition, the City's reliance on subsequent environmental review is misplaced. City Br., p. 20. Project-by-project review will not analyze the cumulative impacts of all the Eligible Projects. Further, Mr. Mazzola admitted many of the projects, individually, would be considered exempt and would have no subsequent environmental review. *Mazzola*, Day 2, Part 3, 28:45-34:40.

As with its arguments on housing affordability, the City has neither disproven the Coalition's evidence of probable, significant, adverse impacts from construction nor justified its failure to analyze those impacts. The DNS must be remanded for evaluation of these impacts in an EIS.

E. Mr. Freeman was not authorized to act as SEPA official.

The City asserts that Mr. Freeman was authorized to act as SEPA official and that there is no conflict of interest. City Br., pp. 6-7. To the contrary, SMC 25.05.910.C requires that "the

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department head shall designate for each proposed action, or for classes of actions, the responsible official." Here, the City admits that there was no formal designation, instead asserting there was only a so-called "implied delegation" of this responsibility to Central Staff. City Br., p. 7. This is insufficient under the plain language of the Code and the DNS should be reversed on this basis alone. The Examiner should remand to the City for an independent City department to conduct full and objective environmental review, in compliance with WAC 197-11-926(2).

III. CONCLUSION

The Coalition respectfully asks the Examiner to reverse the DNS and remand to the Director with instructions to comply with SEPA. Based on the evidence at hearing, the Proposal will result in significant adverse impacts to housing and construction impacts. These impacts must either be disclosed and mitigated to a level that is less than significant in a new mitigated DNS or must be disclosed in an EIS that also considers mitigation and alternatives.

Dated this 26th day of July, 2019.

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