BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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

The City will not repeat arguments that it already made in its closing brief. Rather, it attempts to briefly address a few arguments contained in Petitioner's Closing brief that may benefit from further argument by the City. And, for the benefit of the Examiner, the City Council (City) provides a copy of the hearing transcript at the same time as it files this Response to Petitioner's Post-Hearing brief.

Standard of Review and Burden of Proof. The DNS in this case is entitled to substantial weight.[1] 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

[1] RCW 43.21C.090; SMC 25.05.680.B.3. *Accord* HER 3.17(a).

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

the burden of providing affirmative evidence of likely significant environmental impacts.[2] *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 meaning that the Examiner is left with a definite and firm conviction that a mistake has been committed[3] and that a proposal will result in probable significant adverse environmental impacts. Here, Petitioner has failed to carry its burden to warrant the Examiner reversing the DNS.

Housing. There is nothing in Petitioner's case providing affirmative evidence that the non-project proposal will in fact result in probable significant impacts to housing supply and housing affordability. As noted in *Moss v. City of Bellingham,* 109 Wn. App. 6, 23-24, 31 P.3d 703 (2001), "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.

Instead, Mr. Shook testified that impacts fees are only one of many components of "development feasibility." Shook, Day Three, p. 416:1-23 of Transcript. In fact, he admitted that his analysis contained in Exhibit 36 was an "abstraction" that did not consider rents, land costs, construction costs or zoning. Shook, Day Three, p. 427:1-4 of Transcript. Further, "development feasibility" relates to whether a particular project will be built, and, does not analyze the larger macro analysis of impacts to housing supply given the number of other relevant factors that go into that analysis. Mr. Bjorn testified that while a pro forma for a particular development could analyze the

[2] *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.

[3] *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).

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

1 impact of the cost of an impact fee on the likelihood of development, it would be speculative to
2 attempt to conduct that analysis now when not fee amount has been set and a variety of decisions
3 must be made before an TIF program can be crafted. *Id.*

4 And significantly, Mr. Freeman did not testify that the maximum defensible fee would thwart
5 Comp. Plan objectives; he said that "It seems unlikely that the council would support a fee that might
6 thwart achieving other comprehensive plan goal objectives like accommodating 70,000 new
7 households and 115,000 new jobs." Freeman Testimony, Day Two, p. 167:1-13. And in response to
8 Ms. Kaylor's question: "And why would the not adopting the maximum defensible fee thwart that
9 goal?" Mr. Freeman responded "A. As -- as Mr. Shook testified, it may have a negative effect on
10 development, make development infeasible." Freeman test., Day Two, p. 167:14-18, Hearing
11 Transcript. Petitioner cannot twist Mr. Freeman's testimony to support its arguments.

12 Likewise, Petitioner failed to carry its burden to provide affirmative evidence that the proposal
13 will result in likely significant impacts to housing affordability. Ex. 5 sets out Shook's basis for
14 concluding the proposal will increase housing costs. However, Ex. 5 combined all impact fess plus
15 MHA fees as well as the current South Like Union Fee. Bjorn Test. Day Two. And Shook's
16 conclusion of an impact to housing affordability is based on a variety of assumptions that have not
17 been established through any affirmative evidence. Further, he stated only that "Land Use polices
18 that make it difficult to build and reduce the production of urban land also create hidden costs on the
19 existing supply while increasing overall prices. This, in turn, restricts the accessibility and
20 affordability of land and hosing in high-demand markets; creates barriers to economic opportunity;
21 and contributes to economic displacement." Ex. 5. He concludes that any reduction in housing
22 production and affordability is a significant adverse impact that should be disclosed to the City
23 Council before they take action. *Id.* And as noted above, Ex. 36 relied on a set of development

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

assumptions, for example, there is a single cap rate within the city, which may not be the case, and ideal lending rates, which may not be the case and such rates likely vary between developers. Bjorn, Day Three, p. 458:8-15 of Hearing Transcript. Further, there are a variety of other factors that need to be analyzed such as rents, construction costs, land value, etc. that were not analyzed in Shook's work (Ex. 5 and Ex. 36). Petitioner has not accrued their burden to provide affirmative evidence of likely impacts to hosing supply and housing affordability based on the proposal.

While Petitioner argues on p. 15 of its Post-Hearing Brief that the City's position is that due to the non-project nature of the proposal, the proposal inherently cannot 'affect the extent, intensity or rate of impacts to the build or natural environment", that is not what the City concluded. Nor did the City "fail to base the DNS on any environmental information or analysis." Petitioner's Post-Hearing Brief, p. 15. Nor does the City believe that the proposal "is not or cannot be subject to SEPA," as argued by Petitioner. Id. at p. 16: 15-16. The City conducted SEPA, prepared a SEPA checklist and, based on its review, issued a DNS. Freeman Testimony, Day Two. *See* III.c p. 15 of the City's Closing Brief.

Petitioner next argues that the City failed to conduct adequate review under SEPA because "consideration of housing affordably and construction impacts would provide 'meaningful information' for the Council to consider. P. 17:19-20. However, the "housing affordability and construction impacts" alleged to by Petitioner is based on the testimony of Shook and Swenson. Steirer, Day One, p. 115-117 Transcript. However, as discussed above and in the City's closing brief, there are significant problems with the conclusions reached by both Shook and Swenson. Shook and Swenson's testimony was based on a variety of unsubstituted and incorrect assumptions.

Petitioner's claim that "the Council should understand what Mr. Freeman already knows that a program that sets fees too high may negatively impact housing affordability. It cannot reasonably

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

be argued that this potential adverse effect would not be "meaningful information for the council to possess when it considers and acts on the Amendments" Petitioner's Post-hearing Brief. At p. 18:3-8. All of the information that may have a 'potential adverse effect" is not required to be disclosed in a SEPA checklist, nor is it required to be analyzed by the responsible official prior to issuing a threshold determination. WAC 197-11-794 (definition of "significant"); WAC 197-11-782 (definition of "probable"[4]). Evidence of a potential impact to an element of the environment- affordable housing or transportation- is insufficient to carry Petitioner's burden here. A "possible" or "potential" impacts does not meet the definition of "probable" or "likely" required under SEPA to mandate an EIS. *Id.*

Moreover, while SEPA requires review of all direct and indirect impacts of a proposal in advance of action on the proposal, such review of likely environmental impacts occurred here. Petitioner have failed to establish that their claims of "impacts" are likely. Instead, they acknowledge above that the housing and transportation impacts are simply "potential" impacts. SMC 25.05.055.B.2 provides:

> Timing of Review of Proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decisionmaking process, when the principal features of a proposal and its environmental impacts can be reasonably identified.
>
> 2. A major purpose of the environmental review process is to provide environmental information to governmental decisionmakers for consideration prior to making their decision on any action

Contrary to Petitioner's claims, the City has not alleged that non-project actions are subject to a lesser standard of environmental review. Petitioner's Post-Hearing Brief at. 19:4-5. Further, case

[4] "Probable" means likely or reasonably likely to occur, as in "a reasonable probability of more than a moderate effect on the quality of the environment" (see WAC 197-11-794). Probable is used to distinguish likely impacts from those that merely have a possibility of occurring but are remote or speculative. This is not meant as a strict statistical probability test.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

law citations included in Petitioner's post-hearing brief at p. 18:9-19:4 do not support Petitioner's argument that it was a SEPA error for the City to not evaluate the "potential adverse effect" as testified to by Shook and Swenson. In *King County*, the Court reversed an annexation decision enlarging the city of Black Diamond because it was not preceded by the preparation of an EIS even though environmental checklists documented environmental impacts that would flow from the annexation. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 665, 860 P.2d 1024, 1032-33 (1993); *see also Int'l Longshore*, 176. Wn. App. 512, 521, 309 P.3d 654 (2013).

Both cases discuss the "snowball" and "snowballing effect" that highlights the importance of evaluating an action's "likely environmental impact either down the road or immediately". *Int'l Longshore.*, 176 Wn. App. 522. The Court in *Int'l Longshore*. concluded that "Under SEPA, there is no snowball" when the City entered into a Memorandum of Understanding regarding possible stadium development. *Id.* The Court concluded that the MOU was not an "incremental decision that required SEPA review." *Id.* Rather, the MOU "is best understood as a preliminary step taken by the city to set forth an arena proposal that is sufficiently definite to allow future study." *Id.* at 521. Like the MOU in *Longshore.,* here the proposed Comp. Plan amendments are also best understood as a preliminary step, needed before to determine the City Council's willingness to even discuss and consider creation of a Transportation Impact Fee program. testimony, Day Two, pages 135:3 to 136:7 of the Hearing Transcript.

Speculative analysis. As testified to by Freeman and Bjorn, it would be speculative to attempt to evaluate the environmental impacts to housing, based on anticipated contours of a proposed Transportation Impact Fee program. Petitioner's reliance on the example TIF fees sent to Ketil Freeman in Nov. 2018 do not establish that the City Council Staff had worked with the proponent CM O'Brien's staff to develop a TIF program- there are a myriad of policy decisions that need to be

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

made before a legislative proposal on a TIF program can be prepared. For example, Mr. Bjorn and Mr. Freeman identified a few key factors including a fee schedule for various land uses, geographic application, application to certain types of development, development of exemptions, inclusion of an individualized assessment, etc. Freeman, Bjorn. A fee schedule is based on a rate study, including analysis of a variety of additional components.[5] Further, as noted by Ms. Breiland, a rate study is needed. Breiland, Day Two, Pages 196:16 to 198:21 of Hearing Transcript. *See also* Ex. 26, April 15, 2016 Fehr Peers Memo identifying a "fee schedule description which seven factors to be included, each of which could vary.

And, contrary to Petitioner's claims, the list of transportation impact fee eligible projects is not integral to the TIF methodology. Freeman Testimony, Day Two, Page 163:19 to 163:25. Nor is the methodology necessarily reflective of the TIF rates. Freeman Test., Day Two, Page 165:1-22. Thus, there are a variety of components that must be determined before the City Council can propose a Transportation Impact Fee Program. Petitioner's argument that the City had all of the information it needed to create a TIF program is incorrect. Further, SEPA "is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decisionmakers" and it "was not desired to usurp local decision-making." *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 95 (2017).

For the reasons noted above and in the City Council's Closing Brief, the TIF Program need not be evaluated concurrently with the Comp. Plan amendments under SEPA because the TIF Program is not specific enough at this time to allow evaluation of its probable environmental impacts,

[5] Contrary to SMB's arguments, the fee is based on various factors, some of which are set out at Ex. 4 (including update to "a very generic set of land use", change to ITE Edition rates, as well as analysis related to the proposed project list, calculation of eligible costs from that list, eligible impact fee costs per project, as well as "select link analysis (% Seattle trips), "eligible impact fee costs per project".)

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

1 contrary to Petitioner's claims at p. 23:4-5. The City Council could not and was not required to
2 evaluate impacts due to a TIF program, because significant policy decisions still need to be made to
3 propose a TIF program. Evaluation of a TIF program without policy direction would require analysis
4 on remote and speculative impacts under SEPA. The City Council could not analyze the impacts of
5 a TIF program at this point. And Petitioner cannot shoehorn its piecemealing arguments into a SEPA
6 error that requires the DNS be reversed.

7 **No procedural error.** Procedurally, the City did not commit error in preparing the SEPA
8 checklist or issuing the DNS. The SEPA checklist requires applicant to answer three questions related
9 to housing:

10 9. **Housing**
a. Approximately how many units would be provided, if any? Indicate whether high,
11 middle, or low-income housing.
b. Approximately how many units, if any, would be eliminated? Indicate whether high,
12 middle, or low-income housing.
c. Proposed measures to reduce or control housing impacts, if any:
13

14 P. 21-22 of 36 of Ex. 34, SEPA checklist form.

15 Petitioner has established no error in the City completing its SEPA checklist. Petitioner did
16 not provide evidence contrary to the City's testimony that no housing units would be directly
17 demolished as a result of the Council's consideration of the proposal. Freeman, Day Two. This is
18 consistent with the plain language of the proposal. Further, Petitioner provided no evidence that there
19 would be demolition of housing units as an indirect result of the proposal. Petitioner only provided
20 evidence that the fee is one factor of many factors to be considered in whether a development project
21 was feasible or not. Freeman and Bjorn testified that likely significant impacts to housing affordability
22 cannot be evaluated at this time. Mr. Bjorn also testified that in his opinion, even assuming a $5000
23 impact fee to likely be imposed by the City Council, that such a fee would have marginal impacts on

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

1 housing affordability for market rate housing. Bjorn, Day Two. Mr. Shook's analysis did not analyze
2 impacts to low-incoming housing. Shook, Day One.

3 Even Mr. Shook could not quantify a number of housing units that would not be produced as
4 a result of the proposal. Nor did Petitioner provide any other evidence that establishes, in any
5 quantifiable way, a number or percentage reduction in housing production as a result of the proposal,
6 if adopted by Council. Ex. 5 failed to independently consider the impacts of impact fees And Exhibit
7 36 Here, Mr. Freeman did not complete that section because, as noted in his testimony, it would not
8 provide useful information.

9 The DNS was based on adequate information under SMC 25.05.335, which mirrors WAC
10 197-11-335, and provides that when conducting a SEPA review, the lead agency "shall make its
11 threshold determination based upon information *reasonably sufficient* to evaluate the
12 environmental impact of a proposal." Here, the Council Central Staff provided evidence that the
13 proposal was based on reasonably sufficient information to evaluate the environmental impacts of
14 proposed Comp. Plan amendments.

15 Last, although Petitioner argues throughout its post-hearing brief and in fact bases its entire
16 case on the unsubstantiated claim that the City Council improperly piecemealed its SEPA review
17 here, the evidence in the record does not bear that out, nor does the case law cited in Petitioner's
18 Post-Hearing Brief.

19 Because Petitioner failed to establish either procedural error or affirmative evidence of
20 likely significant housing, transportation or construction impacts, the Petitioner's Notice of Appeal
21 must be denied and the City Council's DNS must be affirmed.

22

23

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

1
2 DATED this 26th day of July 2019.

3 PETER S. HOLMES
Seattle City Attorney
4
5
By: *s/ Elizabeth E. Anderson*, WSBA #34036
6 Assistant City Attorney
Seattle City Attorney's Office
7 701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
8 Ph: (206) 684-8200
Fax: (206) 684-8284
9 liza.anderson@seattle.gov
Attorneys for Respondent
10 Seattle City Council

11

12

13

14

15

16

17

18

19

20

21

22

23

CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of Respondent City's Response to Petitioner's Post-Hearing 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:

Courtney Kaylor
McCullough Hill Leary PS [X] Email
701 – 5th Ave., Ste 6600
Seattle, WA 98104
Phone: (206) 812-3388
Email: courtney@mhseattle.com
Lauren Verbanik, Paralegal
Email: lverbanik@mhseattle.com
Attorney for Appellant
Seattle Mobility

DATED this 26th day of July 2019.

*s/Alicia Reise*___________________________
ALICIA REISE, Legal Assistant

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200