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 SUPPLEMENTAL POST-HEARING BRIEF**

I. INTRODUCTION

Appellant Seattle Mobility Coalition ("Appellant") files this supplemental brief in response to the questions posed by the Examiner at the August 28, 2019 re-opened hearing. For the reasons explained below, the Determination of Nonsignificance ("DNS") must be reversed, regardless of whether the Examiner concludes that Appellant has established a likelihood of significant adverse impacts, because of the City of Seattle's ("City's") complete failure to analyze and disclose the housing production and affordability and construction impacts of its proposal to impose a transportation impact fee ("Proposal"). The City failed to base the DNS on sufficient information and unlawfully piecemealed its State Environmental Policy Act ("SEPA") analysis. The City relies entirely on the legal argument that analysis of the housing and

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construction impacts of the Proposal is not required at the Comprehensive Plan amendments ("Amendments") stage. Yet, the City's recent actions show it intends to adopt the Amendments and the implementing impact fee regulations ("Regulations") concurrently this year. Further, it intends to treat the Regulations as SEPA exempt, thereby avoiding the analysis and disclosure of the impacts of the Proposal both now and in the future. The requirements to base a threshold determination on sufficient information and to avoid piecemealing a proposal, while legally distinct, yield the same result in this case. Each provides a sufficient and independent basis to reverse the DNS because of the City's failure to engage in actual consideration of the environmental impacts of the Proposal.

II. ISSUES PRESENTED

The Examiner posed four questions to the parties:

(1) If the Examiner does not find that Appellant met the burden of demonstrating probable significant impacts, can Appellant prevail on its claims that the City lacked sufficient information to issue the DNS and piecemealed the environmental review of the Proposal? The answer to this question is yes. Appellant can (and should) prevail on both claims regardless of whether it has demonstrated significant adverse impacts.

(2) Is Appellant's claim that the City lacked sufficient information to issue the DNS essentially the same as its claim of piecemealing? The answer to this question is no. The claims are legally distinct. However, both claims require the same result in this case: The City must analyze the housing production and affordability and construction impacts of the Proposal.

(3) Is the City required to show *prima facie* compliance before the burden of proof shifts to Appellant? What is required for *prima facie* compliance with SEPA? The answer to the first question is yes. The City is required to show *prima facie* compliance with SEPA before the

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burden of proof shifts to Appellant. The answer to the second question is that the City must show at least some substantive consideration of environmental impacts. This burden is not high and, in most cases, does not arise because the agency has taken the minimal steps necessary to show *prima facie* procedural SEPA compliance. Here, however, the City has conducted no SEPA review whatsoever of housing production or affordability or construction impacts, instead steadfastly maintaining this is not required at this stage. It has therefore failed to meet its burden.

(4) Is there case law addressing the requirement to complete Section B of the Environmental Checklist? The answer to this question is that, while Appellant found no published Court decision addressing this issue, Growth Management Hearings Board authority supports Appellant's argument that the City was required to complete Section B.

III. ARGUMENT

A. The City's failure to base the DNS on adequate information and piecemealing of environmental review require reversal of the DNS.

Even if Appellant did not show that the Proposal will result in significant adverse environmental impacts,[1] SEPA still requires reversal of the DNS because the City did not base the DNS on adequate information and piecemealed review of the Proposal. As noted by Professor Richard Settle, "[t]he courts have been steadfast supporters of SEPA's environmental enlightenment mission not only by . . . closely scrutinizing agency determinations of nonsignificance but *also* by insisting upon a credible threshold determination *process*." R. Settle, *Washington State Environmental Policy Act: A Legal and Policy Analysis* ("Settle"), §

[1] For the reasons discussed in Appellant's Post-Hearing Brief and Post-Hearing Response Brief, Appellant demonstrated that the Proposal will result in significant adverse impacts. The DNS should be reversed on that basis as well.

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13.01[4] (emphasis added). "[A]ction which was not preceded by a proper threshold determination process is invalid and the agency must begin the decision-making process anew; *and* action for which a required [Environmental Impact Statement ("EIS")] was inadequate or not prepared is rendered a nullity and remanded for reprocessing in light of an EIS." *Id.*, § 20.09[1] (emphasis added). "From SEPA's earliest days, [the threshold] determination required *actual analysis and disclosure*," because "without preliminary environmental analysis of a proposal, application of the threshold standard, no matter how stringent, would be uneducated guesswork and hardly amenable to meaningful administrative and judicial review." *Id.*, § 13.01 (emphasis added). Numerous cases from SEPA's early years to today demonstrate that a city must actually evaluate the environmental impacts of a proposal before issuing a DNS and the failure to do so alone is sufficient grounds for reversal.

1. Foundational SEPA cases require reversal for lack of analysis of a proposal's environmental impacts.

The earliest major cases interpreting SEPA's requirements, which remain good law, establish unambiguously that an agency's failure to engage in actual consideration of environmental impacts provides an independent basis for invalidating a threshold determination.

In an early SEPA case, the Department of Water Resources (now the Department of Ecology) issued a permit to withdraw water from a lake over neighbors' objections. The neighbors appealed, claiming "numerous pollution and health problems." *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 111, 508 P.2d 166, 171 (1973). The Department argued that the statute governing water rights permits did not require it to consider whether "potential pollution" could result from its issuance of a permit to withdraw water from a lake. The Supreme Court concluded that this argument was "no longer meritorious in light of the enactment of" SEPA. *Id.* at 117. The Court did not reach the question of whether water pollution was probable or

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significant (the Court referred to it only as "possible"). *See id.* at 119. Instead, the Court held that SEPA imposed an obligation to engage in full environmental consideration, which the agency simply had not completed. The Court thus affirmed a trial court's "remand decree ordering further departmental investigation before the permit could be validly issued." *Id.* at 120.

In the case of *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973), an association sought to invalidate a grading permit that was issued for a neighboring property without the preparation of an EIS. The trial court found that the evidence was "insufficient to establish that said activities will cause any significant impact on the environment," and thus that (1) no EIS was required, (2) the grading permit was not a major action, and (3) the city could not deny the grading permit on this basis. *Id.* at 67. The Court of Appeals reversed:

> [W]e hold that RCW 43.21C.030(c) necessarily requires the *consideration* of environmental factors by the appropriate governing body in the course of all state and local government actions before it may be determined whether or not an Environmental Impact Statement must be prepared. Thus, SEPA requires that a decision *not* to prepare an Environmental Impact Statement must be based upon a determination that the proposed project is not a major action significantly affecting the quality of the environment. A decision by a branch of state government on whether or not to prepare an Environmental Impact Statement is subject to judicial review, but before a court may uphold such a decision, the appropriate governing body must be able to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.

Id. at 73 (emphases in original). The *Juanita Bay* Court cited concerns related to piecemealing as well as to inadequate information: it noted that factors supporting the requirement of more detailed review included that the grading permit "constitutes the threshold act" in a larger plan for an industrial park development and that "the environmental impact of the total project, rather than that of the grading project alone, must be weighed in order to meet the requirements of

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SEPA." *Id.* at 72. For both reasons, the court "remand[ed] this case to the City for its determination of whether it is necessary to prepare an Environmental Impact Statement before making a decision on the question of whether or not to issue [the] grading permit," noting that if the City could "affirmatively demonstrate prima facie compliance with the procedural requirements of SEPA, *then* the burden will fall upon the appellant . . . to prove the City's decision was invalid." *Id*. at 73-74 (emphasis added).

Three years later, in *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 271, 552 P.2d 674, 677 (1976), the Supreme Court considered the proper scope of review of a threshold determination "made pursuant to [SEPA] that because the government action in question would not significantly affect the quality of the environment, no environmental impact statement is required." In considering the appropriate standard of review, the Court noted that "[t]he SEPA policies of full disclosure and consideration of environmental values require actual consideration of environmental factors before a determination of no environmental significance can be made." *Id.* at 275 (citing *Juanita Bay*, 9 Wn. App. at 73.) "In the absence of a record sufficient 'to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA,' a 'negative threshold determination' *could not be sustained* upon review . . . because the determination would lack sufficient support in the record." *Id.* at 276 (quoting *Juanita Bay*, 9 Wn. App. at 73) (emphasis added). Accordingly, the Court remanded the subdivision approval at issue for "consideration of environmental values based on full information *before* a decision is made." *Id.* at 279 (emphasis in original).

Next, the Court considered several actions taken by the City of Wenatchee to redevelop its central business district. *Lassila v. Wenatchee*, 89 Wn.2d 804, 806, 576 P.2d 54, 56 (1978).

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The court noted:

> If the governmental body makes a threshold determination of "no significant impact" under SEPA, it must then demonstrate that environmental factors were considered in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA. . . . Further, before a court may uphold a determination of "no significant impact," it must be presented with a record sufficient to demonstrate that *actual* consideration was given to the environmental impact of the proposed action or recommendation."

Id. at 814 (emphasis in original). With respect to the city's amendment of its comprehensive plan, the court determined that the record revealed "no discussion of environmental factors" and concluded that it could not tell "whether the environmental significance of the Plan was even *considered* by the commissioners." *Id.* at 817 (emphasis in original). This was impermissible, because the fact of a threshold determination alone is not enough. "*At minimum* SEPA requires a threshold determination for such recommendations *and* an actual consideration of potential environmental significance." *Id.* (emphasis in original). The Court therefore vacated the amendment and directed the City "to actually consider the environmental factors involved; to determine the environmental significance of those factors prior to making any subsequent amendment of the City's comprehensive plan; and, to prepare an adequate record that will demonstrate the action taken and reasons therefor." *Id.* at 818.

In *Bellevue v. King Cty. Boundary Review Bd.*, 90 Wn.2d 856, 867, 586 P.2d 470, 477 (1978), the Court stated that "[t]he burden is upon the governmental body subject to SEPA to show that it made a threshold determination which 'demonstrate[s] that environmental factors were considered in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA.'" (Citing *Lassila, supra,* at 814.) The Court held that a city's environmental assessment of a planned annexation was insufficient because "[t]he record fails to show sufficient deliberation and consideration and contains little other than the conclusion that an EIS

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is unnecessary." Describing the city's conclusions as "a naked decision not to take any action under SEPA, a decision which is devoid of any serious consideration of environmental factors," *id.*, the Court affirmed the trial court's invalidation of the annexation until additional environmental analysis could take place. Notably, although the *Bellevue* Court discussed the possibility of environmental impacts resulting from the annexation (primarily because of a development that was planned for the annexed territory), it "express[ed] no opinion as to whether an assessment of environmental factors which includes discussion of this possibility must result in a decision to prepare a full EIS," recognizing that "the board may properly find that the impact on the project will be minor no matter what annexation decision is made." *Id.* at 868. However, "the [city] was required at least to consider, as fully as possible, this and all other environmental factors involved in this annexation before approving it." *Id.* Because the city did not do so, "it failed to make an adequately based threshold determination." *Id.*

Similarly, in *Gardner v. Pierce Cty. Bd. of Comm'rs*, 27 Wn. App. 241, 245, 617 P.2d 743, 746 (1980), the county approved a subdivision with smaller lot sizes than would otherwise be required by regulation based on the soil type in the area. The court held that the county "had an affirmative duty to demonstrate its justification for a negative declaration under SEPA": "Whether or not property owners in petitioner's position specifically raise a SEPA challenge, the record of a government agency's negative threshold determination must demonstrate that environmental factors were considered in a manner sufficient to amount to a prima facie compliance with the procedural requirements of SEPA." *Id.* The subdivision approval, however, did not make such a demonstration: the court determined that it was "not clear . . . whether any engineering justification can be made for approval of smaller lots" than would otherwise be required, and thus that the county had "failed to demonstrate a justification for its

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negative declarations under SEPA." *Id.* at 246. "'The failure to litigate environmental and zoning issues at this stage could result in decisions being reached by the county that have a binding impact on intervenors without their consent or participation.'" *Id.* (quoting *Loveless v. Yantis*, 82 Wn.2d 754, 759-61, 513 P.2d 1023 (1973)). "The lack of a record renders the County's determination clearly erroneous." *Id.*

2. Courts continue to reverse for lack of analysis of a proposal's environmental impacts.

Recent decisions have continued to recognize that "lack of a credible threshold process precludes judicial review of the threshold determination until the lead agency has proceeded properly on remand." Settle, § 13.01[4].

In *Conserv. Nw. v. Okanogan Cty.*, No. 33194-6-III, 2016 Wash. App. LEXIS 1410, at *90 (Ct. App. June 16, 2016), the Court determined that a county's decision to open its roads to all-terrain vehicles was accompanied by a checklist that was "almost devoid of specific information," containing only "repetitive, superficial, conclusory statements regarding the potential environmental impacts" of the action.[2] Echoing the *Bellevue* decision, the court declined to require an EIS – in other words, to hold specifically that there had been a showing of significant adverse impacts – and instead remanded for preparation of a "checklist that includes a complete disclosure and review of information relevant to the environmental impact to the areas surrounding roads opened by the ordinance." *Id.* at 97.

In *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 309 P.3d 673, 685 (2013), the Court found the county's SEPA review of a comprehensive plan

[2] "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." Washington State Court Rule 14.1.

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amendment was inadequate. The Court stated, "[t]he agency must base its threshold determination on 'information reasonably sufficient to evaluate the environmental impact of a proposal." (Citation omitted.) *Id*. at 579. "Thus, for a nonproject action, such as a comprehensive plan amendment or rezone, the agency must address the probable impacts of any future project action the proposal would allow." The checklist was inadequate because it attempted to address the proposal "with broad generalizations" and did not "tailor its scope or level of detail to address the probable impacts" of the proposal on specific areas of the environment. *Id*. at 580. Instead, the checklist merely "repeated formulaic language postponing environmental analysis to the project review stage and assuming compliance with applicable standards. Thus, the checklist lacked information reasonably sufficient to evaluate the proposal's environmental impacts." *Id.* at 581.

In *Ellensburg Cement Prods., Inc v. Kittitas Cty.*, 171 Wn. App. 691, 287 P.3d 718 (2012), the court considered a DNS that a county had issued for a rock-crushing operation. Although the DNS was issued after public comment, the administrative appeal consisted only of a closed-record hearing, during which, by definition, "no evidence was provided showing that the proposal presented adverse impacts." *Id.* at 700. The court determined that the failure to provide an open record hearing was "erroneous as a matter of law," citing both statutory requirements for appeal procedures and the necessity for a threshold determination to be "based upon information reasonably sufficient to determine the environmental impact of a proposal." *Id.* at 712 (citation omitted). As a "practical" matter, the county's action was erroneous because it precluded "meaningful" consideration." *Id.* The Supreme Court affirmed the Court of Appeals, though it only discussed the statutory procedural grounds. *See Ellensburg Cement Prods., Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 751, 317 P.3d 1037, 1045 (2014).

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In *Alpine Lakes Protection Society v. Department of Natural Resources*, 102 Wn. App. 1, 979 P.2d 929 (1999), the court reversed a DNS for a timber company's watershed analysis. Once a watershed analysis is approved, subsequent forest practices that comply with tis prescriptions are exempt from SEPA. The timber company argued the DNS was not required to address subsequent forest practices because none were "on the table." *Id*. at 15. The Court rejected this assertion, observing that there was "little if any question that [the timber company] will make application for forest practices in the Alps watershed in the future – the analysis so indicates and it is unlikely that [the timber company] would have gone to the expense of performing the analysis if it did not so intend." *Id.* at 16. The court did not require an EIS, but remanded for further environmental review, including an analysis of the impacts of future forest practices. *Id*. at 17.

Similarly, in *Indian Trail Prop. Ass'n v. Spokan*e, 76 Wn. App. 430, 443, 886 P.2d 209, 218 (1994), the Court held that the city improperly segmented environmental review of underground fuel storage tanks and a gas station from the review of a shopping mall of which they were a part. This error was cured by withdrawal of the initial mitigated DNS ("MDNS") and DNS and issuance of a new MDNS that considered all components of the proposal. The Court also considered whether the city had sufficient information on which to base its threshold determination. The original DNS and MDNS were not based on sufficient information about venting of fuel storage tanks and noise from delivery trucks. This error was corrected by additional analysis prior to issuance of the new MDNS. *Id*. at 443-444.

In addition to these cases, the Growth Management Hearings Board has invalidated a number of actions on the basis of SEPA noncompliance. In *Kittitas County Conservation v. Kittitas County*, EWGMHB Case No. 11-1-0001, Corrected Final Decision and Order (Partial),

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at 15 (June 13, 2011), the Board invalidated two proposed amendments to a county's comprehensive plan, finding that one had not actually been subject to a threshold determination and the other was based on a checklist that "contains no actual information on environmental effects and is woefully inadequate." The *Kittitas* decision was based not on any discussion of the specific impacts of the amendments but solely on SEPA's requirement "to identify and analyze the environmental effects of proposed actions in order to achieve good land use decision making." *Id.* at 17. Similarly, in *Olympians for Smart Development v. Olympia*, WWGMHB Case No. 19-2-0002c, Final Decision and Order at 64 (July 10, 2019), the Board invalidated a zoning ordinance because the city had "bas[ed] its issuance of a DNS on an inadequate Checklist." The checklist "failed to demonstrate *prima facie* SEPA compliance" because it included "no information" regarding certain "possible" and "foreseeable" impacts and thus "failed to adequately consider" those impacts, leaving the "City's decision makers [with] inadequate information regarding the foreseeable environmental effects" of the ordinance. *Id.* at 58-61. Again, the declaration of invalidity was not a holding "that the city that the City must prepare an EIS but rather that initial SEPA compliance failed to meet the requirements of SEPA." *Id.* at 51.

Cases interpreting the federal National Environmental Policy Act ("NEPA"), which may provide persuasive authority for SEPA interpretation, *see Pub. Util. Dist. No. 1 v. Hearings Bd.*, 137 Wn. App. 150, 158, 151 P.3d 1067, 1070 (2007), likewise establishes that *prima facie* compliance is a standalone issue. *See, e.g.*, *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 640 (9th Cir. 2004) ("[W]hen an agency has taken action without observance of the procedure required by law, that action will be set aside.").

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All these cases make manifestly clear that the City's unquestionably deficient DNS must be reversed and remanded – if not for preparation of an EIS, then at minimum for compliance with the well-established procedural requirements of SEPA to conduct meaningful environmental analysis of the entire Proposal prior to making a threshold determination

As Appellant has explained throughout its briefs, the City's DNS did not comply with these requirements because it contains no analysis of impacts to housing production or affordability or of construction impacts. Instead, the City simply asserts that any analysis of the potential impacts of the Amendments would be "speculative" because the implementing Regulations have not yet been proposed. *See e.g.*, City Response Brief, pp. 6-7. Appellant has explained why this argument has been universally rejected by courts and is unavailing here. *See* Appellant's Opening Brief, pp. 15-22; Appellant's Response Brief, pp. 8-12; *see also, e.g., King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993) ("Decisionmaking based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land use changes would occur as a direct result of a proposed government action."). The City's failure to provide any analysis of the impacts of the Proposal is, alone, sufficient basis for reversal.

B. The City's failure to consider sufficient information and piecemealing of review provide separate bases for reversal.

The City's failure to consider sufficient information and piecemealing of the Proposal are distinct legal errors which both require reversal of the DNS.

1. The City improperly piecemealed review of the Proposal.

Improper "piecemealing" of SEPA review occurs when the scope of the proposal under review is improperly defined. Settle, § 11.01[5]. "To avoid misleading, piecemeal environmental review, the SEPA Rules require that 'proposals or parts of proposals that are

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related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document.'" *Id.* (quoting WAC 197-11-060(3)(b)). Here, the City was required to consider the entire Proposal in one environmental document under WAC 197-11-060(3)(b)(ii) because the Amendments and the Regulations are, in effect, a single course of action. They are "interdependent parts" of the City's Proposal to establish an impact fee program and depend on that program for justification and implementation. *See* Appellant's Post-Hearing Response Brief, pp. 4-6.

The fact that the City is piecemealing environmental review of the Proposal is underscored by recent City actions. In the hearing in this matter, the City stated it did not know when the Regulations would be proposed, but it could be years from now. Hearing Transcript, Day 1, p. 153:9-13 ("I could also see a scenario in which the council amends the Comprehensive Plan but sets out a time frame by which an impact fee program might be developed in that time frame . . . . it could be years from now.").[3] The City also argued that it was not required to analyze the impacts of the entire Proposal because the Regulations had not yet been proposed. City's Closing Brief, pp. 9-11 (arguing the Proposal was not piecemealed because there is no evidence that the Amendments and Regulations will proceed simultaneously or that they are interdependent parts of a larger proposal).[4] The City stated, in essence, "Trust us. We'll look at

[3] *See also id.* at p. 138:1-2 (fees "could be implemented over, you know, a broad planning horizon"); *Id*., p. 147:24-148:4 (staff does not know "who the decision-makers will be when the time comes for a decision on – on a future implementation step" or "what the regulatory environmental will be like"); *Id*., p. 149:15-18 ("Ultimately there may be a proposal forthcoming from Council Member O'Brien, but I don't have any knowledge about what that fee might – what his proposal might be."); *Id*., pp. 150:24-151:4 ("there are future steps that would be needed to implement a transportation impact fee program, but what those – sort of how those – whether those steps occur and how they – how they occur remain to be seen"); *Id*., p. 162:21-23 ("at some point in the future the Council would need to implement an impact fee program.").

[4] *See also* id. at p. 17 ("City was "not required to evaluate the housing impacts of the proposal" because it "does not adopt a TIF program" or "set a TIF amount"); *Id*. at p. 24 (same); *Id*. at p. 25 ("without a proposed impact fee schedule or other program details . . . the expected impacts are impossible to evaluate"); Id. at p. 29 (no "viable SEPA claim" because "fee amount has not been set"); City's Response to Petitioner's Post-Hearing Brief, p. 7 ("TIF Program need not be evaluated concurrently with the Comp. Plan amendments under SEPA because the TIF

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this later."

Yet the City's subsequent actions show such trust would be misplaced. Before the ink was dry on its closing brief, the City announced a schedule under which the Council would adopt both the Amendments and Regulations concurrently as a package in 2019. The City submitted its post-hearing response brief on July 26, 2019. Only ten days later, on August 6, 2019, the City's Transportation and Sustainability Committee held a briefing on the Amendments and Regulations. At this briefing, the same staff member who testified that adoption of the Regulations may be "years" away presented a schedule of "next steps" under which Committee discussion and action on both the Amendments and Regulations would occur in August and September 2019, amendments to the Mayor's proposed budget based on an impact fee program would occur in September and October 2019, and full Council action on the Amendments and Regulations and associated budget amendments would occur in November 2019.[5] Presentation to Sustainability and Transportation Committee, August 6, 2019, p. 41; Verbatim Transcript of Testimony – Ketil Freeman (submitted concurrently with this brief). A rate study with "proposed impact fee rates" was also presented to the Committee. Seattle Impact Fee Study (Fehr & Peers, August 2019), p. 16, Appendix A. The Committee was poised to consider the Amendments and Regulations again on August 16, 2019, but did not because the decision on this

Program is not specific enough at this time"); Hearing Transcript, Day 1, p. 171:14-172:2 (when there is an ordinance proposing a fee, "at that time an analysis might be ripe"); Ex. 7, p. 15 ("construction-related impacts associated with potential future development of identified projects would be mitigated by . . . additional environmental review" for non-exempt projects).

[5] The Growth Management Act allows amendment of the Comprehensive Plan only once a year, and the City already adopted its Comprehensive Plan amendments for this year. The City appears to believe it may adopt the Amendment during the budget process in an attempt to squeeze it into the exception for "the amendment of the capital facilities element of a comprehensive plan that occurs concurrently with the adoption or amendment of a county or city budget." RCW 36.70A.130(2)(a)(iv). Of course, this ignores the fact that the Amendment does not amend the capital facilities element.

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appeal had not yet been issued.[6]

Strikingly, this schedule does not accommodate any additional SEPA review of the Regulations. There is simply not time to conduct SEPA review, issue a SEPA determination, resolve any appeals, and adopt the Regulations under the proposed schedule. Instead, under this schedule, the Council would rush to adopt the entire Proposal – both the Amendments and Regulations – before its primary proponent, Council Member O'Brien, leaves office.[7]

There is a reason for the schedule's silence on SEPA compliance. The City has proposed legislation that would exempt from SEPA "[a]mendments to development regulations that are required to ensure consistency with the City's Comprehensive Plan if the Comprehensive Plan was previously subjected to environmental review pursuant to this Chapter 25.05 and the impacts associated with the proposed regulation were specifically addressed in the environmental review for the Comprehensive Plan." CB 119600. The City is pushing this legislation through in a hurry as well, with the Planning, Land Use and Zoning ("PLUZ") Committee holding a briefing on it on September 4, 2019, a public hearing on September 9, 2019, and taking action at a special meeting on September 11, 2019. This would pave the way for adoption by the full Council as early as October 7, 2019. Central Staff Memorandum, p. 3.[8] One may reasonably conclude the

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[6] Relevant portions of the August 6, 2019, Sustainability and Transportation Committee Agenda, Staff Presentation to the Committee, and Seattle Impact Fee Study (Fehr & Peers, August 2019) are attached as Exhibits A-C to the Declaration of Courtney A. Kaylor in Support of Seattle Mobility Coalition's Supplemental Post-Hearing Brief ("Kaylor Declaration"). These documents are subject to official notice under Hearing Examiner Rule of Practice and Procedure ("Examiner Rule") 2.18 and ER 201. The existence of these documents is generally known in the City and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* ER 201(b). They are public records and the complete documents are posted on the Seattle City Council's web site. See http://seattle.legistar.com/Calendar.aspx?BodyID=32477&Mode=All (link to Sustainability & Transportation Committee agendas, minutes and video; agendas have embedded links to supporting materials). The agenda, minutes and video for the August 16, 2019, meeting are also at this link, and subject to official notice.

[7] Hearing Transcript, Day 1, pp. 133:25-134:1 ("The primary proponent for this proposal is Council Member O'Brien."); *id*., p. 134:2-4 (Council Member O'Brien asked staff to prepare the proposal); *id*., p. 134:18-21 (staff worked "pretty much exclusively" with Council Member O'Brien in preparing the proposal).

[8] The relevant portions of CB 119600 and the Central Staff Memorandum are Exhibits D and E to the Kaylor Declaration. The September 4, 2019, agenda and the complete documents are at the web link provided above in

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City plans to exempt the Regulations from further SEPA review under this new exemption (even though, as discussed below, its requirements are not met).

The Examiner should not allow this end run around SEPA. Contrary to the City's inaccurate assertions in its closing brief (City's Closing Brief, pp. 9-11), the City's own documents show the entire Proposal will be considered and acted upon by the City Council as a unified whole in the next two months. Presentation to Sustainability and Transportation Committee, August 6, 2019, p. 41; Verbatim Transcript of Testimony – Ketil Freeman. The Examiner should reject the City's assertions at hearing and in its briefing that this is not a single Proposal. Instead, the Examiner should require SEPA review of the entire Proposal now, before the Council acts.

At a minimum, the Examiner should rule that the impacts of the Regulations were not specifically analyzed in the EIS for the Comprehensive Plan. At the hearing in this matter, City staff testified that the EIS prepared for the Comprehensive Plan (Seattle 2035) contained only "broad disclosures about construction impacts associated with growth over the 20-year horizon of the plan." Hearing Transcript, Day 1, p. 154:10-12; *see also* pp. 154:10-157:8. City staff admitted that there was no "analysis, per se" of the environmental impacts of the proposed adoption of transportation impact fees in the EIS for Seattle 2035. *Id.*, p. 172:9-15; *see also id.*, pp. 172:6-173:12. Since these impacts have not been specifically analyzed, the Regulations are not exempt from SEPA review even under the newly proposed SEPA exemptions, and the City must conduct additional SEPA review before acting on them.

2. The City failed to consider sufficient information.

The prohibition on piecemealing and the requirement to utilize sufficient information in

footnote 6 and are subject to official notice under Examiner Rule 2.18 and ER 201.

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making a threshold determination are legally and conceptually distinct. The former requirement is that "[a]gencies shall make certain that the proposal that is the subject of environmental review is properly defined," as provided in WAC 197-11-060. The latter is that the "agency shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal," as provided in WAC 197-11-335.

The distinction between the two requirements is illustrated by *Indian Trail Prop. Ass'n*, *supra*, 76 Wn. App. at 443. As previously discussed, in that case, the Court determined that the city originally piecemealed environmental review of underground fuel storage tanks and a gas station from the review of a shopping mall. However, this error was cured by withdrawal of the original threshold determination and issuance of a new MDNS that considered all components of the proposal. Separately, the Court considered whether the city had sufficient information on which to base its threshold determination. The Court determined the original threshold determination was not based on sufficient information but this error was cured by additional analysis prior to issuance of the new MDNS. *Id*. at 443-444. The Court's separate consideration of these two requirements illustrates their independence.

While these are distinct legal requirements, they are focused on the same goal, "to prevent government agencies from approving projects and plans before the environmental impacts of doing so are understood." *Int'l Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 522, 309 P.3d 654, 659 (2013). While SEPA review is not required for "[p]reliminary steps that retain an agency's authority to change course or to alter the plan it was considering implementing," it is expressly required "prior to the 'go-no go' stage" of an action." *Id.* at 525-26 (citations and internal quotation marks omitted). Here, in the City's own words, the Amendments constitute the "go/no-go" decision on the Proposal to enact a

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transportation impact fee. *See* Hearing Transcript, Day 1, p. 135:17-18. The Amendments and the Regulations are "interdependent parts" of this Proposal and must be analyzed together. *See* WAC 197-11-060(3)(b)(ii); *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.").

Accordingly, SEPA required the City to develop or obtain sufficient information to evaluate the environmental impacts of the entire Proposal. WAC 197-11-335. Instead, the City chose to conduct no analysis whatsoever of the housing production or affordability or construction impacts of the Proposal, failing even to complete Section B of the Environmental Checklist. At hearing, the City simply maintained such analysis was not required. The City thereby violated SEPA's most basic prohibition: "The agency cannot close its eyes to the ultimate probable environmental consequences of its current action." *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184, 188 (1976).

The prohibition on piecemealing and requirement to base a threshold determination on sufficient information provide separate and independent grounds for reversal of the DNS in this case.

C. The City bears the burden of showing *prima facie* compliance with SEPA, which is satisfied only by actual consideration of environmental effects.

SEPA case law establishes that (1) the burden of demonstrating *prima facie* compliance falls squarely on the agency, and (2) the burden is only satisfied by actual, substantive consideration of potential environmental impacts.

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1. The City bears the burden of proof.

Case law establishes that, in a DNS appeal, the City has the initial burden of demonstrating *prima facie* compliance with SEPA's procedural requirements. *Bellevue*, 90 Wn.2d at 867 ("The burden is upon the governmental body subject to SEPA to show that it made a threshold determination which 'demonstrate[s] that environmental factors were considered in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA.'"); *Lassila*, 89 Wn.2d at 814 ("If the governmental body makes a threshold determination of "no significant impact" under SEPA, it must then demonstrate that environmental factors were considered in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA."); *Conserv. Nw.*, 2016 Wash. App. LEXIS 1410, at *96 ("SEPA imposes the burden on the local government of thoroughly exploring and analyzing the possibility of environmental harm in an environmental checklist."); *Gardner*, 27 Wn. App. at 245-46 ("Thus we hold the County had an affirmative duty to demonstrate its justification for a negative declaration under SEPA."); *Juanita Bay, supra,* 9 Wn. App. at 73 ("[B]efore a court may uphold such a decision [a DNS], the appropriate governing body must be able to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA."). *See also* Settle, § 13.01[4] ("[T]he correctness of a threshold determination *will not be reviewed* unless it was preceded by consideration of 'environmental factors . . . in a manner sufficient to amount to *prima facie* compliance with the procedural requirements of SEPA.'" (emphasis added) (quoting *Juanita Bay,* 9 Wn. App. at 73).

Here, the City failed to meet its burden of proof and the record demonstrates that the City had insufficient information on which to base the DNS. In most cases, the agency has at least some information prior to issuance of the threshold determination, or provides such information

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at hearing, supporting its conclusion of no significant impact. This case presents an unusual situation, however, in which the City has presented no information or analysis whatsoever that would support its decision that the Proposal will not result in significant impacts. Instead, the record establishes that the City: (a) agrees that the Amendments will require implementing Regulations establishing a transportation impact fee calculated based on the existing-system value methodology; (b) considers the Amendments to be the "go/no-go" decision on whether the City will adopt the fees; (c) affirmatively testified that the maximum fee under the existing-system value methodology would impact housing production; and (d) based the DNS not on any of these considerations but only its erroneous legal conclusions that a comprehensive plan amendment is only a "procedural" step with no predictable effects. *See* Appellant's Post-Hearing Brief, pp. 1-2.

The City failed to make the required threshold showing of prima facie SEPA compliance and the DNS should be reversed on this basis alone.

2. *Prima facie* compliance requires actual consideration of impacts.

To demonstrate *prima facie* compliance with SEPA's procedural requirements, an agency's "mandatory preliminary environmental analysis" need not necessarily take a particular form. Settle, § 13.01[4]. "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." Settle, § 13.01[4][c]. However, the procedural requirements of this process are "essential," because the process leads to "informed" decisionmaking, enables "meaningful judicial review," and provides the basis for "exercising SEPA substantive authority when an EIS is not required." Settle, § 13.01[4]. Thus, courts continue to scrutinize *prima facie* compliance closely.

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For example, in *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 926-27, 319 P.3d 23, 27 (2014), the Court evaluated whether the DNS for a paper mill project was "based upon information reasonably sufficient to evaluate the environmental impact" of the proposal. In *PT Air Watchers*, the checklist and DNS contained adequate information because they specifically addressed impacts alleged by the appellants, including impacts from greenhouse gas emissions. *Id.* at 927-931.

In *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31).3d 703 (2001) the Court reviewed the MDNS for a subdivision and considered whether "environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." In *Moss*, this standard was satisfied because "the record indicates that the project received a great deal of review." The agency required additional information beyond the checklist, gathered "extensive comments" from agencies and the public, and held "numerous meetings." *Id*.

In contrast, in *Spokane Cty., supra,* 176 Wn. App. 555, the Court found the county's SEPA checklist for a comprehensive plan amendment inadequate. The Court found the DNS was not based on "information reasonably sufficient to evaluate the environmental impact of a proposal." *Id*. at 579. The checklist was inadequate because it used broad generalizations and did not address specific areas of the environment. *Id*. at 580. Instead, the checklist merely "repeated formulaic language postponing environmental analysis to the project review stage and assuming compliance with applicable standards." *Id.* at 581. Accordingly, it lacked sufficient information on which to evaluate the proposal's impacts.

NEPA cases take the same approach. "NEPA requires the government to take a 'hard look' at environmental and ecological factors in reaching decisions." *Pub. Util. Dist. No. 1,* 137

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Wn. App. at 158. Evidence that the agency considered environmental impacts is provided in a document that "must indicate, in some fashion, that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns." *Found. on Econ. Trends v. Weinberger*, 610 F. Supp. 829, 841 (D.D.C. 1985).

Here, the City's checklist fails to demonstrate actual consideration of environmental impacts as required by these cases. Instead, it is like the inadequate checklist in *Spokane Cty., supra*, 176 Wn. App. 555, because it either provides no information (in the case of Part B of the SEPA Checklist) or provides formulaic statements that analysis is not possible at this stage (in the supplemental sheet for nonproject actions). Ex. 7. Appellant is aware of no case in which a court has found actual or effective *prima facie* SEPA compliance on the basis of a determination like the City's DNS: a decision that (1) its proposal was an "action" subject to SEPA's threshold determination requirement, but that (2) *none* of the effects of the proposal could be analyzed. Much less has any court done so when the agency's determination that impacts are too "speculative" for analysis is based solely on the need for additional policy decisions. *See, e.g., Boundary Review Bd.*, 122 Wn.2d at 664; *accord Bellevue*, 90 Wn.2d at 867-68 (court finding procedural noncompliance "note[d] particularly the complete absence of any suggestion in the record that the board made the slightest serious inquiry into the effect which [a potential annexation] might have upon the scope and nature of" a large development that was not itself under review but was planned for the annexed territory). The City cannot demonstrate *prima facie* compliance on the basis of its legally erroneous avoidance of environmental review.

Under any definition and any burden of proof that Washington courts have articulated, the City has failed to demonstrate *prima facie* compliance with SEPA's requirements.

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D. The City was required to complete Part B of the Checklist.

In response to the Examiner's question, Appellant has identified one decision that specifically discusses an agency's approach to Part B of the SEPA Checklist. In *Kittitas County Conservation v. Kittitas County*, EWGMHB Case No. 11-1-0001, Corrected Final Decision and Order (Partial), (June 13, 2011), the Growth Management Hearings Board cited a county's failure to complete this portion of its checklist as part of the basis for its conclusion that the county had failed to comply with SEPA. The county had proposed a comprehensive plan amendment, but the Board concluded:

> With respect to Map Amendment 10-12, the SEPA Environmental Checklist is devoid of any facts or information relating to environmental effects for the 2010 Kittitas County Annual Comprehensive Plan and Development Code Amendments. Instead of providing information about environmental effects, the environmental checklist merely contains the entry "N/A" for all of the various environmental elements. Moreover, the Supplemental Sheet For Non-project Actions contains mere conclusory statements that there are not likely to be significant environmental impacts from the proposed comprehensive plan amendments, without providing any actual information about environmental effects. As noted *supra*, SEPA review is required to ensure decision-makers have all the pertinent information needed to make informed decisions, and also so an informed public has an opportunity to meaningfully participate in the CPA process.

Id. at 13. As Appellant explained at pages 15-18 of its Opening Brief, express regulatory language required the City specifically to consider whether any of the questions in Part B of the Checklist would "contribute meaningfully to the analysis of the proposal." *See* SMC 25.05.960; *see also* Settle, § 13.01 ("[T]he sponsors of "nonproject" proposals, such as comprehensive plans and area-wide zoning actions, are directed to complete the checklist, *as applicable, and* the Part D "Supplemental Sheet for Nonproject Actions.") (emphasis added). *Kittitas County* confirms this is required by SEPA to ensure that decision-makers have all the information necessary to make informed decisions.

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IV. CONCLUSION

Appellant respectfully asks the Examiner to reverse the DNS and remand to the City with directions to conduct SEPA review of the entire Proposal based on sufficient information to evaluate its impacts.

Dated this 6th day of September, 2019.

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