BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	Hearing Examiner File:
SEATTLE MOBILITY COALITION,	**W-18-013**
Appellants.	CITY'S SUPPLEMENTAL BRIEFING IN RESPONSE TO QUESTIONS POSED BY THE HEARING EXAMINER
From a Determination of Non-Significance issued by the Seattle City Council.	

On August 28, 2019, the Examiner requested the parties brief the following questions:

(1) If the Examiner finds that the Appellants' do not prevail in their claim that the proposal will result in likely significant environmental impacts, can the Appellants' prevail on piecemealing or lack of procedural compliance claims?

(2) Are Appellants' "piecemealing" and "lack of information" claims essentially the same issue?

(3) What is required for a prima facie showing of compliance with procedural requirements and is that a basis for remand to the Department?

(4) Is there any case law addressing whether the City must complete Section B of the SEPA checklist for a non-project action.

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The City will address the Examiner's questions No. 1 and 3 first, and then the City will briefly address Questions No. 2 and 4.

(1) If the Examiner finds that the Appellants' do not prevail in their claim that the proposal will result in likely significant environmental impacts, can the Appellants prevail on piecemealing or lack of procedural compliance? [1]

Appellants cannot prevail on their piecemealing claim. Appellants argued in their notice of appeal that "Since the proposal is expressly intended to be followed by development regulations imposing transportation impact fees and, subsequently, by development of the transportation improvements expressly identified in the proposal, there is no possible conclusion other than that these proposed amendments and projects are interdependent parts of the larger proposal." SMB Notice of Appeal, p. 7:9-19. As detailed in the City's Closing brief, pp. 7-13, Appellants' piecemealing claim fails.

While SEPA requires review of all direct and indirect impacts of a proposal in advance of action on the proposal, such review of <u>likely</u> environmental impacts occurred here. The lead agency must evaluate an action and conclude whether it will result in likely significant adverse environmental impacts. Washington Courts have held for many years that the purpose of SEPA is to facilitate the decision-making process; it need not list every remote, speculative, or possible effect.[2] Appellants failed to establish that their claims of "impacts" to housing supply, housing affordability or transportation are likely. Further, the evidence before the Examiner demonstrated that attempting to evaluate the environmental impacts of a TIF program could not be evaluated at the time the proposed Comp. Plan amendments were evaluated under SEPA and a DNS was issued.

The testimony demonstrated that there are a multitude of policy decisions that need to be made

[1] The second part of this question is addressed below under Question No. 3.
[2] *Gebbers v. Okanogan Cnty. Pub. Util. Dist. No. 1,* 144 Wn. App. 371, 379, 183 P.3d 324, 328 (2008).

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before a legislative proposal on a TIF program can be prepared- most importantly whether there is sufficient support of a majority of councilmembers to lay the groundwork for such policy conversations and decisions. Mr. Bjorn and Mr. Freeman identified key factors to be evaluated 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.[3] 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.

Here, the Comp. Plan amendment, a TIF Program legislation and a list of approximately 20 construction projects are not a single course of action, which would require SEPA review of all components in one environmental document. Rather, they all related to Transportation Impact Fees; however, each action is subjectively independent and lays the groundwork for additional development of a TIF program. The project list currently identified is not necessary to the creation of a TIF program- the City has the discretion to determine what projects are needed to meet its transportation requirements, depending on the City's priorities, location of development, the methodology utilized, etc. The SEPA regulations require agencies to consider certain "connected" or "closely related" actions together in a single EIS. "Connected actions" are proposal or parts of

[3] 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".)

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proposals which are closely related under WAC 197-11-060(3). *See* WAC 197-11-972(2)(ii). As stated in WAC 197-11-060.3.b/SMC 25.05.060.C.2 provides:

> (b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5).) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
>
> (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
>
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

Additional projects do not require review in an environmental determination for cumulative impacts if they are either subjectively independent from the proposed action or are not necessary to meet the project's purpose and need. *Mountlake Terrace*, 87 Wn.2d at 345; *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614, 744 P.2d 1101 (1987) (EIS need not cover subsequent phases if initial project is substantially dependent of subsequent phases and project would be constructed without regard to future development); *see also* WAC 197-11-060.3.b.ii.

In *Gebbers*, Division Three also looked to the federal NEPA standard for guidance, *Gebbers* at p. 10, citing 40 CFR 1508.7; *see Florida Wildlife Federation. v. US Army Corp of Eng'rs*, 401 F. Supp.2d 1298, 1326, 1330 (S. Dist. Fla. 2005)(applying reasonably foreseeable future actions test); *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985)(future action foreseeable if it is sufficiently certain); *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)(impact reasonably foreseeable when sufficiently likely to occur that person of ordinary prudent would take it into account in reaching decision).

Here, Mr. Freeman testified that he was aware of three councilmembers who may support the proposal. It is not reasonably foreseeable that Councilmembers will in fact decide to proceed to lay the groundwork to allow the creation of a TIF program. The Examiner head testimony that

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Ms. Breiland began working with the Council in 2015 on exploring the creation of a TIF program for Seattle.

Moreover, even if it is foreseeable that the Council may adopt the Comp. Plan proposal, even Morgan Shook, housing expert for the appellant, could not provide testimony about the affect on housing affordability if the maximum defensible rate was adopted. This was because there are so many factors that play into housing affordability that such analysis is speculative. Bjorn agreed that such analysis would not be possible to identify the impacts on housing affordability at the time the DNS was issued. If adoption of the maximum defensible fee amount is not probable, but is only hypothetical and speculative, SEPA does not required that it be considered in a DNS. WAC 197-11-782; *see Mountlake Terrace*, 87 Wn.2d at 345-46.

This is in contrast with *King County Boundary Review Board*,[4] where it was probable and uncontested that future development of undeveloped annexed property would have a significant adverse environmental impact. There, the likelihood of development of the annexation properties was unquestionable and following annexation, the land would be in an urban growth area and would immediately have new and substantial development potential. In that case, the Court held that special development plans were not necessary in order to determine that adverse environmental impacts would be likely.

Here, however, TIF program legislation need not be evaluated in the DNS because the Comp. Plan amendments and TIF legislation are not closely related enough to be a single course of action since the Comp. Plan changes can occur independently from adoption of a TIF program. It is well recognized that the choice of proposals is a policy decision, not an environmental decision.[5]

[4] 122 Wn. 2d 648, 665, 860 P.2d 1024 (1993).

[5] *SWAP v. Okanogan County*, 66 Wn. App. 439, 445, 832 P.2d 503, review denied, 120 Wn.2d 1012 (1992); *see also Citizens Alliance to Protect Our Wetlands v. Auburn,* 126 Wn.2d 356, 362, 894 P.2d 1300 (1995) finding that a court

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And Appellants' claim that the Comp. Plan amendments and development regulations must be evaluated together under SEPA is incorrect. Mr. Freeman testified about the City's practice to adopt Plan amendments first, and then develop code, if needed. Moreover, not all policies require adoption of development regulations.

And finally Appellants reliance on WAC 365-196-805(1) supporting concurrent adoption of Comp. Plan amendments and regulations, which is not applicable to SEPA but is rather a GMA recommended practice, which is not within the scope of the present SEPA appeal.

As to claims that the City piecemealed the review of the Comp. Plan amendments with the funding or construction of the project list proposed to be added to the Transportation Element, the evidence in the record establishes that the Comp. Plan amendments can and will proceed regardless of whether the current project list is implemented simultaneously with them. Mr. Freeman and Ms. Breiland both testified that the project list may change, that the projects on the list were pulled from the multimodal master plans or levy projects which will move forward even if no Comp. Plan amendments in this proposal are adopted.

Furthermore, the project list is a component of a TIF program, as are Comp. Plan amendments that establish a process to determination deficiencies; however, the first step in consideration of creating a TIF program requires the Comp. Plan amendments. As stated by Mr. Mazzola, additional SEPA review will occur on the project list once the planning for such projects is far enough along to determine the scope of the work and to evaluate the likely environmental impacts of such work, if needed, beyond that evaluated in the DNSs issued for the Modal Master Plans.

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reviewing the adequacy of an EIS does not rule on the wisdom of a proposed development, but rather on whether the EIS gave the local decision-maker sufficient information to make a reasoned decision.

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The evidence in the record is clear that the Council did not improperly piecemeal its analysis of the Comp. Plan proposal but excluding analysis of the TIF Program legislation or its analysis of likely environmental impacts of the projects list, given the early planning stages of all of those projects. Appellants claim of piecemealing fails and its appeal must be denied. As for an appropriate remedy for a SEPA violation, it appears that if the violation is unrelated to an error in the threshold determination, courts have oftentimes overlooked such errors. *See Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 52 P.3d 522 (2002)(failure to formally adopt EIS and failure to property circulate addendum were harmless); *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001)(variety of procedural errors related to MDNS were harmless where all adverse impacts were mitigated.).

All cases where invalidation of the agency action occurred it was due to a finding that a proposal would result in likely significant environmental impacts and a negative threshold determination had been issued. *See e.g., King County*, 122 Wn.2d 648, 667, 683, 860 P.2d 1024(1993). Further, Washington Courts have noted that the Growth Board has never issued an "invalidity" order based on SEPA noncompliance, *Davidson Serles & Assoc. v. Centr. Puget Sound Growth Mgmt. Hearing Bd*., 159 Wn.App. 148, 158, 244 P.3d 1003 (2010); *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 291 P.3d278(2013), aff'd, 180 Wn.2d 165, 322 P.3d 1219 (2014). No procedural errors have occurred based on evidence in the record. For this reason, Appellants' challenge to the DNS must be denied and the DNS must be affirmed.

(3) What is required for a prima facie showing of compliance with procedural requirements of SEPA? (and then can Appellants' prevail on a claim of lack of compliance with procedural requirements of SEPA?)

a. Case Law simply requires evidence of actual consideration of environmental factors to meet the prima facie compliance with the procedural requirements of

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SEPA before issuing a DNS.

There are numerous cases where the Court in essence concludes that compliance with the procedural component of SEPA requires "sufficient deliberation and consideration" of the environmental impacts of a proposal before issuance of a procedural determination. *See e.g.*, *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wash. 2d 267, 279, 552 P.2d 674, 680-681 (1976). In *Norway Hill Pres. & Protection Ass'n*, the court concluded that the DNS issued by King County was clearly erroneous where the project area was large and would change the nearly uninhabited woodlands to residential suburban neighborhood and therefore the project should have required an EIS, despite the County concluding otherwise. *Id.* The 53-acre housing development would produce 198 single family homes. The *Norway Hill* court stated:

> Generally, the procedural requirements of SEPA, which are merely designed to provide full environmental information, should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability. *See City of Davis v. Coleman*, 521 F.2d 661, 673—74 and n. 16 (9th Cir. 1975)."

Id. at 278.

Likewise, the Washington Supreme Court stated in *City of Bellevue v. King Cty. Boundary Review Bd.*, that the standard was two-fold: "as long as the record showed sufficient deliberations and consideration [of the environmental impacts] in addition to a final decision." 90 Wash. 2d 856, 867, 586 P.2d 470, 477 (1978). Thus, the procedural requirements of SEPA required "sufficient deliberation and consideration" of the environmental effects of an action which, in that case, was annexation of land by two cities, and evidence of a threshold determination. *Id.* In *City of Bellevue*, the Court ruled that the "record fails to show sufficient deliberation and consideration" of the environmental impacts of the annexation and concluded that "Indeed, the record strongly refutes the contention that a threshold determination was made." *Id.* at 867-868.

The Washington Supreme Court stated further that based on the record on review:

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> It is clear that the Evergreen East project itself will have massive environmental impact, and any decision which will affect that development must necessarily involve consideration, to the extent possible, of the nature of the effect that such decision will have.
>
> We express 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. Not every annexation proposal automatically requires filing of an EIS. Carpenter v. Island County, 89 Wash.2d 881, 577 P.2d 575 (1978). It is possible that the board may properly find that the impact on the project will be minor no matter what annexation decision is made, and it may be that precise information on this subject will be unavailable. Nevertheless, the board was required at least to consider, as fully as possible, this and all other environmental factors involved in this annexation before approving it. The board did not meet its responsibilities; it failed to make an adequately based threshold determination.

Id. (emphasis added). Likewise, in *Lasilla v. City of Wenatchee*, the Washington Supreme Court concluded that SEPA required the City to determine whether a Comprehensive Plan amendment to redevelop waterfront property would significantly affect the quality of the environment before incorporating it into the comprehensive plan, stating:

> Given this state of the record, we cannot determine whether a determination of 'nonsignificance' was made when the City incorporated the Plan into its comprehensive plan. In fact, we cannot tell whether the environmental significance of the Plan was even considered by the commissioners. At minimum SEPA requires a threshold determination for such recommendations and an actual consideration of potential environmental significance. The city commissioners met neither requirement. Finding serious noncompliance with SEPA's mandate, we must vacate the City's amendment of its comprehensive plan.

89 Wn.2d 804, 817, 576 P.2d 54, 61 (1978).[6] Thus, the prima facie standard to demonstrate the lead agency complied procedural compliance requires "full consideration" of the environmental impacts the action will have. *See* Keith Hirokawa, The Prima Facie Burden and the Vanishing

[6] *Lasilla* is subsequently distinguished by the Supreme Court in *King County v. Washington State Boundary Review Bd. For King County*, 122 Wn. 2d 648, 664, 860 P.d 1024, 1033 (1993), where the Court holds that a proposed land-use related action (here, a boundary change and annexation from County to city) is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Because RCW 43.21C.031 mandates that an EIS should be prepared when significant adverse impacts on the environment are "probable", not when environmental impacts are "inevitable".

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SEPA threshold, 37 Gonz. L. Rev. 403, 411 (2002).[7]

This is consistent with the Hearing Examiner Rules (HER) 3.17, which provides "Where the applicable law does not provide that the appellant has the burden of proof, the Department must make a prima facie showing that its decision or action complies with the law authorizing the decision or action" Under subsection (d), HER 3.17 states "Unless otherwise provide by applicable law, the standard of proof is preponderance of evidence." This "prima facie" language arose out of case law where Washington courts delineated the scope of an agency's duties at the threshold level of SEPA. Hirokawa, 37 Gonz. L. Rev. 403, 410, citing *Juanita Bay Valley Community Ass'n.*:

> As one of the first reported threshold determination decisions, where the Appellate court denied deference to the agency's negative environmental determination because the agency was unable to prove that it gave adequate consideration to environmental factors. This decision contained the "oft-cited rules that "before a court may uphold… a [threshold] decision, the appropriate governing body must be able to demonstrate that environmental factors were considered in matter sufficient to amount to prima facie compliance with the procedural requirements of SEPA.

Id.

Washington law has consistently described SEPA's prima facie duty in burden terms, stating "routinely that the burden of proof is first born by the agency to make its prima facie showing." *Id*. However, Hirokawa states both the confines and criteria of the "prima facie" case of SEPA compliance has not been explore to great depth, which is what is article aims to advocate for. *Id.* at p. 411.

Hirokawa also acknowledges throughout his article that "as a matter of practice, the SEPA threshold requirement is not particularly burdensome." *See e.g., id.* at p. 407. To meet this standard,

[7] Per the article "The most declarative, if not only, statement on this issue is that the agency bears the burden to illustrate 'actual consideration of environmental factors'", *citing Gardner*, 27 Wn. App. 241, 245, 617 P.2d 743 (1980)).

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he argues that relevant information should actually be found in the administrative record that was relevant to the agency's environmental review. *Id*. at 411. He also notes that the administrative record should illustrate the way a particular proposal does or does not affect the environment. *Id*. at 412.

If the Examiner finds that Council bears the burden of proof in establishing prima facie compliance with the procedural components of SEPA, the Council has provided a preponderance of evidence that it complied with SEPA procedures. The preponderance of the evidence standard "requires that the evidence establish the proposition at issue is more probably true than not true. *In re Welfare of Sego*, 82 Wash.2d 736, 739 n. 2, 513 P.2d 831 (1973)." *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768, 773 (2005). Here, the evidence must establish that it is more likely than not that the City complied with the procedural requirements of SEPA.

Before providing argument on that point, only three kinds of SEPA determination may be subject to administrative appeal: (1) final threshold determination, positive or negative, including revised threshold determinations after reconsiderations and supplemental threshold determinations; (2) determinations of adequacy of final environmental impact statements; and (exercise of SEPA substantive authority to condition or deny proposals. Section 19.01(3) of Settle at pp. 19-6 and 19-7, nothing further that "while administrative review of these three kinds of SEPA determination is permissible an agency may allow review of only some or none of them." *Id.*

SMC 25.05.680.A.2 allows an administrative appeal of 1) a Determination of Nonsignificance (DNS); or 2) the Adequacy of the Final EIS as filed in the SEPA Public Information Center. Agencies may not allow administrative appeals of determinations whether there is a proposal of action, whether a proposal is categorically exempt, or who is the lead agency.

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Nor may there be agency appeals of checklists…" *Id.* at p. 19-7. Even if the Examiner finds a procedural error in the checklist, this does not establish a procedural error when the Council issued the DNS and therefore the DNS must be affirmed. Moreover, Appellants has raised no claim and provided no evidence that the DNS was issued consistent with some SEPA procedure.

b. **Appellants cannot prevail on any claim of SEPA procedural error where City Staff demonstrated prima facie compliance with the procedural requirements of SEPA in issuing the DNS**.

The City provided preponderance of evidence that it based the DNS on sufficient environmental information or analysis. 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. Here, the Examiner heard evidence that the Council staff provided full consideration of the likely environmental impacts of the non-project action. Council provided testimony at hearing that Mr. Freeman evaluated the principal features of the proposal and the probable environmental impacts of the proposal. A lead agency is to make its threshold determination "based upon information reasonably sufficient to evaluate the environmental impact of a proposal." SMC 25.05.335. 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

See also the City's Response to Closing Brief.

Council staff was not required under SEPA procedures to identify speculative impacts alleged by Appellants such as impacts to housing supply or housing affordability or transportation impacts. As discussed in detail in the Council's closing briefs, Appellants' established only that impacts to

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housing supply, housing affordability and transportation impacts were speculative. So any alleged procedural error argued by Appellant fails in this appeal.

Here, the record is replete with evidence that Council staff considered how the proposal does or does not affect the environment. Mr. Ketil discussed at length his preparation of the environmental checklist, the preparation of the DNS, and his analysis about disclosure of likely environmental impacts from the proposed comprehensive plan amendments laying the groundwork to create a Transportation Impact Fee program for Seattle. The Examiner heard testimony that the adoption of the Comp. Plan amendments is not a foregone conclusion and that it is still unclear the level of support that may exist for adoption of the Comp. Plan amendments beyond the legislation sponsor, CM O'Brien. Regardless, the record reflects Mr. Freeman's analysis of likely environmental impacts due to the proposed Comp. Plan amendments.

The record is also clear that the Comp. Plan amendments will not result in the construction of the projects identified in the project list to be added to the Transportation Appendix of the Comp. Plan amendments. As testified to at hearing, these projects are part of the Pedestrian, Transit, Freight and Bike Master Plans, which have been evaluated under SEPA as the overarching level as reflected in the subject DNS. Further, Mr. Mazzola testified that the projects are still in the planning stages and will be subject to further SEPA analysis and review once 30% plans are developed. The non-project action here does not authorize or fund construction of these projects. Mazzola Testimony, Freeman testimony. Therefore, any environmental impacts that may be likely due to the project list need not be further evaluated through the current Comp. Plan action. *See also* the City's Closing Brief, discussing in detail no errors the City preparing the SEPA checklist.

Procedurally, the City did not commit error in preparing the SEPA checklist or in issuing the DNS. Here, the Council Central Staff provided evidence that the proposal was based on reasonably

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sufficient information to evaluate the environmental impacts of proposed Comp. Plan amendments. The City Council easily met its burden to establish prima facie evidence that it gave adequate consideration to environmental factors before issuing the DNS. Appellants' claims to the contrary must be denied.

c. **Non-Compliance with SEPA procedures does not serve as a basis for remand to the Department**.

The City complied with and met its prima facie burden that its SEPA review conformed with the procedural requirements of SEPA. However, if for some reason the Examiner believes the City did not met its procedural obligations under the low preponderance of evidence standard, the case law does not support the idea that the Examiner should reverse and remand the DNS to the Council Central Staff for additional work.

Even when the court found that the procedure of SEPA might have been violated, the Court "refused to remand for further environmental study." Hirokawa, The Prima Facie burden and the Vanishing SEPA Threshold, 37 Gonz. L. Rev. 403, 417-418, referring to *Moss v. City of Bellingham* and an unpublished decision *Stop the Amphitheater Today v. Clark County*, where the court did not require the agency to demonstrate prima facie compliance with the procedural components of SEPA; *Boehm v. City of Vancouver* and *Erikson v. City of Camas*, and a Growth Board decision, *Achen v. City of Battle Ground*, where the record's absence of cumulative impacts and instead reliance on speculative impacts, the appellate courts shifted the burden of proof to the public to determine whether the proposal surpassed the threshold level of significance. *Id.*

Since that 2002 article by Hirokawa, there are no Washington cases discussing in detail any additional obligation for a lead agency to meet the prima facie standard beyond what the courts have required for decades- which is evidence in the record to demonstrate the agency actually considered the environmental factors, as discussed in detail above. Under the preponderance of evidence

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standard, that simply requires evidence in the record that it is more likely than not that the agency actually considered the environmental factors. Here, there is easily sufficient evidence to meet that standard and, in fact, evidence that the Council carefully drafted and reviewed the proposal, the SEPA checklist and the DNS.

The Washington State Environmental Policy Act, a Legal and Policy Analysis, prepared by Richard Settle, identifies the procedural requirement of SEPA, nothing that "the most proximate and significant relate to the 'detailed statement' or what is popularly known as the Environmental Impact Statement (EIS). Settle, The Washington State Environmental Policy Act, a legal and policy analysis, p. 3-6, Section 3.01(2)). He cites no cases that add to the case law discussion above. Appellants' claims that the City failed to conduct prima facie compliance with the procedures of SEPA falls flat and must be denied.

(2) Are Appellants' "piecemealing" and "lack of information" claims essentially the same issue?

The City interprets the question above to relate specifically to Appellants' claims contained in its Notice of Appeal; however, the City reserves the right to respond to Appellants' arguments in the Response to Supplemental Briefing requested by the Hearing Examiner.

(4) Is there any case law addressing whether the City must complete Section B of the SEPA checklist for a non-project action.

In short, the City Council found no case law requiring the City to complete Section B of the SEPA project for non-project actions. This is not surprising given the language contained in the SEPA checklist form created by Washington State Department of Ecology, who was authorized to draft rules and forms consistent with the SEPA statute[8], which provides:

[8] *See* RCW 43.21C.110.

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WAC 197-11-960 Environmental checklist.

Purpose of checklist:

> The State Environmental Policy Act (SEPA), chapter 43.21C RCW, requires all governmental agencies to consider the environmental impacts of a proposal before making decisions. An environmental impact statement (EIS) must be prepared for all proposals with probable significant adverse impacts on the quality of the environment. The purpose of this checklist is to provide information to help you and the agency identify impacts from your proposal (and to reduce or avoid impacts from the proposal, if it can be done) and to help the agency decide whether an EIS is required.

Use of checklist for nonproject proposals:

> For nonproject proposals complete this checklist and the supplemental sheet for nonproject actions (Part D). The lead agency may exclude any question for the environmental elements (Part B) which they determine do not contribute meaningfully to the analysis of the proposal.
> For nonproject actions, the references in the checklist to the words "project," "applicant," and "property or site" should be read as "proposal," "proposer," and "affected geographic area," respectively.

As testified to at the hearing, Ketil Freeman concluded that preparation of answers to the questions in Part B of the Environmental checklist form would not contribute meaningfully to the analysis of the proposal.

This is common sense based on the proposal at hand. How would answering these questions meaningfully contribute to the analysis of the proposal?

> General description of the site (circle one): Flat, rolling, hilly, steep slopes, mountainous, other.....
> b. What is the steepest slope on the site (approximate percent slope)?
> c. What general types of soils are found on the site (for example, clay, sand, gravel, peat, muck)? If you know the classification of agricultural soils, specify them and note any agricultural land of long-term commercial significance and whether the proposal results in removing any of these soils.

How would Mr. Freeman describe the site? He can't with any reasonable accuracy because the proposal is to adopt Comp. Plan amendments that lay the groundwork to consider adoption of a TIF program for Seattle. And while Mr. Steier gave his opinion that he thinks that completing the questions in Section B would have "meaningfully contributed" to the City's analysis, he is wrong.

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His testimony was based on the "conclusions" reached by Shook and Swenson. As described in detail in the City's closing briefs, Shook's opinion rested on the fact that the proposal may have probable significant impacts to housing affordability/supply - but these conclusions are inconsistent with the evidence in the record. And Shook failed to provide affirmative evidence that such impacts are likely significant. To the contrary, they are not and appellants' claims are based on speculative impacts that do not flow from the non-project proposal. Recall testimony of Freeman, Bjorn, and Breiland.

This is also true with respect to construction impacts. Mr. Steier testified that in his opinion the completion of Section B would provide meaningful information to the decisionmaker. But Steier did not conduct his own analysis- he relied on Swenson's opinions- and Swenson's opinions were that the project list proposed to be added to the Comp. Plan as part of the proposal may result in transportation impacts. To the contrary, the evidence in the record makes clear that the multimodal projects are not authorized or funding by the current proposal.

And it is not possible to evaluate what environmental impacts would flow from the construction projects in any level of detail at the time the DNS was issued because the projects are in the beginning planning stages. Mazzola and Freeman testimony.

Moreover, common sense makes clear that answering questions in the SEPA checklist related to transportation would not assist the decisionmaker in evaluating the environmental impacts of the proposal.

> WAC 197-11-960, Section B, 14. **Transportation**
> a. Identify public streets and highways serving the site or affected geographic area, and describe proposed access to the existing street system. Show on site plans, if any.
> b. Is the site or affected geographic area currently served by public transit? If so, generally describe. If not, what is the approximate distance to the nearest transit stop?
> c. How many additional parking spaces would the completed project or nonproject proposal have? How many would the project or proposal eliminate?

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d. Will the proposal require any new or improvements to existing roads, streets, pedestrian, bicycle or state transportation facilities, not including driveways? If so, generally describe (indicate whether public or private).
e. Will the project or proposal use (or occur in the immediate vicinity of) water, rail, or air transportation? If so, generally describe.
f. How many vehicular trips per day would be generated by the completed project or proposal? If known, indicate when peak volumes would occur and what percentage of the volume would be trucks (such as commercial and nonpassenger vehicles). What data or transportation models were used to make these estimates?
g. Will the proposal interfere with, affect or be affected by the movement of agricultural and forest products on roads or streets in the area? If so, generally describe.
h. Proposed measures to reduce or control transportation impacts, if any.

Further, SMC 25.05.060.D provides in part: "D. Impacts. 1. SEPA's procedural provisions require the consideration of "environmental" impacts (see definition of "environment" in Section 25.05.740 and of "impacts" in Section 25.05.752), with attention to impacts that are likely, not merely speculative. (See definition of "probable" in Section 25.05.782 and Section 25.05.080 on incomplete or unavailable information.)"

The City demonstrated through testimony at hearing that it did in fact consider likely environmental impacts of the proposal. Mr. Freeman explained that he did not conclude that there would be likely significant impacts to housing affordability, housing supply or construction because such impacts were speculative and were not likely. *See* City's closing briefs.

For these reasons, the Appellants' claims of procedural error in completing the SEPA checklist must be denied.

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DATED this 6th day of September 2019.

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CERTIFICATE OF SERVICE

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

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

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