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 RESPONSE TO CITY'S SUPPLEMENTAL BRIEF**

I. INTRODUCTION

The City of Seattle ("City") admits that it bears the burden of showing *prima facie* compliance with the State Environmental Policy Act ("SEPA") and that this requires "actual consideration" of environmental impacts. The evidence in this case shows unequivocally that the City failed to meet this burden. The checklist is mostly blank. On its face, it does not address the impacts of the City's proposal to adopt transportation impact fees ("Proposal"), particularly housing production and affordability and construction impacts. At hearing, the City admitted the fees could impact housing production and affordability, yet failed to provide any analysis of these impacts, instead merely reiterating its belief it was not required to do so. The City also asserts that it did not piecemeal environmental review of the Proposal because the

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Comprehensive Plan amendments ("Amendments") and implementing development regulations ("Regulations") are not, in effect, a single course of action. The City's own statements and actions belie this claim. The City failed to meet its *prima facie* burden and this failure alone requires reversal. The Examiner must reverse the Determination of Nonsignificance ("DNS") and remand to the City for actual consideration of environmental impacts.

II. ARGUMENT

A. The City failed to demonstrate *prima facie* compliance with SEPA and the DNS should be reversed on this basis alone.

1. The City admits it has the burden to show *prima facie* compliance with SEPA, which requires actual consideration of environmental impacts.

The City admits without reservation that it has the burden to show *prima facie* compliance with SEPA. City's Supplemental Briefing in Response to Questions Posed by the Hearing Examiner ("City Supplemental Brief"), pp. 7-11. The City also acknowledges that this standard requires "actual consideration," "sufficient deliberation and consideration," and "full consideration" of environmental impacts. *Id.* at pp. 7-10, *citing Norway Hill Pres. & Prot. Ass'n. v. King Cty. Council*, 87 Wn.2d 267, 279, 552 P.2d 674 (1976), *City of Bellevue v. King Cty. Boundary Review Bd.*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978), *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54 (1978); *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973), *Gardner v. Pierce Cty. Bd. of Comm'rs*, 27 Wn. App. 241, 245, 617 P.2d 743, 746 (1980),[1] and a law review article, Hirokawa, *The Prima Facie Burden and the Vanishing SEPA Threshold*, 37 Gonz. L. Rev. 403, 411 (2002). The City admits that "the burden of proof is "*first born[e] by the agency* to make its prima facie showing." City

[1] All of these cases, and others describing the City's *prima facie* burden of proof, are discussed at length in Appellant Seattle Mobility Coalition's ("Appellant's") Supplemental Post-Hearing Brief ("Appellant's Supplemental Brief"), pp. 5-12, 20, 22-23.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Supplemental Brief, p. 10 (emphasis added). The City further elaborates that this burden requires that "relevant information should actually be found in the administrative record that was relevant to the agency's environmental review" and that the "record should illustrate the way a particular proposal does or does not affect the environment." *Id.*, pp. 10-11. Appellant agrees with the City that the City bears this burden of proof.

The City next argues that it must prove its *prima facie* compliance by a preponderance of the evidence. *Id.*, pp. 10, 11. The City relies on Hearing Examiner Rule of Practice and Procedure ("Examiner Rule") 3.17 which provides that "unless otherwise provided by applicable law" the standard of proof is the preponderance of the evidence. City Supplemental Brief, p. 10. Yet, ample case law from 1973 to the present describes the quantity and quality of evidence necessary to make a *prima facie* showing of SEPA compliance. *See* Appellant's Supplemental Brief, pp. 5-12, 20, 22-23. None of these many cases invoke the preponderance of the evidence standard. *Id.* The cases cited by the City relating to the preponderance of the evidence standard are not SEPA cases. *See* City's Supplemental Brief, p. 11, *citing In re Welfare of Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973) (child custody case); *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005) (defamation case). The Examiner should reject the City's attempt to interject a different standard and apply well established SEPA authority.

In sum, as the City admits, and Appellant agrees, the City bears the initial burden to show *prima facie* SEPA compliance, which requires it to demonstrate "actual" and "full" consideration of environmental impacts.

2. The City failed to show that it actually considered the environmental impacts of the Proposal.

The City argues it actually considered environmental impacts (City's Supplemental Brief, pp. 12-14) but the record demonstrates conclusively that the City failed to meet its *prima facie*

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

burden.

The City asserts that testimony at hearing showed that Council Central Staff member Ketil Freeman evaluated the probable environmental impacts of the proposal when he "prepared a SEPA checklist and, based on its review, issued a DNS." *Id.*, p. 12. The City asserts Mr. Freeman discussed at length his "preparation of the environmental checklist, the preparation of the DNS, and his analysis about disclosure of likely environmental impacts." *Id.*, p. 13.[2] However, just saying this does not make it so. Indeed, in the same breath the City asserts "Council staff was not required under SEPA procedures to identify speculative impacts . . . such as impacts to housing supply or housing affordability or transportation impacts." *Id.* at p. 12. In other words, staff did not analyze those impacts.

Indeed, the record in this case belies the City's claim that it gave "actual" or "full" consideration to the environmental impacts of the Proposal. The SEPA checklist contains an inaccurate project description. The checklist asserts that the Amendments provide only a "procedural basis for establishing a transportation impact fee program." Ex. 7, pp. 1; *see also* pp. 14-16 ("[t]his non-project proposal would accomplish procedural steps necessary to implement a transportation impact fee program"). The checklist fails to acknowledge that the Amendments: (1) *require* the adoption of a transportation impact fee;[3] (2) establish the methodology by which the fee will be determined; and (3) establish the list of transportation improvements to be funded by the fee. The discussion of environmental impacts in the checklist

[2] The City also asserts that, because an environmental checklist is not separately appealable, "[e]ven 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." *Id.*, pp. 11-12. This argument ignores the ample case law reversing negative threshold determinations based on the agency's failure to actually consider environmental impacts, in the checklist or otherwise. *See* Appellant's Supplemental Brief, pp. 5-12, 20, 22-23.

[3] In response to the question, "this particular language [in the Amendment] would require the council to adopt impact fees," Mr. Freeman responded, "yeah." Hearing Transcript, Day 1, p. 163:6-9.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

is largely missing. The entirety of Part B blank. Ex. 7, pp. 13. The supplemental sheet for nonproject actions is limited to cursory and repetitive responses that primarily assert that the Amendment would have no impact and that analysis of impacts will be done later. Ex. 7, pp. 14-17. There are no separate studies of the impacts of the Proposal attached to or referenced in the checklist.

At hearing, the City failed to provide any additional analysis of impacts. When asked "did you conduct any independent analysis on whether the proposal would affect housing," Mr. Freeman responded, "[n]o. I did not." Hearing Transcript, Day 1, p. 162:9-11. In fact, to the extent Mr. Freeman actually considered the impacts of the Proposal, his conclusion was that the Proposal may impact housing production and affordability. He stated that the maximum fee allowed under the Amendments "might thwart achieving other comprehensive plan goals like accommodating 70,000 new households and 115,000 new jobs." Hearing Transcript, Day 1, p. 167:11-13. In response to questions, he elaborated:

> Q. And why would the . . . maximum defensible fee thwart that goal?
>
> A. As – as Mr. Shook testified, it may have a negative effect on development, make development infeasible.
>
> Q. Okay. But there's nothing in this proposal here that prevents the council from doing that, from adopting the maximum defensible fee?
>
> A: No.

Id., p. 167:14-21.

The City's other witnesses testified in a similar manner. The City's expert Kendra Brieland, of Fehr & Peers, testified that she did not contribute to development of the checklist or DNS. *Id.*, p. 194:17-21. The City's expert Andrew Bjorn, of BERK Consulting, testified that he did not analyze the housing impacts of the Proposal: "I did not evaluate changes in housing

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

feasibility specifically as the result of this Comprehensive Plan Amendment, no." *Id.*, p. 264:22-24. Mark Mazzola, with the Seattle Department of Transportation ("SDOT"), testified that "I agreed to Mr. Swenson's testimony to the extent that he believes that these construction projects [transportation projects identified in the Amendments] would have construction impacts while they're being built, yes" (Hearing Transcript, Day 2, p. 312:1-4), however in his view SEPA analysis of these impacts should be deferred to a later stage (*id.*, at 292:18-293:8).

In short, the record demonstrates that the City did not actually consider the environmental impacts of the Proposal. Instead, the City simply took the position this consideration was not legally required. This is insufficient to meet the City's *prima facie* burden. Indeed, the City's approach is strikingly similar to the one rejected in *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 309 P.3d 673, 685 (2013). In that case, Court found the county's SEPA review of a comprehensive plan 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.

Fundamentally, the City's position is that "actual consideration" of environmental

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

impacts is not required for nonproject actions. Yet the legislature has not exempted nonproject actions from SEPA review. Case after case requires "actual consideration" of the impacts of nonproject actions. *See* Appellant's Supplemental Brief, pp. 5-12, 20, 22-23. The Examiner must reject the City's unsupported claim.

3. This error was not harmless.

The City argues that any failure to show *prima facie* compliance with SEPA should be excused as harmless error because Appellant did not demonstrate significant adverse impacts.[4] City's Supplemental Brief, pp. 14-15. The City is confused about what it means to have the burden of proof. The City bears the initial burden to show *prima facie* compliance. Only if the City meets this burden does the burden then shift to Appellant to show significant adverse impacts. The City failed to meet its burden. The Examiner's inquiry must end there. The burden never shifted to Appellant to demonstrate impacts. By definition, Appellant has no obligation to meet a nonexistent burden in order to prevail.

Indeed, ample case law demonstrates that the failure to demonstrate *prima facie* compliance with SEPA is not harmless error. Rather, it is a separate and independent ground for reversal of a DNS. Appellant's Supplemental Brief, pp. 5-12, 20, 22-23. The City itself relies on a line of cases (also cited by Appellant) that clearly establish that the City's failure to show *prima facie* compliance with SEPA requires reversal of the DNS. City's Supplemental Brief, pp. 8-9, *citing Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 276, 552 P.2d 674, 677 (1976) (threshold determination for subdivision reversed because the county did not show *prima facie* compliance with SEPA); *Bellevue v. King Cty. Boundary Review Bd.*, 90

[4] 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.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Wn.2d 856, 867, 586 P.2d 470, 477 (1978) (threshold determination for annexation reversed because city did not show *prima facie* compliance with SEPA); *Lassila v. Wenatchee*, 89 Wn.2d 804, 806, 576 P.2d 54, 56 (1978) (threshold determination for comprehensive plan amendment reversed because city did not show *prima facie* compliance with SEPA).

None of the cases cited by the City require a different conclusion. The City actually relies primarily on a 17-year old law review article, *The Prima Facie Burden and the Vanishing SEPA Threshold, supra,* 37 Gonz. L. Rev 403, and its citation to case law. City's Supplemental Brief, pp. 14-15. But law review articles are not precedential and none of the cases the article references support the City. In the first referenced case, *Moss v. Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001), the Court determined that the city met its *prima facie* burden 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.* Here, the Proposal received no review for its environmental impacts.

The City also references *Boehm v. City of Vancouver*, 111 Wn. App. 711, 47 P.3d 137 (2002), but in *Boehm* the project's environmental checklist "described the project in detail and discussed its impacts on the earth, air, water, plants, animals, energy and natural resources, environmental health, land, housing, light and glare, recreation, historic and cultural preservation, transportation, public service and utilities." *Id.* at 719. In addition, the city prepared an "Environmental Review Report describing the project's potential environmental impacts and required mitigation measures." *Id.* Accordingly, the Court concluded "the record indicates that the City thoroughly considered appropriate environmental factors." *Id.* at 721. Here, this analysis is absent.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

In addition, the City refers to a Growth Management Hearings Board ("Growth Board") decision, *Achen v. City of Battle Ground,* WWGMHB, No. 99-2-0040 (Final Decision and Order, May 16, 2000). In that case, the Growth Board reviewed the city's adoption of amendments to the capital facilities element of its comprehensive plan. The city took the position these actions were merely "procedural" and did not require SEPA review. The Growth Board rejected this claim and remanded to the City for preparation of a threshold determination. This case supports Appellant, not the City.

The City further references two unpublished cases, *Stop the Amphitheater Today v. Clark County*, No. 26067-1-II, 2001 Wn. App. LEXIS 3379 (August 10, 2001), and *Erikson v. City of Camas*, No. 25668-1-II, 2001 Wash. App. LEXIS 1140 (Mary 25, 2011), but as unpublished decisions issued prior to 2013, these cases have no precedential value and cannot be cited under Washington's Court Rules. GR 14.1.

Finally, the City relies on Richard Settle's treatise *The Washington State Environmental Policy Act, a Legal and Policy Analysis*, but this reliance is also misplaced. As discussed at length in Appellant's Supplemental Brief, Mr. Settle's treatise supports Appellant. Appellant's Supplemental Brief, pp. 3, 9, 13, 20, 21, 24.

In sum, the City provides no authority whatsoever supporting its claim that its failure to demonstrate *prima facie* compliance with SEPA is not a basis for reversal and remand of the DNS. Instead, the opposite is true. The Examiner should reverse the DNS on this basis alone.

B. The City's piecemealing of environmental review requires reversal of the DNS.

The City argues that Appellant cannot prevail on its piecemealing claim. City's Supplemental Brief, pp. 2-7. The City is incorrect.

1. WAC 197-11-060(b) requires consideration of the entire Proposal in a single environmental document.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

The City admits that WAC 197-11-060(b) applies here, but argues that it does not require consideration of the entire Proposal. The City is wrong.

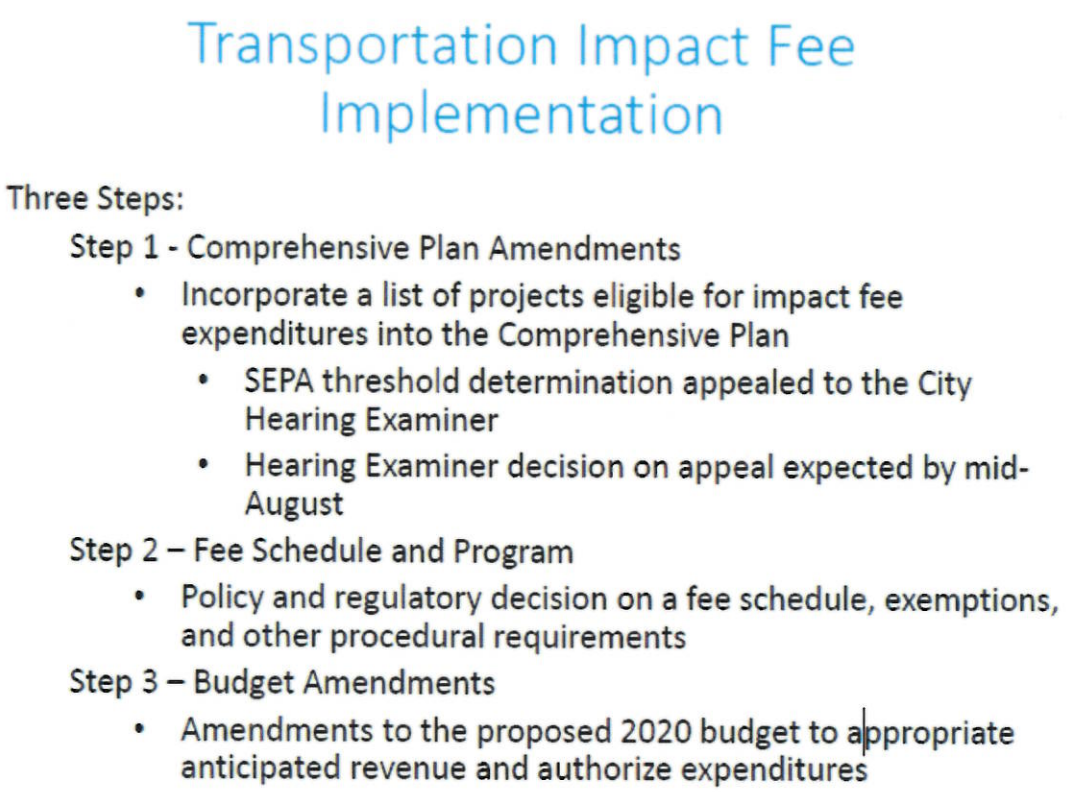
WAC 197-11-060(b)(3) requires that:

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

Here, the Amendments and Regulations are interdependent parts of the larger Proposal and depend on the larger Proposal as their justification or for their implementation. The City has admitted the Amendments are the "first step" in "creating a TIF program." City's Supplemental Brief, p. 6. The Regulations are the second step. Together, these elements constitute the Proposal to adopt a transportation impact fee program. Ex. 7, p. 1 (Amendments are a "necessary step" to establish a transportation impact fee program); Hearing Transcript, Day 1, p. 132:23-133:4 (Amendments would meet statutory requirements for "what's necessary to implement an impact fee program"); *Id.*, p. 135:7-11 (Amendments are the "initial step"; "[a]fter that policy proposal is adopted, implementing regulations are adopted."); *Id.* at pp. 135:17-18, 136:12-13 (Amendments are a "go/no go" decision on the impact fees). Both the Amendments and Regulations depend on the larger Proposal for their justification – there is no reason to adopt either except to adopt a transportation impact fee program. In addition, both the Amendments and Regulations are necessary to implement the Proposal. Under WAC 197-11-060(b)(3), both components of the Proposal must be evaluated in the same environmental document.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

The interdependence of the Amendments and Regulations is demonstrated by Mr. Freeman's recent presentation to the City Council Sustainability and Transportation Committee. In that presentation, Mr. Freeman identified the "steps" involved in transportation impact fee implementation. The first is the Amendments, the second the Regulations and the third budget amendments. These steps are interdependent parts of the overall transportation impact fee Proposal.



Declaration of Courtney A. Kaylor in Support of Seattle Mobility Coalition's Supplemental Post-Hearing Brief ("Kaylor Dec."), Ex. B (Staff presentation to Committee).

The same presentation shows the Council intends to move forward with the complete Proposal as a package this year:

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Next Steps - Contingent on Hearing Examiner Decision

- August – September
  - Committee discussion and action on Comprehensive Plan amendment legislation and
  - Discussion and potential action on implementing regulations
- September - October
  - Discussion of potential amendments to the Mayor's proposed budget based on an impact fee program
- November
  - Potential Full Council action on Comprehensive Plan amendments, implementing regulations, and associated budget amendments

Id.; *see also* Verbatim Transcript of Testimony – Ketil Freeman (submitted with Appellant's Supplemental Post-Hearing Brief).

The City argues "additional projects" need not be analyzed if they are "subjectively independent" from the proposed action or are not "necessary to meet the project's purpose and need," citing *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 552 P.2d 184 (1976). City's Supplemental Brief, p. 4. In *Cheney*, the plaintiff challenged a road project due to the potential future need for acquisition of right of way over private property. The plaintiff claimed the City might be coerced into approving development of the property in order to gain the right of way and so must analyze the impacts of potential future development of the property The Court found the future use of the private parcel was too remote to require review. *Id.* at 346. *Cheney* is inapplicable here. Unlike the situation in *Cheney*, the Amendments and Regulations are not "subjectively independent"; they are two steps in a single overall Proposal, and both are necessary for the implementation of the Proposal.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

The City also cites *Gebbers v. Okanogan Cnty. Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 379, 183 P.3d 324 (2008) and three federal cases cited by *Gebbers*. City's Supplemental Brief, p. 4. *Gebbers* and its associated cases are inapplicable here. In *Gebbers*, the agency prepared an EIS on a new electrical transmission line. The Court applied the "rule of reason" to determine the EIS was adequate. The EIS did not need to also consider rebuilding an existing transmission line. The appellants claimed rebuilding this line would be necessary in the future, but the record did not support this assertion. *Id.* at 382. The appellants' characterizations of the record were inaccurate and did not support their contentions. *Id.* at 382-385. Instead, "on its face," the new line was "independent of any existing line rebuild and vice versa." *Id.* at 385. Here, the Amendments and Regulations are, on their face, not independent of each other. Rather, as the City admits, the Amendments are the "first step" in implementation of a transportation impact fee and the Regulations are the second. City's Supplemental Brief, p. 6; Hearing Transcript, Day 1, pp. 132:23-133:4, 135:7-11; Kaylor Dec., Ex. B.

In sum, the Amendments and Regulations are "interdependent parts of a larger proposal" – the transportation impact fee program – and must be reviewed together under SEPA.

2. SEPA applies to discretionary actions and the City bears the burden to show actual consideration of the impacts of the entire Proposal.

The City argues that Appellant cannot prevail on its claim of piecemealing because (the City asserts) it did not establish that there will be likely significant adverse impacts.[5] Instead, the City asserts impacts are speculative because there are a "multitude of policy decisions that need to be made" and the positions of Council members are not known. *Id.*, pp. 2-3, pp. 4-5. The City's argument is fundamentally flawed.

[5] Appellant preserves its argument that it proved significant adverse impacts and the DNS should be reversed on this basis as well.

MCCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

Contrary to the City's apparent belief, from the first days of SEPA, it has been well accepted that SEPA applies to discretionary actions. Thus, the fact that an agency has discretion to disapprove or modify a proposal in the future does not eliminate the need for SEPA review. The City also forgets that it bears the initial burden of proof in this case to establish *prima facie* SEPA compliance, which requires it to show that it actually considered the environmental impacts of the Proposal. Until the City does this, the burden does not shift to Appellant to show significant impacts. These principles are reflected in the case of *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 510 P.2d 1140 (1973). In that case, an association sought to invalidate a grading for lack of SEPA compliance. The city argued SEPA did not apply because the grading permit was ministerial. The Court rejected this claim, holding that SEPA applies to both discretionary and ministerial permits. The Court did not require the appellant to demonstrate significant adverse impacts, but instead reversed the permit issuance because the city failed to meet its *prima facie* burden under SEPA, stating, "we 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." *Id.* at 73 (emphasis in original). "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.* The Court also held that the city must consider the entire proposal. Since the grading permit "constitutes the threshold act" in a larger plan for an industrial park development, "the environmental impact of the total project, rather than that of

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

the grading project alone, must be weighed in order to meet the requirements of SEPA." *Id.* at 72.

The City itself acknowledges that the case *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993), 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." City's Supplemental Brief, p. 9 n. 6, *citing King County, supra*, at p. 664. The City attempts to distinguish this case, however, stating that in that case "it was probable and uncontested that future development of undeveloped annexed property would have a significant adverse environmental impact." City's Supplemental Brief, p. 5. Yet it was equally "uncontested" that no development applications had been submitted for the annexed properties and that future, discretionary permit decisions would be required. *See King County, supra*, at p. 662. Thus, the City's claim that impacts are speculative because the Regulations have not yet been proposed and approval of the Proposal is not guaranteed rings hollow. The City has admitted the Amendments would allow adoption of the "maximum defensible fee," which could "make development infeasible" Hearing Transcript, Day 1, p. 167:7-21. Since the Amendments would constitute the "first step" toward implementation of the Proposal, the City must conduct environmental review of the entire Proposal now. *See also Spokane Cty., supra,* at pp. 579-580 ("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."); *see also* Appellant's Post-Hearing Brief, pp. 21-24; Appellant's Post-Hearing Response Brief, pp. 4-6.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

The City bears the burden to show it actually considered the environmental impacts of the entire Proposal. The City failed to meet this burden.

3. The piecemealing of the Proposal is not harmless error.

The City asserts that its piecemealing of the Proposal may constitute harmless error. City Supplemental Brief, p. 7. But the error here is anything but harmless.

None of the cases cited by the City support its claim. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 52 P.3d 522 (2002) is inapposite. In that case, the failure to formally adopt an EIS and circulate an addendum was harmless because "the public received adequate notice . . . and was afforded an opportunity to be heard at least as good as that which would have been afforded under the formal adoption procedure." *Id.* at 54. Here, the issue is lack of analysis, not lack of notice.

In *Moss, supra*, appellants alleged lack of notice and failure to properly adopt an environmental document. 109 Wn. App. at 28-29. The Court rejected these claims and stated that, even if appellants were to prevail, they did not demonstrate prejudice because they received notice of the DNS and challenged it. *Id.* at 29. The Court also rejected the challenge to the DNS because the record indicates that the project received "a great deal of review." *Id.* at 31. The agency required additional information beyond the checklist, gathered "extensive comments" from agencies and the public, and held "numerous meetings." *Id.* Here, in contrast, no actual consideration of environmental impacts has occurred and the City failed to meet its *prima facie* SEPA burden.

Citing *King County, supra*, 122 Wn. 2d 648, the City asserts that "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." City Supplemental Brief, p. 7. This is flat wrong.

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

There are numerous cases in which the Court reversed a DNS because the agency did not demonstrate *prima facie* SEPA compliance without a showing of significant adverse impacts. Appellant's Supplemental Brief, pp. 5-12, 20, 22-23.

Finally, the City asserts that the Growth Board has never issued an invalidity order based on SEPA noncompliance. That is irrelevant. As the Examiner knows, under the Growth Management Act ("GMA"), the Growth Board may find an action noncompliant with GMA or SEPA and reverse and remand on that basis. In that case, projects may still vest to the challenged land use decision during the period of remand. RCW 36.70A.300. The Growth Board may issue a determination of invalidity only if it determines "that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of [GMA]." RCW 36.70A.302. As the Court stated in *Davidson Serles & Assoc. v. Centr. Puget Sound Growth Mgmt. Hearing Board*, 159 Wn. App. 148, 158, 244 P.3 1003 (2010), the legislature did not grant the Board authority to invalidate comprehensive plans or development regulations based on lack of SEPA compliance, only based on substantial interference with GMA. This certainly does not mean that failure to comply with SEPA is harmless.

Instead, the purpose of the prohibition against piecemealing is to prevent an agency from avoiding environmental review by segmenting a proposal into pieces. *Alpine Lakes Prot. Soc'y. v. Dep't. of Ecology*, 135 Wn. App. 376, 382 n. 7, 144 P.3d 385 (2006). Here, the City has conducted no analysis of the impacts of the Amendments, in particular the housing production, housing affordability and construction impacts. If the City's piecemealing of the of the Proposal is allowed to stand, then the City will avoid future environmental review by exempting the Regulations and transportation projects funded by the impact fees from SEPA review. Strikingly, the City's recent schedule for adoption of the Proposal does not mention SEPA

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

review of the Regulations and does not accommodate time for review, issuance of a threshold determination, and any appeals. Kaylor Dec., Ex. B. It appears the City intends to improperly invoke a newly adopted SEPA exemption to avoid SEPA review of the Regulations. Appellant's Supplemental Brief, pp. 15-17. In addition, Mr. Mazzola testified that many of the transportation projects funded by the fees will fall within existing SEPA exemptions, including arterial reconstruction projects involving shutting down portions of a street to rebuild; all pedestrian facilities including sidewalks, crosswalks and curb bulbs; signal installation; adding or restriping lanes; all bicycle facilities; and lighting. Hearing Transcript, Day 2, p. 327:13-330:7. In sum, if the City's piecemealing is allowed to stand, this will mean that the Proposal receives no environmental review of its housing impacts and little to no review of construction impacts, either now or in the future. Particularly in light of how important housing and housing affordability is to our City, this error is not harmless.

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

The City provides no argument on whether its failure to consider sufficient information and piecemealing of the Proposal are distinct legal errors. City's Supplemental Brief, p. 15. The City attempts to preserve its ability to argue this point at a later date (*id.*), but a party abandons an issue by failing to brief it and a party may not brief an issue for the first time on reply. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The Examiner should decline to consider any of the City's untimely arguments on this topic.

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

The Examiner asked the parties for any case law addressing whether an agency must complete Part B of the checklist. The City admits it found none, but nevertheless devotes three

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

pages of briefing to this issue, without citing a single case. City's Supplemental Brief, pp. 15-18. The City's arguments fail. Appellant incorporates by reference its prior briefing on this topic in Appellant's Post-Hearing Brief, pp. 16-18. In short, WAC 187-11-315(1)(e) allows an agency to not complete a question in Part B only if that question "would not contribute meaningfully to the analysis of the proposal." Here, Part B requires discussion of housing that would be provided or eliminated and its affordability. Ex. 7, p. 10. The City's argument that it would not be helpful for Council to know that its action may impact housing production and affordability, which rank high among the most significant challenges facing Seattle today, does not pass the straight face test. *See* Hearing Transcript, Day 1, p. 42:19-43:2. Part B also requires an analysis of street improvements, parking impacts and mitigation for transportation impacts. Ex. 7, pp. 12-13. The evaluation of the cumulative impacts of the transportation projects funded by the Proposal would provide meaningful information for the phasing and mitigation of these projects. *See* Hearing Transcript, Day 1, p. 101:2-18. Under both the applicable WAC and the only decision identified by either party on this topic, *Kittitas County Conservation v. Kittitas County*, EWGMHB Case No. 11-1-0001, Corrected Final Decision and Order (Partial), (June 13, 2011), the City was required to respond to the questions in Part B. The City's failure to do so was error and the Examiner should reverse and remand the DNS to the City for completion of the checklist.

III. 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 11th day of September, 2019.

MCCULLOUGH HILL LEARY, PS

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

s/Courtney A. Kaylor
Courtney Kaylor, WSBA #27519
Attorneys for Appellant

McCULLOUGH HILL LEARY, P.S.
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

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** **DECLARATION OF SERVICE**

I, Alexander R. Brenner, declare as follows:

I am employed with McCullough Hill Leary, P.S., which represents Seattle Mobility Coalition, Appellant. On this date, I served the following documents, namely the SEATTLE MOBILITY COALITION'S RESPONSE TO CITY'S SUPPLEMENTAL BRIEF and this DECLARATION OF SERVICE via electronic mail to:

Liza Anderson
Seattle City Attorney's Office
701 5th Ave.
Suite 2050
Seattle, WA 98104-7097
Email: liza.anderson@seattle.gov
Email: Alicia.reise@seattle.gov

McCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 11th day of September, 2019 in Seattle, Washington.

s/Alexander R. Brenner
Alexander R. Brenner, *Legal Assistant*
McCULLOUGH HILL LEARY PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
Tel: 206-812-3388
Fax: 206-812-3389
Email: abrenner@mhseattle.com