BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:	Hearing Examiner File:
SEATTLE MOBILITY COALITION,	**W-18-013**
Appellant.	CITY'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEFING
From a Determination of Non-Significance issued by the Seattle City Council.	

The Seattle City Council Central Staff responds briefly to several arguments raised by Appellant Seattle Mobility Coalition in its Supplemental Briefing:

SMC's entire case is based on its claim that the City Council piecemealed the environmental review of the Comp. Plan amendments.[1] In order to make this argument, SMC states that the Comp. Plan amendments mandate the adoption of a Transportation Impact Fee program. This claim is wrong. The Comp. Plan amendments do not mandate adoption of a Transportation Impact Fee (TIF) program. Rather, the amendments, if adopted, signify a majority of Councilmembers willingness to take one incremental step toward adoption of a TIF program. This is insufficient to establish the actual nuts and bolts of the TIF program.

[1] SMC's attempt to rely on additional evidence filed with the Examiner and parties on September 6 long after the close of the hearing must be disregarded. *See* City's Motion to Strike.

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The City Council has very broad discretion in adopting Comp. Plan policies and adopting the requirements of the GMA to local realities. *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 56 (2013). Moreover, a Comp. Plan is a "guide" or 'blueprint' to be used. *Id.* at 56. Moreover, nothing in the GMA or any other state law requires the City to adopt a TIF program. The language of the Comp. Plan amendments do not mandate adoption of a TIF program. Therefore, the environmental review of the Comp. Plan amendments was not piecemealed. Rather, the City properly evaluated the environmental impacts of the proposed Comp. Plan amendments. The proposed Comp. Plan amendment make minor changes to the Funding Policy in the Transportation Element of the Comp. Plan and identifies a list of transportation projects that may be impact fee eligible if TIF program is adopted. Exhibit 2. The City conducted a reasonable analysis of the likely environmental impacts of the Comp. Plan amendments. Claims to the contrary are without merit and must be denied.

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

Appellant failed to address the question raised by the Examiner in its Supplemental Briefing. A quick review of Appellants' Notice of Appeal makes clear that the piecemealing argument seeks to require environmental review of the Comp. Plan amendments along with the legislation to implement a TIF program and the construction of the transportation projects identified only a "TIF eligible" in the Transportation Appendix. This is the same argument that SMC's makes in its Notice of Appeal that the DNS is based on inadequate information. *See* Seattle Mobility Coalition ("SMC") Notice of Appeal, pp. 4:15-5:4. The record contains sufficient evidence to establish the fact that the sponsor of the Comp Plan amendments is CM O'Brien and, according to Mr. Freeman, it is not clear whether CM O'Brien has sufficient support of his colleagues to adopt the Comp. Plan proposal. Consideration

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of the Comp. Plan amendments is a necessary precondition to adopting a TIF program- but the Comp. Plan proposal is not an "interdependent" part of a larger proposal that must be evaluated in the same environmental document, as discussed above.

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

Appellant SMC ("SMC" or "Appellant") identifies no new case law in its supplemental briefing that support its claim that there is a separate procedural requirement outside of the standard to issue a threshold determination under SEPA.

Rather, SMC's reliance on "foundational SEPA cases" actually provide support for the Respondent City's position that SEPA does not require separate procedural actions beyond the requirement to issue a threshold determination.

Most significantly, *Norway Hill Pres. & Prot. Ass'n v. King County* makes clear that the procedural requirements of SEPA relate to issuance of a threshold determination.

> 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).

Norway Hill Pres. & Prot. Ass'n v. King Cty. Council, 87 Wn. 2d 267, 278, 552 P.2d 674, 680 (1976).

The other cases cited by SMC in its supplemental briefing support the City's position that the "procedural" requirements of SEPA relate to a municipality issuing a threshold determination as to whether the action is a 'major action significantly affecting the quality of the environment." *See e.g., Id., Norway Hill* at 273.[2]

[2] *Id*. stating in detail:

> In order to achieve this public policy it is important that an environmental impact **678 statement be prepared in all appropriate cases. As a result, the initial determination by the 'responsible official,' *See*

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In *Stemple*, which was decided in 1973, the Court remanded the water use permit for evaluation under SEPA and the Water Resources Act of 1971, finding " There being no argument that the issuance of the water use permit in this case does not amount to a major action significantly affecting the quality of the environment, (RCW 43.21C.030(2)(c)), the department is required to act in accordance with the provisions of SEPA in conducting its additional investigation under the remand decree." *Stempel v. Dep't of Water Res.*, 82 Wn. 2d 109, 119, 508 P.2d 166, 172 (1973). The Court reversed there because no environmental review of the water use permit occurred as required by SEPA.

Likewise in *Juanita Bay*, the Washington Division One Court of Appeals stated:

> Moreover, we hold that RCW 43.21C.030(2)(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. *See Hanly v. Mitchell*, 460 F.2d 640 (2nd Cir. 1972).

RCW 43.21C.030(2)(c), as to whether the action is a 'major actions significantly affecting the quality of the environment' is very important. The policy of the act, which is simply to ensure via a 'detailed statement' the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect 'threshold determination' is made. The determination that an action is not a 'major action significantly affecting the quality of the environment' means that the detailed impact statement of SEPA is not required before the action is taken or the decision is made. Consequently, '(w)ithout a judicial check, the temptation would be to short-circuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary or capricious standard.' Anderson, The National Environmental Policy Act, in Federal Environmental Law 361 (1974); *See* Note, Threshold Determinations Under Section 102(2)(C) of NEPA: The Case For 'Reasonableness' As A Standard For Judicial Review, 16 Wm. & Mary L.Rev. 107, 109 (1975).
For the reasons stated above, we feel that judicial review of 'negative threshold determinations' beyond that provided under the 'arbitrary or capricious' standard is necessary. A 'negative threshold determination' is more than a simple finding of fact because the correctness of a no significant impact determination is integrally linked to the act's mandated public policy of environmental consideration.

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Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, 9 Wn. App. 59, 73, 510 P.2d 1140, 1149 (1973).

In context, the *Juanita Bay* Court specifically stated, "In short, the detailed procedural requirements of SEPA, specifically RCW 43.21C.030, are directly imposed upon all branches of state government, including municipalities." *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 65, 510 P.2d 1140, 1145 (1973). The Court provides further:

> The primary question presented is, Does the record reflect a violation of SEPA such that the grading permit in question must be deemed to be invalid? At the outset it is apparent that the very heart of the procedural requirements of SEPA is the necessity for preparation of an Environmental Impact Statement. RCW 43.21C.030(2)(c). As appellant points out in its brief, an Environmental Impact Statement is particularly important because it documents the extent to which the particular agency has complied with other procedural and substantive provisions of SEPA; it reflects the administrative record; and it is the basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA between the benefits to be gained by the proposed 'major action' and its impact upon the environment.

Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, 9 Wn. App. 59, 68–69, 510 P.2d 1140, 1146–47 (1973) (emphasis added).

In *Juanita Bay*, the court concluded "SEPA requires that an Environmental Impact Statement be prepared prior to the first governmental authorization of any part of a project or series of projects which, when considered cumulatively, constitutes a major action 'significantly affecting the quality of the environment." *Id.* at 72-73. The court remanded the case to the City for its determination of whether it is necessary to requires an EIS before deciding to issue applicant KSG a grading permit. *Id.* This was in response to the City's claim that SEPA's requirement of an EIS is applicable only in the ae of a discretionary or policy making action. *Id.* at p. 69.

Here, it is clear that what the Court meant when it said that a municipality must be able "to demonstrate that environmental factors were considered in a manner sufficient to amount to a prima

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facie compliance with procedural requirements", the issue at hand was whether the City had issued a threshold degermation requiring preparing of an EIS and, since it had not, the court remanded the matter on that basis.

Similarly, *Norway Hill Pres. & Prot. Ass'n v. King County Council* was not reversed based on a finding that the County erred in meeting the procedural requirements of SEPA. Rather, remand was required where the action- approval of a preliminary plat that would transform a heavily wooded and unpopulated area into a residential suburban neighborhood" with 198 single family homes- with all of the necessary amenities would significantly affect the environment and that the King County Council's determination that an EIS was not required was clearly erroneous. *Norway Hill*, 87 Wn.2d 267, 278 (1976). And, as noted above, the 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).

Norway Hill Pres. & Prot. Ass'n v. King Cty. Council, 87 Wn. 2d 267, 278, 552 P.2d 674, 680 (1976). Likewise, *Gardner v. Pierce County Bd. Of Comm'rs*, 27 Wn. App. 241 (1980) at SMB's brief p. 8, simply repeats the requirement that the county has a "duty to demonstrate its justification of a negative declaration under SEPA." And the City met its duty to issue a negative declaration under SEPA (a DNS, here). And the DNS is entitled to substantial weight and SMC failed to meet its heavy burden to establish the Comp. Plan proposal would result in any likely significant environmental impacts.

Several other cases cited by SMC are addressed in the City's Supplemental Briefing in response to the Hearing Examiner's questions including *Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856 (1978), and *Lasilla*.

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SMC next argues that courts continue to reverse for lack of analysis of a proposal's environmental impacts (pp. 9-13 of SMC's Supplemental briefing). These cases do not support SMC's arguments that the City has some burden to establish the issuance of the DNS was proper beyond the requirement to issue a threshold determination, which occurred here. Rather, SMC's cases simply summarize the SEPA requirements related whether a municipal property issued a negative threshold determination or not.

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

The Examiner must deny SMC's claim that the City Council Central Staff erred in not completing Part B of the SEPA checklist. Neither SEPA regulations/city code or case law supports SMC's claim that failure to complete Section B of the SEPA checklist for non-project actions constitutes a procedural SEPA error. As already discussed in the City's prior briefing, completing Part B of the SEPA checklist is only required if its completion will "contribute meaningfully" to the analysis of the proposal. SMC 25.05.960. City witnesses testified at hearing that completion of Part B would not contribute meaningfully to the analysis of the proposal.

Further, SMC identified no case law that requires the City to complete Section B of the SEPA checklist for non-project actions. Instead, Appellant relies on *Kittitas County Conservation v. Kittitas County*, an Eastern Washington Growth Management Hearings Board decision, EWGMHB Case 11-1-0001, Corrected Final Decision and Order (Partial), (June 13, 2011). The Kittitas Growth Board Decision flatly does not "confirm [completion of Part B of the Checklist] is required by SEPA" contrary to SMC's claim. is distinguishable from the present matter.

In *Kittitas County Conservation*, the Eastern Growth Board decision did not evaluate or reach a conclusion that would require the City Council Central Staff to have completed Part B of

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the SEPA Checklist; the Decision does not mention or discuss Part B of the SEPA checklist requirement. Rather, the Board found that the County failed to conduct any analysis of the environmental impacts of a Comprehensive Plan map and zoning change to expand a LAMIRD ("a Type 3 Limited Area of More Intensive Rural Development."[3]

The action for purposes of SEPA in that case was two Comp. Plan Map Amendments designated as Map Amendments "10-12" and "10-13". The Map Amendment 10-12 was "the Thorp LAMIRD II Expansion from 12 acres to 30.5 acres for the purpose of developing the Thorp Travel Center, consisting of a truck stop, restaurant and hotel and RV Park." Kittitas County Conservation Corrected Final Decision and Order (Partial), (June 13, 2011) at p. 12:3-5.

Map Amendment 10-13 change the land use map and rezone from Agriculture 20 to Commercial Highway. *Id.* at p. 12:6-9. The Board held that the County failed to conduct any analysis of the environmental impacts of the map and zoning changes to Expand a LAMIRD (a Type 3 Limited Area of More Intensive Rural Development") and therefore, it failed to comply with SEPA where the Checklist was "devoid of any factor or information related to environmental effects for the [Comp. Plan amendments]. P. 9 of Decision.

The present matter is distinguishable from the Comp. Plan amendment in Kittitas County. The proposed legislation does not change any zoning or overlay zones from farming to more intensive commercial development on 20 acres to allow a struck stop, restaurant, hotel and RV park. Rather, the legislation makes minor changes to the City's financing policies in the Comp. Plan to allow further consideration of creating a Transportation Impact Fee in the City of Seattle.

[3] Additional details of the two amendments (10-12 and 10-13) are discussed at *Kittitas County v. Kittitas County Conservation*, 176 Wn.App. 38, 45-46, 308 P.3d 745 (2013).

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The Examiner must deny SMC's claim that the City Council Central Staff erred in not completing Part B of the SEPA checklist.

For all of these reasons, the Hearing Examiner should dismiss SMC's appeal in total and affirm the City Council's DNS.

DATED this 11th 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 Response to the 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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