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 OF SEATTLE'S MOTION TO STRIKE**

I. INTRODUCTION

The Hearing Examiner must deny the City of Seattle's ("City's") motion to strike ("City's Motion"). The material the City seeks to strike is relevant to an issue on which the Examiner requested further briefing after reopening the hearing under Hearing Examiner Rules of Practice and Procedure ("HER") 2.20, specifically whether the Determination of Nonsignificance ("DNS") in this case should be reversed because the City piecemealed its State Environmental Policy Act ("SEPA") review. For this reason, the material may be considered under HER 2.20 and 2.21. The material is also subject to official notice under HER 2.18. HER 2.18 provides that parties must be notified of the facts or materials noticed before a decision is issued, but provide no earlier deadline. The material is timely. The Examiner should deny the

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City's motion to strike and take official notice of the materials provided by Appellant Seattle Mobility Coalition ("Appellant").

II. ARGUMENT

A. The Examiner should deny the City's Motion under HER 2.20 and 2.21.

The City request that the Examiner strike the material that Appellant requested the Examiner officially notice. The City's Motion is based exclusively on one portion of HER 2.21(b), stating that "information submitted after close of the record shall not be included in the hearing record or considered by the Examiner." City's Motion, pp. 1-2. The City ignores the rest of HER 2.21(b) and HER 2.20, which allow this information.

HER 2.21 is entitled, "leaving the record open." Subsection (b) of this HER provides, in full: "Except as provided in this Rule, HER 2.20 and HE 2.23, information submitted after the close of the record shall not be included in the hearing record or considered by the Examiner." (Emphasis added.) The City ignores the underlined language referring to Rule allowing consideration of information submitted after the close of the record under HER 2.20.

HER 2.20 provides, in pertinent part, that "Following the close of the hearing and/or the record, but prior to issuing a decision or recommendation, the Examiner may reopen the record and/or the hearing for good cause and may permit or require written briefs or oral argument." HER 2.20(c).

Here, this is what occurred. The Examiner asked the parties to attend a reopened hearing. At the hearing, the Examiner posed four questions. Two of these relate specifically to Appellants' claim that the City piecemealed SEPA review. The first question is, if the Examiner does not find that Appellant met the burden of demonstrating probable significant impacts, can Appellant prevail on its claims that the City lacked sufficient information to issue the DNS and

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piecemealed the environmental review of the Proposal? The second is whether Appellant's claim that the City lacked sufficient information to issue the DNS is essentially the same as its claim of piecemealing? The Examiner allowed the parties to ask clarifying questions. In addition, the Examiner specifically invited the parties to address related issues, stating:

> One thing I invite you not to get too much into with each other is if someone goes a bit beyond these questions, if you want to add something, I'm not, don't worry about trying to catch each other on that. I . . . There are elements of this that you may think of when you leave here that you did not think to ask a question that I would invite you to address. Obviously that does not go into arguing issues on whether there were significant impacts or not but if there are relative items or issues you wish to raise in this context this is really an opportunity for the parties to try to address these questions so I do not want to limit you in that respect.

Hearing Audio Recording, 8/28/29, 19:41-20:19.

The Examiner's statement was consistent with the distinction the HER makes between the "hearing" and the "record," which the City's Motion ignores. As provided in HER 3.19, the "record" consists of numerous materials, including "[e]vidence received or considered," "[p]leadings, procedural rulings, and other non-evidentiary materials that are part of the Hearing Examiner's file," the "[r]ecording of the hearing," and "[s]tatement of matters officially noticed, if any." In other words, simply because a hearing at which evidence is received has concluded, the overall "record" in the appeal has not closed – a proposition the City tacitly acknowledges by stating that the Examiner "closed the record for the appeal hearing on July 26, 2019," which was not the last day of hearing but the date on which the parties submitted their closing response briefs. Moreover, the City cites no basis for its assertion that this was the date the record closed – no statement by the Examiner, and no HER provision indicating that the "record" automatically closes when a party completes its closing argument. Even if the record were deemed closed as of July 26, 2019, however, it was necessarily reopened when the Examiner

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invited additional briefing – i.e. "[p]leadings," which are considered part of the record under HER 3.19(4). As explained, above HER 2.20, and 2.21 expressly contradict the City's assertion that there is a blanket prohibition on receipt or consideration of evidence after the close of the hearing.

In preparing its brief in response to the questions regarding piecemealing, Appellant determined that the City's recent statements and actions, reflected in the public record and subject to official notice, were relevant items and issues that should be raised in its supplemental briefing. These materials indicate the City plans to move forward with the all components of its proposal to adopt a transportation impact fee ("Proposal"), including both the Comprehensive Plan Amendments ("Amendments") and development regulations ("Regulations") simultaneously as a package this year. The materials directly contradict the City's position and statements at hearing. The materials are relevant and the Examiner should consider them. The provisions of the HER should not be applied to require the Examiner to turn a blind eye to reality.

B. The Examiner should deny the motion under Examiner Rule 2.18.

HER 2.18, which the City fails to address, provides a separate and independent ground on which the Examiner should consider the materials. HER 2.18 provides, in pertinent part:

> (a) The Hearing Examiner may take official notice of judicially cognizable facts. In addition, the Examiner may take notice of general, technical or scientific facts within his or her specialized knowledge.
>
> (b) Before a decision or recommendation is issued, parties must be notified of the facts or material noticed and their source, and afforded an opportunity to contest or rebut them.

(Emphasis added.) As explained in Appellant's Supplemental Post-Hearing Brief, the materials in question here are subject to official notice under HER 2.18 and ER 201. The existence of

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these materials is generally known in the City and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* HER 2.18(a); ER 201(b). The materials are public records and are posted on the Seattle City Council's web site.[1]

Indeed, although the City refers to these materials as "additional evidence," that is not how the HER treats them in this context. HER 2.17, which governs "evidence," is a separate section from HER 2.18, which governs when the Examiner "may take official notice of judicially cognizable . . . facts or material." HER 3.19 also lists "[e]vidence received or considered" and "[s]tatement of matters officially noticed, if any" separately as distinct items that are both part of the overall "record of an appeal." Thus, even if the actual documents submitted by Appellant were considered "evidence," the Examiner would not have to admit them as exhibits in order to take notice of the *facts* contained therein.

Under the plain language of HER 2.18, the parties must be notified of officially noticed material only "before a decision or recommendation is issued." There is no earlier deadline. "When statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself." *Post v. City of Tacoma*, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). Here, the City was well aware of the materials because they are public records of the Seattle City Council. Even if it had not been aware of them previously (which it was), it was certainly notified of them when Appellant provided them to the Examiner. The City was timely notified, and the requirements of HER have been satisfied.

The Examiner may take official notice of the materials under the plain language of HER

[1] See http://seattle.legistar.com/Calendar.aspx?BodyID=32477&Mode=All (link to Sustainability & Transportation Committee agendas, minutes and video; agendas have embedded links to supporting materials). All documents attached to the Declaration of Courtney A. Kaylor in Support of Seattle Mobility Coalition's Supplemental Post-Hearing Brief are posted here. In addition, the transcript of Central Staff member Ketil Freeman's testimony is a transcript of the audio recording posted on this web site.

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2.18, which provides a separate and independent ground for Examiner consideration of them.

C. The City has been provided the opportunity to respond.

The City asks that, if the Examiner considers the materials submitted by Appellant, then the City be given an opportunity to respond. City's Motion, p. 3. Appellant believes this has already occurred. Appellant filed its Supplemental Post-Hearing Brief, including its request for official notice with the associated materials, on September 6, 2019. The City filed its response brief on September 11, 2019. The City had the ability to address the materials in its response brief but, for reasons known only to itself, chose not to do so. No additional opportunity is warranted. To the extent the Examiner intends to take official notice of the materials, and believes the City is entitled to an additional notification and opportunity for rebuttal under HER 2.18 ("[b]efore a decision of recommendation is issued, the parties must be notified of the facts or material and their source, and afforded an opportunity to contest or rebut them"), the Appellant requests that any materials submitted on rebuttal be limited to public documents that qualify for official notice, as do the materials submitted by Appellant.

III. CONCLUSION

For these reasons, the Examiner should deny the City's motion to strike and take official notice of the materials provided by Appellant.

Dated this 18th day of September, 2019.

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