AMENDED FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

SEATTLE MOBILITY COALITION

from a Determination of Non-Significance issued by the Seattle City Council

Hearing Examiner File:
W-18-013

Introduction

The City of Seattle Council Central Staff Division of the City Council ("City") issued a State Environmental Policy Act ("SEPA") Determination of Non-Significance ("DNS") for a proposed ordinance that would modify the Seattle Comprehensive Plan ("Ordinance"). The Appellant Seattle Mobility Coalition ("Appellant"), exercised the right to appeal pursuant to Chapter 25.05 Seattle Municipal Code.

The appeal hearing was held on June 10, 12 and 18, 2019, before the Hearing Examiner. The Appellant was represented by Courtney A. Kaylor, attorney-at-law, and the City was represented by Elizabeth E. Anderson, attorney-at-law. The parties submitted closing briefs on July 19, 2019, and response briefs on July 25, 2019. The hearing was reopened on August 28, 2019, and the parties filed supplemental briefing on September 6, 2019, and responses to supplemental briefing on September 11, 2019.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. After considering the evidence in the record, the Hearing Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

1. The DNS describes the proposal identified in the Ordinance ("Proposal") as:

> The 2018 amendments to *Seattle 2035* related to transportation impact fees are non-project in nature, primarily procedural, and will have citywide applicability. The proposed amendments would (1) amend the Capital Facilities and Transportation Elements of the Comprehensive Plan and related appendices to identify deficiencies in the transportation system associated with new development and (2) incorporate a list of transportation infrastructure projects that would add capacity to help remedy system deficiencies.

> Projects included in the list would be eligible for future investments with revenue from a transportation impact fee program. The amendments to *Seattle 2035* are a necessary, but not sufficient, step to establish an impact fee program under RCW 82.02.050.

Exhibit 8 at 1.

2. The Proposal's amendments to the Comprehensive Plan would not create a Transportation Impact Fee ("TIF") program, but, if adopted by the City Council, would be the first step toward authorizing such a program. If the City Council adopts the proposed amendments, the next step in creating a TIF program would be for the City Council to consider and adopt a TIF program plan and/or development regulations that implement the goals set by the Comprehensive Plan by setting the parameters of such a program, including applicability of the program, the cost of the fees and management of the program consistent with RCW 82.02.050-.110.

3. The Proposal concerns a nonproject action under SEPA. The City issued the DNS for the Proposal on October 25, 2018. The DNS concluded that the Proposal would not have any probable, significant adverse impacts on the environment. The DNS also stated:

> the proposed amendments are of a non-project nature, primarily procedural, and have a citywide effect, rather than a site-specific effect. As such, the amendments would not affect the extent, intensity or rate of impacts to the built and natural environments. The amendments would accomplish the procedural requirements of RCW 82.02.050(5)(a) for establishing a transportation impact fee program to help mitigate a portion of the impacts attributable to planned residential and employment growth. Projects listed in the Comprehensive Plan would guide investment decisions by the City for mitigation payments made pursuant to a transportation impact fee program. Projects included in the list are drawn from capacity-improvement projects that are partially funded by the Move Seattle levy, projects identified in adopted modal plans, and Move Seattle vision projects identified through the Move Seattle levy planning process. The amendments would not in themselves create a transportation impact fee program. For future development of an impact fee program and a fee schedule, estimates for growth in trips on the transportation network would be based on growth estimates for *Seattle 2035*.

Exhibit 8 at 1-2.

4. Seattle Mobility Coalition appealed the DNS to the Hearing Examiner.

5. At the hearing, the Appellant called Morgan Shook to testify regarding the impacts of the Proposal on housing production and affordability. He testified concerning his experience with multiple impact fee programs in the region, and about a range of issues associated with different fee programs including some potential issues associated with the type of fee program identified in the Proposal. He discussed fee programs in the terms of their efficiency, and indicated the Proposal's cost-allocation basis was less efficient than a marginal-cost basis. A written analysis was prepared and discussed by Mr. Shook that analyzed the potential impact of the Proposal, and it identified loss of feasibility for certain of the densest development projects. Mr. Shook's analysis did not measure impacts of the Proposal on affordable housing. In addition, the identified loss of feasibility for certain of the densest development projects was not quantified such that it demonstrated a more than moderate effect on the quality of the environment.

6. The Appellant called Mike Swenson, a traffic and transportation expert who testified concerning the transportation infrastructure projects identified by the Ordinance, and the construction impacts that are likely to result from those projects. Impacts Mr. Swenson identified included, but were not limited to: construction related lane-closures and parking displacement; long-term parking loss; transit route closures and rerouting; construction impacts to pedestrians; construction related dust, noise, and glare. Mr. Swenson indicated that these projects were more likely to occur if identified as a result of the Ordinance. He testified that overlapping in sequence of the projects would exacerbate the potential impacts.

7. George Steirer, land use planner, testified regarding the City's procedural and substantive compliance with SEPA in relation to the Proposal with generalized statements about SEPA standards, and City SEPA practices.

8. Kendra Breiland testified concerning development of key components of the Proposal, in particular she testified to the use of cost-allocation methodology in other locations.

9. Andrew Bjorn responded on behalf of the City to Appellant's claims that the DNS should have analyzed impacts to housing and housing affordability.

10. Mark Mazzola testified for the City about the environmental review process typically used by the Seattle Department of Transportation, and about the status of projects identified as impact fee-eligible as an attachment to the proposal. He testified about the status for projects identified as impact fee-eligible as an attachment to the non-project action that is the subject of the appeal, and that this list of transportation infrastructure projects would be subject to additional SEPA review at the project level.

11. Ketil Freeman, Supervising Analyst, City Council Central Staff, testified concerning the SEPA review process for the Ordinance. Mr. Freeman conducts SEPA review for the legislative branch, and was the lead staff for the DNS. He also testified in response to Appellant's claims of procedural and substantive SEPA errors. Mr. Freeman testified that as part of the City's environmental review of the Ordinance, the City reviewed the proposed Ordinance and the SEPA checklist ("Checklist") prepared for the Ordinance, and determined that the Checklist contained sufficient information to make the threshold determination.

12. Andrew Bjorn testified in response to Appellant's claims that the DNS should have analyzed impacts to housing and housing affordability.

13. WAC 197-11-060.3.b 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.

14. WAC 197-11-315 provides:

> (1) Agencies shall use the environmental checklist substantially in the form found in WAC 197-11-960 to assist in making threshold determinations for proposals, except for:
> . . .
>
> (e) Nonproject proposals where the lead agency determines that questions in Part B do not contribute meaningfully to the analysis of the proposal. In such cases, Parts A, C, and D at a minimum shall be completed.

15. SMC 25.05.752 defines "impacts" as "the effects or consequences of actions. Environmental impacts are effects upon the elements of the environment listed in Section 25.05.444."

16. The impacts to be considered in environmental review are direct, indirect and cumulative impacts. SMC 25.05.060 D.

17. "A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth *caused by a proposal* . . . ." SMC 25.05.060.D.4. (Emphasis added.)

18. "Probable" is defined in SMC 25.05.782 as "likely or reasonably likely to occur . . ."

19. SMC 25.05.794 defines "significant" as "a reasonable likelihood of more than a moderate adverse impact on environmental quality. . . . Significance involves context and intensity . . . The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact . . . . Section 25.05.330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact."

20. SMC 25.05.330 directs that, in making the threshold determination, the responsible official shall determine "if the proposal is likely to have a probable significant adverse environmental impact . . . ." If the responsible official "reasonably believes that a proposal may have" such an impact, an environmental impact statement is required. SMC 25.05.360.

21. SMC 25.05.665 D. Subparagraphs D.1 through D.7 cover situations where existing regulations may be inadequate or unavailable to assure mitigation of adverse impacts and thus, SEPA-based mitigation is appropriate.

22. The SEPA Cumulative Effects Policy, SMC 25.05.670, states that:

A. Policy Background.

1. A project or action which by itself does not create undue impacts on the environment may create undue impacts when combined with the cumulative effects of prior or simultaneous developments;

. . . .

B. Policies.

1. The analysis of cumulative effects shall include a reasonable assessment of:

a. The present and planned capacity of such public facilities as sewers, storm drains, solid waste disposal, parks, schools, streets, utilities, and parking areas to serve the area affected by the proposal;

b. The present and planned public services such as transit, health, police and fire protection and social services to serve the area affected by the proposal;

c. The capacity of natural systems—such as air, water, light, and land—to absorb the direct and reasonably anticipated indirect impacts of the proposal; and

d. The demand upon facilities, services and natural systems of present, simultaneous and known future development in the area of the project or action.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 25.05.680.B, which also requires that the Hearing Examiner give substantial weight to the Director's determination.

2. The party appealing the Director's determination has the burden of proving that it is "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). Under this standard of review, the decision of the Director may be reversed only if the Hearing Examiner is left with the definite and firm conviction that a mistake has been committed. *Cougar Mt. Assoc. v. King County*, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).

3. SEPA requires "actual consideration of environmental factors before a DNS can be issued." *Norway Hill Preservation and Protection Ass'n. v. King County*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). The record must "demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Id.* at 276 (citation omitted).

4. Nothing in SEPA requires that an agency's environmental review be completely contained within a checklist and DNS. A SEPA checklist is simply a variation of a prescribed form and normally does not include an analysis of the proposal. *See, e.g.* SMC 25.05.970. An agency is required to review the checklist, SMC 25.05.330 A.1, but it may also require more information of the applicant, conduct further study and consult with other agencies about the proposal's potential impacts. SMC 25.05.335. It is expected that the agency will utilize its own knowledge and expertise in analyzing the proposal. As noted above, the question on review is whether the agency actually considered environmental factors. *See Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 881, 613 P.2d 1164 (1980), *overruled on other grounds, Save a Neighborhood Environment (SANE) v. City of Seattle*, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984).

5. The Appellant argued that Council Central Staff had not been properly delegated authority to serve as the SEPA responsible official. There is no indication based on the Code or case law that the delegation of authority was improper for identifying a responsible official under SEPA.

6. Appellant through Mr. Shook's testimony indicated that impact fees would cause an increase in cost of housing, because they would reduce the feasibility of certain development projects. Mr. Shook testified, but did not introduce evidence demonstrating, that the cost of any housing would increase significantly, and that such increase would result in any negative significant environmental impact. The mere fact that an expert states that a proposal will have a significant adverse impact is not sufficient, when that statement is not accompanied by analysis or evidence that quantifies the level of impact. If such were the case, then hiring an expert who

parrots the words that identify the SEPA threshold for EIS review would be all that was necessary for SEPA appellants to prevail.

7. Further, Mr. Shook's testimony simply went to demonstrating the potential lack of feasibility of some development projects due to cost increases. SEPA environmental review is limited to analysis of potential impacts to the natural and built environment. Elements of the environment to be considered under SEPA review are listed in SMC 25.05.444. Economic impacts to property owners is not an element of the environment that is required to be studied under SEPA. Economic impacts are considered only when they will cause a probable significant adverse environmental impact to one of the elements of the environment. In this case Mr. Shook's testimony and written analysis did not demonstrate how lack of feasibility of development projects (in and of itself an economic impact on the development community) would translate into a significant impact on the availability of affordable housing or other elements of the environment subject to SEPA review.

8. Appellant's expert indicated that significant impacts would occur as a result of the projects identified with the Ordinance if all projects were developed at the same time or within a close time. However, nothing in the record indicates that such a development scenario is likely, and SEPA review is not required for speculative worst-case scenarios. In addition, Appellant did not take into account that some elements of such projects are exempt from SEPA review. Finally, even if the projects were developed within a close time period, Mr. Swenson's testimony was not supported by adequate evidence or analysis to demonstrate that any of the construction impacts would have a more than moderate negative impact on the environment. Mr. Swenson's testimony consisted of listing various construction and development related impacts, and delivering a conclusory statement that these impacts would be "significant." This later statement was not accompanied by analysis that quantified or measured impacts that are likely to be associated with potential project. Therefore, Mr. Swenson's testimony failed to demonstrate both the "probability," and the "significance" of the potential impacts raised in his testimony, and the Appellant failed to meet its burden with regard to these issues.

9. Appellant did not quantify the scale or probability of impacts related to parking, and did not meet its burden to demonstrate the proposal is likely to result in significant negative parking impacts.

10. Appellant raised the issue of a failure to consider cumulative impacts, but Appellant failed to demonstrate the probability of any negative significant environmental impacts arising as cumulative impacts. Appellant did not describe what the nature of cumulative impacts would be in scope, type, or scale of impacts.

11. There is no evidence in the record that the proposed Ordinance is likely to have a significant adverse impact.

12. The Hearing Examiner is not left with a definite and firm conviction that a mistake has been made concerning Appellant's allegations that the City has conducted SEPA review for the Ordinance in a piece-meal fashion. Appellant has not demonstrated that the proposed legislation "cannot or will not proceed unless" additional ordinances are adopted to implement a TIF program. The Proposal consists of amendments to the City's Comprehensive Plan. A comprehensive plan is a generalized land use policy statement, and development regulations are the implementation of that generalized statement. *See e.g.* RCW 36.70A.030(5). The City's Comprehensive Plan states:

> Policies should be read as if preceded by the words It is the City's general policy to. A policy helps to guide the creation of or changes to specific rules or strategies (such as development regulations, budgets, or program plans). City officials will generally make decisions on specific City actions by following ordinances, resolutions, budgets, or program plans that themselves reflect relevant Plan policies, rather than by referring directly to this Plan. Implementation of most policies involves a range of actions over time, so one cannot simply ask whether a specific action or project would fulfill a particular Plan policy. For example, a policy that states that the City will give priority to a particular need indicates that the City will treat the need as important, not that it will take precedence in every City decision.

City of Seattle 2035 Comprehensive Plan at 17.

Adoption of generalized policies of a comprehensive plan do not require (or even guarantee) that implementing ordinances be adopted. Appellant presented no evidence that the Ordinance cannot or will not be adopted by Council unless additional ordinances are adopted to implement a TIF program.

13. Similarly, Appellant has not demonstrated that the proposal is an interdependent part of a larger proposal and depends on the larger proposal as its justification or for its implementation. The Appellant did not present caselaw or other argument that showed other cases wherein SEPA review for an amendment to a comprehensive plan was found inadequate because it did not include environmental review of implementing development regulations or programs. Based on the presentations of the parties, there is an absence of precedent requiring SEPA review for an amendment to a comprehensive plan to include environmental review of implementing development regulations or programs. One case cited by the parties, *Spokane City, v. E. Washington Growth Management Hearings Board*, 176 Wn. App. 555, 309 P.3d 673, (2013) does concern the adoption of a comprehensive plan amendment, and associated development regulations. In that case, the comprehensive plan amendment was done concurrently with a site-specific rezone. Comprehensive plan amendments addressing site-specific rezones are typically part-and-parcel with related site-

specific rezone development regulations – they can be viewed as essentially a single action. This is distinguishable from the case at hand where the Comprehensive Plan amendments are a goal for subsequent adoption of a program. The Comprehensive Plan amendments proposed in the Ordinance seem to lack sufficient detail to identify the environmental impacts that may be associated with a subsequent implementing program. The proposed Comprehensive Plan amendments do not ensure the adoption of a TIF program, and does not establish important elements of such a program, such as fee amounts and potential exemptions. In addition, the environmental impacts of development projects that may be funded by a TIF program are merely speculative at this time, because funding for those projects is not provided for by the Ordinance. The Ordinance is merely a directive to create a program to fund such projects.

14. TIF program plans and/or development regulations that may be adopted to implement the Ordinance have not been analyzed as part of the DNS SEPA review that is the subject of this appeal – both parties agree on this point. In addition, environmental analysis that must accompany any such proposed regulations was not addressed in the Environmental Impact Statement ("EIS") for the City's Comprehensive Plan. In that EIS, transportation impact fees were only identified as a potential mitigation tool, and the potential environmental impacts of a TIF program were not analyzed. New SEPA review must accompany any adoption of TIF program plans and/or development regulations implementing the Ordinance.

15. On the face of it, the City took an approach to the SEPA review in this matter that improperly truncated the required environmental analysis for the proposal. There is no exemption of non-project actions from SEPA review, or from adequate environmental review directed at identifying potential significant environmental impacts. The Code allows for "more flexibility in preparing EIS's on nonproject proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals." SMC 25.05.442. However, there is no comparative softening of the analysis required at the time of the threshold determination for nonproject proposals. The City concluded that because the proposal was of a nonproject nature, it was not required to complete Section B of the environmental checklist, stating:

> This is a non-project proposal with no particular development site. This section is left blank pursuant to WAC 197-11-315(1)(e). Potential impacts are discussed and disclosed in Section D.

Exhibit 7 at 3.

WAC 197-11-315 directs agencies to utilize an environmental checklist to assist in making the threshold determination, but does provide an exception for:

> (e) Nonproject proposals where the lead agency determines that questions in Part B do not contribute meaningfully to the analysis

of the proposal. In such cases, Parts A, C, and D at a minimum shall be completed.

In addition, SMC 25.05.960 provides with regard to Section B of a SEPA checklist and nonproject proposals the agency may "exclude any question for the environmental elements (Part B) which they determine do not contribute meaningfully to the analysis of the proposal."

While there is no bright-line rule or precedential caselaw preventing an agency from simply not answering any questions in Section B, the language of WAC 197-11-315 does not indicate that the lead agency can simply ignore Section B. Coupled with the directive under SEPA that a threshold determination must be supported by actual analysis and disclosure of the environmental impacts of a proposal, and that mere conclusory statements about impacts in a DNS do not convey analysis on the part of the City, the City's mere reference to WAC 197-11-315(1)(e) with no demonstration that it considered, or made a determination with regard to, the questions in Section B is reversible error in this case. "Agencies shall to the fullest extent possible . . . [p]repare environmental documents that . . . are supported by evidence that the necessary environmental analyses have been made." SMC 25.05.030.B.

The allowance for excluding questions in Section B for nonproject proposals is provided to allow an agency to skip questions directly related to project proposals. For example, many questions concern conditions at a specific "site," and many nonproject proposal have no clearly identifiable site or cover such a broad area as to render a response to such questions meaningless. However, other questions are more general in nature (*See e.g.* "Proposed measures to reduce or control housing impacts, if any," "How many additional parking spaces would the completed project or non-project proposal have?" or "Proposed measures to reduce or control transportation impacts, if any." Exhibit 8 at 10, 12 and 13.), and could be applicable to a nonproject proposal. The DNS indicates no consideration for these questions.

16. In this case, the Checklist was identified by the City as central to the City's threshold determination. Aside from the Ordinance, the Checklist was the only information identified by the City as part its consideration of the potential environmental impacts. No additional information was requested about the potential impacts of the Ordinance. Where Section B of the Checklist is left blank[1], and the DNS does not show a determination as to the questions therein, the DNS was not based on "information reasonably sufficient to evaluate the environmental impact" of the Ordinance, the record does not support a finding of prima facie compliance by the City, and the DNS should be reversed.

17. The City filed a motion to strike materials submitted by the Appellant with its Supplemental Post-Hearing Brief. The Hearing Examiner reopened the hearing "to

[1] Except a reference to the exemption and analysis in a different section of the Checklist.

address a narrow question of law not fully briefed by the parties in their closing arguments." At the reopened hearing the Hearing Examiner emphasized that he was seeking additional briefing concerning case law. There was no indication by the Hearing Examiner that the record was open for additional evidence to be submitted. The Hearing Examiner did err in not stating at the end of the hearing that the record was closed, however, with the close of the hearing any party wishing to submit additional evidence for review should have done so by motion (under any of the theories presented by Appellant) rather than simply attaching it to closing arguments. Both counsel for the City and Appellant as experienced practitioners understand that it would be poor precedent to allow parties to submit new evidence with written closing after the hearing has closed, and in the absence of a motion to consider such materials. The City's Motion to Strike is **GRANTED.**[2]

Decision

The Determination of Non-Significance is **REVERSED.** The City must issue a new threshold determination.

Entered this 24th day of October, 2019.

Ryan Vancil, Hearing Examiner
Office of Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

Under RCW 43.21C.075 any appeal of the City's threshold determination shall accompany the underlying governmental action. Consult applicable local and state law, including SMC Chapter 25.05 and RCW 43.21C.075, for further information about the appeal process.

[2] The City filed a reply to the Appellant's response to the motion to strike. HER 2.16 provides "[t]he Hearing Examiner may provide for the filing of a reply or other additional briefing on a motion, and may call for oral argument prior to ruling." The City did not request to submit the reply, and the reply is hereby not accepted in the record, and has not been reviewed by the Hearing Examiner.

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Amended Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **SEATTLE MOBILITY COALITION**, Hearing Examiner Files: **W-18-013**, in the manner indicated.

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Dated: October 24, 2019

Galen Edlund-Cho
Executive Assistant