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

In the Matter of the Appeal of	Hearing Examiner Files: **W-21-007**
TreePAC Environmental Impact Review (TEIR) and Greenwood Exceptional Trees (GET),	Department Reference: Townhouse Reforms Legislation

from a decision by the Director, Seattle
Office of Planning and Community Development.

I. FINDINGS OF FACT

1. Background. The Seattle Office of Planning and Community Development ("Department") issued a Determination of Non-Significance under the State Environmental Policy Act, Ch. 43.21C RCW ("SEPA") on proposed legislation. TreePAC Environmental Impact Review and Greenwood Exceptional Trees ("Appellants") appealed.

2. Hearing. A remote hearing was held February 28, and March 1 and 2, 2022. Daniel B. Mitchell, Asst. City Attorney, Seattle City Attorney, appeared for the Department. The Appellants appeared through Richard Ellison, Kevin Orme, and David Moehring.

3. Department Witnesses. The parties coordinated on witness presentation with Department witnesses also directly testifying for the Appellants.

- Brennon Staley has been the Department Strategic Advisor for the past five years and was previously a land use planner. He holds a BS in Environmental Engineering and a Masters of Urban Planning. He has over 15 years of experience with policy analysis, legislative development, and environmental documentation. He had the lead role in preparing the proposed legislation and environmental analysis.

- Geoffrey Wentlandt has been the Department Land Use Policy Manager since 2016, and before that, he was a Senior Planner for eight years. He holds a BA in both Architectural Studies and Economics, with a Masters of Urban Planning. He worked on urban planning issues in the private and public sectors. He reviewed the environmental analysis and issued the SEPA Determination of Non-Significance.

- Nicolas Welch has been the Department Strategic Advisor for the past three to four years and before that was a Planning and Development Specialist, with extensive GIS experience. He has a BA, and an MA in Urban and Environmental Planning. He prepared a GIS analysis for the proposal.

- Jennifer Pettyjohn is a Department Senior Planning and Development Specialist, with 30-years of City experience. She provided permit data to Mr. Staley.

- Megan Neuman is the Department of Construction and Inspections Land Use Policy and Technical Teams (POTEC) Manager. She manages seven teams comprising POTEC and has been in this role for just over a year. She has worked at SDCI since 2014, starting as a zoning land use planner then becoming a POTEC technical expert, which she now manages. She holds a BA in Architecture with an Urban Studies minor and a Masters in Urban Planning and Policy. She provided background to Mr. Staley on existing development practices and potential outcomes from the proposed legislation.

- Faith Ramos works at Seattle City Light and had no role in the SEPA review or in drafting the proposed legislation. She prepared a report on land use tree protection codes and enforcement in 2016/2017 when she worked at the Department of Construction and Inspections. Appellants requested her testimony on this topic, so she briefly addressed questions on this earlier work.

4. Appellants' Witnesses. The Appellants, besides calling the above witnesses for direct testimony, also called these witnesses:

- William Lider, PE, CESCL, founded Lider Engineering, PLLC in 2008 and has over 43-years of experience in engineering, erosion control and stormwater/utility design for municipal and private clients in the Puget Sound area. He holds a BS in Civil-Environmental Resources Engineering.[1]

- Brian Derdowski served three terms as a King County Councilmember. He holds a BA with majors in Government and Business/Economics. He testified on policy and environmental review.[2]

- Martin Henry Kaplan is a licensed architect and principal of Martin Henry Kaplan, Architects AIA. His resume details extensive involvement in Seattle land use and design matters dating to 1980.[3]

- Kathleen L. Wolf, PH.D., is a social scientist who focuses on urban greening urban forestry. Her resume details her publications on these topics.[4]

- Richard Lee Ellison holds a BS in Biology and Geology and an MS in Botany. He formerly taught as an Adjunct Professor throughout the Puget Sound region.[5]

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[1] App. Ex. 33 (Resume); App. Ex. 66 (Declaration).
[2] App. Ex. 35.
[3] App. Ex. 31.
[4] App. Ex. 36.
[5] App. Ex. 51.

- Woody Wheeler has owned and operated Conservation Catalyst since 2009, which provides education, tours, and other services on birding, natural history, and conservation. He was the Seattle Parks Foundation Program Director from 2005-2009, and the Director of Audubon Centers, Washington from 1999-2004. He holds a BS in Environmental Studies and BA in Geography.[6]

- David Moehring is a Senior Capital Planner at UW, Bothell. He holds both a BS and Masters in Architecture. He is a registered architect with the State of Illinois and has over 25 years' experience building design and renovation.[7]

- Michael Oxman, ISA Certified Arborist, has been a self-employed arborist since 1985, with work in 2002 and 2003 for the Seattle Parks Department and Seattle Tree Preservation.[8]

- Suzanne Grant lives in a Seattle neighborhood and testified on her experience with townhouse/rowhouse redevelopment of a single-family lot.[9]

5. Exhibits. The Examiner admitted Department Exhibits 1-18. The Appellants objected to 19 and 20 as they related to proposed tree code amendments not yet adopted. As only provided for context, the Department did not object to exclusion. Appellants' exhibits were admitted without objection, including three new hearing exhibits.[10]

6. Briefing. The parties both submitted post-hearing closing and reply briefs.

7. Pre-Hearing Motion. The Department moved for partial dismissal. As the Examiner cannot resolve policy disputes or entertain challenges to adopted codes, the Examiner granted the motion requesting dismissal of those questions.[11]

8. Site Visit. As a non-project action, there is no site to visit. However, Appellants provided several development examples, identifying some as meeting their criteria and others which did not. On March 27, 2022, the Examiner visited several.[12] The site visits provide context for the evidence received but are not evidence.

9. Appeal Issues. The appeal raised issues on impacts, including cumulative impacts, to lot coverage (Issue A), tree canopy (Issue B), transportation access (Issue D), stormwater/sewer infrastructure (Issue F), solar access (Issue I), historic preservation/cultural resources (Issue J).

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[6] App. Ex. 47.
[7] App. Ex. 32.
[8] App. Ex. 34.
[9] App. Ex. 45.
[10] The Clerk's Master list identifies the exhibits. The Appellants also submitted a written version of their opening argument and the Department provided hearing transcripts.
[11] Order on Department's Motion for Partial Dismissal (February 8, 2022).
[12] Sites visited included townhouse and rowhouse examples along Greenwood Ave. N. Phinney Ave. N, NW 63rd St., and 34th Ave. W.

10. Townhouses/Rowhouses, Generally. The Comprehensive Plan identifies a need for more affordable housing, including for the City's middle-income workforce. The City created the Affordable Middle Income Housing Advisory Council to assess housing options. "Our work seeks to … support strategies that address the growing housing affordability needs of Seattle's middle-income workforce."[13] This Council found townhouses provide home ownership opportunities at costs lower than the single-family homes prevalent throughout the City, which is increasingly out-of-reach for all but higher income households.[14]

> Recent home prices represent a dramatic shift from a generation ago. From 1988 to 2017, the average price of a Seattle-area home increased from 2.5 times the average income to 5.7 times the average income. … **Overall, these numbers highlight … that owning a home in Seattle is no longer affordable to the vast majority of people who live and work here**.[15]

In assessing ownership concerns, the Advisory Council engaged the public, raising questions on desired housing, housing attributes, and location. For many, townhouses were identified as a preferred housing type, including for many who cannot afford detached homes but wish to own their residence.[16] In a survey, out of eight options, 70% of people under 35 ranked townhouses as a desired housing type. However, permit data and interviews with building industry professionals indicated townhouse development is decreasing due to regulatory requirements especially challenging for smaller, non-luxury developments.[17] This review resulted in several recommendations[18] and led (in part) to the townhouse reform legislation.[19] The record details the history behind present home ownership market challenges:

> Before the introduction of zoning laws, Seattle had no restrictions on where different types of homes could be located. Apartment buildings, flats, and boarding houses were allowed citywide. In the 1920s, Seattle adopted its first zoning ordinance, assisted by Harland Bartholomew, a St. Louis planner who in 1919 said his goal for that city's zoning plan was to "preserve the more desirable residential neighborhoods" and to prevent movement in "finer residential districts … by colored people."

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[13] Dept. Ex. 16 (Housing Advisory Council Policy Recommendations, 2020), p. 3.
[14] Testimony, Mr. Staley.
[15] Dept. Ex. 15 (Housing Choices Report, 2019), p. 12, emphasis in text ("the private market is creating few new homeownership opportunities…." *Id.* at p. 11; App. Ex. 17 (Market Rate Housing Needs and Supply Analysis, BERK 2021), p. iii ("The growing population of higher income households … during the past decade has been paired with a net loss of households with incomes between 50% and 100% of AMI.")
[16] *See e.g.*, Dept. Exs. 15 (Housing Choices Report 2019) and 16 (Housing Advisory Council 2020); and App. Ex. 18 (Housing Choices Public Engagement 2020).
[17] Dept. Ex. 1, p. 1.
[18] Dept. Ex. 16.
[19] Testimony, Mr. Staley.

> Adopted in 1923, Seattle's first zoning ordinance outlawed multi-unit structures in much of the city and introduced areas reserved exclusively for detached houses. … Single family zoning and limits on density encourage large, expensive homes and result in housing scarcity that drives up prices overall. This creates a very high financial bar for entry into many Seattle neighborhoods and disproportionately limits housing access for low-income households and people of color.[20]

Mandatory Housing Affordability, which included City-wide rezoning and a significant overhaul of the land use code, was a start in addressing these issues. It underwent EIS review. In comparison, the changes here adopt no rezones, and do not significantly alter buildable areas or densities. The proposal instead eliminates duplicative review processes and measures which add to housing costs consistent with City policy.[21]

11. Proposal Summary.[22] Seattle land use code complexity can create unnecessary permitting steps, as occurred with townhouses and rowhouses. These are similar housing products. One difference is that rowhouses must front the street. Also, in the LR-1 zone (the primary zone where townhouse and rowhouses occur), townhouses face greater density limitations than rowhouses, cottage housing and apartments.[23] Lots are thus subdivided with rowhouses on the street frontage, with townhouses behind.

The legislation eliminates the incentive behind the extra permitting step by lowering the LR-1 townhouse density limit by 150 square feet, or from one townhouse unit per 1,300 square feet to 1,150 square feet. The density is also applied to rowhouses on interior lots. The reduction was chosen as development on larger interior lots is frequently developed below one unit per 1,300 square feet but rarely below one unit per 1,150 square feet.

> Together, these changes would continue to allow development consistent with what is occurring today but would substantially reduce complexity and delay in the permitting process. It would also remove the incentive to subdivide the lot to achieve higher densities. The proposal would not modify the total floor area or lot coverage allowed in these projects.[24]

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[20] Dept. Ex. 15 (Housing Choices Report), p. 4. 51% of white households own their own home compared to 24% of black households. *Id.* at p. 12. "From 1990 to 2010, the black share of the … [Central Area] dropped" 58% to 24% "while the white share increased" 32% to 58%. *Id.* at p. 14.

[21] Regulatory processes "often result in added time and cost to new housing development, as well as land use zoning that often limits housing choices." Exhibit 16 (Housing Advisory Council 2020), p. 3; Dept. Ex. 15 (Housing Choices Report), p. 17 ("**1. Simplify rules for smaller projects**. … **3. Make permitting faster and predictable**. Establish clearer permitting requirements and reducing review times could reduce the cost of construction, particularly for small-scale and lower-cost projects."), emphasis in text. *See* Dept. Ex. 16, p. 7.

[22] *See* Dept. Ex. 1. (Proposal Summary Townhouse Reforms) for description, and Dept. Ex. 2 (draft legislation), for proposed code language.

[23] Apartments, cottage housing, rowhouse developments on corner lots, and rowhouse development on lots greater than 3,000 square feet can be built in the LR1 zone without any density limits, and apartment developments have achieved density levels of 1 du/500 sq. ft. Dept. Ex. 3, p. 18.

[24] Dept. Ex. 1 (Proposal Summary Townhouse Reforms), p. 2.

These changes are coupled with bike and vehicular parking revisions. The City quadrupled long-term biking stalls in 2018 on residential projects and added a public short-term bike parking requirement.[25] Short-term bike parking was designed for apartments with common areas throughout the first floor and basement. Townhouses and rowhouses have more limited open space and common areas so many developments have been using the front yard of one unit for common bike storage, reducing green space. The proposal removes the short-term bike parking requirement for townhouses and rowhouses and makes long-term bike parking easier to accommodate.[26] The proposal also: (1) excludes from floor area surface parking only covered by certain types of limited projections; (2) allows parking 26 instead of 25-feet from the alley property line; (3) changes garage parking space minimize size from large to medium; and, (4) clarifies how standards such as density limits apply on lots with multiple housing types.

Department witnesses explained the rationale behind these changes, which allows the portion of car parking under a building overhang to not count towards FAR. While garages are not exempt, this measurement approach makes for a more efficient parking arrangement with less impervious surface and incentivizes rear parking, which is generally preferred. As the larger parking stall size has meant projects cannot have normal size bedroom on the first floor the change improves living arrangement options.

12. Seattle Tree Canopy. Seattle's Urban Forest Stewardship Plan set a goal for 30% tree canopy cover (on average) by 2037.[27] 2016 LiDAR (light detection and ranging) data showed the City at 28%.[28] This study found that multi-family areas which comprise 11% of the City at about 23%, which exceeds the 20% goal.[29]

> The majority of Seattle's urban trees are found in two locations: residential areas (representing 67% of the land with 72% of Seattle's tree canopy), and in the right-of-way interspersed throughout the city (representing 27% of the land and 22% of the canopy). … Canopy exceeds targets in developed parks, natural areas, multi-family, and institutional areas; is close to target in single-family, downtown, and commercial areas; and is below target in industrial areas.[30]

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[25] Dept. Ex. 16 (Housing Advisory Council Policy Recommendations, 2020), p. 45 (such requirements can "have unintended consequences like limiting open space in a townhouse development…"); Testimony, Mr. Staley.
[26] The parking requirement which has been one long term and one short term per unit, with a total two-space minimum, would now only require one space. Several other adjustments were made: (1) bike parking allowed in dwelling unit; (2) bike lockers/sheds allowed in certain setbacks and separations; (3) enclosed bike parking does not count toward floor area if within a freestanding structure exclusively for biking parking; and (4) weather protection and freestanding structures used exclusively for bike parking do not count in measuring building length and width.
[27] App. Ex. 1 (2016 Tree Canopy Assessment), p. 1.
[28] App. Ex. 1 (2016 Tree Canopy Assessment), p. 1.
[29] App. 1, pp. 2 and 7; Testimony, Mr. Staley.
[30] App. Ex. 1 (2016 Tree Canopy Assessment), p. 17.

The Appellants were skeptical that the 2016 canopy cover estimates will exist when a survey is completed later this year and provided examples of townhouse/rowhouse projects where tree canopy and vegetation has been reduced. The City is considering tree protection ordinance revisions. As this update is still under review, Appellants objected to including this material, so it was excluded.

13. Appellant Description of Legislation Impacts on Tree Canopy. Appellants detailed tree canopy benefits, including manufacturing oxygen, absorbing particulate, slowing stormwater run-off, mitigating summer heat, absorbing carbon, and improving quality of life, emphasizing their role in climate resiliency and emotional health.[31] Appellants raised concerns about current tree requirements, including both canopy removal and substandard planting conditions for vegetation, which can occur due to cramped soil conditions. Extensive examples of townhouse and rowhouse development throughout the City were provided, with testimony on examples of projects the Appellants viewed as incorporating sufficient tree canopy and those which had not.[32] The testimony detailed present conditions but did not explain how the proposal exacerbates these issues.

In addressing questions on whether the Appellant arborist had prepared a study on the impacts of the proposal she confirmed no ("I can't say that I have. … [N]o, we have not.").[33] Another Appellant witness, a botanist, stated the tree protection code has been unsuccessful in practice,[34] acknowledging the projects testified about were developed under historic or current development regulations. Another witness expressed concerns with single-family areas transferring to the LR1 zone and referenced a newspaper article related to pending state legislation that would require more "missing middle" housing.[35] The proposal is not a rezone and is unrelated to this pending legislation.

14. Department Description of Impacts. The Department described the LR1 density change as minor, as the proposed density limit is already being achieved under the existing code.[36] The proposal does not rezone or amend zoning classifications. It does not change height limits, FAR,[37] setbacks, open space, or green factor (vegetation) requirements. The proposal's principal feature is to largely eliminate the need to subdivide property into two parcels to achieve outlined densities. Under the current regulatory structure, development is occurring like what will occur with the legislation. There is just an added step which adds to housing costs as detailed in various exhibits and hearing testimony.[38]

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[31] App. Ex. Ex 37, Table 2; App. Ex. 38.
[32] Testimony, Mr. Oxman and Mr. Moering.
[33] Testimony, Ms. Wolf (TR, Vol. II, p. 386).
[34] Testimony, Mr. Ellison, point to for example, Exhibits 20 and 21; *see also* Testimony, Mr. Wheeler, App. Exs. 46 and 47.
[35] Testimony, Mr. Ellison (TR, Vol. III, p. 435-436); App. Ex. 77.
[36] Testimony, Brennon Staley; Ex. 17
[37] The vast majority of LR zoning has the MHA suffix so do not have density requirements for townhouses and rowhouses, cottage housing, apartments, and rowhouses on corner or 3,000 square foot lots or more. Testimony, Mr. Staley (TR, Vol. 1, pp. 32-33)
[38] Mr. Staley detailed what is presently happening versus what will happen with the proposal, noting his consultation with others confirming his analysis, including Ms. Neuman and Mr. VanSyke. He also reviewed permit data, requesting information from Ms. Pettyjohn. *See* Dept. Exs. 7 and 8.

The legislation won't significantly change floor plate. Allowing parking underneath buildings could reduce impervious surface and slightly change densities. Removing bike requirements may free open space that might otherwise have bike sheds. Basic massing of buildings and open space is unchanged. The Department assessed the revisions in comparison with what is occurring today, concluding that overall impacts are not likely to be significant.

The Department's witnesses, experienced professionals with expertise based on education and experience with code development, analyzed what the new revisions are expected to accomplish, concluding the revisions would have relatively minor vegetative impacts.[39] Testimony from Ms. Neuman confirmed this analysis. Mr. Staley shared draft legislation and she provided feedback as is common practice. She agreed the code change is a small change to the density and would not be significant to development capacity ("Yes, I agree with that.") She explained that similar densities are being achieved through the lot segregation process.

Mr. Staley stated the Department completed a GIS analysis of the proposal, assessed the development capacity model, completed an informal permit review, reviewed site plans, and consulted with colleagues, townhouse builders, as well as relying on personal judgment/expertise. He has worked on tree issues for many years, including serving on the Urban Forestry Core Team, the group which developed Canopy Cover analysis and Stewardship Plan.[40]

> In terms of plants. . . we're not modifying, we're not allowing development in any new areas, we're not allowing any new types of development, we're not changing the floor area, the height, we're not changing the stormwater regulations, we're not changing the green factor regulations, we're not changing the open space regulations, parking regulations. …
>
> Removing the short-term bike parking requirement will free up more space for planting, and that could potentially - - that could be planted with trees and vegetation . . . allowing more flexibility where you locate bike parking so that it doesn't as frequently need to be in front and rear setbacks also would allow for potential more space that could potentially be planted. Allowing parking to be partially underneath the building could also potentially reduce the amount of . . . impervious space needed for parking. And . . . making it easier to put on alleys similarly could because it would remove the need for driveways. On the other side, if - - in some cases, if it changes the density of a . . . unit, that might slightly increase impervious surface, which would reduce plants.[41]

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[39] Testimony, Mr. Staley; Dept. Ex. 3 (SEPA Checklist), including Section D for non-project actions; Dept. Ex. 4 (Decision).
[40] Consultation with Nick Welch (Dept. Ex. 6).
[41] Staley Testimony, Volume I, p. 71-73

15. Stormwater and Sanitary Sewer Impacts. Appellant witness testimony expressed concern about components of the City sewer system composed of vitrified clay pipes from the 1940's.[42] Appellants' evidence explained how trees help reduce stormwater runoff and expressed a desire for stronger code requirements. The Appellants stated there is overflow in lower areas with heavy flows. The Appellant's stormwater witness did not complete a surface water review of any specific project or project block and did not detail how the revised legislation would exacerbate existing conditions. He addressed the importance of maintaining tree canopy and the stormwater impacts ensuing when canopy is degraded or reduced.[43] But the witness had not prepared a report on proposal impacts ("No I have not") and was unclear as to proposal features.[44] He acknowledged the declaration submitted did not address the proposal but discussed the relationship between tree retention and stormwater runoff.[45]

16. Other Issues. The appeal raised issues on impacts to transportation, solar access, and historic preservation and cultural resources. The Appellant witnesses did not explain how the proposal itself impacts them. Appellants did not detail how the bicycle and vehicle parking modifications will cause any significant changes to the built landscape or how the proposal would limit solar access. As height, FAR, and setbacks are not being revised, there was no demonstration that solar access is an issue with the proposal. Densities are likely to be roughly the same as similar densities are already being achieved through the added permitting described in Finding 11. Similarly, Appellant's evidence did not detail how the proposal impacts historic preservation and cultural resources. As with tree and vegetation requirements, requirements addressing these issues are not being revised.

17. Department Approach to SEPA Review. Testimony was received on the Department's approach to SEPA and when an EIS would be prepared. Typically, this would be when a proposal could cause a real perceptible shift in land use pattern which differs from growth patterns called for in the Comprehensive Plan or a likelihood of causing a LOS exceedance (i.e., parks, transportation, or utilities). If the policy change could lead to conflicts with local, state or federal regulations, then this could signal significance. As a Department witness explained:

> [The proposal is] not an upzone. The proposal is largely a matter of technical corrections and clarifications to the code that address some unintended ways that the current regulations are being applied and lead to unnecessary administrative aspects in the permitting process. So the code changes that are being proposed here are -- are very narrow compared to the type of code changes that we have looked at before that would require an EIS.[46]

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[42] App. Ex. 65; Testimony, Mr. Lider,
[43] *See* witness declaration at App. Ex. 66.
[44] Testimony, Mr. Lider (TR, Vol. II, pp. 264 and 266).
[45] Testimony, Mr. Lider (TR, Vol. II, p. 265); App. Ex. 66; *See also* App. Ex. 30.
[46] Testimony, Mr. Wentlandt (TR, Vol. 1, p. 165).

The MHA proposal was distinct:

> That proposed action made zoning changes in 27 urban villages across the city. It addressed many more zones in addition to the zones that I'm looking at on the screen. It changed height limits for pretty much every zone, including neighborhood commercial zones, lowrise zones [along with density and FAR], highrise zones, midrise zones, residential small lot zones. It also expanded I think over a dozen urban villages on the City of Seattle's future comprehensive plan land use map.[47]

In contrast, the proposed legislation clarifies and makes minor code revisions to improve the regulatory review process. It does not exacerbate current conditions and so lacks cumulative significance.

II. CONCLUSIONS OF LAW

1. Jurisdiction and Standard of Review. The Examiner has jurisdiction over this SEPA appeal of Department SEPA review of a legislative proposal.[48] Substantial weight is accorded the SEPA Determination. Absent clear error, the Determination is upheld.[49] This is a deferential review standard. The Director's decision is only reversed if the Examiner, on review of the entire record, and in light of public policy expressed in the underlying law, is "left with the definite and firm conviction that a mistake" was made.[50]

To meet this burden, actual evidence of probable significant adverse impacts from the proposal must be provided.[51] "Significance" is "a reasonable likelihood of more than a moderate adverse impact on environmental quality."[52] SEPA does not require "consideration of every remote and speculative consequence of an action."[53] An appellant does not meet its burden by only arguing " they have a concern about a potential impact, and an opinion that more study is necessary."[54]

In evaluating impacts, a proposal is evaluated based on the context it is set within. Impact assessment considers the extent to which the action will cause adverse environmental effects exceeding those existing uses or conditions.[55] Establishing baseline

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[47] Testimony, Mr. Wentlandt (TR, Vol. 1, p. 171).
[48] SMC 25.05.680
[49] WAC 197-11-680(3)(a)(viii) ("Agencies shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight."); RCW 43.21C.075(3)(d); *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 523 (1985).
[50] *Moss v. Bellingham*, 109 Wn. App. 6, 13 (2001).
[51] *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719 (2002); *Moss v. City of Bellingham*, 109 Wn. App. 6, 23 (2001).
[52] WAC 197-11-794(1).
[53] *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 526 (1985); WAC 197-11-330(3).
[54] *Save Madison Valley*, HE MUP-20-023, Amended Findings and Decision at 11 (June 18, 2021).
[55] *Chuckanut Conservancy v. WA State DNR*, 156 Wn. App. 274, 285, (2010); *Wild Fish Conservancy v. WDFW*, 502 P.3d 359, 372 (2022)

environmental conditions helps in assessing impacts.[56] The context here is a highly urbanized environment, as the Appellant documented in their depictions of townhouse and rowhouse projects developed under the existing code structure. If a proposal does not change "the actual current uses to which the land was put nor the impact of continued use on the surrounding environment" then it is not a "major action significantly affecting the environment and an EIS is not required."[57]

2. "Prima Facie" Compliance. Case law has referred to a requirement that the SEPA lead agency establish "prima facie" compliance with SEPA.[58] The requirement's source is unknown. SEPA does not use the term, imposing the "substantial weight" standard.[59] It is unclear whether the judiciary intended to create a review standard not found in SEPA or has repeated citations from earlier cases without confirming the statutory source. Given the ambiguity, the Examiner reviewed for prima facie compliance.

The Department prepared a SEPA Checklist and written analysis detailing proposal impacts.[60] This is a non-project action[61] so contains less detail than a specific project action, but the Department completed the procedural steps needed to adequately consider impacts. This was detailed in the written record and explained in testimony from highly experienced professionals explaining how the analysis was completed and how they concluded that proposal effects fell short of probable significance. The Department demonstrated prima facie compliance with SEPA.

3. Department's Review. The potential impacts were properly analyzed in relation to the established baseline. Baseline environmental conditions are the current uses and developmental regulations applicable to development in the multifamily zone, particularly the LR1 zone. The baseline includes existing development conditions within the affected areas and development expected to occur within the future time horizon under the current code. Department witnesses with extensive familiarity with SEPA and code review described the proposal and determined impacts fell short of significance. The analysis provided was credible.

> [T]he proposed legislation does not rezone any property. It does not propose any changes to setback distances. It does not propose any changes to height limits. It does not propose any changes to the open space requirements on new development. It does not propose any changes to the green factor landscaping requirement.[62]

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[56] *Wild Fish Conservancy v. WDFW*, 502 P.3d 359, 371-372 (2022).
[57] *Chuckanut Conservancy v. WA State DNR*, 156 Wn. App. 274, 285 (2010).
[58] *See e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176 (2000).
[59] RCW 43.21C.075(3)(d); WAC 197-11-680(3)(a)(viii).
[60] Dept. Exs. 1-4, *see also* Dept. Ex. 17.
[61] *See e.g.*, WAC 197-11-774; WAC 197-11-442.
[62] Testimony, Mr. Wentlandt (TR, Vol. I, p. 166).

> Overall, because of all the regulations that are in place, because we're not allowing development in new areas, because we're not allowing new types of development, because . . . development … is already allowed through … mechanisms the densities that we're considering here, that these things. . . are going to be minor changes overall.[63]

This is a modest proposal and not akin to the Growth Board case Appellants referenced in testimony.[64] The proposed legislation does not significantly change the City's land use patterns. No rezone is proposed and the testimony detailing the proposal outlined how there are no significant changes to development footprint and thus to tree canopy or the other resources, including stormwater, sewer, transportation, cultural resources, and solar access. Without documentation on how these resources are significantly impacted, Appellants have not met their burden of proof to demonstrate clear error.

Appellants are dissatisfied with the current regulatory structure. The Examiner does not make policy decisions on how legislation should be designed but only reviews the decision appealed from in relation to code requirements. The SMC (and state and federal constitutions), separate legislative and judicial work, with policy enactments in one box and judicial review in another. Repeated appellate court wading into the policy box over the last century gives the impression that the judiciary is properly used to enact policy despite the lack of legal assignation.[65]

That the Examiner cannot do policy work assigned elsewhere does not mean the evidence prepared for this forum cannot be repurposed for other settings. The record includes material on housing and density options to address affordability, equity, and property ownership goals. There is also material on how such options can be attractive so development is a welcome community addition. Such material can inform policy discussions on how to increase housing ownership; secure public acceptance of densities and more varied housing options; and improve community resilience. However, the question here is not about the best policy approaches but only whether the legislation has probable, significant adverse environmental impacts under SEPA. As the modest proposal has not been demonstrated to, the DNS must be upheld.

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[63] Testimony, Mr. Staley (TR, Vol. I, p. 72).

[64] *Olympians for Smart Development & Livable Neighborhoods v. City of Olympia*, Case #19-2-0002c, Order (March 29, 2019), *see also* FDO (July 10, 2019). The Board mentions SEPA's "substantial weight" standard of review but its analysis is based on a "prima facie case" framework. Assuming this was the correct lens, the record, arguments raised, and proposal itself are all distinct. The Department's technical impact analysis was credible, developed by experts in their fields, and more than met basic SEPA analysis requirements. This was completed for a proposal which clarifies and simplifies the permitting structure but does not change City land use patterns in any fundamental way.

[65] *See e.g., Citizens United v, Federal Election Commission*, 558 U.S. 310 (2010) in which a divided court made a policy decision about campaign finance, rather than deferring to the legislative body the Constitution assigned to such determinations.

DECISION

The Department's SEPA Decision is **UPHELD**.

Entered April 7, 2022.

__/s/Susan Drummond_____
Susan Drummond, Deputy 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.

The decision of the Hearing Examiner is the final decision for the City of Seattle. Under RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially pay for preparing a verbatim hearing transcript. Instructions for transcript preparation are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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 **FINDINGS AND DECISION** to each person listed below, or on the attached mailing list, in the matters of **TREEPAC ENVIRONMENTAL IMPACT REVIEW**, Hearing Examiner Files: **W-21-007** in the manner indicated.

Party	Method of Service
Appellant TreePAC Environmental Impact Review 206-661-4195 treesandpeople@pacificwest.com Richard Ellison 206-661-4195 climbwall@msn.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Department Geoffrey Wentlandt OPCD 206-684-3586 geoffrey.wentlandt@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Department Legal Counsel Daniel Mitchell City Attorney's Office 206-684-8232 daniel.mitchell@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Mailing Laurie Menzel City Attorney's Office 206-684-0290 laurie.menzel@seattle.gov Eric Nygren City Attorney's Office Eric.Nygren@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Dated: April 7, 2022

___/s/ Angela Oberhansly
Angela Oberhansly
Administrative Specialist