BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In Re: Appeal by MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTY, LEGACY GROUP CAPITAL, LLC, BLUEPRINT CAPITAL SERVICES, LLC, AA ASHWORTH DEVELOPMENT LLC, BLACKWOOD BUILDERS GROUP LLC, AND BUILD SOUND, LLC, of the SEPA Threshold Determination of Non-Significance for the Tree Protections Update.	Hearing Examiner File: **W-22-003** CITY OF SEATTLE'S CLOSING BRIEF

I. INTRODUCTION

For more than 20 years, Seattle has regulated the removal and replacement of trees on private property.[1] Seattle's Tree Protection Ordinance, chapter 25.11 Seattle Municipal Code ("SMC"), is an important part of the City's overall strategic goal of maintaining a healthy urban forest on both public and private lands. Seattle recognizes the environmental benefits of having a healthy urban forest.[2] Seattle's Urban Forest Management Plan identifies the environmental

[1] Ordinance 120410, Seattle's Tree Protection Ordinance, was adopted in 2001.
[2] Appellant's Ex. 24, p. 6-8 of 41.

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benefits from a healthy urban forest to include benefits in the areas of stormwater reduction and watershed function, air pollution removal, carbon storage and sequestration, wildlife habitat and reduction in the heat island effect, to name a few. Id.

In 2019, the Seattle City Council adopted Resolution 31902 seeking to strengthen Seattle's existing Tree Protection Ordinance to better protect, maintain, and enhance Seattle's urban forest.[3]

In response to Resolution 31902, the Seattle Department of Construction and Inspection ("SDCI"), with assistance from the Office of Sustainability and Environment ("OSE") developed a proposal that will mainly accomplish the following:

- Expand the definition of "exceptional trees" to include trees that are 24 inches wide diameter at standard height ("DSH").[4] The expanded definition would affect about 1% more development sites than are affected under the existing exceptional tree regulations in Seattle's neighborhood residential, multifamily, and commercial zones.
- Prohibit the removal of "significant trees" over 12 inches DSH outside of development, as already provided for exceptional trees, unless the tree is unhealthy and hazardous; as well as require the replacement of trees over 12 inches DSH that are removed during development.
- Establish a new voluntary payment-in-lieu program to allow property owners to choose between either replacing exceptional trees or significant trees over 12" wide at DSH onsite, or voluntarily paying a fee to a city fund used to plant and establish new trees in city parks,

[3] City Ex. 2.
[4] SDCI DR 16-2008 currently establishes the size thresholds that determine whether a tree is "exceptional." See Intervenor's Ex. 2. The proposed director's rule is Appellants Ex. 5. Also, DSH is the same measurement that is commonly referred to as diameter at breast height ("DBH").

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open spaces, and rights of way, with a priority of adding new tree canopy to underrepresented neighborhoods that are currently lacking in tree canopy.[5]

In developing the proposal, SDCI considered all the City's goals and policies and developed a set of regulations that struck a balance between the City's housing goals related to housing and future development patterns and the City's goals to maintain a healthy urban forest that provides sizeable tree canopy coverage. As part of striking that balance, SDCI chose not to include all of the recommendations from the Urban Forestry Commission that would have added further tree regulations on affected development sites beyond what SDCI proposed.[6]

After a thorough review of the Proposal's environmental impacts, Seattle's SEPA responsible official properly issued a Determination of Non-Significance ("DNS"), determining that the Proposal would not have probable significant adverse impacts on the environment. In fact, the DNS recognizes the many positive environmental benefits that would result from the proposal.

In order for the Master Builders Association of King and Snohomish County, et al., ("appellants") to prevail in their administrative appeal, they must overcome the substantial weight given to SDCI's DNS and prove that SDCI's determination was clearly erroneous. To carry their burden, appellants had to provide affirmative evidence that SDCI's proposal to update the City's Tree Protection Ordinance will result in probable, significant adverse environmental impacts. Appellants did not carry their burden.

[5] The proposal includes draft amendments to the Seattle Municipal Code ("SMC"), and two accompanying draft SDCI Director's Rules that collectively make up the "proposal."

[6] See City Ex. 18. This is a chart prepared by Patti Bakker who is the staff liaison to the Urban Forestry Commission identifying the UFC's key recommendations compared to what was included in the proposal.

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Rather, the evidence presented at the hearing established that SDCI (1) appropriately considered the potential impacts from the proposal to the environmental elements, including the potential impacts to the City's existing housing stock and future development patterns, as well as the other elements of the environment raised in this appeal; and (2) properly concluded that the proposal will not result in probable significant adverse impacts to Seattle's existing housing or future development patterns. Appellants did not provide sufficient affirmative evidence to the contrary, and, therefore, their appeal must be denied.

II. STANDARD OF REVIEW

A. Appellant cannot overcome the high burden to establish clear error as required by the Code.

The decision in this case is entitled to substantial weight.[7] In order for the appellants to prevail, they have the burden of proving clear error, which requires that the Examiner be left with a definite and firm conviction that a mistake has been committed.[8] It is not enough that the reviewing tribunal merely disagree with a determination, it must be "left with a definite and firm conviction that a mistake has been committed."[9] The Examiner has recognized that in order for an appellant to overcome this standard, the appellant has the burden of establishing that the Department's decision is clearly erroneous.[10] Appellant must carry this burden on the issues they

[7] RCW 43.21C.090; SMC 25.05.680.B.3; HER 3.17(a).
[8] *Id*., *Cougar Mt. Assoc. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988); *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981).
[9] *Moss v. Bellingham*, 109 Wn. App 6, 13, 31 P.3d 703 (2001); *In the Matter of the Appeal of George W. Recknagel*, **HE W-13-002** and In the Matter of the Appeal of Ballard Business Appellants, **HE W-12-002**.
[10] *In re Madrona Elementary School*, MUP 00-029 stating: The burden is on an appellant to overcome substantial weight by proving that the decision is "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). A decision is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ancheta v. Daly*, 77 Wn.2d 255 (1969), *citing United States v. Unites States Gypsum Co.*, 333 U.S. 364, 92 L.Ed 746, 68 S.Ct. 525 (1948).

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raised in their appeal statements; however, they failed to carry their burden.[11]

B. Appellant must demonstrate the proposal will have probable significant adverse environmental impacts.

In general, appellants failed to prove that SDCI's DNS was clearly erroneous, and their appeal must fail and SDCI's decision must be affirmed.

In order to prevail in their SEPA claims that SDCI erroneously issued a DNS and that an Environmental Impact Statement must be prepared, appellant bears the burden of providing affirmative evidence of likely significant environmental impacts.[12] Boehm and Moss make clear that the appellants have the duty to actually prove, through affirmative evidence, that SDCI's determination was clearly erroneous and that the proposal would result in probable significant adverse environmental impacts. It is not enough for appellants to merely assert, without proving through evidence, that the proposal would result in probable significant adverse environmental impacts.

C. SDCI had reasonably sufficient information to evaluate the impacts of the proposal.

On appeal, the lead agency must demonstrate that it actually considered relevant environmental factors before issuing the DNS, and that the DNS was based on information reasonably sufficient to evaluate the proposal's environmental impacts.[13] SMC 25.05.335

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[11] Appeal issues were preliminarily dismissed by the Hearing Examiner regarding economic impacts of the proposal. *See* Order on Motion to Dismiss, pg. 4. In addition, the Examiner also noted in the Order on Motion to Dismiss that the Appellants would be limited to those appeal issues contained in its appeal statement. This is consistent with land use case law including *City of Olympia v. Drebick*, 156 Wn.2d 289, 311, 126 P.3d 802 (2006); *City of Medina v. T-Mobile USA*, 123 Wn. App. 19, 29, 95 P.3d 377 (2004).

[12] *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719-720 (2002); *Moss v. City of Bellingham*, 109 Wn. App. 6, 23-24, 31 P.3d 703 (2001). The court stated "although appellants complain generally that the impacts were not adequately analyzed, they have failed to cite any facts or evidence in the record demonstrating that the project as mitigated will cause significant environmental impacts warranting an EIS" at 23-24.

[13] WAC 197-11-335/SMC 25.05.335. *See also* Matter of the Appeal of Tom Gibbons for Fred Meyer, and Gary Brunt for Greenwood Shopping Center, **HE W-11-003** *citing Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137 (2002).

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provides that when conducting a SEPA review, the lead agency "shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal."

III. SDCI ESTABLISHED THAT IT MET ITS PROCEDURAL REQUIREMENTS OF SEPA.

Under SEPA's procedural component, the lead agency "shall make its threshold determination based upon information *reasonably sufficient* to evaluate the environmental impact of a proposal."[14] The record must demonstrate the environmental factors were considered in a manner sufficient to amount to a prima facie compliance with the procedural requirements of SEPA.[15] Here, SDCI provided community outreach to receive input from interested stakeholders that helped SDCI craft the proposal.[16] SDCI identified the "baseline," or status quo, under the City's current tree protection regulations, and then utilized the City's best available data to identify and quantify the scope of the impact and the effect the proposal will have on the environment.[17] SDCI properly identified those impacts to be generally neutral when compared to the baseline, with some minor impacts on future development coupled with noted environmental benefits.

A. The City established the baseline by identifying the City's existing tree protection regulations.

` The existing tree regulations establish the baseline by which to measure the environmental impacts of the proposal that seeks to amend the Seattle Tree Protection

[14] WAC 197-11-335/SMC 25.05.335.
[15] *Norway Hill Preservation and Protection Ass'n v. King County*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976).
[16] City Ex. 16 is the Community Outreach Report.
[17] A "baseline" is a practical tool used in environmental analysis to identify the possible consequences of a proposed agency action. The basic idea is that establishing baseline environmental conditions is necessary to determine the effect a proposal will have on the environment. *Wild Fish Conservancy v. Wash. Dept. of Fish and Wildlife*, 502 P.3d 359, 371 (2022).

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Ordinance.[18]

Chanda Emery, SDCI's lead planner who prepared the proposal, prepared a chart comparing the existing tree regulations with the proposed amendments of the Tree Protection Ordinance. [19] The second column of the chart provides a summary of the existing code and the way it currently regulates four categories of trees on private property: (1) trees at least 6 inches DSH (but not exceptional); (2) trees over 12 inches DSH (but not exceptional); (3) exceptional trees; and (4) trees less than 6 inches DSH (not regulated).

Currently, trees less than 6 inches DSH on private property (and not exceptional) are not regulated and may be removed without limitation and without required mitigation. The proposal will not change the status quo for this category of trees. It should also be noted that the proposal does not seek to amend the existing regulations that apply to trees on public lands, trees within the City right of way, or trees located within environmentally critical areas, except for more stringent code enforcement provisions for unlawfully cutting any trees in those categories.[20]

The existing Tree Protection Ordinance regulates trees at least 6 inches in DSH the same as trees over 12 inches DSH that are not exceptional. They must be identified on all site plans.[21] The removal of such trees is prohibited on undeveloped lots unless the removal is required for the construction of a new structure, retaining wall, or rockery, or as part of an approved building or grading permit. SMC 25.11.040.A. SMC 25.11.040.B limits the removal of trees at least 6 inches DSH or greater (except exceptional trees) to up to three trees in any one-year period

[18] Trees located within the City right of way are regulated as street trees pursuant to chapter 15.43 SMC, and trees located within an Environmentally Critical Area are regulated under chapter 25.09 SMC, neither of which are amended by this proposal.
[19] See City Ex. 15.
[20] See Appellants Ex. 7, p. 26-31.
[21] Testimony of Deborah McGarry.

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unless the removal is required for the construction of a new structure, retaining wall, or rockery, or as part of an approved building or grading permit. There are no limits on the number of trees not determined to be exceptional that may be removed due to construction, and there are no mitigation requirements, except those trees over 24 inches DSH must be replaced pursuant to SMC 25.11.090. Also, for trees over 24 inches DSH, an applicant may request that SDCI allow them to apply the development standard adjustments that are applied for exceptional trees to preserve such trees during the development process.[22] The proposal does add provisions for when trees in this category are proposed to be removed for emergency reasons or to abate a hazard.[23]

Deborah McGarry provided testimony regarding the current review process for project permit applications that are affected by exceptional trees or potential exceptional trees. Exceptional trees, as determined by Director's Rule 16-2008, currently may not be removed outside of development, unless the tree is unhealthy and hazardous.[24] SDCI approval is required before an exceptional tree may be removed during development in neighborhood residential, multifamily or commercial zoning designations.[25] Under the current code, in order to receive SDCI approval to remove an exceptional tree, the applicant must show that the maximum lot coverage on the site cannot be achieved pursuant to SMC 25.11.060.A.1 or that the total floor area ratio that could be achieved within the maximum floor area ratio (FAR) and height limits cannot be achieved, even after applying the allowed development standard adjustments and height adjustments.[26] Currently, if an exceptional tree is proposed to be removed, the project

[22] SMC 25.11.060.B; SMC 25.11.070.B; SMC 25.11.080.B.
[23] Appellants Ex. 7, p. 11 – 13 (proposed SMC 25.11.035 and .037)
[24] See 25.11.040; DR 16-2008 is in the record as Intervenor Ex. No. 2.
[25] SMC 25.11.060; SMC 25.11.070; SMC 25.11.080.
[26] SMC 25.11.070.2 and 3; SMC 25.11.080.A.2.

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permit application is required to go through streamlined design review, unless the project requires full design review for another reason. SMC 25.11.070.A.1 and .080.A.1.

In summary, a comprehensive set of regulations already exists that regulates trees on private property. This established the baseline by which SDCI reviewed and compared the impacts of the proposal.

B. The City used best available data to quantify the impacts of the proposal.

To quantify the impact of the proposal, the City utilized best available data to quantify the estimated number of newly regulated trees, the number of new sites affected by the regulated trees, and the increase in annual permit volume involving a regulated tree.

1. The 2016 LIDAR GIS dataset is the City's best available tree data.

Patricia Bakker from OSE testified about the City's efforts in 2016 to determine the percentage of tree canopy cover in Seattle by utilizing LIDAR data from 2016 in leaf-off conditions analyzed together with leaf-on imagery to produce a useable citywide tree canopy GIS dataset.[27] The data from 2016 identified that the City's tree canopy covered 28% of the City. Id. Seattle's consultants for this 2016 tree canopy analysis, Jarlath O'Neil-Dunne and his team at the University of Vermont Spatial Analysis Laboratory, also determined the number of large trees in Seattle using height as a proxy for DBH.[28]

Ms. Bakker testified that new regional LIDAR data was made available on a county-wide basis at the end of 2021 and that Seattle IT received from King County raw LIDAR data in March 2022.[29] Ms. Bakker testified that Mr. O'Neil-Dunne from the University of Vermont Spatial Analysis Laboratory was again hired as a consultant to analyze the raw leaf-off LIDAR

[27] See Appellant's Ex. 23, p. 4.
[28] Id. at 12; Diameter at Breast Height ("DBH") is synonymous with DSH.
[29] Testimony of Patricia Bakker; See also Appellants' Ex. 13.

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data together with leaf-on photography using the same process that was used in 2016 so as to result in a comparable study with usable and comparable datasets. This effort is underway and still ongoing. Id. Simply put, GIS datasets using the 2021 LIDAR data do not yet exist, and were therefore not available to have been used in the environmental review of this proposal. SEPA requires that the lead agency shall prepare its threshold determination **at the earliest possible point in the planning and decisionmaking process**, so waiting several months for the completion of the new datasets was simply not an option.[30] Emphasis added.

2. The GIS analysis used best available GIS datasets and properly used height as a proxy for DSH to quantify the scope of the impacts.

The GIS analysis that was prepared to review the environmental impacts of this proposal was developed by Charles Spear from SDCI, with assistance from Christina Thomas from Seattle IT. The GIS analysis utilized the City's best available tree data (2016 LIDAR datasets) and overlayed that tree data with the GIS zoning layer and development site layer to identify the development sites within single family, multifamily, and commercial zoning classifications affected by the proposal.[31]

To identify affected development sites, the City used height of trees as a proxy for DSH.[32] Mr. Spear consulted with and received confirmation from Jarlath O'Neil-Dunne from the University of Vermont Spatial Analysis Laboratory approving the general methodology.[33] Mr. O'Neil-Dunne confirmed the general logical assumption that the number of lots containing trees taller than a certain height percentile will be roughly similar to the number of lots containing

[30] SMC 25.05.055.B.
[31] Testimony of Charles Spear; Testimony of Christina Thomas.
[32] Appellants' Ex. 8; City Ex. 22.
[33] Testimony of Charles Spear.

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trees wider than the same diameter percentile.[34] The height percentile was developed utilizing data from a US Forest Service study employing the USFS i-Tree methodology. SDCI used San Francisco's DSH distribution curve, instead of the national average from data collected from 38 cities. This is because San Francisco's curve better represented Seattle's climate and urban forest, both of which tend to have more larger trees than the national average. Applying the San Francisco curve using Seattle tree data, the height percentiles for 30 inches DSH (representative of the status quo), 24 inches DSH (representative of the proposed change to the definition of "exceptional tree"), and 12 inches DSH (representative of significant trees that will be required to be replaced or mitigated) were all determined.[35]

The results of the GIS analysis are reflected in Table 5 of the Director's Report.[36] SDCI estimates that about 4% of development sites in applicable zones (6,480 out of 162,000) are already regulated under the existing definition of exceptional trees and that about 17,700 trees would already be considered as exceptional trees under the existing regulations. By changing the definition of "exceptional trees" to include all trees over 24 inches DSH, SDCI estimates that an additional 1% of lots (about 1,620 new lots) would be affected by the inclusion of approximately 4,700 more trees.[37]

The proposal would create a new category of "significant trees" that, when larger than 12 inches DSH, would be prohibited from being removed outside of development and would be required to be replaced if removed during development. SDCI estimates that about 17,820 development sites would be affected by this category of trees (16% of 162,000 – 5% = 11%),

[34] City Ex. 22, p. 5.
[35] City Ex. 22, p. 10.
[36] Appellants' Ex. 3, p. 15.
[37] 4,700 more trees comes from the following: 22,400 – 17,700 = 4,700.

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estimating about 48,000 trees in the appropriate zones would fall into this category (70,400 – 22,400).

3. The environmental checklist is detailed and properly identifies the potential environmental impacts.

Ms. Emery completed an environmental checklist for the proposal, thoroughly identifying the proposal's potential impacts to the elements of the environment.[38] Ms. Emery completed Section B of the environmental checklist with detailed answers, even though many of the questions in Section B refer to project actions rather than non-project actions.[39] Ms. Emery also completed Section D of the checklist, the section specific to non-project actions that requests information as to the elements of the environment in a manner more appropriate to a non-project action.[40]

Section B asks for information related to the potential impacts to the elements of the environment, such as earth, air and water, plants and animals, as well as land and shoreline use, to name a few. The questions tend to be narrowly focused on project type impacts. For instance, Section B.2.a asks what type of emissions to the air would result from the proposal during construction, operation, and maintenance *when the project* is completed. The checklist properly answered that this is a non-project action, and that any increase in Seattle's tree canopy cover could serve to improve air quality.[41] Similarly, Section B.3.2 asks, *will the project* require any work over, in, or adjacent to waters? The checklist properly answered that the proposed non-project action does not include any construction or development that would require work over,

[38] Appellants' Ex. 2.
[39] Appellants' Ex. 2, p. 5-17.
[40] Appellants' Ex. 2, p. 18-27.
[41] Appellants' Ex. 2, p. 6.

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in, or adjacent to the surface waters, and that any potential impacts of future, specific development proposals would be addressed through regulations and/or project-specific environmental review as appropriate. The checklist also notes that "Enhanced tree protection through this proposal could increase tree canopy cover in the city which would tend to reduce and control surface, ground and runoff water impacts as trees slow, filter, and detain stormwater."[42]

Regarding the questions in Section B specific to housing, Section B.9.a asks, how many units would be provided, if any? The Environmental Checklist provided that the proposal is a non-project action that does not include construction or development of housing. This is an appropriate response not only because it is accurate, but because Section D provides more specific information as to impacts to future development patterns. Likewise, in response to Section B.9.b asking about how many units, if any, would be eliminated, the checklist properly indicates that "[N]o housing units would be eliminated as part of this non-project action." This is also accurate. An earlier answer to a checklist question makes clear that no structures would be demolished. Ms. Emery testified that the proposal does not amend the zoning or use classification of any property in the City, nor is it likely to contribute either directly or indirectly to the conversion of residential use in any existing residential buildings.[43]

The questions in Section B.9 focus on specific potential impacts related to the creation of a specific number of housing units from a project action, or the specific elimination of existing housing units. The City's answers to these questions were appropriate because they are accurate

[42] Appellants' Ex. 2, p. 8.
[43] Testimony of Chanda Emery.

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and also because the broader impacts to future development patterns are properly addressed in Section D of the checklist.

Regarding potential transportation impacts, the checklist points out that most sites affected by the proposal "are likely to have access to the existing street system; some large, undeveloped sites may require a connection to the existing street system as part of future project development. More specific information concerning site-specific public streets and highways would be addressed during future permitting of individual development projects." The checklist also notes that the proposed non-project action would not construct or eliminate any parking spaces.[44]

In addressing impacts to utilities, the checklist points out that nearly all areas in Seattle have electricity, telephone, water and refuse services, and that most (but not all) have cable/fiber optics, sanitary sewers, and/or natural gas – and that most properties affected by the proposal have access to and would use existing utilities provided throughout the city. It further states that future development indirectly related to this proposal would require water and sewer services at similar but potentially higher levels than development otherwise allowed under existing regulations, and that potential impacts on public utilities on future development projects would be addressed through City permit review.[45]

Section D of the checklist asks questions about the proposal's potential impacts to the environment, specific to non-project actions.

For instance, Section D.1 asks about whether the proposal would be likely to increase discharge to water; emission to air; production, storage, or release of toxic or hazardous

[44] Appellants' Ex. 2, p. 16.
[45] Appellants' Ex. 2, p. 17.

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substances; or production of noise. SDCI's response properly notes that the proposal would not result in probable increase in discharge to water or air emissions, nor the additional production, storage, or release of toxic substances or noise, and that increased tree protections could result in positive impacts, as the proposal would likely lead to fewer instances of tree removals and soil disturbances and reduce the probability of adverse pollutant emissions to water and air.[46]

Similarly, Section D.2 asks how the proposal would likely affect plants and animals. After describing the results of the GIS analysis, as well as the features of the proposal, SDCI's overall conclusion is that the proposal would not generate direct impacts on animals, fish, or marine life, and would likely generate positive impacts on trees by expanding the size range and definition of regulated tree designations (exceptional and significant trees).[47] SDCI notes that there would be an increase in the number of development sites subject to tree mitigation requirements if exceptional and/or larger significant trees are removed, which would be of net benefit to Seattle's urban forest. Id at 21.

Section D.5 asks how the proposal would be likely to affect land and shoreline use, including whether it would allow or encourage land and shoreline uses incompatible with existing plans.

SDCI reviewed Seattle's Comprehensive Plan and determined that the proposal is consistent with all of the City's goals and policies, specifically supporting the City's Urban Forest Management Plan and the Seattle's Comprehensive Plan's environmental-related goals, growth strategy and housing goals, environmental and land use policies.[48]

[46] Appellants' Ex. 2, p. 18.
[47] Appellants' Ex. 2, p.
[48] Testimony of Chanda Emery; See also Appellants' Ex. 2, p. 22-24; See also Appellants' Ex. 3, p. 22-24.

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SDCI also analyzed the potential impacts to future development patterns, and noted that property owners may need to factor trees into site plans and design considerations in more future development proposals, to build structures that may accommodate exceptional trees to remain on-site even after development – all the while recognizing that these aspects of the proposal reflecting the existing nature of the competing interests (land use regulations and tree protection regulations) are already present by virtue of the City's existing policies, code, and practices regarding regulated trees. SDCI notes that with respect to reasonably accommodating new development, these interests are partly addressed by accommodating flexibility in application of development standards and similar considerations regarding development capacity in individual developments, and the proposal would continue to implement these principles in its regulations, as well as remove the streamlined design review process requirement, solely because of an exceptional tree, for sites in Lowrise, Midrise, and Commercial zones, with the proposals instead being reviewed as Type I administrative decisions per Chapter 25.11. SDCI identified that the proposal could increase the probability that prospective applicants for new development might evaluate the effect of the tree protection requirements (relative cost of mitigation) and decide against submitting a development proposal at that site, choosing instead a different site without the additional mitigation costs associated with tree removal of exceptional or larger significant trees.

In summary, SDCI thoughtfully identified potential adverse impacts that the proposal to increase the tree protection regulations might have on land use regulations and future development patterns, while also noting that these types of conflicts already exist under the City's current code provisions, and determined that the proposal provides flexibility in allowed development adjustments to allow for development in a way that preserves exceptional trees, or

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if that is not feasible, allows for the removal of exceptional trees with required mitigation. The proposal adds more flexibility allowing a developer the choice between mitigating tree removal with on-site tree planting, or voluntarily paying a fee into a tree protection fund allowing the city to plant and establish trees with a focus on planting in areas with low tree canopy coverage.

C. The City properly determined the proposal's impacts, including those on future development patterns, would be essentially neutral, as compared to the current baseline, with notable environmental benefits.

` Gordon Clowers, the City's SEPA responsible official, reviewed all the environmental documents, analyzed the potential impacts of the proposal, and properly issued a DNS, determining that the proposal would not have significant adverse environmental impacts.[49] In reaching this determination, Mr. Clowers tapped into his thirty-plus years of SEPA-related experience, as well as his extensive knowledge of the City's land use code and growth strategies.[50]

The DNS analysis begins by addressing the short- and long-term impacts of the natural environment, covering impacts to earth, water, water quality, plants/animals/fisheries and marine life. The DNS provides that the proposal "would result in no probable direct adverse or significant adverse impacts to earth, water, or water quality" and recognizes that increased tree protections "could result in positive impacts for these environmental elements, by increasing the number of trees that are protected" which would "likely lead to fewer instances of tree removals and soil disturbances" which would "reduce the probability of adverse pollutant emissions to water from the relevant properties that otherwise might be caused by such disturbances."[51] Similarly, the DNS concludes that the proposal "would not likely generate probable significant

[49] Testimony of Gordon Clowers. See also Appellants' Ex. 1.
[50] Id.; See also City Ex. 17.
[51] Appellants' Ex. 1, p. 6.

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adverse impacts on plants, animals, fish, or mammal life, directly, indirectly, or cumulatively. Rather, it would likely be neutral in overall impacts or generate positive impacts with respect to trees, by expanding the size range and definition of protected tree designations." Id.

Regarding the environmental elements of energy, natural resources depletion, environmental health, air quality, and noise, the DNS concludes that the proposal would not directly, indirectly, or cumulatively generate significant adverse impacts on energy or natural resources depletion, nor would it generate significant increases in discharges or emissions of toxic or hazardous substances, to the air or water, or increase the production of noise, and the DNS recognizes that the proposal would likely lead to fewer instances of tree removals and soil disturbances, which would likely avoid the possibility of adverse pollutant emissions to the air that might otherwise be caused by such disturbances.[52]

The DNS includes a thorough discussion and analysis of the potential impacts to future development patterns.[53] The analysis recognizes that depending on the location of a regulated tree on a development site, such tree could in some cases lead to differences in how future new housing units (including detached accessory dwelling units) could be situated on existing lots.[54] The DNS concludes that the proposal would not fundamentally reshape the typical prevailing land use and development pattern within any given zoning designation or neighborhood. This is because development "would still be possible in many or most cases, and protecting regulated trees, as proposed, would not prohibit development, but rather would require sensitivity in site design. Property owners may need to factor trees into site plans and design considerations in future development proposals, to build structures that may accommodate regulated trees to

[52] Appellants' Ex. 1, p. 10.
[53] Appellants' Ex. 1, p. 11-15.
[54] Id. at 11.

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remain on-site even after development." The analysis recognizes that the proposal would increase the probability that future development would be more often subject to addressing tree protection requirements in the future design and permitting of development proposals, which could increase the probability that prospective applicants for new development would evaluate the effect of the tree protection requirements (mitigation costs for example) and decide against purchasing properties or submitting development proposals for those sites.[55]

On the other hand, the analysis recognizes that the aspects of the proposal (increasing tree protection regulations that compete with land use regulations) do not alter the existing nature of the competing interests that are already present by virtue of the City's existing policies, codes, and practices regarding regulated trees, i.e. the baseline. Further, the analysis recognized that reasonable accommodations are provided in the proposal for new development by accommodating flexibility in application of development standards, substantially similar to development adjustments already provided in current code, and that the proposal would remove the requirement for streamlined design review process for sites in Lowrise, Midrise, and Commercial Zones, with these proposals instead being reviewed per Chapter 25.11 as a Type I administrative review.

At the hearing, Mr. Clowers acknowledged that the proposal would only have minor impacts on future development and housing affordability. Mr. Clowers made the determination based on his analysis above, in which he recognized that the proposal does not stray far from the existing code provisions regarding the permit review of development proposals on sites that involve an exceptional tree, considering the amount of development sites affected by an exceptional tree at 24" inches DBH is expected to increase by only about 1% from exceptional

[55] Id.

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trees at 30" DBH. Even though about 1% more development sites in the appropriate zones (Neighborhood Residential, Multifamily, Commercial) are expected to be affected by the change in the definition of exceptional trees, Mr. Clowers also considered the added flexibility to developers by removing the streamlined design review process (when it was only required because of the presence of an exceptional tree) and allowing substantially the same development adjustments to be reviewed as a Type I administrative decision.[56]

Mr. Clowers also testified that the proposal's impacts on housing development are minor because the City's urban growth strategy of directing the most density to the city's urban centers and urban villages is working.[57] Upon review of maps that show the tree canopy cover using the 2016 LIDAR dataset, it was clear to Mr. Clowers that the bulk of the larger exceptional and significant trees that will be affected by the proposal are located in the Neighborhood Residential zone (formerly single-family zone) and not in higher-density zoned areas (Urban centers and urban villages) where, by design, most of Seattle's higher-density affordable housing is being built.[58]

The DNS also analyzed the proposal's impacts to transportation, as well as public services and utilities, and determined that the proposed action would not be likely to increase demands or impacts on transportation or public services and utilities systems in a significant adverse manner. This was due to a lack of a significant material relationship of the contents of the proposal (increasing Seattle's tree regulations) to these environmental elements. Outcomes from the proposal were not identified to have generated probable adverse or significant adverse

[56] City Ex. 20 compares the existing development adjustments with the development adjustments provided in the proposal.
[57] City Ex. 28 and 29.
[58] See City Ex. 12, 13, and 14.

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impacts upon the functioning of transportation systems, electrical, water or utility systems, police, fire/emergency public services, schools, or other similar public utilities and services.[59]

Mr. Clowers testified that he has previously issued two Determinations of Significance ("DS") for prior non-project proposals, those being the Livable South Downtown rezones of Pioneer Square and Chinatown/ID, and also the 2016 Comprehensive Plan update.[60] He described that he issued DSs for those proposals because of their potential to shape future development, regarding the amounts of growth, transportation impacts, aesthetics such as height, bulk, and scale, as well as the impacts to noise, historic preservation impacts, housing impacts, and impacts to public services that come with major area wide rezones. He testified that he thought the potential impacts from this proposal were minor in comparison.

Here, this proposal does not involve rezoning any property, nor does it amend the City's height, bulk, and scale requirements. A legislative determination has already been made under the existing code that the benefits to the City that come from preserving an exceptional tree during development outweigh the impacts from applying development adjustments on a small number of lots such as waivers from setback or parking requirements, or from a height allowance that allows an additional story. The proposal only slightly increases the number of development sites that might be able to utilize development adjustments so as to preserve an exceptional tree, an estimated increase of only 1,620 additional development sites out of a total of 162,000.

The holding from *Chuckanut Conservancy v. Washington State Dept. of Natural Resources* is instructive: A proposal that does not change the actual current uses to which the

[59] Appellants' Ex. 1, p. 15-16.
[60] Testimony of Gordon Clowers.

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land was put nor the impact of continued use on the surrounding environment is not a major action significantly affecting the environment and an EIS is not required.[61]

For all the above reasons, the DNS issued by Mr. Clowers, the SEPA Responsible Official, was the right decision, made after a careful analysis based on best available data, and should be upheld.

IV. APPELLANT FAILED TO PROVIDE AFFIRMATIVE EVIDENCE OF LIKELY SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS.

As the Examiner recently explained in *Save Madison Valley*, HE File No. MUP-20-023, Amended Findings and Decision at 11 (June 18, 2021), Appellant faces an uphill battle in challenging the DNS.

> The burden of proving the inadequacy of a threshold determination is high, and can be particularly difficult to meet. In this case, Appellant is challenging, in part, the responsible official's determination that there will be no probable significant adverse environmental impacts caused by the proposal. To meet their burden of proof under SEPA, the Appellant must present actual evidence of probable significant adverse impacts from the proposal. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002); *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001). As noted above, "significance" is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794. This burden is not met when an appellant only argues that they have a concern about a potential impact, and an opinion that more study is necessary. The SEPA process does embody value for personal and societal concerns that individuals may have, but this is addressed during the comment period of SEPA review, not during the appeal period, which occurs post SEPA process analysis. After the comment period has concluded, and where (as in this case) the responsible official shows that they have fully reviewed and considered such comments and concerns, including requiring additional review and analysis from an applicant, if the process proceeds to appeal, the bar is raised for concerned appellants to proactively provide adequate evidence of significant impacts that were not considered by the SEPA reviewer.

[61] *Chuckanut Conservancy v. Washington State Dept. of Natural Resources*, 156 Wn. App. 274, 285, 232 P.3d 1154 (2010).

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Appellants did not and cannot meet their high burden to establish error in the City's SEPA analysis and consideration.

The Appellants' overall theory that development will not keep up with demand because of this proposal is speculative, not supported by any adequate evidence, and proven untrue by 20 years of development since 2001 under the City's existing tree protection ordinance. The Appellants' witnesses did not present any evidence in support of their assertion that a DS should have been issued instead. Not one of the witnesses prepared any study or report that concluded that the proposal would lead to probable significant adverse environmental impacts.

The Appellants' first two witnesses, Lucas DeHerrera and Michael Pollard from the Seattle development community, both testified that when choosing between available development sites, they decide to avoid sites affected by an exceptional tree, and instead chose to develop sites without an exceptional tree. Nonetheless, they both testified that they have successfully developed sites affected by an exceptional tree, either by removing the tree or developing around it. Also, they testified that while they might decide to pass on a site affected by a regulated tree, there are other developers that would develop on it. Accordingly, their testimony does not support the extreme and speculative conclusion that development will cease to happen on sites affected by regulated trees. Even if it did support such a conclusion (which it does not), Appellants' own testimony made clear that development would simply continue to occur on one of the approximately 153,900 lots (out of 162,000) not affected by an exceptional tree.

The testimony from the third witness, Todd Britsch, was completely irrelevant in analyzing the proposal's impacts because his conclusion that there is a slowdown in Seattle's development pipeline, even if true, was based on current market data that he analyzed, unrelated

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to the proposal. Mr. Britsch did not analyze the proposal, nor did he reach any conclusions one way or the other whether the proposal would have an adverse impact, let alone a probable, significant adverse environmental impact.

The testimony from the fourth witness, Michael Swenson, was entirely based on speculation. Mr. Swenson testified that the City should have analyzed the impacts the proposal might have on other jurisdictions simply on the speculation that the proposal could cause development to occur in other jurisdictions outside of Seattle. However, SEPA does not require consideration of every remote and speculative consequence of an action.[62]

First, there was not sufficient evidence presented to support the speculative claim that there will be a development exodus from Seattle if the proposal is adopted. This flies in the face of development trends and years of data that show that urban forest regulations can coexist with other land use regulations.

Second, even if the extremely speculative claim were hypothetically taken as true, that development that would have otherwise been built in Seattle will be built in some other nearby jurisdiction because of the proposal, no evidence was presented that such other jurisdictions would be adversely impacted by such development. There was no study or analysis conducted by Mr. Swenson as to the impacts to other jurisdictions, let alone one that found that some other jurisdiction would be significantly impacted in transportation, parking, or utilities, such that the City should have issued a DS.

Finally, Mr. Allen Haywood testified as to the imperfections of using height as a proxy for width to identify trees over a certain width at DSH citywide. However, Mr. Haywood did not provide a different methodology that he thought the City should have used to identify the widths

[62] *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 526, 704 P.2d 1242 (1985).

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of the trees on a city-wide basis. Mr. Haywood was the main arborist and horticulturalist for Issaquah for over thirty years, but he indicated that he never gathered data citywide as to the number of trees over a certain width at DSH.

The City readily acknowledges that measuring the width of all the trees on development sites throughout Seattle would render even more accurate results, but such a venture would not be feasible because of the privacy concerns, as well as the time and cost of measuring each tree on 162,000 privately owned development sites. The City's methodology is based on the City's best available data and the Appellants did not present any evidence, let alone sufficient evidence, of some alternative method that the City should have, but did not, utilize in determining the approximate number of trees and development sits affected by the proposal.

V. CONCLUSION

The Hearing Examiner should uphold the DNS. The City presented sufficient evidence that it complied with SEPA's procedural requirements. The City quantified the impact of the proposal using best available data, compared the proposal to the baseline, and properly determined that the proposal's adverse impacts to the environment were essentially neutral, with some potential minor adverse impacts to future development patterns, along with positive environmental benefits to other elements of the environment.

Appellants did not meet their burden. Appellants failed to establish error in the City's SEPA analysis and consideration. Appellants also failed to provide any evidence, let alone adequate evidence, of probable significant impacts that were not considered during the City's review.

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DATED this 11th day of July 2022.

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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of the foregoing document 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 via email to the following parties:

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Dated this 11th day of July 2022, at Seattle, Washington.

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