Hearing Examiner Ryan Vancil

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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| In the Matter of the Appeal of<br><br>MBAKS, LEGACY GROUP, BLUEPRINT CAPITAL, et al,<br><br>From a Determination of Non-Significance issued by the Director, Seattle Department of Construction and Inspections. | Hearing Examiner File:<br>W-22-003<br><br>Department Reference: 00268-22PN<br><br>APPELLANTS' CLOSING BRIEF |

## I. INTRODUCTION

This proceeding is an appeal of the issuance of a SEPA threshold determination of nonsignificance[1] ("DNS") in support of SDCI's proposal to amend Title 23 (Land Use Code) and Chapter 25.11 (Tree Protection) of the Seattle Municipal Code and adopt two related Director's Rules[2] to increase tree protection ("Proposed Action"). The hearing on the appeal took place remotely on June 14, 15 and 22, 2022, before Hearing Examiner Ryan Vancil where the following witnesses testified on behalf of Appellants: Lucas Deherrera, Michael Pollard, Todd Britsch, Alan Haywood, and Michael Swenson; the following witnesses testified on behalf of the City: Patricia Bakker, Chanda Emery, Charles Spear, Christina Thomas, Deborah McGarry, and Gordon Clowers; and one witness, Peg Staeheli, testified on behalf of TreePAC, the intervenor.

[1] SEPA DNS, Ex. 1.
[2] Draft Director's Rule regarding Exceptional Trees, Ex. 5; Draft Director's Rule regarding Payment in Lieu, Ex. 6.



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Appellants presented substantial evidence that the City erred in issuing the DNS by failing to adequately analyze the impacts from the Proposed Action to housing production, the City's ability to achieve certain Comprehensive Plan goals – including those regarding availability of affordable housing, and to street parking, traffic, utilities, and other infrastructure in light of a threefold (or more) increase in the number of trees regulated by the Proposed Action. The City mistakenly relied on insufficient and faulty data and exhibited bias towards tree protection in concluding that no probable significant adverse environmental impact would occur as a result of regulating the removal of at least three times as many trees as are currently regulated. The most fatal aspect of the City's analysis, or lack thereof, is that it did not consider what the Proposed Action's impacts would be during the lifetime of the proposal. In doing so, the City has failed to produce the breadth and depth of information regarding environmental impacts that SEPA requires. Given the deeply flawed environmental review, there was no way the City could accurately determine whether or not the Proposed Action would create probable significant adverse impacts to the environment. The Hearing Examiner must remand for further environmental review.

## II. SUMMARY OF EVIDENCE

The testimony at the hearing established that Seattle City Council Resolution 31902[3] tasked SDCI with drafting the Proposed Action. In doing so, City Council acknowledged the tension between tree protection and housing development. Thus, the impact on housing creation and development should have received more than a cursory mention during environmental review. Although SDCI referenced some potential impact to housing and land use issues in the DNS and the supporting SEPA Checklist,[4] it did so only superficially, rendering SDCI's environmental review of the Proposed Action deficient. The most

[3] Resolution 31902, Ex. 31.
[4] SEPA Checklist, Ex. 2.



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deficient aspect of SDCI's environmental review is that it was backwards looking; SDCI did not consider present or future circumstances in determining whether the Proposed Action is likely to cause adverse environmental impacts over time – ignoring the fundamental fact that trees will grow, and the number of regulated trees and lots will increase over time – even from 2016.

The failure to take tree growth into account is emblematic of the shortcomings of the environmental review that led to the DNS. SDCI's witnesses consistently affirmed that they did not consider the impacts of the Proposed Action over the lifetime of the proposal and that they were relying on five-year old data (while acknowledging it possessed more recent LiDAR data) regarding tree counts and heights without accounting for the fact that trees grow. SDCI had no real interest in performing a thorough analysis of the impacts on the built environment despite being required to do so by SEPA and the City's SEPA rules. As a result, there was little effort to gather information to conduct an appropriate environmental review and no effort to look at the current impacts, much less the impacts over the lifetime of the proposal.

In particular, the City failed to utilize information it had at its disposal that bears on the issue of probable adverse impact to housing production and land use patterns. For example, SDCI could have looked at the comparison between the process time for reviewing a permit application that requires a tree review and one that does not. Or, they could have attempted to quantify the cost of the tree review process. They also failed to analyze or request additional information regarding the following questions:

- How many previously issued or in-process permits that required or require a tree review were proposing to preserve an exceptional tree and how many are proposing to remove an exceptional tree because the allowed FAR[5] or lot coverage cannot be

[5] Floor area ratio.



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achieved and what is the estimate of the number of such permits in the future under the Proposed Action;

- How does a regulated tree impact whether a builder would develop a particular lot;
- How many current lots contain an exceptional tree and a significant tree greater than 12-inches;
- How many current lots contain an exceptional tree that is significant by virtue of its species and not its size; and
- How many lots will be regulated with an exceptional tree and significant tree in the future due to tree growth.

In addition to failing to consider reasonably available data in its possession, SDCI relied on faulty data in analyzing the Proposed Action's impacts on housing in Seattle.

Instead of undertaking a reasonable analysis of the various factors that affect the development of housing and the Proposed Action's impact on those factors, SDCI and the Designated Official mistakenly assumed that the Proposed Action would not change the regulatory framework of the existing Tree Protection Ordinance in a way that would adversely impact housing development and land use patterns and, therefore, no significant adverse impact would result from the Proposed Action on housing development and land use patterns. The SEPA DNS, however, did recognize some potential impacts on housing and land use from the existing ordinance, but concluded the Proposed Action would not cause a significant adverse impact despite tripling (or more) the magnitude of these impacts.

The Proposed Action will cause probable significant adverse impacts on housing stock, housing affordability, and plans for addressing population growth in Seattle and SDCI failed to perceive those impacts because it conducted a flawed and wholly inadequate environmental review. By concluding otherwise without a review of proper scope and depth,



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the DNS is clearly erroneous. Thus, the DNS should be reversed and remanded to SDCI for preparation of an EIS or, at a minimum, for further environmental review.

## III. ARGUMENT

### A. Standard of Review for SEPA.

Appellants are challenging the compliance of the SEPA DNS issued for the Proposed Action with state and city SEPA regulations. In an administrative appeal, the City's DNS is accorded substantial weight, and the Appellants bear the burden of proving that the decision is "clearly erroneous". SMC 25.05.680.B.3. A determination of no significant environmental impact "can be held to be 'clearly erroneous' if, despite supporting evidence, the reviewing court on the record can firmly conclude 'a mistake has been committed.'" *Norway Hill v. King County Council*, 87 Wn.2d 267, at 275, 552 P.2d 674 (1976) (citing *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 114, 508 P2d 166 (1973)). "When a governmental agency makes an initial threshold determination, it must consider the various environmental factors even if it concludes that the action does not significantly affect the environment and therefore does not require an EIS." *Sisley v. San Juan County*, 89 Wn.2d 78, 83-84. 569 P.2d 712 (1977) (citing *Juanita Bay Valley Com. v. Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973)). "If after considering the cumulative effects of the entire project, the government agency makes a determination of no significant impact under SEPA, i. e., a negative threshold determination, it must show that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Sisley*, 89 Wn.2d at 84 (internal quotations and citations omitted). "The policy of the act, which is simply to insure via a 'detailed statement' the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect 'threshold determination' is made." *Norway Hill* at 273.



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The City failed to adequately consider environmental factors implicated by the Proposed Action. In addition, the scope of the review was inconsistent with SEPA requirements. By committing these mistakes, the City's decision that the Proposed Action would not result in probable significant adverse environmental impacts was clearly erroneous.

## B. The City's environmental review of the Proposed Action did not comply with SEPA regulations.

Under the City's SEPA rules, SMC Chapter 25.05, SDCI was required to "carefully consider the range of probable impacts, including short-term and long-term effects." SMC 25.05.060.D.3. "Impacts shall include those that are likely to arise or exist **over the lifetime of a proposal** or, depending on the particular proposal, longer" (emphasis added). *Id*. The City must also consider the cumulative effects of an action when considered in combination with existing and future conditions. SMC 25.05.670 and .792. SEPA further requires that: "Whenever possible, agency people carrying out SEPA procedures should be different from agency people making the proposal." SMC 25.05.926.B. The purpose of this latter requirement is to avoid bias during the SEPA review process because the agency tasked with approving a proposal is inherently biased and should not also be the agency performing the environmental review.

The City is not permitted to limit the scope of an environmental review to the contents of the policies found in SMC 25.05.675. SMC 25.05.060 lays out the content of an environmental review. Nowhere does the City's SEPA rules limit review to the policies articulated in SMC 25.05.675. SMC 25.05.675 provides specific topics of inquiry but does not limit the broad scope of SMC 25.05.060. Furthermore, SMC 25.05.060.D requires consideration of all environmental impacts, whether direct or indirect. The elements that



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comprise the "environment" are found in SMC 25.05.444[6] and include aspects of the "Built Environment," such as land and shoreline use (including housing and relationship to existing land use plans and **population growth**) and transportation (including parking and circulation of people and goods), as well as public services and utilities.

In addition, SMC 25.05.330 provides instructions for rendering the threshold determination. SDCI was required to use and review the checklist form found at WAC 197-11-960 in making its threshold determination. SMC. 25.05.315.A and .330.A. If the lead agency does not have sufficient information to evaluate the proposal, it can request more information from the proponent or make its own further study. SMC 25.05.335. The checklist requires the proponent to consider impacts to land use, housing, transportation, and public services among other elements of the environment. While the checklist form includes Part D, Supplemental Sheet for Nonproject Actions, there is no exemption in the SEPA rules from completing the entire checklist for the purposes of reviewing the environmental impacts from a proposed nonproject action. The City failed to meaningfully complete the SEPA Checklist, other than completing the Supplemental Part D.

## C. The SEPA DNS contained multiple deficiencies and did not comply with SEPA regulations.

### 1. Appeal Issue C.1.

#### a) Introduction.

The question raised in in Section C.1 of the Notice of Appeal ("Appeal Issue C.1") is whether or not the City adequately disclosed, discussed, and analyzed the direct, indirect, and cumulative impacts on "the environment" from the Proposed Action.[7] Appeal Issue C.1 concerns SDCI's failure to analyze environmental impacts in the manner required by SEPA. Housing is an element of "the environment" under SEPA regulations and the City's SEPA

[6] The environmental elements described in SMC 25.05.444 are taken from WAC 197-11-444.
[7] Ex. 29, Notice of Appeal, p. 5.



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rules. WAC 197-11-444 and SMC 25.05.444. It also is an explicit component of the SEPA Checklist. WAC 197-11-960. To adequately review the Proposed Action's impacts to housing development, SDCI should have made more of an effort to evaluate its effect on all the factors that could result in adverse impacts to housing production. If SDCI had asked this question, they would have found that, as Mr. Deherrera and Mr. Pollard testified, housing developers routinely pass on opportunities to develop or redevelop properties if a tree needs to be removed for a development to achieve the allowed FAR in a multifamily lowrise or more intense zone.

b) Appellants' witnesses' testimony regarding impacts to housing production.

Before joining Blueprint Capital Services ("Blueprint"), Mr. Deherrera was a senior land use planner with SDCI and conducted tree reviews as part of his responsibilities. With Blueprint, Mr. Deherrera assesses the feasibility of potential development projects. Blueprint develops its own projects and permits projects for other builders.

If you combine Blueprint's projects and the other projects it permits, Blueprint is the largest developer of housing in Seattle in single-family and multifamily lowrise zones. Blueprint considers, at some level, over 4,000 sites each year for development. Mr. Deherrera testified that 450 to 500 of those sites (around 10%) are rejected due to the presence of an exceptional tree as determined by the current Tree Protection Ordinance. The reason that Blueprint does not undertake projects involving exceptional trees in lowrise zones is because the tree-review process is time consuming and uncertain under the existing regulations. Mr. Deherrera testified that he has been involved in two to three projects that were subject to SDR because of a tree review, that this increased the permitting time by six to nine months, and that the increased cost to the project was between $50,000 to $100,000.



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This often renders development of such lots infeasible if the tree cannot be retained while achieving full development potential.

Mr. Deherrera testified that he expects the burdens of the tree-review process to remain under the Proposed Action. Although the Proposed Action allows for tree reviews to be performed as administrative design review instead of under streamlined design review, he anticipates there will continue to be a back-and-forth process with land use planners. Given the lack of a TIP or Director's Rule to guide the process, tree reviews are not uniform. Different planners want to see different information and applications invariably must be revised at least once. When predictability and certainty is key to developers, this uncertainty results in many less lots being developed when they contain an exceptional tree.

Mr. Deherrera's testimony was reinforced by Mr. Pollard's. Both witnesses testified that even with an administrative process, applicants will still need to design and redesign their plans to show the SDCI planner that a tree cannot be saved while achieving the allowed development potential. The process is further complicated because an adjustment can cause issues elsewhere. For example, reduced setback gets you a bigger building, but then you have nowhere to put utilities. So, if a developer needs to remove an exceptional tree to develop or redevelop a site, it's highly unlikely they will take on the project.

Adjustments to design standards do not resolve these issues because they are not always an adequate incentive to assume the risk of proposing to remove an exceptional tree under the current Tree Protection Ordinance. Eliminating parking is usually not a benefit to the project nor is an extra floor. As a result, unless the adjustment is limited to moving the structure forward to save a tree in the back yard, they will pass on a proposal if the lot has an exceptional tree that would otherwise need to be removed to obtain the allowable FAR or lot coverage.



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Given the number of lots that would contain regulated trees by protecting significant trees over 12-inches and all trees over 24-inches as exceptional under the Proposed Action, Mr. Deherrera and Mr. Pollard expect there will be far fewer lots the development or redevelopment of which would otherwise be feasible. Mr. Deherrera estimated that around 80% of all projects that he reviews, contains a significant tree 12-inches or larger. They concluded that the Proposed Action would result in few developable lots and, as a result, less housing will be created than otherwise would without the Proposed Action.

Mr. Pollard, who performs feasibility analysis and manages the entitlement process for Shelter Homes, has extensive experience with land use permit applications subject to the current Tree Protection Ordinance. As pointed out above, Mr. Pollard echoed Mr. Deherrera's testimony regarding the time, cost, and uncertainty (i.e., risk) of trying to remove an exceptional tree as part of a development. Mr. Pollard concludes that the implementation of the current Tree Protection Ordinance results in the loss of buildable lots to save exceptional trees.

By Mr. Pollard's estimation, going through tree review adds $10,000 to $30,000 in design costs and 4 to 6 months in permit review time for a project. He describes the process as "stifling." Mr. Pollard further testified that the permitting time would balloon with all the additional permits that would contain a tree review under the Proposed Action.

Developers need to use every square inch of property they can in order to make a project pencil out and the adjustments to design standards allowed to protect exceptional trees do not offset the losses. For example, while a project may not be required to provide parking, this results in the loss of $50,000 for the lack of a parking space. And while a project may be able to add an additional floor, this can cause additional building code requirements like sprinklers, which burdens a project with additional costs. Mr. Pollard anticipates the same will be true under the Proposed Action – only three times (at least)



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more burdensome – since there will continue to be back and forth with the planners during permit review, with time consuming and costly redesigns as a result. Consequently, either development will become more time consuming and costly as more projects will be subject to this process or projects simply won't be built.

Todd Britsch, a Senior VP and Director of Market Research at Level Capital, expressed similar views about the impact of the Proposed Action. Mr. Britsch has consulted with developers in Seattle, the surrounding area, and around the country for several decades. For purposes of his testimony, he reviewed residential sales history, inventory supplies, and price per square foot. He also had around 15 conversations with developers who have left Seattle to build elsewhere.

Recently, Mr. Britsch has seen housing developers moving out of Seattle because of the regulatory environment and he anticipates more will leave because of the Proposed Action. He also expects, based the number of permits in the pipeline, the number of housing units sold to drop from around 1,000 per year from 2015 to 2022 to about half that amount in the next five years. Mr. Britsch sees more single-family homes being built now and far fewer townhomes than during the prior five years. According to Mr. Britsch, adopting the Proposed Action will make development more challenging, lead to even fewer housing developers operating in the City, and will dramatically reduce the already decreasing new housing supply.

c) SDCI's assumptions underlying the DNS are clearly erroneous.

Instead of considering the kind of information to which Mr. Deherrera, Mr. Pollard, and Mr. Britsch testified and that could have been made available to Mr. Clowers,[8] Mr.

[8] For example, Mr. Clowers testified that he only had the "barest of knowledge" of the concerns with the Proposed Action expressed during a listening session SDCI and OSE held with developers. While the SEPA DNS identifies public comment from the Urban Forestry Commission, it is silent on public comments from developers and builders. *See* Ex. 1 at p. 4.



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Clowers testified that he relied only on the information in the Checklist, the language of the proposed ordinance and the Director's Report in drafting the DNS. He also testified that he relied on general housing permitting and production data for the last five or six years in forming his opinion, but that data is not cited in the DNS and as discussed elsewhere, is not predictive of future conditions in which the Proposed Ordinance will operate.

By relying on the insufficient and misleading information in these sources, the DNS was premised on a mistaken assumption that the Proposed Action will have no greater impacts to the built environment than the current Tree Protection Ordinance because, according to Mr. Clowers, both will allow lots with regulated trees to be developed to the extent allowed by the Land Use Code. This assumption is mistaken for several reasons. One reason is because the current Tree Protection Ordinance *does* impact the amount and nature of the housing built in Seattle (and elsewhere). By increasing the number of developable lots with regulated trees by at least 300% (as of 2016 and more over time), the Proposed Action will have far greater impacts compared to the current conditions. Instead of undertaking a reasonably thorough review to test his assumption, the Designated Official instead relied solely on the fact that City had met its aggregate housing goals over the previous 5 or 6 years. More investigation and analysis were required of Mr. Clowers.

SDCI did not consider the various factors that led to those historic housing data, how those factors have changed and may change in the future, and how the Proposed Action may exacerbate or counteract those trends. SDCI simply assumed, without critical analysis, that the current Tree Protection Ordinance had negligible effects on housing production in the past and, therefore, the Proposed Action would lead to no significant adverse impacts in the future. In other words, SDCI assumed the impact of the current Tree Protection Ordinance is zero and, since three times zero is zero, the Proposed Action would have no adverse impacts. As the testimony revealed, however, the effect of the current Tree Protection



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Ordinance is not zero and, thus, the impact of the Proposed Action is far from zero. Mr. Clowers, as the Designated Official, failed to undertake a meaningful inquiry as to what degree the Proposed Action would impact the built environment.

d) SDCI failed to consider critical and available information.

Curiously, the DNS and SEPA Checklist acknowledge the Proposed Action could "increase the probability that prospective applicants for new development would evaluate the effect of the tree protection requirements … and decide against purchasing properties or submitting development."[9] However, Mr. Clowers did not analyze the increased frequency of that happening under the Proposed Action. The SEPA DNS similarly recognizes the "potential adverse" impact from allowing adjustments to project designs in order to protect regulated trees. Mr. Clowers goes on to conclude the incidence of adjustments would occur only intermittently and "perhaps rarely" in a given geographic vicinity.[10] Mr. Clowers came to this conclusion without even asking SDCI for information regarding the frequency of the occurrences of adjustments under the current Tree Protection Ordinance let alone an estimation of the frequency (and location) in the future given the increased number of lots with protected trees. This would have been valuable information, especially if Mr. Clowers had considered that the trend in housing development is towards development in single-family zones as opposed to lowrise zones, where protected trees are more prevalent or if he had considered that over the life of the proposal, even more trees would be protected, and more lots impacted as a result.

The superficial nature of Mr. Clower's impact analysis of the known effects of the current Tree Protection Ordinance in the face of knowable trends in housing development and the fact that tree grow over time is stunning. He made assumptions about the current

[9] Ex. 2, SEPA Checklist at p. 11.
[10] Ex. 1, SEPA DNS at p. 12.



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Tree Protection Ordinance and the Proposed Action without requesting additional information regarding their impacts even though he had the authority to request this information and SDCI could provide it.

Such information includes the time and cost of a tree review either under the current Tree Protection Ordinance or under the Proposed Action, the percentage of tree reviews involving the potential removal of an exceptional tree, the number and type of adjustments granted to save a tree, or the time and cost involved in replacing the a protected tree.[11] Mr. Clowers instead relied on backwards looking production data and his experience to conclude the current ordinance does not impact housing development. There is no doubt Mr. Clowers has significant experience in environmental reviews. An environmental review, however, that relies on experience without the proper information to understand the context in which the proposal will operate is an incomplete review at best. The procedure used to conduct the review was clearly erroneous because SDCI failed to request available data so that it could understand the potential environmental impacts.

Furthermore, Mr. Clowers relied on old data of past conditions to confirm his mistaken assumption and did not consider the current development environment or future trends. As Mr. Deherrera, Mr. Pollard and Mr. Britsch testified, development is already moving from lowrise zones to single family – resulting in less housing being created and development patterns deviating from those intended by the Land Use Code. Mr. Deherrera and Mr. Pollard also testified that 75% of the proposed projects in single-family zones have significant trees over 12-inches or exceptional trees. While the current Tree Protection Ordinance may not be driving the trend away from development in lowrise zones, the impact

[11] The SEPA DNS indicates that significant trees are removed in the same manner as an exceptional tree under the Proposed Action. Ex. 1 at p. 2.



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of the Proposed Action will be felt more acutely as a result. Mr. Clowers should have considered that impact and he did not.

e) The GIS data utilized by the City is not reliable.

Not only did the SDCI err in failing to request additional information to undertake a sufficient environmental review the information, the data it did rely on is fundamentally flawed. That is no more apparent than when one considers that the City failed at every stage to consider the impact of growth of trees over the lifetime of the proposal as required by SMC 25.05.060.D.3. Apparently, no one thought to adjust the 2016 LiDAR data to account for tree growth over the intervening five years. Nor did Mr. Clowers, or anyone else at the City, analyze the future impact of more trees growing into a significant tree over 12-inches or into exceptional trees. This failure to consider growth is hard to understand given Ms. McGarry's testimony that SDCI will request that trees be remeasured during the permit review process if enough time has passed since the initial measurement to ensure that trees that were not exceptional have not become exceptional in the interim. This oversight is further evidence that SDCI made mistakes when performing the environmental review – especially when it considered impacts to the built environment.

In addition to failing to account for tree growth over the lifetime of the Proposed Action, the accuracy of SDCI's analysis of the number of trees would be regulated under the Proposed Action and the percentage of developable lots that will contain regulated trees is highly questionable and SDCI should have known that. First, SDCI estimated the number of additional trees regulated and lots impacted by those trees by employing a correlation between the height of a tree and width of a tree using old data from a 2016 LiDAR survey that was not intended for that purpose. SDCI was aware that there was only a rough correlation between the height and the width of a tree. Mr. Haywood explained that species traits and growing conditions make a simple correlation unreliable. The methodology used



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by SDCI to transform height to DSH likely resulted in an undercount of lots currently containing exceptional trees, as well as an underestimation of the number of exceptional trees that would result from applying the 24-inch threshold of the Proposed Action and of significant trees between 12 and 24 inches. And, as discussed above, SDCI did not consider any trees less than 24-inches that were exceptional because of their species.

SDCI witnesses testified that the LiDAR survey and the resulting analysis was the best available data, but that is simply not the case. SDCI inexplicably went to great lengths to match the LiDAR data to a distribution curve of tree widths from a San Francisco iTree survey. Clearly, the more accurate way to determine the number of trees in Seattle over 12-inches, and trees that are exceptional by virtue of their species, would be to develop Seattle's own tree-width distribution curve by conducting its own iTree survey. Mr. Spear admitted a tree survey would have resulted in a more accurate analysis. Given the number of cities who undertook such surveys – even smaller cities with (presumably) smaller budgets – requesting that SDCI conduct its own tree survey would not have been unreasonable. The City instead used extremely limited information from its Accela database to estimate only one range of tree width (greater than 30-inches DBH) to select the San Francisco distribution curve as the proxy curve for Seattle.

Using the Accela data is problematic since it is based on biased information in the sense that the percentage of development permit applications for sites containing exceptional trees under the current definition is skewed low by the fact that developers avoid properties with exceptional trees. Therefore, the actual number of trees in Seattle larger than 30-inches is likely greater than the 8% calculated from the Accela data. Furthermore, as Alan Haywood, an arborist with the City of Issaquah for over 30 years, testified, the growth patterns of trees vary widely depending on the environment in which they grow. Given the differences in climates between San Francisco and Seattle, trees in general may be on



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average wider in Seattle than San Francisco. If so, there may be a larger percentage of trees over 12-inches in Seattle than San Francisco[12] and using the San Francisco distribution curve resulted in an undercount of trees greater than 12-inches in Seattle. Again, the best available data was the actual tree widths in Seattle the distribution of which could have been determine as it has been in many other cities. There is no reasonable explanation for why a tree survey was not performed.

Mr. Spear also admitted he did not determine the number of exceptional trees that are exceptional because of their species, and not because of their size. During cross-examination Mr. Spear stated that he believed the new proposed Director's Rule[13] only regulated trees that were 24-inches DBH or larger. While he tried to walk back this statement on redirect, he admitted that he did not determine the number of exceptional trees that are exceptional even though they are less than 24-inches DBH.

The proposed Director's Rule identifies 33 separate tree species that are exceptional, even though their DBH is less than 24-inches. 14 of those 33 tree species are exceptional when their DBH is less than 12-inches. While it is impossible to know how many exceptional trees there are in the City that are less than 24-inches DBH (because the City did not attempt to ascertain that information), the conclusion is clear: There are more exceptional trees and regulated lots than the City calculated.

The City exemplifies its lack of analysis when it reduced the total number of exceptional trees 24-inches and larger by 9%. To avoid double counting, Mr. Spear testified that he reduced the estimated number of additional exceptional trees in Seattle if the threshold is reduced to 24-inches by 9% to account for trees that are between 24-inches and 30-inches and are already considered exceptional because of their species. This percentage

[12] As Mr. Spear noted, Seattle is known for having exceptionally large trees.
[13] Ex. 5.



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was based upon a sample size of one tree, as Mr. Spear admitted. This number was calculated using limited data from the City's GIS system that began tracking the size and specie of exceptional trees two years ago. Whether 9% accounts for too many or too few exceptional trees is impossible to know. What we do know is that basing this calculation on one single tree is not reliable data. Because SDCI was able to determine the number of permits with a tree review, it could have easily reviewed those permits, or at least a statistically significant portion, to determine how many of those trees were between 24-inches and 30-inches DBH and were exceptional because of their species. This would have been reliable information to determine what percentage the total number of exceptional trees should be reduced by to avoid double counting.

In addition, Mr. Britsch testified that jurisdictions often overcount the number of developable lots. Here, the City just counted the total number of existing lots and did not investigate the many factors that might render them undevelopable, or at least inhibit their full development potential. Thus, the actual percentage of lots available for development or redevelopment that currently contain exceptional trees and would contain significant and exceptional trees could easily be greater than estimated by the City. As Mr. Pollard testified, there are numerous reasons for concluding the development of a lot is infeasible, (e.g., water availability, utilities, etc.). So, the representation that there are 162,000 available lots is misleading and the percentage of developable lots impacted by the Proposed Action is likely much higher than stated on Table 5.[14]

f) SDCI failed to account for the impacts of other differences between the existing Tree Protection Ordinance and the Proposed Action.

Even though the SEPA DNS recognizes some impact (i.e., "tensions") the regulation of trees will have on development, the Proposed Action will increase that impact by at least

[14] SEPA DNS, p. 8; Draft Director's Report, p. 15.



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300%. In addition to the impact from the sheer volume of additional regulated trees and impacted lots, the Proposed Action will add additional burdens on housing developers that were not adequately considered in the SEPA DNS (if at all). For instance, the Proposed Action will require permanent covenants be placed on exceptional and significant trees that are not removed during development. And there is no mechanism for removing the covenant if the protected tree eventually dies or is otherwise removed. This will burden the property in perpetuity.

Similarly, the SEPA DNS and Checklist fail to consider the time and expense of determining how to either replace significant trees or to make a payment in-lieu.[15] Applying this requirement potentially to three times as many trees is going to negatively influence the production of housing in Seattle. By failing to gather information about all the effects of the Proposed Action, SDCI did not disclose the potential environmental impacts because it did not have complete information. So, the environmental impacts cannot be given proper consideration by the decision makers; in this case, City Council.

g) The environmental review was not conducted properly and the DNS is the product of clear error.

In the aggregate, Mr. Clowers' conclusions are no better than rank speculation. SDCI's conduct of the environmental review is clearly erroneous. The SEPA DNS is not the result of an appropriate consideration of all environmental factors. If Mr. Clowers had considered reasonably available information concerning the impact of the current Tree Protection Ordinance on the environment, it is likely he would have concluded that the Proposed Action would create a probable significant adverse environmental impact on housing supply and development patterns. SDCI made mistakes in performing the

[15] SDCI merely assumed the fee-in-lieu options would be a benefit to developers because option is not in current ordinance, but the cost of replacement still will have a greater impact under the Proposed Action since it will apply to at least three times as many trees.



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environmental review, and the threshold determination failed to adequately disclose, discuss, and analyze the Proposed Action's direct, indirect, and cumulative impacts on the environment – specifically, the built environment.

2. Appeal Issue C.2: Failure to analyze impacts on the City's ability to meet Comprehensive Plan Goals.

The appeal issue in Section C.2 of the Notice of Appeal ("Appeal Issue C.2") concerns consideration (or lack thereof) in the City's environmental review of the Proposed Action's impact on the ability of the City to achieve the housing goals in its Comprehensive Plan. Appeal Issue C.2 challenges whether the Proposed Action is consistent with the City's plan to promote the availability of housing in Seattle and other housing-related goals. SDCI's failure to even identify the Comprehensive Plan's housing goals in the SEPA Checklist or in the DNS is compelling evidence to support Appellants' claim that SDCI failed to conduct the environmental review in accordance with SEPA. The City was plainly aware of these goals because it identified them in the SEPA Draft Director's Report.[16]

In particular, neither the SEPA DNS nor the SEPA Checklist included Housing Goals relating to affordable housing, such as:

> H 5.13 – Seek to reduce cost burdens among Seattle households, especially lower-income households and households of color.
>
> H 5.16 – Consider implementing a broad array of affordable housing strategies in connection with new development, including but not limited to development regulations, inclusionary zoning, incentives, property tax exemptions, and permit fee reductions.

They also ignored the following goals that encourage infill development and direct Seattle to meet the housing needs of all its citizens:

> **GS 1.5** *Encourage **infill development** in underused sites, particularly in urban centers and villages.*

[16] Ex. 5 at p. 22-23.



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**GOAL**
**H G2 Help meet current and projected regional housing needs of all economic and demographic groups by increasing Seattle's housing supply.**

(emphasis in the original).

The testimony at the hearing established that the Proposed Action will be contrary to these goals. It will increase housing costs, not only through the added cost of development, but also being a drag on housing production. As Mr. Pollard testified, the current Tree Protection Ordinance has contributed to development patterns that were not intended by current zoning with the abandonment of multifamily lowrise zones in favor of development in the far less dense single-family zones.

In addition, Mr. Britsch testified that the cost of addressing tree protection reduces the development of townhomes because the cost of compliance cannot be absorbed at the current market price for townhomes. Therefore, prices need to increase, or developers will build elsewhere. Mr. Britsch noted the downward trend in applications for the development of townhomes and that townhomes are the primary source of affordable housing in Seattle. He testified that new single-family homes in Seattle sell for around $2,000,000 while townhomes sell for around $650,000. So, a drop in the stock of townhomes is contrary to the City's goals regarding affordable housing. Furthermore, Mr. Britsch pointed out that increasing the cost of construction means that fewer low-income housing units can be developed.

Despite a specific policy outlined in SMC 25.05.675.I to consider impacts to affordable housing, SDCI did not consider the Proposed Action's impact on affordable housing. The SEPA DNS and Checklist did not address this issue. Those documents were also silent on the Proposed Action's impact on the City's ability to achieve any other Comprehensive Plan goals other than protection of trees. There was no effort to quantify these impacts in any way.



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3. Appeal Issue C.3: SDCI failed to adequately analyze impacts to all elements of the built environment.

In Appeal Issue C.3, Appellants address the City's failure to make a reasonable effort to identify all probable adverse impact to the environment from the Proposed Action. Appellants cite to several examples of probable adverse impacts that SDCI barely mentions in the SEPA DNS or the Checklist if at all, including, the built environment, affordable housing, utilities, traffic, and parking.

SDCI's inability to follow the SEPA rules and assess the impacts to all elements of the environment is revealed by the dearth of such analysis in the SEPA DNS as well as in the Checklist. SDCI failed to consider the Proposed Action's potential for adverse impacts to the availability of adequate affordable housing; it made no attempt to quantify that impact. If it had, SDCI would have found that the impact was probable, adverse, and significant because of increased costs of development, more funds required for low-income housing development, and far fewer townhomes that constitute much of the affordable housing stock in Seattle. Instead, SDCI focused on building its case for the Proposed Action by focusing its review almost exclusively on how the Proposed Action will protect more trees.

In addition to failing to consider the impacts to affordable housing, SDCI only superficially considered impacts to existing utilities, infrastructure, and to street parking and traffic. The testimony was clear that the development trend is moving away from lowrise zones and towards single-family zones. SDCI did not perform any analysis regarding whether this will conflict with City's plans for parking, traffic, utilities, and other infrastructure and result in insufficient services to manage the new land-use patterns.

Mike Swensen testified regarding possible impacts to street parking and traffic because of the Proposed Action. He offered that if growth is pushed away from Urban Centers and Urban Villages (as Mr. Deherrera, Mr. Pollard, and Mr. Britsch testified) where



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services are concentrated and transportation options exists, that development pattern would be contrary to the Comprehensive Plan goal supporting infill development, and there likely will be transportation, traffic, and parking impacts. Depending on where that density moves, the impacts could include more vehicle miles traveled, traffic congestion, and air pollution. SDCI did not consider any of these impacts. Mr. Swensen noted that there was no reference to any traffic or parking studies in the SEPA DNS, Checklist, or the Director's Rule. Mr. Clowers confirmed the lack of traffic and parking analysis and that no such studies were performed.

SMC 25.05.060(D)(2) obligated SDCI to consider potential environmental impacts outside of the City limits: "In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries (see subsection 25.05.330.C also)." The City witnesses admitted that they did not investigate the Proposed Action's potential environmental impacts to areas outside of Seattle.

Additionally, SDCI did not sufficiently analyze changes in neighborhood character that would result from adoption of the Proposed Action. As pointed out above, Mr. Clowers concluded there would be no significant adverse impacts from the adjustments granted to protect trees from removal without asking for information about the number and frequency of past tree reviews resulting in such adjustments and without considering that there would be at least three times more trees, lots and permits impacted by adoption of the Proposed Action.



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4. The City was blatantly biased towards tree protection and approving the proposed Tree Protection Ordinance.

The slant of the SEPA DNS and Mr. Clowers' involvement in developing the SEPA Checklist[17] leave the unavoidable impression that the goal of SDCI's environmental review of the Proposed Action was not to fully analyze the impacts to the environment from the Proposed Action, but simply to support the adoption of the Proposed Action by highlighting the salutary environmental impacts and downplaying the adverse impacts to the environment. The bias is exhibited in the testimony of the City's witnesses and by the content of the SEPA DNS, Checklist and Director's Report. This bias was most exemplified when Ms. Emery testified that even if the Proposed Action rendered each lot with a regulated tree undevelopable, that it still would not result in a probable significant adverse environmental impact! Mr. Clowers agreed with Ms. Emery's testimony.

Mr. Clowers testified (and the DNS reflects) that he considered the UFC report, but not the listening sessions, in making his threshold determination. Furthermore, while the SEPA DNS and Checklist include numerous Comprehensive Plan goals and policies regarding protection of trees, neither the DNS nor the Checklist cite to goals and policies regarding housing, land use, or addressing population growth. Mr. Clowers also was quick to proclaim the benefit of saving trees, but resistant to identify adverse impacts to the built environment. Finally, by offering wholesale advice regarding the content of the SEPA Checklist and even being involved in the development of the Proposed Action, Mr. Clowers calls his objectiveness into question. As addressed by SMC 25.05.926.B, there is an inherent appearance of a lack of impartiality when serving as both proponent and Designated Official for a particular proposal.

[17] Version 1 of the SEPA Checklist contains extensive comments by Mr. Clowers; Ex. 15.



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## IV. CONCLUSION

The SEPA DNS issued by SDCI regarding the Proposed Action is based on an inadequate environmental review that failed to collect and consider sufficient information necessary to identify impacts to all elements of the environment, including housing production, ability to achieve Comprehensive Plan goals and policies, parking, and traffic in Seattle. If SDCI had performed its environmental review properly, it would have identified probable significant adverse enviro impacts – requiring the preparation of EIS. By failing to follow the procedures for a threshold determination provided for in SEPA and the City's SEPA rules, SDCI is not providing the decision makers the information they are supposed to receive from a SEPA review. The City made a mistake in the way it superficially reviewed impacts to the built environment that renders the determination of non-significance clearly erroneous. The DNS should be reversed and remanded to SDCI for preparation of an EIS.

Respectfully submitted this 11th day of July, 2022.

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