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

In the Matter of the Appeal of

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTY, et. al.

Hearing Examiner File:
W-22-003

Department Reference:
No. 000268-22PN

from a Determination of Non-Significance issued
by the Seattle Department of Construction and Inspections

Introduction

The Seattle Department of Construction and Inspections ("Department" or "City") issued a State Environmental Policy Act ("SEPA") Determination of Non-Significance ("DNS") for a proposed ordinance that would propose updates to the Land Use and Tree Protection Codes ("Proposal"). The Appellants 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 ("Appellants"), exercised the right to appeal pursuant to Chapter 25.05 Seattle Municipal Code.

The appeal hearing was held on June 14, 15 and 22, 2022, before the Hearing Examiner. The Appellants were represented by Brandon Gribben, attorney-at-law, the Department was represented by Daniel Mitchell, attorney-at-law, and the Intervenor TreePAC, was represented by Claudia M. Newman, attorney-at-law. The parties submitted closing briefs on July 11, 2022, and response briefs on July 19, 2022.

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

Findings of Fact

1. The Proposal concerns a nonproject action under SEPA. The City issued the DNS for the Proposal on February 22, 2022. The DNS describes the proposal identified in the Ordinance as:

> This is a non-project legislative action proposing amendments to Titles 23 (Land Use Code) and 25 (Tree Protection Code). The purpose of the code amendments is to update tree protections. In addition, the proposal would correct errors and improve the clarity and readability of the code.

And,

> A. Expand the types and sizes of trees that are regulated, including a new definition of significant trees;
> B. Apply replacement requirements to include significant trees 12 inches in diameter and larger;
> C. Simplify provisions, including allowing development standards to be modified to aid in tree preservation as an administrative process without requiring Design Review, while maintaining Design Review as an option in multifamily and commercial zones;
> D. Establish a payment option for tree replacement (payment in lieu);
> E. Support tracking of tree preservation, removal, and replacement; and
> F. Increase penalties for violations of tree regulations.

Exhibit 1 A at 1-2.

2. The DNS determined that the Proposal would not have probable significant adverse impacts on the environment.

3. The DNS included an analysis concerning the number of trees and properties that would be affected by the Proposal, stating:

> SDCI worked with Seattle IT to estimate the number of lots that might be affected by the change from a 30-inch to a 24-inch DSH threshold for most exceptional trees. The analysis also looked at the effect of using a threshold of significant trees at a 12-inch DSH. The GIS analysis employed the City's 2016 tree canopy layer, SDCI's lot and zoning layers, statistics from a U.S. Forest Service study of tree canopy DSH distribution in 30 US cities[1], and an Accela query of SDCI tree reviews in 2020 and 2021.
>
> The following table estimates what proportion of additional development sites (e.g., properties) in the affected environment would be newly affected, and how many additional trees would be protected as a result of the proposal. Rows 2 and 3 of the table below relate to two different components of the proposal, either or both of which could be approved. The numbers in Row 3 of the table below reflect the adoption of the proposal regarding both exceptional and significant trees.

[1] Morgenroth, Justin, David J. Nowak, and Andrew K. Koeser 2020. "DBH Distributions in America's Urban Forests— An Overview of Structural Diversity" Forests 11, no. 2: 135. https://doi.org/10.3390/f11020135

Row #	Existing tree regulation compared to proposal	Percentage of lots* to be regulated during development	Number of trees** to be regulated during development
1	Regulating using existing definition of exceptional trees (varies by trunk size and species)	4% of lots in applicable zones	17,700 trees
2	Regulating with an expanded definition of exceptional trees (most at 24" or larger); groves and heritage trees	5% of lots in applicable zones	22,400 trees
3	Regulating trees 12" and larger plus exceptional trees***	16% of lots in applicable zones	70,400 trees

* The total number of approximately 162,000 applicable lots are in single family, multifamily and commercial zones.
** Estimated total number of trees 6" and larger on private property in the applicable zones: 175,013.
***The proposal defines the size range of significant trees to be 6" and larger, but replacement/ mitigation would only be required for significant trees 12" and larger, along with trees designated as exceptional trees, heritage trees, and trees in groves.

> The proposal to expand the definition of an exceptional tree by lowering the threshold from 30 inches to 24 inches as measured by diameter at standard height (DSH) and add tree groves and heritage trees would result in the regulation of about 22,400 trees. Residential and commercial zoned lots containing exceptional trees would rise from 4% to 5%.
>
> The proposal to expand the range of regulated trees for newly-defined significant trees with 12 inches diameter or larger, along with the exceptional trees proposal, would result in the regulation of about 70,400 trees. The proportion of residential and commercial lots containing regulated trees would rise from 5% to 16%.

Exhibit 1 A at 7-8.

4. The DNS detailed a fee-in-lieu option that is part of the Proposal:

> The proposed amendments would require trees 12 inches or greater in diameter removed as part of development to be either replaced on-site or mitigated by payment-in-lieu of replacement, unless hazardous. These changes would primarily impact builders and property owners seeking to remove trees as part of development activity beyond the existing tree removal limit, which currently allows up to three non-exceptional trees to be removed per year.

> Exceptional trees and trees 12 inches or greater in diameter are proposed to be protected from removal (e.g., in required yards or property line setbacks) unless they are authorized to be removed for a new building.
>
> On-site replacement is preferable. However as an alternative, under the proposal, a builder could opt to make a payment-in-lieu to replant trees. The payment amounts would be based on the Guide for Plant Appraisal, 10th Edition, authored by the Council of Tree and Landscape Appraisers which is based on the size and species of the tree, ranging from several hundred to several thousand dollars for a regulated tree. Payment amounts could be adjusted in the future and may include City costs related to establishing the trees for a period, likely three to five years. Revenues would be used for City programs that would result in planting of new trees on public property with an emphasis on low-canopy neighborhoods, many of which are BIPOC communities.

Exhibit 1 A at 9.

5. The DNS generally concluded with regard to impacts to the built environment:

> The proposed non-project action is not likely to generate significant adverse impacts on land use and shoreline use patterns, directly, indirectly, or cumulatively. Also, the proposal would not likely affect the arrangement and combinations of land uses that could occur with future development in a significant adverse manner.

Exhibit 1 A at 10.

6. Specifically with regard to potential impacts on development patterns the DNS concluded:

> The analysis for plants and animals impacts summarizes how many properties could be newly affected by lowering the DSH from 30 inches to 24 inches for exceptional trees, and with respect to properties with newly regulated significant trees (trees with a DSH 12 inches to 24 inches). Depending on the location of a regulated tree on the development site, such trees could in some cases lead to differences in how future new housing units (including detached accessory dwelling units) could be situated on existing lots.
>
> This could potentially be viewed as creating competing interests between land use regulations and tree protection regulations, but would not fundamentally reshape the typical prevailing land use and development pattern within any given zoning designation or neighborhood. 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 more future development proposals, to build structures that may accommodate regulated trees to remain on-site even after development. It should be noted that these aspects of the proposal 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. 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; the proposal would continue to implement these principles in its regulations. And the proposal also includes the removal of a streamlined design review process requirement for sites in Lowrise, Midrise and Commercial zones, with the proposal instead being reviewed per Chapter 25.11.

The nature of the changes would be to increase the number of affected properties and the number of protected trees. This 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. It could also increase the probability that prospective applicants for new development would evaluate the effect of the tree protection requirements (for example, relative to costs of mitigation) and decide against purchasing properties or submitting development proposals. In this fashion, the proposal might mean that properties with exceptional trees and other regulated trees would be less frequently selected for future development purposes, and thereby the regulated trees would more likely be preserved over the long-term.

The analysis above similarly applies to probable shoreline use impacts. Additionally, other code prescriptions and restrictions applicable to shoreline areas would continue to apply to review of future development proposals. The proposal would not inherently affect these shoreline-related codes, and thus its impact is likely to be relatively neutral on the nature of future development potential for properties in shoreline-designated areas. The combination of proposed changes to increase development site plan flexibility through reduction in minimum development standards could lead to tangible physical differences in how development could occur, on a site-by-site basis. This would depend on the location of trees that can be preserved and the degree to which new buildings can be designed to fit into the remaining parts of a site. While the trees to be protected could remain, if reductions in development standards would occur on a more frequent basis under the proposal, new development could be:

- Up to twice as close in their setback (a 50% reduction) to adjacent properties and/or separations from other buildings;

- With reduced amounts of landscaped area and on-site amenity areas;
- With reduced amounts of parking and/or space allocated for vehicle access compared to otherwise minimum code requirements; and
- In Lowrise zones, allowed to be 50 feet in height (with pitched roof) rather than 40 feet in height, accommodating recovery of floor area that would otherwise be lost due to the preservation of a tree or trees.

In terms of land-use-related impacts on their surroundings, these differences could adversely alter perceptions about density of development in a given local setting. This might lead to, for example, a new building being located closer to an adjacent property's dwelling or structure, with added possible perception of building bulk depending on how long a building façade is, or in some cases an extra floor added to the new building. Reduced amenity space, landscaping area, and reductions in space for parking and access arrangements could similarly lead to a slightly greater potential for negative perceptions by nearby area residents and users about a denser occupation pattern or unusual arrangement of buildings on a property. These are evaluated in this analysis as representing potentially adverse but not significant adverse impacts, because their incidence would tend to occur intermittently and perhaps rarely in any given geographic vicinity where exceptional or significant trees would be present, and where such properties would be subject to future development and where such development would be adapted in design to retain an existing exceptional tree.

For the purposes of this programmatic-level impact analysis, City staff are not able to anticipate and analyze all possible locations and arrangements of trees on all potentially affected individual properties and development sites. Similarly, the extent to which an individual property owner may need to or be able to reconfigure a development proposal to accommodate regulated trees cannot be fully known and described. With the requirement to obtain a permit for removing an exceptional tree, for example, such situations would be evaluated and decided on a case-by case basis. As today, regulated trees that are deemed hazardous to existing buildings would be removable, with mitigation required. This principle would also be the same for significant trees. The limiting factors discussed in this paragraph limit the depth and specificity of analysis on potential land use and natural environmental impacts of this proposal. However, for the sake of programmatic-level impact analysis, there is sufficient information about the proposal and interpretation of its probable impacts to conclude that significant adverse land use and shoreline use impacts are not probable for this proposal.

Exhibit 1 A at 10-12.

7. 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 likely 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 to these elements of the environment.

8. The Department completed an environmental checklist for the Proposal, identifying the Proposal's potential impacts to elements of the environment. The Department 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. The Department also completed Section D of the checklist, the section specific to non-project actions that requests information as to elements of the environment in a manner appropriate to a non-project action.

9. The record indicates that in developing the Proposal, the Department considered 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. For example, the Department 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 the Department proposed.

10. The Department conducted community outreach to receive input from interested stakeholders that helped the Department craft the Proposal. The Department identified a "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. The Department identified those impacts to be generally neutral when compared to the baseline, with some minor impacts on future development. The Department compared existing tree regulations with the proposed amendments of the Tree Protection Ordinance.

11. To quantify the impact of the Proposal, the Department utilized best available data, including a citywide tree canopy GIS dataset, 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.

12. 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.

13. The Department estimated 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.

14. The Proposal seeks to change the definition of "exceptional trees" to include all trees over 24 inches diameter at standard height ("DSH"). The Department's analysis estimates that an additional 1% of lots (about 1,620 new lots) would be affected by the inclusion of approximately 4,700 more trees.

15. 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. The Department estimated that about 17,820 development sites would be affected by this category of trees, and estimated that about 48,000 trees in the appropriate zones would fall into this category.

16. The Proposal allows 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.

17. The Department 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, and to build structures that may accommodate exceptional trees to remain on-site even after development. The Department analysis identified that the Proposal could increase the probability that prospective applicants for new development might evaluate the effect of the tree protection requirements 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.

18. The Department reviewed the City'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. The DNS includes a section addressing the relationship between the Proposal and City plans and policies. Exhibit 1 A at 12-13.

19. The Appellants appealed the DNS to the Hearing Examiner.

20. At hearing, the following witnesses testified on behalf of Appellants: Lucas Deherrera, Michael Pollard, Todd Britsch, Alan Haywood, and Michael Swenson.

21. Appellants' witnesses Lucas Deherrera and Michael Pollard testified concerning their long-time experience with the City development process. Their testimony primarily focused on challenges posed by the exiting system of tree ordinance regulation. They also expressed the concern that the Proposal would adversely impact development costs and result in less development in the City. Neither witness presented substantive analysis of the Proposal and or its impacts.

22. Todd Britsch testified on behalf of Appellants concerning his observation that housing developers are moving out of Seattle because of the current regulatory environment, that he sees more single-family homes being built now and far fewer townhomes than during the prior five years, and that adopting the Proposal will make development more challenging, lead to fewer housing developers operating in the City, and will dramatically reduce the already decreasing new housing supply. The later opinion was not supported by quantifiable analysis, but was expressed as Mr. Britsch's expert opinion.

23. Michael Swenson testified on behalf of Appellants, and included in his testimony the concern that the City should have analyzed the impacts the Proposal might have on other jurisdictions. Mr. Swenson did not provide any supporting analysis of the impacts of the Proposal.

24. Alan Haywood, an arborist with the City of Issaquah for over 30 years, expressed concerns about the City's methodology of the City's tree analysis. Mr. Haywood did not conduct any independent analysis of the impacts of the Proposal.

25. The following witnesses testified on behalf of the City: Patricia Bakker, Chanda Emery, Charles Spear, Christina Thomas, Deborah McGarry, and Gordon Clowers.

26. Patricia Bakker 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. Chanda Emery is a Senior Planner with the Department, and she testified concerning her lead role in the preparation of the proposed legislation amending the tree protection ordinance and associated environmental analysis at issue in the appeal.

28. Charles Spear testified concerning the development of the GIS analysis that was prepared to review the environmental impacts of the Proposal.

29. Christina Thomas testified on behalf of the Department concerning her involvement in the Department's methodology for determining the number of Exceptional Trees and Significant Trees that will be subject to the Proposal.

30. Deborah McGarry provided testimony regarding the current review process for project permit applications that are affected by exceptional trees or potential exceptional trees.

31. Gordon Clowers, the Department's SEPA responsible official, testified concerning his review of the environmental documents, analysis of the potential impacts of the proposal, and issuance of a DNS. At the hearing, Mr. Clowers acknowledged that the Proposal would only have minor impacts on future development and housing affordability.

32. Peg Staeheli, testified on behalf of TreePAC, the intervenor.

33. WAC 197-11-060.3.b provides:

> (b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5).) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
> (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

34. WAC 197-11-315 provides:

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

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

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

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

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

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

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

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

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

A. Policy Background.

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

. . . .

B. Policies.

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

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

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

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

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

Conclusions

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

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

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

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

5. The record demonstrates that the City considered the Project's potential impacts concerning housing stock, housing affordability, and plans for addressing population growth in Seattle in a manner sufficient to amount to *prima facie* compliance with the requirements of SEPA and that the Decision was based on "information sufficient to evaluate the proposal's environmental impact" as required by SEPA. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). The Appellants acknowledge that the Department referenced potential impacts to housing and land use issues in the DNS and the supporting SEPA Checklist, that the DNS did recognize some potential impacts on housing and land use from the existing ordinance, and that these issues, and the identification of housing related comprehensive plan goals were included in the Draft Director's Report.[2] The Department complied with SEPA's procedural requirements by

[2] Appellants' Closing at 2 and 4.

evaluating the SEPA checklist, the Draft Director's Report, relevant comprehensive plan policies, SEPA policies and guidelines, comment letters submitted by the public (including Appellants), and other information before issuing the DNS. The SEPA responsible official, Gordon Clowers also relied on his extensive knowledge and experience about growth patterns and development in the City of Seattle. The record reflects actual consideration by the Department of the impacts of concern to the Appellants.

6. The burden of proving the inadequacy of a threshold determination is high, and can be particularly difficult to meet. In this case, Appellants are 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 Appellants must present actual evidence of the likelihood of 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 the responsible official shows that they have reviewed and considered such comments and concerns, if the process proceeds to appeal, the bar is raised for concerned appellants to proactively provide adequate evidence of the likelihood of significant impacts that were not considered by the SEPA reviewer.

7. Much of Appellants' arguments are ostensibly focused on demonstrating that the Department did not meet its burden to show prima facie compliance with SEPA procedural requirements. However, these arguments exaggerate the Department's burden of proof, fail to take into account the record showing actual consideration of the impacts by the Department, and attempt to shift the burden of proof from the Appellants to the Department. Where, as here, the record reflects actual consideration of the impacts complained of by the Appellants, Appellants complaints that the record should include more detailed analysis, or specific details of concern to Appellants must be accompanied by evidence showing the reasonable likelihood of a significant adverse impact. Where such evidence is absent the Department did not have any further obligation to conduct additional environmental analysis, because SEPA does not require a full analysis of impacts as part of the threshold determination, but only a determination if an impact is "significant," and only then must the full analysis of such impacts be disclosed and analyzed in an Environmental Impact Statement. Similarly, "SEPA's procedural provisions require the consideration of 'environmental' impacts, . . .

with attention to impacts that are likely, not merely speculative." WAC 197-11-060 (4)(a).

8. Appellants did not quantify the scale or probability of impacts related to housing stock, housing affordability, and plans for addressing population growth in Seattle, and did not meet their burden to demonstrate that the Proposal is likely to result in significant negative impacts related to housing stock, housing affordability, and plans for addressing population growth in Seattle.

9. Appellants' arguments that the Proposal will increase the costs of development, and will have negative impacts on the City housing supply were based on speculation, not any actual quantitative analysis that was introduced into evidence. Appellants' case focused on the current state of City tree regulations and their impact on development. Appellants did not introduce adequate analysis demonstrating the likelihood that current circumstances will be exacerbated by the Proposal to such a degree as to cause significant adverse impacts. Appellants' expressed concern that development will be more expensive, uncertain, and problematic on some unidentified number of lots is not enough to demonstrate that the Proposal will likely have significant adverse impacts to future housing in the City.

10. The testimony of Appellants' witnesses Lucas Deherrera and Michael Pollard focused almost entirely on current conditions for development under the current Code. They provided opinion statements that the Proposal would have significant adverse impacts on housing stock, but did not support these statements with evidence quantifying the likelihood of such impacts.

11. Testimony from Appellants' witness Todd Britsch was not related to analyzing the Proposal's impacts, because his conclusion that there is a current slowdown in Seattle's development pipeline, was based on current market conditions that he analyzed, and unrelated to the Proposal. Mr. Britsch did not testify concerning any quantified analysis of the Proposal's impacts.

12. Testimony from Appellants' witness Michael Swenson was speculative. Mr. Swenson testified that the City should have analyzed the impacts the proposal might have on other jurisdictions, because the proposal could cause development to occur in other jurisdictions outside of Seattle. However, Mr. Swenson present no adequate evidence to demonstrate that any such impact could occur. SEPA does not require consideration of remote and speculative consequences of an action.

13. Allen Haywood's testimony on behalf of Appellants raised concerns with the City's methodology concerning tree data, but did not demonstrate any error in the City's methods and instead only indicated there may be alternative methodologies that could be used. In addition, Mr. Haywood provided no evidence of the likelihood of any significant adverse environmental impact associated with the Proposal.

14. Appellants assert that the City failed to meaningfully complete the SEPA checklist. However, the checklist belies this argument. Those sections of the checklist relative to a non-project action show completion and attention by the Department.

15. The Appellants argue in closing briefing "[t]he City improperly balanced beneficial aspects of the Proposed Action against its adverse impacts." This issue was not raised in Appellants' Notice of Appeal, and cannot now be raised for the first time in a responsive closing brief. Even if Appellants had timely raised this issue, it is without merit. The DNS does not balance beneficial aspects of the Proposal against adverse impacts. The DNS does include beneficial aspects of the Proposal in its analysis, but nowhere does the DNS apply these beneficial aspects against adverse impacts. The DNS analysis of beneficial impacts is independent of its analysis of adverse impacts. In closing briefing the City attorney did emphasize the beneficial aspects of the Proposal, but this closing briefing is not the DNS or Department analysis at issue, and the Examiner has not considered any mention of positive impacts of the Proposal in the review of the record to determine if the DNS properly considered adverse impacts as such positive impacts are irrelevant to that review.

16. Appellants allege that the City did not comply with SMC 25.05.926.B and was biased when it issued the DNS. These issues were not raised in the Appellants' Notice of Appeal and are therefore not within the scope of the appeal and for that reason should be dismissed.

17. Several of Appellants' witnesses stated that the Proposal would have significant adverse impacts. However, these statements of opinion were not supported by quantified analysis of the likelihood of more than moderate negative impacts to the environment. The mere fact that an expert states that a proposal will have a significant adverse impact is not sufficient, when that statement is not accompanied by analysis or evidence that quantifies the level of impact.

18. Some of Appellants witnesses testified concerning the negative economic impact of the Proposal on the development community. SEPA environmental review is limited to analysis of potential impacts to the natural and built environment. Elements of the environment to be considered under SEPA review are listed in SMC 25.05.444. Economic impact is not an element of the environment that is required to be studied under SEPA.

19. Appellants' complaint that the Department did not consider the City's Comprehensive Plan housing goals as part of the environmental review is without merit. The Director's Report provides that the proposal was determined to be consistent with the comprehensive plan goals and policies, and lists specific housing goals in that section of the report. Gordon Clowers testified that he reviewed all of the environmental documents, including the City comprehensive plan goals and policies outlined in the environmental checklist and Director's Report and determined the Proposal to be consistent with the comprehensive plan, including the housing, land use, growth strategy, and environmental goals.

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

21. There is no evidence in the record that the Proposal is likely to have a significant adverse impact.

22. There is no evidence in the record demonstrating clear error on the part of the SEPA responsible official in issuing the threshold determination.

Decision

The Director's decision to issue a Determination of Nonsignificance for the proposed ordinance is not clearly erroneous and is **AFFIRMED,** and the Appellants' appeal is **DENIED.**

Entered August 10, 2022.

/s/Ryan Vancil
Ryan Vancil, Hearing Examiner
Office of Hearing Examiner

Concerning Further Review

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

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

If a transcript of the hearing is required by superior court, the person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, Room 1320, 618 Second Avenue, Seattle, Washington 98104, (206) 684-0521.

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **MBAKS, LEGACY GROUP, BLUEPRINT CAPITAL** Hearing Examiner File: **W-22-003** in the manner indicated.

Party	Method of Service
Appellant Legal Counsel Helsell Fetterman, LLP Brandon Gribben bgribben@helsell.com Samuel Jacobs sjacobs@helsell.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Department Legal Counsel City Attorney's Office Daniel Mitchell Daniel.Mitchell@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Department SDCI Gordon Clowers Gordon.Clowers@seattle.gov	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Intervenor/The Movement Legal Counsel Bricklin & Newman, LLP Claudia M. Newman newman@bnd-law.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
Mailing	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail

Chanda Emery SDCI Chanda.Emery@seattle.gov Eric Nygren Seattle City Attorney's Office Eric.Nygren@seattle.gov Gennifer D. Holland Helsell Fetterman LLP gholland@helsell.com Scott Johnson sjohnson@helsell.com Kyna Gonzalez Helsell Fetterman LLP Kgonzalez@helsell.com Peggy Cahill Bricklin & Newman, LLP cahill@bnd-law.com	☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Dated: August 11, 2022

/s/Angela Oberhansly_
Angela Oberhansly,
Legal Assistant