BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: SEATTLE MOBILITY COALITION From a Decision by the Seattle City Council Central Staff	No. W-23-001 RESPONDENT CITY'S MOTION TO DISMISS IN PART

I. INTRODUCTION AND RELIEF REQUESTED

Respondent Seattle City Council respectfully requests dismissal of two of three of the Appellant Seattle Mobility Coalition's claims that have been previously litigated: (1) whether the proposal will result in likely significant environmental impacts; and (2) whether the environmental review of the proposal was piecemealed under SEPA. Because the parties litigated these claims previously in 2018–19 and the legislative proposal is substantively the same, the parties are precluded from litigating these claims again under the doctrine of res judicata.

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Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

II. STATEMENT OF FACTS

A. The legislative proposal was first considered in 2018: Comp. Plan Amendments to create a Transportation Impact Fee Program.

In 2018, the Seattle City Council issued a Determination of Non-Significance (DNS) for proposed Comprehensive Plan amendments that were:

> … related to transportation impact fees are non-project in nature, primarily procedural, and will have citywide applicability. The proposed amendments would (1) amend the Capital Facilities and Transportation Elements of the Comprehensive Plan and related appendices to identify deficiencies in the transportation system associated with new development; and (2) incorporate a list of transportation infrastructure projects that would add capacity to help remedy system deficiencies. Projects included in the list would be eligible for future investments with revenue from a transportation impact fee program. The amendments to Seattle 2035 are a necessary, but not sufficient, step to establish an impact fee program under RCW 82.02.050.

Exhibit A to the Declaration of Ketil Freeman in support of Respondent's Motion (hereafter Freeman Decl.) (Seattle Mobility Coalition's 2018 Notice of Appeal on W-18-013).

B. Hearing Examiner Appeal of 2018 Comp. Plan Transportation Impact Fee DNS

On November 15, 2018, Appellant Seattle Mobility Coalition (Appellant) filed a Notice of Appeal with the Seattle Hearing Examiner, challenging the DNS for the proposed Comprehensive Plan amendments related to a Transportation Impact Fee program.

As part of the 2018 appeal, the parties conducted discovery including five depositions as well as three days of hearing testimony by seven witnesses (Morgan Shook, Mike Swenson, George Steirer, Kendra Breiland, Andrew Bjorn, Mark Mazzola and Ketil Freeman) and a final decision on the merits. Exhibit D of Appellant's 2023 Notice of Appeal (2019 Amended Findings and Decision).

In the decision, the Hearing Examiner summarized the testimony provided, finding no evidence of likely significant impacts to the cost of housing, housing, or parking. He also found that the appellants failed to demonstrate the probability of any negative significant environmental impacts arise as cumulative impacts. *Id*., at COL Nos. 6-10 at pp. 6-7 of Exhibit D to Appellant's 2023 Notice

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

of Appeal (2019 Amended Decision). Based on his findings, the Examiner concluded: "There is no evidence in the record that the proposed Ordinance is likely to have a significant adverse impact." *Id.* Conclusion of Law No. 11 at p. 7 of 11).

The Hearing Examiner further concluded:

> 12. The Hearing Examiner is not left with a definite and firm conviction that a mistake has been made concerning Appellant's allegations that the City has conducted SEPA review for the Ordinance in a piece-meal fashion…
>
> Appellant has not demonstrated that the proposed legislation 'cannot or will not proceed unless' additional ordinance are adopted to implement a TIF program. The Proposal consists of amendments to the City's Comprehensive Plan…. Adoption of generalized polies of a comprehensive plan do not require (or even guaranteed) that implementing ordinance be adopted. Appellant presented no evidence that the Ordinance cannot or will not be adopted by Council unless additional ordinances are adopted to implement a TIF program.
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> 13. Similarly, Appellant has not demonstrated that the proposal is an interdependent part of a larger proposal and depends on the larger proposal as its justification. The Appellant did not present caselaw or other argument that showed other cases wherein SEPA review for an amendment to a comprehensive plan was found inadequate because it did not include environmental review of implementing development regulations or programs…. The proposed Comprehensive Plan amendment do not ensure the adoption of a TIF program and does not establish important elements of such a program, such as fee amounts and potential exemptions. In addition, the environmental impacts of development projects that may be funded by a TIF program are merely speculative at this time, because funding for those projects is not provided by for by the c. The Ordinance is merely directive to create a program to fund such programs.

Id. at pp. 8-9 of 11 of Ex. D to Appellant's 2023 Notice of Appeal (2019 Amended Decision).

However, "the City concluded that because the proposal was of a non-project nature, it was not required to complete Section B of the environmental checklist," the Examiner concluded that a lead agency cannot simply ignore Section B of the Checklist and here "the City's mere reference to WAC 197-11-315(1)(e) with no demonstration that it considered, or made a determination with regard to, the questions in Section B is reversible error in the case." Conclusion No. 15 at p. 10. He further concluded that "Where Section B of the Checklist is left blank, and the DNS does not show

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

a determination as to the questions therein, the DNS was not based on 'information reasonably sufficient to evaluate the environmental impact' of the Ordinance, the record does not support a finding of prima facie compliance by the City, and the DNS should be reversed." Conclusion No. 16 at p. 10 of 11 of Ex. D to Appellant's 2023 Notice of Appeal. Based on Conclusions 15 and 16, the Examiner ruled: "The Determination of Non-Significance is REVERSED. The City must issue a new threshold determination."

C. 2023 Comp. Plan Proposal and Determination of Non-Significance

The Council subsequently complied with Examiner's Amended Decision and evaluated the proposal anew under SEPA, ultimately revising and updating the SEPA checklist and issuing a revised DNS. Freeman Declaration and Ex. B to Freeman Decl. (2023 legislative proposal). See also, Exhibit A to Appellant's 2023 Notice of Appeal (revised DNS) and Exhibit B to Appellant's 2023 Notice of Appeal (revised SEPA checklist).

The 2023 legislative proposal is substantively the same as that proposed in 2018, with a couple of small changes noted in strike-through and underline here:

> The ~~2018~~ 2023 amendments to Seattle 2035 related to transportation impact fees are non-project in nature, primarily procedural, and will have citywide applicability. The proposed amendments would (1) amend the ~~Capital Facilities and~~ Transportation Elements of the Comprehensive Plan and related appendices to identify deficiencies in the transportation system associated with new development~~; and~~ (2) incorporate a list of transportation infrastructure projects that would add capacity to help remedy system deficiencies; and (3) establish a policy of considering locational discounts for urban centers and villages and exemptions for low-income housing, early learning facilities and other activities with a public purpose for future rate-setting, if any. Projects included in the list would be eligible for future investments with revenue from a transportation impact fee program. The amendments to Seattle 2035 are a necessary, but not sufficient, step to establish an impact fee program under RCW 82.02.050.

P. 3 of Exhibit D to Appellant's Notice of Appeal (SEPA checklist for 2023 proposal) and *see also* Exhibit B to Freeman Decl. (2023 legislative proposal).

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

The 2023 proposal also (1) removed projects from the project list that had been completed between 2018 and 2023; and (2) updating the estimated costs for the remaining fee-eligible projects. Freeman Decl. In particular, the 2023 proposal removed five projects from the project list because those projects had been completed. Freeman Decl. at No. 5. The 2023 proposal also updated the cost estimates to take into consideration some cost increases due to inflation. Freeman Decl. at Nos. 6-7.

As far as updating the estimated costs for the remaining fee-eligible project list, the proposal used the same methodology used for the 2018 proposal to create a Transportation Impact Fee maximum defensible fee. *Id.* In the 2018 proposal, the maximum defensible fee was based on the project list and estimated costs as $11,380.36 per person trip. *Id.* The fee was adjusted slightly in 2023 to reflect the removal of costs for the five completed projects and to take into consideration some portion of inflation from 2018 to 2023. Freeman Decl. Thus, the maximum defensible fee was adjusted to $12,597.90 per person trip for the 2023 legislative proposal. Using the Bureau of Labor Statistics calculator (which uses CPI as an inflator), $11,380.36 in October 2018 is equivalent to 13,583.26 in March 2023. *Id.* So, the cost per person trip in the revised rate study (12,597.90) is less than the 2018 study after considering inflation. *Id.*

The Council carefully considered the environmental impacts of the 2023 proposal and concluded that it would not result in likely significant environmental impacts. Exhibit A to 2023 Notice of Appeal. The 2023 proposal contains five less projects on the transportation list than that considered in 2018. Transportation Appendix Figure A-18 of 2023 proposal, Exhibit B to Freeman Decl.

III. ISSUE STATEMENT

Under res judicata, the Hearing Examiner should dismiss a claim if the parties, the subject matter, the cause of action, and the quality of the persons for or against whom the claim is made are identical to a subsequent action. Here, in both cases Seattle Mobility Coalition and Seattle City

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Council are the parties, the claims involve Comp. Plan amendments setting the groundwork for Council to consider a Transportation Impact Fee program, two of the three claims are identical (that the proposal will result in likely significant environmental impacts and that the proposal was piecemealed under SEPA) and the quality of the persons are the same. Should the Hearing Examiner dismiss the two claims that have already been litigated in full?

IV. EVIDENCE RELIED UPON

This motion relies on the papers and pleadings in this matter and the Freeman Declaration submitted concurrently with this motion. The papers and pleadings in this action include the Appeal.

V. AUTHORITY

A. The Hearing Examiner may dismiss an appeal over which the Examiner lacks jurisdiction or that is without merit on its face, frivolous or brought merely to delay.

"An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay." Hearing Examiner Rules of Practice and Procedure ("HER"), Rule 3.02. "Any party may request dismissal of all or part of an appeal by motion." *Id.*

B. The Examiner should dismiss appellant's claims under res judicata because they have already been litigated.

The doctrine of res judicata, or claim preclusion, prevents the same parties from relitigating a claim that was raised or could have been raised in an earlier action. *Roberson v. Perez*, 156 Wn.2d 33, 41 n. 7, 123 P.3d 844 (2005). The doctrine is intended to prevent piecemeal litigation and to ensure the finality of judgments. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 117 (2005). Res judicata applies if a subsequent action is identical to an earlier

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

action in (1) identity of persons and parties, (2) the subject matter, (3) the cause of action, and (4) the quality of the persons for or against whom the claim is made. *Id*. Res judicata applies to quasi-judicial decisions. *Clallam County v. W. Wash. Growth Mgmt. Hearings Bd.*, 130 Wn. App. 127, 121 P.3d 764 (2005).

As our Supreme Court has noted: "Res judicata [claim preclusion] and collateral estoppel [issue preclusion] [are] kindred doctrines designed to prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts, [and] are at times indistinguishable and frequently interchangeable." *Bordeaux v. Ingersoll Rand Co.,* 71 Wn.2d 392, 395, 429 P.2d 207 (1967). Washington courts have at times used res judicata to mean both issue preclusion and claim preclusion. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328, 941 P.2d 1108, 1112 (1997). More recently, *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 280, 996 P.2d 603 (2000) concluded that res judicata (claim preclusion*) is what might or should have been litigated* and issue preclusion (collateral estoppel) covers issues that have been actually litigated.

All four prongs of the res judicata test are met here for two of the three Seattle Mobility Coalition's claims because these claims were or should have been litigated in Hearing Examiner Cause No. W-18-013 and therefore they must be dismissed by the Examiner.

i. Both prong one and four are met here: the identity and quality of the parties is the same in both matters.

Under the first prong of the res judicata test, the identity of the persons and parties is identical in both the earlier 2018/2019 action and the present action: Seattle Mobility Coalition and Seattle City Council. Compare Exhibit A to Freeman Decl. (2018 Notice of Appeal) and Notice of Appeal in present matter.

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Likewise, the fourth prong of the res judicata test is also met here: the quality of the parties for or against whom the claims are made remains the same. Seattle Mobility Coalition is the appellant in both matters and Seattle City Council is respondent in both matters.

ii. Prong two is also met: the subject matter of both cases is identical.

Additionally, the subject matter of both cases is identical—both appeals are about the Determination of Non-Significance (DNS) for Comp. Plan amendments that identify deficiencies in the transportation system associated with new development and that adopt a list of transportation infrastructure projects that would add capacity to help remedy system deficiencies, required to adopt a TIF Program under RCW 82.02.050-.090.

While Appellant will argue that the 2023 legislative proposal is a completely new proposal, this is not the case. The 2023 proposal is substantively the same as the 2018 proposal with only a few minor changes: (1) the 2023 proposal added Comp. Plan language to "establish a policy of considering locational discounts for urban centers and villages and exemptions for low-income housing, early learning facilities, and other development activities with a public purpose, as authorized by RCW 82.02.060;"[1] (2) the 2023 proposal eliminated projects from the project list that have been completed;[2] and (3) the 2023 proposal updated the estimated costs for the remaining projects.[3]

In both the 2018 and current (2023) proposal, the Council relied on a methodology that would create the maximum defensible fee for a TIF program. The 2018 maximum defensible fee was

[1] P. 2 of Exhibit A to 2023 Notice of Appeal (DNS); p. 3 of Exhibit B (Checklist); and Exhibit B to Freeman Decl. (2023 legislative proposal).
[2] Exhibit B to Freeman Decl., at Attachment 2 to 2023 Proposal (Transportation Appendix, Figure A-18, Impact Fee Eligible Projects, where five projects are removed from the list because they were completed, and maps reflect the same).
[3] Exhibit A to 2023 Appellant's Notice of Appeal at p. 1 of DNS ("In January 2023, the Council updated the impact fee rate study to eliminate projects that have been completed and update estimated costs for the remaining projects."); *see also* Freeman Decl.

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

proposed to be $11,380.36. Freeman Decl. at No. 7. In the 2023 proposal, Council updated the maximum defensible fee to be $12,597.90. *Id.* The intent in increasing the maximum defensible fee was to take into consideration at least a portion of the increased cost due to inflation. *Id*. Using the Bureau of Labor Statistics calculator (which uses CPI as an inflator), $11,380.36 in October 2018 is equivalent to $13,583.26 in March 2023. So, the cost per person trip in the revised rate study ($12,597.90) is less than the 2018 study.

The 2023 Rate Study is based on the same methodology used in the 2018 Proposal to which Kendra Breiland testified in detail in hearing, in deposition and provided Exhibit 3 in prior hearing of W-18-013. Exhibit D to Freeman Decl. (Memorandum from R. Schwartzman and K. Breiland to K. Freeman, dated 10/2/2018). The proposal continues to be the framework for Council to consider adopting a Transportation Impact Fee program based on the transportation projects that identified in the proposal.

Further, this current appeal attempts to relitigate the City's environmental review of the proposal, which is precluded by res judicata. While not binding, the Examiner has in the past applied res judicata in a similar SEPA appeal. *See e.g.,* Order on Motion for Partial Dismissal, In the Matter of the Appeals of Friends of Cheasty and Patricia Nauman from the SEPA determination by the Superintendent, Department of Parks and Recreation, W-18-010 and W-18-011.

iii. Prong three is also met: two of the three claims are identical in both appeals and should therefore be dismissed under res judicata.

Seattle Mobility Coalition brings three claims in its present appeal. Two of those three claims are identical to those claims appellant raised in the prior appeal and were fully litigated:

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Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

a. The claim that "the proposal will have significant adverse environmental impacts" is identical in both appeals.

The first identical claim is that: "The Proposal will have Significant Adverse Environmental Impacts." See Mobility Coalition's 2018 Notice of Appeal at p. 5, line 4 through p. 6, line 19 and p. 7 at line 20 through p. 8, line 7 and compare the identical claims in Mobility Coalition's 2023 Notice of Appeal at p. 6, line 7 through p. 8, line 2.

The prior appeal proceeding included five depositions and three days of hearing testimony by seven witnesses (Morgan Shook, Mike Swenson, George Steirer, Kendra Breiland, Andrew Bjorn, Mark Mazzola and Ketil Freeman) and resulted in the "Amended Findings and Decision", Exhibit D of Appellant's 2023 Notice of Appeal. In the 2019 Decision, the Examiner concludes "There is no evidence in the record that the proposed Ordinance is likely to have a significant adverse impact". P. 7 of 11 at Conclusion of Law No. 11.

The Examiner reached this conclusion after he summarized the testimony provided, noting no evidence of likely significant impacts to the cost of housing and housing or parking, and failure to demonstrate the probability of any negative significant environmental impacts arise as cumulative impacts. *Id*., at COL Nos. 6-10 at pp. 6-7 of Exhibit D to Appellant's 2023 Notice of Appeal. Appellant already had the chance to litigate whether the proposal will result in likely significant environmental impacts and failed to carry its burden to prove as much. The Hearing Examiner should dismiss the identical claim because it has already been litigated.

Appellant will argue that because the maximum defensible fee has increased in raw numbers from $11,380.36 to $12,597.90 from the 2018 to 2023 propsoal that the environmental impact must of such change must be evaluated. This argument fails. Using the Bureau of Labor Statistics calculator (which uses CPI as an inflator), $11,380.36 in October 2018 dollars is equivalent to

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

$13,583.26 in March 2023. So, the cost per person trip in the revised rate study ($12,597.90) is less than the 2018 study after considering inflation. Freeman Decl.

Further, like the 2018 proposal, the maximum defensible rate is not necessarily what the Council would adopt for a fee schedule when creating a Transportation Impact Fee program but rather, is the maximum amount per person trip that the Council could adopt if Council creates a TIF program. Because the maximum defensible fee is less than the cost of inflation for the 2018 amount, the economic impact to developers (or, if passed on to renters or homeowners) need only be analyzed in SEPA when such fees would result in likely significant impacts to housing. This issue was litigated in the prior appeal and the Examiner concluded that the maximum defensible fee would not result in likely significant impacts to housing and because the 2023 proposed fee is less than the 2018 fee when taking into consideration inflation, the housing impacts of such a maximum defensible fee of $12,597.90 cannot rise to the level of a likely significant impact to housing. Because this issue was fully litigated and is substantively the same claim, it must be dismissed under res judicata.

b. The claim of "Piecemealing" is also identical in both appeals.

The second identical claim is Appellant's claim regarding SEPA "Piecemealing". Compare Seattle Mobility Coalition's 2018 Notice of Appeal at p. 6, line 20 through p. 7, line 19 ("Piecemealing") to the identical claim in their 2023 Notice of Appeal, at p. 8, line 3 through p. 9, line 2 ("Piecemealing").

The Examiner concluded no SEPA piecemealing occurred in the prior appeal. The Hearing Examiner concluded in relevant part:

> 12. The Hearing Examiner is not left with a definite and firm conviction that a mistake has been made concerning Appellant's allegations that the City has conducted SEPA review for the Ordinance in a piece-meal fashion…

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

> Appellant has not demonstrated that the proposed legislation 'cannot or will not proceed unless' additional ordinance are adopted to implement a TIF program. The Proposal consists of amendments to the City's Comprehensive Plan…. Adoption of generalized polies of a comprehensive plan do not require (or even guaranteed) that implementing ordinance be adopted. Appellant presented no evidence that the Ordinance cannot or will not be adopted by Council unless additional ordinances are adopted to implement a TIF program.
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> 13. Similarly, Appellant has not demonstrated that the proposal is an interdependent part of a larger proposal and depends on the larger proposal as its justification. The Appellant did not present caselaw or other argument that showed other cases wherein SEPA review for an amendment to a comprehensive plan was found inadequate because it did not include environmental review of implementing development regulations or programs.

Id. at p. 8 of 11 of Ex. D to Appellant's 2023 Notice of Appeal (2019 Amended Decision).

While Appellant will argue that the 2023 proposal is different than the 2018 proposal and therefore a new appeal is warranted, this claim lacks merit. The proposal is substantively the same and, based on a few minor changes, would—if anything—lessen the environmental impact of the proposal by removing five completed projects that were included in the 2018 proposal and adding a possible policy to consider locational discounts for urban centers and villages and exemptions for low-income housing, early learning facilities and other activities with a public purpose for future rate-setting, if any.

Significantly, the 2018 proposal was subject to a complete hearing where the Examiner concluded that SEPA piecemealing did not occur. The changes to the 2023 proposal do not create a new proposal that requires an entirely new SEPA determination and administrative hearing. This issue has been litigated before the Examiner and the proposal is substantively the same to that already litigated. Appellant cannot relitigate this issue on the same proposal under res judicata.

All four prongs of the res judicata test are met here for Seattle Mobility Coalition's claims that (1) the proposal will result in likely significant environmental impacts; and (2) the City Council piecemealed the proposal under SEPA.

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

VI. CONCLUSION

Res judicata prevents relitigating a claim after a party has had a full and fair opportunity to litigate his or her case. Since all prongs of the res judicata test are met here for both Appellant's claims (1) that the proposal is likely to have significant environmental impacts and (2) SEPA piecemealing, these claims must be dismissed.

DATED this 17th day of April 2023.

ANN DAVISON
Seattle City Attorney

By: *s/Elizabeth E. Anderson*
Elizabeth E. Anderson, WSBA# 34036
Assistant City Attorney
liza.anderson@seattle.gov

Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

Attorney for Defendant City of Seattle

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

CERTIFICATE OF SERVICE

I certify that on this day, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Courtney Kaylor, WSBA #27519 David P. Carpman, WSBA #54753 McCullough Hill PLLC 701 Fifth Avenue, Suite 6600 Seattle, WA 98106 (206) 812-3388 courtney@mhseattle.com dcarpman@mhseattle.com Attorneys for Appellant Seattle Mobility Coalition	( ) U.S. Mail ( ) ABC Legal Messengers ( ) Faxed (**XX**) Via Email

Dated this 17th day of April at Seattle, Washington.

s/ Eric Nygren
Eric Nygren, Legal Assistant

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200