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.	**Hearing Examiner No. W-23-001** **APPELLANT'S RESPONSE TO MOTION TO DISMISS IN PART**

The Motion to Dismiss in Part ("Motion") filed by Respondent Seattle City Council ("City") fails to establish that Appellant Seattle Mobility Coalition's ("Coalition") claims are barred by res judicata. This appeal challenges the February 13, 2023 Determination of Nonsignificance ("2023 DNS") for the 2023 proposed Comprehensive Plan amendments regarding transportation impact fees ("Proposal" or "2023 Proposal"). The City argues that two of the claims are barred by res judicata on the basis of the Coalition's challenge to the City's DNS ("2018 DNS") for an earlier set of proposed Comprehensive Plan amendments ("2018 Proposal"). The Motion fails because the 2023 DNS and the 2018 DNS are not the same: the Examiner expressly required the City to conduct a new SEPA analysis and issue a new threshold determination, and that new determination is the subject of this appeal. In addition, the

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

circumstances relevant to the impacts of the 2023 Proposal on housing and housing affordability, among other impacts, are different from those surrounding the 2018 Proposal, so the two appeals are not based on the same set of facts. For these reasons, the doctrine of res judicata does not apply and the Examiner should deny the Motion.

I. STATEMENT OF FACTS

A. 2018 Proposal and Appeal

The 2018 Proposal would have amended the Comprehensive Plan to direct the use of impact fees on new development to fund a number of identified transportation projects. *Seattle Mobility Coalition*, HE No. W-18-013, Amended Findings and Decision (Oct. 24, 2019) ("2019 Decision") at 1-2; *see* Declaration of Courtney Kaylor ("Kaylor Dec."), Exhibit A (2018 DNS). The City issued the 2018 DNS accompanied by an environmental checklist ("2018 Checklist") in which Section B was left entirely blank. 2019 Decision at 10. The Coalition appealed the 2018 DNS to the Examiner. *Id.* at 2.

Under the 2018 Proposal, transportation impact fees in the City would be calculated according to the "existing system value methodology" developed by Fehr & Peers. Kaylor Dec., Exhibit B (2018 Ordinance). Evidence in the 2019 hearing established that Fehr & Peers had prepared a memo describing this methodology and calculating the maximum allowable fee that the methodology would permit. *See* Declaration of Ketil Freeman ("Freeman Dec."), attached to Motion, Exhibit D. However, Fehr & Peers had not prepared a rate study, calculated rates by land use, or established exemptions or reductions for the City's fee, providing only a draft table indicating how these determinations could be made. Kaylor Dec., Exhibit C (2019 Rate Table).

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

After the hearing, the Examiner held that the 2018 DNS was not "based on 'information reasonably sufficient to evaluate the environmental impact' of the Ordinance, [and] the record does not support a finding of prima facie compliance by the City." 2019 Decision at 10. The Examiner concluded: "The Determination of Non-Significance is REVERSED. The City must issue a new threshold determination." *Id.* at 11. In addition, the 2019 Decision stated that the Coalition had not met its burden to demonstrate that the 2018 Proposal was likely to result in significant adverse impacts or shown that the City had improperly piecemealed its SEPA review. *Id.* at 7-8.

B. Changes from 2018 to 2023

Today, the existing environmental conditions concerning housing differ substantially from the conditions under which the City analyzed the 2018 Proposal. It goes without saying that the global COVID-19 pandemic resulted in widespread changes that could not have been anticipated in 2018. Some of these changes are reflected in residential development patterns and housing project feasibility. Shifting economic conditions, as well as legislative and regulatory changes, have made the development landscape significantly more challenging, making housing projects – including affordable housing projects – more sensitive to increased costs. This is not a mere economic concern. Instead, these changes reflect the current conditions under which the effects of the proposal on the built environment – specifically, housing – must be analyzed.

1. MHA

Through its Mandatory Housing Affordability (MHA) program, Seattle requires developers of new residential and commercial projects to either include affordable homes onsite or pay into a City fund used to produce and preserve low-income housing. Chapter 23.58C

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

SMC, Chapter 23.58B SMC. MHA takes effect through legislative re-zones that increase overall development capacity while requiring contributions toward affordable housing. SMC 23.58C.010 - .015. Primarily, MHA "leverage[s] market-rate development to augment the City's supply of housing affordable to low- and moderate-income families and individuals."[1] Publicly funded affordable housing developments are exempt from MHA, but privately funded affordable housing developments are not. SMC 23.58C.025.C; Declaration of Benjamin Maritz ("Maritz Dec.") ¶¶ 5-6.

When the City issued the 2018 DNS in October 2018, MHA applied in only six neighborhoods.[2] In April 2019, the City Council expanded MHA to nearly all of portions of the City zoned for multifamily housing and to six percent of the land previously zoned exclusively for single-family homes.[3] At the close of 2022, MHA had yielded $246.1 million for affordable housing development and produced 176 affordable homes.[4] This was a significant increase from the end of 2018, when MHA had generated only $13.3 million for affordable housing.[5]

The dramatic increase in MHA funds raised since 2018 is attributable both to the citywide expansion and to the rising fees developers pay. MHA in-lieu fee rates adjust every

---

[1] Seattle Office of Housing, *2022 Annual Housing Investments Report* (2023) at 38, *available at* https://www.seattle.gov/documents/Departments/Housing/Reports/2022_AnnualInvestments_Final.pdf

[2] In October 2018, MHA only applied to developments in the University District (Ordinance No. 125267, March 2017), Downtown (Ordinance No. 125291, April 2017), South Lake Union (*id.*), Chinatown/International District (Ordinance No. 125371, August 2017), the 23rd Avenue Corridor in the Central District (Ordinance Nos. 125359, 125360, and 125361, August 2017), and Uptown (Ordinance No. 125432, October 2017).

[3] City of Seattle Office of Housing, *Annual Report 2022: Mandatory Housing Affordability and Incentive Zoning* at 4, *available at* https://www.seattle.gov/documents/Departments/Housing/Reports/2022_MHA-IZ-AnnualReport_Final.pdf.

[4] *Id.* at 5, 12.

[5] City of Seattle Office of Housing, *Annual Report 2018: Incentive Zoning and Mandatory Housing Affordability* at 14 (2018), available at https://www.seattle.gov/documents/Departments/Housing/Footer%20Pages/Data%20and%20Reports/2018%20IZ%20MHA%20Report.pdf

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

year. Since 2018, the MHA fee in many residential zones has increased almost 25%. For example, in the DMC 85/75-170 zone, fees have increased from $22.03 per square foot in 2018 to $27.42 per square foot today.[6]

The increase in the geographic scope and amount of MHA fees has added substantially to the cost of development. Declration of Meredith Holzemer ("Holzemer Dec.") ⁋ 4; Declaration of Morgan Shook ("Shook Dec.") ⁋ 4; Maritz Dec. ⁋ 4. This increase challenges the viability of market-rate and non-exempt affordable housing projects. *Id.* In addition, because MHA has become such a valuable source of affordable housing funding, challenges to developing market-rate projects that pay MHA fees tangibly threaten housing affordability. Declaration of Patience Malaba ("Malaba Dec.") ⁋⁋ 5-7; Maritz Dec. ⁋⁋ 4-6.

2. Energy Code

In March 2021, the City adopted Ordinance 126279, which updated its building code and enacted new energy efficiency provisions, including the 2018 Washington Energy Code. The requirements of the City's energy code update significantly raise the cost of post-2021 projects compared with costs prior to the update. Holzemer Dec. ⁋ 4, Maritz Dec. ⁋ 4; Shook Dec. ⁋ 4.

3. Additional changes

Construction costs and interest rates have increased since 2019, making it more difficult to produce housing. Holzemer Dec. ⁋ 4; Maritz Dec. ⁋ 4; Shook Dec. ⁋ 4. These occur against a backdrop of permitting cost increases, inflation, economic volatility, and gaps in public funding

[6] SDCI TIP 257, *Table 3 – Adjusted Payment Calculation Amounts for Chapter 23.58C – Residential and Live-Work Requirements in Downtown, SM-SLU, and SM-U 85 Zones* at 1 (2023), available at https://www.seattle.gov/documents/Departments/SDCI/Codes/MHA_rates.pdf.

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

that pose particular challenges to affordable housing. Malaba Dec ⁋⁋ 5-6; Maritz Dec. ⁋⁋ 4-7; Shook Dec. ⁋ 4.

4. Changes to City Policy Favoring Housing

When Seattle began working on the city's current Comprehensive Plan, it set the goal of 30,000 new market rate units and 20,000 new affordable units being built over the next 10 years.[7] The city's goal for housing production over the Comprehensive Plan's 20-year lifespan was 70,000 new homes.[8]

As Seattle begins drafting the next major update to its Comprehensive Plan, the City has tacitly acknowledged that the goal of 50,000 new housing units by 2025 was not enough to address housing demand and affordability. In an issue brief on housing for the Comprehensive Plan update, the City describes how "competition for scarce housing drives up prices," and despite more than 70,000 new homes being built in Seattle in the past ten years, "we still aren't producing enough housing to keep up with increasing demand."[9] The first "major" housing issue for the Comprehensive Plan update: "[a] severe housing shortage."[10]

A 2021 report funded by the Washington State Department of Commerce prepared for the City by an independent consulting firm gave Seattle a clear picture of that housing shortage. The report forecasts that in 2045, Seattle could have a deficit of up to 34,234 housing units

---

[7] Seattle Department of Planning & Development, *Housing Affordability and Livability Agenda Boards* at 2 (2015), available at https://www.seattle.gov/documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/HALAFall2015Boards.pdf.

[8] Seattle Department of Planning & Development, *Draft Environmental Impact Statement for the Seattle Comprehensive Plan Update* at 1 (2015), available at https://www.seattle.gov/documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/SeattleFullCPDEIS.pdf.

[9] Office of Planning and Community Development, *One Seattle Comprehensive Plan Housing Issue Brief* at 1 (2022), available at https://www.seattle.gov/documents/Departments/OPCD/SeattlePlan/Housing_IssueBrief.pdf.

[10] *Id*. at 2.

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

affordable to people earning below 80% of the area median income (AMI) and a shortage of 90,860 units for households earning below half of the area median income.[11]

All five of the "action" alternatives Seattle considered in the early stages of its Comprehensive Plan update process included land use changes that allow for growth and create more housing at varying degrees.[12] The most conservative alternative studied would allow for 100,000 new housing units while the boldest alternative considered would facilitate 120,000 housing units.[13] These alternatives show the City's focus on meeting the housing shortage identified in the 2021 report. This is not a mere policy concern. Instead, these changes reflect the current conditions under which the effects of the Proposal on the built environment – specifically, relationship to existing land use plans – must be analyzed.

C. 2023 Proposal

On February 13, 2023, the City provided notice of the 2023 Proposal and published the 2023 DNS. The 2023 DNS is accompanied by and based on a new environmental checklist ("2023 Checklist") that includes responses to Section B but no substantive analysis of the Proposal. Notice of Appeal, Exhibit B.

The 2023 Proposal differs from the 2018 Proposal in two primary ways:

- The 2023 Proposal adds two policies to the transportation element of the Comprehensive Plan that were not included in the 2018 Proposal: "Consider

[11] BERK Consulting, *Seattle Market Rate Housing Needs and Supply Analysis* at 73 (2021), available at https://www.seattle.gov/Documents/Departments/OPCD/OngoingInitiatives/HousingChoices/SeattleMarketRateHousingNeedsAndSupplyAnalysis2021.pdf.

[12] City of Seattle Office of Planning and Community Development, *One Seattle Plan EIS Scoping Report* at 14 (2022), available at https://www.seattle.gov/documents/Departments/OPCD/SeattlePlan/OneSeattlePlanEISScopingReport.pdf.

[13] *Id.* at 23.

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

exemptions from transportation impact fees for low-income housing . . . as authorized by RCW 82.02.060" and "Consistent with the transportation level of service, consider location adjustments to transportation impact fees in urban centers and villages based on the roadway space each mode uses per trip compared to a trip made driving alone." Freeman Dec., Ex. B.

- The 2023 Proposal is accompanied by a Transportation Impact Fee Rate Study ("Rate Study"), prepared by Fehr & Peers, that uses the existing system value methodology to establish an impact fee rate of $12,588 per trip. Freeman Dec., Ex. C at 19. The Rate Study uses this per-trip rate to calculate the impact fee that would apply to different land uses in the City. *Id.* at 21. For multifamily housing, the fee would be between $4,005 and $6,384 per dwelling unit in an urban center and between $5,414 and $8,629 per dwelling unit in other areas of the City. *Id.*

The 2023 Checklist mentions the Rate Study as containing information relevant to the 2023 Proposal (specifically, the list of projects to be funded) but does not discuss the fee levels, calculations, or exemptions proposed. Notice of Appeal, Ex. B at 19.

II. ARGUMENT

A. The City fails to prove all elements of the res judicata test as required.

"Under the doctrine of res judicata, or claim preclusion, a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737, 222 P.3d 791, 798 (2009) (internal quotations omitted).

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

"[T]he res judicata test is a conjunctive one requiring satisfaction of all four elements." *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108, 115 (2004). Here, the City fails to establish that the subject matter and cause of action in this action are identical to those in the 2019 appeal.

B. The subject matter is not identical.

1. The appeal challenges the 2023 DNS.

The Motion argues that the subject matter of the two appeals is identical because "[t]he 2023 proposal is substantively the same as the 2018 proposal with only a few minor changes." Motion at 8. This appeal, however, does not challenge the 2023 Proposal; it challenges the 2023 DNS. The City does not and cannot dispute that the 2023 DNS is different from the 2018 DNS,because the 2019 Decision required the City to issue a "new threshold determination." 2019 Decision at 11. This alone is sufficient to defeat the City's argument: this appeal challenges the 2023 DNS, which – because it was prepared specifically in response to the Order – did not exist and could not have been challenged in the 2018 action. "Res judicata does not bar claims which arise out of a transaction separate and apart from the issue previously litigated." *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1, 3 (1986).

The Motion states that this appeal "attempts to relitigate the City's environmental review of the proposal, which is precluded by res judicata." Motion at 9. But the Coalition is not relitigating prior environmental review, because the Examiner's 2019 Decision required the City to conduct *new* environmental review, which is the subject of this appeal. Accordingly, the subject matter of the Coalition's challenged appeal claims – whether the 2023 DNS is clearly

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

erroneous – has not previously been litigated, because the previous appeal concerned a different decision by the City.

City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 164 Wn.2d 768, 793-94, 193 P.3d 1077, 1091 (2008), is instructive. In that case, the Supreme Court held that a prior appellate decision affirming a county's decision to designate an area of land as agricultural did not bar a subsequent appeal challenging the county's designation of the land as urban commercial. The Court explained that because the standard of review, clear error, "is such a high standard to meet, it follows that situations may exist where a county could properly designate land either agricultural or urban commercial depending on how the county exercises its discretion in planning for growth, without committing clear error." *Id.* Thus, "simply because the Board and courts previously held that the agricultural designation was not clearly erroneous in view of the record and in light of the GMA, does not mean that an urban commercial designation would be clearly erroneous in view of the same or similar record and in light of the goals and requirements of the GMA." *Id.* at 794. "The prior judgment and the current litigation do not involve the same claim, nor are the issues identical." *Id.* at 795.

Like the county's designation decisions in *City of Arlington*, "[a] threshold determination that an EIS is not required is reviewed under the 'clearly erroneous' standard." *King Cnty. v. Friends of Sammamish Valley*, 525 P.3d 214, 235 (Wash. Ct. App. 2023). As in *City of Arlington*, this appeal challenges a discretionary action for clear error and is not barred simply because a prior, separate action was previously litigated. *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 919–20 (9th Cir. 2012) (court properly declined to apply res judicata where "the claim raised in the second lawsuit could not have been raised in the first

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

lawsuit because the governmental action that was the subject of the second suit had not yet occurred").

The City implicitly concedes that it has engaged in a new act of environmental review that is subject to appeal, because it has not sought to dismiss the Coalition's challenge to the City's prima facie compliance with SEPA, which was the basis for the reversal of the 2018 DNS. Nonetheless, the City argues that the Coalition cannot claim that the 2023 Proposal will create significant adverse impacts. Effectively, the City's argument is that it can create a new checklist but that it necessarily will reach the same conclusion. That is contrary to the Examiner's prior ruling, which not only required a new threshold determination but specifically directed the City to consider the actual impacts of the Proposal, which the City had not previously done. In addition to violating the 2019 Decision, this would be contrary to the public purpose of SEPA, which requires a threshold determination based on "actual consideration of potential environmental significance," using the baseline of environmental conditions at the time of the proposal under review – rather than at the time of a previous proposal. *See Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54 (1978); *King Cnty. v. Friends of Sammamish Valley*, 525 P.3d 214, 235 (Wash. Ct. App. 2023). Because the City must reach a new conclusion based on new information, it would violate this public policy (and make no sense) to say that the City's *process* of conducting environmental review may be litigated while the correctness of the *outcome* of that process is a foregone conclusion. Thus, precluding the Coalition's claim that the DNS was clearly erroneous on this basis would be an improper use of the equitable doctrine of res judicata. *Weaver v. City of Everett*, 194 Wn.2d 464, 482, 450 P.3d 177, 186 (2019) (declining to apply res

MCCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

judicata where it "would work an injustice because it would contravene clear public policy memorialized in the Act" implicated by the lawsuit).

The City cites *Friends of Cheasty*, HE No. W-18-010 and W-18-011, Order on Motion for Partial Dismissal (Aug. 29, 2019), but that case does not support the arguments in the Motion. *Cheasty* concerned an appellant who challenged a 2015 DNS issued for a bicycle and pedestrian loop trail proposal. In an appeal filed in 2015, the appellant obtained a reversal of the DNS for failure to demonstrate prima facie compliance with SEPA. *Friends of Cheasty*, HE No. W-15-008 and W-15-009, Findings and Decision (Jan. 26, 2016) at 12. The decision in that appeal also found that the appellant had not demonstrated that the impacts of the proposal would be significant, despite presenting evidence on that point regarding multiple impacts. The City then conducted a new analysis and, in 2018, issued a new DNS consistent with the Examiner's order, and the appellant appealed the 2018 *Cheasty* DNS. The City moved to dismiss several of the appellant's claims under the doctrine of res judicata. The Examiner granted the motion, dismissing claims that largely concerned legal questions not affected by changes to the proposal or the environmental analysis, such as whether the Examiner has jurisdiction over an environmentally critical areas exemption and whether the City was required to consider alternatives before adopting a DNS, as well as challenges to the same factual transactions previously discussed, such as whether the City had inappropriately communicated with the Seattle Landmarks Commission. HE No. W-18-010 and W-18-011, Order on Motion for Partial Dismissal at 4-5. However, the City did not seek, and the Examiner did not grant, dismissal of claims from the 2018 appeal that challenged the new DNS's analysis of impacts, including the claim that the proposal would have significant adverse impacts on elements of the environment

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

for which the Examiner in the 2015 *Cheasty* appeal had previously found no evidence of such impact. *See Friends of Cheasty*, HE No. W-18-010 and W-018-011, Notice of Appeal (Nov. 5, 2018) at 6-7. *Cheasty* does not support the City's argument that such a dismissal should be granted in this case. "By its nature, res judicata applies to what has been decided." *Hilltop Terrace Homeowners Ass'n v. Island County*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995). The sufficiency of the City's 2023 environmental review of the 2023 Proposal has not been decided, so res judicata does not apply.

Finally, although the City has moved for partial dismissal on the basis of res judicata only, the Motion also suggests that res judicata is interchangeable with the doctrine of collateral estoppel. To the extent this is an assertion that dismissal in this matter is also merited on the basis of collateral estoppel, it is incorrect. "For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957, 961 (2004). "Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding." *Id.* Here, collateral estoppel would not apply even if the City had invoked it (which it has not done), because the question of whether the City clearly erred in issuing the 2023 DNS has not actually been litigated and is not identical to the issue in

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

the 2018 appeal – as it could not have been and could not be, because it is a new and different threshold determination. Neither res judicata nor collateral estoppel bars the Coalition's claims.

2. The proposals are not the same.

Even if this appeal challenged the 2023 Proposal, rather than the 2023 DNS, res judicata would not apply because the 2023 Proposal differs from the 2018 Proposal. Although neither proposal is a permit application, cases applying res judicata in the context of quasi-judicial decisions related to land use rely on the test in *Hilltop Terrace Homeowner's Ass'n v. Island Cnty.*, 126 Wn.2d 22, 33, 891 P.2d 29, 35 (1995). In that case, the Supreme Court ruled that successive land use permit applications are not barred by res judicata "if there is a substantial change in circumstances or conditions relevant to the application or a substantial change in the application itself." *Id*. Here, both types of change have occurred.

First, the 2023 Proposal differs substantially from the 2018 Proposal due to its inclusion of exemption language and the Rate Study. The 2023 Proposal's direction to "[c]onsider exemptions from transportation impact fees for low-income housing . . . as authorized by RCW 82.02.060" means that an exemption from impact fees would only be provided for housing with a monthly cost "that is no greater than thirty percent of eighty percent of the median family income. . . ." RCW 82.02.060. However, rental housing at this level would not satisfy affordability problems in the City, where significant housing cost challenges remain for families earning up to 100% AMI.[14] Moreover, any development receiving an exemption would need to enter a covenant to remain affordable or pay the full value of the impact fees, which in the meantime would be paid from public funds. RCW 82.02.060(2), (4)(a). The implications of this

[14] BERK Report, *supra* footnote 11, at 21, 23.

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

exemption – particularly for privately funded affordable housing, which must earn a market return while providing housing at below-market rates and thus already develops under tight constraints – are not analyzed. *See* Maritz Dec. ¶¶ 4-7. These factors are, or should have been, relevant to the City's analysis of the 2023 Proposal's impacts. In addition, the 2023 Proposal includes what the 2018 Proposal lacked: a rate study establishing likely fee amounts for different land uses, including exemptions. Whereas the 2018 Proposal "lack[ed] sufficient detail to identify the environmental impacts that may be associated with a subsequent implementing program . . . such as "fee amounts and potential exemptions," the 2023 Proposal includes this detail. *See* 2019 Decision at 9. This is a substantial change.

Second, there has been a dramatic shift in conditions relevant to the Proposal: specifically, the background, existing conditions against which the Proposal's impacts must be analyzed. Under SEPA, the appropriate baseline from which to gauge a nonproject proposal's impacts is the environment at the time of the proposal's enactment. *King Cnty. v. Friends of Sammamish Valley*, 525 P.3d 214, 235 (Wash. Ct. App. 2023). The baseline for the 2023 Proposal differs substantially from the baseline for the 2018 Proposal. As described above, circumstances have changed due to the increase in MHA applicability and fee levels, the application of the new energy code, and changed economic conditions. Section I.B, *supra*. Against this backdrop, the imposition of transportation impact fees at the levels proposed in the Rate Study would make both market rate and affordable housing projects infeasible. Holzemer Dec. ¶ 4; Maritz Dec. ¶¶ 4-6. This is not a mere economic impact but affects the physical built

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

environment – i.e., the amount of housing, including affordable housing, in the City.[15] In addition, because the City's prospects for achieving its housing goals have worsened since 2018, *see supra* Section I.B.4, the circumstances relevant to the Coalition's claim that the proposal will cause significant adverse impacts to a component of the built environment, land use plans, have also changed. These are substantial changes in circumstances relevant to the Proposal and to the analysis the City was required to complete.

The 2023 DNS is not the same as the 2018 DNS. The 2023 Proposal is not the same as the 2018 Proposal. The subject matter of the two appeals is different, and the claims are therefore not barred by res judicata.

C. The causes of action are not the same.

The City also argues that the causes of action in the 2018 Appeal and the present appeal are the same. For similar reasons as described above, this is incorrect. "The determination whether the same causes of action are present includes consideration of (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." *Ensley v. Pitcher*, 152 Wn. App. 891, 903, 222 P.3d 99, 104 (2009). Because "[t]hese four factors are analytical tools" and "it is not necessary that all four factors be present to bar the claim," *id.*, it likewise cannot be shown by that satisfaction of any one factor establishes that the causes of action are the same. That the

[15] This in turn affects other components of the built environment, including but not limited to relationships to land use plans, aesthetics and transportation. References to housing and housing affordability impacts in this response are intended to refer to these impacts and ancillary impacts.

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

Coalition has invoked the same legal principles does not establish identity of causes of action because the challenged decisions and surrounding circumstances differ.

Here, the *Ensley* factors clearly weigh against the City's argument. First, the rights or interests established in the prior judgment are the right of the public to actual SEPA analysis of transportation impact fees. Barring the Coalition's claim from going forward would impair that right because the required SEPA analysis would be meaningless if its outcome was preordained. The City argues that the 2019 Decision, which reversed the 2018 DNS because such analysis had not been conducted and required a new threshold determination, is nonetheless preclusive regarding the content of the new threshold determination. But the City has no "right" to such a determination; as explained above, construing the prior decision in this way would be contrary to the purpose and requirements of SEPA.

Second, the same evidence will not be presented in the two actions. *See Ensley*, 152 Wn. App. at 903 ("The 'substantially the same evidence' factor requires analysis of whether the evidence necessary to support each action is *identical*.") (emphasis added). The evidence in this appeal will not be identical to what was presented in the prior appeal: it will focus on an amended proposal and new DNS; it will include the rate study; and it will include evidence of changed circumstances under which the proposal would have significant adverse impacts to housing, including housing affordability. The Motion asserts that the maximum allowable fee under the 2023 Proposal is less than the maximum allowable fee under the 2018 Proposal due to inflation and that any housing impacts will be lessened by the effects of the exemption. Motion at 12. But whether these factors were sufficiently analyzed by the City in considering the impacts of the 2023 Proposal is precisely the question posed by this appeal.

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

Third, for similar reasons, the two suits do not arise out of the same transactional nucleus of facts. The appeals challenge two separate threshold determinations – *i.e.,* two transactions – that were based on different environmental checklists, one of which was prepared more than four years after the other. As explained above, background circumstances have changed during that time, meaning that analysis of the Proposal's impacts on housing requires consideration of the baseline environment for affordable housing production as of 2023, not 2018. *Friends of Sammamish Valley*, 525 P.3d at 235.

The City challenges the Coalition's claim that issuance of a DNS rather than EIS was erroneous, asserting that the prior appeal "concluded that the maximum defensible fee would not result in likely significant impacts to housing" and thus that the current proposal's fee "cannot" do so either. Motion at 11. But the Order did not contain a definitive conclusion about the impacts of the 2018 Proposal, much less about the impact of a fee proposal for a different amount at a different time. The final judgment in the prior appeal was one of reversal. The Examiner's conclusions about whether the record in the prior appeal showed clear error by the City in issuing the 2018 DNS does not determine the correctness of the City's subsequent, discretionary decision to issue the 2023 DNS. *See City of Arlington,* 164 Wn.2d at 795. As in *Cheasty*, reversal of the DNS for failure to demonstrate prima facie compliance with SEPA requirements does not provide a basis for claim preclusion regarding the correctness of the threshold determination as a whole.

Likewise, the City's argument that the piecemealing claims are the same is unavailing because the 2023 Proposal differs from the 2018 Proposal in ways identified as important by the Examiner. The Order noted that the 2018 Proposal "seem[ed] to lack sufficient detail to identify

McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, Washington 98104
Phone: 206.812.3388
Fax: 206.812.3389

the environmental impacts that may be associated with a subsequent implementing program," in part because it did not "establish important elements of such a program, such as fee amounts and potential exemptions." Order at 9. Now, those details are known: the rate study establishes fee amounts, as calculated under the methodology required by the Proposal, along with exemptions or reductions, and the proposed Comprehensive Plan language has been amended since 2018 to provide for potential exemptions from the fee. The inclusion of this information is directly relevant to and highly supportive of the Coalition's claim that the City has inappropriately deferred consideration of the details of a fee program past the point when important decisions need to be made about them, contrary to SEPA's requirements and purpose.

The City has not shown that the causes of action are the same, and res judicata does not apply.

III. CONCLUSION

The Applicant respectfully requests that the Hearing Examiner deny the Motion.

DATED this 1st day of May 2023.

s/Courtney A. Kaylor, WSBA #27519
s/David Carpman, WSBA #54753
Attorneys for Appellant
McCULLOUGH HILL PLLC
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
Tel: 206-812-3388
Fax: 206-812-3398
Email: courtney@mhseattle.com
Email: dcarpman@mhseattle.com