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 CITY'S REPLY ON ITS MOTION TO DISMISS IN PART

I. INTRODUCTION

The four prongs of the res judicata test are met in this case. There is no dispute that prong one (same parties) and prong four (same quality of the person for or against whom the claim is made) are met. Additionally, Appellants' arguments against prong two (whether the subject matter of both appeals is identical) and prong three (whether the claims in both appeals are identical) fail.

The subject matter of both cases is identical: both cases challenge a DNS for a legislative proposal to adopt policies and transportation projects into the Comprehensive Plan in support of Transportation Impact Fee Program.

Likewise, prong three is met. The claims raised in both appeals are identical: (1) whether the proposal will result in likely significant environmental impacts; and (2) whether the environmental review of the proposal was piecemealed under SEPA.

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Appellants' attempt to rely on a common law res judicata test cited in *Hilltop Terrace* fails because *Hilltop Terrace* is easily distinguishable from this case. Under that test—which is only applicable to quasi-judicial land use decisions that are substantially the same—res judicata bars re-litigation unless there is a substantial change in circumstances since the decision on the first application. However, that test only applies to cases involving quasi-judicial land use applications, like a conditional use application, which is not present here. This case involves a broad, generally applicable legislative proposal, not a land use application like in *Hilltop Terrace.*

Appellants' attempt to distract the Examiner from the actual test by arguing various "changed circumstances" also fails since the alleged "changed circumstances" do not factor into the res judicata test. The appeals involve the same subject matter and identical claims. Appellants' claims of piecemealing under SEPA and likely significant environmental impacts must be dismissed. Appellants do not get a second bite of the apple. They had the chance to litigate these same issues to finality previously and should not get the chance to relitigate them again in an attempt to achieve a different result.

II. IT IS UNDISPUTED THE APPEALS CONTAIN THE SAME PARTIES AND SAME QUALITY OF PERSONS.

Appellants failed to argue either prong one (same parties) and prong pour (same quality of persons). These two prongs of the test are clearly met and undisputed.

III. THE SUBJECT MATTER OF BOTH APPEALS IS THE SAME.

A. The Notice of Appeal in both matters shows that prong two is met.

The subject matter of both cases is identical—both appeals challenge the Determination of Non-Significance (DNS) for proposed Comprehensive Plan amendments that identify transportation system deficiencies due to new development and identify a list of transportation infrastructure projects that add capacity to help remedy system deficiencies, as required to adopt a TIF Program

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under RCW 82.02.050-.090. *See* Notice of Appeal, W-18-013, Ex. A to Declaration of Ketil Freeman in Support of Respondents' Motion to Dismiss in Part ("Freeman Declaration") compared to Notice of Appeal, W-23-001 on file with the Examiner.

Appellants' claim that the "subject matter" is different between cases because the present appeal challenges the 2023 DNS, which did not exist in 2019. Response at 9-10. This argument lacks merit and overly simplifies the test and purpose behind res judicata. Of course, the 2023 DNS had not been issued in 2019, but that does not make the subject matter of the cases different.

The subject matter of both cases is substantively identical: Appellant challenges to the Determination of Non-Significance (DNS) of the legislative Transportation Impact Fee (TIF) proposal. And, as discussed below and in the City's Motion to Dismiss, the 2023 legislative proposal is substantively the same as the 2018 legislative proposal.

B. The Legislative Proposal is Substantively Identical.

As noted in the Freeman Declaration, the 2023 proposal is the substantively the same as the 2018 legislative proposal. It includes proposed Comprehensive Plan policies to establish the groundwork for a TIF program, including identification of transportation projects that would be potentially eligible in part for TIF funds. *See* pp. 1-2 of Attachment A to Notice of Appeal, No. W-23-001 (2023 DNS) ("Proposal Description").

Appellant argues that the Legislative proposal is different because the 2023 proposal relies on a new 2023 Rate Study, however, this is a red herring. The 2018 proposal relied on the methodology contained in Exhibit 5 from the prior appeal. Freeman Declaration. Kendra Breiland testified about that methodology in her deposition and at the prior hearing. And that same methodology is the basis of the current proposal and is used in the 2023 Rate Study. P. 4 of Attachment C to the Freeman Declaration.

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As noted in the Freeman Declaration, the transportation project list between proposals is identical except the 2023 list removed projects that had been completed. Freeman Declaration, paragraph 5

Further, the proposed land use rate concept with potential locational "discounts" contained at p. 21 of the 2023 Rate Study involves the same concepts discussed and prepared in 2018. Compare 10/31/2018 draft rate study table (Exhibit C to Kaylor Declaration ISO Appellant's Response) with p. 21 of 2023 draft rate study table (Exhibit C to Freeman Decl. ISO Motion to Dismiss). The locational discounts are identified in both the 2018 and 2023 tables.[1] Both proposals involved consideration of the Comprehensive Plan policies and eligible transportation projects needed to create a TIF Program. If the Comprehensive Plan proposal is successfully adopted, Council can consider TIF rates by land use with possible locational discounts and possible exemptions for affordable housing. The rate study is a requirement to create a TIF program, but it is not part of the proposal and does not bind Councilmembers from considering or adopting different fees or discounts than those discussed in the Rate Study. The minor changes from the 2018 proposal to the 2023 proposal are identified in strike-through and underline and do not substantively change the analysis that is the subject of challenge in this case. Ex. B to Freeman Decl. ISO Motion (2023 Proposal).

C. The Examiner's Friends of Cheasty Order is on point.

Significantly, the City properly relies on the Friends of Cheasty, Order on Motion for Partial Dismissal, in support of the City's motion to dismiss in part. Cheasty involved an appellant who

[1] In the 2018 table, see locational discounts identified in columns I and J with the standard rate listed under column H. Exhibit C to Kaylor Decl. In the 2023 table, see locational discounts under the column headings "Within urban center location adjustment per person trip" and "within UV or ½ Mile of Light Rail Station Location adjustment per person trip" and the standard rate is identified under column heading "All other Seattle Locations Adjustment per person trip".

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challenged a 2015 DNS issued for a bicycle and pedestrian loop trail proposal. Order on Motion for Partial Dismissal, HE Cause W-18-010 and W-18-011. The Examiner issued a reversal of the initial DNS based on the determination that Parks failed to demonstrate prima facie compliance with SEPA. Friends of Cheasty, HE No. W-15-008, Findings and Conclusion (Jan 26, 2016) at p. 12 and Friends of Cheasty, HE No. W-18-010 and W-18-011, Order on Partial Dismissal at p. 2, Finding No. 4. After Parks conducted additional review and analysis, Parks issued a revised DNS for the same project. Order on Partial Dismissal at p. 2. The same appellant subsequently challenged the 2018 DNS. The Parks Department brought a motion for dismissal in part, which the Examiner granted based on res judicata, for identical claims raised by the appellant in both appeals. Order on Motion for Partial Dismissal, Cause W-18-010 and W-18-011, pp. 3, paragraphs 1-3.

The Examiner applied the four-prong res judicata test and concluded that all four prongs had been met. Id. In particular, the Examiner concluded that the subject matter prong was met because both appeals were the same: the appellant challenged the original DNS to the trail project and the revised DNS for the Cheasty trail project. Order on Motion of Partial Dismissal at p. 3. It was irrelevant that there were two DNS decisions—from 2015 and 2018—because the 2018 DNS was based on the 2015 DNS that had been supplemented to meet the procedural component of SEPA as required by the Examiner. The Examiner also concluded that the claims raised in both appeals were the same. *Id.*

In this case, like the Cheasty matter, the subject matter of both appeals involves the challenge to a DNS of a proposal. The second, 2023 DNS, was based on the earlier DNS and corrected deficiencies found by the Examiner. The Examiner should follow the reasoning in the Cheasty decision and find that the second prong of the res judicata test is met.

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D. Appellant's cases fail to establish the subject matter of both cases is different.

Further, Appellants' reliance on *Schoeman, City of Arlington, Turtle Island Network, King County v. Friends of Sammamish Valley and Weaver v. City of Everett* at pp. 9-10 of Response is misplaced. The quote Appellants used from *Schoeman v. New York Life Ins. Co.* dealt with a narrow issue related to the federal compulsory counterclaims rules not at issue in this case and should be disregarded by the Examiner.[2] Response at p. 9.

Under *Schoeman's* test, res judicata applies if the counterclaim is logically related. Here, the claims in both the prior and present appeal are identical and would meet the *Schoeman* test if it did apply.

Similarly, the *City of Arlington* case is easily distinguishable from the present matter. The claim in the first Arlington appeal was whether the County's designation of land as agricultural was clear error, while claim in the subsequent Arlington appeal was whether the County's designation of land as urban commercial was clear error. The claims in the two appeals were plainly different and involved a different designation of land (agricultural vs. urban commercial). Here, the underlying subject matter is identical and involves the same legislative action. *City of Arlington* does not apply.

Appellants mischaracterize the *Turtle Island Network* case cited at pp. 10-11 of Response.[3] *Turtle Island* supports the City's Motion to Dismiss. The *Turtle Island* Court held that the

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[2] Fed.R.Civ.P. 13(a) provides:

> Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it *864 arises out of *the transaction or occurrence* that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Schoeman v. New York Life Ins. Co., 106 Wn. 2d 855, 863–64, 726 P.2d 1, 5 (1986)(Italics added).

[3] The quote that Appellant's attributed to Turtle Island is incorrect; it came from Lujan, which was cited in the Turtle Island decision, but the Turtle Island court found the analysis in Lujan inapplicable. Further, the Lujan case is distinguishable from the present case. In *Lujan*, the court concluded that the Federal actions at issue involved different and new conduct- in the first case, the action was the government's failure to prevent bison from leaving Yellowstone and, in the second, the action was the government's adoption of a bison management plan, both actions occurred without conducting an EIS. Because the actions involved different conduct, the *Lujan* court found that the second prong of res

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appellant's current challenge arose from the "same transactional nucleus of facts" as its earlier litigation and therefore res judicata barred its claims. Like this case, the appellant in Turtle Island attempted to separate the actions (first action: promulgating the 1993 and 1999 Guidelines and second action: making the certification decisions under the guidelines on the other). The *Turtle Island* Court reasoned that "[w]hile these two actions may be procedurally different; both arise from the government's regulation of shrimp imports to encourage foreign turtle-safe shrimp harvesting. Adopting rules for certifying that countries meet the U.S. standards and actually making the certification decisions aren't sufficiently different to defeat res judicata." *Turtle Island Restoration Network v. U.S. Dept. of State*, 673 F.3d 914, 920 (9th Cir. 2012).

Moreover, Appellants' reliance on *Weaver v. City of Everett* for the assertion that the use of res judicata here would contravene a clear public policy is also misplaced. *Weaver v. City of Everett*, 194 Wn.2d 464, 482 at pp. 11:22-12:3. The *Weaver* court held that barring a firefighter's permanent disability claim under res judicata would work an injustice under the Workers' Compensation Act because the second claim (permanent disability) was different from the first claim (temporary disability previously litigated). Unlike the *Weaver* case, barring an administrative appeal on two of the three identical claims that were already litigated by Appellant on the same legislative proposal does not work an injustice here.

Relitigating the same issues unnecessarily burdens the administrative appeal system and all involved parties with repetitious litigation. Washington courts recognize that res judicata prevents both public and private burdens associated with litigation: "The judicial interest in avoiding the public burdens of repetitious litigation is allied with the interest of former litigants in avoiding the

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judicata was not met. Here, the action under SEPA is the same: proposed Comprehensive Plan amendments to adopt policies and a transportation project list as the basis for a TIF Program.

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parallel private burdens. *Hilltop Terrace Homeowner's Ass'n v. Island Cnty.*, 126 Wn. 2d 22, 31, 891 P.2d 29, 34 (1995)

Public policy weighs in favor of res judicata in this case. It would bar repetitious litigation on the same proposal to prevent waste of public resources where Appellant already raised and actively litigated two of their three claims in the present Notice of Appeal.

Lastly, *King County v. Friends of Sammamish* did not involve res judicata and does not apply here.

IV. THE CLAIMS RAISED IN BOTH APPEALS ARE IDENTICAL.

Appellant's two claims that (1) the proposal "will have significant adverse environmental impacts"; and (2) "Piecemealing" are identical in both appeals. *See* City's Motion to Dismiss in Part, pp. 9-12. Appellant's attempt to recast their claim from whether the proposal will result in likely significant impacts to whether the DNS was clearly erroneous fails. Response at 11. The standard of review for a challenge to a DNS is whether the DNS was clearly erroneous. The standard of review does not change the underlying nature of the claims. Even if it did, the standard of review is the same in both cases, supporting the City's Motion.

Appellant's Response focuses almost exclusively on the inapplicable test set forth in *Hilltop Terrace Homeowner's Ass'n v. Island County* (Wash. 1995) in an attempt to argue an exception to re judicata. Response 1-2, 14-15. The *Hilltop Terrace* exception to the application of res judicata is inapplicable here. The Proposal involves legislation, not a quasi-judicial project permit. The *Hilltop Terrace* exception is not applicable to this case. Appellants focus on the alleged "change in circumstances" in an attempt to argue that res judicata should be denied. However, this inapplicable

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test is irrelevant here. Regardless, Appellant spends the bulk of its Response, in the "Facts"[4] and "Argument" section of its Response and in its declarations ISO its Response hammering the idea that there has been a "substantial change in circumstances or conditions relevant to the [~~application~~]". *E.g.*, Response, pp 3-7, 14-16. However, Appellant replaces the term "application" with the term "proposal" which is not the "test" announced by the *Hilltop Terrace* court. Appellant attempts to extend the "change in circumstances" exemption applied to res judicata in quasi-judicial permit applications is baseless. This exemption set out in *Hilltop Terrace* is not the applicable test here and no courts have applied this exemption in a legislative proposal context.

Appellant also attempt to extend the inapplicable *Hilltop Terrace* exemption to the present case by arguing a wide array of alleged "changes in circumstances or conditions" such as an increase in interest rate, collection of MHA funds, covid, adoption of the energy code, among other things. Response at pp. 3-7. However, this attempt must be disregarded. The rule in Hilltop Terrace does not apply here to a legislative proposal.

Last, Appellant fails to cite *Kuhlman*, 78 Wn. App. at 122, 897 P.2d 365, quoted in *Ensley v. Pitcher*, which provides "there is no specific test for determining identity of causes of action"); Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L.REV. 805, 816 (1984). *Ensley v. Pitcher*, 152 Wn. App. 891, 903, 222 P.3d 99, 105 (2009). Appellant argues that he claims are not eh same because "the challenged decisions and surround circumstances differ". Response at p. 16-17. This is irrelevant under the 4-prong res judicata test. As already established, the subject matter of the cases is the same and the claims raised by Appellant in both appeals are identical. The 4-part Ensley factors have been used in some cases to

[4] The City objects to Appellant's attempt to include documents cited in footnotes 1-13 of its Response that are not relevant or probative here and are not attached to a sworn declaration. These irrelevant documents should be ignored.

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determine if the causes of action are the same. Here, no analysis is needed because the claims raised by Appellant are identical.

Even if the Examiner considers the Ensley factors, they are met here. Granting the City's motion does not preclude a Hearing Examiner appeal, compliance with the procedural obligations is still at issue; however, the parties already litigated the issue of whether the Proposal will result in likely significant environmental impacts and SEPA piecemealing. The public interest in not wasting Examiner and city staff time and resources to litigate the same issue would be destroyed if a second action were allowed to proceed. Substantially the same evidence would be presented: The same proposal with witnesses called previously (Morgan Shook, Mike Swenson, Ketil Freeman, Kendra Breiland). The suits involved infringement of the same right- here, the suits involve an alleged noncompliance with SEPA, and the two suits arise out of the same nucleus of facts. As described in City's Motion, the Proposal is the same and adopted the same list of environmental documents and relied on the 2035 Comprehensive Plan. Exs. A and B to Notice of Appeal (DNS and SEPA checklist, respectively). Contrary to Appellant's argument that the Order did not contain a definitive conclusion about the impacts of the 2018 Proposal is wrong. Response at 18.

The Appellant's argument focuses on trying to re-write the Examiner's Decision. The Examiner concluded in Conclusion of Law No. 11 at p. 7 of 12 of Amended Decision for HE No. W-18-013 that "There is no evidence in the record that the proposed ordinance is likely to have a significant adverse impact." This claim was litigated and is now barred by res judicata.

Similarly, 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

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> 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.
>
> 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). The Proposal is still the same and does not ensure adoption of a TIF program or establish important elements of such a program. If the Comp. Plan amendments are adopted, only then would Council move to the next step to consider, and, if sufficient votes, set fee amounts and potential exemptions. The 2023 Rate Study does not bind a TIF program or bind Councilmembers to set certain fee amounts or exemptions. Rather, it is an example of how such a Program could be structured. However, Council will never get to have this policy discussion if Appellants continue to delay by serial SEPA appeals.

V. CONCLUSION

Res judicata prevents relitigating a claim after a party has had a full and fair opportunity to litigate his or her case. Appellants had that opportunity for both claims 1) that the proposal is likely to have significant environmental impacts and (2) SEPA piecemealing. As much as Appellant seeks a do-over, all four prongs of res judicata are met here and the Examiner should grant the City's Motion to Dismiss in part.

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DATED this 10th day of May 2023.

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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:

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Dated this 10th day of May at Seattle, Washington.

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