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 CLOSING ARGUMENT

I. INTRODUCTION

After conducting environmental review of the project pursuant to the State Environmental Policy Act (SEPA)(RCW 43.21C), the City of Seattle (City) Council Central Staff (hereafter "Council") issued a determination of non-significance (DNS) in February 2023 for a non-project legislative proposal to modify the Comprehensive Plan as follows:

> The 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 Transportation Elements of the Comprehensive Plan and related appendices to identify deficiencies in the transportation system associated with new development; (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.

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Exhibit 3 (SEPA checklist) at p. 3 of 28, Response to Question #11. *See also* Exhibit 4 (draft Comprehensive Plan proposal, hereafter Proposal or Legislative Proposal).

The City issued a DNS because, based on its evaluation, it had concluded that the Proposal would not result in probable significant adverse impacts to the environment. Appellant's claims that Council committed clear error in issuing a Determination of Non-Significance is inconsistent with the hearing record. Appellant's have failed to carry its burden by providing affirmative evidence that the Proposal will indeed result in probable significant impacts to housing or land use.[1]

The Coalition's housing witness, Morgan Shook, based his opinion and his report (Exhibits 9) on his best guess of what Council may propose in a rate-setting ordinance and then he makes sweeping conclusions of alleged housing impacts based on that imaginary proposal. The proposal that is the subject of the present appeal does not propose a single fee for any type of land use, nor does it impose any exemptions or deductions for specific geographic areas. There are a multitude of policy decisions to be made in order to create a rate-setting ordinance. Testimony at hearing provided that Council staff has not been asked to recommend policy direction on the contours of a rate-setting ordinance nor has Council staff heard direction from any Councilmembers about preparing a rate-setting ordinance.

Lay witnesses Meredith Holzemer and Ben Maritz provided testimony the there are a lot of factors at play in deciding when and how their businesses will develop housing. So far, despite increased interest rates, increased construction costs and increased city fees imposed on development, they continue to produce housing units. Both Ms. Holzemer and Mr. Maritz testified that any fee on development will affect their return on investment and impact housing. SEPA does not require analysis

[1] As discussed in Section II.E, claims in Appellant's Notice of Appeal alleging likely significant impacts to other elements of the environment have been abandoned by Appellant when Appellant failed to provide any affirmative testimony or evidence in its case demonstrating otherwise. *City of Olympia v. Drebick*, 156 Wn.2d 289, 311, 126 P.3d 802 (2006); *City of Medina v. T-Mobile USA*, 123 Wn. App. 19, 29, 95 P.3d 377 (2004).

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of business decisions of developers, especially for some future, yet developed legislative proposal. Moreover, a lack of possible housing project feasibility is not sufficient to establish a likely impact to housing or housing affordability under SEPA. The Appellant's SEPA witness, Richard Weinman, concluded the proposal would result in likely land use impacts, but he could identify no new land use impacts based on the Proposal. This is not affirmative evidence of a likely significant land use impact. To the contrary, the evidence in the hearing record establishes that the Proposal will not result in probable, significant adverse impacts to housing or land use.

Likewise, Appellant's claim that the City improperly "piecemealed" its environmental review fails because the Proposal and possible future rate-setting ordinance are not a "single course of action" that cannot or will not proceed unless both are implemented simultaneously. Nor is the Comp. Plan legislation an interdependent part of a larger proposal that depends on the larger proposal as its justification. The Proposal here is a precondition to a rate-setting ordinance. Freeman Testimony. No rate-setting legislation has been developed by any current Councilmember.[2] Freeman Testimony. And a rate-setting ordinance cannot be adopted without an eligible transportation project list contained in the Comprehensive Plan therefore the Proposal is a necessary precondition to creation of a rate-setting ordinance, but the Proposal can proceed without the rate-setting ordinance. Freeman Testimony.

SEPA does not require evaluation of two proposals together unless the proposals are interdependent and the first will not proceed without the second, which is not the case here. The current Proposal contains a transportation project list that must be adopted into the Comprehensive Plan that is one necessary component needed to develop rate-setting ordinance. But nothing in SEPA requires the Comp. Plan proposal and rate-setting ordinance to be evaluated in the same environmental document. Further, the Proposal does not authorize the construction or funding of the transportation eligible

[2] Freeman testified that he prepared a draft rate-setting ordinance for CM O'Brien, a former councilmember.

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projects identified in the Proposal. The City acted consistently with SEPA's mandate for the lead agency to prepare its threshold determination "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified."

Finally, Appellant's claim that Council failed to adequately disclose and analyze environmental impacts of the Proposal in the SEPA checklist is inconsistent with the testimony and evidence in the record. For these reasons, Appellant failed to carry its burden here and its appeal must be denied.

II. ARGUMENT

A. Appellant Seattle Mobility Coalition ("Coalition") did not overcome the high burden to establish clear error required by the Code.

SEPA and the Seattle Municipal Code ("SMC") require the Hearing Examiner to give substantial weight to the Council's Decision to issue a Determination of Non-Significance for the Comprehensive Plan proposal.[3]

In order for the Appellant Coalition to prevail in its appeal, it has the burden of proving clear error with the DNS, such that the Examiner is left with a definite and firm conviction that a mistake has been committed.[4] The Examiner has recognized that in order for an appellant to overcome this standard, the appellant has the burden of establishing that the City's DNS is clearly erroneous.[5] The appellant must carry its burden on the issues it raises in its Notice of Appeal or its appeal fails.

It is not enough that the reviewing tribunal may disagree with a particular determination, the

[3] RCW 43.21C.090; SMC 25.05.680.B.3, *Boehm v. City of Vancouver*, 111 Wn App. 711, 718, 47 P.3d 137, 141 (2002) citing *Norway Hill Preserv. & Prot. Ass'n v. King County Council,* 87 Wn.2d 267, 275, 552 P.2d 674 (1976)).

[4] *Id., Cornelius v. Washington Dept. of Ecology,*182 Wn.2d 574, 344 P.3d 199 (2015), *Cougar Mt. Assoc. v. King County,* 111 Wn.2d 742, 747, 765 P.2d 264 (1988); *Brown v. Tacoma,* 30 Wn. App. 762, 637 P.2d 1005 (1981).

[5] *In re. Madrona Elementary School,* MUP-00-029 stating: The burden is on an appellant to overcome substantial weight by proving that the decision is "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). A decision is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ancheta v. Daly*, 77 Wn.2d 255 (1969), *citing United States v. United States Gypsum Co.,* 333 U.S. 364, 92 L. Ed 746, 68 S.Ct. 525 (1948).

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Examiner must only find clear error when it is "left with a definite and firm conviction that a mistake has been committed."[6]

Under the clearly erroneous standard, reviewing bodies do not substitute their judgments for those of the agency and may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain Ass'n. v. King County* 111 Wn.2d 747,764 P.2d 264 (1988), *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *Ass'n of Rural Residents v. Kitsap County*, 141 Wn.2d 185,4 P.3d 115 (2000). An appellant does not meet its burden to show a decision is clearly erroneous if the evidence shows only that reasonable minds might differ with the decision. *See e.g.,* Findings and Decision of the Hearing Examiner for the City of Seattle, In the Matter of the Appeals of CUCAC and Friends of UW Open Space, et. al, File Nos. 5-96-002 and 5-96-003 (July 15, 1996), p. 13.

Likewise, Appellant must carry its burden on the issue that it raises in its Notice of Appeal alleging that the Council failed to demonstrate prima facie compliance with SEPA. Based on the record, Council demonstrated such compliance based on its preparation of a SEPA checklist in response to the Examiner's Amended Findings and Decision, October 24, 2019. Testimony of Ketil Freeman, Lish Whitson and Calvin Chow. *See also* Exhibit 16 (based SEPA checklist from 2018), reviewed and modified as shown in Exhibit 17, 18 and 19.

Once the Council has demonstrated that it considered the environmental impacts of the Proposal, which occurred here, then Council has met its prima facie obligation under SEPA and then it is up to Appellant to provide substantial evidence that the Proposal will have likely nonspeculative adverse impacts that the jurisdiction failed to consider.

[6] *Moss v. Bellingham*, 109 Wn. App 6, 13, 31 P.3d 703 (2001); *In the Matter of the Appeal of George W. Recknagel***,** W-13-002 and *In the Matter of the Appeal of Ballard Business Appellants*, W-12-002.

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Appellant failed to provide substantial evidence that the Proposal will have likely nonspeculative adverse impacts to housing or land use that the Council failed to consider. The record does not demonstrate clear error that City Council committed in preparing the SEPA checklist. Appellant has not demonstrated any such error. Further, Appellant cannot challenge a SEPA checklist under the SMC, but can only appeal the DNS. The evidence in the record demonstrates that Council considered the environmental impacts of the Proposal. For these reasons, Appellant's appeal must be denied, and the DNS must be upheld.

B. Appellant must produce affirmative evidence the Proposal will result in probable significant adverse environmental impacts.

In general, appellant failed to prove that the subject DNS was clearly erroneous, therefore, appellant's appeal must fail, and the Determination of Non-Significance (DNS) must be affirmed.

In order to prevail in its appeal that Council Central Staff (hereafter, "Council") erroneously issued a DNS and that an Environmental Impact Statement must be prepared, the Appellant bears the burden of providing *affirmative evidence* of likely significant environmental impacts. *Boehm v. City of Vancouver,* 111 Wn. App. 711, 719-720 (2002); *Moss v. City of Bellingham,* 109 Wn. App. 6, 23-24, 31 P.3d 703 (2001). The court stated "although appellants complain generally that the impacts were not adequately analyzed, they have failed to cite any facts or evidence in the record demonstrating that the [proposal] will cause significant environmental impacts warranting an EIS" at pp. 23-24.

Boehm and *Moss* make clear that the Appellant has the duty to actually prove, through affirmative evidence, showing that such environmental impacts will occur as a result of the proposal. Thus, where an Appellant claims of a failure to adequately identify adverse impacts, the Appellant must produce evidence that such impacts will actually exist for a decision to be overturned. *Boehm*, 111 Wn. App. 719-720. *See also Moss* 109 Wn. App. 6 at 31.

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Mere complaints or claims without the production of affirmative evidence proving that the decision was clearly erroneous, are insufficient to satisfy an Appellant's burden of proof in a SEPA appeal as a matter of law.

i. Land Use Impacts:

a. Appellant failed to present substantial evidence showing that the Council's decision on land use impacts was clearly erroneous.

Appellant relied on the testimony of Richard Weinman to meet Appellant's burden of proving that the City's DNS concluding the proposal will not have likely significant adverse land use impacts was clearly erroneous. Appellant failed to meet its burden.

While Mr. Weinman stated that he thought there could be land use impacts, he did not conduct his own analysis, nor did he disclose or quantify what those impacts were. Significantly, neither he nor any other witness provided any affirmative evidence of likely significant land use impacts. Rather, Mr. Weinman testified that the SEPA documents should disclose that the Proposal may encourage development within urban centers or discourage it outside of urban centers. It's unclear how the Proposal will do this when it sets no rates or makes any determinations about locations discounts in any areas. Further, even if the Proposal set rates, which it does not, encouraging development in urban centers and discouraging it outside of Urban centers is consistent with the City's long standing Urban village strategy contained in the Comprehensive Plan. However, it is not possible to evaluate land use impact for a rate-setting ordinance that does not exist.

Mr. Weinman's testimony was reduced to a conclusory statement, unsupported by any actual evidence, that the proposal may result in land use impacts. This testimony was speculative. Mr. Weinman did not point to a specific significant impact that would occur as a result of the Proposal. It cannot be considered as substantial evidence. *Boehm v. City of Vancouver*,

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11 Wn. App. 711, 719-720, 47 P.3d 137 (2002); WAC 197-11-060(4)(a); SMC 25.05.060(D)(1); *Moss v. City of Betlingham,*109 Wn.App. 6, 31 P.3d 703 (2001). Appellant failed to meet its burden regarding alleged impacts to land use.

b. The City provided substantial evidence demonstrating that the Council's decision of no probable significant land use impacts was not clearly erroneous.

The City submitted substantial evidence showing that the Proposal would cause no probable significant adverse impacts related to land use. The proposal does not change the zoning, it does not upzone any property, it does not authorize any development, it does not authorize construction or funding of transportation projects identified in the Proposal. Freeman Testimony. City staffer Lish Whitson also testified that he has experience reviewing SEPA checklists for programmatic proposals and the responses provided in the checklist are common. Whitson Testimony, Day 3. He further testified that he did not identify adverse land use impacts in the checklist because he did not anticipate adverse land use impacts due to the proposal to consider a Transportation Impact Fee program. Whitson Testimony. Appellant failed to produce substantial evidence demonstrating that the non-project proposal will have probable significant land use impacts. Appellant's claim must be denied.

ii. Housing Impacts

a. Appellant failed to present substantial evidence showing that the Council's decision on housing and housing affordability impacts was clearly erroneous.

Appellant's claim that the Proposal will result in likely significant impacts to housing and housing affordability is meritless and relies exclusively on tying the actual Proposal to some speculative future rate-setting ordinance that does not exist. Appellant spends in inordinance amount of time and energy making this argument. But the Examiner should not be sucked into attempting to evaluate the environmental impacts of some future action that is not part of the Proposal. In order for Appellant to carry its burden to establish clear error, Appellant must provide substantial evidence in

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the record of likely housing impacts. All of Appellant's witnesses rely on the incorrect assumption that the maximum defensible fee amount is part of the Proposal. It is not. These witnesses provided no other affirmative evidence other than alleged impacts based on some future rate-setting amount. Appellant did not meet its burden; its claim of housing and housing affordability impacts must be denied.

Even if the Examiner wants to look at the testimony related to some possible rate-setting ordinance, which SEPA does not support and which would be error, the evidence by Appellant's witnesses simply establishes that any amount of fee—even $1—will impact housing. So under Appellant's theory, any fee amount that is applied to any development must be disclosed in SEPA. That is not what SEPA requires. SEPA does not require analysis of economics generally. And there was testimony that taxes and other fees may be SEPA exempt. There are no cases finding that housing impacts under SEPA must look at housing feasibility on a project by project basis for a legislative proposal.

Further Mr. Shook's testimony and report rely on unfounded assumptions about some future rate-setting ordinance. Bjorn Test. It is wholly speculative to try to evaluate housing impacts for some future action and SEPA does not require disclosure of remote or speculative impacts. Mr. Bjorn identified key errors in Mr. Shook's report including, but not limited to, assumptions about fee amounts, assumptions about housing development feasibility, and actions that a developer may or may not take. Bjorn Test Critically, Mr. Shook's extrapolation of one of the maximum defensible fee numbers to try to establish a broader housing impact does not establish any probable significant impacts to housing or housing affordability of the Proposal. Bjorn Test. Mr. Bjorn established fundamental errors in the assumptions of the limited universe to which developers may act to adjust a development proposal to respond to a speculative fee, which did not include a reduction of even one

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stall of a parking space, which could offset a fee, or a slight increase in rent, of say $50 a month for rents which are currently rented at market rate of $1500 or more. Bjorn Testimony. As well, Mr. Shook's report and testimony incorrectly used return on cost on an annual basis to then extrapolate to alleged impact over a twenty-year period to housing, which result in conclusions about alleged housing impacts that are not likely to occur and are wrong. Bjorn Test. And most significantly, Council has not proposed any rate-setting fee amounts for any types of land uses, or proposed any exemptions or range of exemptions or any geographic deductions. Freeman Test., Whitson Test., Breiland Test. Based on this evidence in the record, Appellant failed to establish the Council committed clear error in reaching the conclusion the Proposal will result in no likely significant housing impacts. Freeman Test. Bjorn Test. Breiland Test.

It is very difficult to evaluate alleged effects on housing for some possible rate-setting ordinance which has not been drafted or proposed. Further, testimony of Ms. Holzemer and Mr. Maritz make clear that there are many assumptions that go into housing feasibility; but their testimony is that impacts to housing feasibility will impact housing production and housing affordability. This is complicated analysis, as testified to at length by Andrew Bjorn.

b. The City provided substantial evidence demonstrating that the Council's decision of no probable significant housing impacts was not clearly erroneous.

The weight of testimony provided by Mr. Whitson, Mr. Freeman and Mr. Bjorn was that the Proposal will not result in probable housing impacts. Whitson, Freeman and Bjorn Testimony. The record reflects that Mr. Freeman evaluated the principal features of the Proposal and the probable environmental impacts of the Proposal. A lead agency is to make its threshold determination "based upon information reasonably sufficient to evaluate the environmental impact of a proposal." SMC 25.05.335. SMC 25.05.055.B.2 provides "The lead agency shall prepare its threshold determination…

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at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be *reasonably identified*." Here, Mr. Whitson, who is planner, has reviewed SEPA checklists, DNS and EISs as part of his work on legislative and programmatic proposals including the recent Maritime and Industrial Strategy EIS. Mr. Whitson testified that he did not disclose housing impacts on the SEPA checklist because, based on his experience, the Proposal would not have likely housing impacts. And that attempting to evaluate the housing impacts of some future proposal would be speculative and not provide reasonably sufficient information to evaluate the environmental impacts of the actual proposal. Mr. Freeman testified that in his experience as a planner and in preparing environmental documents that the Proposal would not result in likely housing or housing affordability impacts because the Proposal did not demolish any structures, did not authorized construction of structures or make it more or less likely in any appreciable way that housing units would be constructed or not. Freeman Testimony. Because Appellant did not provide affirmative evidence of likely significant housing based on the Comprehensive Plan Proposal, Appellant have not established clear error when the City issued its DNS. Appellant's claim to the contrary should be denied and the DNS upheld.

Appellant failed to carry its burden to establish likely significant housing or housing affordability impacts based on the Proposal. Its claims to the contrary must be denied.

iii. Mitigation is Not Warranted Here and Appellants Suggestion to the Contrary Is Wrong.

SEPA provides that an agency may mitigate an environmental impact only (1) "to the extent attributable to the identified adverse impact of its proposal"; (2) if the condition is based on policies identified by the agency and incorporated into regulations, plans or codes that are formally designated by the agency as possible bases for the exercise of its authority under SEPA. RCW 43.21C.060; WAC 197-11-660(1); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 803, 801 P.2d 985

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(1990); *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 752, 765 P.2d 264 (1988); *see also* SMC 25.05.660.4.

SMC 25.05.675, which contains the City's substantive SEPA policies, does not give authority to impose specific housing mitigation policies for legislative proposals. SMC 25.05.675.I.1.a, and 675. I.3.a.1-iii. Similarly, SMC 25.05.675.J.2 contains the City's substantive SEPA policies does not provide specific land use mitigation policies for non-project proposals,

Mr. Weinman's testimony that the SEPA checklist and DNS should have proposed mitigation is inconsistent with the plain language in SEPA, the SMC and SEPA case law. No housing or land use impacts were identified in the checklist or the DNS and, as summarized above, Appellant provided no affirmative evidence to establish any likely significant housing or land use impacts based on the Proposal. The City did not err when the DNS did not impose mitigation for the Proposal. Appellant's claim to the contrary must be denied.

C. Appellant's piecemealing claim is based on a speculative concept, not part of the Proposal in any way.

Just like the last appeal brought by Appellant's in 2018, Appellant continues to argue that the City improperly truncated its environmental review ("piecemealing") of the proposal by not evaluating the rate-setting ordinance concurrently with the current Proposal. Appellant's argument lack merit, is inconsistent with the plain language of SEPA and case law and such claim therefore fail.

The prohibition on piecemealing stems from WAC 197-11-060(3)(b), which provides:

> 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. . .. 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.

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And as noted in *Murden Code Pres. Ass'n v. Kitsap County*, 41 Wn. App. 515, 526, 704 P.2d 1242, 1249 (1985):

> *Piecemeal review is permissible if the first phase of the project is independent of the second and if the consequences of the ultimate development cannot be initially assessed. Cathcart v. Snohomish Cy.*, 96 Wash.2d 201, 210, 634 P.2d 853 (1981).

Further, piecemeal review is impermissible where a "series of interrelated steps [constitutes] an integrated plan" and the current project is dependent upon subsequent phases. *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 345, 552 P.2d 184 (1976). The assessment of a proposed action's environmental effects must include its direct as well as "reasonably anticipated indirect impacts".

> subsequent development of a similar nature, however, need not be considered in the threshold determination unless there will be some causal connection between this development and one or more of the governmental decisions necessary for the proposal in question.

WAC 197–10–060(3).

The prohibition against piecemealing under SEPA focuses on whether a project has been segmented to avoid full environmental review.[7] The City has been unable to find any piecemealing case law that determines improper segmentation occurred between Comp. Plan amendments and code regulations. The Examiner recognized this in the last appeal on the 2018 Proposal and concluded:

> Adoption of generalized policies of a Comprehensive Plan do not require (or even guarantee) that implementing ordinances be adopted. Appellants present no evidence that the Ordinance cannot or will not be adopted by Council unless additional ordinances are adopted to implement a TIF program.

Examiner's Amended Findings and Decision dated October 24, 2019, at p. 8, Conclusion of Law No. 12.

As is still the case today, no improper segmentation occurred here. Appellant failed to provide any affirmative evidence that the current Proposal and some possible future rate setting ordinance

[7] *See Merkel v. Port of Brownsville*, 8 Wn. App. 844, 851-52, 509 P.2d 390 (1973); WAC 197-11-060(3)(b).

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cannot or will not proceed unless both are implemented simultaneously. Appellant will no doubt argue that the creation of a rate study in 2023 somehow make it such that the Proposal and any future rate setting ordinance cannot or will not proceed unless both are implementing simultaneously. However, this is not true. The rate study is not part of the Proposal, and its existence does not establish that the Proposal and some future rate-setting ordinance cannot or will not proceed unless both are implemented simultaneously. Ms. Breiland noted that rate studies are regularly changed or updated, and the rate study does not require that a rate-study ordinance be considered by Council or adopted. Breiland Testimony.

Here, the Proposal is independent of any future rate-setting ordinance. Freeman, Whitson, Breiland Testimony. Here, the "consequences" of a rate setting ordinance cannot be evaluated at this time. There are a variety of factors that must be evaluated to develop a rate-setting ordinance, if it occurs at all, which have not happened. Freeman, Breiland Testimony.

Nor is this Proposal part of a series of interrelated steps that constitutes an "integrated plan" where the current project is dependent upon subsequent phases. *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 345, 552 P.2d 184 (1976). The Proposal is not a project-level proposal like that in Cheney, nor is the Proposal dependent upon subsequent phases. The Proposal and possible future rate-setting legislation are not a "single course of action" that cannot or will not proceed unless both are implemented simultaneously. Nor is the Comp. Plan legislation an interdependent part of a larger proposal that depends on the larger proposal as its justification. The Comp. Plan proposal lays the groundwork for Council to consider adoption of a TIF program. The Comp. Plan proposal, if adopted, does not guarantee adoption of a TIF program, nor does it establish the critical components of the program such as determining fee amounts, determining exemptions, individualized determinations and other policy decisions related to the program. Freeman Testimony. Consequently, the Comp. Plan

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amendments and any subsequent TIF program legislation are separate pieces that involve the same subject matter- Transportation Impact Fees- but, aside from that, they are different proposals and need not be implemented simultaneously.

The proposed Comp. Plan amendment language, identical to the language in the 2018 Proposal, relies on is at Funding Policy T10.7:

> T10.7 ((~~Consider~~)) ((~~u~~)Use ((~~of~~)) transportation-impact fees to help fund transportation system improvements needed to serve growth.

Exhibit 4 (Proposal). This Proposal does not "mandate impact fees" as will be argued by Appellant. The Comp. Plan clearly states:[8]

> **Policies** should be read as if preceded by the words It is the City's general policy to. A policy helps to guide the creation of or changes to specific rules or strategies (such as development regulations, budgets, or program plans). City officials will generally make decisions on specific City actions by following ordinances, resolutions, budgets, or program plans that themselves reflect relevant Plan policies, rather than by referring directly to this Plan. Implementation of most policies involves a range of actions over time, so one cannot simply ask whether a specific action or project would fulfill a particular Plan policy. For example, a policy that states that the City will give priority to a particular need indicates that the City will treat the need as important, not that it will take precedence in every City decision.

The proposed change from "consider use of" to simply "use" does not "mandate impact fees" as will be argued by the Coalition.

Moreover, Ketil Freeman testified that the City typically proposes Comp. Plan amendments as stand-alone legislative proposals, separate and distinct from code regulations that may implement Comp. Plan policies. Freeman Testimony. And while Appellant casts such a claim as a violation of SEPA, nothing in SEPA mandates concurrent review of a Comp. Plan legislation with code regulations. This was recognized by the Examiner in the last appeal when the same argument was

[8] Testified to by Mr. Freeman. See also Introduction of the Comp. Plan, subheading "Application and Implementation of the Plan" at p. 22 of 601 of the pdf (but page number "17" on the footer of the document). The Plan can be found here: ComprehensivePlanCouncilAdopted2021.pdf (seattle.gov)

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made by Appellant. *See* Amended Findings and Decision of the Hearing Examiner, dated October 24, 2019, at Conclusion of Law No. 13, p. 8. The Examiner further stated:

> The proposed Comp. Plan amendments 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 for by the Ordinance. The ordinance is merely a directive to create a program to fund such projects.

Id. COL No. 13.

This continues to be the case with the current Proposal. The Proposal does not ensure the adoption of a Transportation Impact Fee program and does not establish important elements of such a program, such as fee amounts or potential exemptions.

Issuance of a rate study does not change that fact. Mr. Freeman testified that no Councilmember has asked for preparation of a fee ordinance or given any direction about the policy decisions needed to create such a fee-setting ordinance (what level of fees to charge for various land uses, what exemption would apply, at what levels exemptions may apply to low-incoming house if that is an exemption, locational discounts based on various geography). Testimony of Freeman. Appellant's own witness Mr. Maritz testified that the City did not adopt the maximum possible exemption of 80% AMI for its MFTE program. Mr. Bjorn testified that it would be useless and speculative to analyze impacts to housing and housing affordability based on the maximum defensible fee for various land uses in the rate study. And Ms. Breiland testified that the rate study did not take into consideration any exemptions from the fee. The evidence in the record establishes that the rate study does not establish important elements of a program such as fee amounts or potential exemptions.

Case law is clear that additional projects do not require review in an environmental determination for cumulative impacts if they are either subjectively independent from the proposed action or are not necessary to meet the project's purpose and need. *Mountlake Terrace*, 87 Wn.2d at

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345; *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614, 744 P.2d 1101 (1987) (EIS need not cover subsequent phases if initial project is substantially dependent of subsequent phases and project would be constructed without regard to future development); *see also* WAC 197-11-060.3.b.ii.

In *Gebbers*, *v. Okanogan Cnty. Pub. Util. Dist. No. 1,* 144 Wn. App. 371, 379, 183 P.3d 324, 328 (2008), Division Three also looked to the federal NEPA standard for guidance, *Gebbers* at p. 10, citing 40 CFR 1508.7; *see Florida Wildlife Federation. v. US Army Corp of Eng'rs*, 401 F. Supp.2d 1298, 1326, 1330 (S. Dist. Fla. 2005)(applying reasonably foreseeable future actions test); *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985)(future action foreseeable if it is sufficiently certain); *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)(impact reasonably foreseeable when sufficiently likely to occur that person of ordinary prudence would take it into account in reaching decision).

It is not sufficiently certain if any rate-setting ordinance will be proposed, considered, or adopted. In fact, it is not even certain the current Proposal will be taken up by enough Councilmembers; so if the Proposal is not adopted, certainly no rate-setting ordinance can be developed or adopted. Adoption of a fee-setting ordinance is not probable, but is only hypothetical and speculative, therefore, SEPA does not required that it be considered in a DNS. WAC 197-11-782; *see Mountlake Terrace*, 87 Wn.2d at 345-46. Appellant's claim that the City erred in piecemealing the environmental review fails and its claim of such must be denied.

D. Council provided sufficient deliberation and consideration of the environmental impacts of the Proposal.

Appellant's claim that Council failed to demonstrate prima facie compliance with SEPA also fails. The procedural component of SEPA requires "sufficient deliberation and consideration" of the environmental impacts of a proposal before issuance of a procedural determination. *See e.g., Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wash. 2d 267, 279, 552 P.2d 674, 680-681 (1976).

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Appellant argues that the City failed to adequately disclose impacts to land use or housing the SEPA checklist. However, Appellant provides no affirmative evidence of any likely impacts to land use or housing based on the actual Proposal. Rather, Appellant focuses exclusively on the claim that the City had to analyze the environmental impacts of a rate-setting ordinance, which does not exist. SEPA does not require analysis of speculative impacts of a proposal.

Washington Courts have held for many years that the purpose of SEPA is to facilitate the decision-making process; it need not list every remote, speculative, or possible effect.[9] SEPA requires consideration of "environmental impacts that are likely, not merely speculative"; speculative impacts need not be evaluated under SEPA.[10] Richard Weinman testified that the City should have disclosed possible effects to land use of the Proposal but provided no evidence that the proposal will in fact have any probable land use impacts. Mr. Whitson testified that the Proposal will not have any land use impacts. This is clear from the Proposal because it does not propose any development or any changes to any land uses or authorize construction or fund any construction. There are simply no impacts to land uses.

Similarly, the City properly disclosed impacts to housing in Section 9 of the SEPA checklist based on the likely impacts of the Proposal. The City did not attempt to evaluate the housing impacts of some future possible rate-setting ordinance because it is not clear what the rates for each land use should be, whether any exemption should apply and if so at what level and whether any geographic discounts should be applied and if so where and how much. Freeman Testimony, Whitson Testimony. The City did carefully and thoughtfully complete the SEPA checklist, including Sections B and D,

[9] *Gebbers v. Okanogan Cnty. Pub. Util. Dist. No. 1,* 144 Wn. App. 371, 379, 183 P.3d 324, 328 (2008).
[10] SMC 25.05.060 D.1; WAC 197-11-060.4.A; *see, also Boehm v. City of Vancouver*,111 Wn. App. 711, 47 P.3d 137 (Div. 3, 2002) and *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 108 Wn. App. 836, 988 P.2d 27 (Div 1., 1999).

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disclosing likely environmental impacts, which frankly were very limited given the nature of the Proposal, which is largely procedural. The City noted this in the Checklist and the DNS. See Ex. 3 (SEPA Checklist) at p. 2, Ex. 1 (DNS) at p. 1 (Project description) and p. 2 "Threshold Determination", last paragraph.

In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a "detailed statement," the decision of the governmental agency must be accorded substantial weight. RCW 43.21C.090. *King Cnty. v. Friends of Sammamish Valley*, 530 P.3d 1023 (Div. 1, June 12, 2023).

In that case, Div. One looked at whether appellant pointed to substantial evidence that an ordinance will have likely nonspeculative adverse impacts that the jurisdiction failed to consider. Finding none, the Court concluded that the SEPA checklist was sufficient to support the DNS. *Id.*

Likewise, here, the record contains evidence that Mr. Freeman carefully reviewed the SEPA checklist, and the proposal before issuing the DNS. Freeman Testimony. Mr. Freeman had reasonably sufficient information to evaluate the environmental impacts of the Proposal. Appellant's SEPA witness, Mr. Weinman, failed to establish that the Proposal will have likely nonspeculative adverse impacts that the Council failed to consider. Instead, Mr. Weinman testified that the SEPA checklist "should have" identified any possible environmental impacts, but that is not what SEPA requires. SEPA requires disclosure of likely or probable environmental impacts and the responsible official then evaluates those impacts to determine whether probable impacts are significant to any element of the environment or not.

As noted above, SEPA does not require disclosure or analysis of possible impacts. Washington Courts have held for many years that the purpose of SEPA is to facilitate the decision-

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making process; it need not list every remote, speculative, or possible effect.[11] Further, while Mr. Weinman testified about his concern regarding lack of analysis in the SEPA checklist, his general concern did not translate to any evidence of impact associated with the Proposal. And, ultimately, Mr. Weinman conceded on cross-examination that he could not say what impacts of the proposal should have been disclosured. Test. of Weinman. As such, Weinman's testimony provided no evidentiary support to Appellant's claims regarding land use impacts or housing impacts in this appeal. No other witness for Appellant provided any expert testimony on this point.

The record demonstrates that the Council adequately considered environmental factors of the Proposal in light of SEPA's requirements. The SEPA checklist was carefully completed, and the DNS correctly concluded the Proposal will not result in likely significant environmental impacts. The City did not commit any clear error in disclosing and analyzing the environmental impacts of this Proposal. Appellant's claims to the contrary must be denied.

Finally, Council properly adopted several environmental documents, including the EIS for Seattle 2035 Comprehensive Plan update, which analyzed the full range of impacts associated with the allocation of 70,000 new housing units and 115, 000 new jobs for the 20-year planning horizon. Exhibit 1 (DNS) at p. 3 under "Description of Adopted Documents". Council also adopted the environmental documents that analyzed the environmental impacts of the programmatic modal plans, which set out a variety of pedestrian, bike, freight, transit projects that the City used in creating the list of potential fee eligible transportation projects in the Proposal. *See* Transportation Appendix Figures A-18 and A-19 of Proposal. Further, the Council looked at the Maritime and Industrial EIS and the Seattle 2035 which mentioned TIF as a possible mitigation measure. *Id.* and testimony of Freeman.

[11] *Gebbers v. Okanogan Cnty. Pub. Util. Dist. No. 1,* 144 Wn. App. 371, 379, 183 P.3d 324, 328 (2008).

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E. Council is not required to conduct "worst case" analysis of speculative fee amount contained in Rate Study

Appellant argues that Council erred in not conducting "worst case" analysis of the fees contained in the Rate Study. This argument is flatly inconsistent with what SEPA requires. SEPA requires analysis of likely environmental impacts of a Proposal. As has been stated many times, as much as Appellant wants to characterize the maximum defensible fee listed in the Rate Study as part of the Proposal, it is not. Freeman Test. Whitson Test. Bjorn Test. Breiland Test. There is a long line of various decisions that must occur before Council could even consider creation and proposing a rate-setting ordinance—most pressingly, whether to consider the Proposal under appeal, which is a necessary prerequisite to any further steps to create a Transportation Impact Fee.

There is no basis in SEPA to require Council to analysis fees amounts not tied to a Proposal. The worst-case analysis Appellant wants to rely on is not required here because the Proposal will not result in significant environmental impacts. WAC 197-11-080 provides:

> **Incomplete or unavailable information.**
>
> (1) If information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies shall obtain and include the information in their environmental documents.
>
> (2) When there are gaps in relevant information or scientific uncertainty concerning **significant impacts**, agencies shall make clear that such information is lacking or that substantial uncertainty exists.
>
> (3) Agencies may proceed in the absence of vital information as follows:
>
> (a) If information relevant to adverse impacts is essential to a reasoned choice among alternatives, but is not known, and the costs of obtaining it are exorbitant; or
>
> (b) If information relevant to adverse impacts is important to the decision and the means to obtain it are speculative or not known;
>
> Then the agency shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty. If the agency proceeds, it shall generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed.

Here, Council correctly concluded no probable housing impacts based on the Proposal. Appellant failed to establish substantial evidence of likely significant housing impacts based on the

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Proposal. Nor does SEPA require analyzing the environmental impact of some possible future piece of legislation. It is not a direct, indirect or cumulative impact of the Proposal to analyze potential fee amounts in the Rate Study because there is no decision that the maximum defensible fee will be what is proposed in a rate-setting ordinance. Appellant does not carry its burden to establish clear error that Council must evaluate impacts of some nebulous rate-setting ordinance that does not yet exist.

F. Appellant abandoned numerous claims by failing to present any evidence to support such claims.

Appellant failed to make arguments or present evidence at the hearing for several claims that it had raised in its appeal statement. These arguments have been abandoned by appellant and should be considered waived. *Boehm v. City of Vancouver,* 111 Wn. App. 711, 722, 47 P.3d 137 (2002). No evidence or argument was presented at the hearing regarding these issues; they must be considered waived:

- Notice of Appeal, Section A, p. 5, lines 14-23, "construction impacts from construction of the TIP identified in the Proposal" resulting in "temporary construction-related impacts to the following elements of the elements of the environment: earth, air, water, the built environment, transportation and long-term traffic, noise and aesthetic impacts.
- Notice of Appeal, Section B, p. 6, lines 15-24, "significant construction impacts" that will result in significant construction-related impacts to the following elements of the environment: earth, air, water, the built environment, transportation and long-term traffic, noise and aesthetic impacts.
- Notice of Appeal, Section B, p. 7, lines 18-22 Housing impacts due to sprawl including increased miles traveled and accompanying pollution.
- Notice of Appeal, Section B, p. 7, lines 23-26 compliance with land use plans and policies, energy use and transportation.

III. CONCLUSION

For these reasons, the Examiner should find Appellant failed to carry its burden to establish clear error with the DNS. Appellant's appeal should be denied, and the DNS affirmed.

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DATED this 21st day of September 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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