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 RESPONSE TO APPELLANT'S CLOSING ARGUMENT

A. Appellant Failed to Establish Improper Piecemealing Occurred Here.

Significantly, Appellant did not mention, much less argue in its closing brief, that the City improperly piecemealed its environmental review here. Likewise, Appellant did not place evidence into the record at hearing to support its argument of improper piecemealing. Appellant's claim about improper piecemealing was abandoned.

Even if Appellant Seattle Mobility Coalition (SMC or Appellant) argues it its response to City's closing that the City improperly segmented the environmental review of the Comprehensive Plan Proposal (Proposal), such an argument lacks merit.

SEPA procedural determinations are entitled to substantial weight. RCW 43.21C.075(3)(d). Therefore, Appellant must establish clear error in the City's DNS for the Comprehensive Plan Proposal including a claim of improper piecemealing. Appellant fails to meet its burden.

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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; such review is impermissible where a series of interrelated steps constitute an integrated plan and the current project is dependent upon subsequent phases. *Murden Cove Pres. Ass'n v. Kitsap County,* 41 Wn. App. 515, 526, 704 P.2d 1242 (1985). Further, in the absence of specific plans for any future development, SEPA does not require consideration of every remote and speculative consequence of an action. *Murden Cove,* 41 Wn. App. at 526. In *Murden Cove*, the Court found:

> Here the approval of the rezone and proposed PUD has not been shown to be dependent upon, functionally related to, or causally connected to any future development of the applicants' property.
>
> Further, in the absence of specific plans for any future development, SEPA does not require consideration of "every remote and speculative consequence of an action." ***527** *Short v. Clallam Cy.,* 22 Wash.App. 825, 834–35, 593 P.2d 821 (1979) (quoting *Cheney, supra,* 87 Wash.2d at 344, 552 P.2d 184). In this case the rule of reason dictates that any assessment of the environmental consequences of the applicants' future plans be deferred until they are presented in a specific form for requested governmental action. *Short, supra* 22 Wash.App. at 835, 593 P.2d 821.

Murden Cove, 41 Wn. App. 515, 526, 704 P.2d 1242 (1985).

Here, like in *Murden Cove,* the approval of the Comprehensive Plan Proposal is not dependent upon, functionally related to, or causally connected to any future development of a rate-setting ordinance. There is no specific proposal for future development of a rate-setting ordinance so any assessment of the environmental consequence of a future rate-setting plan should be deferred until a specific proposal is presented.

Further, Appellant failed to establish that the Comprehensive Plan Proposal is not part of a single course of action that must be evaluated in the same environmental document because the Comprehensive Plan proposal cannot or will not proceed unless the rate-setting ordinance (and any other necessary parts of a rate-setting program) are implemented simultaneously with the

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Comprehensive Plan proposal. The Proposal can proceed without a rate-setting ordinance. Mr. Freeman testified that Comprehensive Plan Proposals regularly proceed without an implementing ordinance and that it is only in more recent instances that a few large proposals (e.g., Industrial/Maritime Strategy) have included the Comprehensive Plan proposal at the same time as an implementing ordinance. Similarly, Appellant has not established that the Proposal and other components to create a Transportation Impact Fee program including a rate-setting ordinance are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation. WAC 197-11-060(3)(b). As testified to by Mr. Freeman and as established in the Proposal documents, including the SEPA checklist and the DNS, this Proposal is the first step needed for Council to consider a TIF Program. If Council considers this Proposal, Council may amend it to include a different transportation project list as TIF-eligible or it may consider a different methodology for establishing the maximum defensible fee. There are a variety of ways that a jurisdiction could set up a Transportation Impact Fee Program so the Comprehensive Plan Proposal is not dependent on a larger proposal as the City's justification. As noted before, the City is unaware of any case law finding that a Comprehensive Plan proposal must proceed with implementing legislation to prevent improper piecemealing.

Rather, Washington Courts have found improper piecemeal review where a project development is "so interrelated and interdependent that no part of the project can proceed until all provisions of [the SMA and SEPA] have been fully complied with." *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 847, 509 P.2d 390 (1973). In *Merkel*, the Court held that the Port could not proceed to cut trees and clear uplands without regard to whether or not permits required by Shoreline Management Act had been issued for the marina expansion, where the marina expansion project required modification of both the upland and lowland areas.

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Here, the Proposal is legislative in nature and testimony established that there are many Comprehensive Plan policies or goals that do not have implementing legislation in the Code so a Policy or Goal is not so interrelated and interdependent that the Comprehensive Plan proposal cannot proceed without code amendments. Freeman Testimony. For these reasons, Appellant's claim that the Council improperly piecemealed the environmental review here fails, and their appeal issue must be denied.

B. **Appellant Failed to Establish City Councill Committed Clear Error in Analyzing the Environmental Impacts of the Proposal.**

SEPA makes clear that procedural determinations made by the SEPA responsible official are entitled to substantial weight. RCW 43.21C.075(3)(d).

Both parties agree that, on appeal, the lead agency must demonstrate that it actually considered relevant environmental factors before issuing the DNS, and that the DNS must be based on information reasonably sufficient to evaluate the proposal's environmental impacts.[1] Here, the City did establish that Council met the prima facie compliance with the requirements of SEPA.

The record contains significant evidence that Council staff actually considered the environmental factors of the Proposal. HE 16, 17, 18, 19 (various versions of the SEPA checklist where Mr. Whitson, Mr. Chow or Mr. Freeman added or deleted analysis from the draft SEPA checklist, with the final checklist (Ex. 19); plus testimony of Lish Whitson, planner with long-range planning experience and experience reviewing SEPA checklists, DNSs, and EISs; Testimony of Calvin Chow; Testimony of Ketil Freeman, urban planner with years of experience with project and non-project planning as well

[1] WAC 197-11-335/SMC 25.05.335. *See also* Matter of the Appeal of Tom Gibbons for Fred Meyer, and Gary Brunt for Greenwood Shopping Center, HE W-11-003 citing *Boehm v. City of Vancouver*, 111 Wn. App.711, 718, 47 P.3d 137 (2002).

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as SEPA experience, including drafting and reviewing SEPA checklists, DNSs, and EISs. Freeman Test., Chow Test., Whitson Test.

Contrary to SMC's claim at p. 12:26-p. 13:5, the Council did comply with its policies that the City should, to the fullest extent possible, "Prepare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made." SMC 25.05.030.B.

The Examiner heard testimony about the disclosure and analysis considered by three staffers- all three of whom are trained as planners and each have experience drafting or reviewing environmental checklists, threshold determinations, or EISs in their work, including for long range planning.

Further, there is no evidence in the record that Council staff "entirely ignored" an environmental impact as suggested by SMC at SMC Closing at p. 13: lines 12-16 in citing *PT Air Watchers*. In *PT Air Watchers*, the Court concluded that the Department of Ecology made a reasoned assessment of the environmental impacts of the application by owner of pulp and paper mill for a permit to construct a new cogeneration project at the existing mill. *PT Air Watchers v. State, Dep't of Ecology*, 179 Wn. 2d 919, 930, 319 P.3d 23, 29 (2014). Here, like in *PT Air Watchers,* Council made a reasoned assessment of the environmental impacts of the Comprehensive Plan Proposal and the information analyzed was sufficient to evaluate the general change to housing based on the Proposal, which is no probable significant impact. Like in *PT Air Watchers*, where the Court upheld the DNS issued by Ecology where Ecology made a reasoned assessment of the environmental impacts of a proposal; the Examiner should do the same here.

Appellant's citation to *Lassila* to support its claim that the City did not actually consider the environmental impacts of the Proposal also misses the mark. Unlike *Lassila* where "the record on review is totally inadequate" where the Court could not "tell whether the environmental significance

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of the [Riverfront Development] Plan was even considered by the commissioners" or if the city commissioners made the required threshold determination." *Lassila v. City of Wenatchee*, 89 Wn. 2d 804, 817, 576 P.2d 54, 61 (1978). This case is distinguishable from the perspective that the record contains evidence that the Council staff considered the environmental impact of the Comprehensive Plan proposal. Discussed immediately above, *see* HE Ex. 16-19 (various versions of the SEPA checklist) plus testimony of Whitson, Chow and Freeman.

Further, Appellant's citation to WAC 197-11-060(4)(c),(d), cited in SMC Closing at p 5;17-20, supports the City's consideration of the environmental impacts of the Proposal. The impacts argued by SMC regarding housing are not likely; rather, they are speculative. WAC 197-11-060 explicitly excludes speculative analysis and requires attention to impacts that are likely due to the Proposal.

WAC 197-11-060 provides in relevant part:

> (4) **Impacts.**
> (a) SEPA's procedural provisions require the consideration of "environmental" impacts (see definition of "environment" in WAC 197-11-740 and of "impacts" in WAC 197-11-752), with attention to impacts that are likely, not merely speculative. (See definition of "probable" in WAC 197-11-782 and 197-11-080 on incomplete or unavailable information.)
> …
> (c) Agencies shall carefully consider the range of *probable impacts*, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer.
> (d) A proposal's effects include *direct and indirect impacts* <u>*caused by a proposal*</u>. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions. For example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects or extension of sewer lines would tend to encourage development in previously unsewered areas.

Emphasis added.

Likewise, Appellant's citation to WAC 197-11-055(2)(a)(I) at SMC Closing Brief at p. 6, lines 9-11, also supports the Council's analysis of the Proposal.

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> (2) **Timing of review of proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, 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.
>
> (a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.
>
> (i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.
>
> (ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.

Emphasis added.

As reflected in the testimony by city staff, including Ketil Freeman, Calvin Chow, Lish Whitson, and consultants Kendra Breiland and Andrew Bjorn, the components of a Transportation Impact Fee Program are a future step that has not yet been developed. The details of a rate-setting ordinance have not been proposed, discussed, or analyzed. Freeman Testimony. Thus, the consideration and adoption of the Comprehensive Plan Proposal is a preliminary step that can help flesh out discussion regarding important components of a TIF Program, such as setting rates for various land uses, determining whether exemptions will be allowed for low-incoming housing and at what level of low-income housing and whether any other exemptions should be included and whether locational discounts are imposed or not. The testimony at hearing provided that the rate-setting ordinance has not been developed based on the transportation project list in the 2023 Proposal so the environmental impacts of such Proposal cannot be analyzed in a way that will be reasonably accurate to inform the decisionmakers, as required by SEPA. Freeman Testimony. *See also* WAC 197-11-335.

Mr. Weinman's testimony was based on this assertion that the Council should have disclosed possible environmental impacts[2], however, that is not what SEPA requires. SEPA requires analysis of probable or likely environmental impacts of the Proposal at hand. WAC 197-11-055, 060, 782,

[2] Appellant's Closing Brief at p. 5:17-20.

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784. WAC 197-11-310(2) provides: "The responsible official of the lead agency shall make the threshold determination, which shall be made as close as possible to the time an agency has developed or is presented with a proposal." It is undisputed that Council staff conducted SEPA and issued a DNS after CM Pedersen developed the Comprehensive Plan Proposal. The rate-setting ordinance has not been developed yet and will depend on policy direction and decisions to be made by a bill sponsor, which has not occurred. Freeman Testimony.

To support Appellant's argument that the Council had to analyze the environmental impacts of the land use rates set in the Rate Study, Appellant cites to the Lassila case which discusses timing of EIS preparation. Significantly, Council did not conclude the Proposal will result in likely significant impacts to housing or housing affordability so an EIS is not required. The relevant issue in the case was "(2) whether the Commission violated SEPA when it reclassified areas for expansion of alpine skiing in May 2011 without preparing an EIS." *Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 795, 309 P.3d 734, 738 (2013). The Court concluded the Commission did violate SEPA because:

> The Commission's approval document [a ski classification decision]…unambiguously provided that approval of the classification "would allow for the development *of the MS 2000 proposal to develop one lift and seven ski runs*...." CP at 367 (emphasis added). Similarly, the Commission's map showing the adopted classifications plainly shows the layout of a specific ski area. The approval, however, does expressly state that the "MS 2000 proposal is conceptual in nature and that final development plans will designate the location of the treed ski islands and developed ski runs." CP at 367. This wording makes clear that the "conceptual" element of the action does not extend to whether the Commission approved an alpine ski area of this size and nature. CP at 367. Instead, it simply recognizes that the final location of the runs and islands may vary from that shown on the map."

Lands Council v. Washington State Parks Recreation Comm'n, 176 Wn. App. 787, 797, 309 P.3d 734, 739 (2013). The *Lands Council* Court concluded that the Commission had violated SEPA where the Commission did not prepare an EIS before approving the Ski Classification Decision "because

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approval of the classification was effectively the Commission's decision to approve expansion of the ski area." *Id.* at 802–03.

Unlike the *Lands Council* case, the proposal here was carefully evaluated and deemed not to result in any likely significant impacts to housing. So, no EIS was required. Further, unlike in *Lands Council*, the Comprehensive Plan proposal does not establish a Transportation Impact Fee program with rates by land use, exemptions for certain land uses or locational discounts. The *Lands Council* case is not on point.

Appellant's citations to WAC 197-11-784/25.05.784 at p. 6, lines 22-2; WAC 197-11-055.(2)(c), 25.05.055.A and 25.05.055.B.1.a[3]; does not establish the City committed clear error in its evaluation of the Comp. Plan proposal and not the rates set out in the Rate Study. The principal features of a rate-setting ordinance could not be reasonably identified at the time the SEPA checklist was reviewed, and the DNS was issued, and still cannot be—7 months later at hearing. Freeman Testimony. Mr. Freeman testified that he has been given no direction about the contours of a rate-setting program. *Id.* Andrew Bjorn also testified that while the Council could have prepared some pro forma analysis based on the information in the January 2023 Rate Study, that information would

[3] WAC 197-11-055(2) **Timing of review of proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, 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.
(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.
(i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.
(ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.
(b) Agencies shall identify the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis. Agencies may also organize environmental review in phases, as specified in WAC **197-11-060**(5).
(c) Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC **197-11-070**).

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not be useful because it would not disclose actual impacts to housing or housing affordability. Testimony of Andrew Bjorn, Day 3. The creation of any rate-setting ordinance (a subsequent phase of the TIF Program) has not been developed such that its component parts can be evaluated under SEPA. *Id.*

Moreover, citation to WAC 197-11-330(3)(d)[4] at Appellant Closing p. 7: lines 7-10, does not require the Council to analyze the environmental impacts of the land use table in the Rate Study because Appellant has not established that such land use table is part of the Comp. Plan Proposal or that such table is an interdependent part of the Comp. Plan Proposal. To the contrary, and as discussed above in detail, the Comp. Plan proposal can proceed without an ordinance implementing a TIF Program. Appellant has failed to establish otherwise.

Here, Appellant argues that Council committed clear error by not conducting a "worst case" analysis of the Proposal; however, the "worst case" analysis of the Proposal was not necessary here because no significant impacts to housing were found based on the Proposal. SEPA regulations only require a worst-case analysis if information on significant adverse impacts to the Proposal are essential to a reasoned choice among alternatives:

> **WAC 197-11-080, 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:

[4] (3) In determining an impact's significance (WAC 197-11-794), the responsible official shall take into account the following, that: (a) The same proposal may have a significant adverse impact in one location but not in another location; (b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment; (c) Several marginal impacts when considered together may result in a significant adverse impact; *(d) For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified.*

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(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.

(4) Agencies may rely upon applicants to provide information as allowed in WAC **197-11-100**.

And WAC 197-11-335 provides Additional information.

The lead agency shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal (WAC **197-11-055**(2) and **197-11-060**(3)). The lead agency may take one or more of the following actions if, after reviewing the checklist, the agency concludes that there is insufficient information to make its threshold determination:

(1) Require an applicant to submit more information on subjects in the checklist;

(2) Make its own further study, including physical investigations on a proposed site;

(3) Consult with other agencies, requesting information on the proposal's potential impacts which lie within the other agencies' jurisdiction or expertise (agencies shall respond in accordance with WAC **197-11-550**); or

(4) Decide that all or part of the action or its impacts are not sufficiently definite to allow environmental analysis and commit to timely, subsequent environmental analysis, consistent with WAC **197-11-055** through **197-11-070**.

Here, the lead agency did not reasonably believe that the Proposal will have a significant adverse impact on housing or housing affordability. Freeman testified that he concluded that relying on the maximum defensible fee would not provide accurate, helpful information to Council for a few reasons, including because the Proposal did not set any fee, and creating a TIF Program will require policy discussion and decisions about the scope of a rate-setting ordinance that have not been contemplated yet.

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Washington Practice provides a section on consideration of future impacts, 36 Wash. Prac., Washington Land Use § 9:6:

> While every remote and speculative consequence of an action need not be included in an environmental analysis, the lead agency, "cannot close its eyes to the ultimate probable environmental consequences of its current action." [5]
> A proposed land-use related action was not found to be insulated from full environmental review, "simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Instead, an Environmental Impact Statement (EIS) should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action."[6] (Emphasis added).

Distinguishing this circumstance from the annexation under consideration in *King County v. Washington State Boundary Review Board for King County* cited above, the *International Longshore and Warehouse Union, Local 19*, 176 Wn. App. at 522, Court concluded that SEPA review was not necessary for a Memorandum of Understanding:

> [State Environmental Policy Act (SEPA)] review must precede approval of an annexation, even though specific development proposals are not yet on the table, because an action has been taken that will have impacts on the environment down the road. SEPA review must precede a decision to go ahead with the arena because if and when that decision is made, the decision will be a project action with immediate environmental impacts. *The memorandum of understanding is not an "action" because* by itself it has no environmental impact, either down the road or immediately. Under

[5] Washington Practice, 36 Wash. Prac., Washington Land Use § 9:6, footnote 1: *Cheney v. City of Mountlake Terrace*, 87 Wash. 2d 338, 344, 552 P.2d 184 (1976), citing *Eastlake Community Council v. Roanoke Associates, Inc*., 82 Wash. 2d 475, 513 P.2d 36, 5 Env't. Rep. Cas. (BNA) 1897, 3 Envtl. L. Rep. 20867, 76 A.L.R.3d 360 (1973). See also *In re Northwest Pasco Annexation*, 100 Wash. 2d 864, 867–68, 676 P.2d 425 (1984).

[6] Washington Practice, 36 Wash. Prac., Washington Land Use § 9:6, footnote 2: *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn. 2d 648, 664, 860 P.2d 1024 (1993) ("RCW 43.21C.031 mandates that an EIS should be prepared when significant adverse impacts on the environment are 'probable', not when they are 'inevitable'. The absence of specific development plans should not be conclusive of whether an adverse environmental impact is likely."). *See also WAC 197-11-055(2); WAC 197-11-406; WAC 197-11-060(5)(b); Lands Council v. Washington State Parks Recreation Com'n,* 176 Wash. App. 787, 804, 309 P.3d 734 (Div. 2 2013) ("Subject to these standards, WAC 197-11-060(5)(b) allows agencies to phase environmental review 'to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready.'").

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> SEPA, there is no snowball. *All that has happened so far in terms of SEPA is a decision about the process that will be used to make a decision.*

Emphasis added.

The *International Longshoreman* Court also went on to distinguish the facts of the *Magnolia* Neighborhood Planning Council case too:

> [Unlike in Magnolia Neighborhood Planning Council] The adoption of Redevelopment Plan for U.S. Department of Defense property, even though not a definite proposal for actual development, warranted environmental review *where the plan identified the number of residential units approved, the layout of the uses, and information indicating potential environmental impacts.* Footnote 6 *citing Magnolia Neighborhood Planning Council v. City of Seattle,* 155 Wash. App. 305, 317, 230 P.3d 190 (Div. 1 2010), as amended on reconsideration, (May 14, 2010)).

Emphasis added.

Like in the *International Longshoreman* case, the maximum defensible rate in the 2023 Rate Study is not part of the Proposal and it is not an action under SEPA at this time. And unlike the *King County v. Washington State Boundary Review Board for King County* case, where the proposed annexation would result in development, here the Proposal will not result in any development. In the *King County v. Washington State Boundary Review Board for King County* Court found the County erred in not evaluating the environmental impacts associated with annexation of an area, and the Court concluded:

> The likelihood of development of the annexation properties is unquestionable. On even a cursory reading of the record, it is clear that the annexation properties are destined for development. Black Diamond has itself recognized this fact. In hearing King County's original appeal of the DNS, the Black Diamond City Council made a finding of fact that the areas in question will be designated "medium density residential" following annexation.

King Cnty. v. Washington State Boundary Rev. Bd. for King Cnty., 122 Wn. 2d 648, 665, 860 P.2d 1024, 1033 (1993).

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And unlike the *Magnolia Neighborhood Planning* case, the Comp. Plan Proposal does not impose any fee, nor does it approve any residential units or approve any land uses.

Moreover, the *Alpine Lakes* case is distinguishable from this case because this Proposal did not involve a watershed analysis for changes to forest practices. In the *Alpine Lakes* case, the Court concluded: "The determination of whether approval of a particular watershed analysis requires an EIS is not the kind of action that is categorically exempt from ***17** threshold analysis even though final approval may lead to the exemption of forest practices that otherwise would require threshold analysis." *Alpine Lakes Prot. Soc'y v. Washington State Dep't of Nat. Res.,* 102 Wn. App. 1, 16–17, 979 P.2d 929, 937 (1999), as amended on denial of reconsideration (Aug. 23, 2000).

And finally, *Spokane County v. Eastern Washington Growth Management Hearings Bd.,* 176 Wash. App. 555, 685, 309 P.3d 673 (Div. 3 2013) case is distinguishable from the current case. In Spokane County, the hearings board found the County's checklist ignored the probable impacts of any future commercial development amendment 07–CPA–05; Amendment 07–CPA–05 would allow and improperly postponed environmental analysis to the project review stage. *Id.* at 579–81.

Appellant's arguments at pp. 8-9 are inaccurate. In particular, Appellant's citation to *Klickitat County Citizens* is distinguishable. *Klickitat Cnty. Citizens Against Imported Waste v. Klickitat Cnty.*, 122 Wn. 2d 619, 641, 860 P.2d 390, 403 (1993), as amended on denial of reconsideration (Jan. 28, 1994), amended, 866 P.2d 1256 (Wn. 1994).

The *Klickitat County* case is distinguishable from the present matter because in *Klickitat County*, the County prepared an EIS for the 1990 Solid Waste Management Plan which must be in place and approved by the Department of Ecology (DOE) before a county may receive a permit for building or altering a solid waste disposal facility. RCW 70.95.170. Thus, the Solid Waste Plan included expansion a regional landfill to accept 3 million tons of waste per year. *Klickitat Cnty.*

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Citizens Against Imported Waste v. Klickitat Cnty., 122 Wn. 2d 619, 629-630 and 643, 860 P.2d 390, 404 (1993), as amended on denial of reconsideration (Jan. 28, 1994), amended, 866 P.2d 1256 (Wash. 1994).

Appellant's argument that the City claimed that due to the nature of the proposal means that "no environmental analysis is required," Appellant's closing brief at p. 10, lines 1-3, is inconsistent with the record. The City never claims that no environmental analysis of the Proposal was required. The City did conduct SEPA on the actual proposal and there was testimony by Whitson, Chow, and Freeman about the disclosure and analysis of the proposal.

Nor did the City argue or suggest that "the environmental impacts of a legislative proposal cannot be analyzed because "the Legislature might amend or reject the proposal." Appellant's Closing at p. 10, lines 9-11. The Examiner heard the testimony of the analysis of the Proposal and it is also contained in the record in the DNS and the various versions of the SEPA checklist.

Contrary to Appellant's claims (Appellant's Closing at p. 10: 16-19), The City did not "state that it would not be useful for the Council to know about the adverse impact to housing production or affordability. Andrew Bjorn, Ketil Freeman, Lish Whitson and Calvin Chow testified that using the maximum defensible fee to prepare a pro forma analysis would be possible, but that it would not be useful and that it would not provide reasonably accurate information for the decisionmaker. Plus, it would be costly to produce this, and it is not required in order for Council to consider the current Proposal.

Like in the *International Longshoreman* case, the City has not approved a Transportation Impact Fee Program with proposed rates, rate exemptions or locational discounts. Rather, the evidence in the record demonstrates that Council staff was looking for a variety of possible funding

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sources for transportation work. See Exhibit 34, where Mr. Freeman states

> There are many, many factors that would determine the potential for revenue generation in an impact fee program, not least of which is the policy choice by decision-makers about where to set fees. The model Fehr and Peers developed for the GMA-authorized impact fee estimate is attached. This used estimated residential and employment growth from the Comp plan and assumed that the land uses would be distributed as they have been in the past. Using a cost per person-trip equal to Bellevue's, this estimates up to about $400M over 10 years. ***That number was never shared publicly.*** That was because (1) it's high enough that it might set an unreasonable expectation and (2) it gave CM O'Brien some flexibility in decision-making. $200M was a number the O'Brien Office discussed with advocates. So, in your memo you may want to phrase things to reflect that. Something like... While impact revenue generation is uncertain due to, among other things, policy decisions about rates and the variability of real estate markets, a preliminary estimate of a GMA-based impact fee program indicated that such a program could generate $200M or more over a ten-year period."

March 2020.

Without some policy discussion and direction, any information analyzed about possible rates to be used as part of a Transportation Impact Fee program is just guess work. Bjorn Testimony, Freeman Testimony, Whitson Testimony. SEPA does not require analysis of remote or speculative impacts, which is what the City would have to analyze if it's used the land use fees contained in the Rate Study.

Appellant has failed to establish the City committed clear error in conducting its SEPA analysis, in preparing the SEPA checklist and issuing the DNS.

C. Further, Appellant Failed to Produce Affirmative Evidence the Proposal Will Result in Probable Significant Adverse Environmental Impacts.

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.

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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. Housing Impacts

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

In Appellant's closing brief, it continued to act as though the Proposal included the Rate Study and the land use table in such rate study with proposed maximum defensible fee. However, Appellant failed to establish, and in fact, cannot establish that the maximum defensible fee is part of the Proposal. It is not. And there is no SEPA regulation or case law that requires the Council to analyze the maximum defensible fees contained in the Rate Study without Appellant demonstrating through clear error that the City impermissibly piecemealed its environmental review- which Appellant has failed to do. *See* Section A and B above.

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's Closing. 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.

D. 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 28th 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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Dated this 28th day of September at Seattle, Washington.

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