BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of: **SEATTLE MOBILITY COALITION** from a Decision by the Seattle City Council Central Staff.	**Hearing Examiner No. W-23-001** **APPELLANT RESPONSE TO CITY CLOSING ARGUMENT**

I. INTRODUCTION

Respondent City of Seattle's ("City") closing argument ("City Brief") fails to establish that the City "conduct[ed] environmental review" of the housing impacts of its proposed Comprehensive Plan amendments ("Proposal") in any meaningful sense. *See* City Brief at 1. It is undisputed that the City's housing analysis consisted of the bare conclusion that the Proposal will not have housing impacts because it does not include rate-setting legislation, and that neither the preparation of the DNS nor any of the documents adopted therein contain any consideration of housing impacts or other actual impacts of a fee. What the City refers to as environmental review was, in reality, a procedural determination that no substantive analysis is required at this stage because the Proposal is not a "sufficient" action to establish a fee program. The City's reasoning in support of this determination is not convincing.

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The City asserts that the impacts of a fee are too remote and speculative to allow for analysis because future legislation is not certain to be passed, but that argument is squarely at odds with caselaw recognizing the need for analysis of non-project proposals at a point early enough in policy development to allow for meaningful consideration and to prevent snowballing. Likewise, the City's insistence that it lacks information sufficient to facilitate environmental review of a fee at this juncture is contradicted by the record, which shows that ample information is available to conduct the type of housing review the City has commissioned for similar nonproject proposals. The incorrectness of both arguments is only heightened by the City's admission that it does not expect to conduct further SEPA review of the housing impacts of the Proposal even when legislation is considered, in conflict with the Examiner's prior ruling – a fact that the City's brief fails to acknowledge. In sum, the City has not only failed to examine the environmental impacts of the Proposal but has affirmatively closed its eyes to those impacts now and in the future, contravening both the Examiner's order and clear prohibitions in SEPA. The City has not demonstrated *prima facie* compliance with SEPA's requirements.

The City's brief also fails to discredit the Appellants' witness testimony establishing that the Proposal will have probable, significant adverse impacts on housing for the reasons stated at hearing and in Appellant's opening brief ("Appellant Brief").

II. ARGUMENT

A. The City fails to demonstrate prima facie compliance with the requirements of SEPA.

"SEPA requires 'actual consideration of environmental factors before a DNS can be issued.'" Ex. 14 at 6 (quoting *Norway Hill Preservation and Protection Ass'n v. King County*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976)). Nothing in the City's brief establishes that the City

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conducted such actual consideration, as it could not because the City did not do so. The Checklist reflects precisely the amount of analysis the City did regarding housing impacts: none. This violates SEPA.

1. The City has not conducted environmental analysis.

The City argues throughout its brief that it has conducted environmental analysis of the Proposal – in effect, that because it has answered all of the questions in the Checklist, SEPA's mandate is satisfied. The City is incorrect, because its answers do not reflect actual consideration of environmental impacts. Neither the answers in the Checklist, nor the documents incorporated by reference, nor anything else in the record reflects "an actual consideration of potential environmental significance." *See Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54 (1978). It is undisputed that the City conducted no quantitative analysis or even general consideration of the prospect of housing impacts from this Proposal – to the contrary, as the Checklist reflects, it affirmatively concluded that no such analysis is necessary because the proposed amendments do not include implementing legislation. The City has argued that the Appellant cannot challenge the checklist, only the DNS, but the Appellant is challenging the DNS. A checklist is simply a record of the environmental information that the City considered and the reasoning used in reaching the DNS, and in this case the Checklist reflects that no such information was utilized. Appellant agrees that the wording of the Checklist is not a basis for reversal if the record reflects adequate consideration of relevant environmental impacts, but here the record reflects no such consideration.

The City has also pointed to the various documents incorporated by reference in the City's SEPA analysis, but those documents are entirely irrelevant because it is undisputed that

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they contain no analysis of either housing impacts due to increased development costs or any of the impacts arising from imposition of an impact fee. Freeman Testimony, Weinman Testimony.

The City asserts that Mr. Whitson conducted an environmental analysis of the Proposal, *see* City Brief at 11, but Mr. Whitson's testimony reflected that he simply agreed with Mr. Freeman's procedural determination that no actual consideration of environmental impacts was required. Indeed, Mr. Whitson's review of the Proposal undermines the City's case as a whole, because – as his comments on a draft of the Checklist demonstrate – Mr. Whitson recognized the Proposal's potential to cause housing impacts based on the legislation that it would authorize, demonstrating the City's understanding that transportation impact fees can and will impact development feasibility and housing production and that such impacts can be analyzed as part of SEPA. Mr. Whitson suggested including a statement to this effect in the Checklist. Ex. 17 at 21 ("Impacts of any potential future transportation impact fee on the feasibility of any particular type of housing development would be assessed in developing a specific impact fee proposal as discussed in the Rate Study."). But Mr. Freeman removed this language from the Checklist before issuing it – not, as with the physical impacts of specific transportation projects, because additional analysis will occur later, but instead because such analysis will *not* occur.

This is contrary to the purpose of SEPA, which – as the City notes several times – is "to facilitate the decision-making process." City Brief at 18. Here, the record of the City's consideration does not facilitate the decision-making process; rather, it actively obscures relevant information by failing to disclose that the City recognizes the potential for housing impacts in the future but has not analyzed and will not analyze those impacts. Instead, the City believes it is incumbent on the Council itself to request information about housing impacts separately from

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SEPA if it chooses to do so. Freeman Testimony. Yet the Checklist does not even disclose *that* – such as by including an indication that the "[i]mpacts of any potential future transportation impact fee on the feasibility of any particular type of housing development [**will not**] be assessed in developing a specific impact fee proposal as discussed in the Rate Study." Instead, the City simply seeks to close its eyes to the consequences of its action – an approach that would render SEPA an empty exercise in paperwork and is therefore prohibited.

2. Future legislation does not preclude SEPA analysis now.

The City's primary argument, made throughout its brief, is that because this Proposal does not include implementing legislation, and because it is not certain that implementing legislation will be adopted in the future, no analysis of the actual impacts of a fee is needed at this stage. The City is incorrect: analysis both *can* and *must* occur at this stage.

The City's witnesses could not and did not dispute that the Proposal to amend the Comprehensive Plan represents the first step in a larger initiative to impose a transportation impact fee – indeed, it repeatedly refers to this Proposal as just such a "step." *E.g.* Ex. 1 at 1. Contrary to the City's argument that this Proposal does not make housing impacts "more or less likely in any appreciable way," City Brief at 11, Mr. Freeman testified that the Proposal makes adoption of a fee "somewhat more likely." Freeman 2.2 36:00

SEPA review is required at the "earliest possible point in the planning and decisionmaking process when . . . impacts can be reasonably identified." SMC 25.05.055.A; *see* SMC 25.05.055.B.1.a (consideration required when "*some* evaluation of [] probable environmental impacts" is possible) (emphasis added). The record establishes that that point has been reached here. The City argues that actual consideration of the environmental impacts of a

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legislative proposal is not necessary when the adoption of the proposal is not certain, *see* City Brief at 17, but that argument would rule out essentially all SEPA analysis and is self-evidently incorrect. In addition to foreclosing consideration of any non-project action (which necessarily requires legislative adoption) it would also establish that standard SEPA project review at the Master Use Permit stage is unnecessary because it cannot be said for certain that a project will obtain a building permit. The argument is also inconsistent with SEPA regulations and with caselaw. SMC 25.05.055.B.3 ("Appropriate consideration of environmental information shall be completed *before* an agency commits to a particular course of action.") (emphasis added); *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1032-33 (1993) (initial policy actions can "begin a process of government action which can 'snowball' and acquire virtually unstoppable administrative inertia."). As in *King County*, the City cannot here close its eyes to the future consequences of its policy action simply because some room for decisionmaking remains in the future – a fact that the City, of course, recognizes, because it has conducted SEPA analysis for numerous nonproject proposals in the past, including the broader Comprehensive Plan update. That an analysis of housing impacts at this stage would necessarily examine a range of potential impacts does not make such an analysis either "remote" or "speculative"; again, it is the type of analysis that the City has previously conducted and relied upon.

Here, it is particularly important for actual consideration of environmental factors to take place because the City has affirmatively indicated that it does not intend to conduct such consideration in the future as it believes a future rate-setting ordinance will be categorically exempt. Not only does this contradict the Examiner's prior order, *see* Ex. 14 at 9, it means that

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this is not only the "earliest" point in the process of adopting an impact fee when analysis can be conducted; it is the *only* point in that process when that analysis will take place.

3. Future decisionmaking regarding fee amounts does not preclude SEPA analysis now.

The City also argues that because the details of a future proposal could vary – particularly with regard to the specific amount of a fee or exemptions – no analysis is needed or even possible now. Again, this is incorrect. The probable impacts of a future fee program are neither remote nor speculative: despite the City's efforts to characterize implementing legislation as "some nebulous rate-setting ordinance that does not yet exist," City Brief at 22, the record contains evidence establishing ample information regarding a future program to permit the type of analysis the City has conducted regarding other non-project proposals – including a detailed rate-setting study including a methodology and possible fee levels for specific land uses, comparable fee amounts charged by other jurisdictions, revenue targets and quantitative analysis of revenue projections, and more. *See* Appellant Brief at 11-12. The City argues that the Fehr & Peers rate study is not technically part of the Proposal and that it does not establish important elements of a program such as fee amounts and exemptions, but this misses the point: the rate study establishes a sufficient framework and likelihood of outcomes to permit and thus require analysis. That the amount of a fee has not been precisely determined does not mean that any analysis of probable impacts is speculative, because the City has demonstrated through analysis of prior nonproject proposals that it can take such information into account as appropriate.

Similarly, Appellant does not seek to characterize the maximum defensible fee as part of the proposal. *See* City Brief at 14. Rather, the existence of the rate study, including the maximum defensible fee, established that sufficient information exists to enable the City to

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conduct an actual analysis of the impacts of a transportation impact fee at the level likely to be implemented. The City inaccurately describes Appellant's witnesses' testimony as "rely[ing] on the incorrect assumption that the maximum defensible fee amount is part of the Proposal," City Brief at 9, but that is not what Appellant's witnesses claimed. Rather, the evidence established that the Proposal is accompanied by far more specific and definitive information than the City allows, including evidence regarding the potential range of a fee, likely benchmarks that the City will use to establish a specific amount, and analysis of revenues that would be generated by fees at specific levels. Given this information, it is far from speculative to consider the impacts of a fee within the parameters the City has already established – particularly where no such analysis will take place in the future.

Finally, the City incorrectly describes Appellant's argument as seeking a "look at housing feasibility on a project by project basis for a legislative proposal." City Brief at 9. Again, that is not what Appellant is seeking. Mr. Shook's report examined a number of specific projects in order to reach conclusions and make predictions about a broader trend that would result from the adoption of this nonproject Proposal and the additional actions it would facilitate. The City could have conducted just such an analysis of its own, as it has done for other proposals. Appellant's argument is not that the City is required to look at the effects of an impact fee on every individual building, but instead that it take into account the impacts a fee is likely to have against the broader development landscape and include that analysis in its SEPA determination. In other words, Appellant argues not that the City was required to conduct project-by-project housing analysis, but rather that the City was required to conduct *some* analysis and that it has failed to do so.

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More broadly, the City's criticism of Mr. Shook's analysis only serves to highlight what is lacking in the City's own record: actual consideration of readily available information about the effects of an impact fee on housing production and affordability. Because the City's SEPA process failed to include any such consideration, the DNS does not demonstrate *prima facie* compliance with the procedural requirements of SEPA and must be remanded. *See* Appellant Brief at 12-13.

B. The Proposal will have probable significant adverse impacts on housing.

Although the Examiner need not reach the question of significant adverse impacts due to the City's failure to demonstrate *prima facie* SEPA compliance, the City also fails to counter Appellant's evidence that such impacts are probable. Notably, the City's criticism of Mr. Shook's, Ms. Holzemer's, and Mr. Maritz's arguments essentially does not dispute the significance of the impacts those witnesses described. In other words, the City does not dispute that impacts to development feasibility that prevent housing construction would represent a significant adverse impact – only the likelihood that this will occur. This fails to disprove the likelihood of significant adverse impacts. Indeed, Ms. Holzemer and Mr. Maritz testified that even the proposed Comprehensive Plan amendments *alone* would be likely to impact the feasibility of their projects. In addition, for the reasons described in the previous section, the imposition of a fee within the parameters described throughout the record is far from a speculative outcome.

The City argues that Ms. Holzemer and Mr. Maritz "continue to produce housing units" despite "increased interest rates, increased construction costs and increased city fees imposed on development," City Brief at 2, as if this necessarily establishes that no *additional* fee increase

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could impact development. But that obviously does not follow. Ms. Holzemer's, Mr. Maritz's, and Mr. Shook's undisputed testimony established that seemingly small reductions in return on investment due to project cost increases can have significant impacts on the outcome of a project and can be determinative regarding the feasibility of housing production. *See* Appellant Brief at 14-20.

The City also argues that "SEPA does not require analysis of business decisions of developers," City Brief at 2-3, but this misses the point that the Appellant's witnesses were making. Ms. Holzemer and Mr. Maritz explained in detail that reductions in return on investment does not simply represent a lower profit; instead, it will result in investors looking elsewhere to allocate their capital, meaning that projects simply are not built and housing units are not added in the City, impacting the physical environment and reducing housing affordability. Moreover, contrary to the City's suggestion that Appellant has argued SEPA analysis is required for "even $1" of a fee increase, Ms. Holzemer acknowledged that a truly nominal fee of that kind would not be likely to impact development feasibility – while emphasizing that a fee charged at an amount comparable to other jurisdictions, and within the range that the City is considering, would be likely to do so.

The City argues that Mr. Shook's analysis was unconvincing because it did not allow for the possibility of increasing rents or reducing parking to allow projects to go forward. This fails to counter Mr. Shook's points. As Mr. Shook explained, and as Ms. Holzemer and Mr. Maritz acknowledged, increasing rents could be one way to facilitate project feasibility – but if developers take that route, it will necessarily impact housing affordability. Moreover, Ms. Holzemer and Mr. Maritz explained that it is not that simple: a project cannot simply decide to

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charge a higher rent if it is not clear that the market will bear such rents, as investors will not accept that strategy without assurance that it will work. And Mr. Bjorn acknowledged that a rent increase of $50 per month, which the City's brief seeks to frame as nominal, is in fact significant in the context of housing affordability. With regard to parking, many of Mr. Shook's and Mr. Maritz's projects do not include parking. For those that do, Ms. Holzemer explained that due to the expense of including parking spaces, developers already seek to minimize what can be included while maintaining project feasibility, and that simply removing spaces is not realistic as a real-world strategy for reducing costs because it will make prospective tenants avoid the building after it is constructed.

The City also criticizes Mr. Shook's analysis for extrapolating conclusions regarding development feasibility in future years from the representative projects he examined in preparation for this hearing. Mr. Shook, however, explained that he used the industry-standard methodology of a *pro forma* analysis that Mr. Bjorn has also frequently employed, and that this type of analysis yields sufficiently reliable conclusions to inform analyses of housing impacts for nonproject actions. Moreover, it is not necessary for Mr. Shook's 20-year-timescale predictions to be definitively proven in order to reach the conclusion that probable significant impacts will result from the Proposal – as Mr. Shook explained and Ms. Holzemer and Mr. Maritz affirmed, even a shorter period of reduced housing production as the market reacts to the imposition of the fee would have significant impacts on the amount of housing in the City and the ability to achieve the housing production goals established by the Comprehensive Plan. And once again, Mr. Bjorn's assertions that Mr. Shook should have looked at additional factors only highlights the analysis that the City should have conducted in the first place. That such analysis is

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"complicated," City Brief at 10, does not mean that it cannot or need not be done, as it has been done for other proposals.

The evidence provided by Mr. Shook, Ms. Holzemer, and Mr. Maritz establishes that the Proposal will have probable, significant adverse impacts to housing affordability, requiring the preparation of an EIS.

III. CONCLUSION

The Coalition respectfully asks the Examiner to reverse the DNS and remand to the Director with instructions to comply with SEPA. Based on the evidence at hearing, the Proposal will result in significant adverse impacts to housing. These impacts must be disclosed in an EIS that also considers mitigation and alternatives.

DATED this 28th day of September 2023.

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