

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of:

**SEATTLE MOBILITY COALITION**

From a Determination of Nonsignificance issued  
by the Seattle City Council

**Hearing Examiner file:**

**W-23-001**

**SEATTLE MOBILITY COALITION'S  
MOTION FOR RECONSIDERATION**

**I. INTRODUCTION**

Pursuant to Hearing Examiner Rule (“HER”) 5.21, Appellant Seattle Mobility Coalition (“Appellant”) files this Motion for Reconsideration of the Examiner’s November 6, 2023 Findings and Decision (“Decision”) in this matter. Appellant respectfully requests that the Hearing Examiner reconsider the conclusions in the Decision that: (1) the evidence regarding lack of feasibility of development projects established only economic impacts to developers; and (2) the evidence did not quantify housing impacts. Both of these conclusions represent a “clear mistake as to a material fact,” HER 5.21(a)(4), because they provided the basis for denial of the appeal regarding both the issue of *prima facie* compliance with the State Environmental Policy Act (“SEPA”) and the issue of significant adverse impacts. The Appellant’s evidence regarding development feasibility established that housing units will not be constructed, exacerbating an

1 ongoing housing shortage. This is evidence of a significant impact to the housing element of the  
2 environment. Second, Appellant witnesses quantified the impact in multiple, non-speculative  
3 ways, demonstrating both the significance of the impact and the City’s ability to conduct actual  
4 analysis of the Proposal.

5 Appellant requests reconsideration of the Decision on these grounds.<sup>1</sup>

## 6 7 **II. ARGUMENT**

### 8 **A. Reconsideration is proper on the basis of clear mistake as to a material fact.**

9 HER 5.21(a)(4) provides that reconsideration may be granted in the case of clear mistake  
10 as to a material fact. The conclusions for which this motion seeks reconsideration are  
11 conclusions as to material facts because they concern whether the record contains evidence to  
12 support the key legal determinations in this litigation. *See Appeal of Neighbors to Mirra Homes*  
13 *Developments*, HE Nos. MUP-19-019, MUP-19-020, MUP-19-021, Order on Motion for  
14 Summary Judgment at 2 (Aug. 7, 2019) (quoting *Hudesman v. Foley*, 73 Wn.2d 880, 886-87,  
15 441 P.2d 532 (1968) (“A material fact is one upon which the outcome of the litigation  
16 depends.”); *cf. Appeal of Save Madison Valley*, HE No. MUP-20-023, Order on Motion for  
17 Reconsideration at 2 (June 17, 2021) (“As no evidence has been submitted to support a finding  
18 that significant negative impacts will likely result . . . on this basis, the Hearing Examiner should  
19 reverse his earlier decision.”).

### 22 **B. Appellant’s evidence of housing impacts was not limited to economic considerations.**

23 The Decision states that the Appellant’s evidence regarding “potential lack of feasibility  
24 of some development projects due to cost increases” from the Proposal was evidence of  
25 “[e]conomic impact to property owners.” Decision at 7. This represents a clear mistake as to a  
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28 <sup>1</sup> Appellant expressly reserves its right to raise other issues on appeal and does not waive or abandon any claims.

1 material fact because diminished development feasibility, *i.e.* reduced housing production, is an  
2 impact to the housing element of the environment.

3 As previous decisions by the Hearing Examiner (and analyses by the City) have  
4 recognized, analysis of housing impacts from a nonproject proposal involves examination of the  
5 proposal's effect on the availability of housing – whether through changing zoned development  
6 capacity, altering the economic environment in a way that will affect the built environment, or  
7 otherwise. *E.g. Appeal of Wallingford Community Council*, HE No. W-17-006, Revised  
8 Findings and Decision at 24 (Dec. 6, 2018) (“The alternatives examined in the FEIS provide an  
9 opportunity for a decision maker to analyze the proposal in the context of . . . the amounts of  
10 housing growth that could result across the city.”); *Appeal of Seattle Community Council*  
11 *Federation*, HE No. W-10-005, Findings and Decision at 9-10 (Oct. 5, 2010) (“The DNS  
12 addresses the impact on affordable housing in light of the minimal increase in overall  
13 development capacity that would result from the proposal.”). Here, the Appellant's evidence  
14 established that the Proposal would result in *less* housing growth by adding costs, leading to the  
15 same result as reduced development capacity. The economic evidence that the Decision  
16 describes as ancillary to this point was, instead, central to it.

17 Because housing supply cannot increase unless it is financially feasible for developers to  
18 construct units, the Appellant's economic evidence was relevant to the SEPA claims. For a  
19 nonproject action, “SEPA requires analysis of both the direct and indirect impacts that would  
20 occur over the lifetime of the proposal.” *Appeal of Queen Anne Community Council*, HE No. W-  
21 16-004, Findings and Decision at 11 (Dec. 13, 2016). Here, “[a]s with other zoning legislation,  
22 the direct impact of the proposed ordinance would be to alter the economic environment for  
23 development.” *Id.* However, where the evidence “shows that the indirect impacts of the  
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1 legislation would adversely affect housing,” those impacts must be studied “in the context of the  
2 development/economic environment that would be created by the proposal.” *Id.* at 11-12. That  
3 context is what the Appellant’s evidence provided. Evidence regarding developers’ return on  
4 cost and other investment decisions was not presented to make a point about individual  
5 developers’ bottom lines but, rather, to address the overriding and central issue of project  
6 feasibility under an impact fee – in other words, how the Proposal will affect the built  
7 environment by affecting the number of housing units that can be produced.  
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9         The Decision indicates that Mr. Shook’s testimony regarding “the potential lack of  
10 feasibility of some development projects due to cost increases” concerned an “[e]conomic impact  
11 to property owners [that] is not an element of the environment that is required to be studied  
12 under SEPA.” Decision at 8. Mr. Shook’s testimony and report, however, did not simply state  
13 that the addition of a transportation impact fee would cause economic impacts to property  
14 owners. Instead, Mr. Shook spoke in detail to *how* property owners would respond to the  
15 economic changes that the Proposal would cause, and more specifically to how their responses  
16 would affect the amount of housing produced in the City. *See, e.g.*, Ex. 9 at 11-16. Mr. Shook’s  
17 report concluded that because a transportation impact fee would increase project costs beyond  
18 what would be financially feasible, projects subject to the fee either would not proceed or would  
19 require design modifications to become less costly – modifications that would result in a lower  
20 number of housing units being produced. *Id.* at 20. The Decision’s conclusion that Mr. Shook  
21 spoke only to economic impacts is a clear mistake as to a material fact because Mr. Shook’s  
22 analysis provided detailed evidence of a reduction in housing supply. That reduction will result  
23 from an economic impact to property owners, but the reduction itself is an impact to the built  
24 environment.  
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1 Likewise, the Decision states that “Ms. Holzemer and Mr. Maritz testified in part that any  
2 fee on development will affect their return on investment,” but that SEPA “does not require  
3 analysis of business decisions of developers or return on investment.” *Id.* Ms. Holzemer and  
4 Mr. Maritz did not state that the Proposal would affect their return on investment; rather, they  
5 explained that in order to attract the capital that is necessary to make a project feasible, they must  
6 be able to provide outside investors and/or lenders with assurance that they will receive a  
7 sufficient return on their investment. Holzemer 1.5 0:26-:30; Maritz. 2.1 0:46-:47.<sup>2</sup> When a  
8 project cannot provide that assurance, the investors do not simply accept lower profits; instead,  
9 they invest elsewhere. *Id.* Because of how those investment decisions are made, seemingly  
10 small changes in yield (such as an 0.1% reduction in return) can “tip the scales from an investor  
11 deciding to invest or not invest.” Holzemer 1.5 0:33. Due to recent increases in interest rates,  
12 investors are looking for a higher rate of return than they did even a few years ago. Holzemer  
13 1.5 0:42-:43. If a project is unable to secure investors, the project becomes infeasible and will  
14 not move forward. *Id.* Both Ms. Holzemer and Mr. Maritz stated, in unrebutted testimony, that  
15 the Proposal would result in their current or recent projects becoming infeasible – even if a  
16 transportation impact fee is ultimately set at half the maximum supportable level. Holzemer 1.5  
17 0:22, 0:42; Holzemer 2.1 0:04; Maritz 2.1 0:51. That would result in the loss to the City’s future  
18 housing supply of nearly one thousand housing units that would have been provided by these  
19 projects alone.  
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24 The Decision’s conclusion that evidence regarding project feasibility was limited to the  
25 issue of economic impacts on developers was a clear mistake as to a material fact, because it  
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27 <sup>2</sup> Ms. Holzemer explained that as a developer, her company would profit from the lifetime cash flow from a project  
28 – but that that was a separate consideration from the initial, and essential step of attracting investors to support  
construction of the project in the first place. Holzemer, 1.5 1:09:00.

1 does not recognize the indirect impacts those financial considerations will have on housing  
2 production and supply throughout the built environment of Seattle.

3 **C. Appellant’s evidence established a quantifiable reduction in housing units.**

4 The Decision states that Mr. Shook “indicated that impact fees would cause an increase  
5 in cost of housing, because they would reduce the feasibility of certain development projects,”  
6 but that he “did not introduce evidence quantifying that if the cost of housing increased  
7 significantly that such increase would result in any negative significant environmental impacts.”  
8 Decision at 7. These conclusions represent a clear mistake as to the material fact that was  
9 supported by Mr. Shook’s testimony – namely, the specific, quantitative prediction about the  
10 reduction in housing units produced that will result from the Proposal.  
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12 First, as discussed in the previous section, the Appellant’s evidence establishes that the  
13 Proposal will impact housing by reducing the number of housing units produced in the City.  
14 While Mr. Shook’s report includes statements (undisputed by the City) indicating that a  
15 reduction in housing growth will contribute to rising rents and exacerbate affordability problems,  
16 the bulk of the report is addressed to how the Proposal will impact the built environment by  
17 affecting housing production. In other words, the Appellant did not need to “translate” a “lack of  
18 feasibility of development projects” into an “impact on housing,” *see* Decision at 7; the lack of  
19 feasibility of development projects *is* an impact on housing.  
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21 Second, Mr. Shook provided significant quantitative support for this conclusion – nearly  
22 all of his 20-page report consists of a description of his research methods and calculations,  
23 leading to specific conclusions about the impacts of a fee. Although the Decision states at page 7  
24 that “impacts of increased costs to development . . . were left to assumption and speculation,” the  
25 impacts of those costs were precisely and exactly analyzed by Mr. Shook. His report  
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1 included case studies of individual projects, which he analyzed to determine the likely reduction  
2 in the number of units included in each one. *E.g.* Ex. 9 at 15. As just one example, Mr. Shook  
3 calculated the impact that the Proposal would have had on return on cost for the Midtown Square  
4 development, calculated how this figure would be affected by three possible design changes, and  
5 concluded that the likeliest strategies for the developer to utilize in mitigating the cost increase  
6 would reduce the number of units in the building from 12%-16%. Ex. 9 at 11-15. This is  
7 quantitative evidence, not assumption or speculation. Based on this analysis, Mr. Shook also  
8 provided extrapolations about the Proposal's City-wide effects that were drawn directly from the  
9 calculations in the case studies. Ex. 9 at 20 ("We found that the TIF will reduce the amount of  
10 housing units in MHA performance housing projects by 9% on average in total and 7% for  
11 affordable performance units. In MHA payment housing projects, the TIF will reduce housing  
12 units by 13% on average . . . ."); *see id.* ("If transportation impact fees move forward and reduce  
13 the amount of housing production in the 9-13% range, it would translate to a loss of 6,800 to  
14 9,900 housing units" over 20 years.").

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18 The Decision suggests that Mr. Shook's discussion of MHA projects is relevant to City  
19 policy considerations rather than environmental impacts, but Mr. Shook explained that the report  
20 focused its analysis on MHA projects in order to get an accurate picture of the costs the MHA  
21 program already imposes on development. Ex. 9 at 8. In addition, Mr. Shook explained that a  
22 reduction in MHA contributions resulting from decreased housing production will itself cause an  
23 environmental impact, because the City will be less able to produce affordable units – further  
24 reducing the supply of housing. Likewise, Mr. Shook's discussions of regional growth targets  
25 and of populations likely to be affected by further housing shortages provided background for  
26 understanding the significance of the Proposal. *See* SMC 25.05.794.B ("Significance involves  
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1 context and intensity . . .”). However, they were not the basis for his conclusions regarding  
2 environmental impacts: namely, that “[t]he imposition of a traffic impact fee will impact the  
3 amount of housing produced.” Ex. 9 at 20.

4 The Decision’s conclusion that the Appellant did not quantify impacts to housing was a  
5 clear mistake as to a material fact, because it does not recognize the detailed analysis prepared by  
6 Mr. Shook demonstrating that the Proposal will impact the built environment by reducing the  
7 production of housing.  
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9 **D. Appellant’s evidence establishes both a failure of prima facie analysis and a**  
10 **probable significant adverse impact.**

11 The material facts described in the previous sections establish both that the City failed to  
12 comply with the *prima facie* requirements of SEPA and that the Proposal is likely to have a  
13 significant adverse impact on housing, requiring analysis in an Environmental Impact Statement  
14 (“EIS”). The determinations that Appellant’s evidence concerned only economic impacts and  
15 that Mr. Shook’s testimony was speculative was material to the conclusion that the City  
16 conducted sufficient analysis in the DNS, because they concerned the scope of what the City was  
17 required to analyze. *See* Decision at 7. Likewise, the conclusion that housing impacts would not  
18 be significant was based largely on the determination that Mr. Shook had not quantified impacts.  
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20 *Id.*

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22 Because Mr. Shook’s testimony was based on a detailed quantitative analysis, and  
23 because the testimony of all Appellant witnesses concerned how the Proposal would affect the  
24 built environment by impacting housing supply, both of these conclusions should be reversed.  
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### III. CONCLUSION

For these reasons, Appellant respectfully requests modification of the Decision to reverse the DNS and remand to the Director with instructions to comply with SEPA, including preparation of an EIS that considers mitigation and alternatives.

DATED this 16th day of November 2023.

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