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 MOTION FOR RECONSIDERATION

Appellant's Motion for reconsideration should be denied because the facts it is disputing are immaterial to the Hearing Examiner's Decision and thus do not meet the standards in HE Rule 5.21(a)(4). Appellant's Motion for Reconsideration ("Motion") is based on the continued falsehood pushed by Appellants that the Proposed Comprehensive Plan proposal includes a rate-setting ordinance which will imposes a fee on development. It does not. Rather, Appellant's continued attempts to tie the actual Comprehensive Plan proposal to some future rate-setting bill and then bring a motion for reconsideration based on alleged housing impacts of some future hypothetical bill, is outside the scope of analysis that SEPA requires. Thus, even if Appellant could establish that the Examiner made errors related to two Conclusions of Law, which Appellant cannot, such errors would not constitute a clear mistake of material fact because the present litigation does not depend on alleged housing impacts of some future rate-setting proposal.

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Even if the facts are material, Appellant's motion fails because the disputed conclusions and relevant evidence are limited to economic considerations which are outside of the scope of SEPA review.

1. **Speculation about the likely housing impacts of some future legislative proposal is not a material fact in this litigation so any alleged error about a possible housing impact for a possible future proposal is not a material fact upon which the outcome of the litigation depends.**

Appellant's alleged errors are irrelevant to the environmental review of the Comprehensive Plan proposal, which is the subject of the litigation. The Code does not authorize the Examiner to consider, much less rule on, a challenge to a possible future legislative proposal under SMC 25.05.680. Thus, the evidence provided by Morgan Shook, Ben Maritz, and Meredith Holzemer was irrelevant to the housing impacts of the Comp. Plan proposal that the Determination of Non-Significance was issued for. SEPA requires disclosure and analysis of the likely environmental impacts of the proposal at issue, which occurred here. SEPA does not require disclosure and analysis of environmental impacts of some separate and distinct undetermined future action.sn. A proposal's effects include *direct and indirect impacts* <u>*caused by a proposal*</u>. WAC 197-11-060(4)(c). A rate-setting bill is not a direct or indirect impact caused by a proposal. It is a separate proposal. That will have to be evaluated under SEPA if such a proposal is developed.

Appellant's Motion focuses entirely on Morgan Shook's testimony and report, and the testimony of Meredith Holzemer and Ben Maritz, all three of which relied on the incorrect assumption that the "Proposal" imposes fees similar to the rate study prepared in January 2023. The rate-study is not part of the proposal and the proposal did not include a rate-setting ordinance.

The City is not required to evaluate the environmental impacts of some possible future rate-setting ordinance which has not been developed or proposed. Appellants strained and inaccurate

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

attempt to characterize a possible future rate-setting ordinance as part of the actual legislative proposal fails. Any supposed error arising out of the alleged housing impacts of a non-existent rate-setting bill is baseless and, for that reason alone, is not an issue of material fact. Such an alleged error cannot serve as a basis to deny Appellant's motion for reconsideration under HE Rule_5.21(a)(4).

2. Even if the Examiner considers "evidence" of alleged housing impacts of a Rate-Setting Ordinance, which is outside of the Examiner's authority of a SEPA appeal, Appellant's Motion must be denied because the "evidence" of alleged housing impacts was limited to economic considerations.

Even if the Examiner considers the testimony of Shook, Maritz and Holzemer material to the current proposal, although it is not, the Examiner properly concluded that such evidence was limited to economic and business considerations of whether developers decide to develop housing or make modifications to proposed housing. Numerous cases have recognized that alleged economic impacts due to an action are not subject to environmental review unless the economic impacts will cause a probable significant adverse environmental impact to one of the elements of the environment.[1]

The Examiner has also consistently refused to review the economic impacts of a proposal under SEPA. In the *Appeal of Robert Goodwin, et al.*, Appeal MUP 10-010, 011, 012, Conclusion No. 18 at p. 8, the Examiner held that economic impacts, rather than environmental impacts, are not evaluated under SEPA. Further, in *Ballard Business*, HE Appeal No. W-12-020, Appellants argued the impacts of a trail project would cause maritime businesses to close and the City failed to consider those impacts. The Examiner concluded that:

> [E]conomic concerns are not included in SEPA's list of the elements of the environment. *See* SMC 25.05.444. SEPA contemplates that the general welfare, social, economic and other requirements, and essential considerations of state policy will be taken into account by the decision-maker. SMC 25.05.448. Even an "environmental impact statement is not required to evaluate and document all of the possible effects and

[1] In *West 514, Inc. v. County of Spokane, et al.,* HE Appeal No. 53 Wn. App. 838, Appellants alleged economic impacts to existing businesses must be evaluated under SEPA. The court held that "economic competition, in and of itself, is not an environmental effect and need not be discussed in an EIS. WAC 197–11–448(3)."

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

> considerations of a decision." Id. SDOT was not required to consider potential economic impacts of the proposal as part of its SEPA process.

Economic impacts are immaterial for SEPA review unless Appellant demonstrates such economic impacts will result in a likely significant impact to one of the elements of the environment. The Examiner correctly noted that standard in the Decision and concluded the Appellant's evidence did not demonstrate likely significant impacts to housing based on the Comp. Plan proposal.

a) No clear mistake regarding Appellant's Economic Impacts.

Appellant's Motion seeks reconsideration of the Examiner's conclusion of Appellant's evidence regarding "potential lack of feasibility of some development projects due to cost increases" from the Proposal was evidence of "economic impacts to property owners". Motion at p. 1:19-21 and p. 2:22-p. 6:2. Appellant then argues that its evidence of development feasibility establishes a potential reduction in new housing units exacerbating a housing shortage, which is evidence of significant impacts to the housing element of the environment. Motion at p.1:26- p.2:2. However, this argument ignores the standards for reconsideration. The Examiner's Conclusions took into account the evidence presented by Appellants and there is no indication that the Examiner made a clear mistake of material fact. The Examiner's Conclusions find that the presented evidence did not bridge the gap between the evidence of potential financial impacts on development projects and a probable significant impact on housing. Disagreement with a Conclusion of Law is not a sufficient basis to show a need for reconsideration.

First, the Examiner states in Conclusion of Law (COL) No. 7:

> Mr. Shook's testimony and written analysis did not demonstrate how lack of feasibility of development projects (in part in and of itself an economic impact on the development community) would translate into a significant impact on housing or other elements of the built or natural environment subject to SEPA review.

Hearing Examiner Decision at p. 7.

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

And the Examiner then concludes at COL No. 8:

> Further, as indicated above, Mr. Shook's testimony, in part, only went to demonstrating the potential lack of feasibility of some development projects due to cost increases. SEPA environmental review is limited to analysis of potential impacts to the natural and built environment. Elements of the environment to be considered under SEPA review are listed in SMC 25.05.444. Economic impact to property owners is not an element of the environment that is required to be studied under SEPA. Economic impacts are considered only when they will cause a probable significant adverse environmental impact to one of the elements of the environment. Similarly, Ms. Holzemer and Mr. Maritz testified in part that any fee on development will affect their return on investment. SEPA does not require analysis of business decisions of developers or return on investment.

The Examiner properly evaluated whether alleged environmental impacts, here alleged housing impacts, of a proposal would cause a probable significant adverse environmental impact to one of the elements of the environment.[2] And in doing so, the Examiner took into account the evidence provided by Mr. Shook, Ms. Holzemer, and Mr. Maritz. There is not mistake of material fact.

Appellant did not establish at hearing, as argued in its Motion, that "the evidence regarding development feasibility established that housing units will not be constructed exacerbating a housing shortage" which is "evidence of significant impacts to the housing element of the environment." Motion, p. 1:26-p.2:2. The evidence in the record established that the legislative proposal did not change the use, authorize any development, or impose any fee associated with development. Testimony of Lish Whitson and Ketil Freeman. The evidence in the record instead established that this proposal will not result in the loss of a single housing unit. Lish Whitson, Ketil Freeman. Thus, the Examiner properly concluded that Appellant failed to carry its burden that there would be likely significant housing impacts based on the proposal.

[2] The proposal, however, is not a rate-setting ordinance. So, the Examiner need not opine on environmental or economic impacts of some future proposal.

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

b) **The cases cited by Appellant are easily distinguishable**.

The cases raised by Appellant in its Motion at p. 3 are inapplicable here. *Wallingford Council* involved an EIS whereby the alternatives analyzed the amounts of housing growth (no alternatives required for a DNS). Likewise, the Seattle Community Council is distinguishable. In Seattle Community Council, the Examiner found "the DNS addresses the impact on affordable housing in light of the minimal increases in overall development capacity that would result from the proposal." Here, unlike in *Seattle Community Council*, the proposal is a Comp Plan proposal that does not change development capacity or zoning in any way. Here, Appellant carries the burden to provide affirmative evidence that the proposal result in likely significant impacts to housing; Appellant did not demonstrate how feasibility would translate into a significant impact on housing. Further, unlike in the Appeal of Queen Anne Community Council, cited at p. 3: 21-p. 4:2, which involved an appeal of zoning legislation, the Comp. Plan proposal here does not have indirect impacts on housing because it does not adopt a TIF Program or set any fees for such program. As noted above, arguing that a possibility of a rate-setting ordinance to be considered and adopted in the future, is not an indirect impact of the current Comp. Plan proposal.

3. Appellant's evidence did not quantify housing impacts.

Appellant also takes issue with second sentence of the Examiner's conclusion No. 7 at p. 7-arguing in its Motion that "Mr. Shook did not introduce evidence quantifying that if the cost of housing increased significantly that such increase would result in any negative significant environmental impacts." Motion at p. 6:4-9. Appellant's claim that the evidence discussed above then "quantified the impact to housing in non-speculative ways, demonstrating both a significant impact and the City's ability to conduct actual analysis of the proposal". Motion at p. 6:3-p.8:8. Such a claim is baseless and is an attempt to re-litigate this issues that the parties have fully briefed.

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

Appellant's argument continues to build its house of cards, extending one step further, all based on the falsehood that the Proposal sets a fee, which is does not. Since the Proposal does not set a fee and it is unclear what a fee would be, if one is set, this line of testimony is likewise, not an issue of material fact- because it is not one upon which the outcome of the SEPA appeal on the Comp Plan proposal will turn. For this reason, the Examiner should deny Appellant's Motion.

Without some policy discussion and direction, any information analyzed about possible rates to be used as part of a Transportation Impact Fee program is 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.

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.

Likewise, the testimony of Shook, Maritz, and Holzemer and Shook report was contested by evidence provided by City witnesses countering the veracity of their testimony that such business decisions would result in a loss of housing units.[3] For example, Andrew Bjorn testified that Mr. Shook's extrapolations that a slight change in return on investment (which Shook alleges would result in developers deciding not to build housing) did not consider the market as a whole, over a longer term and did not consider a range of possible options that developers could take to offset a fee,

[3] Again, the Examiner does not even need to reach a conclusion about this testimony because it is speculating on the alleged impacts of imposing a fee on development, which does not exist. Thus, this line of testimony is all speculative- as to how some future rate-setting ordinance may—or may not—result in any alleged loss of housing.

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

such as increase rent or reduce the percentage of on-site parking stalls. Bjorn, Day 3. Further, because no rate-setting fee ordinance has been developed, it is not clear what kinds of exemptions the City may adopt for affordable housing or at what fee amount the City would set for various types of land uses. Without that information, it is speculative to determine what the environmental impacts of such a rate-setting fee would be. Bjorn Testimony, Day. 3. This response will not re-argue the issues with Mr. Shook's report, but the evidence in the record demonstrated that Mr. Shook's conclusions were based on several of faulty assumptions that resulted in a report that is misleading and inaccurate. Bjorn Testimony, Day 3; Freeman Testimony, Day 3. Weighing the various evidence presented and deciding in favor of the City does not constitute a mistake of material fact.

4. Conclusion

The Examiner should deny Appellant's Motion for Reconsideration. Because Appellant takes issue with the Examiner's characterization of Mr. Shook's testimony and because Mr. Shook's testimony is based on speculation about some future rate-setting bill, which is not before the Examiner, such alleged clear error is Even if the Examiner considers Appellant's Motion for a non-material fact, which he should not, Appellant's Motion must be denied.

Appellant's attempt to reargue the relevance of Mr. Shook's testimony and his report, as well as that of Mr. Maritz and Ms. Holzemer is inconsistent with the testimony of Andrew Bjorn and Ketil Freeman; Appellant fails to establish the Examiner's conclusions constitute a clear mistake as to a material fact.

//

//

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200

DATED this 27th day of November 2023.

ANN DAVISON
Seattle City Attorney

By: *s/Elizabeth E. Anderson*
Elizabeth E. Anderson, WSBA# 34036
Assistant City Attorney
liza.anderson@seattle.gov

Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

Attorney for Respondent City of Seattle Council

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:

Courtney Kaylor, WSBA #27519 David P. Carpman, WSBA #54753 McCullough Hill PLLC 701 Fifth Avenue, Suite 6600 Seattle, WA 98106 (206) 812-3388 courtney@mhseattle.com dcarpman@mhseattle.com Attorneys for Appellant Seattle Mobility Coalition	( ) U.S. Mail ( ) ABC Legal Messengers ( ) Faxed (**XX**) Via Email

Dated this 27th day of November at Seattle, Washington.

s/Eric Nygren
Eric Nygren, Legal Assistant

Ann Davison
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7095
(206) 684-8200