BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of	Hearing Examiner Files: **W-23-001**
SEATTLE MOBILITY COALITION	
from a Determination of Non-Significance issued by the Seattle City Council	**ORDER ON RECONSIDERATION**

The Appellant submitted a Motion for Reconsideration on November 16, 2023 ("Motion"). The City filed a response to the Motion. The Appellant filed a reply brief on December 13, 2023. The Hearing Examiner has reviewed the motion documents.[1]

The Hearing Examiner Rules of Practice and Procedure ("HER") provide the following:

> (a) The Hearing Examiner may grant a party's motion for reconsideration of a Hearing Examiner decision if one or more of the following is shown:
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> (1) Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;
> (2) Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing;
> (3) Error in the computation of the amount of damages or other monetary element of the decision;
> (4) Clear mistake as to a material fact.

HER 3.20.

The Motion 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."

1. Consideration of Economic Impacts.

The Motion argues that "Appellant's evidence of housing impacts was not limited to economic considerations," (Motion at 2) and "testimony of all Appellant witnesses concerned how the Proposal would affect the built environment." Motion at 8. The Motion takes issue with the Decision's Conclusion in paragraph 8 concerning testimony by Mr. Shook, Ms. Holzemer and Mr. Maritz. Conclusion paragraph 8 states:

[1] For purposes of this order, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated.

> 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.

(emphasis added)

The Appellant has not read the Conclusion closely. This Conclusion does not indicate that the testimony of Appellant's witnesses was *solely* directed at economic impact considerations. The Conclusion indicates that Appellant's witnesses "in part" addressed the economic impact to the development community, including the individual developers that testified. Appellant's witnesses did address the economic considerations of the development community which in part is driven by economic interests. To the degree testimony of witnesses addressed this, it is not relevant to the Examiner's consideration of the adequacy of the DNS. Appellant's case follows a line of argument that if the Proposal increases costs of development and developers cannot realize an adequate rate of return on a project, developers will elect not to build, and as a result less housing will be built in Seattle. The Decision simply recognizes that in this chain of causation argued by the Appellant, the link concerning economic impact to developers is not a relevant consideration – in and of itself – under SEPA. Appellant states "The unrebutted testimony at hearing from individuals who develop housing was that the adoption of a Comprehensive Plan amendment would, by itself, affect their ability to finance and develop housing." (Appellant's Reply on Motion for Reconsideration at 2). To the degree this testimony addressed the economic interests of the developers testifying, the Decision identifies this as an economic impact, and correctly rejects any requirement to analyze this aspect of the testimony.

2. Housing Impacts.

The Motion (and Appellant's arguments at hearing) takes the position that showing a reduction in housing (to the degree Appellant established this) is a per se significant negative impact to the built environment under SEPA. (See e.g. "reduced housing production, is an impact to the housing element of the environment." Motion at 3.) The Decision found that Appellant's argument and evidence did not meet Appellant's burden of proof to prevail in its appeal of the DNS for three reasons: (a) Appellant's argument that there will be reduced housing production relies on a speculative ordinance proposal, as a result Appellant's argument that there will be a housing reduction is speculative (Decision Conclusion 14); (b) a reduction in housing production is not a per se significant negative impact (Decision Conclusion 6 and 7); and (c) Appellant did not demonstrate that the housing reduction it argued would occur would result in a significant negative impact to the built environment (Decision Conclusion 6 and 7).

a. Appellant's allegation that the Proposal will have a significant negative impact on the built environment is speculative.

SEPA requires disclosure and analysis of the reasonably likely environmental impacts of the proposal at issue, but does not require analysis where alleged impacts are remote or speculative.

The Proposal does not change the use, authorize any development, or impose any fee associated with development. The rate study prepared by the City in January 2023, is not part of the Proposal and the Proposal did not include a rate-setting ordinance.

Appellant's arguments are founded on the assumption that a rate-setting ordinance resulting from the Proposal would lead to significant negative environmental impacts. Because there was no rate-setting ordinance associated with the Proposal, if the Appellant was to demonstrate that the Proposal would have the significant negative impacts it alleged, it needed to construct an ordinance that was demonstrably likely to be similar to an ordinance that would be adopted as a result of the Proposal.

Appellant's arguments rely on the assumption that the Proposal will result in the imposition of fees similar to the January 2023 rate study. However, Appellant did not demonstrate a likelihood that the Council would adopt a Transportation Impact Fee program based on the 2023 rate study. In addition, as detailed by City expert Mr. Bjorn, the Appellant failed to consider certain elements of what could be included in a potential rate-setting ordinance, e.g. potential exemptions that could be included.

SEPA does not require analysis of remote or speculative impacts. The Appellant's theoretical rate-setting ordinance, its strong reliance on the January 2023 rate study, and failure to consider likely elements of a future rate-setting ordinance (e.g. potential exemptions for affordable housing projects) is remote and too speculative in nature to provide foundational support for Appellant's argument that such an ordinance would result in significant negative environmental impacts.

b. A reduction in housing production is not a per se significant negative impact on the built environment.

If the Appellant had demonstrated that the probable effect of reduced housing production was that the built environment would be significantly affected, then analysis of that effect would be required in an EIS. However, Appellant's analysis was limited to attempting to demonstrate that the Proposal would result in significantly reduced housing production, and arguing that that reduction was in itself a significant negative impact to the built environment for purposes of consideration under SEPA. Appellant's assumption that a reduction in housing development is a significant negative impact to the build environment is not supported by case law, and in this instance is not supported by evidence in the record.

It may be that under current City policies (and even state policies) increased housing development has been identified as a desired outcome to address specific existing negative conditions in the built environment. However, if in future years such policies bear fruit, reduced housing

development may well become the new desired outcome, or at least be less of a public concern. The change in development volume of housing – whether as an increase to the number of houses being built or a decrease in that number is not a significant negative impact to the built environment without some demonstration of a negative effect. The Appellant did not even attempt to show that reduced housing development would result in specific negative environmental impacts to the physical environment (e.g. homelessness, neighborhood blight etc., displaced populations increasing due to less development of affordable housing etc.). Instead, Appellant relied entirely on its assumption that reduced housing development alone is a negative impact on the built environment.

Appellant cited previous Examiner decisions for the principal that "analysis of housing impacts from a nonproject proposal involves examination of the proposal's effect on the availability of housing." These decisions are not precedential, and even if they were, these cases are not representative of the arguments made by Appellant in this matter. W-17-006 concerned the appeal of a Final Environmental Impact Statement ("FEIS"), and is not relevant to the analysis in this appeal of a DNS (the standard of review, required level of environmental analysis and other elements are different for an FEIS than a DNS). What was addressed by the DNS in W-10-005 is not precedential with regard to the City's analysis of the DNS at issue in this matter, or for the Examiner's analysis on review. Notably, in W-10-005 the relevant issue raised by the appellants was that the City had "failed to properly analyze the proposal's impacts on the availability of affordable housing **and the resulting displacement of low income people**," ((emphasis added) *Appeal of Seattle Community Council Federation*, W-10-005, Findings and Decision at 9 (Oct. 5, 2010)), with the emphasized portion of this issue (or any other significant negative impact resulting from reduced availability of housing on the build environment) not addressed by analysis from the Appellant in this matter, as indicated in the Decision.

c. Appellant did not demonstrate that the housing reduction it argued would occur would result in a significant negative impact to the built environment, because it did not quantify significant impacts to the built environment.

Appellant made no attempt to demonstrate that the reduction in housing that it alleges would result in significant negative impacts to the built environment (e.g. homelessness, neighborhood blight etc., displaced populations increasing due to less development of affordable housing).

Conclusion 6 of the Decision states:

> Appellant, through Mr. Shook's testimony, indicated that impact fees would cause an increase in cost of housing, because they would reduce the feasibility of certain development projects.
>
> Mr. Shook's testimony first concerned review of available literature concerning impact fees relative to housing affordability, which research he admitted was limited. His analysis also included indications that the City's MHA program may be less successful with the implementation of the Proposal. While this on its face is a likely undesirable policy outcome for the City, the analysis fails to demonstrate that failure to fulfill the MHA

> program goals is likely to result in significant negative impacts to the natural or built environment. Similarly, Mr. Shook's analysis indicated that the implementation of the Proposal would result in the City not meeting regional growth target allocations, but failed to provide an analysis of the actual environmental impacts that might result from a failure to meet this growth target.[2]
>
> The Appellant did not introduce evidence quantifying that if the cost of housing increased significantly that such increase would result in any negative significant environmental impact – the impacts of increased costs to development, failure to reach MHA goals, etc. were left to assumption and speculation.

This conclusion addresses Appellant's failure to provide evidence concerning specific significant negative environmental impacts that may be caused by the Proposal to the built environment. It highlights that Appellant argued certain policies of the City to increase housing development might not be met, but that this is not evidence of an actual negative impact to the built environment.

Conclusion 7 of the Decision states:

> Mr. Shook's analysis stated summarily that "impacts will fall disproportionally on lower-income households, communities of color, and other vulnerable populations who are often less able to pay higher costs of scarce housing units during housing shortages. In addition, housing shortages have been shown to contribute to poorer education outcomes, increases in homelessness, lower economic growth, and degraded environmental conditions, all primarily experienced by low-income and vulnerable populations." Mr. Shook's analysis also indicated there should be "concern about gentrification, displacement, and homelessness of these marginalized groups." The analysis did not quantify any of these impacts. The Appellant provided no analysis or quantification (through Mr. Shook or any other witness) of such impacts, or how the Proposal at issue will result in such impacts. 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.

As with conclusion 6, this conclusion addresses Appellant's failure to provide evidence concerning specific significant negative environmental impacts that may be caused by the Proposal to the built environment. It highlights that Appellant argued that the Proposal would likely result in a decrease to the volume of housing development in the City, but ended its analysis there and made only an

[2] The Growth Management Act, Ch. 36.70A RCW, governs growth targets. The statute requires cities and counties to plan for sufficient housing to accommodate allocated population growth; this includes adequate affordable housing. Recent amendments strengthened these requirements. *See* e.g. HB 1110 (2023) and HB 1337 (2023).

oblique reference to the type of actual negative impacts to the built environment it needed to demonstrate that the Proposal could result in in order to meet its appeal burden under SEPA.

Appellant requests "that the Examiner conclude that the City must conduct additional SEPA review prior to adopting any ordinance imposing a transportation impact fee, as the Examiner did previously in his [W-18-013] 2019 decision." The Examiner's comments in the W-18-013 decision were simply that – comments about the likely SEPA process to be applied in the future. It was not a directive to the City, and had no controlling effect on the City. With regard to a DNS appeal the Examiner simply considers adequacy of the DNS within the context of the issues and evidence presented by the parties. The Examiner has no authority to direct additional SEPA action by the City following a ruling finding adequacy or inadequacy of a City DNS.

Respondents' Motion for Reconsideration is **DENIED**. To the degree the Motion raises issues that require clarification with the Decision, the Hearing Examiner will treat the Motion as a request for clarification pursuant to HER 3.27. An amended Findings and Decision is attached.

Entered February 1, 2024.

/s/Ryan Vancil
Ryan Vancil, Hearing Examiner
Office of Hearing Examiner

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CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **ORDER ON MOTION FOR RECONSIDERATION** to each person listed below, or on the attached mailing list, in the matter of **SEATTLE MOBILITY COALITION**. Hearing Examiner File: **W-23-001** in the manner indicated.

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Dated: February 1, 2023.

/s/Angela Oberhansly
Angela Oberhansly, Legal Assistant