AMENDED FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

SEATTLE MOBILITY COALITION

from a Determination of Non-Significance issued by the Seattle City Council

Hearing Examiner File:
W-23-001

Introduction

The City of Seattle Council Central Staff Division of the City Council ("City") issued a State Environmental Policy Act ("SEPA") Determination of Non-Significance ("DNS") for a proposed ordinance that would modify the Seattle Comprehensive Plan ("Ordinance"). The Appellant Seattle Mobility Coalition ("Appellant"), exercised the right to appeal pursuant to Chapter 25.05 Seattle Municipal Code.

The appeal hearing was held on September 5, 6, and 7, 2023, before the Hearing Examiner. The Appellant was represented by David P. Carpman, attorney-at-law, and the City was represented by Elizabeth E. Anderson, attorney-at-law. The parties submitted closing briefs on September 22, 2023, and response briefs on September 28, 2023.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. After considering the evidence in the record, the Hearing Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

1. In 2019, the Hearing Examiner remanded a Determination of Nonsignificance ("2018 DNS") issued by the City for a set of proposed Comprehensive Plan amendments ("2018 Proposal") to establish a transportation impact fee program.

2. The City has issued a new DNS for a revised proposal February 10, 2023. The DNS was issued for the following proposal ("Proposal"):

> The 2023 amendments to Seattle 2035 related to transportation impact fees are non project in nature, primarily procedural, and will have citywide applicability. The proposed amendments would (1) amend the Transportation Elements of the Comprehensive Plan and related appendices to identify deficiencies in the transportation system associated with new development; (2) incorporate a list of transportation infrastructure projects that would add capacity to

> help remedy system deficiencies; and (3) establish a policy of considering locational discounts for urban centers and villages and exemptions for low-income housing, early learning facilities and other activities with a public purpose for future rate-setting, if any. Projects included in the list would be eligible for future investments with revenue from a transportation impact fee program. The amendments to Seattle 2035 are a necessary, but not sufficient, step to establish an impact fee program under RCW 82.02.050.

Exhibit 3 at 3.

3. The Proposal's amendments to the Comprehensive Plan would not create a Transportation Impact Fee ("TIF") program, but, if adopted by the City Council, would be the first step toward authorizing such a program. If the City Council adopts the proposed amendments, the next step in creating a TIF program would be for the City Council to consider and adopt a TIF program plan and/or development regulations that implement the goals set by the Comprehensive Plan by setting the parameters of such a program, including applicability of the program, the cost of the fees and management of the program consistent with RCW 82.02.050-.110.

4. The Proposal concerns a nonproject action under SEPA. The DNS concluded that the Proposal would not have any probable, significant adverse impacts on the environment.

5. Seattle Mobility Coalition appealed the DNS to the Hearing Examiner.

6. At hearing, Richard Weinman, land use planner and SEPA consultant, testified regarding the City's procedural and substantive compliance with SEPA in relation to the Proposal with general statements about SEPA standards, and City SEPA practices for past legislation.

7. Appellant called Morgan Shook to testify regarding the impacts of the Proposal on housing production and affordability. Mr. Shook reviewed the Proposal, prepared a study that reviewed academic literature regarding the housing cost effects of impact fees,[1] and analyzed the likely impacts of a transportation impact fee on development in the City. A written analysis was prepared and discussed by Mr. Shook that analyzed potential impacts of the Proposal. Mr. Shook's analysis concluded that the imposition of a traffic impact fee will impact the amount of housing produced.

8. Mandatory Housing Affordability ("MHA") is a City of Seattle program that requires certain new commercial and multifamily residential developments to

[1] Mr. Shook acknowledged that research in the area of literature he was reviewing is limited.

either include affordable housing or contribute to the Seattle Office of Housing fund to support the development of affordable housing. Mr. Shook's analysis concluded:

> impact fees will reverse any gains made by the MHA program. Adding impact fees to already existing development fees would only interfere with the MHA's production.

Exhibit 9 at 20.

> the TIF will reduce the amount of housing units in MHA performance housing projects by 17% on average in total and 7% for affordable performance units. In MHA payment housing projects, the TIF will reduce housing units by 15% on average as well as resulting in a significant reduction in MHA fees . . .

Id.

9. Mr. Shook's analysis concluded in part:

> In addition, land use regulations adopted since 2018 that increase the cost of production (i.e., energy efficiency standards, etc.) and other exogenous factors such as changes in construction costs or development financing, have undoubtedly impacted the feasibility of housing production. . . . In particular, denser forms of development (such as towers) are more likely to pause or cancel development plans as these projects require much greater financing and are thus higher risk. However, losing higher density forms of development would result in a much greater reduction in units than smaller development types. Based on these results, it is likely that under harsher development conditions the TIF is likely to have a higher decrease in the total number of units and further exacerbate the housing shortage problem.

Id.

10. Meredith Holzemer also testified on behalf of the Appellant. Ms. Holzemer expressed her concerns about the impacts of the Proposal based on her experience as a housing developer. Ms. Holzemer described the elements of development project feasibility review. Ms. Holzemer testified that investors are currently requiring returns of 6 to 6.35%, before they will proceed with investing in a project. She indicated that the Proposal will likely reduce feasibility of development projects in Seattle, and reduce the amount of housing available and the cost of housing for renters.

11. Benjamin Maritz also testified for the Appellant. He develops for-profit affordable housing. He testified that the Proposal and any future TIF program would negatively impact his ability to develop affordable housing. Mr. Maritz concluded that a TIF would either be infeasible due to cost increases or would require raising rents beyond affordability.

12. Ketil Freeman, Supervising Analyst, City Council Central Staff, testified concerning the SEPA review process for the Proposal. Mr. Freeman conducts SEPA review for the legislative branch, and was the lead staff for the DNS. He also testified in response to Appellant's claims of procedural and substantive SEPA errors. Mr. Freeman testified that as part of the City's environmental review of the Proposal, the City reviewed the Proposal and the SEPA checklist ("Checklist").

13. City staffer Lish Whitson testified on behalf of the City. Mr. Whitson was one of two reviewers and signatories on the SEPA checklist, and he testified about his review. He discussed his experience reviewing SEPA checklists for programmatic proposals, and that he did not identify adverse land use impacts in the checklist, because, based on his experience, description of the Proposal and SEPA checklist, he did not anticipate adverse land use impacts due to the proposal to consider a TIF program. He indicated that two primary reasons no additional analysis was performed, beyond review of the SEPA checklist and consideration of staff experience in this area, is that no impact fees are actually proposed as part of the Proposal, and that impacts were not likely except economic impacts which are not required for analysis by SEPA. He also indicated that the Comprehensive Plan includes policies encouraging other impact fee types (e.g. parks and open space), that have not been implemented through ordinance.

14. Calvin Chow also testified for the City. Mr. Chow was the second reviewer and signatory to the SEPA checklist, and testified concerning his review.

15. The City called Andrew Bjorn to respond to Appellant's claims concerning impacts to housing and housing affordability. Mr. Bjorn reviewed Mr. Shook's analysis and provided testimony thereon. He agreed with some of Mr. Shook's starting assumptions, but did not agree with his final conclusions. Mr. Bjorn testified that Mr. Shook's analysis was "illustrative of short-term effects, but not indicative of the market over a long period of time," and that the report Mr. Shook prepared cannot substantiate the negative impacts it alleges. Mr. Bjorn testified that Mr. Shook's extrapolations that a slight change in return on investment 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, such as increasing rent or reducing the percentage of on-site parking stalls. Further, he testified that 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, and that

without that information, it is speculative to determine what the environmental impacts of such a rate-setting fee would be.

16. 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.

17. WAC 197-11-060.3.b provides:

> (b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5).) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
> (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

18. WAC 197-11-315 provides:

> (1) Agencies shall use the environmental checklist substantially in the form found in WAC 197-11-960 to assist in making threshold determinations for proposals, except for:
> . . .
>
> (e) Nonproject proposals where the lead agency determines that questions in Part B do not contribute meaningfully to the analysis of the proposal. In such cases, Parts A, C, and D at a minimum shall be completed.

19. SMC 25.05.752 defines "impacts" as "the effects or consequences of actions. Environmental impacts are effects upon the elements of the environment listed in Section 25.05.444."

20. The impacts to be considered in environmental review are direct, indirect and cumulative impacts. SMC 25.05.060 D.

21. "A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth *caused by a proposal* . . . ." SMC 25.05.060.D.4. (Emphasis added.)

22. "Probable" is defined in SMC 25.05.782 as "likely or reasonably likely to occur . . ."

23. SMC 25.05.794 defines "significant" as "a reasonable likelihood of more than a moderate adverse impact on environmental quality. . . . Significance involves context and intensity . . . The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact . . . . Section 25.05.330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact."

24. SMC 25.05.330 directs that, in making the threshold determination, the responsible official shall determine "if the proposal is likely to have a probable significant adverse environmental impact . . . ." If the responsible official "reasonably believes that a proposal may have" such an impact, an environmental impact statement is required. SMC 25.05.360.

25. SMC 25.05.665 D. Subparagraphs D.1 through D.7 cover situations where existing regulations may be inadequate or unavailable to assure mitigation of adverse impacts and thus, SEPA-based mitigation is appropriate.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 25.05.680.B, which also requires that the Hearing Examiner give substantial weight to the Director's determination.

2. The party appealing the Director's determination has the burden of proving that it is "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). Under this standard of review, the decision of the Director may be reversed only if the Hearing Examiner is left with the definite and firm conviction that a mistake has been committed. *Cougar Mt. Assoc. v. King County*, 111 Wn. 2d 742, 747, 765 P.2d 264 (1988).

3. SEPA requires "actual consideration of environmental factors before a DNS can be issued." *Norway Hill Preservation and Protection Ass'n. v. King County*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). The record must "demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Id.* at 276 (citation omitted).

4. An agency is required to review the SEPA checklist for the proposal, SMC 25.05.330 A.1, but it may also require more information of the applicant, conduct further study and consult with other agencies about the proposal's potential impacts. SMC 25.05.335. It is expected that the agency will utilize its own knowledge and expertise in analyzing the proposal. As noted above, the question on review is whether the agency actually considered environmental factors. *See Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 881, 613 P.2d 1164 (1980), *overruled on other*

grounds, Save a Neighborhood Environment (SANE) v. City of Seattle, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984).

5. The City must demonstrate prima facie compliance with the procedural requirements of SEPA. In this case, City staff testified about the nature of the Proposal, and indicated that an environmental impacts analysis was conducted for the DNS. In addition, City staff testified that they had relied on the description of the Proposal,[2] environmental checklist, and their own experience to reach the conclusion that the Proposal would not have significant negative environmental impacts. At the time of environmental impact analysis for the DNS, housing impacts were found to be remote and speculative (as discussed herein, that assumption was not proven to be inaccurate at hearing). SEPA does not require analysis of speculative impacts of a proposal. The City properly disclosed environmental impacts in the SEPA checklist based on the likely impacts of the Proposal, and demonstrated prima facie compliance with the procedural requirements of SEPA.

6. 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.

   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.

[2] The Proposal includes several environmental documents, including the EIS for Seattle 2035 Comprehensive Plan update, which analyzed the full range of impacts associated with the allocation of 70,000 new housing units and 115,000 new jobs for the 20-year planning horizon; the environmental documents that analyzed the environmental impacts of the programmatic modal plans, which set out a variety of pedestrian, bike, freight, transit projects that the City used in creating the list of potential fee eligible transportation projects in the Proposal; and the Maritime and Industrial EIS and the Seattle 2035 which mentioned TIF as a possible mitigation measure.

7. 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.

8. 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. See e.g. WAC 197-11-448 ("Examples of information that are not required to be discussed in an EIS are: . . . profits and personal income and wages." WAC 197-11-448 (3)).

9. Appellant's analysis included determinations concerning whether the Proposal would be effective in collecting desired impact fees, the benefit of such fees to community areas from which the fees were collected, etc. Such issues do not concern the environmental impact analysis at issue here. The Examiner does not have jurisdiction over concerns about the legislative effectiveness of the Proposal.

10. Appellant's Notice of Appeal raised issues concerning: temporary construction-related impacts to elements of the environment including but not limited to: "earth (due to earth movement for construction), air (due to emissions from construction and other vehicles), water (due to increased impervious surface), the built environment (including noise, light and glare, and aesthetics), and transportation, . . . and long-term traffic, noise and aesthetic impacts." Notice of Appeal at 6. In addition, the Notice of Appeal alleges "resulting sprawl will have its own adverse environmental impacts, including increased vehicle miles traveled, and accompanying pollution," and "increasing housing development in the suburbs will result in bidding up land prices in those locations, further exacerbating affordability

issues." These issues were not adequately addressed at hearing, and are considered abandoned.

11. There is no evidence in the record that the Proposal is likely to have a significant adverse impact. It is not sufficient for Appellant to simply allege inadequacies with the DNS environmental review. Instead, to prevail on the appeal of a DNS, Appellant must demonstrate that there are probable significant negative impacts associated with the proposal. In the absence of evidence showing any probable significant impacts associated with the Proposal, no additional SEPA review is required, and the Appellant has failed to meet its burden.

12. The Hearing Examiner is not left with a definite and firm conviction that a mistake has been made concerning Appellant's allegations that the City has conducted SEPA review for the Proposal in a piece-meal fashion. Appellant has not demonstrated that the proposed legislation "cannot or will not proceed unless" additional ordinances are adopted to implement a TIF program. The Proposal consists of amendments to the City's Comprehensive Plan. A comprehensive plan is a generalized land use policy statement, and development regulations are the implementation of that generalized statement. *See e.g.* RCW 36.70A.030(5).

    Adoption of generalized policies of a comprehensive plan do not require (or even guarantee) that implementing ordinances be adopted. Appellant presented no evidence that the Proposal cannot or will not be adopted by Council unless additional ordinances are adopted to implement a TIF program.

    Appellants argued "the very Comprehensive Plan that is the subject of this Proposal is a policy document that **must** be implemented through subsequent regulations." Appellant Closing Argument at 5 (emphasis provided). However, this is not the case. There is no imperative or requirement that the proposed Comprehensive Plan policies be implemented through subsequent regulations – they *may*, but they are not required to be. Appellant's own argument admits "[t[he Plan does not fully enact any of the policies it sets out, does not set zoning regulations, and does not authorize any construction projects." As Mr. Whitson indicated in his testimony, the Comprehensive Plan includes policies encouraging other impact fee types (e.g. parks and open space), that have not been implemented through ordinance.

13. Appellant argued that "Mr. Weinman and Morgan Shook both described similar environmental analysis that was conducted for [Mandatory Housing Authority ("MHA")] and [Accessory Dwelling Unit ("ADU")] legislation, although neither of those proposals established a specific legislative program either." Appellant Closing Argument at 5. The environmental analysis conducted for the MHA and ADU legislation was for Environmental Impact Statements ("EIS"), and not for a DNS. The depth and standard of environmental review required for an EIS, where significant environmental impacts have been identified, is greater than that required for a DNS, wherein no significant environmental impacts have been

identified. In addition, the environmental analysis conducted for the legislation described, demonstrates a practice of the City with regard to past legislation, it does not dictate what is required under SEPA with regard to the specific Proposal at issue. Those past practices do not dictate the legal standard required for DNS review for the Proposal.

14. Similarly, Appellant has not demonstrated that the proposal is an interdependent part of a larger proposal and depends on the larger proposal as its justification or for its implementation. The Appellant did not present case law or other argument that showed other cases wherein SEPA review for an amendment to a comprehensive plan was found inadequate because it did not include environmental review of implementing development regulations or programs. Based on the presentations of the Appellant, there is an absence of precedent requiring SEPA review for an amendment to a comprehensive plan to include environmental review of implementing development regulations or programs. In the absence of such a bright-line rule, the Appellant was required to demonstrate that the City had failed to consider a probable significant negative environmental impact, which it failed to do.

    The Comprehensive Plan itself is clear that it is a goal and policy-oriented document, and not a directive:

> Goals represent the results that the City hopes to realize over time, perhaps within the twenty-year life of the Plan, except where interim time periods are stated. Whether expressed in terms of numbers or only as directions for future change, goals are aspirations, not guarantees or mandates.
>
> Policies should be read as if preceded by the words *It is the City's general policy to*. A policy helps to guide the creation of or changes to specific rules or strategies (such as development regulations, budgets, or program plans). City officials will generally make decisions on specific City actions by following ordinances, resolutions, budgets, or program plans that themselves reflect relevant Plan policies, rather than by referring directly to this Plan. Implementation of most policies involves a range of actions over time, so one cannot simply ask whether a specific action or project would fulfill a particular Plan policy. For example, a policy that states that the City will give priority to a particular need indicates that the City will treat the need as important, not that it will take precedence in every City decision.
>
> Some policies use the words shall, should, ensure, encourage, and so forth. In general, such words describe the emphasis that the policy places on the action but do not necessarily establish a

> specific legal duty to perform a particular act, to undertake a program or project, or to achieve a specific result.

Seattle 2035 Comprehensive Plan at 22.

The Comprehensive Plan amendments in the Proposal lack sufficient detail to identify the environmental impacts that may be associated with a subsequent implementing program. The proposed Comprehensive Plan amendments do not ensure the adoption of a TIF program, and does not establish important elements of such a program, such as fee amounts and potential exemptions. In addition, the environmental impacts of development projects that may be funded by a TIF program are merely speculative at this time, because funding for those projects is not provided for by the Proposal.

15. 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 as a result of such ordinance, it needed to construct an ordinance 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.

    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.

16. To the degree the City has argued that the SEPA analysis for the Proposal was not required to consider reasonably likely significant impacts to the environment that could result from an ordinance implementing the Proposal, this Decision does not reach that conclusion. This decision does not conclude that SEPA review for a comprehensive plan amendment is completely precluded from including consideration of potential subsequent ordinance implementation. The decision only concludes that the City made a prima facie showing that it complied with SEPA review procedural requirements in issuing the threshold determination for the DNS, and that the Appellant failed to meet their burden of showing a probable significant impact to housing from the Proposal at hearing.

Decision

The Determination of Non-Significance is **UPHELD**, and the appeal is **DENIED.**

Entered February 1, 2023.

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

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

Consult applicable local and state law, including SMC Chapter 25.05 and RCW 43.21C.075, for further information about the appeal process.

BEFORE THE HEARING EXAMINER
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 **AMENDED FINDINGS AND DECISION** 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.

Party	Method of Service
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Dated: February 1, 2023.

/s/Angela Oberhansly
Angela Oberhansly, Legal Assistant