BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of CITIZENS FOR LIVABILITY IN BALLARD, From a decision by the Director, Office of Planning and Community Development, regarding the adequacy of a Final Environmental Impact Statement.	Hearing Examiner File: W-16-003 REPLY IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Citizens for Livability in Ballard cannot satisfy two fundamental and longstanding criteria for challenging a final environmental impact statement: (i) providing input during the designated public comment period for the previous DEIS, and (ii) demonstrating an immediate, concrete and specific injury-in-fact sufficient to establish SEPA appellate standing. Both of these requirements are well-established under Washington law and have been consistently imposed by courts and administrative tribunals. Citizens' attempts to avoid these mandatory standards invite the Hearing Examiner to disregard a lengthy body of controlling precedent and are unavailing. The Examiner should reject Citizens' arguments and dismiss the above-

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

captioned appeal.

II. EVIDENCE RELIED UPON

For purposes of this Reply, the City relies upon the original Declaration of Gordon Clowers and all Exhibits thereto, the Supplemental Declaration of Gordon Clowers and all Exhibits thereto, and the pleadings and other documents on file with the Hearing Examiner. The Examiner is also requested to take official notice of the Seattle 2035 DEIS and FEIS, respectively, which are accessible through the internet link provided in Mr. Clowers' Supplemental Declaration. Supplemental Clowers Dec. ¶5.

III. ARGUMENT AND LEGAL AUTHORITY

3.1 Citizens' Failure to Comment on the Seattle 2035 DEIS Precludes Its Appeal of the FEIS.

SEPA unequivocally prohibits parties from challenging an FEIS where they failed to submit formal comment on the DEIS. WAC 197-11-545. This rule has been uniformly recognized by courts, s*ee, e.g., Kitsap County v. Dept. of Natural Resources*, 99 Wn.2d 386, 390-91, 662 P.2d 381 (1983); the Growth Management Hearings Board, *see, e.g., Blair v. City of Monroe*, CPSGMHB Case No. 14-3-0006c, Order on City's Dispositive Motion and Petitioners' Motions to Supplement (May 23, 2014); *Tooley v. Gregoire*, CPSGMHB Case No. 11-3-0008, Order on Dispositive Motions (November 8, 2011); *City of Shoreline III and IV v. Snohomish County*, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Order on Dispositive Motions (January 18, 2010); the Pollution Control Hearings Board, *see, e.g., Spokane Rock Products, Inc. v. Spokane County Air Pollution Control Authority*, PCHB No. 05-127, Order Granting Motion for Summary Judgment (February 13, 2006); the Department of Ecology, *see* Washington State Department of Ecology, *State Environmental Policy Act Handbook*,

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

Publication No. 98-114, at 69 (2003); and the definitive SEPA treatise. *See* Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* §14.01[10], at 14-92/93 (2015).

Unable to cite any contrary Washington precedent (none exists), Citizens' response to this well-established body of authority is simply to ignore it. Appellants' Response to City's Motion for Dismissal ("Response") at 2-3. Citizens instead contends that the language of the City's local SEPA regulations dilutes or otherwise modifies the preclusive effect of WAC 197-11-545. *Id.* Citizens' argument is incorrect.

3.1.1 SEPA's failure-to-comment waiver provision is unaltered by the City's definition of an "interested person". Citizens first posits that WAC 197-11-545 is inapplicable because Seattle's procedural regulations purportedly allow any "interested person" to administratively appeal a SEPA determination. Response at 2-3 (citing SMC 25.05.680). Because the definition of an "interested person" under SMC 25.05.755 does not expressly require appellants challenging an FEIS to have first commented on the DEIS for the proposal, Citizens contends that the comment mandate does not apply. Response at 2-3. This argument is untenable.

Nothing in SMC 25.05.755 (or any other relevant code provision) suggests that local appeals are exempt from the SEPA waiver and exhaustion standards imposed by state law. To the contrary, the City's code acknowledges that many of the state SEPA Rules "are adopted verbatim or nearly so" in the City's local regulations; that Seattle's local SEPA provisions are expressly intended "to implement" Chapter 197-11 WAC; and that the relevant state law policies, regulations and laws regarding the SEPA process are, together with the provisions of Chapter 25.05 SMC, to be interpreted and administered as one consistent whole. SMC

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

25.05.010 -.030. As the Hearing Examiner has previously acknowledged, the appeal provisions in Chapter 25.05 SMC "must be consistent with state SEPA law and its implementing rules." *Laurelhurst Community Club*, Hearing Examiner File No. W-11-007, Order on Motions to Dismiss/Cross Motion for Summary Judgment (April 10, 2012); *see also Washington Community Action Network,* Hearing Examiner File Nos. MUP-15-010(W), MUP-15-011(W), MUP-15-012(W), MUP-15-013(W), MUP-15-014(W), Order on Respondent's Joint Motion to Dismiss (May 21, 2015). This mandate necessarily includes the failure-to-comment provisions of WAC 197-11-545 which, as noted *infra*, "are adopted verbatim or nearly so" in SMC 25.05.545. Citizens' proffered interpretation disregards this clear legislative intent and should be rejected.

3.1.2 WAC 197-11-545 applies to administrative SEPA appeals. Citizens likewise errs in asserting that the waiver effect of WAC 197-11-545 is inapplicable to local administrative appeal proceedings. Response at 2-3. No reported Washington precedent supports this contention. To the contrary, it is widely recognized that a party's failure to comment on a DEIS pursuant to WAC 197-11-545 does indeed "preclude later *administrative and* judicial challenges". Washington State Bar Ass'n, *Washington Real Property Deskbook Series: Vol. 5 Land Use Planning* §14.2(4)(b) (4th ed. 2012) (citing WAC 197-11-545) (emphasis added).

3.1.3 The City's failure-to-comment provision must be construed consistently with WAC 197-11-545. Citizens also asserts that the language of the City's local SEPA regulations regarding the public comment requirement differs from the corresponding provision of WAC 197-11-545 and should therefore be construed differently. Response at 3. This contention is belied by even a cursory comparison of the two provisions. The relevant

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

WAC subsection provides as follows:

> Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis, if the requirements of WAC 197-11-510 are met.

WAC 197-11-545(2) (emphasis added).

The operative text of the City's corresponding local regulation is identical:

> Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, shall be construed as lack of objection to the environmental analysis, if the requirements of Section 25.05.510 (public notice) are met. Other agencies and the public shall comment in the manner specified in Section 25.05.550. Each commenting citizen need not raise all possible issues independently. Appeals to the Hearing Examiner are considered de novo; the only limitation is that the issues on appeal shall be limited to those cited in the notice of appeal.

SMC 25.05.545(B) (emphasis added).

To the extent the relevant content of the two provisions differs at all, the City's local regulation actually underscores even more pointedly the requirement for interested parties to provide input on the earlier SEPA document, emphasizing that "the public shall comment" in the manner specified by the Seattle code. *Id.* (Emphasis added.) Citizens' argument that SMC 25.05.545 should be interpreted more leniently than its state law counterpart on this basis is without merit. Indeed, it appears that longstanding administrative precedent of the Hearing Examiner expressly rejects this position. *See* Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* §19.01[1], at 19-6.1 n.19a (2015) (noting that the City of Seattle has interpreted WAC 197-11-545 "to preclude administrative review of FEIS adequacy by a party who failed to comment on the DEIS") (citing *Institute for*

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

Transportation and the Environment, Hearing Examiner File No. MUP-91-079(W), Findings and Decision of the Hearing Examiner (December 27, 1991)).

Citizens' reliance upon *Smart Growth*, Hearing Examiner File No. W-14-001, Order on Motion to Dismiss (September 2, 2014) is misplaced. Response at 3. *Smart Growth* involved an appeal of a Determination of Non-Significance (DNS) and does not control the present case, which involves an EIS. Failing to comment after publication of a DNS has an entirely different impact than failing to comment on a DEIS. Public comment is critical to the finalization of an EIS under both state law, *see* WAC 197-11-560, and the City's local SEPA procedures. *See, e.g.,* SMC 25.05.500 ("Review, comment, and responsiveness to comments on a draft EIS are the focal point of the act's commenting process because the DEIS is developed as a result of scoping and serves as the basis for the final statement.") (emphasis added). The prescribed public comment process for a DEIS is lengthy, strictly defined and mandatory: The SMC requires a public hearing, a 30 day public comment period, and then preparation of the FEIS by considering and responding to each individual public comment. SMC 25.05.500-.560. In contrast, a DNS requires only a 14-day comment period, after which the lead agency may in its discretion choose to simply retain its original determination "as is" without acknowledging any input received from the public. SMC 25.05.340. Failure to comment on a DEIS removes the City's ability to comprehensively evaluate and respond to comments prior to finalizing its FEIS. Allowing parties to appeal a FEIS without commenting after the DEIS frustrates the very purpose of the SEPA framework under both the SMC and the WAC, both of which require that the FEIS specifically respond to concerns expressed by interested parties. *See, e.g., Kitsap County v. Dept. of Natural Resources*, 99 Wn.2d 386, 391, 662 P.2d 381 (1983). *Smart Growth* is inapposite, and the present case—involving an FEIS appeal—is instead controlled by the

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

Examiner's prior *Institute for Transportation and the Environment* decision.[1] Indeed, the Examiner in *Smart Growth* expressly distinguished *Institute for Transportation and the Environment* on that basis. *Smart Growth*, Hearing Examiner File No. W-14-001, Order on Motion to Dismiss at 3 (September 2, 2014).

3.1.4 The specific issues raised by Citizens on appeal are irrelevant to their failure to comment on the DEIS. Citizens asserts that "it would have been impossible for the appellant to comment in [sic] the DEIS on the many issues raised in this appeal because the DEIS did not include discussion of these issues[.]" Response at 3. This argument is nonsensical. The entire purpose of soliciting public comment on a DEIS is to enable interested parties to inform the lead agency of the ways in which the agency's environmental analysis is allegedly inadequate—input which in turn specifically informs the agency's preparation of the FEIS. *See* WAC 197-11-560; SMC 25.05.500. This opportunity necessarily—and obviously—includes the ability to submit comments asserting that the DEIS has erroneously omitted discussion of allegedly relevant issues. *Id.* No Washington authority remotely suggests that SEPA appellants may avoid the preclusive effect of their failure to comment on this basis.

It remains uncontested that no member of Citizens for Livability in Ballard submitted

[1] Citizens also selectively misquotes the Examiner's *Smart Growth* decision by inserting critical text (underlined below) that is not found in the decision itself:

> The state Board decisions referenced by the City in its motion were concerned with appellants' failure to exhaust administrative remedies, but no such concern is presented here. By appealing the issue of EIS adequacy to the Hearing Examiner, an appellant exhausts the available administrative remedy. At that point, ~~and~~ it is the Hearing Examiner's decision, not DPD's, which is the final City SEPA decision.

Response at 3; *In re Matter of Smart Growth*, Case No W-14-001, Order on Motion to Dismiss (September 2, 2014), at 3-4 (emphasis added). Citizens' obvious purpose in adding this text is to attempt to extend the holding in *Smart Growth* to appeals involving a EIS rather than a DNS. The Examiner should reject this attempt.

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

comment on the organization's behalf during the May 4, 2015 - June 17, 2015 comment period for the Seattle 2035 DEIS. Clowers Dec. ¶16, Exhibit 4; Response at 1-3. As a matter of law, this omission is construed as a waiver of any objection to the City's environmental analysis and bars the above-captioned SEPA challenge. *See,* WAC 197-11-545; *e.g.,* Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, *supra*, §14.01[10], at 14-92/9; *City of Shoreline III and IV v. Snohomish County*, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Order on Dispositive Motions (January 18, 2010).[2] Citizens' appeal should be dismissed accordingly.

3.2 Citizens' Inability to Demonstrate an Injury-In-Fact Deprives the Organization of SEPA Standing.

Parties seeking to challenge an agency's SEPA determination must identify a specific "injury in fact" in order to establish standing. *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992). The "injury-in-fact" criterion requires appellants to demonstrate that they will be "'specifically and perceptibly' harmed by the proposed action." *Id.* at 382 (citation omitted). Where a SEPA appellant "alleges a threatened injury as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself." *Id.* at 383 (emphasis added). Citizens cannot satisfy this well-established standard, and the organization's various attempts to avoid the injury-in-fact criterion for SEPA standing are without merit.[3]

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[2] Citizens incorrectly argues that GMHB decisions are irrelevant to the instant proceeding. Response at 4. Because the GMHB has exclusive appellate jurisdiction over SEPA appeals related to local comprehensive plan and development regulation amendments under the GMA, *see* RCW 36.70A.280, GMHB caselaw is at the very least highly persuasive in this context.

[3] Citizens correctly notes that a community organization has SEPA standing if at least one of its members has standing in his/her own right. Response at 4. This is an accurate but ultimately incomplete statement of the organizational standing doctrine, however, as the organization must still demonstrate that at least one of its members will be specifically and perceptibly harmed by the challenged action. *SAVE v. City of Bothell*, 89 Wn.2d. 862, 866-67 (1978); *Anderson v. Pierce County*, 86 Wn. App. 290, 299 (1997). Citizens cannot satisfy this criterion.

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

3.2.1 The injury-in-fact criterion for SEPA standing applies to administrative SEPA appeals. In asserting that SEPA's injury-in-fact requirement is inapplicable to local administrative appeals, Citizens again relies—unpersuasively—upon the City's codified definition of an "interested person". Response at 4. An "interested person" is defined by the City's SEPA regulations as:

> any individual, partnership, corporation, association, or public or private organization of any character, significantly affected by or interested in proceedings before an agency, and shall include any party in a contested case.

SMC 25.05.755. Citizens contends that this definition contains "the sole criteria provided in the relevant city code for standing." Response at 4, 6.

Citizens' argument is erroneous. The Hearing Examiner has repeatedly acknowledged and applied the injury-in-fact standard in prior SEPA appeals and has rejected arguments identical to the one now asserted by Citizens. *See, e.g., Seattle Displacement Coalition*, Hearing Examiner File No. W-15-001/W-15-004, Order on Motion to Dismiss (April 3, 2015); *Laurelhurst Community Club and Seattle Community Council Federation*, Hearing Examiner File No. W-11-007, Order on Motions to Dismiss/Cross Motion for Summary Judgment (April 10, 2012); *Washington Community Action Network*, Hearing Examiner File Nos. MUP-15-010, 011, 012,013,014,015, Order on Respondents' Joint Motion to Dismiss (May 21, 2015); *Keep Washington Beautiful and Total Outdoor Corp.*, Hearing Examiner File Nos. W-13-003 and W-13-004, Order on Motion to Dismiss (July 15, 2003). Citizens' contention that the City's SEPA standing requirements exclude this criterion simply ignores this authority.

More fundamentally, the provisions of Chapter 25.05 SMC must be construed harmoniously with the relevant statutes, regulations and case law that collectively comprise the

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

SEPA framework in Washington. SMC 25.05.010-.030; *Laurelhurst Community Club*, File No. W-11-007, Order on Motions to Dismiss/Cross Motion for Summary Judgment at 2 (April 10, 2012) (acknowledging that the appeal provisions of Chapter 25.05 SMC "must be consistent with state SEPA law and its implementing rules"). This mandate in turn requires that the "significantly affected" qualifier in SMC 25.05.755 be interpreted as reflecting the injury-in-fact criterion for SEPA standing under *Trepanier* and its progeny. Citizens offers no contrary legal authority beyond its implausible interpretation of SMC 25.05.755 itself.[4] The Examiner should reject this unsupported and untenable argument.

3.2.2 Citizens has not demonstrated an injury-in-fact. Citizens' Appeal Statement contains only a vague, indeterminate description of their alleged injury, contending that its members "have standing as an aggrieved party because the appellants are residents of Seattle and adversely affected by changes to the Comprehensive Plan and inadequate analysis in the EIS." Appeal Statement, Attachment at 1. Although Citizens now attempts to bolster its purported standing with *post hoc* declarations from its members, the organization is still unable to establish the type of "specific and perceptible" harm required under SEPA. *Trepanier,* 64 Wn. App. at 382.

The declarations submitted by Citizens' members are insufficient to demonstrate a cognizable injury-in-fact. Messrs. Cohn, Wert and Robbins variously express their subjective beliefs that the proposed Seattle 2035 amendments would result in increased traffic and

[4] Citizens contends that "an extensive body of. . . court decisions" demonstrates the absurdity of the City's application of the injury-in-fact standing criterion. Response at 6, The lone case Citizens actually cites for this proposition, *United States v. Kirby*, is a 150 year-old decision of the United States Supreme Court addressing rules of statutory construction generally. *United States v. Kirby*, 74 U.S. 482, 483 (1868). The persuasive value of *Kirby* in the present case is clearly outweighed by the monolithic body of Washington judicial and administrative SEPA caselaw cited *supra.*

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

congestion; loss of parking; overcrowding of local schools and parks; and the reduction or impairment of certain other public services. Declaration of Steven M. Cohn; Declaration of Joseph E. Wert; Declaration of Kirk W. Robbins. However, the commonality of these purported harms is the lack of any indication that they will in fact necessarily result from the City's adoption of Seattle 2035—much less that this outcome will be "immediate", "specific" and "concrete" as required by SEPA. *Trepanier,* 64 Wn. App. at 383. Rather, the traffic, parking and other threatened impacts identified by Citizens' members depend entirely upon the occurrence of several distinct, and presently speculative future events: That the City will in fact enact (unspecified) amendments to the City's zoning map and development regulations; that (unspecified) landowners will file applications for (unspecified) land use development permits within the relevant area; that several (unspecified) new buildings will be constructed; and that an influx of (unspecified) new residents, vehicles, etc. will in fact occur. The causal link between the proposed Comprehensive Plan amendments and these theoretical future impacts is far too attenuated to constitute "specific and immediate" harm. *See, e.g., Trepanier,* 64 Wn. App. at 383.[5]

Each of the alleged threats from the Seattle 2035 Comprehensive Plan amendments identified by Citizens are instead, by their plain terms, speculative, conjectural and unsubstantiated. Indeed, the organization itself candidly characterizes all of its concerns as

[5] Citizens also severely mischaracterizes and overstates both the content and effect of the underlying plan amendments themselves. For example, Citizens alleges that neighborhood parking impacts may result from the City's adoption of Seattle 2035. Response at 5; Robbins Declaration at 1; Cohn Declaration at 1; Wert Declaration at 2. However, the proposed Comprehensive Plan amendments relevant to this issue involve no actual, substantive change from the City's current goals and policies. Rather, the provisions in question have merely been re-numbered and rephrased while retaining the same intent and effect. There will be no net change in the policies' effective meaning for future implementation, and changes in the City's regulations for the allowance of zero minimum parking will not be necessitated by the amendments. Supplemental Clowers Dec. ¶4 and Exhibit 1.

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

merely "[p]otential areas of injury":

- "Increased traffic congestion may be experienced. . . ."
- Future changes in land use designations under the Seattle 2035 amendments "includes the potential for future upzoning and results [sic] a range of related impacts on traffic, parking, parks and other infrastructure. . . ."
- Elimination of current rezone criteria "has the potential for replacing single family use" with other residential uses.
- Revisions to certain Urban Village goals and policies "have the potential for substantially changing the density and character of urban villages. . . ."
- Revisions to parks/open space goals will place additional demand on local parks "with potential impacts on existing residents' use, include potential overcrowding. . . ."
- New land use policies addressing parking needs "would potentially result in parking spillover with adverse impacts. . . ."
- Future actions "may. . . reasonably occur in terms of likely trends in terms of regulatory framework that necessarily flows from specific proposed policies."

Response at 5 (emphasis added).

The very fact that Citizens is resigned to phrase its allegations of harm as "potential" future impacts fatally undermines its standing to bring this appeal. By definition, a "potential" impact that "may" occur at some indeterminate, future point is not—as a matter of law—an "immediate, concrete, and specific injury" sufficient to establish SEPA standing. *Trepanier,* 64 Wn. App. at 383. Citizens' concession that its alleged harms would not occur unless and until the future adoption of some unspecified new "regulatory framework" should effectively

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

terminate the Examiner's inquiry regarding this issue. Response at 5. Citizens cannot demonstrate an injury-in-fact under these circumstances.

Citizens decries the "legal Catch-22" appellants face in attempting to establish standing to challenge nonproject and/or plan-level amendments under the *Trepanier* standard. Response at 6. But this principle is a longstanding component of the SEPA framework that has been vigorously enforced by Washington courts and administrative tribunals—including the Hearing Examiner. *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52, 882 P.2d 807 (1994); *Master Builders Ass'n of Pierce County.* v. *Pierce County*, CPSGMHB Case No. 02-3-0010, Order on Motion to Dismiss SEPA Claims (October 21, 2002); *Laurelhurst Community Club and Seattle Community Council Federation*, Hearing Examiner File No. W-11-007, Order on Motions to Dismiss/Cross Motion for Summary Judgment (April 10, 2012). As the Examiner acknowledged in *Laurelhurst*, "the very nature of a nonproject action in the form of a broad, legislative proposal, makes it difficult for a challenger to demonstrate the requisite injury in fact." *Id.* (rejecting appellants' SEPA standing where challenged ordinance amending City's Essential Public Facilities regulations did not "identify future EPF projects or project locations").[6]

Overwhelmingly, only land development actions that will directly and immediately cause the alleged impacts themselves will suffice for purposes of SEPA standing; area-wide zoning and comprehensive planning enactments are almost always too causally distant from the purported

[6] Citizens' attempt to distinguish *Trepanier* on its facts is also without merit. Response at 4-5. As in the present matter, the appellant in *Trepanier* sought to demonstrate harm from the zoning ordinance challenged in that case with speculative allegations of future impacts that were unsupported by any direct and immediate causal relationship with the enactment. *Trepanier*, 64 Wn. App. at 383-84. Citizens assert precisely the same argument here—i.e., that the proposed Seattle 2035 plan amendments "will necessarily result" in the future impacts Citizens has alleged. *Id.* (emphasis in original). The causal link in the instant case is even more attenuated, as underlying proposal here is a comprehensive plan rather than the more substantive, controlling zoning ordinance at issue in *Trepanier*.

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

harm under the *Trepanier* injury-in-fact standard. *See, e.g., Hensley VI v. Snohomish County*, CPSGMHB No. 03-3-0009c, Order on Motions at 13 (May 19, 2003) ("The new urban zoning does not increase traffic or drainage problems. Only a specific development proposal, with calculable traffic generation and impervious surface, can result in specific and perceptible harm."). Only in rare circumstances could area-wide comprehensive plan amendments possibly implicate the type of injury-in-fact required for SEPA standing. These circumstances are absent here, where the Seattle 2035 plan amendments have no independent regulatory effect for specific development proposals, rezone no property, involve no revisions to the City's land use code, grant no site-specific development permits or licenses, and neither compel nor otherwise authorize any physical development of land. Clowers Dec. ¶5; Supplemental Clowers Dec. ¶6.

No reported Washington authority has ever found SEPA standing under similar facts. All relevant judicial and administrative precedent instead requires dismissal of Citizens' appeal due to the organization's failure and inability to demonstrate an actual injury-in-fact that would result from the challenged amendments. The Examiner should enforce this well-established standard and dismiss the above-captioned matter.[7]

3.3 The Hearing Examiner Lacks Jurisdiction Over Citizens' Constitutional Arguments, and GMA Claims and Challenges to the Seattle 2035 DEIS.

Citizens' Appeal Statement alleges that the City's EIS analysis violates due process and public participation rights arising under the Growth Management Act. Appeal Statement, Attachment at 2, 15. As explained in the City's Motion to Dismiss, hearing examiners only have the authority delegated to them by statute or ordinance. *Woodinville Water Dist. v. King County,*

[7] Citizens' citation to RCW 43.21C.420(4)(e) is unavailing. Response at 6. The scope of that statute is limited by its terms to subarea plans, and is thus wholly inapplicable to the present case.

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

105 Wn. App. 897, 906, 21 P.3d 309 (2001); *see, e.g., Chaussee v. Snohomish County Council,* 38 Wn. App. 630, 638, 689 P.2d 1084 (1984); *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P. 3d 1141 (2003). No statute or ordinance empowers the Hearing Examiner to consider constitutional or GMA related concerns. The scope of permissible review in the present case is instead strictly limited to whether the challenged FEIS is adequate; legal adequacy in this context is not reviewed through the lens of constitutional due process considerations or the GMA's "public participation" mandate. *See* WAC 197-11-680(3)(a); WAC 197-11-444.

Citizens offers no relevant authority in support of its contrary position, and instead simply cites SEPA's broad policy statements set forth at RCW 43.21C.020 and WAC 197-11-400 without attempting to explain the relevance of these provisions. Neither citation has any bearing upon the Hearing Examiner's subject matter jurisdiction. Citizens' constitutional and GMA related arguments should be dismissed.

Citizens also erroneously contends that the Hearing Examiner's jurisdiction extends to both the DEIS and EIS. There is no independent appeal right concerning a DEIS under state law, *see* WAC 197-11-680(3)(ii), or the City's SEPA regulations. SMC 25.05.680. Because the Seattle 2035 FEIS adopts by reference the DEIS as the "full EIS," the DEIS may only be considered to the extent it is not superseded by content in the FEIS.

IV. CONCLUSION

It remains undisputed that Citizens failed to comment on the DEIS for the proposed Seattle 2035 amendments. As a matter of law, this failure is construed as a lack of any objection to the City's environmental analysis under WAC 197-11-545 and SMC 25.05.545 and bars Citizens' appeal of the FEIS. Citizens is likewise unable to demonstrate the type of injury-in-

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

fact required to establish SEPA standing, as the alleged harms identified by its members are far too attenuated and remote from the Comprehensive Plan amendments at issue in this proceeding. The Examiner is respectfully requested to enter a dispositive order dismissing Citizens' appeal on these grounds.

DATED this 22nd day of July, 2016.

OGDEN MURPHY WALLACE, P.L.L.C.

By _____

James E. Haney, WSBA #11058
J. Zachary Lell, WSBA #28744
Attorneys for City of Seattle
OGDEN MURPHY WALLACE, PLLC
901 5th AVE, Suite 3500
Seattle, WA 98164-2008
(206) 447-7000

DECLARATION OF SERVICE

I, Gloria Zak, an employee of Ogden Murphy Wallace, PLLC, and certify that on the date below, I provided this Reply and Supplemental Declaration of Gordon S. Clowers via email and messenger to the Hearing Examiner, and via email and regular mail to Steven Cohn and Joseph Wert:

Office of the Hearing Examiner
Anne Watanabe, Deputy Hearing Examiner
Office of Hearing Examiner
700 Fifth Avenue, Suite 4000
Seattle WA 98124

Representative for Citizens for Livability in Ballard
Joseph Wert — joewert53@gmail.com
8714 - 23rd Avenue NW
Seattle WA 98117

with additional copy to

Steven Cohn — smcohn@speakeasy.net

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington this 22nd day of July, 2016.

Gloria Zak, Legal Assistant

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215