BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

Plaintiff In the Matter of the Appeals of, **SEATTLE FOR GROWTH AND SEATTLE MOBILITY COALITION,** Appellants. Of the adequacy of the Determination of Non-Significance (DNS) issued by the Seattle City Council for Comprehensive Plan amendments to allow Transportation Impact Fees.	Hearing Examiner File: **W-18-012 & W-18-013** **CITY'S MOTION TO DISMISS**

I. Introduction

In its motion to dismiss the Seattle City Council (City) claim that Appellants Seattle for Growth (SFG) and Seattle Mobility Coalition (SMC) (together Appellants) do not have standing to bring an appeal under the State Environmental Policy Act (SEPA) because the Appellants have not, and cannot, establish concrete and particularized injury-in-fact for this non-project action a proposed Comprehensive Plan amendments as required under SEPA. We would as the Examiner to reject this motion.

First, our appeal is based on the fact that impact fees, if implemented, will have an adverse affect on housing. The City's motion to dismiss is based on the faulty notion that because we have pointed out the connection of the economics of housing in our appeal that housing supply and price is not an environmental issue within the zone of "zone of interest" of SEPA. This is easy to rebut since the SEPA check list includes housing as the 9th item on the checklist jurisdictions use to determine environmental impact. The checklist asks, "Approximately how many units would be provided, if any? Indicate whether high, middle, or low-income housing" and "Approximately how many units, if any, would be eliminated?

Indicate whether high, middle, or low-income housing." The price and supply of housing, which we argue would be adversely affected by the imposition of impact fees is the basis of our appeal, and these issues are acknowledged in the requirements for implementing SEPA. And we represent the people who produce the housing subject to SEPA analysis.

The City argues that any environmental impacts created by the proposed Comprehensive Plan amendments are "totally conjectural because the fees have not even been established, nor has it been determined what types of development will be subject to the TIF Program."

This is simply false since even in the introduction in its motion to dismiss the City states that the proposal would make a new policy to establish "a methodology for determining deficiencies in the transportation system necessary to create a Transportation Impact Fee (TIF) program" and that they already have "a list and map of transportation infrastructure projects that would be eligible to receive transportation impact fee funds, when a TIF Program is established." There is no precedent for any city imposing a fee on the construction of bowling alleys or convenience stores for example, so it is safe to say that if the City imposes fees it will be on new housing. This is the essence of impact fees that are based on curing deficiencies in infrastructure created by new population growth.

Finally, members of the City Council have already stated their intent to impose fees as soon as this appeal is resolved. The Examiner should allow the appeal to go forward since either the City has no intention to impose fees in which case they are in violation of the spirit if not the letter of the Growth Management Act which requires implementation of Comprehensive Plans or they are engaged in a meaningless exercise of legislative authority or theater for purely political purposes. In either case, the City has failed to explain why it has found "no probable significant adverse environmental impacts" as required in WAC 197-11-340(1). This determination cannot be made because the proposal has been piecemealed in

order to avoid adequate environmental review, and the City has failed to show we lack standing in its motion.

II. Statement of Facts

A. Conjecture, Intent, and Law

While the City has suggested that impact fees and possible harm created by them are "totally conjectural," the City has engaged in a pattern of behavior that makes it clear that they intend to impose impact fees and so a TIF is an inevitable outcome of any amendment to the comprehensive plan. And, in the end, they are required to follow through with fees based on a plain reading of RCW 36.70A.070.

Conjecture

The City has proposed an amendment to the City's Comprehensive Plan that establishes the legal basis under RCW 82.02.050-090 for a TIF and creates a potential list of projects that would benefit from fees collected. The legislation itself identifies 21 projects (Attachment 2 Transportation Appendix V1a, page 2) by address and on a map. The amendments proposed explicitly state that, " Projects included in the list are eligible for expenditures using revenue from the transportation impact fee program" (Attachment 2 Transportation Appendix V1a, page 1). The City is either legislatively enacting a plan it has no intention of implementing with specific projects and a methodology for imposing fees or, more rationally and realistically, it is passing the plan with the intention of implementing fees.

Intent

With respect to the City's intentions, Councilmembers Lisa Herbold, Sally Bagshaw, and Mike O'Brien have said publicly in the Seattle Times (*Seattle is overdue for developer impact fees*, June 16, 2017) that, "We want to confirm that we're underway," and "The need

[for impact fees] is clear," and that "We believe impact fees represent a reasonable path forward," and that, "in the last three years we've been steadily moving forward toward adopting impact fees. Like all things land use-related, we are never able to move as quickly as we'd like."

Councilmember Herbold said in a message to constituents that while a Comprehensive Plan amendment would be "necessary but not sufficient" to impose fees, she also said,

> We'd planned to, in December 2018, consider 2018 Comprehensive Plan amendments for a transportation impact fee program. After passage, then from December 2018 to February 2019 the City Council would continue analysis and development of a potential impact fee rate schedule, development of options for credits based on planning geography, and legislation drafting. Finally, the Council had planned from March to April 2019 to consider legislation implementing a transportation impact fee program (Herbold email November 16th, 2018)

Finally, with respect to intent, 2019 is an election year. Councilmembers are proposing impact fees because it is popular. In an article called, "Herbold the hero – Councilmember goes to bat for constituents" (August 7, 2017, Westsideseattle.com) Herbold says, "'It's important for council members to not just pass something – but also to follow the legislation and make sure it's done,' she said." The article goes on in the next paragraph that, "These days, [Herbold] is focused on creating developer impact fee programs – to ensure that developers are contributing back to the communities in which they are building."

The Law

In terms of what is required by Comprehensive Plans, the state law is clear. Comprehensive Plans are not a conjectural exercise. The section on transportation in RCW 36.70A.070 Comprehensive plans—Mandatory elements states that,

> After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or

> strategies to accommodate the impacts of development are made concurrent with the development.

The law requires that the Comprehensive Plan be applied in local ordinances. This means that Seattle is obligated to pass a TIF if this proposal goes forward.

The proposed changes to the Comprehensive Plan are not, as the City argues, conjectural at all but the first step in an intentional effort to impose TIF to raise money to pay for projects and to satisfy a popular sentiment for impact fees. These changes would require action by the City in the form of an ordinance to impose TIF.

B. Loss of Housing

Obtaining declarations of the harm created by the uncertainty created by just from the consideration of impact fees has been impossible because of fears from developers and builders about reprisals from the City. One builder said when asked for a declaration said, "I'm trying to get my building permit so don't want to mess that up" (Declaration of Roger Valdez ("Valdez Declaration"), p. 1. However, some comments were offered with the promise of anonymity to underscore the point that with Mandatory Housing Affordability (MHA) already being considered, the promise of another fee is discouraging development.

> My . . . apartment project . . . got imposed the MHA fee because it went through a contract rezone (before we could get vested) and was subject to the Director's Rule that all rezones meet MHA. The MHA requirement (either fee or performance) has changed five times since we started this process. I think the fee is now $20.75/SF so for our 100k SF project; it is approximately a $2 million fee! That wiped away much-needed equity to get a loan to build this project. I won't do another project in the Rainier Valley, as it isn't worth it. (Valdez Declaration, p. 1)

Many builders and developers I spoke with said that along with MHA and now impact fees, they are not going to put any more projects through the permitting process. Many have said that they will only buy or build projects that are already entitled to avoid MHA fees and impact fees. They won't build anything new after that. One builder reported that he has already had to reduce the price on his townhouses because prices have fallen. He said that if

he moves forward that he would be "building for free," something he cannot afford to do, so he would start looking for land to build in other cities if impact fees pass (Valdez Declaration, page 1). A recent Colliers advertisement emailed to possible buyers of a project in the Roosevelt neighborhood stated

> MUP to be published by February 1, 2019***
> 7001 Roosevelt Way NE is a shovel ready apartment development, fully vested under the existing code.
> This will save a developer over $400,000 in MHA fees (Valdez Declaration, Exhibit A, page 3).

This clearly indicates that in the current regulatory environment that buyers are looking to avoid fees, sellers are pitching projects already entitled, and people who build housing are saying that they will not be able to build in Seattle if more fees are added. Furthermore, as we stated in our appeal, the City itself in its own documentation submitted in support of the DNS, cites the Seattle Pedestrian Master Plan Implementation Plan 2018-2022 that says this about impact fees:

> Additionally, there are well-documented arguments that hold that increased development fees will be passed on to consumers, exacerbating the already-high cost of housing in Seattle (SFG appeal).

We believe the City must consider what those "well-documented arguments" mean not just for housing costs, but the collateral damage to the wider community when people cannot afford to live in the city and must make longer, more costly commutes. So this is not a "bare assertion" like the one cited in *Trepanier v. City of Everett*. There is an abundance of evidence that rational actors in the housing economy will not build and the City's own master plan says that will increase prices. This will have the effect of limiting housing access because of price and if prices fall, builders won't build because additional fees will eliminate the return they need to finance construction. Unless the City can suspend the law of supply and demand or offer halt its efforts to impose MHA, builders, developers, and lenders are

already beginning to step back from creating new housing because of falling prices (*Seattle home prices are dropping. The last time this happened was during the recession*, KUOW, November 17, 2018**)**, increasing costs, and rising uncertainty in the market. Will demand for housing continue to rise? Will costs keep going up? The uncertainty created by new fees is an "immediate, concrete, and special" impact being felt already by builders and developers in Seattle. And if they are imposed they will either make projects infeasible because of falling prices or if demand continues to rise, prices will too because of the exaction being passed on. What environmental impacts will this have? This is what the City must analyze uner SEPA and is the basis of our appeal.

3. Zone of Interest

The argument above might seem to make the City's point that even while we persuade that damages are ongoing that they are economic in nature. The City cites *Harris v. Pierce County* that our injury is economic and that economic injuries are not "within the zone of interest protected by SEPA" (City's Motion to Dismiss page 7). This they argue means Seattle For Growth lacks standing. *Harris* found that, "SEPA is concerned with broad questions of environmental impact . . . Accordingly, our courts hold that economic interests are not within the zone of interests protected by SEPA."

However, our appeal does not allege damage to "economic interests" at all. Instead, we also appeal to Harris because the court cites in that case RCW 43.21C.020 that includes in that includes in the "broad questions of environmental impact" the ability of people to **"**fulfill the social, economic, and other requirements of present and future generations of Washington citizens." Our request for the City to complete further environmental analysis is not based on economic injury but on the broader impact on people who will have to make different

decisions when housing is scarce and expensive; when they do, those decisions are likely to result in impacts to the environment that should be analyzed under SEPA.

4. Appellants satisfy the requirements for SEPA standing.

Along with the points above, the City Code provides that "any interested person" may appeal a DNS to the Hearing Examiner. SMC 25.05.680.B.1. An "interested person" is a defined term, meaning "any individual, partnership, corporation, association or public or private organization of any character, significantly affected by or interested in proceedings before an agency." SMC 25.05.755. Seattle For Growth is an established non-profit that has weathered efforts to challenge its standing before (W-14-001, Order on Motion to Dismiss) and represents people who are "affected by" the City's proposal.

Interested persons must also meet the two-part judicial SEPA standing test. In the Matter of the Appeal of *Laurelhurst Community Club et al.*, Hearing Examiner File No. W-11-007, Order on Motions to Dismiss/Cross Motion for Summary Judgment (April 10, 2012), at 2 ("Laurelhurst Community Club"). An appellant has SEPA standing if they: (1) allege an interest that falls within the zone of interests protected by SEPA; and (2) allege an injury in fact. We believe as argued above that we meet these two tests.

Kucera v. State Department of Transportation, 140 Wn.2d 200, 212, 995 P.2d 63 (2000), citing *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994). A nonprofit corporation has the standing of its members. Save a *Valuable Environment v. Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978). Again, Seattle For Growth has the standing of its members who will have to pay impact fees, pass them on to their customers and reduce the number of units they build each of which adversely affects housing supply and will have environmental impact that should be analyzed under SEPA.

On a motion to dismiss for lack of SEPA standing, courts construe the evidentiary facts in favor of the nonmoving party. See Leavitt, 74 Wn. App. at 679 (noting alleged impacts were "speculative and undocumented; they are possible, but not necessary impacts. However, the claimed impacts are within the interests protected by SEPA and Leavitt alleges that they directly impact her property and interests. We will assume Leavitt has established standing[.]"); see also Kucera, supra, 140 Wn.2d at 200.

Here, Appellants have SEPA standing because they allege interests that fall within the zone of interests protected by SEPA and they allege an injury in fact.

III. CONCLUSION

The Examiner should reject the motion for dismissal because it has failed to demonstrate the Seattle For Growth has no standing. The City's own motion to dismiss holds enough language of intent to extinguish the argument that imposition of the fees is conjectural. The piecemeal approach they've taken is a deliberate effort to evade adequate analysis of the impact on housing production that their policies are already having, an analysis that is at the heart of the State Environmental Policy Act as stated in the statement of legislative intent in RCW 43.21c.020. The fact that the City, along with an onerous per square foot tax on all new housing, is even considering another fee is having specific and concrete injury already. Our appeal doesn't assert economic damages or even challenge the underlying legality of impact fees; our appeal asks the City to do what SEPA requires.

Dated this 28rd day of January, 2019

By: s/Roger Valdez

Director
Seattle For Growth