BEFORE THE CITY COUNCIL FOR THE CITY OF SEATTLE

In re Proposed Final Assessment Roll for Local Improvement District No. 6751 ("Waterfront LID")	Hearing Examiner File No. CWF-0412 NOTICE OF APPEAL OF HEARING EXAMINER'S FINDINGS AND RECOMMENDATION ON EIGHTH AND LENORA LLC'S OBJECTION TO WATERFRONT LID NO. 6751 PROPOSED FINAL ASSESSMENT FOR PARCEL NO. 0660000575

TAXPAYER ("EIGHTH AND LENORA LLC") files this appeal pursuant to RCW 35.44.070, Seattle Municipal Code 20.04.090, City of Seattle Resolution 31915, the notice of the Seattle Office of the City Clerk dated December 30, 2019, and the Hearing Examiner's Findings and Recommendation issued September 8, 2020 ("Examiner's Recommendation").

I. Eighth and Lenora LLC / Appellant

The taxpayer filing this appeal is:

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II. Eighth and Lenora LLC's Representatives

EIGHTH AND LENORA LLC'S representatives in this matter are:

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III. Statement of Eighth and Lenora LLC's Interest

EIGHTH AND LENORA LLC owns the property that is subject to the proposed final assessment described in Section IV. The property is called the Cirrus and is an apartment building with ground floor retail and a restaurant, located near the Denny Triangle area.

The basis of the proposed assessment is a Final Special Benefit/Proportionate Assessment Study for Waterfront Seattle Local Improvement District ("Final Study"), dated October 1, 2019 and prepared by Robert Macaulay with ABS Valuation (the City's

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appraiser). The Final Study proposes assessments that are purportedly limited to paying for the LID-funded components—namely, the Promenade, Overlook Walk, Pioneer Square Street Improvements, Union Street Pedestrian Connection, Pike/Pine Streetscape Improvements, and Pier 58 (together, the "LID Improvements"). The Final Study purports to exclude charges for other improvement projects in the Central Waterfront, and specifically those WSDOT had already agreed to pay for and construct: viaduct demolition, the new Alaskan/Elliott Way surface street, the new/improved Seawall, the State Route 99 Tunnel, the Pier 62 rebuild, Bell Street improvements, and parking spaces WSDOT planned fronting piers between Pike and Madison (together, the "WSDOT Improvements"). But because construction was not complete on the LID Improvements or the WSDOT Improvements at the time the Final Study was prepared, Mr. Macaulay's October 1, 2019 "Before" and "After" valuations are both based on hypothetical conditions rather than actual facts. On February 4, 2020, Eighth and Lenora LLC timely filed an objection to the assessment, which was based on the Final Study.

IV. Matter Under Appeal

EIGHTH AND LENORA LLC appeals the Hearing Examiner's recommendation to deny Eighth and Lenora LLC's objection to the City of Seattle's Waterfront Local Improvement District No. 6751 proposed final assessment dated December 30, 2019 against the following property:

> King County Parcel No. 0660000575
> Site Address: 2030 8th Ave. Seattle, Washington
> Proposed Final LID Assessment for Parcel: $148,501

See Examiner's Recommendation at 61-62, 104. To avoid repetition, Eighth and Lenora LLC incorporates the evidence and arguments raised before the Hearing Examiner into this appeal. In particular, Eighth and Lenora LLC points the City Council to Eighth and Lenora

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LLC's initial Appeal Petition, *Frye* motion, Closing Brief submitted at the close of its case-in-chief (dated 4/16/2020), and supplemental Closing Statement submitted at the close of the City's case-in-chief (dated 7/7/2020).[1]

As discussed more fully below, Eighth and Lenora LLC specifically appeals the following Findings and Recommendations in the Hearing Examiner's September 8, 2020 Recommendation: Pages 61-62, 104, Sections II.6, II.7, II.14, II.15, II.18, II.19, II.20, II.21, II.22, II.23, II.24, II.25, II.26, II.27, II.28, II.29, II.30, II.31, II.32, II.33, IV.A, IV.B.1, IV.B.2, IV.B.3, IV.B.4, IV.B.5, IV.B.6, IV.B.7, IV.B.8, IV.B.9, IV.B.11(a), IV.B.11(a)(i), IV.B.11(a)(ii), IV.B.11(a)(iii), IV.B.11(a)(iv), IV.B.11(c), IV.C.3, IV.C.4, IV.C.5, IV.C.8, IV.C.9, IV.C.11, IV.C.12, IV.C.14, IV.C.18

Eighth and Lenora LLC also appeals the Hearing Examiner's failure to make findings of fact or recommendations on material issues raised during Eighth and Lenora LLC's appeal that were supported by law, expert testimony, and fact. The Final Study fails in numerous ways to satisfy the basic requirements of a LID assessment study, and the Examiner's Recommendation ignores the many deficiencies in the Final Study. In fact, the only instances in which the Examiner recommended anything other than denial of objectors' appeals were where the City's appraiser confessed error. The appraiser's proposed assessments, and the Examiner's Recommendations, would have the City impose arbitrary

[1] Because the City has not provided "metered index numbers," our appeals cannot reference them. *See* SMC 20.04.110. However, as part of the prehearing conference, we recommend that the Public Works committee secure and provide appellants with such a record, so that the appeals can then be supplemented with that additional information, so as to make the Committee's consideration of each individual appeal more efficient and fair. Until that is provided, unless otherwise stated, citations to the record before the Hearing Examiner are to the record for CWF-0233. Based on the Examiner's electronic records, it appears most of the materials submitted on behalf of all objectors retained by Perkins Coie are part of this case file.

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and capricious Waterfront LID special assessments based on "fundamentally wrong methods."

The special benefit for which special taxes are assessed must be "actual, physical and material and not merely speculative or conjectural." *Heavens v. King Cty. Rural Library Dist.*, 66 Wn. 2d 558, 563, 404 P.2d 453 (1965). For a proposed assessment roll to comply with the law, the assessments may not materially exceed the actual special benefit conferred by the LID Improvements. *Id*. The special benefit assessment cannot include charges for general benefits enjoyed by the public at large. *Id*. Further, LID assessments must be proportionate. *Id.* Failure to meet any one of these legal requirements is fatal to the assessment. In this case, the proposed assessment fails each of the legal requirements for special assessments and must be annulled as arbitrary or capricious, or founded on fundamentally wrong methods.

Legal Requirement: Actual, non-speculative special benefit **ABS Study**: Estimates a hypothetical benefit based on "Before" values that increase "actual 2019" values (unstated) assuming the WSDOT Improvements were in place in October 2019 (they were not), and an "After" value purporting to assess the value of properties with the LID improvements in place at least five years before anticipated completion.
Legal Requirement: Cannot materially exceed the special benefit **ABS Study**: ABS calculates a special benefit of $379,000 assuming the LID Improvements were in place and providing benefit in October 2019. However, the LID Improvements will not be completed until the end of 2024 if the City meets its current schedule, and many of WSDOT's alternative improvements will not be built. The present value of future improvements deliverable in five years is significantly lower than the current value of improvements that already exist. Further, ABS's own materials show that benefits may not accrue for at least five years after they are completed, in 2029. If the hypothesized special benefits are discounted to present value, the assessments materially exceed the hypothesized special benefits.

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Legal Requirement: Actual, non-speculative special benefit—Date of valuation/COVID **ABS Study**: The City has not finalized the assessment roll. After the City's appraiser prepared his Final Study in October 2019, and the City issued its preliminary roll in December 2019, COVID devastated downtown hotel and retail properties. The Hearing Examiner finds that COVID is irrelevant because it happened after ABS's appraisal and the City's preliminary roll. On the contrary, the City's assessments have yet to be made and must be based on actual special benefits. While that does not mean ABS's appraisal was wrong when completed, values and benefits need to be reanalyzed before assessments are finalized in light of the unprecedented changes to the downtown real property market.
Legal Requirement: Actual benefit that cannot materially exceed special benefit—Assessment cannot include value attributable to future WSDOT Improvements. **ABS Study**: The City's appraiser asserts that the City is not collecting assessments "based on the value of WSDOT's planned improvements." *See* Final Study at 3. However, the City's own expert, Mark Lukens, acknowledged that was false. In the "Before" condition, the City's appraiser increased 2019 property market values as though WSDOT had completed its work by 2019. The proposed assessment is against this hypothetical WSDOT-enhanced "Before" value, which ABS acknowledges is (to some unstated extent) higher than actual 2019 market values. The City is collecting an assessment against both the 2019 current values and the phantom 2019 WSDOT market value lift, in direct contravention of law and the City's promise not to impose an assessment based on the value of viaduct demolition and the other components of WSDOT's planned work.
Legal Requirement: Benefits must be special, not general **ABS Study**: The City's appraiser fails to determine or explain what general benefits arise due to the LID Improvements. However, the far-reaching and public nature of the improvements make any benefit arising from them general—not special.
Legal Requirement: Must comply with appraisal standards **ABS Study**: ABS's valuation methodology cannot be tested. It is a hybrid of "Individual" and "Mass" appraisal techniques, but fails to meet USPAP requirements for either. Until the Examiner admonished ABS, ABS even asserted its analysis was "confidential and proprietary." ABS's analysis and conclusions can neither be tested nor replicated. The Final Study fails to meet basic standards for admissibility and must be remanded.

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Legal Requirement: Actual and measurable special benefit **ABS Study**: ABS's proposed assessments are assigned rather than measured, as demonstrated by formulas in ABS's spreadsheets. The percentage assignments are based on a host of "micro-judgments" that are not supported by any documentation, nor capable of replication or quality assurance/quality control. The assessments are undocumented, unreliable, and not supported by empirical studies, data, or reports.
Legal Requirement: Actual and measurable special benefit—Park benefits must be supported by empirical evidence **ABS Study**: Dr. John Crompton, the world's preeminent expert regarding the economic value of parks and other public amenities and on whom ABS purported to rely, testified that ABS had completely misapplied his work and dramatically overstated both the distance to which economic benefits might extend from the LID Improvements and the extent of any anticipated benefit within the potentially benefited area.
Legal Requirement: Actual special benefit—Must take into account potential disamenities **ABS Study**: The appraiser ignores the negative value impact of five years or more of construction, as well as other potential disamenities associated with public places.
Legal Requirement: Cannot prematurely commit to build **ABS Study**: The City has not completed NEPA review or other entitlement process for its Pier 58 plans or planned Pike Pine or Pioneer Square improvements for which assessments are being imposed. But finalizing the roll is a commitment by the City to build the improvements, which is a violation of legal process and commits the City to build things it may not secure permission to build.

In addition to these general objections, there are property-specific issues raised by Eighth and Lenora LLC as to which the Examiner also erred, discussed in the course of the appeal statement below.

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V. Standard of Review

"When considering the assessment roll, the city council sits 'as a board of equalization.'" *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 948, 320 P.3d 163 (2014) (quoting RCW 35.44.080(2)). "As such, the council or hearings officer 'will consider the objections made and will correct, revise, raise, lower, change, or modify the roll or any part thereof or set aside the roll.'" *Id*. at 949 (quoting RCW 35.44.080(3)).

The proposed assessments are presumed correct, "unless overcome by clear, cogent and convincing evidence." *Hasit*, 179 Wn. App. at 948. This standard is less deferential than the heightened presumption of correctness on judicial appeal because "applying these elevated standards at the municipal hearing would afford unwarranted deference to a report prepared under contract by a private appraisal firm." *Id.* at 949. Importantly, "a presumption is not evidence and its efficacy is lost when the other party adduces credible evidence to the contrary.... The sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue...." *In re Indian Trail Trunk Sewer Sys.,* 35 Wn. App. 840, 843, 670 P.2d 675 (1983). In other words, because objectors have presented credible evidence showing that the City's proposed assessment is arbitrary, capricious and founded on a number of fundamentally wrong foundations, the burden shifts to the City to prove the assessments are actual, measurable, special, non-speculative and proportionate. The City failed that burden.

VI. Grounds for Appeal

EIGHTH AND LENORA LLC appeals the Hearing Examiner's Findings and Recommendations on the following grounds.

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Eighth and Lenora LLC Not Required to Provide A Special Benefit Study

1. Contrary to the Examiner's findings and recommendations, there is no requirement that experts or property owners provide an alternative special benefit calculation under these circumstances—to do so would also require the same improper speculation the City's expert engaged in, given the timing and information provided. *See, e.g.*, Decl. of Anthony Gibbons ISO Closing Stmt., ¶ 3(dated 7/7/2020); *see also* Decl. of Ben Scott ISO Closing Stmt., ¶ 3(dated 7/7/2020). A Washington court has explained: "[W]e have explicitly rejected an argument that, because certain protestors 'failed to offer expert testimony at the city council hearing[,] the presumptions [in favor of the assessment] were still operative as to their property.'" *Hasit*, 179 Wn. App. at 946 (quoting *In re Indian Trail Trunk Sewer,* 35 Wn. App. at 843); *see also Kusky v. City of Goldendale*, 85 Wn. App. 493, 933 P.2d 430 (1997) (although appraiser did not submit an appraisal, he provided expert opinion showing that improvements actually diminished value of the property). Here, Ben Scott testified that he is an expert in reviewing mass appraisal reports and analyzing their impact on individual properties - precisely the matter at issue in this appeal. *See* 3/5/2020 Hrg. Tr. at 13:1-4 (laying foundation as expert witness while testifying on behalf of a different appellate represented by Perkins Coie). The Hearing Examiner erroneously dismissed the weight of Mr. Scott's testimony, given his professional expertise and experience. In fact, no independent evidence is required at all if, for example, objectors show that the assessment was grounded on a fundamentally wrong basis due to an error in the City's appraiser's methods—as is the case here. *Hasit*, 179 Wn. App. at 947 (citing *Doolittle v. City of Everett*, 114 Wn. 2d 88, 106, 786 P.2d 253 (1990)). As a simple example, a property owner could simply point out that the square footage assumed in the City's appraisal was incorrect. For these reasons, Eighth and Lenora LLC appeals the following

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portions of the Examiner's Recommendation: Sections II.14, II.15, IV.A, IV.B.11(a), IV.C.8, IV.C.9, and IV.C.11.

No Actual, Measurable, Non-speculative, Proportionate, Special Benefit

2. RCW 35.43.040 provides cities and towns authority for ordering local improvements and for levying and collecting special assessments "on property specially benefited thereby[.]" The cost and expense of the local improvement "shall be assessed upon all the property in accordance with the special benefits conferred thereon." RCW 35.44.010.

3. No analysis of general benefits. Special assessments have been "held valid for the construction and improvement of streets, curbs, gutters, sidewalks, and for the installation of sanitary and storm sewers, drains, levees, ditches, street lighting, and water mains." *Heavens*, 66 Wn. 2d at 563. "All such assessments have one common element: they are for the construction of local improvements that are appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the municipality." *Id*.

4. Eighth and Lenora LLC's property is not specially benefited by the LID Improvements. The primary purpose and effect of the LID Improvements are to benefit "members of the whole community" and the public at large. *See, e.g., id*. at 565 ("it is plain that a public library is for the benefit of the members of the whole community individually and collectively who may be served by it"). Mr. Macaulay's own chapter of the LID Manual states clearly that appraisers should "[c]onsider general benefits as well as special benefits" (Hrg. Exhibit 117 (LID Manual) at 58[2]) and he admits that "general benefits

[2] "Hrg. Exhibits" refer to exhibits that were submitted on behalf of multiple objectors represented by Perkins Coie during its seven days of hearing before Hearing Examiner Vancil (March 3, March 5, March 11, March 12, April 13, April 14, and April 16, 2020) and during the two days of cross-examination of the City's witnesses (June 23, 25 and 26, 2020). For ease of reference,

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probably accrue to the LID area" as well (*see* 6/23/2020 Hrg. Tr. at 22:4-12). Eighth and Lenora LLC's expert confirmed that if an appraiser "identifies both general and special benefits, these benefits should be clearly distinguished and explained, and only special benefits should be included in the After assessment." Gibbons Decl. ISO Closing Stmt., ¶ 4 (dated 7/7/2020); *see also* 3/3/2020 (A. Gibbons) Hrg. Tr. at 96:6-97:4. It is undisputed that Mr. Macaulay did not analyze or measure general benefits, including those arising from construction necessary to meet basic design standards. *See* Hrg. Exhibit 117 (LID Manual) at 58 ("[c]onsideration may also be given to those construction costs related to meeting design standards which may be general benefits as distinct from construction costs emanating from requirements of the LID project"). To the extent Eighth and Lenora LLC's property may benefit from the LID improvements, the benefit is general and incidental, and failure to consider general benefits was a fatal flaw in the City's methodology. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections IV.B.7, and IV.B.11(a)(i), IV.B.11(a)(iv), and IV.C.4.

5. LID Improvements not necessary. Unlike typical LID projects, the Waterfront LID improvements are largely unnecessary to the functionality of any particular property, including Eighth and Lenora LLC's property. *See In re Schmitz,* 44 Wn.2d 429, 433, 268 P.2d 436 (1954) (assessment levied for the purpose of raising the grade of a road by 16 to 18 feet held invalid where owners would have benefitted equally from increase of only 9 feet); *Appeals of Jones*, 52 Wn.2d 143, 324 P.2d 259 (1958) (assessment against land at intersection for new water main for hydrant held invalid because land was already afforded functional hydrant at nearby street). Here, Eighth and Lenora LLC provide

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Eighth and Lenora LLC has attached a master list of the hearing exhibits as Attachment A to this appeal notice.

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evidence. Here, Eighth and Lenora LLC provided testimony through Elton Lee, taxpayer representative, who testified that the Cirrus caters to Denny Triangle and South Lake Union, rather than the waterfront area. See 3/11/2020 (E. Lee) Hrg. Tr. at 149:7-25. The building has brief tenancies with demand driven primarily by Amazon employees desiring to live near Amazon's South Lake Union employment centers. *Id.* at 150:18-151:2. There is simply no special benefit to the Cirrus building for additional access to the Seattle waterfront. The fact that there is no case law differentiating between binary improvements and parks does not change the law prohibiting assessments on properties already adequately served by existing amenities. *See* Examiner's Recommendation at IV.C.3 (reasoning that "no case law is provided to support the differentiation between a hardscape benefit and the more ephemeral benefits of park"). Nor does the Examiner's reasoning excuse the City's failure to account for existing amenities as part of the special benefit calculation. As Dr. Crompton testified, existing view amenities may in fact diminish the incremental effect of new park improvements on the value of properties, much like turning on a weak light in an already brightly illuminated room. *See* Hrg. Exhibit 94 (Crompton's Report) at 12-13.

6. To the extent benefits can be considered "special" as opposed to general, they are nominal or nonexistent for many properties even in the Central Waterfront, which already has a promenade, viewpoints, as well as connecting streets and bridges. *Douglass v. Spokane Cty.*, 115 Wn. App. 900, 64 P.3d 71 (2003) (properties' fair market value did not change due to expansion of sewer service *near* owners' parcel which were already connected). Here, again, Eighth and Lenora LLC provided testimony that the primary reason tenants choose the Cirrus is not proximity to the water, but instead proximity to major employment centers like Amazon in the South Lake Union area. Even if the City could assess for a view change (and it has promised not to assess for viaduct removal), the fair

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market value of EIGHTH AND LENORA LLC'S property has not changed because the LID Improvements have not improved the property's waterfront view or access to the waterfront, nor will they when the City anticipates completion in 2024. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections IV.C.3, IV.B.9, and IV.C.3.

7. No analysis of special detriments. The Final Study fails to properly account for special detriments. *See Kusky*, 85 Wn. App. at 501 (city failed to consider the costs to owners for removal and cleanup of underground storage tanks discovered during the improvement project). Mr. Lee testified that the market would not support increasing rental rates today to absorb the LID assessment when the special benefits, to the extent any exist, will not be effective until at least 2024. 3/11/2020 Hrg. Tr. at 157:21-158:15. Therefore, the LID assessment in an immediate expense that comes with no immediate increase in revenue, thereby decreasing the property value. This was not accounted for by Mr. Macaulay. Although Mr. Macaulay claims he analyzed impacts on the City's planned elimination of 450 parking stalls on a parcel-by-parcel basis, there is no explanation of how lost parking might be a detriment, and no property-specific parking analysis in any of his materials. 6/23/2020 Hrg. Tr. at 185:20-24; 186:14-187:12.

8. Likewise, there was no analysis of the risks associated with disamenities such as increased crime, homelessness and unsanitary conditions, and Mr. Macaulay did not quantify the risk that the waterfront will not in fact be maintained. 6/23/2020 Hrg. Tr. at 193:21-194. Instead he relied on the maintenance ordinance (Ordinance 125761) to dismiss these concerns. However, Mr. Foster explained that although the ordinance anticipates that City Council will appropriate $4.8M each year for waterfront operation, it does not bind any

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future city councils or guaranty funding. 6/26/2020 Hrg. Tr. at 12:7-20; 15:2-10.[3] And if the City fails to appropriate that baseline funding, there is an option to suspend or terminate the maintenance agreement. *Id*. at 13:4-14:2.

9. There was also no consideration of negative impacts from another four-plus years of construction (at least). Mr. Macaulay reasoned that construction impacts are not compensable in eminent domain cases. However, there is nothing in the LID statutes or case law allowing him to dismiss these actual, non-speculative impacts. Because future special benefits calculations are inherently speculative, Washington's eminent domain statute specifically allows condemnees to postpone special benefits assessments until improvements are in place. RCW 8.25.220; *State v. Green*, 90 Wn.2d 52, 56, 578 P.2d 855 (1978). Moreover, the studies that Mr. Macualay relied on demonstrate that construction disamenity is real and does have a near-term negative effect on property values. *See* Gibbons Decl. ISO Closing Stmt. (dated 7/7/2020), Ex. C at 24 (during construction of Rose Kennedy Greenway, the Greenway district "significantly" lagged in value). For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections II.25, IV.B.8, and IV.B.9.

10. Special benefit estimate is speculative. When calculating a special benefit, "[f]air market value cannot include a speculative value." *Bellevue Plaza, Inc.*, 121 Wn.2d at 411. "When an appraiser uses a factor 'beyond the knowledge of reasonable certainty', it becomes pure speculation." *Id*. (quoting *In re Local Imp. 6097,* 52 Wn.2d 330, 335–36, 324 P.2d 1078 (1958)).

[3] The Examiner suggests that the issue of whether future City Councils are bound is not at issue. However, the issue of maintenance was part of Mr. Macaulay's special benefit analysis and therefore the assessment amounts.

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11. Assuming without conceding that one day, the City's planned LID Improvements might increase the value of neighboring properties to some extent, that potential benefit is many years away and speculative. While appraisers tolerate some degree of estimation and judgment, Eighth and Lenora LLC's expert testified that Mr. Macaulay's Final Study is far too speculative to satisfy industry practices and standards.

12. Although LIDs are sometimes finalized prior to completion of improvements, this is typically just six month or a year prior, and the assessments are otherwise supported by the near-term construction of the improvements. *See* 3/3/2020 (A. Gibbons) Hrg. Tr. at 117:20-118:9; 119:5-120:9; 122:15-124:9. By contrast, the estimated special benefits here will not be realized for four or five years. In the meantime, there is permitting risk, construction risk, and general economic risk (e.g., COVID), which renders ABS's 2019 hypotheticals inherently speculative and unreliable because it is impossible to predict which, and to what extent, different factors will impact value. *Id*. at 51:13-53:5. Ultimately, Mr. Macaulay concedes that there is inherent uncertainty in valuing the future delivery of projects because "we can't read the future." 6/23/2020 Hrg. Tr. at 79:18-80:8. As he testified: "I just don't know what the market value would be as of the date the project would be finally constructed" because "[t]here could be a lot of elements in the market that did occur between now and then that impact value." 6/25/2020 Hrg. Tr. at 212:9-13; *see also id.* at 211:8-20 (no way to know if his estimates will be higher or lower than comparable sales in 2024 because "markets tend to fluctuate over time" and "I can't predict the future").

13. The record is clear that while no one can know what "special benefit" might accrue to these properties in four years (if any), we do know that there are no actual benefits now. The LID improvements provide no immediate special benefit to property owners because the bulk of the components are still in design stages. *Cf. Hasit*, 179 Wn. App. 917

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(assessments calculated on a fundamentally wrong basis by including costs for an oversized sewer system for future users).

14. Further, there are no "plans and specifications" on file with the Clerk's Office for the LID Improvements, and it is unlawful to move to final assessments without such "plans and specifications." Ordinance 125760, Section 3; *Local and Road Improvement Districts Manual for Washington State 6th Edition*, pp. 3, 19, 31, 44 (2009). It is also unlawful to bind future City Councils and future budgets to spend hundreds of millions of dollars on projects still early in the design process. *See* Washington Attorney General Opinion 2012 No. 4 (May 15, 2012)); *cf. City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 787 P.2d 39 (1990) (assessment upheld because City has apportioned costs of programs and included "only so much of the overall costs" that took place within and benefitted the assessed properties).

15. The COVID-19 crisis highlights how fundamentally speculative and unfair it would be to base a special benefit assessment on twin 2019 hypotheticals for improvements anticipated to be delivered five years later. Even before COVID, it was speculative to assume that market highs experienced in October 2019[1] would be sustained through 2024, after an already extraordinarily long expansion period. *See, e.g.,* 3/3/2020 (A. Gibbons) Hrg. Tr. at 117:6-118:9, 119:17-120:9. And Mr. Macaulay conceded: "[W]hen I was doing my analysis in October 2019, who would have thought that this COVID issue would happen?" 6/23/2020 Hrg. Tr. at 80:3-8. At his deposition in late February, his "thought process was that the market was going to continue to go up." *See* Gibbons Decl. ISO Closing Stmt. at ¶ 12 (dated 7/7/2020). Although COVID does not change actual values as of October 2019 (*see* Examiner's Recommendation at 109), the pandemic has impacted *current* values and rendered the hypothetical October 2019 Final Study valuations outdated.

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16. As another example of how future events could affect the accuracy and reliability of the City's 2019 proposed assessment, Eighth and Lenora LLC recently requested the Hearing Examiner re-open the record to allow the City to explain whether the assessments against property owners within the LID are, in fact, being used by the City to fund the emergency dismantling and reconstruction of Pier 58.[4] It has been reported that the City plans to use LID funding to pay for the expedited, emergency repairs and replacement.[5] If true, the City would be improperly imposing costs on property owners within the LID for improvements that are required to maintain the safety of Pier 58 and to remove a threat to critical salmon habitat and City infrastructure—this does not provide any special benefit to LID property owners.

17. There is also no certainty the improvements will be delivered on time. Mr. Foster testified that 2024 is not a hard deadline for delivery of the improvements, and a delay in construction schedule would not constitute a "material change" under the City Council's ordinance authorizing the improvements. In other words, the City cannot guarantee that the LID Improvements will be delivered as expected in 2024 or any time after that. 6/26/2020 Hrg. Tr. at 18:5-13. Meanwhile, Eighth and Lenora LLC's experts Reid

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[4] Associated Press, *Seattle mayor approves 'emergency dismantling' of waterfront Pier 58* (King 5, Aug. 15, 2020), available at https://www.king5.com/article/news/local/seattle/seattle-mayor-approves-emergency-dismantling-of-waterfront-pier-58/281-f6b7c7d0-78f2-4826-97c8-0b60d4097aa3; *See* Aug. 21, 2020 Memo from R. Holtz et al. to L. Arber re HPA Request for Pier 58 (Waterfront Park) Emergency Demolition Project, *available at* https://www.govonlinesaas.com/WA/WDFW/Public/EnSuite/Shared/pages/util/StreamDoc.ashx?query=UxFpa3XqI8020u5QdaIfpJXX0C+FjfKT5/OpyMkto74=; *see also* Aug. 13, 2020 Ltr. from H. Burton to D. Graves et al. re Review of Pier 58 Movement Observation Report & Recommendations, *available at* https://www.govonlinesaas.com/WA/WDFW/Public/EnSuite/Shared/pages/util/StreamDoc.ashx?query=EvGV09Syk1HCKYhwoN5Gqo5VpGOk5QBr3KFzTsfO4Lw=.

[5] Asia Fields, *'Substantial' pier shift closes Seattle's Waterfront Park* (Seattle Times, Aug. 8, 2020), *available at* https://www.seattletimes.com/seattle-news/substantial-pier-shift-closes-seattles-waterfront-park/.

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Shockey and Richard Shiroyama testified via declaration as to the City's permitting gauntlet, and potential delays and project changes inherent in those processes, that call into question the assumption that the City can deliver the LID Improvements by 2024. Hrg. Exhibits 110 (Shockey Decl., dated 4/15/2020); 111 (Shiroyama Decl., dated 4/15/2020); 107 (Anderson Decl., dated 4/15/2020).

18. Unsurprisingly, of the over one hundred LIDs Mr. Macaulay has worked on, he could not point to a single one where the assessment roll was finalized five years in advance of the anticipated project completion. *See* 6/23/2020 Hrg. Tr. at 16:1-22. Likewise, he has never recommended final special assessments based on designs less than 30 percent complete, other than in this case. *Id*. at 17:22-18:2. Nevertheless, he proceeded with his 2019 hypothetical before, hypothetical after analysis because the City "wanted to get moving ahead with the project" and gave him assurances that designs would not change. *Id*. at 66:17-25. He performed no independent due diligence to determine the reliability of the City's estimates for completion of the LID Improvements, or to ensure that proposed designs or cost estimates were not going to materially change. *Id*. at 78:14-79:13. Yet he agreed that if any of his assumptions are incorrect, his opinion of market value would need to be revised. 6/23/2020 Hrg. Tr. at 68:19-69:8; *see also id*. at 64:13-65:12; 67:10-16; 68:11-18.

19. The City has cited no authority—and Eighth and Lenora LLC is aware of none—that affirms the use of hypothetical, anticipatory Before and After values in order to estimate and assess taxes for "actual" special benefits that will not accrue for another five years (if all goes off without a hitch). To the contrary, the hypothetical assumption that all of the Before and After Improvements are constructed as of October 1, 2019 allows Mr. Macaulay to base his estimates on "pure speculation." *Bellevue Plaza, Inc.*, 121 Wn.2d at

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411. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections II.6, II.7, II.33, IV.B.1, IV.B.2, IV.B.3, IV.B.5, IV.B.6, IV.B.11(c), IV.C.12, IV.C.14, and IV.C.18.

20. Failure to discount special benefit estimates to account for risks and present value. Due to the inherent uncertainty, Eighth and Lenora LLC's expert opine that the Final Study should have accounted for risks associated with delivery of the improvements (including permitting risk, construction risk, general economic risk) and any special damages associated with interim construction. 3/3/2020 (A. Gibbons) Hrg. Tr. at 119:17-120:9, 59:20-60:20. In addition, as is typical appraisal practice, Mr. Macaulay should have discounted the anticipated 2024 benefit to account for the time value of money. *Id*. at 54:17-55:1; *see also* Gibbons Decl. ISO Closing Stmt., ¶ 13, 16 (dated 7/7/2020) ("Appraisers routinely consider the impact of future conditions [through] discounted cash flow analysis.").

21. Mr. Macaulay acknowledged that appraisers can discount the value of a future condition not in place at the date of valuation and can discount for the time value of money. 6/23/2020 Hrg. Tr. at 74:1-75:1. And he agreed that if improvements are not built until 2024, "[y]ou would be discounting it back to a present value." *Id*. at 77:2-19. Discounting would also have been consistent with his approach for analyzing special benefits to vacant land. He testified that the difference between similarly situated vacant sites slated for development and already developed sites was that the labor, capital and risks associated with development had not yet been borne for those vacant sites. Therefore, the vacant land was not valued as highly and received a smaller assessment. 6/19/2020 Hrg. Tr. at 28:1-13; *see also* 6/18/2020 Hrg. Tr. at 205:9-12. *A fortiori*, a project that has not been

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fully permitted, has not completed environmental review, and has not reached full design is presently worth significantly less.

22. The City's hotel expert, Mr. Lukens, likewise explained that to calculate present value, an appraiser would consider discount rates for land development to account for inflation, entitlement risks, cash flow issues, construction, etc. 6/26/2020 Hrg. Tr. at 184:5-185:22. And Mr. Lukens agreed that it would be reasonable for an appraiser to refer to the PricewaterhouseCoopers Korpacz study for applicable discount rates. *Id*. at 187:18-189:23; *see also* Gibbons Decl. ISO Closing Stmt, ¶ 17 (dated 7/7/2020).

23. Applying the Q19 Korpacz rates and assuming arguendo that Macauley's total estimated special benefit is correct, $447,908,000 discounted to 2019 present value for raw land to be developed by 2024 is approximately $153,600,000. *See* Gibbons Decl., ¶ 17, Ex. A. Notably, this is lower than the City's proposed $171,000,000 assessment. Thus, ignoring momentarily all of the other methodological and other flaws discussed here and in Eighth and Lenora LLC's case-in-chief, and assuming that the LID Improvements provide special benefits as soon as they are complete in 2024, Mr. Macaulay's hypothetical assessment materially exceeds special benefits when reduced to present value. Further, to the extent the City is arguing that because they are permitted to assess 100% of the special benefit, the special benefit estimate can be off by 60.8% because they only assess 39.2% of that benefit, the City is again wrong. After applying proper discounting, the City's proposed special benefit assessment is far more than 39.2% of the total estimated special benefit, and in fact exceeds 100% of the total estimated special benefit.

24. But even the assumption that the LID improvements would deliver benefits as soon as they were complete in 2024 is not supported by the studies Mr. Macaulay relied on. Rather, those studies demonstrate that a discount period of five years is conservative.

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See Gibbons Decl. ISO Closing Stmt., ¶ 18 (dated 7/7/2020). In particular, HR&A's study on the Rose Kennedy Greenway in Boston (included in Mr. Macaulay's backup files) indicates that during the construction period, the Greenway district "significantly" lagged in value (i.e., construction disamenity). *Id*., Ex. C at 24. That study also recognized that the "reorientation of development to capture value takes time"—specifically, 12-13 years. *Id*. at 30-31 (discussing New York City High Line and San Francisco Embarcadero improvements). Given the lengthy delay, any prediction of future special benefits is speculative, especially during the construction phase where values are likely to decline. And assuming the LID Improvements take a similarly long period of time after they are complete to start producing tangible property value benefits, each additional year of delay results in further discount to the present value of any future alleged benefit. Gibbons Decl. ISO Closing Stmt., ¶ 19, Ex. A.

25. Applying the same discounting methods described above and in Mr. Gibbons declaration, the 2019 net present value of ABS's estimate for benefits that actually start accruing in 2029 is just $42,204,597, only 9.4% of the benefits ABS hypothesized, even before applying the 39.2% percentage assessment. *Id*. For Eighth and Lenora LLC, this means at most the 100% assessment should be no more than $35,701.80. Anything more would permit the City to assess Eighth and Lenora LLC based on a hypothetical assumption that these improvements are in place and providing benefit, and ignore the risks, construction disamenity, and time value of money that normal appraisal principles would take into account. *Id*., ¶ 20. Proportionality would counsel that the assessment should be only 39.2% of that assessment cap, or $13,995.11.

26. Attachment C includes two Excel spreadsheets applying these discounting methods to Eighth and Lenora LLC's assessment. It is undisputed that special benefits will

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not actually accrue until the LID Improvements are complete in 2024. Accordingly, the first spreadsheet demonstrates that discounting the City's hypothetical October 2019 special benefits to present value would reduce Eighth and Lenora LLC's assessment to $50,949, exclusive of any other flaws in the City's proposed assessment. The second spreadsheet shows even more drastic reductions after taking into account: (1) a rough discount for property value loss due to COVID-19 and (2) discounting to present value for 5 years (*i.e.*, from 2024 when the City anticipates completing the LID Improvements) and 10 years (*i.e.*, from 2029 to account for the time it takes for the improvements to capture property value). After such reductions, Eighth and Lenora LLC's assessment would be just $44,580 (for the 5-year discount) or $12,249 (for the 10-year discount). Further, the spreadsheet concludes a "zero" benefit for this property because, based on Dr. Crompton's testimony, Eighth and Lenora LLC's property is more than 2,000 feet from the core "park" improvements and therefore too distant to receive any special benefit. Neither of these spreadsheets address other issues raised by Eighth and Lenora LLC's appeal, but are intended to help demonstrate how unfair and inflated the City's proposed hypothetical assessment is. The Hearing Examiner's Recommendation simply dismisses Eighth and Lenora LLC's discounting argument without legal or factual analysis; that failure is error.

Appraisal and Assessment Calculation Methods Are Flawed

27. The "general rule is that each lot, piece, or parcel of land should be assessed separately" for purposes of local improvement district special assessment. *Doolittle*, 114 Wn.2d at 97.

28. It is proper to sustain a challenge to an assessment, even without the appraisal testimony from the owner, where the objector's expert establishes that the assessment was

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"clearly grounded upon a fundamentally wrong basis" due to an error in the method employed by the City's appraiser. *See, e.g., Doolittle*, 114 Wn.2d at 106.

29. The City's appraiser purports to utilize the income method of valuation but relied on inaccurate revenue and market data, as discussed further below.

30. The City's appraiser purports to utilize the comparable sales method of valuation, but no City witness attempted "to characterize any one, or all of them, as comparable to [Eighth and Lenora LLC's property]." *See Bellevue Plaza*, 121 Wn.2d at 406 (finding "several serious flaws" in ABS's LID analysis in that case, including that the appraiser "attache[d] a list of a number of land sales within the CBD, but ma[de] no attempt to characterize any one, or all of them, as comparable to any particular property within the LID"). And no City witness could explain how specific adjustments were made to these sales to account for value increases due to the hypothesized Before and After Improvements. For this reason, Eighth and Lenora LLC appeals Section II.23 of the Examiner's Recommendation.

31. <u>Special assessment improperly includes value lift from the Before Improvements</u>. Mr. Macauley is required to exclude (and claims to have excluded) any assessment based on value attributable to demolition of the viaduct and the planned WSDOT Improvements, which WSDOT had independently committed to fund. However, Mr. Macaulay did not calculate the actual market value of LID properties in October 2019, and did not separately analyze the hypothetical increase to property values attributable to WSDOT's planned improvements. *See* 6/23/2020 Hrg. Tr. at 41:11-18 (did not estimate a current value and then separately calculate a hypothetical "With WSDOT" Before value); Gibbons Decl. ISO Closing Stmt., ¶ 8 (dated 7/7/2020); *see also* Gibbons 1/30/2020 Letter (attached to Appeal Petition) at 4; Gibbons 5/2/2018 Letter (attached to Appeal Petition) at

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3-4. Without any documented basis or support, Mr. Macaulay simply "ma[de] a judgment a call" on what occupancy and rates would have been for the commercial properties assuming all of the WSDOT Improvements are completed as of 2019. Macaulay Depo. at 129:19-130:11. This outright omission precludes any independent evaluation of the true market "Before" values. *See* 6/23/2020 Hrg. Tr. at 44:25-45:9. It also fails to meet professional appraisal standards; if an appraiser uses current sales data to infer values, then the appraiser must explain how he analyzed that data and other information to come up with the hypothetical value. 3/3/2020 (A. Gibbons) Hrg. Tr. at 128:1-130:4. This includes not just removal of the viaduct, but also other road, pedestrian and landscaping improvements WSDOT had already committed to make.

32. However, because Mr. Macaulay testified that he did include some WSDOT-related value-lift in the "Before" values, it follows that part of the special assessment improperly is based on value attributable to the WSDOT Improvements. As shown by mathematical formulas in his spreadsheets, Mr. Macaulay applies a special benefit percentage to Before values. So for example, if Mr. Macaulay believed the WSDOT Improvements would add $10,000,000 in value, then his method of analysis assuming a 3% special benefit assignment would result in $300,000 of over-assessment. *See* Gibbons Decl. ISO Closing Stmt., ¶ 9 (dated 7/7/2020). At a minimum, the Final Study should be redone to properly exclude the value of Before Improvements from the assessments. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections II.19, II.29, and IV.B.11(a)(ii)

33. <u>Special benefits were assigned rather than measured</u>. Mr. Macaulay arbitrarily "assigns" special benefits to Before values instead of measuring them for each property. *See* 1/30/2020 Gibbons Letter (attached to Appeal Petition); 3/3/2020 (A.

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Gibbons) Hrg Tr. at 88:25-89:3; 90:8-91:13. Based on formulas in spreadsheets that Mr. Macaulay used to analyze the commercial properties, Eighth and Lenora LLC's experts concluded that Mr. Macaulay based adjustments on hypothesized very small increases to property revenue and very small reductions to cap rates to "calculate" an "After" value due to the coming 2024 LID Improvements. Attachment B (ABS Spreadsheet). These series of micro adjustments were based on "professional judgment" that are neither shown nor replicable.

34. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections II.19 and IV.B.11(a)(iii).

35. Special benefit falls within margin of error. The Final Special Benefit Study applies an estimated value enhancement of less than 4%, which is generally within the margin of error for appraisals and, therefore, not a reliable difference. *See Bellevue Plaza, Inc.*, 121 Wn.2d at 401 (must substantiate use of percentages when allocating assessments). Eighth and Lenora LLC's experts explained that if two appraisers independently arrive at values within 5% of one another, this difference is considered reasonable as it falls within the standard margin of error accepted in the profession. 3/3/2020 (A. Gibbons) Hrg. Tr. at 164:2-9. Because Mr. Macaulay's micro-special benefit percentages fall far below that 5% margin, "there is no way of authenticating" such incremental changes because "[m]arket forces completely obliterate any tiny little noise factor like that." *See* 3/3/2020 (A. Gibbons) Hrg. Tr. at 160:23-161:5. Mr. Macaulay agreed during his deposition that 0.25% is too small to measure. Macaulay Depo. at 25:17-25. Yet, Mr. Macaulay assigned or purported to measure a difference in revenue and cap rates for Eighth and Lenora LLC's property within that margin. Additionally, the fact that "Before" values are also based on a hypothetical that adds some unstated incremental value to actual 2019 values exacerbates this issue—the

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ability for an appraiser to discern the micro-value differences between hypothetical conditions that are so similar (the WSDOT improvements compared to the LID improvements) "verges on being ludicrous." 3/3/2020 (A. Gibbons) Hrg. Tr. at 89:4-90:7.

36. Even if it were possible to accurately tease out such a miniscule hypothetical value change due to improvements coming five years later, experts testified that there is no data to justify the mathematical adjustments—they are just the appraiser's guesses as to what he felt the changes (hypothetically) would be. *See* 3/3/2020 (A Gibbons) Hrg. Tr. at 88:21-88:24 ("you cannot measure one percent difference in a high-rise building for this kind of a medium … it's simply assigned to a before value"). For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: II.27 and IV.B.4.

37. No analysis of value increase attributable to individual components of the LID Improvements. The Final Special Benefit Study lacks clarity to fairly estimate a small percentage difference between hypothetical Before and After conditions. Throughout his testimony, Mr. Macaulay could not explain what benefit arose from specific Before/After descriptions in the Addenda even though he testified that he relied on these to calculate special benefits. 6/23/2020 Hrg. Tr. at 26:21-30:10. When asked where in his report someone might be able to determine how he attributed value to After conditions described in the Addenda, he answered that that was "not the scope of the assignment" because he was asked to look at all of the projects as a whole. 6/23/2020 Hrg. Tr. at 30:3-8. But he admitted that the six components were not actually a continuous project, that he was viewing them together because the City asked him to, and that if he were to view them independently, there was a low probability that properties in the north would specially benefit from improvements in the south and vice versa. *See* 6/25/2020 Hrg. Tr. at 27:18-28:5.

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38. Not only did he fail to analyze benefits from each of these non-contiguous improvements, his familiarity with descriptions as whole was tenuous at best. *See, e.g.,* 6/23/2020 Hrg. Tr. at 26:21-30:10 (Mr. Macaulay could not explain what specific benefit arose from specific Before/After descriptions in the Addenda); *cf. Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (deprivation of due process where building design objectives that guided regulators' assessment of architectural plans for buildings along a "signature street" were so vague that they amounted to ad hoc review based on the regulators' subjective impressions and feelings).[6] It became clear through his testimony that even though he used the renderings as "visual aid[s] in appraising the property in the before and after" to "visually see what the differences would be," he could not explain what specific elements in the visuals added or reduced value. *Id*. at 36:3-39:12. For example, when shown a rendering of a two-lane road going down to one-lane in the After condition near the Pike Street Market, he dismissively reasoned there would be no potential impact on traffic because cars could still technically get through. *Id*. at 171:11- 173:11. When shown a rendering of street improvements on Pike/Pine, he posited absurdly that seasonal variation could explain the depiction of the same trees in the After condition nearly twice as tall as in the Before. *Id*. at 173:17-175:4. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: II.27 and IV.B.4.

[6] As an aside, this admission suggests that there should have been an explicit City Council finding that properties within the LID would benefit from the improvements as a whole. *See* RCW 35.43.050. Without this finding, the cost and expense of each component must "be ascertained separately, as near as may be, and the assessment rates shall be computed on the basis of the cost and expense of each unit." *Id*. In other words, Mr. Macaulay should have estimated the benefit to each property from each component separately, consistent with the law and in recognition of his testimony that not all properties benefit from all components.

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39. Special assessment is not supported by comparable studies, data or reports. Mr. Macaulay's references to empirical research do not justify his fundamental assumption that the LID Improvements will lead to meaningfully increased real estate values for Eighth and Lenora LLC. Indeed, no City witness was able to explain how ABS Valuation used comparable sales or information from the "over twenty-five studies and reports" to arrive at very precise special benefit increases for the commercial properties, including Eighth and Lenora LLC's property. For example, although Mr. Macaulay stated that no single report or study was directly on point due to the unique nature of the LID Improvements (*see, e.g.*, 6/25/2020 Hrg. Tr. at 146:21-147:8), he could not explain how he made specific adjustments in his parcel-by-parcel analysis other than to say that the studies generally provided "some background to base decisions on." *See* 6/23/2020 Hrg. Tr. at 161:5-162:12; *see also* 6/26/2020 Hrg Tr. at 118:7-19 (did not make any specific adjustments to account for similarities and differences between these improvements and the comparable parks he looked at).

40. Mr. Macaulay purports to rely on Dr. Crompton's research to justify the assignment of incremental increase of 0.5% to 4% to property values within the LID. However, among other critiques, Dr. Crompton testified that Mr. Macaulay's reliance on his research misinterprets his work in critical ways, including because the LID Improvements manifest the characteristics of a parkway (not a park), and his research indicates that most of a *park's* impact on single-family home values occurs within a 500-foot range (or 1.5 blocks in Seattle). *See* Hrg. Exhibit 94 (Crompton's report). Further, updated research shows park-related value increases are in fact smaller; that estimated increases are "best guesses" rather than predictions of property value increases in a particular city; and that percentages do not account for diminishing returns after taking into account water views, which would be the

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driving value enhancer. The latter is especially true in a city like Seattle where the sloping topography grants most properties in downtown a water view.

41. Rather than addressing Dr. Crompton's critiques, Mr. Macaulay simply states that this was just one source of information that was not entirely relevant because, among other things, Dr. Crompton's research dealt with parks and not streetscapes. However, Dr. Crompton's critiques were based on Mr. Macaulay's own testimony that the core "park" improvements are the Promenade, Overlook Walk, and Pier 58. Macaulay Depo. at 178:15-180:2 (explaining that for purposes of "drawing boundaries around a park" he was considering only at Overlook Walk, Promenade, and Pier 58). Based on this testimony, Dr. Crompton concluded that 500 feet via road from "park" improvements is just one or two Seattle blocks and that Mr. Macaulay "inappropriately extend[ed] the LID impact significantly beyond that which the park study indicated (even if it was legitimate to use the park review's findings)." Hrg. Exhibit 94 (Crompton's Report) at 7. Indeed, the LID area extends even past 2,000 feet from the core "park" improvements, which is the outer limit of impact applicable to "community parks"—which the LID Improvements are not. *Id*. Eighth and Lenora LLC's property is not within 2,000 road network feet from the "park" improvements. *See* Hrg. Exhibit 104 (Ellen Kersten Decl.) at Exs. E, F.

42. Further, Mr. Macaulay's testimony that he analyzed streetscapes, parkways, greenways, and park-amenities separately contradicts his insistence that he viewed all of the six LID components together as one entity. *See* 6/23/2020 Hrg. Tr. at 167:15-180:16. And based on the attention given to Dr. Crompton's work in the Final Study and supporting materials, it was clearly an important—if not *the* most important—source of information for

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estimating special benefits (especially with respect to the condos).[7] No City witness adequately explained exactly how Dr. Crompton's research informed ABS Valuation's parcel-by-parcel analysis.

43. The destination parks discussed in the Final Special Benefit Study do not provide reliable, comparable, and valid support for the calculation of special assessments here. *See* Gibbons 5/2/2018 Letter at 4; Hrg. Exhibit 49. None of the parks cited in the Final Special Benefit Study were funded by a LID. And in virtually all of those cases, the park improvements dramatically restored unimproved or blighted areas, and properties evaluated were within two or three blocks of the park.

44. ABS's claimed reliance on three economic studies to support property value increase is also flawed. The HR&A study does not inform what value increases are expected from the LID Improvements because it projects increases to tourism from *all* of the Waterfront Projects (not just those funded by the LID) and is based on tourism data from dissimilar parks in other cities,[8] making the methodological application to the LID speculative. Further, Mr. Macaulay appears to have selectively ignored the HR&A Study's conclusion that there would be ***no new net visitors*** from downtown residents as a result of the LID Improvements and could not explain how this impacted his condo analysis.

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[7] Of the 62 files in Mr. Macaulay's "2019 Report Info" folder, which he explained contains all of the studies he relied on to prepare the Final Study (*see* Hrg. Exhibit 122 at ¶ 12; 6/23/2020 Hrg. Tr. at 152:10-154:18), 10 are authored by Dr. Crompton and 9 cite Dr. Crompton. Further, it appears Dr. Crompton's study is the only one that found property value increases up to 2,000 feet from a park (or streetscape) improvement—other studies estimated premiums for real estate only much closer or cited to Dr. Crompton.

[8] These included distinct destination parks like Golden Gate Park, Hudson River Park, Rose Kennedy Greenway, and Millennium Park where tourist "capture rates" varied from 5% (Rose Kennedy Greenway in Boston) to 44% (Golden Gate Park in San Francisco). Further, the calculated expected tourists visiting the LID park was calculated using data from only from New York City, a notorious tourist destination.

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6/25/2020 Hrg. Tr. at 152:15-153:21. The Texas A & M study on "The Impact of Parks on Property Values" primarily focused on whether the benefits accrue to the larger community rather than properties adjacent to the park. And the 2014 New York City Department of Transportation study is not based on real estate transactions and market sales and fails to substantiate any link between increased retail sales and property values. Moreover, this study only looked at impact either directly abutting the streetscape improvement, or a couple hundred feet for plaza-like improvements.

45. Meanwhile, Mr. Macaulay decided not to include the Trust for Public Lands (TPL) Study in the Final Report even though it is Seattle-specific. *Id*. at 171:21-17; Hrg. Exhibit 124. One explanation of that this omission could be TPL's estimate of the economic impact of the *whole park system* on the Seattle economy is much lower—$30 million as compared with HR&A's estimate of $191 million for just the waterfront improvements, and thus would counsel a much lower assessment. Hrg. Exhibit 124 at 3. Regardless, when asked whether he considered that HR&A's estimated LID impact is six times greater than TLP's assessment of Seattle's entire park system, his surmised that it was because the HR&A Study came out in 2019, whereas the TPL Study came out in 2011. *See* 6/23/2020 Hrg. Tr. at 172:19-173:10. But, he did not do any additional analysis and did not adjust his assumptions to account for this difference, which may be partly explained by the fact that the TPL study is Seattle-specific. *Id*. at 173:11-174:1. The TPL Study also estimated that approximately 3.44% of King County tourists visit Seattle primarily because of the city parks, whereas HR&A estimated that 55% of visitors would visit primarily because of the waterfront improvements.

46. Although proximity to the improvements is a key factor in all of these studies, Mr. Macaulay could not explain in what circumstances he measured distance as the

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crow flies or via travel routes. *See* 6/23/2020 Hrg. Tr. at 180:17-182:19. And he seemed to not understand that for both the Trust for Public Lands study and Dr. Crompton's study, benefits extending out 2,000 feet were only observed for community parks that exceeded 40 acres. *See* 6/25/2020 Hrg. Tr. at 145:2-21. By contrast, the total size of the LID Improvements is approximate 20 acres and it is not a community park.[9]

47. There is no explanation in the Final Study or the supporting materials of how the studies or comparable sales were used to derive values for Eighth and Lenora LLC's property. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections II.18, II.20, II.21, II.22, II.23, II.24, II.26, II.30, II.32, and IV.C.5.

48. Failure to comply with USPAP. Eighth and Lenora LLC's assessment also rests on a fundamentally wrong basis due to the City's appraiser's decision to utilize a hybrid mass-appraisal method. Randall Scott, a former mass appraiser responsible (and professionally recognized) for developing the MAI standards for mass appraisals, testified that the Final Study does not meet mass appraisal standards nor allow for independent assessment of the accuracy of Mr. Macauley's conclusions.

49. Specifically, because the parcel-by-parcel approach is not a mass appraisal, Mr. Macaulay was required to comply with USPAP Standards 1 and 2 which govern direct appraisals. *See* Decl. of Randall Scott ISO Closing Stmt., ¶ 4 (dated 7/7/2020). However, the Final Study does not purport to comply with Standards 1 and 2. And Mr. Macaulay's testimony suggests that he incorrectly believed that the only difference between direct

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[9] *See* https://waterfrontseattle.blob.core.windows.net/media/Default/pdf/2019_0208_Waterfront_LID_FAQs_Final.pdf ("Waterfront Seattle will create about 20 acres of improved parks and public spaces connecting Seattle's central waterfront to downtown.").

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appraisals and mass appraisals is the reporting. *See* 6/23/2020 Hrg. Tr. at 207:7-208:12; 6/25/2020 Hrg. Tr. at 140:23-141:7 (explaining that he does not have to comply with USPAP Standards 1 and 2 because he has not written an actual report on any condo unit); *id*. at 205:8-14 (explaining that his mass appraisal simply uses "limited techniques, such as Gordon uses in doing his limited restricted report").

50. But the difference is not only in reporting—mass appraisal techniques must instead comply with substantive standards in USPAP Standards 5 and 6. For example, as Paul Bird (City's witness) testified, the mass appraisal approach is distinct from a parcel-by-parcel approach:

> The mass appraisal technique is an appraisal method used to evaluate a group of properties that are subject to similar market forces as of a certain date through the use of market data, statistical analysis and testing. As a result, the mass appraisal technique does not require or involve analysis of each individual property's specific data.

Second Decl. of Paul Bird ¶ 20 (dated 6/26/2020).

51. Indeed, USPAP's definition for "mass appraisal" is "the process of valuing a universe of properties as a given date using standard methodology, employing common data, and allowing for statistical testing." Appraisal Foundation, Uniform Standards of Professional Appraisal Practice at 5 (2020-2021). And the definition for "mass appraisal model" is "a mathematical expression of how supply and demand factors interact in a market." *Id*. Mr. Scott explains that a mass appraisal must use a model that is suitable for statistical testing—otherwise, there would be no way to assess the accuracy or validity of the mass appraisal. R. Scott Decl. ISO Closing Stmt., ¶ 4 (dated 7/7/2020).

52. Regardless of client direction, Mr. Macaulay is required to comply with USPAP. So if, as he determined, a "[p]arcel-by-parcel direct appraisal" would not have been

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economically feasible because it would have taken "an incredible amount of time and cost" (6/18/2020 Hrg. Tr. at 125:15-10), then ABS Valuation should have conducted an appraisal consistent with USPAP Standards 5 and 6. *See also* Hamel Decl. at ¶ 8 ("performing an individual appraisal of each [condo] parcel would have been cost and time prohibitive").

53. But Mr. Macaulay's methods fail to comply with USPAP Standards 5 and 6 because, *inter alia*, he fails to develop a model structure that reflects characteristics affecting value, fails to calibrate the model structure to determine the contribution of the individual characteristics affecting value, and does not review the mass appraisal results against actual sales/data as a quality assurance/quality control check. *See* 3/3/2020 Hrg. Tr. at 216:18-217:1;[10] Decl. of Randall Scott ISO Closing Stmt., ¶ 4 (dated 7/7/2020).

54. Mr. Macaulay explained that factors like "aesthetic change in the area, the proximity to the elements, the increase in market rent, market vacancy changes, capitalization rate changes, and things of that nature" drove value increases. 6/23/2020 Hrg. Tr. at 211:14-212:3. But he could not specify how these factors were considered in his "parcel-by-parcel" approach, and no one reviewing his work would have a clue. And he did not calibrate his approach to determine how each factor contributes to value. *Id*. at 212:8-

[10] Standard 5 requires mass appraisals to develop a model structure that conceptualizes the relationship between characteristics that affect value, and to calibrate that model to specify how individual characteristics affect value. *See* USPAP Standard 5: Mass Appraisal, Development (2020-21). The purpose is to rationally determine what characteristics will create value, and by how much. This allows the mass appraiser to not only generate outputs, but also to test the reliability of the model (and allow others to do so) by comparing the results of the model with actual sales. *See* 3/3/2020 (R. Scott) Hrg. Tr. at 197:7-15; 203:21-205:13 (explaining that it is typical to test output against actual sales). USPAP Standard 6 sets forth the mass appraisal reporting requirements, which include explanation of the model specification, data requirements, calibration methods, and mathematical form of the final model. *See* USPAP Standard 6: Mass Appraisal, Reporting at 6-2(i)-(o). Without this reporting, it is impossible for users of the appraisal report to determine how the appraiser determined value, and this omission renders the report not credible. *See* 3/3/2020 (R. Scott) Hrg. Tr. at 206:15-207:17.

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213:5. As for reviewing the mass appraisal results, there were no criteria governing the internal review process. *Id*. at 104:24-105:20. And because both the Before and After values were hypothetical, it was not possible to identify matched pair sales and no City witness explained how ABS Valuation made adjustments to "comparable" sales in order to check their conclusions. Finally, Mr. Macaulay failed to comply with Standard 6 which requires him to explain his model structure.

55. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections II.28, II.31 and IV.C.8. In addition, Eighth and Lenora LLC renews Objectors' Motion To Exclude The Expert Testimony of Robert J. Macaulay, filed on April 8, 2020, and appeals the Examiner's denial of that motion.

56. Finally, Eighth and Lenora LLC's property is not appurtenant—or even in close proximity—to any proposed improvements. *See Hasit*, 179 Wn. App. at 947 ("the burden of proving special benefit" shifted to the City because the protestors' parcels merely stood "in close proximity to the property on which expert testimony was given"). Indeed, Eighth and Lenora LLC's property is not even within 2,000 road network feet from the core "park" improvements. And, as described above, the special assessment is overstated because the Final Study makes no attempt to determine general benefits, existing amenities for Eighth and Lenora LLC's specific property, or special detriments. In addition, it is speculative due to the fact that, as of October 2019, improvements were not in in place—and, in fact, much of the waterfront is a construction zone following removal of the viaduct and now Pier 58 demolition. Under these circumstances, rather than relying on entirely imaginary income and shaky hypotheticals, Mr. Macaulay at the very least should have discounted the special benefit estimates or waited to perform the Study until the improvements were at least close to complete.

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Erroneous Pre-Improvement Valuation

57. The proposed final assessment erroneously overstates the pre-improvement value of Eighth and Lenora LLC's property as of October 1, 2019 and, as a result, overstates the special benefit to the Eighth and Lenora LLC's property. This variation in pre-improvement valuation calls into question the City's assessments because the City's Final Special Benefit Study uses the pre-improvement valuation to then calculate the assessment amount.

58. Thus, aside from multiple other reasons why computation of the special benefits was flawed (discussed further below), the assessment is based incorrectly on pre-improvement values that do not accurately reflect market data. For these reason, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Section III.

Erroneous Computation of Special Benefit

59. "Special benefit" is "the increase in fair market value attributable to the local improvements." *Doolittle,* 114 Wn.2d at 103. "A benefit that a particular piece of property may receive by reason of the improvement is not measured alone by the physical character or cost of that portion of the improvement upon which the property abuts. *La Franchi v. City of Seattle*, 78 Wash. 158, 165, 138 P. 659, 662 (1914). "The question is: To what extent is the particular tract or property benefited by the entire improvement, and is it assessed proportionately with the other property included within the assessment district?" *Id*. 165–66.

60. The proposed final assessment erroneously overstates the special benefit of LID improvements in a number of ways.

61. <u>Spreadsheets show arbitrary changes to revenue and capitalization rates</u>. For the Cirrus, Mr. Macaulay assumed rental rates would increase by 0.10% (low) and 0.30%

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(high) due to the 2024 LID Improvements. Based on formulas in the spreadsheets, Mr. Macaulay then uses these same percentages (0.10% and 0.30%) to increase other revenue sources, such as retail and parking. He then uses this hypothesized increased revenue to calculate a new net operating income for the commercial properties and capitalizes that to come up with an "After" valuation.

62. For changes to capitalization rate ("cap rate"), Mr. Macaulay assumes the net operating income remains the same as in the hypothetical "Before" condition, but changes the cap rate. For the Cirrus, the cap rate goes from 4.05% to 4.035% (low scenario, creating a bigger value increase) and 4.045% (high scenario, creating a lower value increase).

63. Mr. Macaulay then averages his four "After" values to arrive at a final special benefit conclusion. For the Cirrus, this is an increase in property value of 0.16% due to the LID Improvements.

64. Mr. Macaulay offered little justification for his micro adjustments to revenue and capitalization rates. When asked precisely what the basis is for his special benefit percentage increases to revenue for each commercial property, he could not point to anything specific other than his judgment. 6/23/2020 Hrg. Tr. at 113:24-115:24. There also is nothing in the report to allow a reader to understand how he came up with these percentages. *Id*. at 112:24-113:3. And there is no model or equation that he relied on—again, just his "judgment." *Id*. at 113:4-6. Although he claims that the spreadsheets explain the basis for his belief that certain factors—liked increased connectivity—will increase property values (*id*. at 50:7-25), he could not explain how he went from general principles to very specific percentage adjustments to revenue and capitalize rate. *Id*. at 115:10-24. And for the first two "Scenarios" in the spreadsheet, he applied percentage changes to all revenue sources equally even though there was no separate analysis done for food and beverage or

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parking. *Id*. at 116:14-25, 117:11-21. Thus, he has not rebutted Eighth and Lenora LLC's expert's conclusion that the adjustments are arbitrary and fall below generally accepted margins of error, and that there is no actual, measurable, non-speculative special benefit to Eighth and Lenora LLC's properties.

65. Mr. Macaulay testified that he used comparable sales as a reasonableness check for commercial properties. But as explained above, no City witness has explained how anyone, or all, of the sales are comparable to any particular commercial property within the LID. *Compare Bellevue Plaza*, 121 Wn.2d at 406. Further, Mr. Macaulay testifies that in order to make sales "comparable," he would have had to make adjustments to account for Before and After conditions, but there is no way to understand how adjustments were made because he "didn't do a separate sales comparison approach where we showed adjustments and whatnot." 6/23/2020 Hrg. Tr. at 128:25-129:24. When asked how he determined that his adjustments were reliable, he said it would have simply been a "test of reasonableness." *Id*. at 127:10-128:24.

66. It also bears noting that any "internal review" of the special benefit estimates would have been largely arbitrary given Mr. Macaulay's testimony that there is no margin of error. Indeed, given all the same information, he seemed to suggest that it would be perfectly reasonable for another experienced appraiser to come up with special benefit estimates that were five times higher than his estimates. 6/23/2020 Hrg. Tr. at 93:2-12; *see also id*. at 89:20-90:2 (testifying that it might be reasonable for two appraisers with the exact same quality of data to be 50% off). Ultimately, his repeated insistence that there is no margin of error conflicts with the testimony of Eighth and Lenora LLC's experts and reaffirms that there are absolutely no standards governing his process. *See id*. at 91:6-94:5. Even if the typical margin of error (5%) is a "rule of thumb" and not a "hard legal standard,"

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there are still reasonable and unreasonable variations within the appraisal field. *See* Examiner's Recommendation at IV.B.4. Thus, the special assessment is not actual, measurable or special because it is arbitrarily assigned; and it is too small to realistically be supported by appraisal techniques.

67. No evidence of special benefit. Meanwhile, there is "no actual evidence from any seller or purchaser that the price was higher because of the LID improvements." *Bellevue Plaza, Inc*, 121 Wn.2d at 409. As in *Bellevue Plaza*, the City's appraiser "has not identified any seller or buyer, or any particular property where the existence of the LID improvements had an effect on the market price." *Id*. at 410-11. Meanwhile, Eighth and Lenora LLC has explained that the property has not increased rental rates or revenue due to the forthcoming LID Improvements, because, among other reasons (and apart from COVID), the improvements ABS believes will generate value do not exist, and will not for a number of years to come. There are no comparable sales because the LID Improvements are not in place, nor will they be until the end of 2024 if completed on schedule.

68. The fair market value of EIGHTH AND LENORA LLC'S property has not changed due to increased waterfront view. *Cf. Appeals of Jones*, 52 Wn.2d 143 (property was not specially benefited from installation of new water main and fire hydrant where it was already adequately supplied with water and afforded adequate fire protection). And in any event, any value attributable to removal of the viaduct was to be excluded from the assessment calculation.

69. There is no special benefit because LID improvements in fact diminish the value of Eighth and Lenora LLC's property by drawing visitors away towards improvements that do not abut the property, increasing competition for the retail component. *See Kusky*,

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85 Wn. App. 493 (testimony of owners' expert that LID actually diminished value of property was sufficient to rebut presumption that assessment was proper).

70. Moreover, the assessment formula is an attempt to distribute costs that do not relate to special benefits. *See Bellevue Plaza, Inc.*, 121 Wn.2d at 416 (model cannot be "merely a mathematical model that distributes costs").

71. The Special Benefit Study fails to address whether the $346,000,000 estimated LID project cost takes into account the investment that would have occurred in the LID area anyway. Furthermore, there is no spatial presentation concerning where dollars are invested. This is a critical component of estimating which properties receive a direct benefit from the improvements, versus more incidental benefits further from the park.

72. Mr. Macaulay also included personal property in his valuation of hotels even though none of the assessment notices were for personal property (*see* Hrg. Exhibit 130) and he did not include personal property values for any other types of property. 6/23/2020 Hrg. Tr. at 62:5-11. This is contrary to an explicit disclosure in the Final Study stating that the "[a]ppraisal applies to the land and building improvements only" (C-17 at 197). *See also* Gibbons Decl. ISO Closing Stmt., ¶ 10 (dated 7/7/2020). This also resulted in hotels receiving a disproportionately high LID assessment in comparison to other property types, since hotels were the only property type subject to personal property LID assessments. Fourth Decl. of Gordon ISO Closing Stmt., ¶ 11 (dated 7/7/2020); Gibbons Decl. ISO Closing Stmt., ¶ 10. Further, inclusion of personal property in hotel valuations violated notice procedures because hotel property owners only received notice that their real estate was being assessed. *See* Fourth Decl. of Gordon ISO Closing Stmt., ¶ 12 (dated 7/7/2020).

73. With seemingly no basis, Mr. Macaulay calculated special benefit to personal property at the same rate as real property. 6/23/2020 Hrg. Tr. at 134:5-24. So, for example,

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a television at the waterfront Marriott is assigned a greater special benefit than the same television at the Hyatt Regency. *Id*. at 134:25-135. But it is simply wrong to assume that furniture and equipment is instantly worth more at a hotel closer to the waterfront, and unreasonable to assign a value lift to personal property that is replaceable at the same cost and may be obsolete before the LID improvements are even completed. Further, personal property is highly depreciable, and likely to be fully depreciated or potentially discarded by 2024. *Id*.; *see also* Gibbons Decl. ISO Closing Stmt., ¶ 10. Thus, the hotel valuations must be redone to correct for this error.

74. The proposed final assessment substantially exceeds the special benefit to the property and is grossly disproportionate to similarly situated properties within the LID. For these reasons, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: Sections II.22, II.23, II.27, IV.B.4, and IV.B.11(a)(iii).

State Environmental Policy Act and Other Environmental Permitting

75. While this appeal is not challenging the City's environmental review and permitting processes, those processes are relevant in determining the legality of the assessments, and to assessing the delivery risk, the present value of the City's plans, and ultimately the amount of the assessment. If the roll is finalized, the City will commit to pursue projects that have not yet undergone environmental review (thus limiting the choice of reasonable alternatives to those projects). For example, if the roll is finalized, the City is committed to build all of LID Improvements, even though NEPA review of Pier 58 (and 63) is just beginning. Further, the City has segmented environmental review, and still has a gauntlet of federal, state and tribal review processes to complete before it will be clear what the City can legally build, and when. *See Summary and Fiscal Note*, Sea. City Council Bill No. 119447 at 3 (Jan. 28, 2019); *see also* SMC 25.05.070(A), SMC 25.05.440(D)(2)(b),

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SMC 25.05.406 and their counterparts in the SEPA Rules, Chapter 197-11 WAC. Either the City is violating SEPA and chapter 25.05 SMC by finalizing the assessment roll and committing to reconstruction of Pier 58 and major street improvements without environmental review, or the City's Final Special Study has improperly included and is proposing to assess the Eighth and Lenora LLC the costs and special benefits of improvements that may not get built. Either way, it is faulty process.

Due Process Rights

76. The City's failed to notify EIGHTH AND LENORA LLC sufficiently in advance of the hearing to allow EIGHTH AND LENORA LLC to obtain evidence and prepare to properly challenge the assessments. Because LID assessments involve a deprivation of property, affected owners have the right to a hearing as to whether the improvement resulted (or will result) in special benefits to their properties and whether their assessments are proportionate, which necessarily includes the right to adequate notice of the hearing. *Carlisle v. Columbia Irrigation Dist.,* 168 Wn.2d 555, 569–70, 229 P.3d 761 (2010).

77. The LID statute specifies that cities must mail notices giving the time and place of the hearing to the affected owners "[a]t least fifteen days before" the hearing and publish the notice once a week for 2 consecutive weeks in the city's official newspaper, with the final publication at least 15 days prior to the hearing. RCW 35.44.090. However, strict compliance with the statute does not necessarily satisfy due process. *Hasit*, 179 Wn. App. at 956. The key inquiry is whether the owner had sufficient time to gather evidence (and secure their own appraisal), evaluate proportionality of the proposed assessments, and whether the owner asked for more time. *Id*. (noting that 15 days was entirely "insufficient for anybody to get an appraisal").

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78. The City's Notice of Assessment was sent on December 30, 2019. And the Final Special Benefit Study has only been available for public review since January 7, 2020. Due to this short time frame, EIGHTH AND LENORA LLC requested a prehearing conference and scheduling order that would preserve and protect Eighth and Lenora LLC's right to analyze and respond to the Final Study, obtain expert appraisal testimony, conduct depositions, and to accommodate preliminary motions (*e.g.*, with respect to the interplay between SEPA and the City's assessment of taxes for Pier 58 and Pike/Pine improvements). The Hearing Examiner erroneously denied that request. For this reason, Eighth and Lenora LLC appeals the following portions of the Examiner's Recommendation: I.B.

VII. Relief Requested

EIGHTH AND LENORA LLC respectfully requests that the City Council:

1. Reject the Hearing Examiner's recommended denial of Eighth and Lenora LLC's objection; and
    a. Cancel the Waterfront Local Improvement District No. 6751 proposed final assessment dated December 30, 2019; or
    b. Revise Eighth and Lenora LLC's Waterfront Local Improvement District No. 6751 proposed final assessment to $0 (zero), or such amount as Eighth and Lenora LLC establishes at the hearing in this matter; or
    c. Remand the matter to the Hearing Examiner or City appraiser to recalculate and reduce Eighth and Lenora LLC's assessment using recognized appraisal techniques consistent with USPAP and:
        i. Excluding any property value increase attributable to viaduct removal and other planned WSDOT Improvements;

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ii. Taking into account the effects of the COVID-19 pandemic on the value of Eighth and Lenora LLC's property and other relevant developments since October 2019;

iii. Accounting for and excluding (1) any special benefits from existing or planned improvements that already provide similar benefits to Eighth and Lenora LLC's property, and (2) any special detriments from construction and other anticipated LID-related disamenities;

iv. Accounting for and including only those actual benefits anticipated to accrue to Eighth and Lenora LLC's property based on its location relative to Pier 58, Overlook Walk, and the Promenade, and specific elements of the LID Improvements;

v. Discounting anticipated special benefits to present value, based on reliable estimates regarding when special benefits will start accruing following completion of the LID Improvements; and

vi. Accounting for such other issues specific to Eighth and Lenora LLC's property relevant to calculation of such assessment; and

2. Grant such further relief as the City Council deems just and proper.

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