BEFORE THE HEARING EXAMINER OF THE CITY OF SEATTLE

In re Proposed Final Assessment Roll for Local Improvement District No. 6751 (“Waterfront LID”) Parcel Nos.: 6094670010; 6094670020; 6094670030; 6094680050; 0660000740; 0660000708; 2285130010; 6792120010; 6195000030; 0942000430; 6792120020; 7683890010; 1976200070; 1976200075; 1976200076; 7666202465; 7666202345; 1975700365; 0696000015; 1974700175; 1117080020; 1975700235; 0696000055; 0660000540 0660000545; 066000-0575; 2538831460; 2538831480; 0939000240; 1974600025; 1974600035	Case Nos. CWF-0318, 0410, 0411, 0412, 0413, 0414, 0415, 0416, 0417, 0418, 0420, 0421, 0422, 0423, 0425, 0426, 0427, 0429, 0430, 0431, 0432, 0433, 0434, 0435, 0436, 0437, 0438, 0439, 0440, 0441 OBJECTORS’ CLOSING BRIEF

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Taxpayers for these 31 assessed parcels (collectively "Objectors") respectfully request the Hearing Examiner recommend the City Council reject the proposed final assessment roll for the City of Seattle's Waterfront Local Improvement District ("LID") No. 6751. Objectors have demonstrated by clear, cogent, and convincing evidence that the City's method of assessing the LID properties is fundamentally flawed and results in proposed assessments that do not accurately reflect actual, measurable, non-speculative, proportionate, special benefits conferred on Objectors' properties as a result of the City's planned Waterfront LID improvements.

First, the LID assessments are inherently speculative because hypothetical "Before" and "After" values assume that improvements that are not actually going to be constructed for another five years are already benefiting Objectors' properties. It is axiomatic that valuations based on hypotheticals are not "actual" measures. At present, there are no benefits—only a value decrease due to the added tax burden on Objectors' properties. Moreover, the proposed LID assessments do not account for any risks associated with the five year delay, notwithstanding obvious uncertainties related to delivery of the LID Improvements and in the micro and macro economy. The Final Study instead assumes that everything will proceed according to plan without any material change or delay until 2024. But COVID-19's impact on these properties and economy has already turned this assumption on its head.

Second, further compounding uncertainties is the fact that the environmental review and permitting process is just starting for Pier 58 and other LID Improvements, and those processes could result in material changes and delays past 2024. It is fundamentally flawed for the City to commit to building the LID Improvements and to assess owners in advance of required environmental and permit review.

Third, the hypothetical "Before" values for most of Objectors' properties are overstated because they rely on incorrect market data. For example, the City's appraiser routinely overestimated the value of hotels in part because he relied on publicly available

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

room rate information to estimate hotel income, even though more reliable data in the form of STR reports showing actual rates was readily available. He also missed United Way's sale of transferable development rights (TDRs), and failed to understand Fourth Avenue Associates' Westlake-related redevelopment constraints.

Fourth, the overstated "Before" values in turn translate into inflated special benefit amounts when Mr. Macaulay multiples the improperly high "Before" values by a "special benefit" percentage to come up with "After" values. Objectors' appraisal experts unanimously testified that Mr. Macaulay improperly assigns immeasurable special benefit percentages to already faulty "Before" values based on professional judgment, instead of using more objective and empirically sound data and information to properly measure any special benefits. And Mr. Macaulay misapplies the studies he cited in his Final Study—most significantly, Dr. Crompton's research—that supposedly informed these arbitrary assignments.

Fifth, the special assessments are arbitrary, overstated, and disproportionate because Mr. Macaulay fails to consider general benefits or special detriments conferred by the LID Improvements. Moreover, each of the owners presented both appraiser and owner testimony contradicting the assumptions that their properties would, in fact, receive special benefits.

The bottom line is that Mr. Macauley's Final Study does not provide a sound basis to assess Objectors for any actual, measurable, proportionate, special benefits that might inure to their properties when the improvements are complete. His Final Study is fundamentally flawed, and stale given recent COVID-19 impacts on property values. For these reasons, and as explained more fully below, the Hearing Examiner should recommend the City Council reject the final proposed assessment roll.

I. ISSUES

Is the City's method of assessing the Waterfront LID properties fundamentally flawed because it assigns rather than measures special benefits based on incomparable case studies and misplaced reliance on empirical research?

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Do the proposed assessments fail to accurately reflect actual, non-speculative, measurable, and proportionate special benefit conferred on Objectors' properties as a result of the Waterfront LID Improvements?

II. FACTS

A. The Waterfront LID Assesses Nearly All Properties in Downtown Seattle to Fund Enhancements to the Waterfront.

In 2012, the Seattle City Council approved a Waterfront Strategic Plan for the area of downtown Seattle stretching for 26 blocks along the City's waterfront. The Waterfront Strategic Plan included creation of a local improvement district that was anticipated to partially fund the Central Waterfront Improvement Program. While LIDs typically fund specific infrastructure targeted to a specific area—such as road, water and sewer extensions—the City is attempting to use this funding mechanism to assess property owners in the largest LID ever formed to pay for city-wide improvements, on the hypothesis that the improvements will "specially benefit" properties of all types in the downtown core.

To inform the City's LID boundary and special assessment decisions, the City hired Mr. Robert Macaulay at ABS Valuation. He began by preparing a preliminary LID feasibility study in August 2017. The feasibility study estimated that the range of special benefit due to the LID improvements to be between $300 million and $420 million. *See* Final Study at 1; Resolution 31812, Summary and Fiscal Note at 2.[1] Mr. Macaulay also prepared a preliminary special benefit assessment study in May 2018 to assist the City in deciding whether to form the LID and establishing the LID boundaries. The preliminary study estimated the total special benefit within the then-proposed LID boundary to be approximately $414 million. *Id*. at 2.[2]

---

[1] Available at http://seattle.legistar.com/View.ashx?M=F&ID=6219628&GUID=7D971630-716E-4753-B75B-99FC36CA1667.

[2] The designs at the time of the preliminary study were less than 10% for Pioneer Square, 10% for Pike/Pine, 30% for Overlook Walk, and 90% for the Promenade. Summary of Formation Special Benefit/Proportionate Assessment Study for LID, May 2018.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Based on these studies, in June 2018, the City Council passed a Resolution of Intent to form the Waterfront LID, which encompasses almost all of downtown Seattle from T-Mobile Park to Denny Way and from Elliott Bay to I-5. *See* Seattle City Council Resolution No. 31812 (Resolution 31812). The LID boundary extends over 5,000 feet away from the "park-like" LID Improvements, which Mr. Macaulay identifies as the Overlook Walk, Promenade, and Pier 58. *See* Declaration of R. Gerard Lutz Decl., Ex. 5 (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); *see also* Kersten Decl., Ex. G. The LID includes 6,238 individual tax parcels, comprising of residential/commercial condominium units, office buildings, hotels, retail spaces, historic structures, and special purpose properties (including sports stadiums, an art museum, a performance hall, a convention center, and a ferry terminal).

B. The City Has Based its Proposed Final Assessment on Mr. Macaulay's Final Study.

Following formation of the LID, Mr. Macaulay prepared the Waterfront Seattle LID Final Special Benefit/Proportionate Assessment Study, with a date of valuation of October 1, 2019 ("Final Study"), to "assist the City in estimating special benefit (increase in market value) to affected property resulting from the LID-funded improvements within the Waterfront Seattle Project." Final Study at 1. To date, there is no evidence that the City based its proposed final assessment roll on any other data, information, or studies other than the Final Study.

The Final Study concludes that the total special benefit to properties in the LID is $447,908,000—more than the cost of the LID Improvements which is $346 million, and more than both initial estimates. Final Study at 8. But because the amount to be assessed is capped at $160 million, plus $15 million in administrative costs, Mr. Macaulay multiplied his estimated special benefit for each property by 39.2% to arrive at the final proposed assessments. Final Study at 9.

The assessments are limited to paying for the LID-funded components—namely, the

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

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 no construction had begun on the LID Improvements or the WSDOT Improvements (aside from removal of the viaduct) at the time the Final Study was prepared, Mr. Macaulay's October 1, 2019 "Before" and "After" valuations are both based on hypothetical conditions. Regarding the WSDOT improvements, there are no designs or renderings provided in the Final Study or its addenda even though "[a] primary assumption of [the Final Study] is that in the before (without LID) scenario, the Alaskan Way viaduct has been removed and Alaskan Way is rebuilt, to WSDOT standards, at street level." Final Study at 3; *see also* Lutz Decl., Ex. 5 (Macaulay Depo.) at 62:1-63:23. Mr. Macaulay nevertheless proceeded to estimate property values under the "Before" scenario without any specific analysis of the impact of the WSDOT Improvements. *Id*. at 69:19-70:19. For example, it is not possible to determine from the Final Study what value lift, if any, Mr. Macaulay attributes to viaduct removal.

The Final Study also states that "records of the King County Department of Assessments forms the basis of the final assessment roll spreadsheets." Final Study at 3. However, there is no explanation why many "Before" valuations differ significantly from King County's assessment rolls. Indeed, nearly all of the "Before" valuations for Objectors' properties substantially exceed the Assessors' valuations, some by nearly double. For example, the Hyatt Regency (Parcel No. 0660000708) is valued at 197% of the Assessor's value and the Century Square building (Parcel No. 1975700365) at 191% of the Assessor's.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Likewise, the Final Study estimates property values in the "After" scenario based on hypothetical assumptions, Final Study at 24, that are rife with guesses and speculation. Aside from the Promenade, designs and specifications for the LID Improvements were incomplete, most at 30% design or less.[3] Discretionary permitting and environmental review were not complete for any of the LID Improvements. For the Pier 58, Pike/Pine and the Pioneer Square components, they had not commenced. Instead of conducting independent diligence, Mr. Macaulay "purely relied on the city's information relative to the completion and the design elements of the project." *See* Lutz Decl., Ex. 5 (Macaulay Depo.) at 93:7-11. However, as discussed below, Objectors' experts testified that there is a reasonable probability that the LID Improvements will not be completed by 2024, and may require material modifications, given the permitting and review process still to come. Decl. of R. Shockey; Decl. of R. Shiroyama; Decl. of C. Anderson.

The "After" values also assumed that Seattle's real estate market maintain strong growth through 2024, and hypothesizes "that the new waterfront amenities and improved waterfront access would enhance trends already in evidence in the various downtown Seattle real estate markets." Final Study at 7. As we know now, COVID-19 has reversed, or at least disrupted, those market trends, which has prompted many objectors to request the City to stay or abandon the LID Improvements. As John Gordon testified, the current value of hotels is approximately 10-15% lower now as compared with January 2020 values. A 10-15% value drop alone would reduce Objectors' collective assessments roughly $2-3 million.

C. Objectors' Presented Evidence That Mr. Macaulay's Methods Are Fundamentally Flawed and Produced Unreliable and Overstated Special Benefit Estimates.

On December 30, 2019, the City sent notices of assessment to property owners within the LID informing them of the proposed assessments as provided for in the Final Study spreadsheets. The notices gave taxpayers until February 4, 2020 to file an objection.

---

[3] The Promenade was at 100% design, Lower Union design was 90% complete, Pier 58 and Overlook Walk designs were 30% complete, and Pike/Pine and Pioneer Square had not yet reached 30% design. *See* Final Study at 2.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Objectors for the 31 assessed parcels here received the notices after the new year and had a month or less to hire experts, attorneys, and prepare objections.

Accordingly, on January 31, 2020, Objectors requested a scheduling order that would grant them sufficient time to prepare, and to accommodate written discovery and an opportunity to depose "Robert Macaulay and potentially other authors of the Special Benefit Study, the appropriate project manager or managers familiar with the Waterfront LID project and planned improvements, the City's engineer, a CH2M Hill engineer, or both, regarding plans and specifications for the LID improvements, and perhaps the City's SEPA responsible official." Motion for Prehearing Conference (Jan. 31, 2020) at 7-8. Although Objectors filed this motion the same month they received the assessment notices and prior to the first LID hearing on February 4, the Hearing Examiner denied the motion, reasoning that Objectors should have made their request earlier. Objectors wish to note their continuing objection to that discovery limitation. The Examiner did allow Objectors one opportunity to depose Mr. Macaulay, which they did on February 27, 2020.[4]

Objectors' assessments total over $21 million, and their properties include 8 hotels, 10 apartment complexes, 4 office/retail buildings, 3 individual condos, and 1 vacant lot. Almost none of Objectors' properties abut any LID Improvements. Most are more than 500 feet from the Promenade, Overlook Walk, and Pier 58 Improvements which—as explained more below—is the distance at which most special value benefits from community parks generally end.

[4] Because it was initially unclear whether depositions would be permitted, Objectors moved to compel the City to produce designees for deposition on two topics: (1) the City's design plans, budget, and construction schedules for the Waterfront LID Improvements; and (2) the status of the City's assessment of environmental impacts of the Waterfront LID Improvements. *See* Objectors' Motion to Compel Depositions, filed February 21, 2020. This motion was also denied.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

See Kersten Decl., Ex. E.

Objectors presented testimony from thirteen taxpayer representatives and nine experts over seven days in March and April 2020.[5] Experts unanimously opine that Mr. Macaulay's methods and conclusions in the Final Study are speculative and unreliable, and resulted in LID assessments that are not actual, measurable, or special.

All four appraisers for the Objectors (Anthony Gibbons, Peter Shorett, John Gordon, and Brian O'Connor) conclude that Mr. Macaulay's methods and conclusions in the Final Study are unreliable, speculative, and do not meet generally accepted standards of appraisal. For example, all four agree that Mr. Macaulay improperly assigns special benefits instead of

[5] Objectors' presented their cases before Hearing Examiner Vancil on March 3, March 5, March 11, March 12, April 13, April 14, and April 16, 2020, with the opportunity for one trailing declaration on April 21..

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

measuring them for each property; that the special benefit assignments are within the margin of error for appraisals; that "Before" valuations are based on unreliable market data and fail to specify how hypothetical "Before" conditions compared with current market values; and that Mr. Macaulay fails to consider general benefits conferred by the LID Improvements. In addition, Randall Scott, a former mass appraiser responsible for developing the MAI standards for mass appraisals, testified that the Final Study does not meet appraisal standards nor allow for independent assessment of the accuracy of Mr. Macauley's conclusions.

Further, expert testimony establishes that 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 Objectors. For example, 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). 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. Likewise, Mr. Shorett explains why case studies from parks in different cities are too dissimilar to serve as an adequate substitute for matched pair analysis or to draw reliable inferences from.

Finally, experts Reid 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. Shockey Decl.; Shiroyama Decl.; Anderson Decl..

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

All thirteen taxpayer representatives testified that no one from the City or ABS Valuation requested information about their properties that would have better informed the valuations prior to the proposed final assessment roll. For this reason, the "Before" valuations for most of Objectors' properties rely on inaccurate data that result in valuations that substantially exceed what any property owner would expect to receive in a real market transaction.

Further, owners testified that the LID Improvements are not necessary to the business of their income-producing properties, all of which already have sufficient access to the waterfront, downtown restaurants, and other amenities necessary for their clients and users. And for residential properties, the assumption that an increase in tourism will cause lifts in property value is both anecdotally and empirically unsupported. Indeed, the construction of new access points may in fact be a negative point for some properties like the Harbor Steps apartment towers which are located at an existing connection between the downtown core and the waterfront. The LID Improvements will draw foot traffic away from the Harbor Steps, increasing competition in other areas of the city. The same issue exists for the 2+U building.

Assuming arguendo that the LID Improvements may increase the value of some properties to some extent—and there is no evidence that it will for any of Objectors' properties—that potential benefit is many years away and speculative. Meanwhile, taxpayer representatives testified that the assessment is an immediate expense that comes with no immediate increase in revenue, thereby decreasing property values. *See* 3/5/2020 (E. Leigh) Hrg. Tr. at 126:10-129:9, 227:8-229:10; Decl. of T. Waithe, ¶ 21 (Alexis Hotel); Decl. of C. Rash, ¶ 13 (Marriott); Decl. of A. Palladino, ¶ 12 (Four Seasons); Decl. of R. Beckley, ¶¶ 12, 17. For example, even before COVID-19, hotels and apartments were not experiencing—and did not expect to experience—increases in room rates or occupancy, due to expected improvements five years away (or more). *See, e.g.*, Lutz Decl., 2 (3/5/2020 (E. Leigh) Hrg. Tr.) at 116:5-14, 117:21-119:4.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Ultimately, the primary reasons users choose a particular hotel or apartment is not proximity to the waterfront. Instead, most of the downtown hotels cater primarily to business travelers attending conventions and meetings. *See, e.g.,* Decl. of Z. Ahmed, ¶¶ 17, 26, 31, 39, 44, 52, 57, 65, 74 (Renaissance Hotel, Hyatt Regency, Hyatt at Olive 8, Grand Hyatt); Waithe Decl., ¶ 12 (Alexis Hotel); Rash Decl., ¶ 12 (Marriott); Palladino Decl., ¶ 11 (Four Seasons); Decl. of R. Meyer, ¶ 18 (Sound Hotel). For this reason, property owners do expect the LID Improvements to increase impact on demand for rooms or room rates. *Id.* The same is true for apartments—for example, the reason residents choose to live in the Harbor Steps apartments is proximity to their places of employment and other amenities downtown. *See* Lutz Decl., 2 (3/5/2020 (E. Leigh) Hrg. Tr.) at 113:13-114:20; 124:3-126:9.

The property owners unanimously testified that they expect no special benefit from the LID Improvements. Condo owners testified that property values may in fact be negatively impacted by the LID Improvements due to loss of parking, increased traffic and noise, and increased potential for crime, homelessness and sanitation issues. Meanwhile, views already protected by air space would not be enhanced by the addition of the LID Improvements. For properties near the waterfront, many testified that the viaduct removal was the primary reason for any potential property value increases. *See, id.* at 112:19-113:12.

Finally, Objectors presented evidence showing that the assessments are disproportionate. For example, the City disproportionately assessed hotels a greater percentage of the cost of the Improvements even though there no evidence that hotel properties will in fact benefit. And even within the hotels, the assessments are disproportionate. For example, Mr. Gordon testified that the differences between the special benefit increases for the Hyatt at Olive 8, the Grand Hyatt, and Hyatt Regency—which are all very close together—made little sense and raised doubts as to proportionality. As another example, the Marriott is assessed a 3.2% special assessment, whereas comparable hotels along the waterfront received an estimated 0.97% increase in value. Rash Decl., ¶ 11.

In addition, one would expect Mr. Macaulay to apply the same percentage increase

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

to income generated from the parking/restaurant/retail portion of the Grand Hyatt, given that was his approach with the rest of the hotels—i.e., he applied the same special benefit percentage to all sources of revenue to calculate the "After" net operating income for commercial properties. But because this portion of the Grand Hyatt happens to be a different parcel number, Mr. Macaulay applies a different special benefit percentage increase to the parking/retail income associated with this hotel. He does the same thing for the garage and retail income for the Four Seasons, which again happen to be different parcels. His inconsistent approach further demonstrates how his methods lead to arbitrary and disproportionate special assessments.

Objectors have presented ample expert and fact evidence showing that Mr. Macaulay's methods are fundamentally flawed and result in arbitrary and capricious special benefit assignments that are not actual, measurable, special, or proportionate.

III. ARGUMENT

It is well-settled that the City may not charge property owners that are not specially benefitted from the LID Improvements. *Heavens v. King Cty. Rural Library Dist.*, 66 Wn. 2d 558, 564, 404 P.2d 453, 456 (1965). RCW 35.43.040 provides cities and town authority for ordering local improvements and for levying and collecting special assessments "on property specially benefited thereby[.]" The City must distribute and assess the cost and expense of the improvements "in accordance with the special benefits conferred thereon." RCW 35.44.010.

For a proposed assessment roll to comply with the law, the assessments must not exceed the actual special benefit conferred by the LID Improvements. *Heavens*, 66 Wn. 2d. at 563. The special benefit cannot include general benefits enjoyed by the public at large. *Id*. Further, LID assessments must be proportionate. *Id.* And the special benefit must be "actual, physical and material and not merely speculative or conjectural." *Id.* Failure to meet any of these legal requirements means the assessment roll must be annulled because the assessments are arbitrary or capricious, or founded on fundamentally wrong methods.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

For example, property already adequately served by public improvements in the "Before" scenario cannot be assessed for additional improvements. In *Appeals of Jones*, 52 Wn.2d 143, 324 P.2d 259 (1958), the Court held that property that was already adequately supplied with water from a main in an abutting street and afforded adequate fire protection by a hydrant at a nearby intersection. Therefore, the property was not specially benefited by installation of new water main and fire hydrant, and hence was not subject to assessment for these local improvements. Likewise, in *In re Schmitz*, 44 Wn.2d 429, 433, 268 P.2d 436 (1954), an assessment levied for raising the grade of a road by 16 to 18 feet was held invalid because the evidence showed that properties would have benefitted equally from an increase of only 9 feet. The court emphasized that "the basic principle and the very life of the doctrine of special assessments [is] that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed." *Id.* at 537. "[O]nly that portion of the cost of the local improvement which is of special benefit to the property can be levied against the property." *Id*. at 433.

Accordingly, the City may not assess owners for "oversized" improvements or improvements meant to serve future users. In *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 948, 320 P.3d 163 (2014), the court annulled the City of Edgewood's LID assessments because the City calculated the assessments on a fundamentally wrong basis by including costs for an oversized sewer system that would benefit only future users not assessed under the LID. *Id.* at 938-41, 960. "The record shows that the City deliberately built the pipes larger than was needed to serve the LID because it wanted to have capacity to serve future users outside the LID." *Id*. at 940.

Finally, in calculating special benefits, the City must account for special detriments. In *Kusky v. City of Goldendale*, 85 Wn. App. 493, 501, 933 P.2d 430 (1997), the court held that the assessment was founded on fundamentally wrong basis where the city failed to consider the costs to owners for removal and cleanup of underground storage tanks discovered during the improvement project. "A formula that merely takes into account the

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

extent of the Kusky property that lies adjacent to the Brooks Street improvement, without considering the costs of removing the gasoline tanks that were on City property and the costs of cleanup, does not fairly represent the benefit to *any* of the properties in the LID." *Id.*

Although there are presumptions in favor of the City that apply on appeal, Objectors have presented ample evidence to overcome those presumptions. Before the Hearing Examiner, the proposed assessments are presumed correct, "unless overcome by clear, cogent and convincing evidence." *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 948, 320 P.3d 163 (2014). 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.

As explained below, Objectors have rebutted the presumption by demonstrating by clear, cogent, and convincing evidence that the City's method of assessing the properties is fundamentally flawed, arbitrary, and not supported by project designs and specifications, permits, market data or empirical research. The proposed assessments do not accurately reflect actual, measurable, proportionate special benefits conferred on Objectors' properties as a result of the LID Improvements. Thus, the Hearing Examiner should recommend the City Council reject the proposed final assessment roll.

A. The Final Study Employs Fundamentally Flawed Methods.

Fundamentally wrong basis "'refers to some error in the method of assessment or in the procedures used by the municipality.'" *Bellevue Assoc. v. City of Bellevue*, 108 Wn.2d 671, 675, 741 P.2d 993 (1987) (quoting *Abbenhaus v. Yakima*, 89 Wn.2d 855, 859, 576 P.2d 888 (1978)). The court may disregard the opinion of an expert if he or she has proceeded on a fundamentally wrong basis. *Id.*

As explained in Objectors' Motion To Exclude The Expert Testimony of Robert J. Macaulay (hereinafter "*Frye* Motion"), filed on April 8, 2020, Mr. Macaulay's methods are critically flawed, fail to meet basic standards of appraisal, and are not capable of producing

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

reliable results. Therefore, Objectors argued that the Final Study should be excluded as unreliable expert evidence. *See* HER 2.17; *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); Evidence Rule 702. Objectors incorporate by reference the entirety of the *Frye* Motion here. For all of the reasons explained in the *Frye* Motion and herein, the proposed assessment roll should be annulled because the methods used to calculate the special assessments are fundamentally flawed.

B. The Special Benefits Are Inherently Speculative Because LID Improvements Will Not be Completed for Another Five Years, and Mr. Macauley's Entire Analysis Relies on Hypotheticals.

Relying on flawed methods, the proposed final assessment roll assigns special benefits that are the opposite of actual or measurable—they reflect Mr. Macauley's hypothetical, speculative "professional judgment." There is no case, to Objectors' knowledge, supporting an assessment where the difference between the fair market value of the property immediately before and after the improvement is based wholly on hypotheticals. Nor have Objectors found examples of public entities finalizing a LID assessment five years prior to construction and before improvements have undergone a lengthy, discretionary environmental and permitting process.

Here, to calculate the "Before" and "After" values of properties within the LID, Mr. Macaulay assumes that as of October 2019, the WSDOT Improvements and LID Improvements are in place. *See* Final Study at 14-15; *see also* Lutz Decl., Ex. 5 (Macaulay Depo.) at 71:14-72:7. But in fact, much of the waterfront is an empty construction zone following removal of the viaduct, awaiting either baseline WSDOT restoration (in the "Before" scenario), or slightly enhanced LID Improvements (in the "After" scenario). Consequently, the "Before" and "After" valuations in the Final Study are untethered to reality. While appraisers tolerate some degree of estimation and judgment, Mr. Macaulay's Final Study is far too speculative to satisfy industry practices and standards. *See* Lutz Decl., Ex. 4 (3/12/2020 (P. Shorett) Hrg. Tr.) at 92:24-93:10 (it is impossible to perform a special

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

benefit analysis with the level of precision implied in the Final Study due to the size of the LID and use of hypotheticals).

1. "Before" values are hypothetical.

First, there is no clear depiction of the WSDOT Improvements, which makes it impossible to understand how Mr. Macaulay came up with his hypothesized "Before" values, both independently and as compare to the "actual" October 2019 conditions. Lutz. Decl., Ex. 5 (Macaulay Depo.) at 62:1-63:23. It appears he did not actually do that work. *Id*. at 69:19-70:19. Although Mr. Macauley is required to exclude any value attributable to demolition of the viaduct and the planned WSDOT Improvements, Mr. Macaulay fails to calculate the actual market value of LID properties in October 2019, and fails to separately analyze the value impact from WSDOT's planned improvements on October 2019 values. Without any apparent basis or support, Mr. Macaulay simply "ma[de] a judgment a call" on what occupancy and rates would be for the commercial properties assuming removal of the viaduct and construction of the WSDOT Improvements. Lutz Decl., Ex. 5 (Macaulay Depo.) at 129:19-130:11. This outright omission precludes any independent evaluation of the accuracy of the "Before" values and fails to meet professional appraisal standards; if an appraiser uses current sales data to infer values, then the appraiser must explain how he/she analyzed that data and other information to come up with the hypothetical value. Lutz Decl., Ex. 1 (3/3/2020 (A. Gibbons) Hrg. Tr.) at 128:1-130:4.

Failure to consider what impact the WSDOT Improvements would have on property values also raises doubts as to Mr. Macaulay's special benefit estimates that accrue specifically due to the LID Improvements. As shown in renderings provided by the City, the viaduct removal produced a noticeable difference for properties near the waterfront, whereas the difference between the "Before" and "After" scenarios are relatively indistinguishable. *See* Lutz Decl., Ex. 16. Because the "before condition is so eerily similar to the after condition," Mr. Macaulay had the especially difficult, but necessary, job to explain what increase in value was in fact due to projects assumed completed in the "Before" condition

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

(*see* Lutz Decl., Ex. 1 (3/3/2020 (A. Gibbons) Hrg. Tr.) at 128:21-130:4) —principally, removal of the viaduct, but also other road, pedestrian and landscaping improvements.

In other words, as in *In re Schmitz,* 44 Wn.2d 429, it is likely—if not certain—that properties will equally benefit from the WSDOT Improvements as from the LID Improvements. *Id*. at 433 (owners would have equally benefitted owners to raise grade of road 9 feet instead of 16-18 feet). But as the Court held there, "only that portion of the cost of the local improvement which is of special benefit to the property can be levied against the property." *Id*. If the City wishes to construct improvements beyond that, it must do so on its own dime. *See also Hasit*, 179 Wn. App. 948 (owners may not be assessed if City deliberately builds oversized pipes in order to accommodate future use).

2. "After" values are also hypothetical.

Second, the Final Study assigns special benefits to arrive at "After" values that are likewise inherently speculative due to the fact that the LID Improvements are not scheduled to be completed until 2024. The Washington Supreme Court has acknowledged that the value of a special benefit is inherently speculative prior to completion of any construction project. Accordingly, the Washington State legislature has authorized condemnees to postpone the determination of special benefits "in order to remedy this inequity and achieve more just results in condemnation cases." *State v. Green*, 90 Wn.2d 52, 56, 578 P.2d 855 (1978). In particular, RCW 8.25.220 allows for a bifurcated proceeding where the valuation of special benefits is separately determined *after* construction of the improvements. "The separate valuation proceeding helps insure against speculative special benefit offsets" for "yet-to-be constructed" improvements. *Green*, 90 Wn.2d at 56.

This reasoning applies with at least equal force in the LID context because final assessments cannot be speculative. *Heavens*, 66 Wn. 2d at 563. Although LIDs can be finalized prior to completion of improvements, this is typically just six month or a year prior. *See* Lutz Decl., Ex. 1 (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

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

or five years, which renders them 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; *see also id.*, Ex. 3 (3/11/2020 (P. Shorett) Hrg. Tr.) at 196:17-21; 205:22-206:2. For this reason, Objectors' experts opine that the Final Study should have accounted for risks associated with delivery of the improvements and any special damages associated with interim construction. *See id.*, Ex. 1 (3/3/2020 (A. Gibbons) Hrg. Tr.) at 119:17-120:9, 59:20-60:20. In addition, as is typical for appraisers, Mr. Macaulay should have discounted the benefit to account for the time value of money. *Id*. at 54:17-55:1.

Instead, here property owners are being assessed now for speculative future special benefits. Mr. Macaulay assumes increased revenue for the commercial properties effective October 2019. But none of Objectors' properties are realizing these benefits now, and none expect to realize any increase in the near term—LID Improvements or not. For example, notwithstanding the questionable hypothesis that hotels will benefit from an expected increase in tourism, there is no question that tourists are not coming in larger numbers and paying higher room rates because of something happening five years down the road, and certainly not now with COVID-19 a reality. *See* Lutz Decl., Ex. 4 (3/12/2020 (J. Gordon) Hrg. Tr.) at 207:11-23.

3. The hypotheticals valuations are inherently speculative because it is unknown whether underlying assumptions will remain relevant when the Improvements are actually constructed.

More to the point, the Final Study is speculative because it relies on unconditioned, undiscounted, hypothetical valuations that assume things will go to plan for the five years. The City has acknowledged that design plans, costs, and construction schedules are subject to change and subject to its ability to obtain discretionary permits. Lutz Decl., Ex. 13 (Interrogatory No. 40) (there are no plans or specification upon which the final assessment roll is based); *Id*., Ex. 14 (Interrogatory No. 50) ("design and construction "will take several years to complete, and the timelines for completion of all designs, plans, agency reviews, specifications, and construction documents are still in process and subject to change").

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Nevertheless, the City assured Mr. Macaulay that he could assume that LID Improvements would be constructed exactly as depicted in preliminary renderings and without delay, even though none of designs were at 100% and all still required environmental review and discretionary permitting—all of which have the potential to materially change or delay the improvements. *See id*., Ex. 5 (Macaulay Depo.) at 93:7-11.

By prematurely committing to construction of the LID Improvements, the City is prejudging the results of the environmental and permitting processes and ignoring the authority of other agencies to modify the proposals. As indicated by preliminary permit applications, the City has not completed environmental review for Pier 58. Nor has the City completed environmental review or permitting for the Pike/Pine Streetscape Improvements or the Pioneer Square Streetscape Improvements.

Meanwhile, each environmental or permit review raises potential for the projects to be delayed or materially changed. For example, the City requires a Hydraulic Project Approval from the Department of Fish and Wildlife (WDFW) to proceed with construction of Pier 58. The permit application is currently on hold because the project has not reached 60% design. *See* Lutz Decl., Ex. 15 (Email re a hold on Hydraulic Permit Application No. 20834). Additionally, WDFW noted at the outset that the project likely requires additional mitigation because of the size of the steel piling footings and the footprint of the Pier. *Id*.

Because of the probable delay securing this permit and others, it is likely the City will miss its target Notice to Procced date to complete Pier 58 on time, which could cause ripple effects delaying completion of any sequentially sequenced projects as well. *See* Decl. of R. Shockey (noting required NEPA review and six other federal reviews with three agency consultations, at least two state agency reviews, five or more local permits, and potential hurdles with historic preservation, cultural preservation, and federal segmentation laws); Decl. of R. Shiroyama (the stacking of narrow windows for project completion in the schedule increases risk of delay).

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Further, Washington law is clear: "decisionmakers need to be apprised of the environmental consequences before the project picks up momentum." *King Cty. v. Washington State Boundary Review Bd. for King Cty.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993). Moreover, both SEPA and NEPA prohibit City actions pending completion of environmental review that would limit the scope of environmental review including consideration of the "no action" alternative. WAC 197-11-070; 40 CFR 1506.1. Here, "[o]nce a final assessment roll is established the City will be obligated to deliver the LID improvements." *See* Summary and Fiscal Note to Waterfront LID Formation to Seattle City Council Bill No. 119447 at 3 (Jan. 28, 2019). This premature commitment violates Seattle Municipal Code 25.05.055(B) and related federal and state law. *E.g.*, 40 C.F.R. § 1500.1(b) (NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken); SMC 25.05.070(A); SMC 25.05.440(D)(2)(b); SMC 25.05.406 and their counterparts in the SEPA Rules, Chapter 197-11 WAC (among others); accord LID Manual, pp. 3, 6, 17, 24, 26.

Thus, because Mr. Macaulay assumes that LID Improvements are complete as of October 2019, he fails to account for any risks associated with potential delays, design or budget changes, or construction impacts, nor for the time value of money. *See* Lutz Decl., Ex. 5 (Macaulay Depo.) at 106:11-108:17; *see also id.*, Ex. 4 (3/11/2020 (A. Gibbons) Hrg. Tr.) at 197:21-198:3. This assumption improperly raises a substantial risk that property owners will be charged for benefits that may never materialize, or that may be significantly delayed or changed through the entitlement process.

Further, the long delay between the date of valuation and the completion of the LID Improvements raises a risk that uncertainties in the market and economy will impact values. At the micro-level, buildings and landscapes could change view and pedestrian access, competitors could enter the market, etc. At a macro-level, markets may shift. Indeed, Objectors witnesses testified that it was speculative to assume that market highs experienced

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

in October 2019 [6] would sustain through 2024, after an already extraordinarily long expansion period. *See, e.g.*, Lutz Decl., Ex. 2 (3/5/2020 (E. Leigh) Hrg. Tr.) at 119:15-123:6; *see also id.*, Ex. 1 (3/3/2020 (A. Gibbons) Hrg. Tr.) at 117:6-118:9, 119:17-120:9. And in fact, the opposite is true. As both Mr. Gibbons and Mr. Gordon explained the COVID-19 crisis highlights how fundamentally speculative and unfair it is to base a special benefit assessment on twin hypotheticals for improvements still five years away.

Although COVID-19 occurred after the effective date of Mr. Macaulay's appraisal, and therefore is not part of his analysis, its impact on property values renders the Final Study unsuitable and unreliable as a basis for determining special benefits to Objectors' properties. Because COVID-19 is already impacting market conditions, the Appraisal Institute's recent guidelines require appraisers to analyze the impact of COVID-19 on values, stating that "it is not appropriate to include a disclaimer or extraordinary assumption that suggests the appraiser is not taking responsibility for analysis of market conditions." Hearing Exhibit 93. Mr. Gordon's preliminary appraisals show that hotel values have already dropped an estimated 10-15% since October 2019, and occupancy rates remain at zero or in single digits. Hotels without guests will derive no benefit, special or otherwise, from the planned LID Improvements. And even assuming hotels recover prior to 2024, there is no basis for assuming that values hypothesized in October 2019 will remain relevant.

The special assessments are far from actual and have not been measured. Instead, they are based on two hypothetical assumptions that stray far from reality. Because there is far more uncertainty than there is certainty, and it is impossible to predict which, and to what extent, different factors will impact value five years down the road, both the "Before" and "After" values are inherently speculative.

---

[6] Reviewing some of the industry studies Mr. Macaulay includes in his analysis, it is clear that third to fourth quarters 2019 were anticipated to be a high-water mark for commercial rents, City employment and other relevant economic indicators.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

C. The "Before" Valuations are Overstated Which Results in Special Assessments That Exceed the Actual Benefit to Objectors' Properties.

As explained in the *Frye* Motion, the Final Study's "Before" valuations for Objectors' properties are unreliable and overstated due to Mr. Macaulay's failure to analyze the market impact from the WSDOT Improvements and his reliance on inaccurate market data.

Assuming Mr. Macaulay *did* consider the value impact from WSDOT's planned improvements on October 2019 market values—and there is no indication that he did—that would result in an overstated special benefit amount because a fraction of the assessment would be due to improvements not included in the LID. And if he did *not* consider the value of the WSDOT Improvements, the "Before" valuations would be too low, likewise resulting in an inflated special benefit assessment—i.e., the difference between the "Before" and "After" values.

In addition, Mr. Macaulay relied on inaccurate market data to estimate the "Before" value, which resulted in overstated special benefit amounts. *See* Lutz Decl. Ex. 3 (3/11/2020 (B. Scott) Hrg. Tr.) at 23:19-22. For example, Mr. Macaulay admits that had he known of development restrictions for the Century Square Property and the United Way Building, this would have lowered his "Before" valuation for these properties. *See id.*, Ex. 2 (3/5/2020 (G. Carpenter) Hrg. Tr.) at 18:18-20:13, 20:14-22:16; 25:19-26:6; *see also id*., Ex. 5 (Macaulay Depo.) at 165:10-167:20.

For the hotels, Mr. Macaulay's decision to rely on inaccurate market data notably deviates from standard appraisal practices because more reliable data in the form of STR reports are readily available. Lutz Decl., Ex. 4 (3/12/2020 (J. Gordon) Hrg. Tr.) at 196:5-197:12; 215:9-18. Without the STR reports or actual input from the hotels, Mr. Macaulay's "Before" valuations are drastically overstated in most cases in large part because he relies on publicly available "room rack rates" to estimate hotel income. *See id*. (J. Gordon) at 162:3-18; 170:16-171:13; 179:25-180:14; 192:15-22. For example, Mr. Macaulay assumes an average room rate of $365 for the Hyatt Regency, which is more than 78% higher than the

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

actual average room rate ($205) for 2019, far exceeds the most optimistic assumptions about future growth in rates for the Hyatt Regency, and is not a reasonable assumption in valuing a hotel of this type in the downtown Seattle market. This results in a "Before" value that is $238,152,000 (or 48%) higher than it would have been if Mr. Macaulay was using reliable data. *See* Lutz Decl., Ex 9 (Comparison Table for Hyatt Regency). For the Hyatt at Olive 8, Mr. Macaulay overestimates the average room rate by 48%. Coupled with the inaccurate data for operation expenses and other income, this results in a "Before" value that is $69,233,000 (or 59%) higher than it would have been if Mr. Macaulay was using reliable data. *See id.*, Ex 10 (Comparison Table for Hyatt at Olive 8). As Mr. Gordon testified, Mr. Macaulay consistently assumes average room rates that are much higher than actual rates, which translates into overstated net operating income and overstated "Before" values.[7]

Similar fundamental errors were found in Mr. Macaulay's analysis of other properties. For the Helios apartment complex, Mr. Macaulay undercounted the number of studios as compared with larger units, which resulted in a substantially inflated "Before" value. *See* Lutz Decl., Ex. 3 (3/11/2020 (B. Scott) Hrg. Tr.) at 22:24-23:18; *see also id.*, Ex. 11 (B. Scott's Supplemental Report for Helios) (using the correct data would have reduced "Before" value by $37,849,000). For the 2+U office building, Mr. Macaulay included the value of all three parcels after concluding that two parcels could be developed into other income-producing properties, when in fact, the 2+U development precludes such use of those two parcels. *See id.*, Ex. 3 (3/11/2020 (B. Scott) Hrg. Tr.) at 54:16-55:24, 58:17-59:13. Using accurate market information would have reduced the "Before" value by $31,968,000. *See id.*, Ex. 12 (B. Scotts' Supplemental Report for 2+U).

These fundamental errors pervade Mr. Macaulay's special benefit analysis—because Mr. Macaulay starts with erroneous data, he is destined to arrive at unreliable "Before" values, even putting aside his failure to describe how he accounted for the WSDOT Improvements. Indeed, nearly all of the "Before" valuations for Objectors' properties

[7] There is no indication Mr. Macauley's estimates are based on WSDOT's work.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

substantially exceeded the Assessors' valuations, some by nearly double, with no apparent reason for the difference. And, as discussed below, these artificially high hypothetical "Before" valuations translate into inflated special benefit amounts after Mr. Macaulay applies a percentage increase to the "Before" numbers.

D. Mr. Macauley's Hypothesized Special Benefits are Not Actual, Measurable or Special Because They Are Arbitrarily Assigned.

It is axiomatic—not only under the law but also pursuant to generally accepted appraisal practices—that the City must substantiate the use of percentages when allocating assessments. For example, in *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 401, 851 P.2d 662, 664 (1993), to determine the amount of special benefit to each parcel, Bellevue used a formula that allocated one-third of the cost of the improvements to existing uses and two-thirds to future uses. But "[t]he City offered little justification for the one-third/two-thirds calculation." *Id*. Further, the formula was based on national data, as opposed to local data. Meanwhile, owners' four real estate appraisers and a traffic engineer were unanimous in their conclusions that (1) the trips generation method of assessment bore no relationship to market value nor to special benefits, and (2) there was no special benefit to the properties involved. *Id*. at 403-404. Because "*no* expert testified that this assumed two-thirds future use was reasonable," the Court therefore concluded that it was "sheer speculation" and "without foundation." *Id*. at 417-418.

1. Instead of measuring special benefits, Mr. Macaulay arbitrarily assigned special benefit percentage increases.

Like the experts in *Bellevue Plaza*, Objectors' four appraiser experts testified that Mr. Macaulay arbitrarily assigns—rather than measures—a special benefit percentage increase to already faulty hypothesized "Before" values. *See* Lutz Decl., Ex. 8 (A. Gibbons Letter, RE: Waterfront Seattle LID Special Benefits Report (Jan. 30, 2020)); *id.*, Ex. 4 (3/12/2020 (P. Shorett) Hrg. Tr.) at 49:4-50:1; *id.* (J. Gordon) at 168:2-20; 176:1-10; *id.*, Ex. 2 (3/5/2020 (B. O'Connor) Hrg. Tr.) at 147:10-149:21; *id.*, Ex. 1 (3/3/2020 (A. Gibbons) Hrg Tr.) at 88:25-89:3; 90:8-91:13. And the *Bellevue Plaza* problem is not solved because

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Mr. Macauley applies a series of "micro" judgment-based adjustments rather than a more macro one. *Id*., Ex. 1 (3/3/2020) (A. Gibbons) Hrg. Tr.) at 182:19-183:6. In other words, his methods do not cease to be arbitrary just because he applies the percentage increases to revenue sources instead of the property values themselves.

Indeed, Mr. Randall Scott further testified that Mr. Macaulay's failure to specify a model structure to actually determine the factors affecting value, to report the model in an appropriate manner, and to test the model against actual sales data to ensure that it produces reliable valuations, renders Mr. Macaulay's methods incapable of producing reliable special benefit assessments that can be truth-tested and recalibrated if appropriate. Mr. Scott concluded that the Final Study fails to comply with USPAP Standards 5 and 6, and "doesn't count as an appraisal." *Id.* at 216:18-217:1.[8]

Assigning what should be a measured value—here, the special benefit accruing to each property as a result of the LID Improvements—is, by definition, speculative and arbitrary if there is no basis for the assignment. *Cf. Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, 40-43 (Miss. 2003) (picking a distance where impact on value stopped rather than measuring impact is not a generally accepted appraisal method). For the commercial properties, Mr. Macaulay's spreadsheets reveal methods that fail to produce "actual, physical and material" and non-speculative assessments. Rather, Mr. Macaulay

[8] 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* Lutz Decl., Ex. 1 (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 also* Lutz Decl., Ex. 1 (3/3/2020 (R. Scott) Hrg. Tr.) at 206:15-207:17.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

bases adjustments on hypothesized miniscule increases to property revenue and changes to cap rate to "calculate" an "After" value due to the coming 2024 LID Improvements.

For example, for the Hyatt Regency, the first two scenarios assume room rates will increase by 0.20% (low) and 0.45% (high) due to the 2024 LID Improvements (hypothetically complete and already generating income in 2019). But as Mr. Gordon testified, it is not possible to accurately conclude that the reason for this level of percentage increase would be due to the LID Improvements, and there appears to be no support for assignment of these percentages. It is speculation masquerading as "professional judgment." Mr. Macaulay uses these same percentages (0.2% and 0.45%) to increase food and beverage revenue, and parking and other income. For example, he "calculates" that food and beverage income will increase from $40 per room to either $40.08 or $40.18 per room in the high/low scenarios respectively. 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. And remember, this is all supposed to be happening five years before the improvements are actually complete.

For the third and fourth scenarios, Mr. Macaulay assumes the net operating income remains the same as in the hypothetical "Before" condition, but changes the capitalization rate ("cap rate"). For the Hyatt Regency, the cap rate goes from 7.25% to 7.2% (low scenario, creating a bigger value increase) and 7.23% (high scenario, creating a lower value increase). Mr. Gordon likewise explained that cap rate changes of .05 or .02% are not typically measurable, and there appears to be no support for these changes in the Final Study or any of its supporting materials. Mr. Macaulay then averages his four "After" values to arrive at a final special benefit conclusion.[9] For the Hyatt Regency, this is an increase in property value of 0.49% due to the LID Improvements.

[9] It is not clear whether this is a true average in every case or whether there is greater weight given to some of the scenarios. But the final special benefit percentage always falls somewhere in the middle of the four scenarios.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

As Objectors' experts testified, Mr. Macaulay's assigned property value increases—which range from 0.12% to 3.2% for Objectors' 31 parcels, with an average of 1.79%—fall within the margin of error for appraisers. 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. Lutz Decl., Ex. 1 (3/3/2020 (A. Gibbons) Hrg. Tr. at 164:2-9; Lutz Decl., Ex. 2 (3/5/2020 (B. O'Connor) Hrg. Tr.) 201:7-204:8; Lutz Decl., Ex. 3 (3/11/2020 (P. Shorett) Hrg. Tr.) at 216:25-217:11. Mr. Macaulay's miniscule special benefit percentages fall far below that 5% margin, and "there is no way of authenticating" such incremental changes because "[m]arket forces completely obliterate any tiny little noise factor like that." *See* Lutz Decl., Ex. 1 (3/3/2020 (A. Gibbons) Hrg. Tr.) at 160:23-161:5. Mr. Macaulay agrees that 0.25% is too small to measure. *See id.*, Ex 5 (Macaulay Depo.) at 25:17-25. Yet, Mr. Macaulay regularly assigns or purports to measure differences in value within that margin. And the fact that "Before" values are also based on a hypothetical that adds some incremental value exacerbates this issue—the ability for an appraiser to discern the value differences between hypothetical conditions that are so similar "verges on being ludicrous." *Id.*, Ex. 1 (3/3/2020 (A. Gibbons) Hrg. Tr.) at 89:4-90:7.

Even if it were possible to accurately tease out such a miniscule hypothetical change due to improvements coming five years later, there is <u>no data</u> to justify the mathematical adjustments—they are just the appraiser's guesses as to what he felt the changes (hypothetically) would be. *See* Lutz Decl., Ex. 4 (3/12/2020 (J. Gordon) Hrg. Tr.) at 168:2-20; 176:1-177:6; *id*. (3/12/2020 (P. Shorett) Hrg. Tr.) at 49:4-50:1. Mr. Macaulay points to no specific measurements, industry standard, academic study or literature, or other justification to explain the percentage increases/decreases he applied to income and cap rates. With respect to the Marriott, when asked to explain the reason for 1.75% and 2% increase, Mr. Macaulay responded: "Just based on the market and what we felt the increase, reasonable increase in rate would be." *See id.* Ex. 5 (Macaulay Depo.) at 148:20-24. And

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

he admitted that changes in cap rate were not "driven by any particular academic study" and the adjustments were instead a matter of "professional judgment." *Id*. at 155:2-156:17.

It is clear that he assigned a value based on his own judgment to propose assessments of millions of dollars on property owners. *See id*. Ex. 1 (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"). They are neither actual nor measured.

2. There is no support for Mr. Macaulay's assignment of special benefit percentage increase.

Mr. Macaulay's special benefit assignment may have been less egregious had he substantiated it with selected matched paired analysis or other reliable empirical research or market data. There is none. Instead, Mr. Macaulay purports to rely on Dr. John Crompton's research to justify the assignment of incremental increase of 0.5% to 4% to property values within the LID. However, Dr. Crompton testified that Mr. Macaulay misinterpreted his work in fundamental ways, and recent updates to his research show even smaller anticipated park benefits.[10]

Before even getting to the new research, however, Dr. Crompton takes issue with many of Mr. Macauley's attempts to extrapolate from earlier studies. First, the LID Improvements manifest the characteristics of a parkway—not a park. *See* Lutz Decl. at Ex. 6 (Crompton Report) at 3-5. "It is inappropriate to apply [Dr. Crompton's] findings to parkways, since they are a qualitatively different amenity" and research indicates that property values do not increase to the same extent due to parkways. *Id*. at 13.

Second, Dr. Crompton finds that most benefits from an open space or community park occur within a 500-foot range (or 3 block) with minimal benefits perhaps extending out as far to 2,000 feet (or 4-12 block). *Id*. at 5-6. Dr. Crompton used "blocks" in his 2004 book as a reified synonym to his "feet" ranges, to give lay readers a sense how far a benefit

[10] Dr. Crompton is the most cited scholar in the world in the tourism and leisure management fields, with over 41,000 citations to his work. *See* Lutz Decl., Ex. 6.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

might be expected to extend (in a single-family residential neighborhood). Mr. Macaulay, however, applies the block measure to "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)" because Seattle City blocks are long—approximately 300 feet. *Id*. at 7. Mr. Macaulay also inappropriately applies these measures to a parkway and fails to recognize that the underlying studies used road network analysis (as opposed to "as the crow flies" distance), which had the effect of further inflating the assumed impact.

Indeed, maps created by Objectors' GIS expert show that a 500-foot area (following road distance) around the supposed "park-like" LID improvements would extend only a block and a half, and a 2,000-foot area would extend only about 6 blocks. *See* Kersten Decl., Exs. C, D; *see also* Lutz Decl., Ex. 5 (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). Nearly all of Objectors' properties are located outside the 500-foot buffer and at least ten properties are located outside the 2,000-foot buffer. *See* Kersten Decl., Exs. E, F. Even more troubling is that the LID boundary extends far beyond the 2,000-foot buffer in most places, and some LID properties are over 5,000 feet away from the "park-like" LID Improvements. *See id*., Ex. G. There is no explanation or justification in the Final Study for finding a potential special benefit at these distances.

Third, Mr. Macauley also overextends Dr. Crompton's research, which focuses on a *park's* impact on *single-family* home values, to apply to all properties in the LID including a variety of multi-story downtown Seattle uses, without explaining the basis for this inference. *See* Lutz Decl., Ex. 6 (Crompton Report) at 14. And, Mr. Macaulay improperly relies on a "Park Quality Scale" to assess the quality of the LID parkway and assign premium percentages to condominiums. But "[n]o valid greenway or parkway scale has been developed that describes or defines 'average' and 'above average' . . . so the Appraiser's judgment is arbitrary." *Id*. at 10. Moreover, Mr. Macaulay's percentage premiums "seem to be entirely arbitrary" and indeed are "much higher than those emanating from [Dr.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Crompton's] 2004 publication from which [Mr. Macaulay] inappropriately infers they are derived." *Id*.

Fourth, Mr. Macaulay fails to consider negative impacts from social and/or environmental disamenities that are sometimes associated with park-like amenities. "These may include – congestion, increased traffic flow, lack of parking or unwanted on-street parking, litter, vandalism, intrusive lighting, and groups engaging in morally offensive activities." *Id*. at 11. Accordingly, a number of studies have shown that properties immediately adjacent to a park do *not* show the highest premium. *Id*. at 10. Mr. Macauley seems to have "assumed away" any potential disamenity (yet another hypothesis) by relying on the City's "promises" to do more to keep the areas well patrolled, clean and nicely maintained. *See* Final Study at 8 (discussing fact that designation of the LID as "park land" will convey power to City to keep the area clean and maintain security).

Fifth, Mr. Macaulay fails to consider the diminished premium from the greenway after taking into account the waterfront amenity that existed even when the viaduct was up. "[T]the magnitude of the water premium is important, because it impacts the perceived value of potential increments of benefit that may emanate from the new greenway." *Id*. at 11. Just as turning on a weak light in an already bright room is unlikely to be detectable, "the incremental effect of the new 'park improvements' on the value of properties which already have a large premium stemming from their view of the water is likely to be very small or perhaps non-existent." *Id*. at 13. This is especially so because Mr. Macauley's "After" value is supposed to exclude any lift associated with removal of the viaduct.

Aside from Dr. Crompton's research, Mr. Macaulay also cites a number of case studies. But instead of using paired sales studies in Seattle between parks with and without a waterfront amenity to identify a relative value assessment, Mr. Macaulay relies on case studies of parks from other cities. *See* Lutz Decl., Ex. 1 (3/3/2020 Hrg. Tr.) at 86:6-89:3. However, as Mr. Shorett explained, the case studies are not an adequate substitute for matched paired analysis and the scale of those projects when compared with the LID

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Improvements are so substantively different that they do not provide useful comparisons. *See* Hearing Exhibit 49 (P. Shorett's Supplemental Report); Lutz Decl., Ex. 3 (3/11/2020 (P. Shorett) Hrg. Tr.) at 208:8-24; Lutz Decl., Ex. 4 (3/12/2020 (P. Shorett) Hrg. Tr.) at 6:19-7:18.[11] *Cf. Bellevue Plaza*, 121 Wn.2d at 401 (use of national instead of local data rendered allocation of traffic percentages unreliable).

Finally, Objectors' witnesses have been unanimous that the increase in tourism the City anticipates from the LID Improvements is not likely to contribute specially, if at all, to the value of their properties. Accordingly, Mr. Macaulay's reliance on the HR&A study, *see* Final Study at 44-45, to project increases in tourism is irrelevant as a basis for hypothesizing special benefits. And in any case, that 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 and is based on tourism data from dissimilar parks in other cities.

Ultimately, however, Mr. Macaulay admits that rather than use data and information from case studies to inform his "measure" of special benefit, he relied on his own professional "judgment" to "estimate" the market difference between the "Before" and "After" conditions. Lutz Decl., Ex. 5 (Macaulay Depo) at 44:8-18. From the underlying materials, it is clear that this "measurement" was just application of an arbitrary percentage to increase property values, uninformed by market data, industry standard, or empirical research. Based on this deficiency alone, the final assessment roll should be annulled because Objectors have shown by clear and convincing evidence that it is based on fundamentally flawed methods that produce arbitrary and capricious special benefit estimates.

---

[11] As described by one taxpayer who lives in San Francisco, the Embarcadero parkway is not a comparable improvement because that involved a "huge transformation" after removal of a viaduct which involved up-zoning, changes in use, and massive development in the area around the removed freeway. By contrast, the Seattle waterfront is already a well-developed tourist destination. *See* Lutz Decl., Ex. 3, (3/11/2020 (E. Lee) Hrg. Tr.) at 121:3-22.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

E. Special Assessments are Overstated and Disproportionate Because the Final Study Fails to Consider General Benefits or Special Detriments.

Not only must a special benefit be actual and non-speculative, it must "bring a benefit substantially more intense than is yielded to the rest of the municipality." *Heavens*, 66 Wn.2d at 563. Accordingly, an appraisal for a LID should consider general benefits as well as special benefits. *See* Lutz Decl., Ex. 7 (Local and Road Improvement Districts Manual for Washington State, 6th Ed. (Oct. 2009)) at 58. This is especially important when the LID is providing enhancement over and above regular requirements because certain costs required to meet design standards "may be general benefits." *Id.* at 58. As all of Objectors' appraisal experts have testified, Mr. Macaulay improperly failed to determine or explain what general benefits arise due to the LID improvements, even though the far-reaching and public nature of the improvements strongly suggest that any benefit arising from them would be general—not special. *See, e.g.*, Lutz Decl., Ex. 1 (3/3/2020 (A. Gibbons) Hrg. Tr. at 96:6-97:4; Lutz Decl., Ex. 2 (3/5/2020 (B. O'Connor)) at 158:13-159:8, 192:8-193:2; Lutz Decl., Ex. 3 (3/11/2020 (P. Shorett)) at 182:14-183:4.

In addition, the special benefits are overstated because Objectors' properties already have convenient access to restaurants, businesses, the waterfront, and other amenities necessary for their clients and users. Many also have protected views. *Cf. Appeals of Jones*, 52 Wn.2d 143 (property that was already adequately supplied with water and fire protection not specially benefitted by new water main and hydrant). Further, the apartment and hotel properties do not expect to see increases in rent or occupancy due to the LID Improvements. As many owners testified, the primary reasons users choose a particular hotel or apartment is not proximity to the waterfront. For example, most of the downtown hotels cater primarily to business travelers attending conventions and meetings. For this reason, the modest waterfront improvements will have no impact on demand for rooms or room rates.

Meanwhile, property owners will experience an immediate decrease in property value. A formula that takes into account benefits without special detriments "does not fairly represent the benefit to *any* of the properties in the LID." *Kusky*, 85 Wn. App. at 501.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Here, taxpayer representatives testified that the assessment is an immediate expense that comes with no immediate increase in revenue, thereby decreasing property values. Further, many testified that property values could be negatively impacted due to noise/disruption from construction for the foreseeable future, along with other special detriments. However, the City's "formula" sidesteps this analysis entirely. *See, e.g.,* Lutz Decl., Ex. 5 (Macaulay Depo) at 186:2-7 (no consideration of impacts from construction), 151:10-152:7 (did not do a separate parking analysis).

Ironically, the Final Study at the same time improperly attributes special benefits from the fact that the "new waterfront amenities will be designated as 'park land', conveying broader powers to the City regarding upkeep, maintenance and security of the vicinity." Final Study at 8; Lutz Decl., Ex. 5 (Macaulay Depo) at 48:1-23. However, "[u]nder the doctrine of reasonable probability, a property cannot be valued as if it were already rezoned for a higher use." J.D. Eaton, Real Estate Valuation in Litigation (2nd Edition) at 146; *see also* Wash. Pattern Jury Instr. Civ. WPI 151.15 (7th ed.) (may not "consider any effect on zoning caused by the project").

Finally, the special assessments are not proportionate as required by law. For example, the Final Study assumes certain types of properties—like hotels—will benefit more from increased tourism or proximity to the LID but there is no support for this assumption, and in fact property owners testify the opposite is true. Further, there is no justification for assigning the Marriott a 3.2% increase, where comparable hotels, even along the waterfront, are estimated to receive a 0.97% increase in value. This disproportionality puts the Seattle Marriott at a severe competitive disadvantage by artificially increasing their expenses relative to their competitors. Rash Decl., ¶ 11. As yet another example, Mr. Macaulay applies a different special benefit percentages to the parking/restaurant/retail portions of the Grand Hyatt and the Four Seasons (because these hotels happen to comprise multiple parcels), even though he applies the same percentage to these sources of revenue

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

when they are within a single-parcel hotel. This inconsistent approach further demonstrates how his methods lead to arbitrary and disproportionate special assessments.

CONCLUSION

Objectors have demonstrated by clear, cogent, and convincing evidence that the City's method of assessing the LID properties is fundamentally flawed and results in proposed assessments that do not accurately reflect actual, non-speculative, proportionate, special benefits conferred on Objectors' properties as a result of the Waterfront LID Improvements. For the foregoing reasons, the Objectors jointly and respectfully request that the Hearing Examiner recommend the City Council reject the proposed assessment roll.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

DATED: April 16, 2020

Perkins Coie LLP

Clark R. Nichols, WSBA No. 8662
CNichols@perkinscoie.com
R. Gerard Lutz, WSBA No. 17692
JLutz@perkinscoie.com
Perkins Coie LLP
10885 N.E. Fourth Street, Suite 700
Bellevue, Washington 98004
Telephone: 425.635.1400
Facsimile: 425.635.2400

Robert L. Mahon, WSBA No. 26523
RMahon@perkinscoie.com
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Objectors