BEFORE THE HEARING EXAMINER
FOR THE CITY OF REDMOND

In the Matter of the Appeal of

RTC 74th Street Property LLC

Of the November 17, 2017 Approval of BLDG-2016-09558 related to the Redmond Town Center Apartments project in Redmond, WA.

CITY OF REDMOND RESPONSE BRIEF

I. RESPONSE

A. The RTC Apartments Development is a *New* Project.

As noted in the City's opening brief, the RTC Apartments development is a completely new project. Residential buildout was never included as part of the RTC Master Plan development nor was residential included in any of the impact analysis conducted for the RTC Master Plan development. As anticipated, Appellants failed in their opening brief to identify any evidence to the contrary. This is a new project and must be treated as such.

On page 5 of their opening brief, Appellants admit that "the approvals of the revised Master Plan and zoning retained the mixed-use concept, including multifamily residential development **as a permitted use**." (Emphasis added.) This admission matches the language of the Master Plan

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which states that "the proposed master plan facilitates fine tuning to adjust to market shifts in the future by creating eight developable city blocks whose dimensions are adaptable to the wide variety of **potential uses** for which the property is zoned." *See* City Exhibit 6, p.6 of PDF. (Emphasis added.) Simply acknowledging that residential is a permitted use, or that the development guidelines "encourage" residential development, does nothing to establish that the Master Plan actually included any residential component. The RTC Apartments development is not a phase of development of the Redmond Town Center Master Plan; the RTC Apartments project is a completely new project never before analyzed by the City.

If all new development is considered a "phase of the Town Center Master Plan" regardless of whether the development was specifically included in and analyzed as part of the planned build out, then every parking lot in the RTC Master Plan area could be developed at will without any analysis of its true impacts. Here, the City was presented with a three-phased Master Plan build out with specific square footage allowances. The City analyzed the proposed scope of the Master Plan build out and did not analyze all hypothetical build outs of the 20 or more allowed uses within the RTC zone.

The City's position that the RTC Apartments project is a new project is supported by all relevant documents such as the RTC Master Plan, the traffic study, the EIS addendum, the Traffic Mitigation Agreement, and so on. This project must be treated as a new project just like every other new project that has never before been analyzed for traffic and parks impacts. To do otherwise would be unfair to other projects both existing and future which must abide by the rules and also unfair to the residents of the City of Redmond who will be shorted on transportation and parks impact fees.

B. Trip Credit Sharing is Not Permitting for New Development.

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Appellants originally argued that the transfer and use of excess trips was the basis for avoiding transportation impact fees for the RTC Apartments. This position was articulated by Jeff Haynie in his letter to the City on May 20, 2016 – Appellants' Exhibit 43. Mr. Haynie explained that he believed that DRA Advisors had peak hour entitled trips left over from the original RTC Master Plan development that could be transferred to a third party for use to satisfy impact fees and transportation concurrency as long as the receiving project falls within the boundaries of the RTC. *See* Appellants' Exhibit 43, p.2. This transferring of peak hour trips to a separate developer after the expiration of the traffic mitigation agreement (City Exhibit 3) creates unfair and impermissible use of those RTC Master Plan trips.

The RTC Master Plan sought and received approval for a defined three-phase build out of a mixed-use development. As outlined in City Exhibit 29, the RTC Master Plan mixed-use development has fully built out the allowed square footage. Those *existing* structures are part of the approved Master Plan mixed-use development which can freely be intensified at the will of the owner without the need to pay additional transportation impact fees. The City of Redmond issued an administrative interpretation on this point in November 2002. *See* City Exhibit 35.

The City acknowledges that existing mixed-use developments contain a variety of tenants that place differing demands on the City's transportation systems. Accordingly, the City expects that a trip generation rate will be used at the outset that accounts for this averaging of tenant trip generations. In doing so, the developer does not pay impact fees for a worst-case scenario of all high intensity uses, but also does not pay impact fees for an exclusively low intensity development. Neither circumstance is the actual anticipated buildout of a mixed-use development site. Similarly, it is the City's position that it will not go back in the future and re-evaluate the actual uses within a mixed-use development following the alteration, reconstruction, remodeling, or replacement of

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existing spaces, buildings, or structures to see if the trips generated in the original traffic analysis match the actual trips following a change to an existing structure within the mixed-use development. As a result, the City will not reach back out to collect additional impact fees if the actual uses at a given moment are more intense than those analyzed in the initial traffic analysis.

What this means is that the *existing* structures that are a part of the RTC Master Plan mixed-use development could at any time intensify the uses within those structures without ever needing to pay additional impact fees. This is true even if the trips generated from that intensified use exceed those analyzed in the original traffic analysis. This is proven by past practice within the RTC site where the City has not imposed additional impact fees on a change in use that intensifies the trip generation. *See* City Exhibit 36.

The same is not true for completely new development. Appellants seek to take a snap-shot in time to see where the total trips for the RTC area stand as compared to the total trips as originally analyzed. Their goal is to say that the current total trips are lower than those originally analyzed, so a new development should be able to grab and utilize those excess trips and not have to pay impact fees. First and foremost, taking a snapshot in time of trips generated by the Master Plan area does not show the true trips for that development. The City is aware that occupancy of the Master Plan development is low and the recent traffic report trip counts would likewise be low due to the reduced occupancy of the development. Taking trip counts at a time where a large number of square feet are not occupied is misleading and fails to truly account for trips from the development site. Second, Appellants' position simply is not allowed for a completely new project that was not part of the original Master Plan development. Further, this position is fatally flawed because it fails to account for the fact that the existing structures can, at any time, intensify even above the originally analyzed trip counts, without paying additional impact fees. If a new

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development could step in and grab excess trips and not pay impact fees as a result, the subsequent redevelopment and intensification of existing structures, or filling of currently empty locations, which is completely allowed and would not result in additional impact fees, would push the grand total of trips well beyond that which was ever considered.

The City has established certain flexibility for mixed-use developments where it will not recalculate trips and exact additional impact fees as existing structures change use. However, that flexibility cannot and does not extend to new developments that were never analyzed as part of that mixed-use development. Trip sharing or trip handoffs are not permitted in the manner that Appellants argue.

C. The RTC Master Plan is Completely Built Out.

The City's original approval of the RTC Master Plan development was limited to a maximum allowed commercial gross leasable square footage of 1.375 million square feet. *See* City Exhibit 6; Staff Report Attachment 25 – Ord. No. 1841. This was later amended to 1.49 million square feet in 1998 and again to 1.8 million square feet in 2001. *See* Staff Report Attachments 22 and 26.

The City's analysis of impacts for the RTC Master Plan build out was predicated on the approved maximum development scenario of 1.375 million square feet. Per King County parcel record data, the RTC site has been built up with mixed use gross leasable building square footage of 1.831 million square feet through 2017. *See* Staff Report Attachment 28 and City Exhibit 29. Therefore, the RTC Master Plan development has already met and exceeded the maximum build out allowed by the Master Plan approvals. Even if the Master Plan "development activity" were to include the future RTC Apartments residential development, which the City strongly disputes, the Master Plan has used all allowed square footage. The addition of new square footage beyond

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that which is allowed by the Master Plan approvals will necessitate the payment of appropriate impact fees at the time of permitting.

D. State and Local Authority Supports Imposition of Impact Fees.

1. Impact Fee Provisions Apply to This Specific Development.

The impact fee regulations outlined within RCW 82.02 are tailored to the specific development that was charged impact fees. RCW 82.02.050(4) provides the baseline intention of the legislature for the limited imposition of impact fees. Impact fees shall:

> (a) Shall only be imposed for system improvements that are reasonably related to the new development;
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
> (c) Shall be used for system improvements that will reasonably benefit the new development.

RCW 82.02.050(4). "The here the statute speaks of "*the* new development," as opposed to "new growth and development" or "new development" (as in the preceding section .050(1) and (2)), indicates that "*the* new development" is synonymous with the "development activity"—that is, with *the particular* new development seeking approval. *City of Olympia v. Drebick*, 156 Wn.2d 289, 297–98, 126 P.3d 802 (2006). (Emphasis in original.) RCW 82.02.090(3), the definition of impact fee, echoes the criteria set forth above and establishes that the phrase "the new development" means the individual development seeking approval. *Id.* Therefore, the impact fees statute centers around *the* new RTC Apartments development, which is *the* new development seeking approval now. It would be improper to look to any other historical projects that are not now seeking approvals for development. The RTC Master Plan development, which does not include any residential component, is not *the* development seeking approval now and is therefore not a part of this impact fee analysis.

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Further, the clear language of RCW 82.02.050(1)(c) is to protect "specific developments" from the imposition of arbitrary or duplicative fees for the same impact. RTC Apartments project is the "specific development" that is seeking a development approval now and is not the same "specific development" that paid fees and constructed improvements in the mid-1990's. As clearly noted above, the RTC Apartments project was not part of the RTC Master Plan or any of the analysis conducted for the RTC Master Plan. Therefore, it cannot be the same "specific development."

Similarly, RCW 82.02.050(2)'s use of the term "development activity" also is directed at the RTC Apartments residential development. "The definition in RCW 82.02.090(1) leaves no doubt that "[d]evelopment activity" refers to the particular new development seeking approval." *Drebick*, 156 Wn.2d at 297.

Therefore, this inquiry must be focused on *the* development activity seeking approval now – the RTC Apartments development. Because the RTC Apartments residential development was not part of the RTC Master Plan development, it would be improper to clump the two distinct developments (separated by 22 years) together for this impact fee inquiry.

2. System Improvements is an Unambiguous Term.

Next, Appellants argue that SEPA mitigation for streets, roads, parks, and open space precludes assessment of an impact fee for the same *category* of public improvements. *See* Appellants' Opening Brief, p.20. This assertion is unsupported by fact and law and cannot be applied here now.

First, the assertion that "system improvements" means only broad categories is not supported by the plain language of the statute. "System Improvements" are defined as "public

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facilities that are included in the capital facilities plan and are designed to provide service to service areas within the community at large, in contrast to project improvements." RCW 82.02.090(9). The plain language of the definition states that system improvements are public facilities within the capital facilities plan – the definition does not state or imply that system improvements are merely categories of improvements such as traffic or parks. Where the meaning of a provision is "plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

Next, the only law identified by Appellants in support of this position is the *Drebick* case which held that impact fees are to be calculated by tying a particular development to the service area's improvements as a whole. *City of Olympia v. Drebick*, 156 Wn.2d 289, 296, 126 P.3d 802 (2006). However, this case does not support Appellants' position that the definition of "system improvements" is limited to just *parks* and *traffic* as general categories. The primary inquiry of the *Drebick* Court was to determine "what the legislature intended when it required that the facilities funded by impact fees be reasonably *related and beneficial to* the particular development seeking approval." *Id.*, at 299. (Emphasis in original.) In comparing GMA impact fees to SEPA fees, the Court explained that "the local government's calculation of a proposed development's GMA impact fee begins, in contrast, with the anticipation of the area-wide improvements needed to serve new growth and development in the aggregate." *Id.*, at 301. "[I]n the GMA impact fee statutes, the legislature did *not* require that the funded facilities be *directly* or *specifically* related and beneficial to the development seeking approval." *Id.*, at 301. (Emphasis in original.). In this way, the Court made the distinction between the funding of "system improvements" that may not

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necessarily be tied to the specific project and SEPA "project improvements" which directly relate to the individual project's particular development impacts.

Therefore, the Court's holding is that there is authority for a local jurisdiction to calculate GMA impact fees by tying the development to the service area's improvements as a whole. The local jurisdiction need not restrict those fees to those projects directly impacted by the development as would be done with SEPA mitigation. This holding does not mean that those system improvements are clumped and viewed only as broad categories such as traffic and parks when analyzing trip credits exemptions or credits – a topic not analyzed in *Drebick*. Impact fees may be directed toward a capital facilities project list (*see* definition of "system improvements") that contains system wide improvements.

Further, the present circumstances are similar to those outlined in *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App 681 (2001). The Court in *Mill Creek* held that traffic mitigation imposed, which related to nine specific streets, was not duplicative of the mitigation outlined in the earlier Road Impact Assessment because the RIA addressed mitigation on a different set of roads. *Id.* at 689-690. The impact fees imposed by the City of Redmond likewise do not overlap with those system improvements constructed by the prior RTC Master Plan developer. Without proof of overlapping or duplicative system improvements, the fees imposed are proper and should be left in place.

3. The RTC Apartments Development is Not Entitled to an Exemption.

Pivoting away from the position taken by Appellants' traffic consultant, which revolved around the netting out of trips, Appellants appear to most heavily rely on the previous payment

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exemption to support their position. This exemption similarly focuses on the proper interpretation of the unambiguous term "system improvements" previously analyzed.

The relevant exemption states that:

> "[w]here a fee has previously been paid for the development activity under the State Environmental Policy Act (SEPA) for all of the system improvements for which impact fees are imposed by this chapter, the development activity shall be exempt from the payment of all impact fees pursuant to RCW 82.02.100. Where a fee previously paid for the development activity under SEPA does not cover all system improvements for which an impact fee is imposed under this chapter, an impact fee credit shall be given to ensure that the City is not collecting both SEPA and impact fees for the same system improvements."

RMC 3.10.060(A)(6). RCW 82.02.100(1) matches this requirement: "A person required to pay a fee pursuant to RCW 43.21C.060 [SEPA mitigation of environmental impacts] for system improvements shall not be required to pay an impact fee under RCW 82.02.050 through 82.02.090 [impact fees] for those system improvements."

Factually, we know that Redmond's 2010 Transportation Facilities Plan (TFP) Pro Rata Mitigation Table listed on Pages 191-193 of the Redmond Town Center Master Plan EIS Addendum Appendix C (Staff Report Attachment 5 and City Exhibit 20), which was in place at the time the RTC Master Plan SEPA mitigation was imposed, is completely different than the City's 2013-2018 TFP (Staff Report Attachment 16 and City Exhibit 24), which lists the system improvements funded by impact fees imposed in 2017. No GMA Impact Fee imposed upon the RTC Apartments development in 2017 goes to pay for transportation system improvements that were either constructed or paid for by the original RTC Master Plan developer.

Further, the Capital Facility Projects currently funded by parks impact fees do not include any projects within the Bear Creek area or the Redmond Town Center open space and critical area buffers. *See* City Exhibits 8, 10, 30. All current parks impact fee funded projects are for active

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recreational system improvements. Back in the mid-1990's the RTC Master Plan development was required under SEPA mitigation to retain 44 acres as mitigation to reduce environmental impacts and loss of open space (it was building upon a golf course). That SEPA mitigation was not mitigation for new or increased demand to parks and recreational facilities brought on by the master plan development, which are the types of projects that would be considered system improvements. Even if the SEPA mitigation retention of open space were considered a system improvement as opposed to mitigation for reduction in open space, the current parks impact fees go to fund completely different projects.

Appellants cannot establish that any improvement was constructed or any fee was paid for the development activity (note – Appellants would need to establish that the RTC Apartments are part of the same development activity as the RTC Master Plan development, which is completely without merit - this exemption would never apply without that being first established) under SEPA for all or any part of the system improvements for which impact fees are imposed by the City now. Factually, the system improvements that benefit from the City's current transportation and parks impact fees are not the same as those which came into play with the RTC Master Plan development. Accordingly, the exemption outlined in RMC 3.10.060(A)(6) and RCW 82.02.100(1) does not apply.

E. <u>Prior Development Within the RTC Area Has been Treated the Same.</u>

Appellants argue that the City has exempted certain developments from transportation and parks impact fees in the past. The analysis of the various projects that have been located within the RTC area is much more nuanced than is presented by Appellants. First, City Exhibit 35 clearly outlines that a redevelopment of an existing structure within a mixed-use development will not trigger new impact fees. The City is prepared to outline examples of the application of this position

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within the RTC area. Next, the City also abided by the terms of the Traffic Mitigation Agreement and did not impose additional mitigation requirements on developments that were part of the Master Plan and occurred within the lifetime of the mitigation agreement, which expired in 2010. Therefore, those projects that were actually part of the RTC Master Plan and were developed within the time allowed by the mitigation agreement were not required to pay additional impact fees. Finally, the City did collect impact fees from new developments within the Master Plan area after the mitigation agreement expired. Both the BJ Restaurant (2012) and the Archer Hotel (2016) paid impact fees contrary to Appellants' assertions. *See* City Exhibits 32, 33.

The RTC Apartments development does not fall into any of these categories. The RTC Apartments project was not part of the RTC Master Plan, it does not seek to alter or redevelop an existing structure, and it comes about seven years after the mitigation agreement expired. The RTC Apartments development is different than those examples put forth by Appellants and will be treated consistent with the circumstances unique to the RTC Apartments.

F. <u>Elimination of System Improvements from the Capital Facilities Plan.</u>

Appellants argue that if system improvements are viewed at the time the impact fees are imposed it would be unfair because completed system improvements would routinely drop off the capital facilities plan as soon as they are constructed. This argument fails to account for the Traffic Mitigation Agreement, which was signed by both the RTC Master Plan developer and the City. *See* City Exhibit 3. The Traffic Mitigation Agreement clearly states that "TCA has been required to, and is, constructing, prior to opening of the first phase of Redmond Town Center, all of the transportation system mitigation required to mitigate the transportation system impacts for the Full Build Out of Redmond Town Center." City Exhibit 3, p. 1. Therefore, the parties were contractually bound to the terms of the mitigation for fifteen years. There was no issue with the

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treatment of system improvements dropping off the capital facilities plan because the parties locked the mitigation requirements in place with the traffic mitigation agreement.

G. Credits are Not Owed.

The applicability of credits under RCW 82.02.060(2) and RMC 3.10.130 similarly hinge upon an appropriate interpretation of "system improvements." As noted above, "system improvements" is an unambiguous term that is clearly defined in the RCWs. Further, Appellants provide no legal authority for their position that "system improvements" are merely broad categories rather than the "public facilities that are included in the capital facilities plan" as clearly stated in the definition. The credits provisions also center around the construction of system improvements "by the developer." In this circumstance, "the developer" that constructed the system improvements in 1995 is not "the developer" that paid impact fees in 2017. Similarly, "the development activity" which generated the current impact fees is the RTC Apartments development, not the RTC Master Plan development from 22 years ago. *The developer* is not the same and *the development activity* is not the same. The RTC Apartments development simply does not meet the qualifications for credits.

H. Fairness Necessitates Imposition of Impact Fees

The imposition of impact fees on the RTC Apartments development is fair and just for three reasons. First, the existing structures within the RTC Master Plan build out can intensify their uses without being required to pay increased impact fees. To allow a new structure to utilize excess trips estimated at a moment in time would compound the potential overburdening of the system with trips that do not belong with the new development. Second, the RTC Apartments development was never included in the RTC Master Plan build out and was never analyzed as part of the SEPA mitigation. To treat the new residential construction as if it was part of the Master

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Plan build out without having been incorporated into any of the impacts analysis would give RTC Apartments a free ride that no other new development receives. Third, the impacts attributed to new developments has changed over time. Requiring the City to treat the RTC Apartments the same way in 2017 as it would have in 1995 means the City and its residents lose out on necessary mitigation. Over the last 22 years since the RTC Master Plan transportation impact fees have evolved to match the changing transportation framework. Impact Fees no longer simply address vehicle impacts, but are instead designed to address person miles traveled in a multi-modal world. Taking this into account, it is fair and just to impose impact fees on new developments to account for the current impacts those developments will have on the City's multi-modal infrastructure. Every other new development pays transportation impact fees to address these changed demands on the City's infrastructure – the RTC Apartments should be no different.

II. CONCLUSION

The City's decision to impose impact fees without exemption or credits being applied is both fair and just. In fact, fairness and justness mandate that the fees be imposed. Further, Appellants will be unable to prove by a preponderance of the evidence that the City's position is clearly erroneous. Accordingly, the City imposed impact fees should remain in place and this appeal should be denied.

DATED this 20th day of February, 2018.

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