BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: **WALLINGFORD COMMUNITY COUNCIL, ET AL.,** of the adequacy of the FEIS issued by the Director, Office of Planning and Community Development.	Hearing Examiner File W-17-006 through W-17-014 CITY OF SEATTLE'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT ON ADEQUACY OF NOTICE

I. INTRODUCTION

On May 11, 2018, the City filed its Response to West Seattle Junction Neighborhood Organization's Motion for Summary Judgment and City's Cross-Motion for Summary Judgment Regarding Notice ("City's Response and Cross-Motion") in which the City asks the Examiner to dismiss JuNO's notice claim because the following three aspects of the City's public notice of the FEIS that are the subject of JuNO's motion were reasonable and adequate: (1) the DS and scoping notice; (2) the City's publication in the Daily Journal of Commerce; and, (3) the City's scoping meetings. In its "Reply in Support of Motion for Summary Judgment" ("JuNO's Reply"), JuNO attempts to address the City's arguments set forth in the City's Response and Cross-Motion. Even though JuNO identified its brief as a "reply," the document advances arguments and presents new evidence that exceed strict reply.[1] Because that additional evidence and argument exceed

[1] For example, JuNO's Reply attaches and advances arguments based on its petition to delay MHA and an agenda from a HALA stakeholder meeting, neither of which was raised by the City's Response and Cross Motion.

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strict reply[2] and because JuNO has not filed a separate response to the City's cross-motion,[3] it appears JuNO's Reply also purports to respond to the City's cross-motion. Accordingly, the City files this Reply in Support of its Cross-Motion on JuNO's notice claims.

JuNO continues to mischaracterize facts and relies on hyperbolic conjecture. These mischaracterizations and conjecture are insufficient to establish disputed material facts sufficient to withstand the City's Cross-Motion. Indeed, most are not even relevant to the three specific purported notice defects that JuNO alleges. Most fundamentally, JuNO's remaining legal arguments are based on a scope and quality of notice that is not required under SEPA or the Seattle Municipal Code ("Code" or "SMC"). Thus, the notice "defects" identified by JuNO are not defects at all. Because JuNO seeks relief to which it is not entitled under the law, the City respectfully requests that the Examiner deny JuNO's Motion, and enter summary judgment affirming the City's actions on the three notice issues that JuNO's Motion challenges.

II. JUNO CONTINUES TO MISCHARACTERIZE "FACTS" AND RELY ON CONJECTURE

To defeat the City's cross-motion for summary judgment, JuNO must present disputed material facts and cannot rely on mischaracterizations, conjecture, or hyperbole.[4] JuNO fails to meet this burden. While the City does not dispute the authenticity of many

[2] *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168–69, 810 P.2d 4, 8 (1991) (holding that any rebuttal documents submitted with a reply must be "limited to documents which explain, disprove, or contradict the adverse party's evidence," as opposed to evidence that the movant failed to file with its motion).

[3] As of 4:45 PM on May 25, 2018, the date by which JuNO's Response to the City's cross-motion is due, the City has not received service of any other pleading purporting to be JuNO's Response to the City's Cross-Motion. If JuNO files an additional brief, the City reserves the right to submit additional reply briefing as needed.

[4] *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736–37, 150 P.3d 633, 635–36 (2007) ("The party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value. The nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." (citations omitted)).

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of the documents attached to declarations associated with JuNO's motion, JuNO continues to grossly mischaracterize the "facts" supported by those documents or invents facts that are not supported by the documents to which they cite. Throughout its Reply, including the list on pages 3–4, JuNO takes statements out of context and assigns meaning that is unsupported by the documents themselves, including inferring malicious motive on the part of the City based on these misrepresentations. Thus, JuNO's statement that there is "no genuine issue" with respect to the list of purportedly "undisputed facts" on page three of JuNO's Reply is both false and misleading.

A complete response to every misstatement is not necessary, because, as explained below, JuNO ultimately seeks relief to which it is not entitled by law and the "facts" JuNO presents pertain to entirely different elements of the City's outreach that are unrelated to the three specific elements of the notice process that are the subject of JuNO's motion and the City's Cross-Motion.[5] The City is nevertheless compelled to respond to JuNO's egregious mischaracterizations of "fact" set forth in its response to the City's Motion, including, for example, the following:

- JuNO repeats its claim that Mayor Murray's statement related to zoning changes to single family residential zones was misleading.[6] As explained in the City's Response and Cross-Motion, Mayor Murray's answer addressed single family zones outside of urban villages, as is clear from an answer he delivered that JuNO selectively quotes.[7]

- The materials that JuNO claims "indicat[ed] that single-family areas would not be rezoned"[8] were from an event titled "Comprehensive Plan Meeting – West Seattle" and was described as an open house to discuss the draft of the Seattle

[5] JuNO implicitly recognizes the irrelevance of the City's outreach efforts because the "Legal Argument" section of its Motion only raises issues relating to the DS Notice and scoping, not to the City's preliminary outreach.
[6] JUNO Reply at 3 ("In response to a direct question at a District 1 Pre-DS Meetup as to whether single-family areas outside urban centers (e.g., Downtown, South Lake Union) would be rezoned, Mayor Murray answered in the negative").
[7] *See* City's Response and Cross Motion at 12–13.
[8] JuNO's Reply at 3.

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Comprehensive Plan—not MHA specifically—and the materials were accurate with respect to the Comprehensive Plan.[9]

- While the FEIS's appendix includes the Comprehensive Plan Meeting and other events as being part of the broad input into MHA, the FEIS also makes clear that some of these events focused on topics other than MHA, such as the Comprehensive Plan Meeting or another event titled "Housing Levy and HALA."[10] JuNO inappropriately takes these events out of context and treats them as MHA-specific events.[11]

- The town hall at which Mayor Murray discussed MHA's proposal to rezone single-family areas in urban villages was for the West Seattle area,[12] belying JuNO's claim that the City failed to discuss rezoning at any "District 1 Pre-DS Meetups."

- JuNO does not and cannot dispute that the Exhibits attached to the City's Response and Cross-Motion show that before the DS Notice's issuance, the City explicitly discussed allowing multifamily housing and changing single family areas to the RSL or Lowrise Multi-family zone.[13] JuNO arguess that the discussion was not sufficiently prominently placed or did not specifically use the word "rezone," which, at best, challenges form over substance and is unavailing.[14]

- JuNO's complaints that some events were not "directed to urban village residents"; that the City's input tools were governed by "members of special interest groups, aligned with the City's goals"; and that focus group attendance was "lackluster"[15] reflect at best JuNO's subjective desire for more or different process, and are not based on any legal requirement.

JuNO also disguises pure conjecture as "fact" in an effort to defeat the City's Motion. For example, JuNO concocts a conspiracy based on an innocuous quote related to the "messaging" of MHA.[16] JuNO cites to an agenda for a HALA stakeholder meeting to discuss HALA's zoning recommendations and anticipated "neighborhood resistance" to changes.[17] On its face, the message does not have the nefarious tone JuNO ascribes to it. From a sentence that talks about "opportunities for messaging," JuNO jumps to the

[9] JuNO's Motion, Declaration of Christine M. Tobin-Presser ("Tobin-Presser Dec."), Exhs. P-Q.
[10] *See* Tobin-Presser Dec., Exh. M.
[11] *See* JuNO's Reply at 3 (faulting City representatives for "declin[ing] to address" single-family rezones at an event titled "Housing Levy and HALA").
[12] Tobin-Presser Dec., Exh. M, V.
[13] JuNO Reply at 9; City's Response and Cross Motion, Wentlandt Dec., Exh. 2 at 5.
[14] JuNO's Reply at 9.
[15] JuNO's Reply at 9-10.
[16] JuNO's Reply at 7.
[17] JuNO's Reply, Declaration of Christine M. Tobin-Presser ("Tobin-Presser Reply Dec."), Exh. N.

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conclusion that the committee behind closed doors decided to intentionally mislead the public by agreeing to "avoid using the word 'rezone' when communicating with neighborhoods." *Id.* Nothing in the text they quote even suggests JuNO's interpretation. The word "messaging" is not a Trojan horse for every nefarious motive JuNO can invent. JuNO's "facts" are the definition of conjecture and hyperbole.

In any event, these invented and distorted "facts" do not affect the outcome of the City's cross-motion because, as described below, JuNO cannot establish a legal principle supporting its claims and the "facts" are not relevant to the specific aspects of the City's public notice that JuNO alleges are defective. The City's Cross Motion seeks to prevent JuNO from introducing at hearing the type of confusing and irrelevant conjecture and mischaracterization that JuNO attempts to bring here.

III. THE CITY'S SCOPING NOTICE IS LEGALLY ADEQUATE

The DS Notice is sufficient because it "describe[s] the main elements of the proposal."[18] JuNO's arguments focus solely on the specificity of the description of changes to the single family zones in Urban Villages and Urban Village expansion areas. As noted in the City's Response and Cross-Motion, the DS Notice expressly advises that the proposal considers "zoning code amendments" and "increased allowable height and floor area" in certain zones, including "single family zones in designated urban villages and potential urban village expansion areas identified in the Seattle 2035 Comprehensive Plan."[19] This complies with SEPA's requirements that the DS include a description of the "main elements of the proposal" and is sufficient to advise the general nature of the changes proposed to those affected single family zones.

[18] SMC 25.05.360.A and WAC 197-11-360.
[19] Tobin-Presser Dec., Exh. DD

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JuNO's arguments to the contrary demonstrate a fundamental misunderstanding or mischaracterization of the proposed zoning changes to the affected single family zoning districts. JuNO falsely states that the proposal will "eliminate all existing single family zoning" in all urban villages and will rezone those districts "to multi-family zoning."[20] JuNO is incorrect. The proposal anticipates changing single family zones in Urban Villages and Urban Village expansion areas to either Residential Small Lot ("RSL") or Lowrise.[21] RSL is properly characterized as a single family zoning district and therefore does not result in a change of zoning type.[22] Single family residential structures continue to be permitted outright in RSL.[23] The RSL zone does "allow an increase in density of households" with "smaller front and rear yard setbacks," but "retains the same height limit" and "would not alter the land use pattern [or] present a scale impact."[24] Lowrise allows single family residential uses and does not require elimination of or prohibit construction of single family housing. SMC 23.45.504.A. JuNO misrepresents the nature of the rezone.

Fundamentally, JuNO seems to argue that the City's notice is deficient because the City failed to expressly use JuNO's preferred terms—"rezone" and "multifamily." That, however, is not the legal standard. The question is whether the notice sufficiently described the "main elements" of the proposal—it does. Indeed, JuNO concedes that the DS Notice communicates that the proposal could result in increased "capacity." [25] JuNO

[20] JuNO Motion at 2 (emphasis in original).
[21] FEIS Appendix H. The balance between rezones to RSL and LR varies between alternatives but both designations are well-represented in all of the alternatives. A very small quantity of single family zones in urban villages are proposed to be rezoned to other designations.
[22] FEIS at 3.128 (describing RSL as "a single family land use and zone"). Moreover, the maps in Appendix H confirm this. The maps show all the rezones and use cross-hatching to depict any changes that result in a change of zoning type. The change from the existing single family zoning to RSL is not shown in cross hatching. FEIS Appendix H.
[23] FEIS at 3.113 (stating there will be "[n]o change in allowed use" from residential).
[24] FEIS at 3.113.
[25] JuNO's Reply at 4.

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makes a distinction without a difference when it argues the increased capacity is meaningfully different from the "increased intensity" that would be permitted in the RSL zone.[26] They are one in the same—more floor area (increased capacity) allows more residential use (increased intensity). Hence, the City's notice accurately describes the proposed change to single family zones as an increase in height and floor area. This accurately communicates the potential impacts to single family zoning districts (whether changes to RSL or Lowrise) at the level of detail needed at the scoping stage of the SEPA process.[27]

Finally, as noted in the City's Response and Cross-Motion, the adequacy of the notice is demonstrated by the comments in response to the Notice that address the very topic JuNO asserts was insufficiently described. In its response to the City's Cross-Motion, JuNO again resorts to hyperbole and mischaracterization when it argues that there should or would have been more comments on the challenged aspects of the proposal if the notice had been clearer.[28] JuNo cites to no facts to support this conclusory statement and it is insufficient to defeat the City's Cross-Motion. Moreover, JuNO's conjecture that more commenters would have responded is based on its unsupported assumption that the proposal would "directly, significantly and adversely impact thousands upon thousands of people" living in single family homes. JuNO's Reply at 2; *Id.* at 5. JuNO's assumption is based on the same fundamental misunderstanding of the rezone. As described above, RSL is a single family zoning district and single family homes are an allowed use in the Lowrise zones. The assumption that every one of the "thousands upon thousands" of existing single family residential structures in the urban villages will be directly,

[26] JuNO's Reply at 4.
[27] Indeed, the SEPA process includes opportunity to offer comment upon the publication of the DEIS where the public has more opportunity to respond to the specific details divulged in the voluminous analysis and very detailed project description.
[28] JuNO's Reply at 5.

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significantly, and adversely impacted by the proposal is baseless. The City's notice sufficiently described the changes to the single family residential zones within urban villages.

IV. THE CITY'S METHOD OF PUBLISHING NOTICE IN THE OFFICIAL NEWSPAPER COMPLIED WITH SEPA AND CODE REQUIREMENTS

It is undisputed that the City published notice in the City's Official newspaper as required in SMC 25.05.360 and 25.05.510. JuNO's only argument is that the City should have instead published notice in the Seattle Times. JuNO's claim that the City should have published notice in the Seattle Times is not based on any SEPA requirement and should be dismissed. JuNO largely admits that its claim is a collateral attack on the sufficiency of the City's notice regulations: "The Code should not be interpreted in a manner that allows the City to circumvent the reasonableness requirement." JuNO's Response at 5. Contrary to the fundamental assumption in its statement, there is no room to "interpret" differently the designation of the City's official newspaper. The SEPA regulations require the City to "specify its method of public notice in its SEPA procedures," and those methods govern, including the specified method of newspaper publication.[29] The Examiner is without jurisdiction to ignore the City's notice rules or otherwise address JuNO's challenges to the City's code in this limited appeal of the FEIS's adequacy. JuNO's claim with respect to publication of notice should be dismissed.

V. THE CITY'S SCOPING MEETINGS WERE REASONABLE AND ADEQUATE

JuNO attacks the City's scoping meetings because they did not follow JuNO's preferred format and therefore allegedly did not provide "a meaningful opportunity to gather with other impacted individuals, share thoughts and concerns with each other, [and]

[29] WAC 197-11-510.

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to present those ideas to the City within the context of an organized meeting."[30] As a fundamental matter, JuNO fails to carry its factual burden in its motion that the meetings failed to provide that "meaningful opportunity." The City presented facts in its Response that contest JuNO's assertions about the subjective value of those meetings and citizens' opportunity to offer comment.[31] Those facts create a factual dispute that is sufficient to defeat JuNO's motion.

More importantly, for purposes of resolving the City's Cross-motion, JuNO has failed to demonstrate any legal authority from which it draws its "standard" for evaluating the sufficiency of a meeting or otherwise supporting its claim that the scoping meeting is not a "meeting" unless it is conducted in accordance with JuNO's preferred format. To the contrary, the law gives the City significant discretion in conducting a scoping meeting. The state SEPA regulations do not require scoping meetings at all.[32] While the City has imposed on itself a requirement for one public scoping meeting for City-sponsored projects in SMC 25.05.409, neither the Code nor the SEPA regulations define or regulate the form of a scoping meeting or otherwise impose the specific requirements asserted by JuNO. The statutory scheme gives the City the discretion to choose how to run the meeting. JuNO completely fails to respond to the authority on which the City relies. For those reasons, JuNO's claim should be dismissed.

VI. CONCLUSION

As explained above, the City's actions that JuNO's Motion challenges—the DS and scoping notice, the City's publication in the Daily Journal of Commerce, and the scoping meetings—are consistent with the requirements of SEPA and the Code, and are

[30] JuNO's Motion at 22.
[31] City's Response and Cross Motion at 9-11.
[32] WAC 197-11-408(4) ("Meetings or scoping documents . . . may be used but are **not** required.") (Emphasis in original.).

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therefore adequate as a matter of law. The City requests that the Examiner deny JuNO's Motion and grant the City's Cross-Motion.

DATED this 25th day of May, 2018.

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In the Matter of the Appeal of: **WALLINGFORD COMMUNITY COUCIL, ET AL.,** of adequacy of the FEIS issued by the Director, Office of Planning and Community Development.	Hearing Examiner File W-17-006 through W-17-014 CERTIFICATE OF SERVICE

I, Amanda Kleiss, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a legal assistant with the office of Van Ness Feldman LLP, on May 25, 2018, filed the City's Reply in Support of Cross-Motion for Summary Judgement Regarding Notice and this Certificate of Service with the Seattle Hearing Examiner using its e-filing system and that on May 25, 2018, I addressed said documents and deposited them for delivery as follows:

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

EXECUTED at Seattle, Washington on this 25th day of May, 2018.

/s/Amanda Kleiss
Declarant

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