BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by

Seattle Coalition for Affordability, Livability, and Equity

of the City of Seattle Citywide Implementation of Mandatory Housing Affordability (MHA) Final Environmental Impact Statement

Hearing Examiner File No. W-17-010

SCALE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. STANDARD OF REVIEW AND PROGRAMMATIC EISs

A. The Issues Presented are Amenable to Resolution by Summary Judgment.

The City argues that EIS adequacy is inherently fact-based determination and thus, like negligence determinations, are not susceptible to resolution on summary judgment. Resp. at 2 and n. 9. But even negligent determinations, which ordinarily are resolved at trial, can be resolved on summary judgment when the facts are not in dispute. "[W]hen reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Hartley v. State*, 103 Wn.2d 768, 775 (1985); *Cornerstone Equipment Leasing, Co. v. MacLeod,* 159 Wn. App. 899, 905 (2011) (while the issue of whether reliance is "justified" to establish tort of fraud "is normally a question of fact [for the jury], summary judgment is appropriate if reasonable minds could reach but one conclusion").

EIS issues frequently are resolved without evidentiary hearings. Numerous reported decisions reflect that the courts have resolved EIS adequacy issues by reviewing an administrative record with no evidentiary hearing in court (or by the agency that prepared the EIS). *See, e.g., Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 641, 94 P.3d 961 (1993) *as amended on denial of reconsideration,* 866 P.2d 1256 (1994). This makes sense because the focus of an EIS adequacy challenge are the statements made (or not made) in the EIS. As here, where the issues focus on omissions of information from an EIS, the omissions can be established simply by reference to the EIS, without need for an evidentiary hearing.

Certainly, in some cases, evidentiary hearings are necessary to determine the accuracy of statements in an EIS. But we have not brought this summary judgment motion to challenge the

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accuracy of information in the EIS. Rather, this motion focuses on information omitted from the EIS. Such issues are appropriately resolved on summary judgment because the issue of whether the EIS omits information can be established without an evidentiary hearing simply by reviewing the words in the EIS itself. The issue then reduces to whether the omitted information was required to be in the EIS. In many situations, that determination can be made as a matter of law.

For instance, SEPA requires an EIS to include a description of the "intended benefit" of mitigation measures. WAC 197-11440 (6)(c)(iv). The Examiner can inspect the EIS and determine if it includes a description of the listed mitigation measures' intended benefits. If it does not, then the issue can be resolved summarily. An evidentiary hearing on the issue is unnecessary and a waste of everyone's time and resources.

B. The Programmatic Nature of the EIS is not *Carte Blanche* for Failing to Address Issues in Detail Sufficient to Allow an Informed Decision.

A programmatic EIS may be less detailed than a project EIS, but it still must contain sufficiently detailed analysis to allow for an informed decision. The rules and the case law acknowledge a sliding scale. The more consequential the impacts and the more specific the proposal, the more detail is required. The less consequential the impacts and the less specific the proposal, the less detail is required. That is the essence of the so-called "rule of reason" and its requirement for a "reasonably thorough" analysis.

What is "reasonably thorough" is, of course, a function of the nature of the decision at hand. The rule of reason employs a sliding scale. The rule requires "a level of detail commensurate with the importance of the environmental impacts and the plausibility of alternatives." *Klickitat County Citizens Against Imported Waste v. Klickitat County, supra.*

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Labels alone are not sufficient to determine the degree of detail necessary in an EIS. Certainly, as a general rule, an EIS prepared for a project will be more detailed than one for a non-project, because the impacts of the project usually can be evaluated in more detail. But even in the realm of project EISs, the amount of detail can vary depending on the stage of the project action. Where an EIS is prepared on a project at an early stage, before the project details are fleshed out, the EIS can be less detailed than otherwise. *See, e.g., Thornton Creek Legal Defense Fund v. City of Seattle,* 113 Wn. App. 34, 53 (2002).

Likewise, within the realm of non-project EISs, the rule of reason applies to require more or less detail, depending on the degree of specificity and the magnitude of the expected impacts of the non-project proposal. As Professor Settle explains: "Impacts and alternatives [for nonproject EISs] are to be discussed at a level of detail appropriate to the level of abstraction of the proposal." Settle, *Washington State Environmental Policy,* §14.01[3] at 14-74.

Thus, a non-project proposal like one only adopting general comprehensive plan policies or a park or open space plan might reasonably have much less detail than a project EIS. But all non-project EISs are not created equal. A non-project proposal that is more specific may reasonably require more specific analysis. And that is especially so when the impacts of the non-project proposal are expected to be particularly consequential and far-reaching. In those cases, the rule of reason dictates that the relatively greater specificity and greater potential for widespread and long-term consequences require that more detail be provided than would be for a more generalized non-project proposal. "If it is reasonably possible to analyze the environmental consequences in an EIS for [a resource management plan], the agency is required to perform that analysis." *Pacific Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1026–27 (9th Cir. 2012), *vacated as moot,* 570 U.S. 901, 133 S. Ct. 2843, 186 L. Ed. 2d 881 (2013).

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The City notes that in *Klickitat County Citizens Against Imported Waste v. Klickitat County*, *supra*, the Supreme Court explained the nonproject EISs need only analyze impacts at a "highly generalized" level." Resp. at 6. But the City omits that the Supreme Court followed that statement with a word of caution: "Even at this more generalized level, however, '[s]ignificant impacts on both the natural environment and the built environment *must* be analyzed, if relevant' in an environmental impact statement. (Italics ours.) WAC 197–11–444(2)(b)(vi)." *Id.* at 642. The Court also stated "SEPA calls for a level of detail commensurate with the importance of the environmental impacts;" that the EIS must include "information sufficiently beneficial to the decision making process to justify the cost of its inclusion;" and that the EIS "shall discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal;" (quoting WAC 197-11-442(2)). Notably, the Court found the EIS failed to meet these standards – even though it was a programmatic EIS.

While use of a sliding scale might suggest that summary judgment is inappropriate, the issues presented in this motion do not involve the City having placed much, if any, evidence on its side of the scale. That is, if the City could show that the EIS included a substantial discussion on the issues we are challenging in this motion, then an evidentiary hearing would be required. But in our motion and in this reply, we demonstrate that is not the case.

Time and again, the EIS comes up empty. There's nothing or virtually nothing, on the City's side of the scale. Historic resource inventories are ignored wholesale. The intended benefits of mitigation are not discussed. Impacts to tree canopies caused by the increased development catalyzed by the proposal are not addressed. Impacts on single family neighborhoods split down the middle by Urban Village expansions are ignored. Comp Plan policies intended to protect open space, neighborhood character and scale, and other aesthetic concerns are never mentioned,

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summarized or analyzed. The proposal's deleterious effects on efforts to protect and enhance open space are never considered.[1]

Given the scope of the EIS's undertaking, it is not surprising that OPCD failed to adequately address these issues. OPCD would have done far better to continue with the neighborhood-by-neighborhood approach it started with for Uptown, the University District and elsewhere. But OPCD opted to jump to a citywide effort and, in doing so, took on a far more substantial burden. Going light on the analysis – or, as demonstrated here, omitting it altogether -- is not justified by OPCD's decision to expand the geographic scope. The specificity of the proposal and the nature of the impacts are the same for each of the neighborhoods studied in the citywide EIS as they were in the neighborhood-specific EISs. That OPCD decided to roll all of the remaining neighborhoods into a single EIS is not a legitimate basis for omitting key parts of the analysis. The key issues identified in this motion should have been addressed in the EIS, regardless whether the city was reviewing the neighborhoods one at a time or all in one fell swoop.

Under these circumstances, where reasonable minds could not differ – where the issues simply are not addressed in the EIS -- summary judgment is appropriate. An evidentiary hearing is unnecessary to decide this set of issues.

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[1] *See* Friends of North Rainier's Motion for Summary Judgment & Joinder in SCALE's Motion for Summary Judgment.

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II. KEY ELEMENTS OF THE EIS ARE INADEQUATE

A. The EIS Fails to Adequately Address Historic Resources.

1. The EIS fails to provide a meaningful description of the proposal's impacts on historic resources.

In our motion, we demonstrated that the EIS provides only a superficial "analysis" of impacts to historic resources. The EIS states that as development increases (in response to the MHA upzones), more historic properties will be at risk:

> [E]stimated growth rates under the Alternatives are indicators of potential impacts to historic and cultural resources. Areas with a higher growth rate have the potential for more redevelopment than areas with lower projected growth rates.

EIS at 3-304.

That fact (that the EIS describes impacts to historic resources in that manner) is not disputed by the City. Instead, the City says that the EIS includes additional analysis of the proposal's impacts. We discuss each of those in turn.

First, the City says the EIS "discusses the differences in impacts based on variable rates of growth among the alternatives." Resp. at 12:9 (citing EIS at 3.304, -.306, -307). But the EIS on those pages just repeats the notion expressed in the block quote above: that impacts to historic resources will vary as growth is shifted from among the urban villages. No description is provided of the historic resources at risk as growth is shifted among urban villages.

Next, the City notes the EIS's brief discussion of impacts to a small subset of the City's historic resources: the eight historic districts designated by the City and the seven historic districts listed on the National Register. Resp. at 12:11 (citing EIS at 3.305). Whether the EIS adequately addressed the proposal's impacts on the historic districts is not the issue. The issue is that the EIS does not provide any meaningful description of the impacts to all the other historic

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resources in the city (outside of the formally designated historic districts). The EIS acknowledges that many historic resources are located outside of the formally designated districts. EIS at 3.297. The failure of the EIS to provide any description of the impacts to *those* historic resources is not refuted by the City's citing other pages of the EIS that mention impacts on the historic districts.

Third, the City claims the EIS includes a discussion of the proposals impacts "due to development adjacent to landmarks and properties that could be eligible for listing." Resp. at 12 (citing EIS at 3.305). The EIS states, generically, that impacts are possible if the "development alters the setting of the landmark and the setting is a contributing element of the landmark's designation." EIS at 3.305. But the EIS includes no discussion of the likelihood of such impacts; their expected frequency in any (or all) of the Urban Villages; or the extent to which such impacts vary among the alternatives. Merely describing the nature of the impact generically without providing any discussion of the likely locations or expected frequency of the impact provides no meaningful information to the City Council or the public.

Fourth, the City says the EIS describes the nature of impacts significant to racial and ethnic minority populations. Resp. at 12 (citing EIS at 3.306). That paragraph of the EIS merely states that minority populations may not participate in project reviews and the development of neighborhood design guidelines to the same extent as others. That does not qualify as a description of the impacts; it merely states that the undescribed impacts may impact the minority populations more than other populations.

Last, the City says that the EIS "compares the impacts of the alternatives." Resp. at 12 (citing EIS at 3.308–3.310). But that "analysis" is just more of the same useless statement that more growth will create more risk to historic resources and that growth is spread among the

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Urban Villages differently in each alterative. There still is no description of the probable impacts in any Urban Village.

The City says the Examiner should await the testimony of expert witnesses. Resp. at 13. But the experts will not change the words in the EIS. Those words are not in dispute.

In sum, the EIS states that impacts to historic resources will increase as development increases The City did not need thirteen pages to provide that "insight" to the public and the City Council. The EIS also says that historic districts will be spared upzoning. But there is no analysis of the impacts to any historic resources outside of the designated historic districts. If anyone wants any greater degree of analysis, they will not find it in this EIS. This issue can be resolved on summary judgment and should be, to avoid an unnecessary hearing regarding these issues.

2. The EIS fails to identify the existing historic resources jeopardized by the upzone and text amendment proposals.

OPCD does not dispute that it has access to inventories of historic resources around the city, but did not use that data to help inform the City Council and the public (and itself) of the probable consequences of the proposed upzones. Those facts are not in dispute. Instead, OPCD offers two justifications for not using the data.

One, it argues that the data is not available for all Urban Villages. So, rather than use that information in the areas where it is available, it decided to not use it at all. This, OPCD claims, allows for an "apples to apples" comparison among the Urban Villages. Resp. at 15.

The merits of this argument are strikingly thin. Important information regarding the impacts in some areas should not be ignored simply because that information is not available citywide. No case, statute or regulation has been cited by the City to support this unique

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argument for omitting important information from an EIS. An EIS is supposed to include the best information reasonably available, not omit it. And if the information is not complete and the data gaps cannot be filled, the agency should include a worst case assessment and the likelihood of that occurring for areas where the data is incomplete. WAC 197-11-080. But nowhere does that rule or any other rule authorize the agency to hide important information simply because it is not available citywide. The Examiner should be able to reject this excuse for omitting the information without holding a long and expensive evidentiary hearing.

OPCD also argues that in the city's database, parcels are variously categorized in one of three groups: likely eligible for historic designation; likely not eligible; and no opinion as to eligibility. Resp. at 15-16. OPCD argues that identifying all parcels in the database would thus include those in the second and third category and misrepresent the extent of probable historic resources likely to be impacted by the proposal. The obvious response is to simply include those in the first category. But the EIS does not do that either.

As stated in our motion, it is impossible to assess a project's impacts if the EIS does not first provide a reasonably complete description of the existing baseline resource. Yet that was not done, as the EIS failed to include readily available information about most of the historic resources in the study areas. Because the City admits that the EIS does not include this information and because the City's justifications for omitting the information lack merit, the Examiner should decide as a matter of law that the EIS is inadequate in this regard.

3. OPCD was able to provide more detailed information when it analyzed MHA impacts in a single neighborhood.

In our opening brief, we demonstrated that the City has the means to provide a more meaningful analysis of MHA's impacts on historic resources – and did so in the EIS for MHA's

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roll out in Uptown (lower Queen Anne). SCALE Mtn. at 27-28. In response, the City argues that such evidence by itself does not establish that the citywide EIS is flawed; simply because a more detailed analysis was provided for Uptown does not mean it was required for the citywide analysis. Resp. at 17. But we did not point to the Uptown EIS as establishing a floor or standard. Rather, we pointed to it to avoid the City arguing that it was not possible to do a better job. SCALE Mtn. at 27-0. As described above and in our motion, the City has access to a significant inventory in its own database and elsewhere of eligible historic resources in numerous Urban Villages around the city. The City could have used that information to provide a meaningful description of probable impacts to historic resources throughout the city – just as it did for Uptown.

The City also explains that the additional historic sites identified and assessed in the Uptown EIS were not taken from the City's database. Resp. at 17 (citing Burke Decl., ¶5). But the defense proves too much. While the additional sites came from some other, unidentified source, the point is that the Uptown EIS did not limit itself to only sites listed on the National Register. As Ms. Burke acknowledges, "In the Uptown EIS, we **also** mapped designated Seattle Landmarks and buildings older than 50 years or between 25 to 50 years old **which were not mapped in the MHA** FEIS." Burke, Decl., ¶5 (emphasis supplied). This testimony *from the City's own witness* corroborates our own arguments that the City had it within its means to provide important historic resource information, but omitted it from the MHA EIS.

4. The EIS includes misleading information about the impacts on historic resources resulting from increased development.

In our motion, we demonstrated that the EIS misleadingly suggested that SEPA implementation at the project level would avoid impacts to historic resources. We acknowledged

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1 that the EIS explained that some projects are exempt from SEPA and so SEPA would not avoid
2 impacts in those situations. SCALE Mtn. at 32. But we challenged the EIS assertion that for
3 projects subject to SEPA, the SEPA policies would work to avoid impacts to historic resources.
4 SCALE Mtn. at 32-34.
5
6 In response, the City first attacks a strawman, claiming we ignored that the EIS
7 acknowledges that some projects are exempt from SEPA. Resp. at 19. That is plain wrong; we
8 acknowledged that explicitly. *See* SCALE Mtn. at 32:11-14.
9 Next, the City argues that SCALE has provided no evidentiary support for its claim that
10 SEPA mitigation is ineffective because it frequently is ignored or misinterpreted. Resp. at 19.
11
12 But the EIS provides its own evidence of its misleading reference to SEPA mitigation.
13 The EIS states that for non-exempt projects, SEPA mitigation "may be required" and "could
14 include" various changes to the project. EIS at 3-306. These uncertainties are not discussed in
15 the EIS. To what extent are SEPA mitigation measures actually used and to what effect (*i.e.,*
16 modest project changes with little beneficial impact or substantial changes that provide
17 significant protection of the resource)? The EIS provides no answers. It simply suggests that
18 non-exempt projects may be protected through SEPA, but it provides no assessment of the extent
19 of that protection. Given the significant attention the EIS devotes to SEPA as a means of
20 avoiding impacts that would otherwise result from non-exempt projects, the failure of the EIS to
21 address the extent to which SEPA will result in that alleged beneficial effect renders the EIS
22 inadequate.
23
24 Again, the facts are not in dispute. The EIS clearly references SEPA mitigation as
25 avoiding impacts from non-exempt projects and the EIS definitely does not provide any
26 discussion of the extent to which SEPA mitigation actually avoids such impacts. No additional

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testimony will make this issue any clearer. The Examiner should find that the EIS's claim that impacts to historic resources will be avoided via SEPA, without assessing the extent to which the City actually employs SEPA to that end, renders the EIS inadequate as a matter of law.

Last, the City argues that our challenge to the EIS's misstatements about the efficacy of SEPA mitigation is an impermissible collateral attack on individual SEPA project decisions. Resp. at 20. But, obviously, we are not now attacking past project decisions. Instead, we are attacking the current EIS's misleading statements about the efficacy of the City's SEPA mitigation for historic resource protection. Citing to past examples where things did not turn out so well for the historic resources and noting the EIS's failure to acknowledge that is not a collateral attack on the prior project decisions. It is an attack on the misleading statements in the current EIS.

5. The EIS fails to discuss measures to mitigate the impacts to historic resources.

The facts are not in dispute regarding the failure of the EIS to do anything more than list possible mitigation measures. We cited the mitigation list in our motion and the City does not contend that elsewhere the EIS provides a discussion of the list. Instead, the City argues that a mere list is sufficient. This presents an issue of law that the Examiner should resolve on summary judgment.

The City's principal legal argument is based on the SEPA regulation which states, in full:

> **Indicate what the intended environmental benefits of mitigation measures are for significant impacts**, and may discuss their technical feasibility and economic practicability, if there is concern about whether a mitigation measure is capable of being accomplished. The EIS need not analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts, or new information regarding significant impacts, and those measures will not be subsequently analyzed under

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> SEPA (see WAC 197-11-660(2)). An EIS may briefly mention nonsignificant impacts or mitigation measures to satisfy other environmental review laws or requirements covered in the same document (WAC 197-11-402(8) and 197-11-640).

WAC 197-11-440 (6)(c)(iv) (emphasis supplied).

The first sentence expressly provides that the discussion of mitigation measures must indicate the "intended environmental benefits." The rule goes on to provide sideboards to the mitigation discussion. It need not include a discussion of "technical feasibility and economic practicability" and, per the second sentence, the discussion need not be "in detail." But unless these sideboards are read to swallow the rule, the basic requirement remains: The EIS must include a discussion of the "intended environmental benefits" of the mitigation measures. A mere list of possible mitigation measures does not satisfy the rule. Yet that is all there is in the EIS and the City does not contend otherwise. Summary judgment should be granted in favor of SCALE on this key issue.[2]

B. The EIS Fails to Adequately Address Tree Canopy Issues.

In our opening brief, we quoted Seattle's *Urban Forest Management Plan* (2007):

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[2] The City also questions the relevance of our citation of federal case law related to EIS discussion of mitigation measures. First, the City argues that SEPA's requirement for a discussion of mitigation measures is tied to SEPA's substantive SEPA requirements and because NEPA lacks substantive requirements, reference to NEPA mitigation law is irrelevant. City Resp. at 22. This argument ignores that SEPA's requirement to discuss mitigation in an EIS is distinct from SEPA's substantive requirements. The rule quoted and discussed above (WAC 197-11-440) is the rule that discusses the content of the EIS, not substantive requirements. The rule is titled "EIS Contents." A different rule (WAC 197-11-660) addresses substantive mitigation. Thus, the City's argument that NEPA case law does not apply is based on an erroneous foundation. Both NEPA and SEPA require discussion of mitigation measures in an EIS, distinct from substantive requirements.

The City also notes that the federal case we cited reviewed a project EIS. City Resp. at 22-23 (discussing *Neighbors of Cuddy Mountain v. Forest Service,* 137 F.3d 1372 (9th Cir. 1988)). But similar statements regarding the inadequacy of a mere listing of mitigation measures are found in cases reviewing programmatic EISs, too. Thus, in *National Trust for Historic Preservation v. Suazo,* 2015 WL 1432632 (D. Ariz. 1015), the court reviewed an EIS for a land management plan. It held the mere listing of mitigation measures to be inadequate. "The present case is similar to *Cuddy Mountain.* The Final EIS simply does not evaluate the effectiveness of its mitigation measures. *See Cuddy Mountain,* 137 F.3d at 1381." *Id.* at 11.

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> Accommodating growth is important in order to preserve open spaces outside of the city. However, the loss of treed relief in our built environment reduces livability and further motivates sprawl.
>
> * * *
>
> Finding the right balance is crucial to maintaining the city's livability and encouraging new development within already developed areas rather than pushing it to the metropolitan fringe.

Urban Forest Management Plan (2007) at 1, 5 (Newman Dec, Ex. A). The City does not dispute that.

We also summarized the risks to the tree canopy posed by MHA's increased development in a regulatory environment with little protection for trees. SCALE Mtn. at 39–41. We observed that "calls for new regulations to protect trees imperiled by development have gone unheeded; and MHA is designed to incentivize additional development in various areas of a city where regulations to protect trees remains inadequate." The City does not dispute either of those factual observations either.

With those fundamentals established, we address the specific issues raised in our motion and the City's response.

1. The EIS fails to describe the impact of the no action alternative on tree canopy

In our motion, we demonstrated that the EIS acknowledges that it made no effort to assess the extent to which development under the current regulatory scheme is impacting tree cover. SCALE Mtn. at 41-42. We quoted the EIS's own admission: "This study does not quantify tree loss resulting from current development patterns." EIS at 3.322.

The City's first response is odd, asserting that the words of the EIS cannot be used to establish that the EIS fails to address this issue. According to the City, our claim that the EIS fails to address this issue must be established via expert testimony. Resp. at 25-26 ("Since

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SCALE provided no declaration to support its argument regarding tree canopy impacts in the 'no action' alternative, there is (at a minimum) an issue of fact precluding summary judgment for SCALE on this issue").

We decline to engage the City in a battle of experts when the language of the EIS is clear. The EIS (and now the City's brief) make clear that the EIS did not assess the baseline (no action) condition. Without that analysis, there is no means to assess the differences caused by the action alternatives. This omission, admitted and glaring, is fatal to the adequacy of the EIS.

The City also responds that it lacks the data to assess the canopy trend under the current regulatory program. Resp. at 25-26. But if that is the case, the City had to comply with WAC 197-11-080 ("Incomplete or Unavailable Information") which establishes a process for addressing data gaps and requires certain affirmative statements, if the EIS is completed without filling the gaps. If the City's defense is that a data gap exists, its defense must be rejected because the City has not provided any evidence that it complied with the procedural requirements of the data gap regulation.[3]

2. The EIS fails to address the impacts caused by increased development in areas where development capacity increases without a zone change.

In our motion, we demonstrated that the EIS fails to address the tree canopy impacts resulting from zoning map changes within the same broad category (*e.g.,* from LR 1 to LR 2, or from NC 30 to NC 40). SCALE Mtn. at 42–43. The City does not dispute that the EIS fails to

[3] The City also asserts that its "static" change in canopy cover assumption for the base case (no action alternative) is a conservative assumption because there is some evidence the canopy is actually increasing. Resp. at 25. But assuming that the base case is worse than reality is not a conservative assumption when it comes time to compare the base case to the action alternatives. By making the base case look worse, the action alternatives look better (relatively speaking). Thus, the effect of the City's assumption is the opposite of what the City asserts.

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discuss these impacts. But it argues that there is a good reason for this omission. Thus, the fact that the impacts are not discussed is admitted. The issue is whether the justification is sufficient.

The justification is that map amendments within the same broad category will not result in more loss of trees. As the City explains, lot line to lot line development is allowed in both the NC 30 and NC 40 zone. If the buildings merely are taller, no greater loss of trees will result. Resp. at 27 (citing EIS at 3.318).

The City's justification overlooks the primary intended impact of these upzones: to stimulate redevelopment of property which would otherwise remain in its current use. Many properties throughout the Urban Villages are developed to less than their *current* allowed development potential. But the economic benefits are not sufficient in many cases to prompt the owners to redevelop. The map upzones are intended to provide for additional development capacity and hence additional economic reward and, thus, catalyze re-development of lots that would otherwise remain in their current use. "[W]e also recognized that certain zoning changes could, in some cases, make development possible on a parcel that wasn't identified as susceptible to redevelopment under existing zoning." EIS, App. G at G.5 (Growth Estimates technical appendix).

Of course, as these under-developed lots are re-developed, lot line to lot line, trees will be lost. That is why the City has been acknowledging in its Urban Forestry plans for over a decade that development regulations need to be strengthened to avoid more tree loss as private property develops. But, as Mayor Burgess's November 2017 executive order makes clear, those regulatory improvements still have not been adopted.

In sum, the City's justification for not addressing the impacts of the map upzones ignores one of MHA's primary intended objectives: re-development of under-developed lots. Because

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the City concedes that the EIS has not addressed the impacts of the map upzones within the same category (*e.g.,* LR 1 to LR 2) and because the City's justification does not address a primary mechanism by which the tree canopy will be destroyed by these upzones, the relevant facts are not in dispute and the EIS should be found inadequate.

The same analysis applies to the text amendments that were not addressed in the EIS. The proposal contemplates a wide variety of text amendments (described in EIS Appendix F). The zoning text amendments increase development capacity to the same or greater extent as the map amendments. The proposal includes height increases for existing zoning no matter where it is located in the City. Thus, for example, every single parcel currently zoned NC1-30 would be changed to NC1-40 (M). EIS App. F at F3. Every parcel that is currently zoned NC1-40 will be NC1-55(M), *id.,* and the list goes on and on. In total, there will be automatic height increases in 18 different zones throughout the entire city.[4]

The City's justification for this omission is the same as for the map amendments, *i.e.,* that the map amendments only allow more height, not more lot coverage and, therefore, will not impact trees. Resp. at 28:3. But as with the map amendments, the City's justification overlooks that the intended purpose of the text amendments was to spur re-development of under-developed lots. EIS, App. G at G.5 (Growth Estimates technical appendix). Re-development of those lots will cause trees to fall and the tree canopy to decrease. The City has provided no adequate justification for the admitted failure of the EIS to discuss the impacts of the proposed text amendments - at all.

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[4] The City challenges our reference to the Council Bill as the basis for describing the proposed map and text amendments. Resp. at 39. But the same or similar information is contained in EIS Appendix F, as cited in the accompanying text. We need not refer to the Council Bill to make our argument.

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3. The EIS fails to discuss mitigation for tree canopy loss impacts.

As the City does, we incorporate here our discussion of the legal standards for mitigation measures from our opening brief and earlier in this reply. As with mitigation measures for historic resources, there is no factual dispute. The EIS does not discuss the "intended environmental benefits" of the listed mitigation measures. The Examiner should conclude that "less detail" does not mean "no detail" and, in particular, it does not nullify the requirement to describe the intended benefits of the listed mitigation. The EIS's mere listing of mitigation measures to protect trees should be determined to be inadequate as a matter of law.

C. The EIS Fails to Include an Assessment of the Impacts of the Text Amendments Outside the Urban Villages

In our motion, we made two arguments regarding the failure of the EIS to address impacts of the proposed text amendments outside of the Urban Villages. The first argument related to amendments that would increase development potential in the multifamily and neighborhood commercial zones throughout the city. We attacked a meaningless sentence regarding the impacts of these text amendments in the Land Use section of the EIS. The City responds that more discussion of these impacts is provided in the Aesthetics section of the EIS. We agree that discussion precludes summary judgment on this issue (though we expect to show at the hearing that the EIS discussion of aesthetic impacts is inadequate, too).

The other issue we raised relates to the failure of the EIS to address impacts of the upzones on single family zones. These are impacts that occur when Urban Villages are expanded and bring new, higher density (*e.g.*, multifamily and commercial) across the street from single family neighborhoods (that heretofore had other single family lots as their neighbors). The EIS refers to these as "edge effects" (EIS at 3-317), but the EIS fails to describe these edge effects in

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adequate detail. Instead, the EIS includes meaningless statements not specific to particular Urban Village expansions. *See, e.g.,* EIS at 3.319 *et seq.*

For instance, the EIS states that expansion of the Rainier Beach Urban Village will create a new "transition condition" where LR abuts SF. EIS at 3122. ("Transition conditions" is apparently Orwellian for compatibility issues.) But that is all that the EIS says. There is no discussion of the extent of the incompatibility and no visualization of the contrasting development types across the street from one another. Yet a half dozen blocks of single family homes will now be split down the middle with single family homes on one side of the street and rowhouses, duplexes, townhouses and even low rise multifamily allowed on the other. *See* Ex. H-66.

As another example, the Preferred Alternative would expand the Roosevelt Urban Village east into a single-family neighborhood east of 15th Avenue NE. *See* App. H, Ex. H-70. The expansion would result in five blocks where existing single-family neighborhoods would now be split down the middle: one side of the street would remain single family; the other side would be zoned RSL and likely developed with rowhouses, duplexes and townhouses, EIS at 3.62. Yet this discordant land use pattern is not mentioned in the EIS. Instead, the EIS omits this adverse impact and instead sugar coats it by saying the expansion would "provide a gradual transition to areas outside the village." EIS at 3.145.

The eastern edge of the Roosevelt Urban Village currently is situated along a major arterial, 15th Avenue N.E. The arterial serves as an appropriate boundary. The new boundary would be in the middle of a long-established single-family neighborhood. Failing to make any mention of the impact of splitting the neighborhood (and instead claiming that splitting the

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neighborhood provides for a "gradual transition") is yet another example of the failure of the EIS to disclose the impacts of the proposed expansions on adjacent single-family areas.

Similar impacts are proposed around other expansion areas. *See, e.g.,* Ex. H-19 (many blocks on east side of Ballard Urban Village expansion area); Ex. H-25 (Columbia City westside expansion area); H-28 (many blocks around Crown Hill expansion areas on west, south, east and northeast sides); H-55 (many blocks around North Beacon Hill expansion areas on east, south and southwest sides); H-58 (approximately eight blocks on east side of North Rainier expansion area); H-64 (over 20 blocks around east and south sides of Othello Urban Village expansion areas); and H-82 (West Seattle Junction).

In some of these locations, the newly zoned parcels may be across the street from well-established single-family neighborhoods. In other areas, perhaps the lots across the street are devoted to other uses and, thus, upzoning in the expansion areas will be less impactful. But the EIS provides no information to allow the City Council or the public to understand the location and extent of the areas that will be impacted. One can only guess where the edge impacts will occur.

In sum, the facts regarding the EIS discussion of so-called edge impacts are not in dispute. The parties agree that the EIS provides a definition of edge impacts. The parties also agree that the EIS provides no description of where those edge impacts will arise if the proposed expansions are adopted. The absence of any meaningful discussion in the EIS of the location and extent of those edge impacts as Urban Villages are expanded in areas abutting single family zones renders the EIS inadequate as a matter of law.

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D. The EIS Fails to Adequately Address the Comprehensive Plan Inconsistencies and Amendments that will Be Needed to Allow the Proposal.

The MHA EIS is misleading and omits information that is required by SEPA with respect to inconsistencies of the MHA Proposal with the Seattle 2035 Comprehensive Plan and proposals to fix those inconsistencies via amendments to the Plan.

1. The EIS fails to address the proposal's consistency and inconsistency with relevant comprehensive plan policies.

The City argues that it need not identify every policy that proposal would violate; that it is sufficient to provide a summary of the relevant provisions. Resp. at 32 *et seq.* But the Examiner need not decide whether every inconsistent policy had to be identified or whether it would have been sufficient to summarize them. The EIS did neither.

First, the MHA EIS fails to discuss whether the MHA Proposal is consistent or inconsistent with the great majority of the Seattle 2035 Comprehensive Plan. There are twelve elements to the Seattle 2035 Comprehensive Plan: the Growth Strategy; Land Use; Transportation; Housing; Capital Facilities; Utilities; Economic Development; Environment; Parks and Open Space; Arts and Culture; Community Well-Being; and Neighborhood Plans. See Declaration of Jeffrey S. Weber in Support of the City of Seattle's Response to Scale's Motion for Summary Judgment (May 23, 2018), ¶3 (2035 Comp Plan Table of Contents). For each of those elements, the City has developed numerous goals and policies. For example, the Transportation Element of the plan has 10 goals that each have five or more policies to further those goals. *Id*. at 72-95. There are four goals, each with four or more policies, for the Parks and Recreation Element. *Id*. at 138-144. There are four goals, each with five or more policies, for the Environmental Element. *Id.* at 131-137. And so on.

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The MHA EIS mentions only a few select policies and goals from only two of the twelve elements: The Growth Strategy Element and the Land Use Element. Weber Dec, ¶ 2 (EIS at 2.23; 3.100, 3.102-3.103; 3.107–3.108; 3.117; 3.168). The EIS does not summarize, much less even mention, any goals or policies related to Transportation; Housing; Capital Facilities; Utilities; Economic Development; Environment; Parks and Open Space; Arts and Culture; Community Well-Being; or Neighborhood Plans. Because it does not mention these policies, the EIS also fails to discuss the proposal's consistency or inconsistency with them. This failure to discuss how the MHA proposal is consistent or inconsistent with the great majority of the Seattle 2035 Comprehensive Plan constitutes a clear violation of WAC 197-11-440(6)(d)(i) and SMC 25.05.440(E)(4)(a). If this MHA EIS is upheld, it would amount to basically waiving this legal requirement almost entirely.

Second, the MHA FEIS fails to disclose inconsistencies between the MHA Proposal and specific 2035 Comp Plan policies. Among others, the MHA proposal is inconsistent with the following policies in the Seattle 2035 Comp Plan:

> **AL-P2**. Protect the character and integrity of Aurora-Lichten single-family areas within the boundaries of the Aurora-Lichten Urban Village.
>
> **F-P13**. In the area where the Wallingford Urban Village and the Fremont Planning Area overlap, the area bounded by Stoneway on the east, North 45th Street on the north, Aurora Avenue North on the West, and North 40th Street on the south, maintain the character and integrity of the existing single-family zoned areas by maintaining current single-family zoning on properties meeting the locational criteria for single-family zones.
>
> **MJ-P13**. Maintain the character and integrity of the existing single-family designated areas by maintaining current single-family zoning both inside and outside the urban village on properties meeting the locational criteria for single-family zones, except where, as part of a development proposal, a longstanding

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> neighborhood institution is maintained and existing adjacent community gathering places are activated, helping to meet MJ-P6.
>
> **MJ-P14**. Ensure that use and development regulations are the same for single-family zones within the Morgan Junction Urban Village as those in corresponding single-family zones in the remainder of the Morgan Junction Planning Area.
>
> **NR-P9**. Seek to maintain single-family zoned areas within the urban village, but allow rezones to residential small lot to encourage cluster housing developments and bungalow courts. A new single-family zoned area within the urban village is appropriate for any of the small lot single-family designations, provided that the area meets other requirements of the land use code rezone evaluation criteria for rezones of single-family land.
>
> **NG-P8**. Maintain the character and integrity of the existing single-family zoned areas by maintaining current single-family zoning on properties meeting the locational criteria for single-family zones.
>
> **R-LUG1**. Foster development in a way that preserves single-family residentially zoned enclaves and provides appropriate transitions to more dense, or incompatible, uses [in the Roosevelt neighborhood].
>
> **W-P1**. Protect the character and integrity of Wallingford's single-family areas.
>
> **WSJ-P13**. Maintain the character and integrity of the existing single-family areas [in the West Seattle Junction].
>
> **W/HP-P3**. Strive to preserve existing single-family areas and increase the attractiveness of multi-family residential areas that offer a range of attractive and safe housing choices affordable to a broad spectrum of the entire community.

Tobin-Presser Decl., Ex. UU.

The EIS does not identify these policies nor does it summarize them. The only passing statement made is that the proposal would require modifying policies in the Comp Plan's neighborhood plan "concerning single family zoning in urban villages." Resp. at 34 (citing EIS at 2.2). Even more vaguely, the EIS refers to "changing policies in the Neighborhood Plans," EIS

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at 2.21 (cited in Response at 34), without any description of which neighborhood plans, the subject matter of the inconsistent policies, the direction provided by the inconsistent policies, or the manner in which the proposal is at odds with those adopted policies. As a result, the public and decision makers are left unaware of the specific inconsistencies of the proposal with the 2035 Comp Plan's Neighborhood Plan policies. This is directly contrary to the SEPA rules.

The City also points to a single sentence in an EIS appendix which states that "several policies" in the neighborhood plan policies section "may" conflict with elements of the MHA Proposal. Resp. at 34 *citing* EIS at F.11. This single sentence is buried in an appendix while the authors repeatedly state in the main body of the EIS that the proposal is generally consistent with the 2035 Comp Plan. And even in this single mention, the appendix does not actually identify or summarize the subject matter of the policies that are inconsistent with the Proposal; the policy directed provided by these problematic policies; or the manner in which OPCD proposes to modify them. The inconsistency of the proposal with so many neighborhood plan policies is a *very significant issue*. The failure of the EIS to summarize these policies, identify them, or discuss the proposal's relation to the policies is not subject to factual dispute and should render the EIS inadequate as a matter of law.

Third, the City cites to certain pages in the EIS in an attempt to demonstrate that the MHA EIS meets the requirements in WAC 197-11-440(6)(d)(i) and SMC 25.05.440(E)(4)(a). Resp. at 33-34. But the cited pages do not help the City at all – they very clearly prove exactly the opposite of what the City is trying to argue.

Several of the cited pages from the EIS address the few policies we acknowledge were discussed in the EIS. *See* Response at 33–34 (citing EIS at 2.23; 3.107–3.108; 3.117). We do not dispute that the EIS addresses eight policies that are consistent with the proposal. Citing the

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pages of the EIS where there is a discussion of a few favorable policies does not address the issue presented by our motion. The issue is whether the EIS identifies and discusses other policies that are inconsistent with the proposal. To that end, the City cites the following pages of the EIS, none of which discuss consistency/inconsistency in any meaningful way:

- The discussion at EIS at 2.4-2.5 does not provide a summary of whether the proposal is consistent or inconsistent with existing Comprehensive Plans, neighborhood plans, and/or zoning regulations as is required by SEPA. Instead, it describes GMA's requirements; discusses the City's adoption of the Seattle 2035 Comprehensive Plan; and provides about a brief overview of the 2035 Comprehensive Plan EIS.

- The EIS at 1.21 states, "Overall, at the citywide scale, land use impacts may be summarized as follows: Changes to land use patterns would be consistent with the overall Comprehensive Plan strategy." This fails to summarize any Comprehensive Plan policies and fails to even note (as is done fleetingly elsewhere) that the proposal is inconsistent with some of them.

- The EIS at 3.100 – 3.103 summarizes a few goals and policies from the Land Use and Growth Strategy Elements of Seattle 2035 Comp Plan and describes the land use classification system employed in the Comp Plan (*e.g.,* Urban Center and Hub Urban Village). But there is no analysis of the proposal's consistency or inconsistency with those policies. Moreover, the authors crafted the summary to avoid any hint that the proposal is inconsistent with any comprehensive plan policies.

- The EIS at page 3.130, 3.140, and 3.155, states that the rezones to implement MHA under each alternative "would be generally consistent with Comprehensive Plan Policy and Land Use Code requirements" (because most upzones are in existing Urban Villages). These statements are woefully incomplete, repeatedly ignore policies the EIS elsewhere fleetingly acknowledges are inconsistent, and purposefully mislead the reader.

- The EIS at 3.168 identifies Comprehensive Plan policy LU 5.15, which addresses views. But there is no discussion of whether or to what extent the proposal is consistent or inconsistent with this policy.

- The EIS at 3.287 does state that the proposal's efforts to reduce the use of single occupancy vehicles is consistent with Comp Plan polices that seek that objective. This is the only statement in the entire EIS where the

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document identifies a specific comp plan policy and addresses the proposal's consistency with it.

In sum, the facts as we described them in our motion are not controverted by the City's response. The EIS never describes - individually or by summary – the numerous EIS policies that are inconsistent with the proposal. The EIS makes no reference to any of the numerous neighborhood plan policies that we listed in our motion that are obviously inconsistent with the proposal. No discussion is provided about the nature of the inconsistent policies (*e.g.,* land use, historic preservation, view protection, aesthetics); the geographic extent of the inconsistency (*e.g.,* one block in one neighborhood; many blocks in many neighborhoods); the qualitative magnitude of the inconsistency or its risk (*e.g.,* high risk of major inconsistencies or low risk of minor inconsistency); or any other respect. Because the City does not point to any facts in the EIS that demonstrate that any discussion of this kind is contained in the EIS, the Examiner can and should determine as a matter of law that the EIS is inadequate for failing to address the proposal's inconsistency with countless Comprehensive Plan policies.[5]

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[5] The City's statement that its "obviously impractical" to meet the legal requirement in WAC 197-11-440(6)(d)(i) is belied by the fact that the EIS's that the City has recently prepared for other MHA legislation contains the requisite summary and analysis of consistency with Comp Plan policies. *See* Declaration of Claudia M. Newman in Support of SCALE's Motion for Summary Judgment (May 9, 2018), ¶ 6 (DEIS for U District at 3.1-15 through 3.131); ¶ 9 (Seattle Uptown Rezone DEIS at 3.33-3.66). They can do it, they just chose not to.

It also is belied by the flyers the City has published identifying specific neighborhood policies that need to be changed. *See infra* at 28–29 (quoting "Meeting in a Box: 2018 Comprehensive Plan Amendments").

In any event, this is a self-inflicted wound. If the City had focused on one neighborhood or just a few neighborhoods at a time instead of upzoning 27 neighborhoods all at once, then complying with SEPA would not be "impractical." The sheer size of the proposal itself creates the workload that is necessary to meet state law requirements. If the City wants to pursue such a massive proposal all at once, then it must, as a matter of law, engage in environmental review that is commensurate with the size of the proposal. The City cannot argue that SEPA requirements should be waived simply because OPCD chose to upzone 27 neighborhoods in one fell swoop.

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2. The EIS fails to describe comprehensive plan amendments that are part of the proposal and, therefore, also fails to analyze the alternatives and impacts of those amendments.

The City challenges the existence of "legal authority" for the requirement that an EIS adequately describe and analyze the comprehensive plan amendments that must be adopted as part of this proposal, but that authority is clear: An EIS must include the "principal features" of the proposal, WAC 197-11-440(5)(c)(i), and it must analyze reasonable alternatives to and impacts of those features of the proposal. RCW 43.21C.030. An EIS is a "disclosure document" and more. WAC 197-11-400(4). It is to be "used" by decision makers, but it cannot serve those purposes if it fails to describe the entire proposal.

Here, again, the undisputed evidence is clear and reasonable minds could reach but one conclusion: the MHA EIS fails to include a description, analysis or alternatives of the proposed amendments to the 2035 Comprehensive Plan. The evidence SCALE and others have presented in their motions regarding this issue is not in dispute.

The Comprehensive Plan amendments that must be adopted are a *very significant* part of the proposal. *See* Junction Neighborhood Organization's Response to City's Motion to Dismiss, Cross Motion for Summary Judgment, and Motion for Summary Judgment (May 1, 2018). The proposal to amend these policies is controversial because the policies OPCD seeks to jettison were adopted only after an enormous amount of work and effort, including hundreds of hours of volunteer time by Seattle citizens. *Id.* The city is proposing to change those policies against the wishes of those neighborhoods. *Id.*

The City has been pursuing a completely separate public process for review and input of Comprehensive Plan amendments. In September, 2017, the Seattle Department of Neighborhoods issued a Notice for Open House to discuss Comprehensive Plan amendments related to "how we

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grow and build housing in Seattle." Tobin-Presser Decl., Ex. TT. The flyer explained that the discussion at the open houses would be about the adoption of future Comprehensive Plan amendments to ensure that the language in existing neighborhood plans is changed to be consistent with the proposed MHA legislative proposal. *Id*. The Open House Notice states "You will have a chance to review neighborhood plan language and help choose new language that is consistent with the City's updated vision and plan." *Id.*

On another flyer issued, titled "Meeting in a Box: 2018 Comprehensive Plan Amendments," the City acknowledged that the MHA proposal was inconsistent with existing policies in the Aurora-Lichton Springs Neighborhood Plan, the Fremont Neighborhood Plan, the Morgan Junction Neighborhood Plan, the North Rainier Neighborhood Plan, the Northgate Neighborhood Plan, the Roosevelt Neighborhood Plan, Wallingford Neighborhood Plan, and the Westwood-Highland Park Neighborhood Plan. Tobin-Presser Decl., Ex. UU. (No such specificity was included in the MHA EIS.) The flyer proposed four different options for new policy language for these neighborhood plans: Option A, Option B, and Option C contained specific proposed language and Option D was "other ideas? Craft your own policy guided by our helpful hints (at the end of this document) and send to 2035 at seattle.gov by December 8, 2017." *Id*. (No alternatives were described in the MHA EIS.)

The EIS not only barely mentions that there is any inconsistency in the first place with the existing policies, but it fails entirely to disclose and analyze the actual proposal – *i.e*. language that is being presented for consideration. The MHA EIS does not describe a "Preferred Option" – or any option. The MHA EIS does not mention the language in Option A, Option B, Option C, and/or any of the other Options that members of the public may have submitted in response to the requests for

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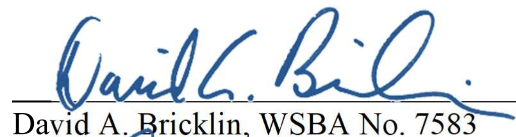
1 input. There is literally no description of any proposed Comprehensive Plan amendment language
2 whatsoever anywhere in the entire EIS.
3
4 Not only has the MHA EIS failed to adequately describe the Preferred Option (a principal
5 feature of the proposal), but it has also failed to adequately describe alternatives to the Preferred
6 Option that are, in a separate forum, being presented to the public as reasonable alternatives. The
7 EIS does not even mention that another process is occurring. There is no analysis or discussion of
8 the different impacts that would be associated with the different "Options" that are being presented
9 to the public.
10
11 In the end, the EIS fails to adequately describe the comprehensive plan amendments that are
12 being proposed and it fails to analyze the alternatives and impacts of those amendments. Because the
13 facts concerning this issue are not in dispute, the Examiner can determine that the EIS is inadequate
14 as a matter of law.

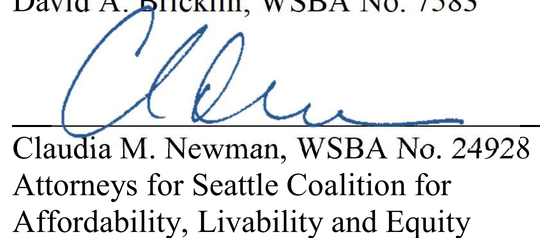
15 **III. CONCLUSION**

16 As to the issues raised in SCALE's and the other appellants' motions, summary judgment
17 is appropriate and should be granted.
18
19 Dated this 30th day of May, 2018.

20 Respectfully submitted,

21 BRICKLIN & NEWMAN, LLP

22 By: 
23 David A. Bricklin, WSBA No. 7583

24 By: 
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