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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In re: Appeal by

**FREMONT NEIGHBORHOOD COUNCIL  
(HE file No. W-17-014)**

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

Hearing Examiner Consolidated File:  
**W-17-006**

**FREMONT NEIGHBORHOOD  
COUNCIL POST HEARING  
OPENING BRIEF**

**I. Introduction**

FNC submits this post hearing brief to provide the Hearing Examiner with references from the record—admitted exhibits and witness testimony—along with relevant legal authority, to support its claims that:

- The MHA EIS does not contain an appropriate range of alternatives.
- The MHA EIS does not adequately assess impacts on urban forest resources (trees and tree canopy).
- The MHA EIS does not adequately assess impacts on the Fremont neighborhood, including land use and forest resources.

1 **II. THE EIS FAILS TO INCLUDE AN APPROPRIATE RANGE OF ALTERNATIVES.**

2 A. Appellants<sup>1</sup> Should Not Be Precluded By The Hearing Examiner’s “Preliminary Ruling” On The  
3 Seпа Phased Review Issue From Pursuing Claims Regarding Improper Application Of Phased Review

4 The Hearing Examiner’s “Preliminary Ruling” stating that “The FEIS satisfies the City’s  
5 phased review process requirements”<sup>2</sup> should not prevent Fremont Neighborhood Council from  
6 arguing that the EIS alternatives are inadequate as a result of how the City applied phased review to  
7 the MHA EIS.

8 First, the main argument regarding phased review by the City in its April 17, 2018 Motion for  
9 Partial Dismissal concerns the non-applicability of a June 8, 2015 DNS, citing to reference to that  
10 DNS in the FNC appeal (W-17-014) and Wallingford Community Council appeal (W-17-006).<sup>3</sup> FNC  
11 does not dispute that the June 8, 2015 DNS is not relevant to the MHA decision. Indeed, that is the  
12 point; the City’s invocation of facial compliance with phased review rules rests entirely on  
13 incorporation of the City’s EIS for the 2035 Plan. The remaining question is as stated in the FNC  
14 appeal, did “The City improperly constrained the range of alternatives by failing to properly invoke  
15 and apply SEPA phased review rules.” (FNC Appeal at IV.2.C., emphasis added)

16 Second, the FNC did not brief facts or law in response to the City’s motion, which discusses  
17 the issue in less than two pages, citing no legal authority beyond the SEPA rule and one inapposite  
18 appellate case.<sup>4</sup> The City cited no facts other than the existence of the 2035 Plan EIS. FNC does not  
19 argue with the City’s assertion of bare compliance with the procedures of phased review rule (SMC  
20

21 <sup>1</sup> The brief is submitted by appellant Fremont Neighborhood Council (FNC). On issues that are of general  
22 applicability to all nine appellants, “Appellants” will be used as appropriate.

23 <sup>2</sup> Preliminary Order on Prehearing Motions, page 3, ¶ 6.

<sup>3</sup> The DNS itself is not in the record. There is a brief reference to it in the “Findings of Fact” accompanying the  
City Council adopted ordinance that became the MHA “framework” —SMC Chapter 23.58C—submitted as an  
exhibit by the City. Ex. 269 at pdf page 58, ¶ 28.

1 25.05.060(E)). FNC does argue that the facts adduced from review of City document production  
2 completed after dispositive motions were concluded,<sup>5</sup> and from testimony at hearing, clearly indicate  
3 an avoidance of the alternatives aspect based on the phased SEPA review.

4 Third, the Hearing Examiner's June 8, 2018 ruling on phased review is subject to the final  
5 sentence of that "Preliminary Order": "The Hearing Examiner ... may reserve discussion on  
6 dispositive aspects of this order for the final decision in this matter."<sup>6</sup> In light of facts and evidence  
7 not known to appellants prior to hearing that bear directly on the question of how the City applied  
8 phased review in its delineation of alternatives in the MHA EIS, FNC requests that this issue be given  
9 consideration at this time.

#### 10 B. The City Improperly Limited Alternatives By Using A Narrow Interpretation Of MHA Objectives

11 SEPA requires EISs to contain a thorough consideration of alternatives to a proposed action.  
12 SMC, 25.05.440(D); SMC 25.05.786. Moreover, regarding the relationship between the statement of  
13 objectives of the proposed action and the range of alternatives:

14 While agencies enjoy "considerable discretion," to define the purpose and need of a project,  
15 *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998), in doing so "an  
16 agency cannot define its objectives in unreasonably narrow terms," *City of Carmel-by-the-Sea*  
17 *v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)." Courts evaluate an agency's  
18 statement of purpose under a reasonableness standard...and in assessing reasonableness, must  
19 consider the statutory context of the federal action at issue...[while] [a]gencies enjoy  
20 considerable discretion in defining the purpose and need of a project...they may not define the  
project's objectives in terms so unreasonably narrow, that only one alternative would  
accomplish the goals of the project." *Honolulu Traffic.com v. Fed. Transit Admin.*, 742 F.3d  
1222, 1230 (9th Cir. 2014) (citations and internal quotation marks omitted).

21 *Cachil Dehe Band of Wintun Indians v Zinke*, 889 F.3d 584, 603 (9th Cir. 2018) (emphasis added).<sup>7</sup>

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22 <sup>4</sup> *Glasser v. Seattle*, 139 Wn. App. 728 (2007), rejecting a collateral attack on a prior "phased," programmatic  
23 EIS. The current challenge to the MHA EIS has no such challenge to any prior SEPA review.

<sup>5</sup> In response to Requests for Production, the City provided Appellants with many thousands of documents in  
hundreds of thousands of pages. It took hundreds of hours for Appellants to review these documents.

<sup>6</sup> Preliminary Order on Prehearing Motions, page 5.

<sup>7</sup> "Because NEPA is substantially similar to SEPA, ... [Washington courts] may look to federal case law for  
SEPA interpretation." *Int'l Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 511,

1 The MHA FEIS Fact Sheet<sup>8</sup> ties the MHA proposed action to the recently adopted 2035  
2 Comprehensive Plan (“2035 Plan”): “The City is following a course of phased environmental review,  
3 pursuant to WAC 197-11-060(5) and SMC 25.05.060.E, to review proposals implementing or related  
4 to the 2035 Comprehensive Plan.”<sup>9</sup>

5 Thus the objectives of the proposed MHA action are directly linked to the broad purposes of  
6 the 2035 Plan “to plan for the amount of population and employment growth that has been allocated to  
7 the City by the Washington State Office of Financial Management.” 2035 FEIS at 1-1 (Ex. 5).

8 The City’s development of the 2035 Plan, adopted in 2016, and the process that led to the  
9 MHA at issue overlapped. The process by which the MHA was developed was outlined in the  
10 testimony of Geoffrey Wentlandt, EIS project manager at OPCD, and Robert Feldstein, Mayor’s  
11 Office policy lead, among others.<sup>10</sup> In summary, Mayor Murray worked with the City Council to  
12 create the Housing Affordability and Livability Agenda Advisory Committee (HALA Committee) in  
13 September 2014.<sup>11</sup> In ten meetings in six months from November 2014 to May 2015, the committee  
14 produced a set of recommendations.<sup>12</sup> that is referred to as the HALA Report.

15 The HALA report contained numerous recommendations. The Council and Mayor decided  
16 which to pursue. The MHA proposal is one of the largest programmatic City-wide actions and has  
17 very broad objectives:

- 18 • Address the pressing need for housing affordable and available to a broad range of households.
- 19 • Increase overall production of housing to help meet current and projected high demand.

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20  
21 525 (2013); *Pub. Util. Dist. No. 1 of Clark County v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158  
(2007). What are named “objectives” in SEPA are called “purpose and need” under NEPA.

22 <sup>8</sup> EIS Fact Sheet content requirements are at SMC 25.05.440(A).

<sup>9</sup> MHA EIS at ix.

<sup>10</sup> Also see EIS p. 2.11, et seq.

<sup>11</sup> Ex. 264, Council Resolution 31546.

<sup>12</sup> Ex. 312, HALA Committee organizational structure and schedule

- 1 • Leverage development to create at least 6,200 net new rent- and income-restricted housing  
2 units serving households at 60 percent<sup>1</sup> of the area median income (AMI) in the study area  
3 over a 20-year period.
- 4 • Distribute the benefits and burdens of growth equitably.<sup>13</sup>

5 Zoning and land use regulations are not mentioned, let alone the specific zoning action of  
6 increasing density on every single parcel in each urban village (UV) in the study area.

7 Notwithstanding this absence of specific direction in the project objectives, increased density via  
8 “upzoning” throughout the study area, plus more in UV “expansion areas,” plus more in most multi-  
9 family residential, commercial, and neighborhood commercial zones outside the UVs, is exactly what  
10 the EIS alternatives are limited to.

11 The EIS in a section titled “RESPONSES TO FREQUENT COMMENTS,” explains this  
12 limitation of alternatives:<sup>14</sup>

13 [The frequent comment]

14 ALTERNATIVES THAT COULD MEET OBJECTIVES

15 The DEIS did not review any alternatives to MHA that could achieve the proposed objectives.  
16 Alternatives 2 and 3 use the same approach. They are both versions of MHA that would  
17 increase zoning capacity to mandate an affordable housing requirement.

18 [City response—partial]

19 No viable alternatives beyond those included in the DEIS were identified by commenters that  
20 could meet the project objectives.

21 A number of comments suggested that an alternative be studied wherein an affordable housing  
22 requirement would apply to development without increasing zoning capacity or providing a  
23 development incentive, such as in impact fee or an inclusionary housing requirement. As noted  
24 above, imposition of MHA requirements is inextricably tied to granting additional  
25 development capacity under the definition of the proposal and its objectives.  
(emphasis added)

26 The City further justifies this conclusion:<sup>15</sup>

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27 <sup>13</sup> EIS, p. 1.3; the footnote is: “The majority of MHA rent-restricted affordable units will serve the  
28 60% AMI level, however some small studio units will serve 40% AMI, and some home-ownership  
29 units may serve households up to the 80% AMI level.”

30 <sup>14</sup> EIS p. 4.12

31 <sup>15</sup> EIS p. 4.247

1 [The City's] approach is based on provisions of Washington State law which place tight limits  
2 on how affordable housing programs may be implemented (RCW 36.70A.540). The City  
3 believes that upzoning is the most effective incentive permitted by the applicable statute.

4 The City errs by claiming RCW 36.70A.540 (a section of the Growth Management Act)  
5 prohibits consideration of alternatives beyond what the City considered—only upzoning. RCW  
6 36.70A.540 does not *require* upzones be given in exchange for developers “providing affordable units  
7 on-site or through payment of a fee.” Nor does that statute require that every parcel of land in a study  
8 area be upzoned; that is a policy determination, not a legal requirement. There is nothing in the GMA,  
9 let along SEPA, that allows the City to proscribe the range of alternatives as it has done.

10 FNC submit that the record shows the decision to preclude alternatives other than upzoning of  
11 every parcel in the study area was in fact a political decision, not based on sound policy. While it is  
12 not impermissible or a violation of SEPA for the City to make land use decisions based on politics  
13 rather than good governance policies and sound land use planning, it is a violation of SEPA if the  
14 content of the resulting EIS is limited in a manner that avoids consideration of alternatives that would  
15 still meet the stated objectives, and that are legally available to the City.

16 Since the MHA EIS is tied to the 2035 Plan, it is instructive to look at the range of solutions to  
17 the identified problems reflected in the comprehensive plan. Three of the MHA objectives are wholly  
18 about housing, and the fourth is about equitable distribution of “the benefits and burdens of growth”  
19 that increased housing supply usually reflects. There are numerous *explicit goals and policies* in the  
20 2035 Plan listing possible solutions and mitigation measures that the City chose to ignore when  
21 preparing the MHA proposal:<sup>16</sup>

22  
23  

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<sup>16</sup> Ex. 3, pp. 4.6 et seq.

1        Housing Element—Goals

2        HG14 Preserve existing low-income housing, particularly in urban centers and villages where  
3        most redevelopment pressure will occur.

4        Housing Element—Policies

5        H25 Support programs that provide financial assistance to low-income homeowners and  
6        owners of low-income rental properties to maintain their properties in adequate  
7        condition.

8        H27 Encourage the adaptive reuse of existing buildings for residential use. Recognize the  
9        challenges faced in reusing older buildings and consider, when revising technical codes,  
10        ways to make adaptive reuse more economically feasible.

11        H29.2 Consider using the substantive authority available through the State Environmental  
12        Policy Act to require that new development mitigate adverse impacts on housing  
13        affordable to low-income households.

14        H29.4 Consider requiring that new development provide housing affordable to low-income  
15        households. Consider adopting such an approach either with or without rezones or  
16        changes in development standards that increase development capacity.

17        The testimony by Peter Steinbrueck helps tie the foregoing pieces together, explaining why the  
18        City failed to include these measure in the MHA proposal, or as alternatives or mitigation measures in  
19        the EIS. Mr. Steinbrueck, an urban planner, was retained by the City to provide analyses of the urban  
20        village (UV) strategy for the 2035 Plan development.<sup>17</sup> Concerning the relationship between his work  
21        informing implementation of the urban village strategy to manage growth, and the implementation of  
22        that strategy going forward, he stated:

23        This is anecdotal and a recollection of a conversation I had with my project manager Tom  
24        Hauger who was the City's top comprehensive plan, senior planner, and who I reported to, in  
25        the undertaking of this work. He said it wasn't needed as I recall, this section, because the  
26        HALA MHA agenda had leaped forward and I was six months too late to be making these  
27        recommendations. It was not relevant at that point. This is what I recall as the explanation.  
28        And I was concerned about that because I felt that this was very important information to help  
29        inform the MHA program and I wanted them to have the opportunity to consider this work. It  
30        had shifted from the planning, comprehensive planning division of the city to the more  
31        political side of things which was the momentum behind MHA.

32        Even more telling is the testimony of the City's hired SEPA expert, Richard Weinman. When  
33        asked why no alternatives were considered other than upzoning, he testified as follows:

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<sup>17</sup> Ex. 50

1 **Q:** In your view, not including upzones would not approximate the accomplishment of the  
objectives of the proposal?

2 **Mr. Weinman:** There's one objective, that is specific to increasing production.

3 **Q:** Right. And my question is your testimony to that effect is based on your analysis or what  
the City has told you?

4 **Mr. Weinman:** I read the objectives and I interpreted the objectives.

5 ...

6 **Q:** Can you tell me the thought process you went through in reaching that conclusion?

7 **Mr. Weinman:** I looked at the objective and I said they could not accomplish that objective  
without upzoning. Upzoning is baked into the cake.

8 ...

9 **Q:** Were you focusing on one or the other of those two bullets or both of those bullets when  
you said that the alternatives that have been mentioned by the proponents that do not  
involve upzoning would not approximate the objectives of the proposal?

10 **Mr. Weinman:** Neither one, I am focused on the second bullet.

11 **Q:** The second bullet is to increase overall production of housing to help meet current and  
projected high demand. Alright. And do you recognize that there is more than one way to  
increase production of housing other than upzoning?

12 **Mr. Weinman:** Sure.

13 ...

14 **Q:** Are you saying the upzoning is the only feasible means to stimulate the production of  
housing?

15 **Mr. Weinman:** No, I am not.

16 The severe constraints on consideration of alternatives in the MHA EIS imposed on itself by  
17 the City as the MHA process moved forward are also evident in an internal Mayor's Office May 1,  
18 2015 "Policy Briefing Memo" preparing the mayor for a May 4 meeting with representatives of the  
19 development community. The considerations on page two, including the "win for the developer  
20 community" of "Zoning capacity," are revealing of the constraints already occurring on the MHA path  
21 two months before the HALA report was published.



1 In fact, that May 4 meeting discussed in that document occurred two days before the final  
2 meeting of the HALA committee.<sup>18</sup> Then, two months later, *on the same day* as the HALA report was  
3 published—July 13, 2015—the Mayor announced the “Grand Bargain,”<sup>19</sup> which imposed yet more  
4 constraints on the ability of the City to implement, and apparently to consider, alternatives to the  
5 “baked in” upzoning path for the MHA.

6 The Grand Bargain’s improper distortion of the scope of the City’s SEPA review of the MHA  
7 proposal is evident in the November 13, 2015 “Mandatory Housing Affordability —Program Key  
8 Policy Questions” table.<sup>20</sup> Regarding MHA-R<sup>21</sup>, the framework for the MHA upzoning being  
9 reviewed in the EIS, the document says “No further SEPA work will be done.” MHA-R, codified at  
10 SMC Chapter 23.58C, was a product of the Grand Bargain and establishes the City’s self-imposed  
11 policy boundaries for implementation of the MHA program outside the downtown core. The content  
12 of the Grand Bargain, an agreement that has no force of law whatsoever, cannot be used to constrain  
13 the City’s obligations under SEPA.

14 One subsection of MHA-R, SMC 23.58C.040(B)(3)(e), is the sole provision regarding  
15 “inclusion” in the City’s “inclusionary zoning” MHA proposed action.<sup>22</sup> Omission of alternatives to  
16 address this issue is another fatal flaw in the EIS.

21 <sup>18</sup> Ex. 312 at p. COS0080982

22 <sup>19</sup> Ex. 279

23 <sup>20</sup> Ex. 315

<sup>21</sup> The adopted Council Bill is Ex. 269

<sup>22</sup> The nature and scope of the requirement in the MHA proposal for “inclusion” of housing in new developments is a major topic of consideration at hearing and is addressed by SCALE.

1 C. The MHA EIS Fails To Assess Or Include Any Alternatives To Address Impacts Of The Proposed  
2 Action On Existing Home Ownership Or On The Loss Of Existing Affordable Housing

3 Housing is not only the explicit focus of the MHA proposal and three of the four objectives in  
4 the EIS, but it is also a key “element of the environment” required to be addressed in the EIS. SMC  
5 25.05.444(B)(2)(b).

6 Two of the most serious deficiencies in the City’s interpretation of the MHA objectives is the  
7 failure to include any consideration of how to promote home ownership, and how to conserve *existing*  
8 affordable housing. There are a number of exhibits that point out how important conserving and  
9 encouraging affordable *home ownership*—not just rental housing—is to meeting the first and fourth  
10 bullets of the EIS objectives. A good starting point for consideration of these points in the HALA and  
11 MHA processes is a May 1, 2015 memorandum from the Race and Social Justice teams of the City’s  
12 Office of Housing, DPD (predecessor to OPCD and DCI), and Office of Civil Rights.<sup>23</sup>

13 The “Strategies and Recommendations” memo purpose is clear: “We respectfully submit the  
14 following recommendations, cautions and RSJI<sup>24</sup> "best practices" for the HALA Committee's  
15 consideration during your final review process.” The following recommendations in that memo are  
16 relevant to the current EIS:

17 Ensuring Equal Access to Housing Opportunities. Racial Equity Outcome - People of color  
18 have access to rental and homeownership opportunities throughout Seattle.

19 ...

20 Ensuring Equal Access to Housing Opportunities ... Homeownership 2(a) & 2(b). Provide  
21 financial resources for coordinated, start-to-finish support ... The Homeownership Workgroup

22 <sup>23</sup> Ex. 313

23 <sup>24</sup> Race and Social Justice Initiative; as the first sentence of Ex. 313 explains: Mayor Murray's Executive Order 2014-02 directs the City to "*incorporate a racial equity lens in Citywide initiatives, such as legislation to increase the minimum wage, efforts to ensure affordable housing and coordinated planning for equitable growth and development.*" In addition, the City's Race and Social Justice Initiative (RSJI), City of Seattle Resolution 31546, and Housing Affordability and Livability Agenda (HALA) goals and values (Attachment A) also affirm a commitment to ensuring racial equality. In accordance with these policies, RSJI Change Team members from OH, DPD and OCR conducted a racial equity review of the preliminary strategies currently under review by the HALA Advisory Committee.

1 summary did not appear to include strategies addressing potential barriers that first time  
2 homebuyers may experience with respect to qualifying for first mortgages from private  
3 banking institutions. Reducing potential barriers and racial disparities within the private  
4 lending market could increase opportunities for families to participate in the City's Down  
5 Payment Assistance Program.

6 Preventing and Mitigating Displacement as Growth Occurs ...

- 7 • Preservation 3(a) & 3(b). Develop incentives to preserve or deepen affordability of existing  
8 housing...
- 9 • Homeownership 1(b). Develop programs and/or resources to support low-income  
10 homeowners...

11 The published HALA report reflects some of these recommendations:

12 **H.1 Support Permanently Affordable Homeownership and Stewardship**

13 Permanently affordable homes are a lasting community asset enjoyed by many low-income  
14 households over time. The City should explore models to develop permanently affordable  
15 homeownership units, including expanding the utilization of models such as land trusts, to  
16 preserve ongoing homeownership opportunities in an increasingly expensive housing market.  
17 The City should integrate affordable homeownership into its surplus property strategies. This  
18 strategy should be accompanied by an appropriate stewardship mechanism to ensure long-term  
19 affordability, including a revenue source to pay for stewardship over the long-term.<sup>25</sup>

20 and

21 **H.5 Enhance Programs to Preserve Homeownership for Low-income Homeowners**

22 The City should explore ways to help low-income homeowners in need remain stably housed.  
23 In addition to the existing HomeWise Weatherization Program and the Home Repair Loan  
Program, the City could explore creating a pool of funds for higher risk home repair loans or  
helping homeowners with their housing costs when temporary financial hardships (such as a  
medical crisis) threaten their housing stability. The City should also explore providing  
additional resource support to supporting low-income seniors at risk of displacement.<sup>26</sup>

Unfortunately, when the recommendations were translated by the City administration into the  
MHA proposal, these recommended actions all but disappeared. Indeed, when RSJ teams were  
reconvened to review the draft MHA EIS, their conclusions were that the above elements of the  
environment had been neglected. The Office of Housing's RSJ review of the draft EIS explicitly  
points out that the lack of adequate socio-economic analysis (i.e., adverse impacts on low income

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<sup>25</sup> Ex. 265, p. 35

1 communities who are a higher percentage people of color than in the overall population) should be  
2 fixed by analyzing “Housing Tenure (Renter v. Home Owner).”<sup>27</sup> The OH review gets very explicit in  
3 the data the EIS needs to include to support that analysis:

- 4 • The Demolition Analysis should be broken by tenure to identify trends in individual markets.  
5 Is a 10-unit rental being replaced with a 25-unit rental? Are ownership units being  
6 demolished and replaced by rental units? Is one older rental house being replaced with four  
7 townhomes? (3.53)
  - 8 ○ Rental Units >> Rental Units
  - 9 ○ Rental Units >> Ownership Units
  - 10 ○ Ownership Units >> Rental Units
  - 11 ○ Ownership Units >> Ownership Units ...
  - 12 ○ Report the percentage of new housing units is rental compared with ownership.

13 The final EIS does not provide data to make up for these identified omissions.<sup>28</sup>

14 Housing economist Bill Reid testified about the omission from the EIS of the same items  
15 needed for an adequate analysis of housing:

16 **Q:** So what conclusions did you reach regarding the analysis provided in the EIS regarding the  
17 impacts of the housing and socioeconomic impacts? ...

18 **Mr. Reid:** The entire FEIS ignores ownership housing. It's treated lightly in certain sections  
19 but ownership housing is the majority of housing need in the city for the majority of  
20 households. At different times in their life in the FEIS glosses over it doesn't really treat the  
21 issue at all in any substance. ... It's overwhelmingly about rental housing.

22 **Q:** The second issue you mentioned was economic dislocation. I think you said the EIS  
23 acknowledges the phenomenon but fails to adequately analyze the issue. Can you explain that?

24 **Mr. Reid:** Well it really is related to primarily the absence of any discussion of the ownership  
25 housing, the impact of these policies on ownership housing or the provision of ownership  
26 housing. Which isn't guaranteed, discussed under this policy and its impact on alleviating  
27 homeownership prices and unavailability. The economic dislocation that's created by that is  
28 people simply and unfortunately households being priced out of their neighborhood whomever  
29 they are. The more people are here the more the more people are renting, again will eventually

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30 <sup>26</sup> Ex. 265, p. 36

31 <sup>27</sup> Ex. 138

32 <sup>28</sup> Indeed, the Office of Housing’s RSJ review of the draft EIS was not submitted to the EIS team until two  
33 weeks after the final EIS was published. Ex. 137. This is so notwithstanding that “This past summer [2016], the  
mayor's office approved the formation of a group to review the Mandatory Housing Affordability Draft  
Environmental Impact Statement for its consideration of racial equity.” Id.

1 move into ownership. If history serves to be correct and it will be always has been that simply  
2 creates increased home price pressure and rising property tax cost pressure on households who  
3 currently own and may already being ownership cost challenged. And therefore an  
4 acceleration and decline in homeownership rates for certain key demographics who are already  
5 vulnerable.  
(emphasis added)

6 ...

7 **Q:** So the proposal for providing for greater zoning capacity in various neighborhoods, it's  
8 your opinion will actually likely end up with making it more difficult for low income people to  
9 get into the homeownership market. Is that the bottom line?

10 **Mr. Reid:** Yes by increasing the development capacity for rental homes of any kind in any  
11 part of town you create more population that's eventually going to demand... Some sooner  
12 some later but eventually going to demand ownership housing. That's going to create inability  
13 for a lot for moderate, modest challenged income households to even get into ownership. The  
14 other thing that happens which doesn't even get discussed really in the FEIS is all these  
15 different urban villages that are going to see new market rate rental housing investment or  
16 higher density, higher capacity development rental housing. Overwhelmingly investment  
17 creates a new population in a district creates what's called a halo effect, it makes the district  
18 more popular. More people there shopping, it draws more people into the district and therefore  
19 it has a positive upward pressure on home prices and rentals elsewhere in the district. And that  
20 doesn't get discussed in here either.

21 (emphasis added)

### 22 **III. THE EIS FAILS TO ACCURATELY ASSESS THE IMPACTS OF THE PROPOSAL ON 23 SEATTLE'S URBAN FOREST RESOURCES**

#### 24 A. The Description Of Existing Seattle Tree and Canopy Conditions Not Accurate

25 The initial flaw in the City's position is that lack of a credible baseline. The no action  
26 alternative does not claim "no impact" but does state "The resulting change in canopy cover is  
27 assumed to be static." There is no definition of "static"; does this mean continued decline? We don't  
28 know because the City's studies over the years have not used a consistent methodology.

29 This and other deficiencies discussed below, is confirmed by the Urban Forestry  
30 Commission's comment letter on the draft EIS, Attachment 3 to this brief.

1 The City relies on the 2016 LiDAR report<sup>29</sup> to establish its baseline, but it has such a large  
2 margin of error it is larger than the estimated trend:

3 Seattle had experienced approximately 2% canopy cover loss over the span of the eight year  
4 study period. This method has a +/- 3% margin of error and **canopy cover extent  
(coverage) is not comparable to the 2016 LiDAR assessment.**

5 (emphasis in original).

6 Remote sensing expert Dr. Jeffrey Richardson did a careful review of the 2016 LiDAR  
7 assessment, including scope of work for the contract to prepare it, and concluded that the study is  
8 inadequate to provide a baseline for determine impacts of the MHA upzoning proposal on Seattle's  
9 trees and canopy. First, he discussed how difficult it was to determine the methodology used, then that  
10 the methodology was flawed, in large part due to doing the LiDAR data gathering when the deciduous  
11 trees had no leaves ("leaved off"). "Leaf off" LiDAR canopy assessments are not as accurate as "leaf  
12 on."

13 Thus, Dr. Richardson found that the conclusion of no significant impacts in the EIS to be  
14 unsupportable:

15 For alternative one, two, and the preferred alternative, plus the no change alternative or the do  
16 nothing alternative that's presented in the environmental impact statement: They all propose to  
17 show that that there is no change in tree canopy based on the changes in zoning and the  
18 summary of my conclusion is that there's really no information that they all show that there is a  
19 change in tree canopy And that that there's also some insufficient information in their [?]  
20 conclusions.

21 For instance, in the no action alternative there's no quantification of how tree canopy would  
22 change based on the no action over time. And then all the preferred alternatives, or excuse me,  
23 the other three alternatives rely on the 2016 Seattle canopy cover. Exhibit 79. They rely on  
24 exhibit 79 which as I said would not pass the test of peer review in my eyes so it's very  
25 difficult for me to want to accept the conclusions that are drawn here because they are based  
26 on an incomplete methodology as well.

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<sup>29</sup> Ex. 79

1 Basically the environmental impact statement Exhibit 83 [Attachment 1] under each  
2 alternative it says that there is not, the change in, change of tree canopy is not a significant  
3 impact. It's not considered a significant impact.

4 The EIS does not go about determining or defining what a significant impact is. Therefore it's  
5 very difficult for me to understand how a conclusion that there is no significant impact can be  
6 made out when there's nothing for us to understand how that is done in the first place.

7 And then secondly even with everything we know about the problems with the accuracy  
8 assessment, the lack of methodology in each one those alternative there's still a showing of a  
9 reduction in tree canopy for each of one of those alternatives and to me that is a significant  
10 impact. It seems very straight forward.

11 A second deficiency in the MHA EIS tree impact assessment is the lack of granularity, the  
12 failure to assess impacts on a neighborhood or urban village scale. This problem is highlighted in the  
13 RSJ review of Section 3.6.<sup>30</sup>

14 The 2016 tree canopy cover reveals that there is disparity in the amount of tree canopy cover  
15 and people of color neighborhoods and lower income neighborhoods. Because the biological  
16 resources information and specifically the tree canopy loss data was not analyzed based on  
17 neighborhoods it cannot be determined what impacts on racial equity are created by additional  
18 tree canopy cover loss or additional impacts on other biological resources. Need to bring the  
19 analysis of tree canopy and environmentally critical areas and shorelines to the neighborhood  
20 level.

21 There is not enough information to make any recommendations.

22 The lack of granularity in analysis of tree canopy was also discussed by the East Fremont witnesses:

23 Tawny Bates

24 A third deficiency is the lack of assessment of the relationship between upzoning and impacts  
25 on right of way (ROW) trees. The City's hired tree canopy assessment expert, Mike Leech, has never  
26 worked on a programmatic EIS where there was the potential for the elimination of significant amount  
27 of canopy.<sup>31</sup> In his testimony, he also exposed the lack of clarity in the assessment regarding right of  
28 way trees:

<sup>30</sup> Ex. 134, pp. 1, 2 (emphasis added)

<sup>31</sup> Testimony of Mike Leech.

1 **Q:** What assumptions did you make in your impact analysis in all these tables of percentage  
2 changes without having the tree, the right-of-way trees separately accounted for? In other  
3 words what assumptions did you make with respect to change the right-of-way trees as  
4 opposed to the private land trees?

5 **Leech:** They were grouped together as, within each zoning designation we included the right-  
6 of-way trees as part of that designation. So there's areas that are part of the right-of-way and  
7 within each of those zoning designations, and we included those, all of those areas in our  
8 calculations.

9 **Q:** Where are the assumptions spelled out?

10 **Leech:** On the assessment methodology on page 3.317 we step through the assessment  
11 methodology. Continuing on 3.318.

12 **Q:** So my question earlier about how you determine that there was a 0 percent change from an  
13 LR1 to an LR3 is buried in that last paragraph there where it says, for example a zone change  
14 from LR to LR would not represent a change, is that correct?

15 **Leech:** Yes.

16 **Q:** The right-of-way assumption is not explicit in here is it? Or if it is please point it out to me.

17 **Leech:** It's not explicit.

18 Impacts on right of way trees are significant, and not accounted for by the City on an ongoing  
19 basis. Testimony of Mike Leech. FNC submitted documents showing recent losses of significant right  
20 of way trees, including an example where the SEPA document clearly stated "No existing trees on  
21 site. R-O-W trees to remain."<sup>32</sup> As can be seen on that exhibit, clearly the ROW trees *did not remain*.  
22 Such events are not unique; evidence of a similar example in the same neighborhood (Fremont) is in  
23 the record.<sup>33</sup>

The City arborist's (Nolan Rundquist) testimony on this subject was as follows:

**Q:** So does SMC 15.43.030 require people to seek a street use permit before planting,  
removing or performing major pruning on any street tree ?

<sup>32</sup> Ex. 212 (emphasis added); Attachment 2 to this brief is an extract from this exhibit.

<sup>33</sup> Ex. 223



1 **Mr Rundquist:** Yes.

2 **Q:** Okay, talk to us about that process.

3 **Mr Rundquist:** Well, basically, if someone wants to do work on a tree planetary or remove a  
4 tree, they give an application to our street use section. We have one of our arborists go out and  
5 review the proposed work to see whether the trees, for example, for removal, We have specific  
6 categories that you know a tree can be removed if it's a dangerous tree, If it poses a danger to  
7 the transportation system that can't be resolved by pruning or whatever, Like if it's a it created  
8 that's blocking visibility to something or whatever cause a traffic hazard

9 If a tree is essentially associated with a construction project and the project impacts it in a way  
10 that it cannot be preserved, treated and be removed again, tree preservation was the primary  
11 thing.

12 ...

13 **Q:** So in your experience existing trees are able to be preserved through protection during  
14 construction process.

15 **Mr Rundquist:** Yes

16 In light of the foregoing evidence, Mr. Rundquist's conclusion is not credible.

### 17 B. The Cumulative Effects Analysis In The EIS Is Deficient

18 There is not reference to the pending City decision on another City-wide rezoning proposal, to  
19 greatly expand the ability of owners of housing in Single Family (SF) zones to construct detached  
20 accessory dwelling units (DADUs, known as "backyard cottages). The construction of the these small  
21 buildings does have the potential to impact Seattle's trees and canopy. The City draft EIS for that  
22 proposal is out with the comment period past. There is no mention of the potential cumulative effects  
23 (or impacts) of the DADU proposal together with the MHA proposal in either EIS.<sup>34</sup>

### 24 C. The EIS Description Of Mitigation Is Fatally Flawed

25 The City has not contested these facts supported by evidence and testimony produced and  
26 adduced by Appellants:

- 1 • Documented by its own assembled tree and urban forestry staff expertise, the current City tree ordinance does **not** protect trees: Tree Regulations Research Project Phase II.<sup>35</sup>
- 2 • The consultant managing preparation of Section 3.6 of the EIS was **not** aware of the existence of the Tree Regulations Research Project or its conclusions. She had not even seen the final report until the day of her appearance before the Hearing Examiner on August 31. Testimony of Charese Graham.
- 3 • The existence of the Tree Regulations Research Project was **not** known to the City’s Urban Forestry Commission until member Steve Zemke noticed a reference to it in the EIS.<sup>36</sup> Testimony of Steve Zemke.<sup>37</sup>

4  
5  
6  
7 The City’s repeated reliance on existing tree protection ordinances to mitigate for harms that  
8 might occur is therefore erroneous under any legal standard. In fact, the City essentially admitted as  
9 much by the issuance of an executive order including the following “Whereas”—“ recent research  
10 showed that existing urban tree protections and enforcement practices related to trees must be  
11 strengthened in order to protect Seattle’s canopy coverage.”<sup>38</sup>

12 **IV. THE EIS FAILS TO ACCURATELY DESCRIBE THE CURRENT CONDITIONS,**  
13 **LIKELY IMPACTS, OR MITIGATION MEASURES FOR SUCH IMPACTS THAT WILL**  
14 **FOLLOW IMPLEMENTATION OF THE PROPOSED MHA IN FREMONT**

15 A. The EIS Description Of Current Conditions In Fremont Is Deficient

16 As with all other neighborhoods “studied” in the EIS, the description of current conditions and  
17 trends in Fremont is cursory, and on some subjects, such as historic resources, wholly absent. To the  
18 extent that there is any description of Fremont conditions, it is brief and lacking in detail sufficient to  
19 inform the reader or decision maker as to the potential consequences of the proposed MHA action.

20 Of particular concern to Fremont residents are two areas:

21  
22 <sup>34</sup> MHA EIS, p. 4.28; DADU EIS, p. 1-13 (<https://www.seattle.gov/council/adu-eis>)

<sup>35</sup> Exs. 73 – 75. There is no evidence of “Phase I” beyond a reference in the Phase II report, Ex. 73, page 1.

<sup>36</sup> EIS p. 5.6

<sup>37</sup> Mr. Zemke’s testimony is summarized in Ex. 71.

<sup>38</sup> Ex. 78, issued less than one month before publication of the FEIS.

1 • The area called “East Fremont” which is in fact inside the Wallingford Urban Village, east of  
2 Aurora, west of Stone Way, and south of North 46<sup>th</sup> Street; and

3 • The area of Fremont along the north edge of the Fremont Urban Village, generally along  
4 North 39<sup>th</sup>, Northwest and North Bowdoin, and North 40<sup>th</sup> Streets, and the area in lowrise, commercial  
5 and neighborhood commercial zones. This area is generally called Upper Fremont.

6 B. The Description Of Likely Impacts On Fremont Is Inaccurate

7 The deficiencies in the EIS description of the impacts of proposed MHA upzones on East  
8 Fremont are covered in the testimony of the following witnesses: Tawny Bates, Jennifer Brailey,  
9 Gordon Lagerquist (Ex. 239, not oral), Michael Oxman, Toby Thaler.

10 One impact that is not described in detail in those witnesses’ testimony is the degree to which  
11 Fremont has already been subjected to extreme levels of economic displacement. This fact is not  
12 stated anywhere in the EIS, but, as Mr. Reid pointed out on the last day of the hearing, is obvious to  
13 see on page M.4 of the EIS appendices (EIS Exhibit M-2). This map shows that in recent years the  
14 Census Tract of Central Fremont has experienced the *highest level of displacement of low income*  
15 *households in the entire City of Seattle*. The City has utterly failed to describe this impact or how its  
16 MHA program is going to prevent the complete ‘cleansing’ of low income, and ultimately of middle  
17 income, households from Fremont.

18 C. The Description Of Mitigation Is Inaccurate

19 The testimony by Gordon Lagerquist demonstrates how the City’s claim that future project  
20 level review, either under SEPA or through design review (and the two are linked), will not be able to  
21 mitigate for the significant likely impacts of implementing the MHA upzones in Fremont. Any  
22 description of mitigation that does not describe or acknowledge the facts as he pointed out so well, is a  
23 deficiency in the EIS.

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DATED this 24<sup>th</sup> day of September, 2018.

FREMONT NEIGHBORHOOD COUNCIL

By \_\_\_\_\_  
Toby Thaler, WSBA 8318

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**Declaration of Service**

Toby Thaler declares that on the 24th day of October, 2018, I filed with the Hearing Examiner and delivered by email as allowed by the Second pre-hearing order of February 16, 2018, Appellant FNR's Closing Arguments and Joinders:

Geoffrey Wentlandt <Geoffrey.wentlandt@seattle.gov>  
MHA <MHA@seattle.gov>  
Jeff Weber <jeff.weber@seattle.gov>  
Daniel B. Mitchell <daniel.mitchell@seattle.gov>  
Alicia Reise <alicia.reise@seattle.gov>  
Tadas A. Kisielius <tak@vnf.com>  
Dale Johnson <dnj@vnf.com>  
Clara Park <cpark@vnf.com>  
Cara Tomlinson <ctomlinson@vnf.com>  
Daniel B. Mitchell <daniel.mitchell@seattle.gov>

Copies were also sent to co-appellants at the following email addresses:

Wallingford Community Council (W-17-006): Lee Raaen <lee@lraaen.com>  
Morgan Community Association (W-17-007): Deb Barker <djb124@earthlink.net>  
Friends of Ravenna Cowen (W-17-008): Judith Bendich <jebendich@comcast.net>  
West Seattle Junction Neighborhood Organization (W-17-009): Rich Koehler <rkoehler@cool-studio.net>  
Seattle Coalition for Affordability, Livability, and Equity (W-17-010): Claudia Newman <newman@bnd-law.com>  
Seniors United for Neighborhoods (W-17-011): David Ward <booksgalore22@gmail.com>  
Beacon Hill Council (W-17-012): Mira Latoszek mira.latoszek@gmail.com  
Friends of North Rainier (W-17-013): Talis Abolins <tabolins@advocateslg.com>

I declare under penalty of perjury under the laws of the state of Washington that the foregoing information is true and correct.

DATED this 24<sup>th</sup> day of September, 2018, at Seattle, Washington.

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MHA EIS conclusions about impacts of the  
four alternatives on Seattle Tree Canopy  
FEIS pages 3.322, 3.328, 3.334, and 3.338

*(underline and ~~strikeout~~ indicate changes from draft to final)*

**p. 3.322 (NO change)**

Under Alternative 1, there would be no change in zoning due to the MHA program. The resulting change in canopy cover is assumed to be static. In other words, changes in canopy coverage would still be expected, but as a result of the current zoning and tree protection policies, codes, and development standards. This study does not quantify tree loss resulting from current development patterns.

**p. 3.328, Alternative 1**

The Tree Protection Ordinance (SMC 25.11) would not change with the proposed changes in zoning and would regulate all tree removal resulting from implementation of the project. The City does not have a threshold for determining significance of tree loss. Assuming that all tree protection regulations are implemented with future development under the new zoning, ~~the This change in tree canopy cover under Alternative 2~~ is not considered a significant impact.

**p. 3.334, Alternative 2**

The Tree Protection Ordinance (SMC 25.11) would not change with the proposed changes in zoning and would regulate all tree removal resulting from implementation of the project. The City does not have a threshold for determining significance of tree loss. Assuming that all tree protection regulations are implemented with future development under the new zoning, ~~the change in tree canopy cover under Alternative 3 is not considered a significant impact. This change is not considered a significant impact.~~

**p. 338, Preferred Alternative**

The Tree Protection Ordinance (SMC 25.11) would not change with the proposed changes in zoning and would regulate all tree removal resulting from implementation of the project. The City does not have a threshold for determining significance of tree loss. Assuming that all tree protection regulations are implemented with future development under the new zoning, the change in tree canopy cover under the Preferred Alternative is not considered a significant impact.

Attachment 2

Portion of Ex. 212, page 9  
City of Seattle Permit Review Document

b6.seattle.gov/dpd/edms/

Tree Aerial

205 KB

10/05/17

3024625-LU



No existing trees on-site. R-O-W trees to remain.

Attachment 3

Content of Urban Forestry Commission  
Comment Letter on MHA DEIS  
With Added Highlighting

Seattle Urban Forestry Commission  
Tom Early, Chair • Steve Zemke, Vice-Chair  
Weston Brinkley • Leif Fixen • Reid Haefer • Craig Johnson  
Joanna Nelson de Flores • Sarah Rehder • Andrew Zellers

August 2, 2017

Samuel Assefa  
Director - Office of Planning and Community Development  
600 4<sup>th</sup> Ave  
Seattle, WA 98124

RE: MHA Draft EIS

Dear Sam:

As the City of Seattle drafts policy that seeks to increase urban density and affordable housing to accommodate more people and jobs, protecting and enhancing Seattle's urban forest is needed more than ever to abate the biological, visual, and health impacts of this measure.

The Urban Forestry Commission commends the MHA Draft EIS for stressing the importance of tree coverage for Seattle, specifically citing the goals outlined in the 2013 Urban Forest Stewardship Plan (UFSP), as well as incorporating the most recently published 2016 canopy cover assessment results.

The Commission, however, disagrees with the MHA Draft EIS determination of no significant impacts to the city's tree canopy and requests clarification regarding methodology and mitigation measures proposed in the MHA Draft EIS, specifically:

1. What is the projected tree loss in the No Action Alternative of the MHA Draft EIS?
2. Please explain in more detail the methodology used to estimate the projected tree loss in Alternatives 1 (No Action), 2 and 3 of the MHA Draft EIS.
3. How would a mitigation measure be actionable or enforceable when the UFSP is a policy document and not a required ordinance?
4. Why is a 0.5% loss of tree canopy considered not significant? The MHA Draft EIS does not cite any authority or precedent for that conclusion.

In addition, the Commission requests a response to the following additional comments regarding the MHA Draft EIS:



1 **Underestimation of tree canopy impacts:**

2 The MHA Draft EIS states that there will be less than a 0.5% decrease in the tree canopy for both Alternatives  
3 2 and 3 compared to the No Action Alternative. The Commission questions the methodology used in the MHA  
4 Draft EIS for calculating this assessment for the following reasons:

- 5 1. The MHA Draft EIS states, "Tree cover for a given zone was assumed to remain constant over time if  
6 the zoning designation stayed the same." [Page 374] The Commission recommends that the MHA  
7 Draft EIS should account for some increase in tree canopy loss in zones that stay the same. MHA will  
8 likely incentivize developers to maximize gross floor area (GFA) on a redevelopment sites, and one  
9 way a developer can maximize GFA is to develop the site to its fullest development potential.

10 The MHA Draft EIS does not take into account the effect (i.e. enhancement or increase) of the  
11 development potential of a lot in MHA areas when calculating tree canopy loss. We request that the  
12 final MHA EIS include a calculation of tree canopy reduction using the full development potential of  
13 each lot within MHA areas even if the zoning is not changing.

- 14 2. The MHA Draft EIS calculates that 0.5% decrease in tree canopy would result in up to a 5 to 16-acre  
15 loss in tree canopy associated with Alternatives 2 and 3. While a 0.5% reduction in canopy seems like  
16 a low percentage of loss, in real terms it would generally equate to a loss of 173-555 trees (assuming a  
17 typical tree canopy has a radius of 20 feet (1,256 square feet)), which is a potentially significant  
18 number of trees. Citing tree canopy loss using an estimated number of trees that are lost would more  
19 accurately communicate the likely impacts of the MHA policy to the neighborhood tree canopy.

20 The MHA Draft EIS does not cite any authority for the assertion that a loss of 0.5% tree canopy (i.e.,  
21 173-555 trees) is not significant. The Commission believes a loss of this many trees is a significant  
22 impact under Alternatives 2 and 3 that should be mitigated, and that the MHA Draft EIS is  
23 unsupported as written.

14 **Inadequate Mitigation Measures:**

15 The MHA Draft EIS states no significant, unavoidable adverse impacts to the tree canopy have been identified,  
16 but does list some mitigation measures that would help to avoid and minimize tree canopy loss. The  
17 Commission thinks the current mitigation measures are inadequate, and need to be expanded and  
18 strengthened.

- 19 1. The MHA Draft EIS recommends the City evaluate future urban forestry policies as part of the 2018  
20 UFSP update, but does not include mitigation measures within the context of existing policies such as  
21 updating Seattle tree protection code, Seattle Green Factor guidelines, or the Seattle Street Tree  
22 Manual. Mitigation measures for tree canopy loss should deal with changing or updating existing  
23 regulations and not just recommending evaluation of future policy, which is not enforceable.

Specifically, the Commission recommends requiring mitigation for tree loss to include replacement of  
equivalent canopy on- or off-site or paying into a City tree replacement and maintenance fund.

2. A healthy urban forest can have an outsized impact on reducing the negative effects associated with  
increased development intensity, as trees (especially street trees) help to mitigate the visual impacts  
of density and create a more human-scaled environment, as well as providing important ecosystem

1 and public health benefits. While the MHA Draft EIS documents multiple negative aesthetic impacts  
2 associated with increased development intensity, the plan does not recommend any mitigation  
3 measures focused on increasing or improving the urban forest to mitigate aesthetic impacts of  
4 density.

5 **The Commission recommends including stronger, more binding requirements to promote and improve tree**  
6 **coverage in urban village areas.** These recommendations could include but are not limited to the following:

- 7 1. Expand incentives and development standards to promote street trees in Urban Villages;
- 8 2. **Update the interim tree protection ordinance to account for the impact MHA will have on**  
9 **development;**
- 10 3. Reduce conflict between power lines and street trees;
- 11 4. Modify the Seattle Green Factor guidelines to give higher score to preserving healthy existing site  
12 vegetation;
- 13 5. **Assess, monitor, and tally tree loss in the permitting process;** and
- 14 6. Update the tree code to require retention, replacement, or payment into a City tree replacement and  
15 maintenance fund for all removed trees, including hazardous trees, or trees which die as a result of  
16 development impacts or that are planted as project mitigation.

17 Thank you for your attention. The Commission looks forward to your response.

18 Sincerely,

19 Tom Early, Chair