BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of **WALLINGFORD COMMUNITY COUNCIL, ET AL.** of adequacy of the FEIS issued by the director, Office of Planning and Community Development.	Hearing Examiner File: **W-17-006** through **W-17-014** WALLINGFORD COMMUNITY COUNCIL APPEAL: CLOSING REBUTTAL ARGUMENT

I. INTRODUCTION AND SCOPE OF ARGUMENT

The Wallingford Community Council submits the following rebuttal to OPCD's initial closing argument. The issues involved in WCC's appeal were only discussed on pages 8 – 12 of OPCD's closing. Its argument on the question of whether the City must consider alternatives to MHA is vague, incomplete and lacks support. Arguments made by OPCD in its summary judgment motion are not included in its closing. Therefore, this submission briefly anticipates a few of these missing arguments in the event OPCD is withholding them for "rebuttal" when no response by WCC will be permitted.

II. SOLE ISSUE ON WCC'S APPEAL

A. The question presented.

The question presented by WCC's appeal and OPCD's response is acknowledged in the City's Closing Brief. OPCD claims *"In the nonproject context the SEPA rules expressly*

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allow the City to limit its alternatives to those that achieve a proposal that was "formally proposed." City Closing pg. 8, ln.14. This contention is simply incorrect. OPCD's cites no relevant language or authority to support its assertion. In making the argument it ignores multiple clear dictates of SEPA, attempts to divert attention from the central issue by mentioning irrelevant topics, and misrepresents regulations.

The issue presented by WCC's appeal and OPCD's response is a clear question of law. "*Whether an EIS is adequate is a question of law, subject to review de novo*." *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wash. 2d 619, 632-33, 860 P.2d 390, 398 (1993). "*Courts review the EIS to determine whether the environmental effects and reasonable alternatives are sufficiently disclosed, discussed and substantiated." Barrie v. Kitsap Cty.*, 93 Wash. 2d 843, 854, 613 P.2d 1148, 1155 (1980).

This case presents a clear and specific question of law, *i.e* whether OPCD is required by SEPA to consider alternatives beyond the MHA proposal. OPCD argues that it did not consider alternatives to MHA because it doesn't have to. This position is contrary to law and, if adopted by the hearing examiner, would nullify SEPA.

B. OPCD arguments not an issue.

It is important to distinguish the central question from diversionary arguments and authority made by OPCD to take attention away from the issue at hand.

OPCD repeatedly claims that the city does not have to prepare "*a compendium of every possible alternative,"* "*all possible" proposals*, or "*every proposal*." No such requirement has ever been advocated by WCC. The argument is irrelevant and a red herring.

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Nor does WCC challenge the general police power of the city as implied by OPCD's argument. The City's argument regarding its police power is irrelevant.

III. CONTROLLING LEGAL AUTHORITY

A. Argument of OPCD "Closing Brief"

OPCD's attempt to justify its lack of consideration of alternatives is entirely based upon general citations to SMC 25.05.442.D. (WAC 197-11-442(4)). Significantly, the City does not quote or analyze the actual terms of the subsection in its closing. It leaves to speculation the language it contends justifies the broad and erroneous contention that "*In the nonproject context the SEPA rules expressly allow the City to limit its alternatives to those that achieve a proposal that was "formally proposed."* (City of Seattle's Closing Brief, pg. 8, ln. 14).

Significantly, the City omits reference to the most applicable section of its ordinance and the controlling sub-section of SMC 25.05.442.B (WAC 197-11-442(2)): It reads:

> The lead agency 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. Alternatives should be emphasized. In particular, agencies are encouraged to describe the proposal in terms of alternative means of accomplishing a stated objective (see Section 25.05.060 C). Alternatives including the proposed action should be analyzed at a roughly comparable level of detail, sufficient to evaluate their comparative merits (this does not require devoting the same number of pages in an EIS to each alternative).

The omission of any reference to this most relevant and controlling section of Seattle's SEPA ordinance reveals an effort by the City to mislead by suggesting that critical provisions of law can be ignored by the Hearing Examiner. Controlling authority should not be disregarded. As the law states, "alternatives should be emphasized" and discussed "in the level of detail appropriate to … the level of planning for the proposal." Furthermore, alternatives should

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include "alternative means of accomplishing a stated objective" and be analyzed "at a roughly comparable level of detail sufficient to evaluate their comparative merits."

The suggestion by OPCD that alternatives to a nonproject proposal need not be considered is wrong and contrary to the law. It undermines the essential purpose of SEPA. How are decision makers to take into account environmental impacts of proposed legislation if reasonable alternatives to achieving stated objectives are not disclosed or considered?

The one authority cited by OPCD to support its contention that rules allow the City to limit its alternatives to those which are "formally proposed" is *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 894 P.2d 1300 (1995). (City Closing, fn. 44.) However, the Supreme Court opinion does not support – or even address – OPCD's theory. The opinion mentioned that a text amendment was formally proposed, but that fact was not a basis for the Court's decision. Auburn was considering a text amendment to allow a race track in a commercial zone (a nonproject action), at the same time it was considering a project action for the track. The city considered alternatives to the proposal, but declined to consider potential sites in Lacy and Fife, areas outside of its jurisdiction. The Court found that Auburn adequately considered alternatives within its borders, but that applying the rule of reason, it could choose to not consider sites in other cities. Regarding the nonproject action (text amendment) there was no evidence that amending the zoning code would have a significant environmental impact outside the city. The Court found that an adequate analysis of alternatives within the city was conducted. *Citizens Alliance* at 367, 1307.

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The *Citizens Alliance* opinion actually undermines a central argument of OPCD, *i.e.* that "nonproject" actions somehow have an exemption from the consideration of alternatives. The Supreme Court said:

> Normally, under the private project exception, private projects which do not require rezones will not compel lead agencies to examine offsite alternatives. The existence of a text amendment, or any other nonproject action, does not eliminate this exception. Instead, nonproject actions pose *separate* obligations under SEPA which a lead agency must satisfy. The environmental significance of the nonproject action creates the obligation to examine alternatives to the nonproject action.

Citizens Alliance to Protect Our Wetlands v. City of Auburn, 126 Wn.2d 356, 366, 894 P.2d 1300, 1306 (1995).

The Court did not hold that because a project was "formally proposed" the City's obligation to consider alternatives was eliminated as contended by OPCD. The *Citizens Alliance* opinion relied on by OPCD contradicts its primary contention.

OPCD spends a large part of its closing argument on its "formally proposed" rationale. It spends pages claiming that a citizen committee recommendation, or a Mayor's action plan, or some general resolutions can result in an idea being "formally proposed" excusing OPCD from full SEPA compliance. This in spite of the fact that multiple versions of the DEIS specifically said that none of the MHA versions reviewed were formally proposed. (Raaen Declaration, Ex. A, filed 5/1/2018.)

OPCD contends that EIS content may be limited to a discussion of alternatives which have been "formally proposed" solely based on one phrase taken out of context in SMC 25.05.442.D. The argument ignores the rest of the language of the subsection and other SEPA requirements which mandate consideration of alternatives. What about consideration of alternatives not formally proposed but reasonably related to the proposed plan as provided

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for in the same sentence of the regulation subsection OPCD relies on – SMC 25.05.442.D? OPCD ignores that requirement. OPCD would have the Hearing Examiner believe that limiting discussion to alternatives that are "formally proposed" (whatever that means) stands alone as a general rule over-riding all other specific statutes and regulations mandating consideration of alternatives. (See discussion below regarding ignored SEPA law.) If the exception that the City urges be adopted by this Hearing Examiner was applied to every proposal, idea or scheme suggested by a mayor, city department or council member there would be little, if anything, left of SEPA review requirements.

OPCD confuses the concept of "objectives" with "proposals", and the "rule of reason" with "exceptions" from SEPA. In footnotes 45 and 46 it cites two opinions where courts determined that under the rule of reason, agencies did not have to consider alternatives incompatible with the objectives of a proposal. It cites *Solid Waste Alternative Proponents v. Okanogan County (SWAP)*, 66 Wn. App. 439, 832 P.2d 503 (1992) and *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp.*, 90 Wn. App. 225, 951 P.2d 812 (1998). Because of practical considerations, the agency in the first case did not have to consider disposal sites in other states. The objective was to create a local site for waste disposal. In *Concerned Taxpayers*, the long stated objective was to establish four lane bypasses around cities. DOT was not deemed required to consider alternatives (two lanes) which conflicted with this objective. The court determined that under the rule of reason, alternatives incompatible with the underlying objective of the proposals need not be considered. The courts did <u>not</u> say that because something might have

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been formally proposed, an agency is thereby exempt from considering alternatives under SEPA.

In the present matter, OPCD is not arguing that there were no other reasonable alternatives to consider in reaching the stated objectives. OPCD is just arguing that it doesn't have to consider any alternatives because MHA is somehow a formally proposed nonproject action. The two opinions cited by OPCD do not address, must less support OPCD's theory.

No evidence or argument is presented by OPCD that alternatives to MHA would be incompatible with the City's claimed objectives which include increasing affordability and equity in housing. One common theme of OPCD's arguments throughout this appeal is to ignore those objectives. **Not once in its arguments has OPCD cited, much less quoted or applied the stated objectives of the FEIS**. It is those objectives which determine the alternatives which must be investigated, analyzed and considered.

OPCD asks the Hearing Examiner to create and apply an entirely new exception to the broad mandates of SEPA with no authority or decision of any court to support it. *"Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, 1179 (1978). [1]

[1] Elsewhere OPCD's argument contains a footnote reference to a decision of the Seattle Hearing Examiner in 2016 on a *pro se* appeal. The Examiner found that an analysis of the alternatives proposed by the mayor was sufficient because they concerned amendments to the comprehensive plan and were adequately addressed in the FEIS. A situation not applicable here.

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B. Anticipated omitted argument.

Mindful that OPCD may raise arguments in its "rebuttal" to which WCC will have no opportunity to respond since OPCD presented no analysis or argument in its closing for its claim that SMC 25.05.442.D excuses the City from consideration of alternatives, some possible arguments will be briefly addressed.

OPCD relied on a limited and erroneous reading of SMC 25.05.442.D in its motion for summary judgment. It repeatedly claimed that the EIS is only required to consider the MHA proposal in its SEPA review. In doing so, it took one phrase out of context ignoring the clear dictates of the balance of the section and several other SEPA rules. SMC 25.05.442.D in its entirety (with the limited portion relied on by OPCD underlined) reads:

> (4) The EIS's discussion of alternatives for a comprehensive plan, community plan, or other areawide zoning or for shoreline or land use plans shall be limited to a general discussion of the impacts of alternate proposals for policies contained in such plans, for land use or shoreline designations, and for implementation measures. The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures but should cover a range of such topics. The EIS content may be limited to a discussion of alternatives which have been formally proposed or which are, while not formally proposed, reasonably related to the proposed action. [underline added]

OPCD essentially ignored the balance of the subsection removing the context and limitations of the phrase it relies on. In its closing, OPCD doesn't even refer to that specific language of the subsection to support its argument.

The first sentence of the subsection limits the application of this provision to specific actions of a city. None are at play here. The MHA is not a comprehensive plan amendment, a community plan, an area wide zoning action, a shoreline designation or an implementation measure for the comprehensive plan.

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OPCD attempted to modify the language of the provision to fit its needs by arguing that a proposal need only "involve" or "include" changes to zoning or the comprehensive plan. However, SMC 25.05.442.D. refers to "*EIS's discussion of alternatives for a comprehensive plan, community plan, or other area wide zoning or for shoreline or land use plans…*" The section is limited to SEPA review of such specific plans. If it included every action that "involved" or "included" a change to zoning, there would be little left of SEPA requirements for considering alternatives to proposals.

MHA by its terms and objectives goes far beyond just changes to zoning. The proposal doesn't fit within the subsection's exception. Even a cursory look at the MHA proposal and its objectives shows that zoning is only one element of the overall MHA scheme. It is a "means" not an "objective." No specific justification for applying this limited exception is described by OPCD.

SMC 25.05.442.D also provides that *"The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures* ***but should cover a range of such topics."*** OPCD ignores the underlined portion of the sentence. OPCD misinterprets it to say it need not consider any alternative "policies, designations, or implementation measures." OPCD tries to evade the requirement in the regulation to examine "a range of such topics," arguing it does not have to do so.

In its summary judgment pleadings, OPCD tried to rebrand "proposals" as "objectives" for the purpose of SEPA regulations – at one point even substituting the word

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"proposal" for "objective" when referencing a regulation.[2] Regulations clearly and often distinguish between a "proposal" and the "objectives" of a proposal for SEPA. OPCD should not be permitted to re-write the law to suit its purposes.

B. Controlling authority ignored by OPCD.

The question posed by WCC's appeal concerns SEPA's preeminent requirement to consider alternatives as part of the environmental impact evaluation process. OPCD finds itself restrained by the Grand Bargain and MHA – outside of which it refuses or is prohibited to go in its SEPA analysis. To justify this limitation, it became necessary for OPCD to ignore crucial SEPA requirements.

Requirements for a SEPA analysis of alternatives were ignored in creating the FEIS and in OPCD's closing argument. Law not acknowledged, discussed or applied by OPCD in its attempted justification for the failure to consider alternatives includes the following.

- The basic requirements of SEPA which directs that all branches of government "*shall*" include in every report on proposal for legislation and other major actions *"…a detailed statement by the responsible official on …alternatives to the proposed action."* RCW 43.21C.030 (c)(iii).
- The regulation mandating that the EIS include a section titled "*Alternatives Including the Proposed Action.*" "*This section of the EIS describe and presents the proposal (or preferred alternative, if one (1) or more exists) and alternative courses of action."* SMC 25.05.440 D. 1. (WAC 197-11-440 (5))
- The section requiring that the *"EIS shall: …e. Devote sufficient detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action. …f. Present a comparison of the environmental impacts of the reasonable alternatives, and include the no action alternative."* SMC 25.05.440 D. 3. (WAC 197-11-440 (5)(v)(vi))

[2] OPCD Summary Judgment Motion, compare pg. 17, ln 14 to WAC in fn. 63.

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- The section titled *"Contents of EIS on nonproject proposals"* which includes the requirement that *"Alternatives should be emphasized. In particular, agencies are encouraged to describe the proposal in terms of alternative means of accomplishing a stated objective (see WAC 197-11-060(3))."* SMC 25.05.442 B; (WAC § 197-11-442 (2))

- In directing the alternatives to be considered, regulations require that, *"Proposals should be described in ways that encourage considering and comparing alternatives. Agencies are encouraged to describe public or nonproject proposals in terms of objectives rather than preferred solutions. A proposal could be described, for example, as "reducing flood damage and achieving better flood control by one or a combination of the following means: Building a new dam; maintenance dredging; use of shoreline and land use controls; purchase of floodprone areas; or relocation assistance."* [underline added]. SMC 25.05.060 B.4.c. (WAC § 197-11-060).

The EIS before the Hearing Examiner violates each of the above directives. The authorities and argument submitted to the Hearing Examiner to support the defective EIS ignore these essential requirements – without explanation or justification.

IV. CONCLUSION

OPCD's construction of the law would eviscerate SEPA and change Seattle forever. OPCD admits it did not consider alternatives to the MHA proposal. The EIS itself states that it only considered the implementation of MHA. OPCD ignores multiple requirements of statute and regulations, claiming that because under some unknown definition MHA was "formally proposed" and therefore was exempt from the broad and clear dictates of SEPA. If the City's theory is deemed correct, a government agency could select the worst possible, most environmentally damaging method to achieve a political objective, claim it was formally proposed, and thereby escape any meaningful environmental review of the proposal. This should not be allowed to happen here as it will have far reaching consequences for the future of environmental review and quality of life.

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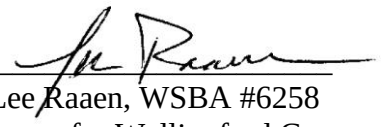
The EIS should be remanded with direction to OPCD to comply with the law by identifying and analyzing reasonable alternatives to MHA for reaching the laudable objectives of equity and affordable housing.

Respectfully submitted this 10th day of October, 2018.



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that this document was filed on this date by E-file with the Seattle Hearing Examiner's Office. This Response was served on the parties' attorneys or authorized representatives of record at the email addresses listed below:

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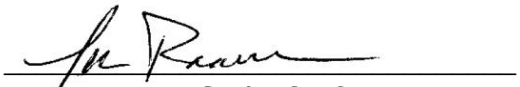

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