BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: **WALLINGFORD COMMUNITY COUNCIL, ET AL.,** of the adequacy of the FEIS issued by the Director, Office of Planning and Community Development.	Hearing Examiner File W-17-006 through W-17-014 CITY OF SEATTLE'S RESPONSE TO APPELLANTS' CLOSING BRIEFS

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I. INTRODUCTION

The FEIS includes robust and thorough analysis of the potential impacts of the citywide implementation of Mandatory Housing Affordability (the "Proposal"). It satisfies, and in many cases exceeds, what is typical for a nonproject action. Appellants have failed to meet the significant burden that is required to prove their claim that the FEIS is not adequate. In their closing briefs, Appellants continue to ignore substantial aspects of the FEIS to falsely assert that the FEIS is lacking analysis. Or they identify different approaches or data that they would have the City consider, but do not demonstrate that the City's approach in the FEIS is unreasonable. Their closing briefs repeat other key flaws in their legal theories. For example, they try to use this SEPA appeal as a vehicle to challenge what they believe to be defects in the underlying proposal, rather than addressing the adequacy of the environmental review. Or they assert that SEPA is much more stringent than the plain meaning of the applicable regulations and statute. Accordingly, the City respectfully requests that the Examiner reject Appellants' appeals for the reasons explained in this response brief and in the City's Closing Brief.

II. BURDEN OF PROOF AND STANDARD OF REVIEW

As explained in the City of Seattle's Closing Brief ("City Brief"), SEPA requires that the Hearing Examiner give substantial weight to the City's determination that the FEIS is adequate and Appellants bear the heavy burden to establish otherwise.[1] Despite the clear standard, in several instances Appellants seek to flip the burden and argue that the City is required to establish the adequacy of the FEIS.[2] Appellants' fundamental

[1] RCW 43.21.090; 43.21C.075(3)(d); Seattle Municipal Code (SMC) 25.05.680.B.3; SMC 23.76.022.C.7 and SMC 23.76.006.C.1.b.

[2] *See, e.g.,*Seattle Coalition for Affordability, Livability, and Equity's ("SCALE") Closing Argument ("SCALE Brief") at 5 ("In any event, to the extent that the city's defense is that subsequent EISs will fill the gap left by this FEIS, the city had the burden to demonstrate the frequency with which EISs will likely be prepared for future projects…")

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characterization of the burden is wrong. Appellants have the burden of proof. As explained below, they have failed to meet it.

III. APPELLANTS RELY ON MISCHARACTERIZATIONS OF THE FEIS AND ERRONEOUS LEGAL THEORIES

The City addresses Appellants' arguments that are specific to analyses or elements of the environment in sections IV–VII, below. In this section, the City responds to Appellants' flawed legal theories and factual mischaracterizations that span various topics.

A. Appellants mischaracterize the City's purported reliance on any subsequent project-level review.

Almost every Appellant incorrectly asserts that the City avoided conducting environmental review of some impacts at the nonproject stage on the promise of subsequent project-level environmental review.[3] Appellants mischaracterize the City's approach. The City did not avoid review. Rather, the City completed an appropriate level of review for the nonproject action and did not skip a topic, an impact, or analysis simply because it might be reviewed later. That is not to say that the City sought to undertake the same level of analysis as is appropriate for a project action. To the contrary, lacking the detail of a specific project proposal, the City undertook reasonable analysis based on the level of detail known.[4] This differentiated level of review between project actions and nonproject actions is not the same as avoiding review because it will be done later at the project-level.

The City's approach is entirely consistent with SEPA, which accords the lead agency "more flexibility in preparing [nonproject] EISs" precisely because "there is normally less detailed information available on their environmental impacts and on any

[3] *See, e.g.,* SCALE Brief at 1, 5, 11; Junction Neighborhood Organization's Closing Brief ("JuNO Brief") at 3.

[4] Tr. vol. 19, 26:22–28:4, 33:4–35:21, Sept. 7, 2018 (Weinman); Tr. vol. 18, 67:11–71:5, Sept. 4, 2018 (Gifford).

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subsequent project proposals."[5] The SEPA Rules' special provisions for nonproject proposals create flexibility for the lead agency by allowing appropriate deviation from the general FEIS content requirements.[6] This flexibility allows lead agencies to conduct analysis at a "highly generalized level of detail."[7]

The only section in which the FEIS even discusses project-level SEPA review (which is ostensibly the fuel for Appellants' mischaracterizations) is the analysis of impacts to historic resources. In that case, the FEIS acknowledged that there could be an opportunity to address project-specific impacts at the project stage.[8] However, even in that instance that specific acknowledgment was not in lieu of conducting review at the nonproject stage. That acknowledgement of the possibility of environmental review at the project stage was accompanied by the express recognition that many projects could be exempt from SEPA review.[9] The FEIS analyzed the impacts of projects proceeding without environmental review to a reasonable degree with the level of information that is known. Importantly, in recognition of that potential impact, the chapter of the FEIS recommends as mitigation changes in SEPA thresholds to increase the number of projects that would trigger SEPA review.[10]

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[5] WAC 197-11-442; SMC 25.05.442.A.

[6] Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14.01[3] at 14–73 (2016).

[7] *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 642, 860 P.2d 390 (1993), *as amended by* 866 P.2d 1256.

[8] *See, e.g.,* FEIS at 3.304-3.305 ("[E]xisting policies and regulations regarding review of historical and cultural resources would not change under any Alternative. For development projects within the study area that would be subject to SEPA, potential impacts to historic and cultural resources would still be considered during project-level SEPA review.").

[9] FEIS at 3.305–3.306. *See also* Tr. vol. 16, 103:2–105:21, Aug. 30, 2018 (Johnson).

[10] FEIS at 3.312 (Additional mitigation includes: "Requiring project proponents to nominate buildings for landmark review when demolition of properties that are over 50 years old is proposed, regardless of City permitting requirements, by modifying the SEPA exemptions thresholds in the Seattle Municipal Code at Table A for section 25.05.800, and Table B for section 25.05.800.").

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The FEIS is fundamentally different than the environmental review that is the subject of the cases to which Appellants cite in support of their false premise. The lead agencies in the cited cases deferred substantive review of entire topics. For example, in *Klickitat Cty. Citizens*, the Court reviewed the adequacy of an analysis of historic resources in an EIS that was published only fourteen days after scoping.[11] The FEIS included less than a page of text on the subject, in which the County primarily explained why it is "not possible to meaningfully evaluate" those potential impacts and defers analysis for site specific proposals.[12] The Court properly concluded that the county's cursory approach, which consisted of less than a page of text, avoided review that could be completed at the programmatic stage, and did not satisfy even the "highly generalized level of detail" for a nonproject EIS.[13] Similarly, in *Better Brinnon Coalition* a county's EIS for a subarea plan did not identify species in the subject area or their habitats, nor did it identify any impacts to fish habitat beyond the cursory statement that there would be the potential for "some countywide loss of habitat." [14] Accordingly, the Board appropriately acknowledged that more analysis was possible beyond the cursory conclusion.[15] Appellants' analogy to these cases is strained. Similarly, in *Pacific Rivers Council*, the EIS provided "no analysis whatsoever" of a key impact, which is not the case for the FEIS.[16] The lead agencies' respective approaches in those cases are truly cursory, defer meaningful review, and stand in stark contrast to the significant analysis and supporting data in the FEIS. In this FEIS, as explained below, the City has identified specific

[11] 122 Wn.2d at 627, 642, 860 P.2d 390 (1993).
[12] *Id.* at 642.
[13] *Id.*
[14] *Better Brinnon Coalition v. Jefferson County*, WWGMHB No. 03-2-0007, Final Decision and Order, Aug. 22, 2003, 2003 WL 22896402, at *20.
[15] *Id.* at *21.
[16] *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1030 (9th Cir. 2012)).

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resources and analyzed the nature of impacts in significantly more detail than in any of the cases cited by Appellants. For example, the City's nearly twenty pages of identification of designated historic resources and analysis of impacts far surpasses the county's less than one page of explanation why it could not complete review of resources in *Klickitat Cty. Citizens*. Importantly, the City has not sought to avoid its obligation to conduct environmental review of the nonproject action.

B. The Proposal was sufficiently defined to conduct environmental review.

The City defined the principal features of the proposal using both general descriptions of changes to the comprehensive plan and development regulations as well as specific and detailed edits.[17] Appellants assert that the City "fail[ed] to completely describe the proposal" and should have included more detailed edits to specific development regulations and neighborhood plan policies.[18] Specifically, Appellants argue that the City should have prepared amendments to specific neighborhood plan policies[19] and development regulations beyond those identified in Appendix F (including identification of the minimum lot size for RSL, the method for calculating exemptions from FAR calculations, incorporation of neighborhood plan review, and revisions to a code provision governing height restrictions outside urban villages).[20] Contrary to their arguments, the City sufficiently defined the proposal to facilitate environmental review and the City is not required to provide the detail that Appellants allege is missing.

[17] *See* FEIS at App. F; FEIS at 1.1–1.2; FEIS 2.16–2.63.

[18] *See* SCALE Brief at 31–32, 35, 50; JuNO Brief at 11.

[19] *See* FEIS at App. F, at F-11. The section expressly acknowledges that the City has docketed amendments to specific neighborhood plan policies. JuNO is incorrect when it asserts that "no amendments to the WSJ Neighborhood Plan have been docketed by the City." JuNO Brief at 11. The City presented documentation demonstrating that a West Seattle Junction neighborhood plan policy (WSJ-P13) is included among the 10 neighborhood plan policies the City has identified for amendment as a result of the proposal. Hr'g Ex. 244 at 004937, 004945-004946; Hr'g Ex. 49 at 10; Tr. vol. 14, 145:1–149:17, Aug. 23, 2018 (Wentlandt).

[20] *See* SCALE Brief at 31–32, 35, 50; JuNO Brief at 11.

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Under SEPA, the City is required to prepare an EIS "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified."[21] The rules allow the City to proceed with its environmental review so long as the proposal is sufficiently defined such that "the environmental effects can be meaningfully evaluated."[22] In this case, the City's witnesses testified that they sufficiently understood the principal features of MHA to allow for meaningful environmental review of the impacts, even if the proposal did not include all the specific code and policy amendments.[23] The City witnesses, including one with experience in over 200 nonproject EISs, also testified that it is common to initiate review at a similar stage of the development of a nonproject proposal, before every detailed revision to code or comprehensive plan policy is drafted.[24] That is precisely so that the City can comply with the mandate to begin its review "at the earliest possible point." While further development of specific revisions will undoubtedly occur as the City advances the proposal, the need to prepare further specific amendments to the plan policies and development regulations did not preclude environmental review.

Appellants' demands for more amendments to specific policies and regulations ignores the controlling requirements in SEPA. Preparing the "principal features" does not require completion of the specific and detailed edits they allege are missing. Moreover, waiting until more of those details are prepared jeopardizes the City's ability to meet the requirement to conduct review "at the earliest possible point."

[21] SMC 25.05.055.B (emphasis added); WAC 197-11-055(2).
[22] *Id.*
[23] Tr. vol. 19, 25:21–26:21, Sept. 7, 2018 (Weinman); Tr. vol. 14, 151:15–152:12, Aug. 23, 2018 (Wentlandt).
[24] Tr. vol. 19, 25:21–26:21, Sept. 7, 2018 (Weinman); Tr. vol. 14, 151:15–152:12, Aug. 23, 2018 (Wentlandt).

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The sole authority to which Appellants cite in support of their premise is SMC 25.05.440.E.4 which mirrors the state requirements in WAC 197-11-440.[25] Despite their claims that the detail they demand is "explicitly required" by those sections, those provisions do not support their legal theory.[26] SMC 25.05.440.E.4 and WAC 197-11-440 only require a "summary" of planning documents and the proposal's consistency or inconsistency with those documents. The City addresses its compliance with that SEPA requirement in section V.A.3, below. However, that requirement to prepare a "summary" does not support Appellants' claims that the City must prepare the detailed revisions they demand.

Finally, to the extent that the Appellants seek to challenge whether the FEIS considered the impacts from the final action taken by the Council on the proposal, those challenges are not ripe for review and are beyond the Examiner's jurisdiction. The City disputes Appellants' suggestion that additional changes to specific code sections that are included in the final action will create impacts that are not analyzed in the FEIS. But, to the extent Appellants seek to argue about whether the FEIS sufficiently analyzes impacts from amendments that are part of the action that the Council will eventually take, that is a challenge for a different forum that has jurisdiction to review challenges to action ultimately taken by the Council.[27] The City sufficiently identified the principal features of the proposal to facilitate review in the FEIS.

[25] SCALE Brief at 35, 50.

[26] SCALE Brief at 35.

[27] *In re King Cty. Hearing Exam'r*, 135 Wn. App. 312, 320, 144 P.3d 345 (2006) (concluding that in an appeal of the adequacy of an EIS, SEPA does not grant the hearing examiner the authority to determine whether a supplemental EIS is necessary to address changes to the proposal since the date of EIS publication; rather, SEPA vests the agency with authority to make that determination when evaluating a proposal).

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C. Appellants continue to incorrectly assert that the FEIS completely lacks analysis or discussion, when in fact the FEIS includes what they purport to be missing.

As they did at hearing, Appellants continue to assert in their closing briefs that the FEIS lacks analysis or discussion entirely. Appellants are wrong. The FEIS includes the purportedly missing discussion or analysis. Appellants' gross mischaracterizations ignore both the general analysis in the FEIS and, in many instances, the specific language that addresses the issue in the very specific location of concern to Appellants. Where their claim is based solely on the mistaken argument that the FEIS does not address their topic, and the FEIS actually includes that analysis, Appellants' claim fails.

The City's closing brief anticipated several of these false assertions that appear in Appellants' closing briefs. The City's response to those allegations are not repeated here. Instead, this brief focuses on additional analysis Appellants in their briefs incorrectly assert is missing.

Most glaringly, Appellants assert incorrectly that "[t]here is no assessment of the extent that the proposal is placing high-intensive zones in areas that are immediately adjacent to low intensive zones with no transition or buffer,"[28] or what is called "edge effect." This sweeping allegation is categorically false. Appellants ignore language describing precisely that impact.[29] Appellants ignore graphics and accompanying text that describe and depict that condition.[30] They ignore the specific acknowledgement of that

[28] SCALE Brief at 36–37 (emphasis added). *See also* Friends of North Rainier Neighborhood Plan's Closing Argument Brief ("FNR Brief") at 22–23.

[29] *See* FEIS at 3.117 (describing "edge" effect). *See also id.* at 1.21 ("Significant land use impacts would be most likely to occur near frequent transit stations, at transitions between existing commercial areas and existing single-family zones, and in areas changing from existing single-family zoning in urban villages and urban village expansion areas"). Only SCALE tries to walk back its own gross mischaracterization that the FEIS completely lacks this discussion with more qualified language further on the same page of its brief that acknowledges only the general analysis on page 3.117. But even SCALE's more qualified characterization is a gross understatement of the extent to which the FEIS addresses that specific impact.

[30] *See* FEIS at 3.186-187 (describing in text and depicting in graphics the condition of "transition," showing the "scale relationships of a neighborhood commercial area along an arterial roadway transitioning to a

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impact for each of the tiers of land use change.[31] They ignore general discussion of the impact for the preferred alternative.[32] They ignore the discussion of that impact as it may occur, generally, in urban village expansion areas.[33] Most glaringly, they ignore the robust discussion of that impact as it might occur in specific urban villages under each of the three action alternatives; the FEIS specifically identifies the impact of increased intensity, scale and use (from multifamily or commercial zoning changes) in areas that are adjacent to low-intensity uses, like single family areas (whether within the urban villages or adjacent to them) in its specific analysis of 20 of the 27 urban villages, describing and analyzing the condition as it evolves among the three alternatives 37 times.[34] These

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residential area block off the arterial roadway," and identifying "the primary impact" of that change as the "increased height" across the street from a residential zone, which "contributes to greater visual bulk and has some reduction to the amount of light and air at ground level.").

[31] FEIS at 3.176 (noting that aesthetic impacts from M1 changes can include "Compatibility impacts [that] could specifically arise where (M1) zoning is adjacent to lower-intensity zones."); FEIS at 3.177 (acknowledging that M2 changes can create "compatibility impacts" where "(M2) zoning is adjacent to lower-intensity zones").

[32] *See, e.g.,* FEIS at 3.142 (for preferred alternative, "Existing single family areas at the outer edges of urban villages with proposed expansion—including Rainier Beach, North Beacon Hill, Othello, and 23rd & Union–Jackson—would experience land use impacts similar to those of Alternative 2. Land use would become denser with more varied housing types, which could result in moderate land use impacts.").

[33] *See* FEIS at 3.190 ("Because expansion areas are at the edges of urban villages, they would likely function as transitional areas, forming a buffer between the most intense development in the urban village and the low-intensity neighborhoods surrounding it. However, expanding urban villages would, over time, lead to the conversion of existing development to higher intensity uses, development of taller buildings, and establishment of a more urban character in the expansion areas, compared with existing conditions.").

[34] FEIS at 3.122 (Rainier Beach under alternative 2); *id.* at 3.132 (Rainier Beach under alternative 3); *id.* at 3.122 (Othello under alternative 2); *id.* at 3.144 (Othello under preferred alternative); *id.* at 3.122 (Westwood-Highland Park under alternative 2); *id.* at 3.132 (Westwood-Highland Park under alternative 3); *id.* at 3.143 (Westwood-Highland Park under preferred alternative); *id.* at 3.122 (Bitter Lake under alternative 2); *id.* at 3.133 (Greenlake under alternative 3); *id.* at 3.145 (Greenlake under preferred alternative); *id.* at 3.123 (Roosevelt under alternative 2); *id.* at 3.145 (Roosevelt under preferred alternative); *id.* at 3.123 (Wallingford under alternative 2); *id.* at 3.135 (Wallingford under alternative 3); *id.* at 3.146 (Wallingford under preferred alternative); *id.* at 3.123–3.124 (Ballard under alternative 2); *id.* at 3.147–3.148 (Upper Queen Anne under preferred alternative); *id.* at 3.148 (Greenwood-Phinney Ridge under preferred alternative); *id.* at 3.136 (Admiral under alternative 3); *id.* at 3.124 (West Seattle Junction under alternative 2); *id.* at 3.136 (West Seattle Junction under alternative 3); *id.* at 3.149 (West Seattle Junction under preferred alternative); *id.* at 3.124 (Crown Hill under alternative 2); *id.* at 3.125 (Columbia City under alternative 2); *id.* at 3.126 (North Beacon Hill under alternative 2); *id.* at 3.137 (North Beacon Hill under alternative 3); *id.* at 3.126 (North Rainier under alternative 2); *id.* at 3.138 (North Rainier under alternative 3); *id.* at 3.127 (23rd & Union-Jackson under alternative 2); *id.* at 3.138 (23rd & Union-Jackson under alternative 3); *id.* at 3.127 (Northgate under alternative 2); *id.* at 3.128 (Morgan Junction under alternative 2); *id.* at 3.139 (Morgan Junction under alternative 3); *id.* at 3.153 (Morgan Junction under preferred alternative); *id.* at 3.128 (Aurora-Licton Springs under alternative 2); *id.* at 3.139 (Aurora-Licton Springs under alternative 3); *id.* at 3.154 (Aurora-Licton Springs under preferred alternative).

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neighborhood-specific analyses of the edge and transition impacts includes areas specifically identified by various Appellant witnesses that Appellants suggest was lacking analysis, including North Rainier,[35] Greenwood-Phinney,[36] Roosevelt,[37] Upper Queen Anne,[38] and others identified in Mr. Moehring's Hr'g Ex. 245 that Appellants never discussed at hearing.[39] Finally, Appellants also ignore mitigation including features incorporated into the proposal precisely to address edge impact in transition areas.[40] To ignore all of this analysis and argue, as the Appellants have, that there is "no" discussion of edge impact or, in the alternative, that the discussion is limited to the paragraph on page 3.117, is a gross mischaracterization. The combination of the maps in Appendix H and the generalized and specific discussion summarized above, capture precisely what Appellants use Exhibit 245 to allege is lacking.[41] Appellants' claims that are premised on the purported omission fail as a matter of fact and law.

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[35] *Compare* Friends of Ravenna-Cowen's Closing Argument [Amended] ("FORC Brief") at 23 (asserting that there is no discussion in "any detail" of creating "these new edges" with particular focus on North Rainier) *with* FEIS at 3.126 (addressing impact of changes under alternative 2 to rezone to lowrise 1 in the vicinity of existing single family homes); 3.138 (addressing transition to single family areas under alternative 3).

[36] Tr. vol. 18, 30:21–31:20, Sept. 4, 2018 (Gifford).

[37] *Compare* FORC Brief at 34 *with* FEIS at 3.145 and 3.134.

[38] Tr. vol. 18, 32:6–33:1, Sept. 4, 2018 (Gifford).

[39] Only by way of example, the discussion of Aurura-Licton Springs in the FEIS at 3.154 ("locations at the edges of the urban village, a transition to single family areas outside of the urban village would be provided, since Lowrise 1 and RSL zones would have the same height limit…") discusses the exact locations highlighted in Hr'g Ex. 245 at H-16. Similarly, the Admiral discussion in the FEIS at 3.136 ("One block located to the northwest of the 45th Ave SW and SW Lander neighborhood commercial and lowrise zoning, would be changed…") points out a specific location highlighted in Hr'g Ex.245 at H-13. The instances identified in footnotes 37–40 also correct misinformation depicted on corresponding maps in Hr'g Ex. 245. These six instances are only examples. Hr'g Ex. 245 is replete with instances demonstrating that Mr. Moehring ignored discussion about specific urban villages.

[40] *See, e.g.,* FEIS at 1.24, 3.156 (describing "Land use changes that create more gradual transitions between higher- and lower-scale zones, may mitigate land use impacts over the long term as this may achieve less abrupt edges between land uses of different scales and intensity"); FEIS at 3.156. *See also* FEIS at 3.176 ("Design standards, such as increased setbacks for properties on the edges of (M1) zones or graduated height limits or setbacks, could soften abrupt transitions between zones."); FEIS at 3.177 ("Design standards, such as increased setbacks for properties on the edges of (M2) zones or graduated height limits, could address conflicts in building scale where (M2) zones contrast with and transition to lower-intensity development.").

[41] Moreover, Hr'g Ex. 245 is flawed on its face because it does not accurately depict what Mr. Moehring claims. Mr. Moerhing claimed the Hr'g Ex. 245 identified areas where the Proposal would increase heights

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Similarly, Appellants' grossly mischaracterize the extent of the view impact and shading analysis by ignoring its totality. SCALE contends that the "entire content" of the view analysis is "two paragraphs long" and the analysis of shadow impacts is only one of those two paragraphs. [42] In fact, they cite only to the specific summary of impacts to views and shading that are "common to all alternatives"[43] and ignore most of the analysis on that topic. The FEIS includes discussion of the regulatory framework governing protection of views.[44] In addition to the discussion of impacts to views common to all alternatives, the FEIS includes discussion of view obstruction (including from scenic routes) and shading effect for all the action alternatives.[45] More generally, it discusses the manner in which scale changes pursuant to the proposal could result in view blockage and decreased access to light,[46] and multiple sections that discuss the manner in which the tier zoning changes can create shading impacts.[47] The FEIS includes discussion of the influence of topography on impacts to views.[48] Additionally, neighborhood-specific

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to at least 50 feet adjacent to areas where the height would be 30 feet. Tr. vol. 11, 214:21–215:3, Aug. 20, 2018 (Moehring). Despite his characterization at hearing, upon closer inspection, literally every single map includes red hatching that highlights at least one area (and for many maps, multiple areas) that do not meet that criterion because they circle locations where the proposal will impose heights below 50 feet. For example, Hr'g Ex. 245 repeatedly and incorrectly identifies areas adjacent to LR3 (M) changes, or changes to LR2 even though the height in those zones will only increase to 40' and the difference with adjacent properties is only ten feet, *See* FEIS, App. F at F2.

[42] SCALE Brief at 28–29 (citing to FEIS 3.191, which identifies view obstruction and shading effects common to all alternatives).

[43] SCALE Brief at 28–29 (citing FEIS at 3.191).

[44] FEIS at 3.168–169.

[45] FEIS at 3.196 (alternative 2); 3.199 (alternative 3); 3.209 (preferred alternative).

[46] FEIS at 3.111.

[47] FEIS at 3.176 (M1 changes "changes would potentially include smaller building setbacks and more visually prominent building forms, which could reduce the amount of direct sunlight reaching ground level in public rights-of-way and other locations near infill development"); *Id.* at 3.177 ("Like (M) and (M1) zones, impacts associated with (M2) zoning changes would be increased building height, greater visual bulk, and reduced access to light and air at ground level."); FEIS at 3.186 ("The primary impact of the (M) Tier capacity increase to NC-55 is the increased height, which allows for the presence of a 5 story building across the street from the residential zone. The additional story contributes to greater visual bulk and has some reduction to the amount of light and air at ground level.")

[48] FEIS at 3.118–3.119.

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analysis specifically identifies potential shadowing impacts onto adjacent areas.[49] The FEIS includes graphics and accompanying text designed to depict shading and shadow impacts on adjacent parks.[50] Indeed, all the graphics in the aesthetic analysis depict and explain shading impacts on adjacent buildings.[51] One of the FEIS appendices has axonometric models for each zone that show shading effects on adjacent lots and buildings, and enable consideration of how views from existing adjacent lots would be affected by new development under proposed regulations.[52] Finally, the FEIS includes mitigation (both existing regulations and other potential mitigation that could be adopted) to address protection of public views (including from scenic routes) and to mitigate shading.[53] The Examiner should reject Appellants' gross mischaracterization that the view and shading analysis is limited to the two paragraphs they identify.

Additionally, Appellants incorrectly assert that the aesthetic analysis uses graphics that "inappropriately assume that the affected environment is fully built out to what is allowed by code."[54] In fact, the FEIS includes text and graphics to describe two scenarios—"distributed" and "concentrated" development conditions.[55] Distributed refers

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[49] *See, e.g.,* FEIS at 3.148 (Upper Queen Anne description identifies that "height increases could allow for buildings that would increase shadowing onto adjacent single family areas"); *id.* (Greenwood Phinney Ridge discussion acknowledges that "Moderate land use impacts on single family zones adjacent to the urban village could occur where height increases could allow for buildings that would increase shadowing onto adjacent single family areas");

[50] FEIS at 3.184–185.

[51] *See, e.g.,* FEIS at 3.188–3.189 (noting how the accompanying exhibits depict how "The increased building height of both the (M) and (M1) zoning changes would increase visual bulk and reduce access to light and air at street level.")

[52] FEIS at App. F, Urban Design and Neighborhood Character Study, at 12–71.

[53] FEIS at 3.211 (acknowledging protections in SMC 25.05.675.P for protection of views and SMC 25.05.675.Q for protection of open spaces from shading, and proposing changes to the Design Review process, promote slimmer building forms that minimize blockage of light and views); 3.212 (identifying other mitigation for view obstruction and shading effects).

[54] SCALE Brief at 28. *See also* Tr. vol. 12, 77:11–78:11, Aug. 21, 2018 (Hill).

[55] *See, e.g.,* FEIS at 3.190; FEIS at 3.178–3.179 (text and accompanying Exhibits 3.3-11 and 3.3-12 describes and depicts the "distributed" and "concentrated" development conditions); FEIS at 3.182–3.183 (text and accompanying Exhibits 3.3-15 and 3.3-16 describes and depicts the "distributed" and "concentrated" development conditions). *See also* Tr. vol. 18, 79:13–81:4, Sept. 4, 2018 (Gifford) (describing distributed and concentrated patterns).

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to the initial condition when only several projects have proceeded under the new regulations, while concentrated represents the potential condition after additional infill has occurred. The text and graphics addressing the "distributed" condition depict and analyze precisely what the Appellants allege is missing by describing the "incremental, temporary conflicts of height and scale" during the "conversion" that occurs with "the gradual introduction [into areas that have been rezoned] of taller, more prominent buildings with potentially greater site coverage than existing development."[56]

Friends of North Rainier falsely claims that there is no discussion of the potential impact of a proposed urban village expansion in the vicinity of the "historic landscape that is part of the Olmsted legacy" and the single family "housing that is of historic character and quality."[57] In fact, the FEIS identifies that potential impact of the urban village expansion on that precise area.[58]

JuNO claims that only 10 percent of the rezones of single family areas in West Seattle Junction are zoned to RSL under the preferred alternative and that the FEIS "failed to address the fact that the remaining *90%* of the upzones [of single family zones in West Seattle Junction] would be to LR1 and LR2."[59] Their statement is categorically false. The FEIS clearly addresses that specific zoning change to LR1 and LR2 in that specific urban village and its potential impact.[60]

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[56] FEIS at 3.190 ("This conversion would include the gradual introduction of taller, more prominent buildings with potentially greater site coverage than existing development. Since development tends to be incremental, temporary conflicts of height and scale may arise between older and newer buildings as properties convert to more intense uses at different times."); Tr. vol. 18, 79:13–81:4, Sept. 4, 2018 (Gifford); FEIS at 3.178–3.188, FEIS Exs. 3.3-10–3.3-22.

[57] FNR Brief at 23.

[58] FEIS at 3.126 ("The urban village expansion area at the east of the village in the vicinity of 30th Ave. S would change zoning from single family to Lowrise 1, which would have moderate land use impact, with potential for significant impact due to an existing condition of established, consistent architectural and urban form context of homes near the Olmsted Boulevard.")

[59] JuNO Brief at 14.

[60] *See* FEIS at 3.148–149 (analysis of the preferred alternative in West Seattle Junction notes the changes from SF to LR 1 and 2 and that those density, use and scale impacts would result in "moderate or greater

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These categorical but false allegations along with those identified in the City's closing brief are representative of a broader credibility issue. For example, Friends of Ravenna-Cowen includes a block quotation in its brief that it attributes to a SEPA treatise, when in fact Ms. Bendich is quoting legal argument lifted from another Appellants' motion for summary judgment.[61] Not surprisingly, that quotation is nowhere to be found in the treatise to which FORC erroneously cites. Similarly, as noted below, Appellants frequently and substantially mischaracterize the testimony at hearing. All of this calls into question Appellants' assertions.

D. Neither SEPA nor the City's past practice require neighborhood-specific EISs.

In their briefs, Appellants continue to advance their central argument that the City should have completed neighborhood-specific EISs, or, alternatively, that the City should have included more individualized analysis for each specific neighborhood.[62] As a general matter, Appellants have not demonstrated that the citywide approach in this FEIS is unreasonable.

1. Appellants ignore the robust neighborhood-specific analysis in the FEIS.

As a preliminary matter, Appellants ignore the many examples of neighborhood-specific environmental analysis, where that information was appropriate and attainable at this nonproject stage. For example, as described above, there is significant neighborhood-level discussion in the FEIS that Appellants' fail to even acknowledge. The examples identified above are the specific examples Appellants assert are lacking from the FEIS,

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land use impacts, but would be less than Alternative 3" because of the differences in those specific rezones under the preferred alternative); FEIS at 3.136 (analyzing impacts from rezoning all SF to LR in West Seattle Junction as proposed in alternative 3).

[61] *Compare* FORC Brief at 9, ln. 16–18, *with* SCALE's Mot. Summ. J. at 15, ln. 3–9.

[62] *See, e.g.,* SCALE at 16, 24; JuNO at 8.

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but do not represent the list of all the neighborhood-specific analysis throughout the document. For example, the parks and open space analysis identified parks and open space availability for each urban village under existing conditions, the no action alternative, and all action alternatives.[63] The biological resources analysis provides maps showing critical areas in every urban village.[64] And in sections where the FEIS did not analyze every urban village in detail, the FEIS identified specific urban villages with specialized conditions or a higher potential for impacts.[65] While the Appellants overlook or minimize the significance of these neighborhood-level analyses to support their demands, the Examiner should not.

2. Contrary to Appellants' arguments, the proposal is qualitatively comparable to other nonproject actions.

To support their demands for more neighborhood-specific detail and analysis, Appellants continue to mischaracterize this area-wide rezone as larger or more complicated than other nonproject actions such that the City is required to provide more analysis than what is included.[66] Their argument ignores the fact that the regulations identify an area-wide rezone as a prototypical nonproject action.[67] Moreover, the City's expert who has been involved in over 200 nonproject EISs confirmed that area-wide rezones, even ones that are city- or county-wide, and changes to development regulations that affect entire cities and counties are not uncommon, nor is this specific proposal remarkable in its scope or scale.[68] That same witness confirmed that any area-wide rezone

[63] FEIS at 3.350 (exhibit summarizing data).
[64] *Id.* at 3.326–3.327, 3.332–3.333.
[65] *E.g., id.* at 3.360–3.362 (identifying urban villages that could be affected by increased demand for police, fire, or emergency medical services); *Id.* at 3.403–3.404 (identifying urban villages within 200 meters of major pollutant sources (a major highway, rail line, or port terminal)).
[66] *See, e.g.,* SCALE Brief at 8–9 (differentiating between "high level policies" and area-wide rezones); FORC Brief at 9 ("parcel-by-parcel zoning").
[67] *See* WAC 197-11-442; SMC 25.05.442.D (characterizing area-wide zoning as a nonproject action).
[68] Tr. vol. 19, 33:4–19, Sept. 7, 2018 (Weinman).

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entails "parcel-by-parcel" zoning changes on a large scale.[69] Moreover, in the context of nonproject actions, SEPA explicitly states that "site-specific analyses are not required," even when the proposal "concerns a specific geographic area."[70] As described below, the level of analysis in the FEIS is appropriate to the level of detail of the proposal.[71]

Indeed, Appellants' own arguments demanding more detailed analysis on a "parcel-by-parcel" basis demonstrate precisely why that detail is unreasonable and speculative at the nonproject stage. For example, when SCALE challenges the sufficiency of the examples of graphics prepared for the aesthetics analysis, they assert that the City should have prepared graphics for all the "combinations of height, bulk, and scale adjacent to each other [that will purportedly be] unleashed by the proposal" that exceed the scenarios shown by the graphics.[72] However, it would be patently unreasonable to require the City to prepare graphics for all the possible permutations and combinations of development for each zoning change in each area. That is the type of "site-specific" analysis that the rules confirm is not required for a nonproject action. Similarly, SUN's suggestion that the City should have relied on more detail on the development potential of nearly 10,000 parcels shown in a graphic in the Growth and Equity Analysis "to show what development from MHA would look like compared to today. . . making it visible to the public how the new MHA developments could look in the neighborhood" is similarly unreasonable.[73] That graphic includes caveats that expressly recognize the speculative

[69] Tr. vol. 19, 33:4–19, Sept. 7, 2018 (Weinman).
[70] WAC 197-11-442(3); SMC 25.05.442.C.
[71] Tr. vol. 19, 33:4–35:21, Sept. 7, 2018 (Weinman).
[72] SCALE Brief at 28.
[73] Seniors United for Neighborhoods' Closing Argument [Amended] ("SUN Brief") at 2–3 (citing to FEIS at App. A, p. 50).

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nature of determining when, where and what type of development projects will occur.[74] More importantly, the implication of SUN's argument is that the FEIS was required to prepare analysis of all the possible outcomes for development, for those 10,000 lots. That site specific analysis of 10,000 lots requires speculation and is unreasonable. More importantly the rules expressly state that type of analysis is not required.[75] SEPA does not require that type of speculation.

3. Uptown and U District EISs do not support Appellants' legal theories.

Appellants repeatedly rely on EISs that were recently prepared for Uptown and the U District as examples, but these EISs do not support Appellants' arguments that SEPA requires more neighborhood-specific analysis and details. Appellants argue, without citation to statute, regulation, or case law, that the fact that the City completed neighborhood specific EISs for those two neighborhoods is conclusive evidence that the City is required to have done the same throughout the City.[76] They infer from those EISs, without corroborating evidence, the City's intent and legal judgment that neighborhood-specific EISs are required to implement MHA.[77] The uncontroverted evidence presented at hearing about the SEPA process for U District and Uptown contradicts Appellants' unsupported inference. The City initiated those EISs for reasons unrelated to MHA and before MHA was proposed.[78] The City added the MHA components to the scope of those

[74] "The model does not predict market trends or suggest when redevelopment will occur. A property owner's decision to demolish and replace an existing building involves many considerations, such as whether the land is owned outright, financial feasibility, and current revenue." FEIS at App. A, p. 54.

[75] "If the nonproject proposal concerns a specific geographic area, site specific analyses are not required, but may be included for areas of specific concern." WAC 197-11-442(3); SMC 25.05.442.C.

[76] *See, e.g.,* SCALE Brief at 9 (providing no citation for the statement that "At a minimum, assuming the documents are of the same nature (e.g., both adopting subarea policies or both adopting new zoning for the neighborhoods), the two EISs should have comparable levels of detail); FNR Brief at 4–5 (City's purported "abandonment of neighborhood level review" implies that the City made a decision that MHA warrants or requires that level of review).

[77] FNR Brief at 4–5.

[78] Tr. vol. 14, 128:15–131:24, Aug. 23, 2018 (Wentlandt).

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neighborhood EISs to use ongoing evaluations of development capacity increases in those neighborhoods as the basis for MHA implementation there. Nothing about MHA prompted the City to conduct neighborhood-specific EISs in those instances.[79] Thus, Appellants' inference is incorrect.

More importantly, even if the City *had* deliberately decided to complete neighborhood-specific EISs for MHA in those instances, that judgment about its approach in those specific proposals is not legally binding or preclusive on future judgments about how to proceed in other parts of the City. To prevail on this argument, Appellants must establish that decision to proceed on a city-wide level is unreasonable.[80] Inherent in the rule of reason is the premise that there can be a variety of methods and levels of scrutiny that are judged on a "case-by-case" basis.[81] The mere existence of a different reasonable approach (for example, proceeding at a neighborhood-level) is legally insufficient to support the conclusion that an EIS is inadequate.[82] The "rule of reason" governs EIS adequacy and allows the agency to choose from many different but reasonable approaches. Therefore, Appellants must do more than simply provide an example in which the City proceeded at a neighborhood level. Nor can they simply rely on a different approach—even one previously used by the City—to satisfy their burden. That is the fundamental flaw in SCALE's arguments regarding the purported legal consequences of the differences in geographic scope between the FEIS and the Uptown or U District EISs.

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[79] Tr. vol. 14, 128:15–131:24, Aug. 23, 2018 (Wentlandt).

[80] *Org. to Pres. Agric. Lands v. Adams Cty*., 128 Wn.2d 869, 881, 913 P.2d 793, 801 (1996) (affirming adequacy of EIS where appellants' expert witness "did not testify definitively that studies were inadequate").

[81] *See, e.g., Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp.*, 90 Wn. App. 225, 229, 951 P.2d 812, 815 (1998).

[82] *E.g.*, Findings and Decision of the Hearing Examiner for the City of Seattle [hereinafter *Findings and Decision*], MUP-14-016(DR,W)/S-14-003 at 15 (rejecting appellants' experts' critiques of EIS analysis and noting, "It is not unusual for experts to disagree on the appropriate analytical approach to a given assignment.").

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The fact- and case-specific inquiry of the FEIS adequacy appeal defies the comparison SCALE advances and SCALE's assumptions that those prior efforts reflect a standard against which the FEIS must be judged. In other words, even if SCALE is correct that the City did in fact "decrease the level of analysis" in the FEIS as compared to Uptown and U District (as stated below, the City contends they are not correct), that does not prove that the FEIS is not adequate. The FEIS can still be reasonable. Appellants are wrong in suggesting that one can divine the required level of analysis by simple reference and comparison to arbitrary geographical constructs. Rather, one has to look at what is appropriate in the particular situation from the standpoint of particular impact analyses. As is explained in the subsequent sections and in the City's closing brief, Appellants have failed to establish that the City-wide approach is unreasonable.

Moreover, the contrast Appellants draw with these two EISs is overstated. Appellants ignore the very similar approach and methodology in each of those EISs to which the City's experts have testified.[83] They have identified only several differences but those differences do not support their legal theories that the FEIS is inadequate. As explained in further detail, below, where there is a distinction on which Appellants rely, the distinction is for a reason and it is within the City's discretion and the rule of reason.[84] For example, as explained in the historic resources section, the City was justified in deciding to map fewer types of historic resources in the FEIS because of the varying availability of data of various categories of resources in the urban villages.[85] That availability of data of certain resources in some neighborhoods but not others was due to past decisions to inventory some urban villages over others, but does not reflect the

[83] *See, e.g.,* Tr. vol. 18, 249:14–252:23, Sept. 4, 2018 (Gifford)(noting that the existing conditions summary and the approach used for the land use impact analysis in the FEIS is similar to the Uptown and U District EISs); Tr. vol. 13, 195:11–16, Aug. 22, 2018 (Johnson).

[84] *See, e.g.,* Tr. vol. 18, 180:8–182:9, Sept. 4, 2018 (Gifford).

[85] Tr. vol. 13, 194:14–201:1, Aug. 22, 2018 (Johnson).

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absence of resources in those areas that were not inventoried. Communicating that information on a city-wide scale could have created the false impression that some urban villages had more resources than others simply because they had more dots on a map.[86] That type of incorrect impression could actually work at cross-purposes to SEPA's goal of informing decision-makers. Instead, the FEIS used text rather than mapping to communicate those issues.[87] This approach is not a "decrease in the level of analysis," as suggested by SCALE.[88] Rather, it represents mindfulness toward the manner in which the information will be received to avoid misinformation. More data is not always better. Similarly, as explained below, the land use and aesthetics analysis (including viewshed impacts) for Uptown was more detailed precisely because the City was more aware of the narrow range of specific parcels upon which development potential was most likely to occur and could complete a more detailed analysis.[89] Accordingly, there are legitimate reasons the City's approach in the Uptown and U District varied in specific instances from the approach taken in the FEIS, which, in some instances is related to the broader geographic study area for the proposal in the FEIS. And, even if that was not the case, Appellants must do more than simply demonstrate that more analysis or different analysis is available or possible. They must show that the City's approach is unreasonable.

Finally, it is important to keep in mind the logical outcome of Appellants' argument. If the Examiner concludes that citywide rezones must be analyzed in neighborhood-specific EISs comparable to U District and Uptown, the result would be exorbitantly expensive, totaling as much as $13.5 million dollars to implement MHA

[86] Tr. vol. 13, 194:14–201:1, Aug. 22, 2018 (Johnson).
[87] Tr. vol. 13, 199:16–24, Aug.22, 2018 (Johnson).
[88] SCALE Brief at 9.
[89] Tr. vol. 18, 253:11–254:14, Sep. 4, 2018 (Gifford); Tr. vol. 18, 180:14–182:9, Sept. 4, 2018 (Gifford).

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throughout the rest of the City.[90] SEPA does not require that outcome because it defies the cost-effectiveness component of the rule of reason.[91]

Appellants have not demonstrated that the "city-wide" approach is unreasonable. While Appellants might prefer an EIS for each urban village, neither SEPA nor the City's neighborhood planning strategy dictate that result. The fact that the City has previously used ongoing neighborhood-specific EIS's as a vehicle for analyzing MHA implementation in two specific neighborhoods does not require the same outcome here.

IV. THE FEIS EVALUATED A REASONABLE RANGE OF ALTENATIVES

A. The City was entitled to limit its alternatives to those involving increases in development capacity.

Appellants err in contending that it was unreasonable for the FEIS to consider only alternatives involving increases in development capacity.[92] Appellants ignore that the SEPA rules allow the City, in the nonproject context, to limit its alternatives to those that achieve a proposal that was "formally proposed."[93] Here, changes to zoning and land use to increase development capacity are an integral element of the proposal formally proposed by the City through a lengthy public process culminating in a series of City

[90] Tr. vol. 19, 40:17–41:11, Sept. 7, 2018 (Weinman). It is also laughable and disingenuous to suggest, as FORC does in its brief, that the City could have "complied with the WAC-197-425(4)'s [*sic.*] 150–page maximum limit for a DEIS" if it had chosen to complete an EIS for each neighborhood. FORC Brief at 43 n.39

[91] *Kiewit Constr. Grp. Inc. v. Clark Cty*., 83 Wn. App. 133, 140, 920 P.2d 1207 (1996) (characterizing the rule of reason as a "broad, flexible cost-effectiveness standard"). *See also Solid Waste Alternative Proponents v. Okanogan County ("SWAP")*, 66 Wn. App. 439, 446, 832 P.2d 503 (1992) (upholding Okanogan County's decision to exclude two other reasonable alternative sites, based on the cost of the additional analysis).

[92] *See* Wallingford Community Council Appeal - Closing Argument ("WCC Brief") at 1–8, Fremont Neighborhood Council ("FNC Brief") at 2–9; SCALE Brief at 39–40.

[93] *See* City Brief at 8–11.

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Council enactments.[94] The choice of proposals is a policy decision that is entitled to deference.[95]

1. Appellants ignore SMC 25.05.442.D.

As explained by the City from the outset of this appeal, SMC 25.05.442.D allows the City to limit its alternatives to those involving increases in development capacity. Wallingford Community Council ("WCC") contends that the City has misinterpreted that provision.[96] However, WCC intentionally declines to present its argument on that score, instead postponing that argument to WCC's reply brief.[97] The Examiner should not countenance this improper tactic. The City fully presented its case at hearing. Appellants have the burden of proof and were required to present their case in chief at hearing, and to provide any additional legal authority in support of that case in chief in their first closing brief. The Examiner should disregard any additional argument or authority on the alternatives issue that WCC presents for the first time it its reply brief.

Nonetheless, based on the summary judgment briefing, the City can anticipate WCC's likely argument, which is contrary to the SEPA rules and caselaw. SMC 25.05.442, entitled "Contents of EIS on nonproject proposals," provides:

> . . .
>
> D. 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*

[94] *Id.* at 9–10.
[95] *Id.* at 8–9.
[96] WCC Brief at 2.
[97] WCC Brief at 1–2.

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> *discussion of alternatives which have been formally proposed* or which are, while not formally proposed, reasonably related to the proposed plan.

(Emphasis added.)[98]

WCC presumably will contend that SMC 25.05.442.D does not apply because the proposal in this case does not involve any of the specific types of enactments listed in the first sentence of SMC 25.05.442.D. On the contrary, the proposal here unquestionably involves area-wide zoning changes.[99] The proposal also includes changes to the Comprehensive Plan (both to the future land use map and to certain policies).[100] Moreover, any effort to circumscribe the applicability of SMC 25.05.442.D is contrary to its evident intent to apply broadly to nonproject proposals. The title of the section reads "Contents of EIS on nonproject proposals," and the body of the section refers to the broad and undefined phrase "land use plans." Indeed, the Washington courts have recognized that the provision applies broadly to types of actions not specifically called out in the first sentence.[101] WCC's effort to avoid the clear meaning and applicability of SMC 25.05.442.D is unavailing.

Instead of addressing the clear authority of SMC 25.05.442, WCC mischaracterizes the objective of the proposal as being a singular goal of "affordable housing," which WCC then contends dictates a broader range of alternatives.[102] WCC suggests that the FEIS should have considered alternatives such as those contained in the report entitled "Solutions to Seattle's Housing Emergency."[103] The report addresses many

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[98] *See also* WAC 197-11-442(4).
[99] FEIS at 2.2.
[100] *Id*.
[101] *See Citizens Alliance to Protect Our Wetlands ("CAPOW") v. City of Auburn*, 126 Wn.2d 356, 365, 894 P.2d 1300 (1995) (characterizing zoning code text amendment as being "formally proposed" for purposes of WAC 197-11-442(4)).
[102] WCC Brief at 1, 6.
[103] WCC Brief at 7.

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strategies for financing additional affordable housing and for addressing affordability issues generally.[104] However, creating affordable housing is not the sole focus of the "formally proposed" proposal. On the contrary, the "formally proposed" proposal combines a mandate on developers to build (or pay to support) rent- and income-restricted housing *and* changes in zoning and land use to increase development capacity.[105] The strategies in the report represent entirely different proposals that the FEIS was not required to evaluate.

Ultimately, the report simply confirms the impracticality of WCC's approach. An EIS evaluating even a fraction of the "alternatives" purportedly contained in this report would be extremely cumbersome to prepare and so broad and vague as to be useless as a tool for environmental review. If the Examiner were to conclude that the objective for a legislative proposal must be as abstract as WCC asserts and that the alternatives considered must include multiple and varying legislative proposals to achieve that abstract goal, the task of environmental review would be impossibly broad. SEPA does not require that result and allows the City to define a more directed legislative objective.[106]

2. The FEIS's objectives support limiting the alternatives to those involving increases in development capacity.

Contrary to Appellants' contention, the objectives stated in the FEIS do not undermine the City's approach. Appellants focus on the FEIS's four objectives and

[104] Hr'g Ex. 258

[105] City Brief at 9–10. Similarly, the FEIS states four objectives, including not only creation of rent- and income-restricted housing units but also an objective to "[i]ncrease overall production of housing to help meet current and projected high demand." FEIS at 2.4.

[106] Finally, WCC errs in contending that "[t]he City alleges the decision to move forward with MHA has already been made and therefore no alternatives need be considered." WCC Brief at 6. This is a straw man argument. The City does not disavow the SEPA requirement to analyze alternatives. More accurately, the City argues that SEPA does not require the lead agency to complete the theoretical exercise of exploring all ways to achieve a broad and abstract objective. Instead, SEPA allows the City to focus its analysis on a proposal that is "formally proposed." Here the City framed the proposal through a lengthy public process culminating in a series of City Council enactments. As discussed above, the choice of proposals is a policy decision that the City is entitled to make.

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suggest that that there are ways of achieving those objectives that do not involve upzones—for example, simply imposing an "inclusionary zoning" requirement or "linkage fee" on new development.[107] First, as a legal matter, SEPA rejects the idea that there could be a fundamental divergence between the proposal and its objective (or objectives).[108] Equally important, as a factual matter, Appellants fail to demonstrate that their suggested approaches could meet *all* of the objectives stated in the FEIS.

In its brief, SCALE states (without citation) that Mr. Levitus testified that an inclusionary zoning or linkage fee approach without upzones would meet the proposal's objectives.[109] However, the FEIS objectives include not only an objective to create new rent- and income-restricted housing, but also a separate objective to "[i]ncrease overall production of housing to help meet current and projected high demand."[110] When asked whether a linkage fee would serve the objective of increasing overall production of housing, Mr. Levitus acknowledged that "it's unlikely to do that."[111] Similarly, Appellants' witness Mr. Sherrard admitted that a linkage fee would not meet the second

[107] SCALE Brief at 39–40; FNC Brief at 4–5.

[108] SEPA uses the terms interchangeably in many cases. *See*, *e.g.*, SMC 25.05.060.C.1.b ("A proposal by a lead agency or applicant may be put forward as an objective. . ."); *see also* WAC 197-11-060(3)(a)(ii); SMC 25.05.442.B (". . . agencies are encouraged to describe the proposal in terms of alternative means of accomplishing a stated objective. . ."); *see also* WAC 197-11-442(2).

[109] SCALE Brief at 39–40.

[110] FEIS at 2.4.

[111] Tr. vol. 7, 157:20–158:5, July 24, 2018 (Levitus).

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EIS objective.[112] An "inclusionary zoning" requirement that new development under existing zoning simply include affordable housing would suffer the same defect.[113]

Moreover, Appellants' attempts to avoid their own witnesses' testimony by citing to Mr. Weinman's testimony are unavailing.[114] While Mr. Weinman agreed there were approaches other than upzones that could increase production of housing, he never suggested any such approaches could meet all of the FEIS objectives; his testimony was that upzones were integral to the proposal and the City was entitled to limit the alternatives pursuant to WAC 197-11-442(4).[115]

3. FNC errs in contending that phased review requirements dictate a broader set of alternatives.

In contending that the FEIS should have considered "alternatives other than upzoning," FNC ignores the authority cited by the City. Instead, FNC contends that the City improperly limited its alternatives "as a result of how the City applied phased review to the MHA EIS."[116]

First, FNC may not raise this claim now, as the Examiner dismissed it in his ruling on the City's Motion for Partial Dismissal. Issue 2.C in FNC's notice of appeal stated: "The City improperly constrained the range of alternatives by failing to properly invoke

[112] Tr. vol. 4, 89:13–89:22, June 28, 2018 (Sherrard) (stating that linkage fee "does not increase the supply of housing necessarily, although I don't think that that really is an appropriate goal."). Mr. Sherrard later stated that the fees could increase production of housing to the extent the fees were used to produce housing—e.g., affordable housing built using the fees. Tr. vol. 4, 90:5–90:9, June 28, 2018 (Sherrard). However, that does not constitute meeting the second EIS objective. The FEIS has a separate objective to create new rent- and income-restricted units, so the second objective clearly refers to housing overall, not affordable housing. Indeed, the FEIS makes this distinction clear. FEIS at 4.12.

[113] Moreover, given that an inclusionary zoning requirement would deprive the City of the ability to leverage other funding sources, there is no evidence that it would meet the FEIS's objective to create at least 6,200 net new rent- and income-restricted units serving people at 60 percent of AMI.

[114] FNC Brief at 8; SCALE Brief at 40.

[115] Tr. vol. 19, 70:3–71:13, Sept. 7, 2018 (Weinman).

[116] FNC Brief at 2 (emphasis in original).

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and apply SEPA phased review rules."[117] In ruling on the City's motion, the Examiner held that "[t]o the degree [JuNO] and Fremont Neighborhood Council challenge the compliance of the FEIS with phased review requirements those issues are DISMISSED. The FEIS satisfies the City's phased review process requirements."[118]

FNC's effort to distinguish the issue it now raises from the issue the Examiner dismissed is unavailing. FNC mischaracterizes the City's motion on phased review as relating to a June 8, 2015, DNS.[119] On the contrary, while the City referenced that DNS in relation to a claim by Wallingford Community Council (which the Examiner separately dismissed), the City's motion on phased review did not mention that DNS but rather requested dismissal of the specific issue (FNC issue 2.C) that FNC now attempts to revive.[120] As FNC admits, it declined to brief the phased review issue in response to the City's motion.[121]

Even if the Examiner allowed FNC to pursue its phased review issue at this point, FNC's argument contravenes SEPA case law and is outside the scope of this appeal. While FNC's argument is opaque, FNC essentially contends that the phased review sequence from the Seattle 2035 Comprehensive Plan EIS to the FEIS that is under appeal prevents the City from framing the proposal to include upzones as an integral element. Based on FNC's reference to Hr'g Ex. 269 (often referred to as the MHA-R "framework"),[122] the argument appears to be similar to contentions made at hearing that

[117] FNC Notice of Appeal at 4.
[118] Hr'g Examiner's Preliminary Order on Prehearing Motions [hereinafter *Prelim. Order on Prehearing Motions*] at 3.
[119] FNC Brief at 2.
[120] City of Seattle's Motion for Partial Dismissal [hereinafter *City's Mot. for Partial Dismissal*] at 21–23, 27–28.
[121] This failure is not excused by any need of FNC for additional time to review the City's document production. Presumably, FNC refers to the documents cited in its brief at 8–9. However, as discussed below, those documents are irrelevant to any issue that is within the Examiner's jurisdiction.
[122] FNC Brief at 9.

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questioned the sufficiency of SEPA review for prior ordinances (a subject that the Examiner recognized is outside his jurisdiction in this appeal).

In any event, FNC's argument based on phased review is unavailing. FNC cites no case law involving phased review and SEPA case law on that subject rejects FNC's argument. In *Glasser*, the Court held that, where a jurisdiction uses phased review, an appellant challenging a second, project-level EIS may question the continued validity of the environmental impacts analysis in the first, programmatic EIS but not "the range of alternatives."[123] The court recognized that allowing opponents to use a project EIS to "collaterally attack previous programmatic policy decisions" was contrary to principles of finality.[124]

While *Glasser* involved a nonproject EIS followed by a project EIS (as opposed to the sequence of two nonproject EISs here), that distinction does not change the key point: with respect to the framing of the proposal and alternatives, a challenge to a second phase EIS is not "backward-looking" and use of phased review does not provide an escape from the general rule (already recognized by the Examiner) that challenges to prior environmental review (or lack thereof) are time-barred and outside the scope of an EIS adequacy appeal. FNC's arguments about allegedly improper narrowing of alternatives based on prior SEPA review, including its argument based on phased review, run afoul of that rule and are outside the Examiner's jurisdiction.

Ultimately, FNC's argument has less to do with phased review than with FNC's belief that the City's framing of the proposal to include the key element of increased

[123] *Glasser v. City of Seattle*, 139 Wn. App. 728, 738, 162 P.3d 1134 (2007), *review denied*, 163 Wn.2d 1033 (2008).
[124] *Id.*

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development capacity "was in fact a political decision, not based on sound policy."[125] However, both the motives of City actors and the wisdom of the policies they advance are irrelevant to the adequacy of the FEIS and outside the scope of this appeal.[126] FNC's claim that the City improperly constrained the range of alternatives by failing to properly invoke and apply SEPA phased review rules must be dismissed.[127]

In sum, the City was entitled to limit its alternatives to those involving increases in development capacity.

B. <u>The range of alternatives satisfies the "rule of reason</u>."

The FEIS evaluated a reasonable range of alternatives consistent with the "rule of reason." SCALE contends that the action alternatives "vary very little from one another" in that "[a]ll rely on upzones and UV expansions."[128] However, as discussed in the preceding section IV.A, the City was entitled to limit its alternatives to those involving increases in development capacity. Thus, the question is whether, within that context, the alternatives provide a basis for a reasoned decision among alternatives having differing environmental impacts.[129]

SCALE suggests (without citation) that "[t]he variations among the alternatives are minor, shifting rezone areas slightly among the various UVs."[130] The FEIS and

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[125] FNC Brief at 6. FNC particularly objects to the so-called "Grand Bargain" (Hr'g Ex. 279), a document signed at the time of the HALA recommendations by the Mayor, one Councilmember, various HALA committee members, and other stakeholders.

[126] *Glasser*, 139 Wn. App. at 739 ("EIS adequacy refers to the legal sufficiency of the environmental data contained in the document."); *CAPOW v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995) (Courts do not rule on the wisdom of the proposal). *See also* City Brief at 3.

[127] Finally, FNC's citation to *Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584, 603 (9th Cir. 2018) is unavailing. The language FNC quotes supports the agency's ability to frame the objective through legislative enactments like those of the Council here. In any event, the court in *Cachil* held that the range of alternatives was not illusory. *Id.* at 604.

[128] SCALE Brief at 38.

[129] *Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 38, 873 P.2d 498 (1994); *Brinnon Group v. Jefferson Cty.*, 159 Wn. App. 446, 481, 245 P.3d 789 (2011).

[130] SCALE Brief at 38.

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testimony at hearing clearly demonstrate that this contention lacks any factual basis. As explained in the City's closing brief, the FEIS alternatives differ meaningfully in the intensity and location of development capacity increases as well as in their approach to urban village expansions.[131] They also differ in their impacts with respect to numerous elements of the environment.[132]

JuNO suggests that there could have been other, allegedly better, ways of distributing development capacity increases in the West Seattle Junction.[133] Other Appellants have suggested other variations for distributing development capacity. But the mere potential that there could be other alternatives does not render the FEIS inadequate. SEPA does not require that the FEIS consider every conceivable alternative.[134] The word "reasonable" is intended to limit the number and range of alternatives.[135] As Mr. Wentlandt testified, the alternatives evaluated in the FEIS give decisionmakers the information needed to make choices about other combinations of zoning changes.[136]

Equally important, SCALE's contention that its suggested alternatives would be more meaningful because they would have fewer adverse impacts lacks any legal basis.[137] SEPA requires only that alternatives present greater impacts in some impact areas, and fewer impacts in other impact areas.[138] As explained in the City's closing brief, the FEIS alternatives clearly meet that standard.

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[131] City Brief at 12–13.
[132] *Id.* at 13–14.
[133] JuNO Brief at 4 n.5.
[134] *SWAP v. Okanogan County*, 66 Wn. App. 439, 446, 832 P.2d 503 (1992).
[135] SMC 25.05.440.D.2.a.
[136] Tr. vol. 14, 109:9–109:19, Aug. 23, 2018 (Wentlandt).
[137] SCALE Brief at 38–39; *see also* SUN Brief at 8–9.
[138] *King Cty. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 138 Wn.2d 161, 185, 979 P.2d 374 (1999) (interpreting WAC 197-11-440(5)(b), the provision cited by SCALE).

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Moreover, even if SCALE's legal theory were correct, as a factual matter SCALE fails to show that its suggested alternatives would have fewer impacts of the types SCALE focuses on.[139] SCALE suggests that an alternative that favors on-site performance over payment of in-lieu fees would reduce the proposal's "proclivity to increase, not decrease, housing segregation in the city."[140] However, the overwhelming evidence presented at hearing demonstrates that payment-funded units are not likely to be concentrated in the manner alleged by Mr. Levitus, but rather will be located in a way that strongly advances social equity goals.[141] Appellants fail to demonstrate that the FEIS's range of alternatives was unreasonable.[142]

C. The FEIS was not required to include alternatives designed to mitigate particular types of impacts.

SCALE asserts that the FEIS was required to include alternatives designed to reduce impacts of particular types, such as impacts on historic resources, aesthetics, and land use.[143] SCALE cites no legal authority supporting a requirement that EIS alternatives be explicitly crafted to reduce impacts of particular types. As explained in the City's Closing Brief, Mr. Weinman testified that nonproject EIS's do not typically include alternatives that are designed around each of the types of impacts evaluated in an EIS, nor are they required to do so.[144]

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[139] The FEIS was not required to consider alternatives not involving increases in development capacity (*see* section IV.A above) or alternatives with higher affordable housing requirements (*see* section IV.D below).

[140] SCALE Brief at 40. As discussed in section V.B.3, below, segregation is not an impact that is required to be evaluated under SEPA in any event.

[141] City Brief at 17–18.

[142] Finally, FNR's challenge to the use of the Growth and Equity Analysis in framing the alternatives is unavailing. FNR Brief at 27. As explained in the City's Brief, contrary to Mr. Steinbrueck's contention, the displacement risk/access to opportunity typology was not the only consideration used in crafting the alternatives, and in any event Mr. Weinman opined that the City's use of it in this context was appropriate. City Brief at 16.

[143] SCALE Brief at 20–22, 32, 38.

[144] Tr. vol. 19, 22:4–23:25, Sept. 7, 2018 (Weinman).

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Instead of crafting alternatives around each of the elements of the environment, the FEIS takes a more holistic approach by integrating variations across numerous elements of the environment within alternatives that are thematically centered on equity. In particular, the preferred alternative incorporates adjustments to alternatives 2 and 3 in a manner intended to address identified impacts, taking into account not only distinctions for access to opportunity and displacement risk but also other factors (including proximity to transit nodes and modifications based on the presence of environmental constraints).[145]

SCALE's contention that, absent an alternative designed to minimize historic resource impacts, the City Council couldn't "evaluate opportunities to modify the proposal in a way to avoid or minimize damage to historic neighborhoods, structures, or landscapes" ignores the totality of what an EIS contains and the role of the alternatives analysis in the overall EIS structure.[146] An EIS is required to contain not only a section on alternatives but also a section on "Affected Environment, Significant Impacts, and Mitigation Measures."[147] As explained at hearing and in the balance of the City's briefing, the FEIS comprehensively and sufficiently discusses impacts and mitigation as to historic resources, aesthetics, and land use (as well as other elements of the environment).

While the alternatives help decision-makers understand how impacts would play out in different scenarios, the impacts and mitigation discussion provides information that the decision-makers can use to evaluate—and adopt—approaches that differ from the precise alternatives studied and reduce impacts.[148] As noted above, SEPA does not require that the FEIS consider every conceivable alternative. Nothing in the SEPA rules supports

[145] FEIS at 2.16–2.17; Tr. vol. 14, 83:20–84:3, August 23, 2018 (Wentlandt).
[146] SCALE Brief at 21.
[147] SMC 25.05.440.
[148] As Mr. Weinman testified, SCALE's approach would be redundant given the mitigation measures already contained in the FEIS. Tr. vol. 19, 22:9–23:5, Sept. 7, 2018 (Weinman).

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the concept that an EIS informs consideration of impacts or mitigation by decisionmakers only to the extent that alternatives are specifically designed to mitigate particular impacts, nor do the rules require that EIS alternatives be specifically designed in that way.[149]

Finally, the impracticality of SCALE's approach is evident from this proceeding. SCALE identifies three types of impacts around which it asserts the City should have crafted alternatives—but the testimony at hearing demonstrates that other Appellants regarded other types of impacts as being critically important as well. Under SCALE's approach, alternatives would also need to be designed around each of those types of impacts. Moreover, it is unlikely that an EIS with alternatives designed around even a subset of those types of impacts would provide information in a comprehensible or useful way. While SCALE suggests that the FEIS should have considered an alternative that "avoided additional growth in historic neighborhoods that have not yet been officially designated," SCALE makes no attempt to explain how a reasonable number of useful alternatives could have been designed around even the three types of impacts SCALE identifies.[150]

D. The FEIS was not required to consider alternatives with higher affordable housing requirements.

As explained in the City's Closing Brief, the City did not consider alternatives with higher affordable housing requirements, because that could lead to development becoming economically infeasible which would potentially decrease overall housing

[149] After alleging that the FEIS should have included an alternative designed to reduce historic resources impacts, SCALE states "[i]f all neighborhoods qualifying for historic designation had already been designated, this would not be an issue," and goes on to discuss the alleged harm from development in not-yet-designated areas. SCALE Brief at 21–22. This is a critique of the FEIS's historic resources impact analysis (a critique which is unfounded, as discussed in section V.C). Fundamentally, however, SCALE's discussion confirms the City's point: a sufficient impact analysis gives the decisionmakers information with which to adopt rezones different than those proposed, regardless of whether an alternative was designed around the impact SCALE perceives.

[150] SCALE Brief at 20.

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production and jeopardize the goal of creating the target number of affordable units, contrary to the City's objectives.[151] The City's economic expert testified that the proposed requirements (topping out at 11 percent of units) were "a very good middle-of-the-road approach."[152] As explained in the City's brief, ample evidence supports the reasonableness of the City's determination not to consider alternatives with higher affordable housing requirements.[153]

SCALE errs in contending that affordable housing requirements greater than 11 percent would meet the FEIS's objectives. SCALE states that Mr. Levitus testified that his alternative of higher affordable housing requirements would meet the FEIS objectives as well or better than the alternatives in the FEIS.[154] However, unlike Mr. Mefford, Mr. Levitus is not a qualified economics expert.[155] Mr. Levitus' views on whether higher requirements were feasible were not based on any analysis he had performed but simply on the experience of peer cities.[156] Mr. Levitus pointed to other cities that have requirements of 20 or 25 percent.[157] However, Mr. Mefford testified that it was not possible to simply compare requirements in different jurisdictions without analyzing all of the relevant variables.[158] Thus, Mr. Levitus's suggestion that higher requirements would meet the FEIS's objectives lacks any factual basis.

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[151] City Brief at 18.

[152] Tr. vol. 10, 109:19–109:25, July 27, 2018 (Mefford).

[153] City Brief at 18–20.

[154] SCALE Brief at 40.

[155] Mr. Levitus has a bachelor's in history and economics, but no professional experience in economics; he is the director of a social justice advocacy nonprofit group. Tr. Vol. 7, 52:12–55:14, July 24, 2018 (Levitus). He stated that he had never conducted any economic modeling or analysis related to the feasibility of development projects. Tr. Vol. 7, 156:2–156:7, July 24, 2018 (Levitus). By contrast, the City's economic expert, Mr. Mefford, has extensive economics training and professional experience in economics, runs a consulting firm focused on economic analysis, and has over 25 years' experience doing economic feasibility analysis. Tr. vol. 10, 79:13–80:24, July 27, 2018 (Mefford); *see also* Hr'g Ex. 228 (Mefford resume).

[156] Tr. vol. 7, 156:8–156:22, July 24, 2018 (Levitus).

[157] Tr. vol. 7, 93:6–93:13, July 24, 2018 (Levitus).

[158] Tr. vol. 10, 109:2–109:18, July 27, 2018 (Mefford).

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As the FEIS explains, a test of a 25 percent MHA requirement using CAI's model found that the number of feasible prototypes dropped to 9 of 23 in strong market areas and 6 of 22 in medium market areas, suggesting that such an alternative would not meet the objectives.[159] Mr. Mefford testified that he agreed with the foregoing finding of the FEIS.[160] He further testified that increasing requirements from 11 percent towards 25 percent would result in decreasing feasibility along a continuum.[161]

SCALE ignores the main point of Mr. Mefford's testimony. SCALE appears to suggest that feasibility is a bright line, such that the question is whether requirements above 11 percent are feasible or not.[162] On the contrary, Mr. Mefford emphasized that feasibility is a continuum and testified that increasing the requirements to levels between 11 and 25 percent was risky for the City because real estate market conditions change, and "if the real estate market doesn't stay as strong as it is when you make those settings, then those settings of affordability requirements and expectations end up being more burdensome than you had analyzed."[163] He warned against "trying to take every penny of profit and send it away from the developers to build these [affordable units]. You want to find a good sweet spot, where there's an incentive to build and enough of a requirement to get something out of that development that would otherwise happen without affordable

[159] FEIS at 2.65. SCALE wrongly insinuates that the City did not do what the FEIS stated, based on a mischaracterization of Mr. Wentlandt's testimony. SCALE Brief at 39 n.11. Mr. Wentlandt testified that the City used CAI's model to test a 25 percent requirement. Tr. vol. 14, 53:1–53:17, Aug. 23, 2018 (Wentlandt).

[160] Tr. vol. 10, 111:22–112:5, July 27, 2018 (Mefford).

[161] Tr. vol. 10, 112:6–112:19, July 27, 2018 (Mefford).

[162] For example, SCALE suggests that Mr. Mefford acknowledged that "he had not ruled out the feasibility of a higher fee." SCALE Brief at 39 n.11. Contrary to SCALE's suggestion, Mr. Mefford did not state that at the cited portion of the tape. Rather, he stated that the proposed fees generally did not cause projects to become infeasible. Tr. vol. 10, 154:11–154:14, July 27, 2018 (Mefford).

[163] Tr. vol. 10, 113:4–113:15, July 27, 2018 (Mefford).

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housing."[164] Based on this testimony, it was entirely reasonable for the City to choose not to be more aggressive and propose higher requirements.

In any event, SCALE's effort to use Mr. Mefford's testimony to minimize the degree of infeasibility caused by increased requirements is unavailing. As noted by SCALE, on cross examination Mr. Mefford pointed out that CAI's report contained a sensitivity analysis as to the effect of a 10 percent increase in overall costs. By analogy to that analysis, he stated that a 50 percent increase in the proposed affordable housing fees left a lot of the prototypes still in the range of feasibility.[165] However, while such an increase had little effect in the high market area, it caused a significant number of prototypes in the medium market area to become infeasible, such that instead of a majority of prototypes in the medium market being feasible, a majority were infeasible.[166] Mr. Mefford also rejected the suggestion that one could substantially increase requirements for certain, highly profitable prototypes without risking driving developers out of Seattle to other jurisdictions.[167]

SCALE also errs in suggesting that the City ignored an available opportunity to increase requirements because some projects might achieve higher rents than assumed by

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[164] Tr. vol. 10, 113:16–113:21, July 27, 2018 (Mefford).

[165] Tr. vol. 10, 134:12–134:18, July 27, 2018 (Mefford).

[166] The sensitivity analysis showed that a 10 percent increase in costs caused the number of infeasible prototypes in the high market area to increase by only one (out of 23); however, such an increase in costs caused the prototypes in the medium market area to go from 65 percent of the prototypes being feasible to only 26 percent of the prototypes being feasible. Hr'g Ex. 229, Exhibits 6 and 8. SCALE's suggestion that "prototype developments that are feasible without the fee remain feasible with the fee" and that "In very few scenarios is the tiny fee the difference between a feasible and infeasible prototype" is misleading. SCALE Brief at 39 n.11. The discussion at the portion of the tape SCALE references addressed the results of the analysis of the proposed requirements, not the results of the sensitivity analysis based on a 10 percent increase in costs. Tr. vol. 10, 154:5–154:14, July 27, 2018 (Mefford).

[167] Tr. vol. 10, 114:6–115:9, July 27, 2018 (Mefford). SCALE's effort to minimize this testimony by alleging that Mr. Mefford "admitted he had not done anything to assess the magnitude of that risk" is misleading. SCALE Brief at 39 n.11. While Mr. Mefford said he didn't quantify how many developers develop primarily or exclusively in Seattle versus in a larger marketplace, he stated he had worked with enough developers to have a feel for that and agreed that "a lot" of developers who work in Seattle also work outside of Seattle. Tr. vol. 10, 129:11–129:15, 157:19–158:1, July 27, 2018 (Mefford).

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the classification of their location on the cost areas map (e.g., high, medium, or low, based on rents).[168] Mr. Mefford acknowledged that there could be projects achieving high rents in areas mapped medium, but he stated that there could also be projects that achieved lower rents than their mapped cost area would suggest, such that the City would be charging too much in those cases.[169] Ultimately, Mr. Mefford testified that it is not practical to calculate MHA requirements based on the rents for particular projects; the City has to draw lines and he opined that the line drawn here was reasonable.[170]

In sum, SCALE errs in suggesting that the City could easily increase the affordable housing requirements by a substantial amount. Ultimately, the City was required to make a judgment about how to weigh the risk that higher requirements would impair attaining the objectives. Based on Mr. Mefford's testimony and all of the other evidence, the City's approach was reasonable.[171]

E. <u>Appellants' contentions that other alternatives would better serve the FEIS's objectives are irrelevant</u>.

Fremont Neighborhood Council's contention that the FEIS is inadequate because it fails to include alternatives "to promote home ownership" due to "deficiencies in the City's interpretation of the MHA objectives" lacks any basis.[172] There is *nothing* in the wording of the FEIS's objectives that requires that alternatives must explicitly focus on promoting homeownership in order for the alternatives to meet those objectives.[173] The

[168] SCALE Brief at 39 n.11.
[169] Tr. vol. 10, 161:8–162:1, July 27, 2018 (Mefford).
[170] Tr. vol. 10, 163:12–163:22, July 27, 2018 (Mefford).
[171] Courts have upheld exclusion of alternatives that would not have attained the agency's objectives and give substantial weight to the agency's determination on that score. *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State Dep't of Transportation,* 90 Wn. App. 225, 229–31, 951 P.2d 812 (1998).
[172] FNC Brief at 10.
[173] FEIS at 2.4.

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MHA proposal allows affordable performance units to be ownership units, and the Office of Housing can invest MHA payments in affordable homeownership projects.[174]

FNC apparently believes that alternatives that include additional or different ways of promoting affordable ownership housing would better serve the objectives (or at least FNC's interpretation of those objectives), but whether a suggested alternative would better achieve the proposal's objectives is irrelevant to whether reasonable alternatives have been evaluated under SMC 25.05.440.D.2. FNC essentially challenges the wisdom of the proposal and objectives as framed by the City—subjects that are outside the scope of an EIS adequacy appeal. Similarly, while other Appellants such as SUN believe the City's approach does not do enough to solve the affordability crisis and that other alternatives would do more, the City's choice not to propose such approaches does not render the FEIS inadequate.[175]

In sum, for all of the foregoing reasons, the FEIS evaluated a reasonable range of alternatives.

V. THE FEIS IMPACTS ANALYSIS IS REASONABLE AND ADEQUATE

As explained in detail in the following sections, Appellants' challenges to the adequacy of the impact analyses fail.

[174] Tr. vol. 15, 93:6–93:12, August 24, 2018 (Alvarado).

[175] SUN's argument that the FEIS "fails to meet its stated objectives" is unavailing. SUN Brief at 5–7. As a factual matter, the record fails to support the idea that the proposal does not advance affordable housing, overall housing production, and equity. SUN may desire that the City propose other approaches that (in SUN's view) would do even better on these scores, but that is not within the scope of an EIS adequacy appeal. As to SUN's specific critiques, section IV.D, above, makes clear that the FEIS was not required to consider alternatives with higher affordable housing requirements. Nor do the facts support SUN's contention that the FEIS does not show how "6,200 net new rent- and income-restricted housing units" would be created. SUN's contentions about demolition of unsubsidized lower-cost housing units are distinct from the FEIS objective of creating new "rent- and income-restricted" units. In any event, as discussed in the next section, the FEIS adequately analyzed demolition as it relates to displacement. SUN Brief at 5–7.

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A. Land use and aesthetics analysis meets the rule of reason.

As explained in the City's Closing Brief, land use and aesthetics analyses are more than adequate.[176] In their closing briefs, Appellants continue to mischaracterize the analysis in the FEIS and "flyspeck" the analysis to suggest more is required. As explained below, Appellants' challenges fail.

1. Appellants continue to mischaracterize the contents of the land use and aesthetics impacts analysis.

In their briefs, Appellants grossly oversimplify the land use and aesthetics analyses before attacking them. For example, SCALE incorrectly asserts that the City simply looked at the impacts in a "linear" manner, assuming all impacts for every tier of zoning change would be the same.[177] They ignore the vast majority of the analyses. While the analyses do begin by categorizing types of land use and aesthetic impacts based on what is known by the tier land use change, that is a standard technique and methodology.[178] But that is only the beginning. The analysis is more fully described in the City's Brief. In addition to the generalized categorization of impacts, it includes identification and consideration of locational factors, precise site-specific mapping (online and in attachments), accompanying graphics to depict various impacts, and nearly 36 pages of detailed neighborhood specific analysis.[179] It includes analysis of the entire study area, not just the urban villages and their expansion areas.[180] The level of analysis is at least typical

[176] City Brief at 20-32.

[177] SCALE Brief at 26.

[178] FEIS 3.109–3.115; FEIS at 3.171–3.177; Tr. vol. 18, 12:1–13, Sept. 4, 2018 (Gifford).

[179] FEIS 3.117–3.155; FEIS 3.169–3.209; Tr. vol. 18, 12:1–13, 41:18–42:6, 50:16–19, 54:4–55:16, 58:13–59:15, 89:8–11, 104:9–19, 108:13–16, Sept. 4, 2018 (Gifford). Mr. Gifford testified how the combination of text in the FEIS and the details provided in the maps allow a decision-maker to adequately understand the impacts of the rezones in areas outside urban village expansion areas. Tr. vol. 18, 93:7–96:11, Sept. 4, 2018 (Gifford).

[180] *See, e.g.*, FEIS at 3.113-115 (including discussion of impacts of zoning changes shown in maps); FEIS at 3.186 (discussion of transition condition); FEIS at 3.187, Ex. 3.3-20 (graphic depicts the relationship that would exist in "areas with transitions between NC zones on mixed use corridors").

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of nonproject actions, in some cases, exceeds the level of analysis that is standard for nonproject actions.[181] This multi-faceted approach that combines specific maps, with EIS text and specific neighborhood description in both the land use and aesthetics chapter exceeds what is the typical level of analysis of aesthetic impacts for a nonproject action.[182] It is a reasonable approach and adequately informs decision-makers of the impacts of the nonproject action.

2. Appellants are without recourse for their challenges to the urban village expansion areas.

Appellants contest the Urban Village expansion areas on their merits, arguing that their "legislative history" in the Comprehensive Planning process precludes the City from pursuing the expansions as part of MHA, that the Expansions are not needed because of existing capacity in the Urban Villages, or that the expansions are otherwise inconsistent with City policy and planning principles.[183] Fundamentally, the Examiner lacks jurisdiction over these challenges. This SEPA appeal solely addresses the adequacy of the FEIS and does not include a broader appeal of the underlying action.[184] Accordingly, the Examiner's jurisdiction is narrow. As explained in the City's Closing Brief, challenges to the wisdom of the proposal, itself, exceed the scope of the Examiner's authority in this adequacy appeal.[185]

The Examiner's only inquiry is to the adequacy of the review of the impacts of these expansions, which Appellants do not directly challenge with their arguments. The FEIS clearly reviewed the potential impacts of expanding the urban village boundaries.

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[181] *See also* Tr. vol. 18, 99:8–17, 233:7–235:15, Sept. 4, 2018 (Gifford); Tr. vol. 19, 36:14–37:3, (Weinman).
[182] Tr. vol. 18, 41:18–42:6, Sept. 4, 2018 (Gifford).
[183] *See* FORC Brief at 2, 40–43; FNR Brief at 23, 25–26.
[184] SMC 25.05.680.B; WAC 197-11-680(3)(a)(vi)(b).
[185] *See* City Brief at 3. *See also CAPOW v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995); Settle, *supra* n.6, at 14–9.

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The FEIS identifies the expansion areas in the study area and attributes impacts to the expansion, in general.[186] The chapters address impacts within those specific areas using both generalized discussion of the impacts of urban village expansion areas,[187] as well as neighborhood specific analysis.[188] Because Appellants' various challenges to the City's decision to include Urban Village expansions (whether due to the legislative history, their purported need, or consistency with planning principles) do not speak to the adequacy of the City's environmental review of the expansions, they must be dismissed.

To be very clear, the City contests Appellants' various substantive challenges to those expansions. Contrary to their assertions, the City Council did not reject the concept of the urban village expansions as part of the Seattle 2035 Comprehensive Plan process.[189] Rather, the Council deferred decision on them so that further analysis and review could be completed in conjunction with MHA.[190] Nor does the Council's decision to exclude them from final action on Seattle 2035 Comprehensive Plan preclude the City from taking up the topic again in the MHA FEIS.[191]

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[186] *See* FEIS at 2.2–2.3; 2.41–2.63

[187] *See, e.g.,* FEIS at 3.109 (impacts common to all alternatives includes impacts due to expansion); *id.* at 3.117; *id.* at 3.121, 3.128 (land use impacts from alternative 2 urban village expansions, generally); *id.* at 3.131, 3.139–3.140 (land use impacts from alternative 3 urban village expansions, generally); *id.* at 3.142, 3.154 (land use impacts from preferred alternative urban village expansions, generally); *id.* at 3.190 (aesthetics section discussing urban village expansions); *id.* at 3.196 (aesthetic impacts from alternative 2 urban village expansions, generally); *id.* at 3.199 (aesthetic impacts from alternative 3 urban village expansions, generally); *id.* at 3.297, 3.300–3.301, 3.303 (historic resources analysis discusses historic resources within urban village expansion areas); *id.* at 3.318, 3.324–3.325, 3.330–3.331, 3.336–3.337 (biological resources addresses expansion areas).

[188] Most notably, the 35 pages of neighborhood-specific land use and aesthetic analysis address the impacts of the 11 proposed individual expansion areas and unique locational issues that pertain to many. *See, e.g.,* FEIS at 3.119–3.155. *See also id.* at 3.196 (aesthetic impacts from alternative 2 urban village expansions includes identification of specific urban villages with unique issues); *id.* at 3.199 (aesthetic impacts from alternative 2 urban village expansions includes identification of specific urban villages with unique issues); *id.* at 3.330, 3.336 (biological resources notes issues with specific urban village expansion configurations)

[189] FORC Brief at 40.

[190] Tr. vol. 14, 61:8–73:14 Aug. 23, 2018 (Wentlandt).

[191] *See generally City of Arlington v. CPSGMHB,* 164 Wn.2d 768, 794-795, 193 P.3d 1077 (2008) (zoning decision is an exercise of discretion that will not be overturned by Board unless found to be clearly erroneous, such that City can reach entirely opposite conclusion when implementing mandatory GMA

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Moreover, expansion of the Urban Villages is authorized by and consistent with the City's comprehensive plan, including specifically Growth Strategy Policy 1.12.[192] The only authority to which Appellants cite in support of their allegations is the City's urban village strategy and Mr. Steinbrueck's report that was prepared as part of the Seattle 2035 process. Contrary to Appellants' assertions, neither supports their allegations that the City cannot pursue expansions of the Urban Villages. The expansion of urban villages is entirely consistent with the urban growth strategy that directs a majority of the growth into urban villages, but does not preclude their expansion.[193] Despite the Appellants' various arguments that there is existing capacity in the Urban Villages, they have not identified any authority, nor does any authority exist, that would preclude the City from expanding Urban Village boundaries unless there is insufficient capacity.[194] Appellants' reliance on Mr. Steinbrueck's report is similarly misguided. The expansion of the urban villages is consistent with the principles expressed in that report, and, importantly, the report does not have any regulatory effect, even if the expansions were inconsistent with them.[195] Contrary to their arguments, those principles in his report do not preclude the proposed expansions.

Perhaps most importantly, these arguments are irrelevant in this EIS adequacy appeal because they go to the wisdom of the proposal. The only relevant question before the Examiner in this appeal is whether the FEIS analyzed the impact of the challenged

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obligations on the same area and still be within range of discretion allowed by law). *See also* Prelim. Order on Prehearing Motions at 2 (dismissing arguments that amendments to the comprehensive plan are barred).

[192] Tr. vol. 14, 71:10–72:12, Aug. 23, 2018 (Wentlandt) (citing Hr'g Ex. 3 at 26, Growth Strategy Policy 1.12).

[193] *Id.*, *See also* Tr. vol. 19, 43:2–44:21, Sept. 7, 2018 (Weinman).

[194] Mr. Steinbrueck's tortured analogy to expansion of Urban Growth Areas does not support Appellants' position. *See* Tr. vol. 19, 43:2–44:21, Sept. 7, 2018 (Weinman).

[195] Tr. vol. 14, 72:12–73:14, 227:10–228:12, Aug. 23, 2018 (Wentlandt).

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aspects of the proposal. It does. The Examiner should reject Appellants' challenges to the urban village expansions.

3. The Summary of Comprehensive Plan Consistency is Adequate.

As explained in the City's Closing Brief, the City satisfied SEPA requirements to include "when appropriate," a "summary of existing plans (for example: Land use and shoreline plans) and zoning regulations applicable to the proposal, and how the proposal is consistent and inconsistent with them."[196] The City took a holistic approach to addressing this requirement, which includes: summaries of particularly relevant policies (the narrow section that is the focus of most Appellants' claims); a summary of each alternative's consistency or inconsistency with various plans;[197] discussion throughout the document of the consistency of the MHA proposal with broader Comprehensive Plan themes and strategies;[198] and use of metrics that provide quantitative comparisons of the 20-year growth scenario under the alternatives compared to the no action alternative that parallels the Seattle 2035 Comprehensive Plan scenario. [199] The City's approach in the FEIS is consistent with the City's past practice and satisfies SEPA requirements.[200]

Appellants in their briefs continue to incorrectly argue that SEPA requires a very specific and exhaustive policy-by-policy analysis to determine whether the proposal is consistent with the comprehensive plan.[201] The plain language of the controlling SEPA rules does not require the detailed policy-by-policy analysis Appellants demand. Nor does

[196] WAC 197-11-440(6)(d)(i); SMC 25.05.440.E.4. City Brief at 30.

[197] *See* FEIS at 3.107–108.

[198] Tr. vol. 14, 135:2–137:16, Aug. 23, 2018 (Wentlandt). For example, the FEIS uses the same overall structure, metrics and approach for assessing growth and impacts as the Seattle 2035 Comprehensive Plan, which allows for quantitative comparison and more informative assessment of consistency than mere policy evaluation. *Id*. at 135:6–136:9. Additionally, the FEIS repeatedly acknowledges that the overall pattern of growth pursuant to the proposal follows the City's comprehensive plan growth strategy that centers on urban villages. *Id*. at 136:9–137:3.

[199] *Id.*

[200] Tr. vol. 14, 133:9–24, Aug. 23, 2018 (Wentlandt); Tr. vol. 19, 37:24–39:11, Sept. 7, 2018 (Weinman).

[201] *See, e.g.,* SCALE Brief at 47; FORC Brief at 42.

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it require summaries of each of the neighborhood plans, as demanded by several Appellant groups.[202] The Appellants simply read too much prescriptive and specific effect into a regulation that acknowledges flexibility ("when appropriate") and generalization ("summary"). The City's approach to summarizing consistency with the comprehensive plan is within the range of discretion and, from the City's perspective, accomplishes the regulatory objective better than the exhaustive "policy-by-policy" approach demanded by the Appellants.[203]

Moreover, the Appellants' strict and extreme interpretation of the regulations is contradicted by WAC 197-11-055, by which the lead agency is encouraged to proceed with review when it has developed only the "principal features" of a proposal. In the nonproject context, where the changes typically involve amendments to planning documents or development regulations, it would be incongruous to encourage the agency to proceed with review when only the "principal features" of amendments to those plans and regulations are developed, but then simultaneously require the agency to nevertheless prepare the plan-by-plan and policy-by-policy analysis and revisions that Appellants demand. The City's approach satisfies SEPA's requirements to include a "summary" of plans, and the proposal's inconsistency and consistency.

As explained in the City's Closing Brief, the City disputes the merits of Appellants' argument that the proposal is inconsistent with the specific policies Appellants have identified.[204] In its brief, JuNO adds specific argument that the proposal

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[202] *See* Beacon Hill Council of Seattle Closing Brief ("BHCS Brief") at 2–5.

[203] *See* Tr. vol. 14, 135:2–137:3, Aug. 23, 2018 (Wentlandt); Tr. vol. 19, 37:24–39:11, Sept. 7, 2018 (Weinman).

[204] Tr. vol. 14, 139:20–143:5, 145:23–150:1, 243:25–245:10, Aug. 23, 2018 (Wentlandt) (testifying that only seven of the policies listed by Mr. Steinbrueck would require amendment to implement MHA). As acknowledged on page F-11 of Appendix F of the FEIS, the City has identified ten neighborhood plan policies that require amendment, only some of which are included on Mr. Steibreuck's list. Tr. vol. 14, 142:13–152:13, Aug. 23, 2018 (Wentlandt). *See also* Hr'g Ex. 244 at 004937, 004945-004946 (listing ten

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is inconsistent with LU 7.2, 7.3, and 7.5. Contrary to their arguments, the Proposal is consistent with these policies because: it expands the range of single-family zones by expanding use of RSL (7.2); it encourages a greater range of infill redevelopment in single-family areas inside of urban villages and centers (7.3); and, it encourages other housing types that are attractive and affordable in single family areas (7.5). Broad policy statements by their nature are subject to interpretation, and other interpretation of these same policies could be possible with respect to certain narrow aspects of the proposal (the highest intensity rezones in some specific locations in single family areas).[205] But those same aspects are highly consistent with other comprehensive plan policies.[206] More generally, JuNO's additional argument on these three policies highlights how an expansive policy-by-policy analysis against the backdrop of a comprehensive plan with hundreds of policies and competing policy directives would provide limited value for the purposes of understanding environmental impacts through the EIS. For that very reason, the City favored the multi-faceted, holistic approach to summarizing comprehensive plan consistency described above to satisfy the generalized SEPA requirement to provide a summary and evaluation of consistency.

Finally, it is worth noting that, just as the City disputes the merits of the Appellants' evaluation of the proposal's consistency with specific policies, the City also disputes the veracity of their bold and overstated assertions that the proposal would "eviscerate" neighborhood plans and that it is "incongruous" with the City's emphasis on

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neighborhood plan policies that are inconsistent and require amendment); Hr'g Ex. 49 (materials soliciting community input on how to amend the identified ten neighborhood plan policies).

[205] For similar reasons, two of the neighborhood plan policies cited by JuNO (WSJ G-1, WSJ P-1) are consistent, while the city has identified the third policy they reference (WSJ P-13) as one that the Proposal will amend.

[206] *See., e.g.,*. LU 8.1, LU 8.10, GS 1.7, GS 1.13, GS 2.3, H G2, H 3.5., H 5.18, H 5.20)

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neighborhood planning, generally.[207] The proposal, including the expansion of urban villages, is consistent with the urban village strategy.[208] Additionally, there is no evidence to support their assumption that the proposal will eliminate neighborhood design review guidelines or that they will not be applied to future development projects.[209] To the contrary, as explained in the City's Closing Brief, existing municipal regulations apply neighborhood design guidelines and the FEIS expressly references the requirement as mitigation.[210] Thus, nothing about this proposal would eliminate or impair neighborhood design review. The City's analysis of consistency with planning documents is adequate.

4. <u>The use of computer-generated depictions in the aesthetic impact analysis is reasonable</u>.

Several Appellants challenged the use of computer-generated images to demonstrate potential aesthetic impacts.[211] There was no technical or expert testimony to challenge the accuracy of the portrayal of development allowed by existing code and by the proposal.[212] Rather Appellants primarily challenged the graphics on two grounds: first, they argue that the City should have used photographs or depictions of actual locations;[213]

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[207] *See* JuNO Brief at 10–11; BHCS Brief at 2–5.

[208] *See* Section V.A.2, above.

[209] *See* JuNO Brief at 10–11.

[210] *See* FEIS at 3.157; SMC 23.41.010.

[211] *See* JuNO Brief at 39–41; SCALE Brief at 27. While SCALE only cites to two pages of the FEIS, the graphics used to depict potential aesthetic impacts from future development are much more extensive. FEIS at 3.178–3.189, 3.207.

[212] Tr. vol. 14, 124:1–6, 125:17-23, Aug. 23, 2018 (Wentlandt)(testifying that graphics are "dimensionally accurate models of the proposed development standards" and that these dimensionally accurate models were "brought into a dimensionally accurate -- representative base" such that "all of the setbacks, the space between the buildings, et cetera, is -- you know, is accurate to the -- to the foot."); *See also* Tr. vol. 18, 107:2–108:7, Sept. 4, 2018 (Gifford).

[213] *See* SCALE Brief at 27 ("They do not represent any actual real street in Seattle… Those graphics do not show any real views from any of the neighborhoods…"); JuNO Brief at 39–40 ("…they are drawings, not photographs…. ")

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and second, they argued that the City opportunistically selected flattering depictions that used views or angles designed to minimize impacts.[214] Both allegations fail.

First, there is no authority supporting the general principle that the City was required to use photographs or depict actual locations. In fact, the City's deliberate choice to use renderings was reasonable. As explained by Mr. Wentlandt, the City was concerned that photographs or depictions of specific locations could have a limiting effect by focusing on impacts at a specific location to the exclusion of others.[215] The graphics were designed to have broader applicability and provide focus on the impact rather than the area, and the FEIS supplemented the graphics with text that describes how site-specific factors could augment impacts from what is depicted in the representations.[216]

While the Appellants demand photographs or depictions of actual locations, their approach would be unreasonable. SCALE argues that the City should have prepared graphics for all the "combinations of height, bulk, and scale adjacent to each other [that will purportedly be] unleashed the proposal."[217] Yet, it would be patently unreasonable to require the City to prepare graphics for the many more permutations and combinations of development possibilities for each zoning change in each area.[218] To provide the specific detail at the locations that capture all the neighborhood specific-detail Appellants demand would require graphics or photographs for every part of the City within the study area,

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[214] *See, e.g.,* JuNO Brief at 40 (arguing that the side view does not communicate the "side-by-side" impact); SCALE Brief at 28 (arguing that the perspective "downplays the height impacts").

[215] Tr. vol. 14, 127:1–25, Aug. 23, 2018 (Wentlandt). Thus, contrary to JuNO's assertions, photographs they present actually misrepresent the potential impact of the proposal. Hr'g Ex. 241 at 12–14, which JuNO contends is representative of impacts of the impacts of Lowrise development in the vicinity of single family home is actually depicting construction pursuant to NC standards. Tr. vol. 11, 90:23–25, 97:1-2, 158:14–159:5, Aug. 20, 2018 (Tobin-Presser). Additionally, it does not represent development that could occur because it does not reflect mitigation that is incorporated into the proposal that is expressly designed to minimize impacts on adjacent existing development, such as upper-level setbacks and articulated façades. Tr. vol. 18, 105:19–106:9, Sept. 4, 2018 (Gifford).

[216] Tr. vol. 14, 127:1–25, Aug. 23, 2018 (Wentlandt).

[217] SCALE Brief at 28.

[218] Tr. vol. 14, 127:1–25, Aug. 23, 2018 (Wentlandt).

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despite the fact that the precise location and details of any specific project are unknown. SEPA does not require that level of impact analysis at this stage precisely because there is "less detailed information available on their environmental impacts and on any subsequent project proposals" at the time of the nonproject action.[219] Indeed, the regulations specifically indicate that "site-specific analyses are not required."[220] Thus, the rules, themselves, do not support Appellants' arguments and invite the City's approach of focusing on representative areas of concern.

Finally, even if every neighborhood-specific concern is not captured in a graphic, it bears repeating that the FEIS discusses the neighborhood-specific aesthetic issues of concern identified by the Appellants. For example, SCALE argues that the graphics fail to depict impacts of NC areas adjacent to single family zones and LR3 adjacent to residential areas, but those impacts are expressly identified in text.[221] JuNO argues that the renderings "fail to take into account the unique conditions of the WSJ Urban Villages" because they do not address topographic changes in that village.[222] However, the FEIS text expressly addresses the impact of that condition.[223] In short, there is no support for Appellants' demands for depictions of actual locations or Appellants' contentions that the FEIS failed to address impacts from conditions that were not depicted.

Second, there is no support for Appellants' arguments that the views depicted were misleading or otherwise unreasonable. As a preliminary matter, Appellants focus on one perspective depicted in the FEIS, but ignore the various perspectives that are included in

[219] SMC 25.05.442.A; WAC 197-11-442(1).
[220] SMC 25.05.442.C; WAC 197-11-442(3).
[221] *Compare* SCALE Brief at 28 *with* FEIS at 3.148 (describing impacts of increased heights from NC zoning on adjacent single family areas).
[222] JuNO Brief at 40.
[223] FEIS at 3.118.

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the FEIS.[224] More generally, the City was reasonable in choosing the street-level view for presentation in the FEIS. As explained at hearing, that specific perspective was included in the FEIS to better approximate the manner in which citizens typically experience neighborhoods from the street level.[225] Appellants' arguments that the FEIS should have presented their preferred view are not supported by anything other than their non-expert difference of opinion. That is insufficient to support Appellants' challenge. Especially where the City has provided a level of detail for aesthetic impact analysis that exceeds what is typically included,[226] the City's approach satisfies the rule of reason.

5. The City's discussion of proposed amendments to FAR for Lowrise zones is adequate.

SCALE asserts that the FEIS incorrectly characterizes the increase proposed to the Floor Area Ratio for the LR1 zone in Appendix F, suggesting the difference in FAR for that zone between existing regulations and the proposal is larger than what is described in the table in Appendix F.[227] In fact, the range of differences in FAR described in the FEIS is accurate. Under current code, the allowed FAR for LR1 has two possible values. The table in Appendix F of the FEIS to which SCALE cites as evidence of the purported error indicates that it is comparing the maximum FAR allowed in the zone under existing code to the maximum FAR that will be allowed under the proposal.[228] Appellants in their brief do not acknowledge the two values allowed under current code or the explanation of the use of maximum FAR values in the table, and simply assert (incorrectly) that the table in

[224] Tr. vol. 14, 125:24–127:9, Aug. 23, 2018 (Wentlandt). In addition to the graphics included in the FEIS chapter, Appendix F includes additional computer generated graphics. *See, e.g.,* FEIS, App. F, at 20 (high level view of LR1); at 18 (street level view).

[225] Tr. vol. 14, 127:1–9, Aug. 23, 2018 (Wentlandt).

[226] *See also* Tr. vol. 18, 99:8–17, 233:7–235:15, Sept. 4, 2018 (Gifford); Tr. vol. 19, 36:14–37:3, (Weinman).

[227] SCALE Brief at 30.

[228] FEIS at App. F, at F2, Ex. F-2 (note to FAR limit under table describes requirements under current code for achieving maximum under existing and proposed regulations).

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Appendix F is in error because the FEIS did not compare to the minimum of the two values under current code. The summary of the change in Exhibit 3.3-9 of the FEIS also correctly identifies the range of the increase in "maximum FAR" for LR1 as between 0.1–0.3 depending on building type.[229]

Appellants correctly point out a scrivener's error in another sentence which refers to the range in increase of FAR for LR1 as between "0.1–0.2." rather than 0.1–0.3. Similarly, Appendix F inadvertently inverts the maximum FAR values for rowhouses and townhouses in the LR 1 and LR2 zones, though that does not change the accuracy of the range of increases that were used in the analysis, which remains 0.1–0.3, despite the inverted values in App. F-1. Those unintentional scrivener's errors is the type of harmless error that does not support a claim that the FEIS is inadequate.[230]

6. The City's analysis of impacts to views, shadowing, and scenic routes is reasonable.

As explained in the City's Closing brief, the extent of the City's aesthetic analysis, which includes its analysis of shading impacts and impacts to views (including views from scenic corridors), exceeds what is typically done for nonproject EISs. Nevertheless, Appellants challenge the extent of the analysis of views, shadowing and scenic resources. Their claims are classic flyspecking that is not sufficient to support their claim that the FEIS is inadequate.

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[229] FEIS at 3.172.

[230] *See* City's Brief at 47 and authorities cited therein. Because this is a nonproject action, the FEIS is assessing the impact of any of the housing types allowed in the LR zones, such that the range of FAR increase is what is relevant. Thus the inadvertent inversion of values is immaterial to the analysis. Similarly, the incorrect recitation of the range for LR1 in one location when it is correctly identified everywhere else, is a scrivener's error that is immaterial to the analysis. Ultimately, SCALE's entire argument incorrectly assumes that a distinction of .1 in the value of the FAR dictates the outcome of the aesthetic analysis for that, despite the only expert testimony to the contrary. Tr. vol. 18, 190:15–191:6, Sep. 4, 2018 (Gifford).

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As explained in section III.C, above, Appellants grossly mischaracterize the totality of the analysis of these issues. Beyond their mischaracterization, Appellants rely on two additional arguments to support their claims, neither of which is compelling. First, Appellants argue that SMC 25.05.675.Q.2 requires the City to have identified specific public parks, schools and street ends that will be affected by the proposal. Appellants misread the code. The provision to which they cite is a part of the City's substantive SEPA policies upon which the City may rely to impose mitigation. The specific section to which they cite pertains to shadow impacts. However, the text anticipates application of that subsection only to specific projects, as opposed to nonproject actions.[231] The section's limited applicability to project actions (as distinct from nonproject actions) is further supported by the level of inquiry the code requires that can only be ascertained at the project stage. The detailed analysis of sunlight blockage and shadow impacts that the provision requires can only be completed when details of a specific proposal are under review.[232] Therefore, SCALE's reliance on a substantive SEPA policy that is intended to develop mitigation for shadow impacts from project-actions is misplaced.

Second, SCALE relies on comparisons to the U District and Uptown EISs. Most importantly, as explained above, comparison to another EIS that may include more detail is not sufficient to demonstrate that the approach in this FEIS is unreasonable. Moreover, witnesses explained the different approach in the neighborhood-level analysis based on a

[231] SMC 25.05.675.Q.2.d ("When the decisionmaker finds that a proposed project would substantially block sunlight from open spaces listed in subsections Q2a and Q2b above at a time when the public most frequently uses that space, the decisionmaker may condition or deny the project…")(emphasis added).

[232] *See, e.g.,* SMC 25.05.675.Q.2.c ("The analysis of sunlight blockage and shadow impacts shall include an assessment of the extent of shadows, including times of the year, hours of the day, anticipated seasonal use of open spaces, availability of other open spaces in the area, and the number of people affected."). As explained by Mr. Gifford, this type of shadow analysis is very project-specific and speculative without more detailed information. *See* Tr. vol. 18, 234:4–235:15, Sept. 4, 2018 (Gifford).

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more detailed understanding of locations.[233] Accordingly, Appellants have failed to demonstrate that the analysis of views (including from scenic routes) and shadowing impacts is unreasonable.

Indeed, even SCALE's own brief contradicts its later arguments that a detailed level of aesthetic analysis is required at the nonproject phase, acknowledging at one point that review for nonproject actions "will not be as specific as an EIS for a specific project; the latter can address details like the shading cast by a particular building design…"[234] Thus, SCALE, itself acknowledges that the impact analysis need not provide the detail of shadow impacts they later argue should have been provided. The analysis of view and shadowing impacts is reasonable for the nonproject stage.

7. The Land Use and Aesthetics Analyses Sufficiently Characterized Existing Conditions.

Appellants' challenges to the characterization of existing conditions in the land use and aesthetics chapters are without merit. The City's Closing Brief anticipated many of the Appellants' specific challenges to the adequacy of the description of the affected environment and the City's response is not repeated here. In summary, SEPA requires lead agencies to "succinctly describe the principal features of the environment that would be affected."[235] This "description of the existing environment is to be no longer than necessary to understand the impacts and alternatives."[236] As explained in the City's Closing Brief, the FEIS meets this standard and describes baseline conditions by incorporating the very analysis of existing conditions from the environmental review for

[233] *See, e.g.,* Tr. vol. 18, 253:11–254:14, Sep. 4, 2018 (Gifford); Tr. vol. 18, 180:14–182:9, Sept. 4, 2018 (Gifford).
[234] SCALE Brief at 9.
[235] SMC 25.05.440.E.3.a; WAC 197-11-440(6)(c)(i).
[236] Settle at Section 14.01[2][a], 14–57.

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Seattle 2035 Comprehensive Plan.[237] Additionally, existing conditions in specific neighborhoods is further described in the neighborhood-specific discussion in the FEIS impact analysis.[238] Finally, the FEIS uses photographs depicting representative existing built form with accompanying narrative description in the aesthetic chapter. This approach is consistent with SEPA.

As they did at hearing, Appellants in their briefs ignore the totality of this characterization of existing conditions and focus primarily on the text in sections 3.159–3.163. That ignores the full discussion of the affected environment on which the City relies. Only SCALE briefly seeks to address the incorporation of the baseline discussion in Seattle 2035 Comprehensive Plan, but, SCALE's arguments that the Seattle 2035 discussion is inadequate is not supported by a closer inspection of that text. While it is true that the Comprehensive Plan EIS included analysis of areas outside the MHA study area, it is inaccurate to conclude that the document "simply does not provide any meaningful information about the affected environment" in the MHA proposal.[239] For example, the discussion of existing conditions in Seattle 2035 Comprehensive Plan which is incorporated into the MHA FEIS provides existing zoning as well as existing land use throughout the city, including throughout the MHA study area.[240] It also includes the same categories of demographic information throughout the city and, therefore, the study area, as included in the Uptown and U District EIS, to which Appellants point as a

[237] *See* FEIS at 3.99 (in the section describing "Affected Environment" the EIS indicates that "This Chapter relies primarily on the background information contained in" the Seattle 2036 Comprehensive Plan EIS.) The incorporated pages from the Seattle 2035 Comprehensive Plan EIS include the information Appellants purport to be missing. *See* Tr. vol. 18, 99:5–101:16, Sept. 4, 2018 (Gifford); Hr'g Ex. 4 at 3.4-1–3.4-14.

[238] *See, e.g.,* Tr. vol. 18, 101:17–104:19, Sept. 4, 2018 (Gifford); FEIS at 3.122.

[239] SCALE Brief at 34.

[240] Tr. vol. 18, 99:5–101:20, Sept. 4, 2018 (Gifford).

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model.[241] These are sufficient to satisfy SEPA's standards for the discussion of the "affected environment."

Additionally, Appellants continue to assert that even more detail is needed, even though SEPA only requires the City to "succinctly describe the principal features of the environment that would be affected" in a manner that is "no longer than necessary to understand the impacts and alternatives."[242] For example, Appellants continue to challenge the adequacy of the photographs and descriptions of existing housing types by focusing on hyper-specific purported distinctions with their respective urban villages. These demands for even more distinction and detail are more than what is required to understand the impacts of the alternatives and are insufficient to demonstrate that the City's description is unreasonable.[243] The purpose of the baseline conditions section is not to describe each and every home or neighborhood precisely.[244] While it is true that the photographs showing existing housing types are not taken in all neighborhoods, Appellants are incorrect when they allege they are not "representative" simply because they are not taken in a specific location.[245]

Moreover, Appellants' comparisons to the description of the affected environment in other nonproject EISs is unavailing. Even if they were able to demonstrate differences with other EISs, the level of detail in one EIS does not dictate what is required in order to

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[241] Tr. vol. 18, 249:14–250:23, Sept. 4, 2018 (Gifford)(discussing the existing conditions summary in the FEIS, and concluding that "so, in that sense, it's actually quite similar to the Uptown and U District EISs…").

[242] SMC 25.05.440.E.3.a; WAC 197-11-440(6)(c)(i); Settle at Section 14.01[2][a], 14–57.

[243] *See. e.g.,* City Brief at 29.

[244] Tr. vol. 18, 55:17–59:15, Sept. 4, 2018 (Gifford).

[245] Moreover, the specific complaints that the photograph of infill development does not represent the infill development in West Seattle Junction fails to understand the purpose of the photograph. As explained, the photograph demonstrates what *could* be built on single family lots based on what code currently allows. Tr. vol. 18, 57:12–58:12, Sept. 4, 2018 (Gifford). It is not intended to represent what actually *has* been built in all instances in all urban villages. *Id.* Ms. Tobin-Pressers survey of what has actually been built over the last several decades does not represent what *will* be built based on current trends, or could be built under current code; nor does it not challenge the accuracy of what the photo included in the FEIS was intended to convey.

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be reasonable or that the level of detail in the MHA FEIS is unreasonable. Moreover, the totality of this description is comparable to the level of detail of baseline conditions in the other nonproject EISs upon which they rely.[246] The Uptown and U District EISs do not go through the exercise demanded by Appellants and include only a handful of photographs.[247] The level of discussion is sufficient for purposes of the analysis.[248] Indeed, because it incorporates the very discussion of affected environment that was used for the Seattle 2035 Comprehensive Plan EIS, it is, by definition, comparable to the level of discussion of baseline conditions in another nonproject EIS.

Finally, Appellants' reliance on a single NEPA case is unavailing. Although NEPA case law may be helpful in some circumstances, SEPA case law and regulations control when there are any divergences or differences between the federal and state standards.[249] The NEPA case to which Appellants cite is not informative or controlling because the Court's conclusion is premised on a key distinction under NEPA. In that case, the court determined that the discussion of the affected environment was flawed because it failed to identify endemic invertebrates known or likely to exist in the description of the affected environment and for failing to analyze impacts to those species.[250] Under SEPA, however, the regulations direct lead agencies to exclude that level of detail from the description of the affected environment, noting that "Inventories of

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[246] *See* Tr. vol. 18, 104:2–104:19, Sept. 4, 2018 (Gifford); Tr. vol. 18, 249:14–250:23, Sept. 4, 2018 (Gifford) (testifying that analysis of baseline conditions in MHA FEIS is comparable to Uptown and University District EISs).

[247] Tr. vol. 18, 250:24–251:12, Sept. 4, 2018 (Gifford). *See also* Hr'g Exs. 306 and 307.

[248] Tr. vol. 18, 59:12–15, Sept. 4, 2018 (Gifford).

[249] *See* City of Seattle's Response ("City's Resp.") to SCALE's Mot. Summ. J. at 9–10, 20–23.. *See also., Alpine Lakes Prot. Soc. v. Washington State Dep't of Ecology*, 135 Wn. App. 376, 394 n.24, 144 P.3d 385, 394 n.24 (2006) (declining to apply NEPA case law because of differences between NEPA and SEPA); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 312, 996 P.2d 582, 592 (2000) (stating that federal case law is inapplicable where there are differences between state and federal statutes, or where there is contrary state authority).

[250] *Ctr. For Biological Diversity v. BLM,* 422 F. Supp.2d at 1165–66.

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species should be avoided, although rare, threatened, or endangered species should be indicated."[251] Thus the sole legal authority upon which Appellants rely does not accurately reflect the level of detail required under SEPA. The City succinctly described the "principal features" of the environment that would be affected sufficiently to inform the reader.

B. The FEIS's housing and socioeconomics impact analysis exceeds SEPA requirements and meets the rule of reason.

1. The FEIS adequately analyzed physical displacement impacts.

SCALE's six-line argument fails to demonstrate any defect in the FEIS's analysis of physical displacement impacts. Contrary to SCALE's contention, the FEIS did not just use "past trends to forecast the future" with respect to demolitions.[252] Rather, the FEIS used two methods to estimate the demolitions that would result from the proposal: the "parcel allocation" approach and the "historic trends" approach.[253]

The "parcel allocation" approach involved a parcel-by-parcel analysis that examined the likelihood of redevelopment of individual parcels.[254] The "historic trends" approach estimated demolitions based on a continuation of the 2010–2016 ratio of net new housing units permitted to units demolished, and resulted in a higher estimate of demolitions.[255] As Mr. Ramsey explained, the "historic trends" approach *overstated* the amount of demolition that would occur in the future because it did not take into account the increased development capacity under the proposal.[256]

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[251] WAC 197-11-440(6)(c). NEPA does not have the same instruction to avoid inventories, and in *CBD*, there is no indication that the missing endemic species were rare, threatened, or endangered.
[252] SCALE Brief at 46.
[253] FEIS at 3.69–3.70 and App. G at 10–12.
[254] Tr. vol. 15, 201:16–204:2, Aug. 24, 2018 (Ramsey).
[255] Tr. vol. 15, 204:16–205:8, Aug. 24, 2018 (Ramsey).
[256] Tr. vol. 15, 205:20–206:16, Aug. 24, 2018 (Ramsey).

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SCALE erroneously contends that the historic trends approach is flawed because it allegedly did not recognize that "past redevelopment primarily involved the 'low hanging fruit' of empty lots or parcels."[257] SCALE confuses the two different approaches. As Mr. Ramsey explained, the "parcel allocation" approach takes into account that parcels that are underdeveloped relative to their development capacity would be more likely to redevelop.[258] At hearing, Mr. Ramsey specifically rejected the idea that the "empty lot" issue made the historic trends approach problematic or changed the fact that the historic trends approach provided an appropriate upper ceiling for estimating demolitions:

> I think exactly the types of issues Mr. Bricklin brought up as making a historic trends analysis problematic looking forward, that's why we chose a parcel allocation method as the first method of analyzing, because it accounts for the fact that there may be less empty parking lots than there were back in the year 2000, and it accounts for what's actually available for development moving forward. So, yeah, it's a better analysis to account for those types of issues. And it came up with a lower estimate of demolitions than historic trends analysis did. That's one reason we're confident that historic trends is a high end estimate, because the more rigorous method that accounts for all of these issues that Mr. Bricklin identified, came up with a lower estimate of demolitions than the historic trends approach.[259]

Given Mr. Ramsey's testimony, there is no factual basis for SCALE's suggestion that, because of the "empty lot" issue, the FEIS "misleadingly understates likely physical displacement because of its inappropriate use of this historic data."[260]

Finally, SUN's critique of the FEIS's physical displacement analysis lacks any basis.[261] As Mr. Ramsey testified, the FEIS acknowledged the limitations of Tenant

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[257] SCALE Brief at 46.

[258] Tr. vol. 15, 202:3–202:22, Aug. 24, 2018 (Ramsey) (stating "So basically if you have a parking lot with nothing developed on it, and you could develop a 10-story building, there's quite a bit of additional capacity compared to what you have now so that that would be very high on our list of redevelopable parcels.").

[259] Tr. vol. 16, 99:13–100:7, August 30, 2018 (Ramsey). In response to Mr. Bricklin's question, Mr. Ramsey also stated "I don't agree that the historic approach underestimates displacement" due to there being fewer empty lots going forward. Tr. vol. 16, 56:15–56:20, August 30, 2018 (Ramsey).

[260] SCALE Brief at 46.

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Relocation Assistance Ordinance (TRAO) data to estimate how many low-income households would be displaced by demolitions, but he explained why that was the best data available and why its use was reasonable.[262] Similarly, SUN's arguments based on the physical displacement analysis in the University District EIS are unavailing.[263] In sum, the FEIS adequately analyzed physical displacement impacts.

2. The FEIS's analysis of economic displacement impacts cannot be challenged in this appeal and is adequate in any event.

As discussed in the City's Closing Brief, SEPA did not require the FEIS to analyze economic displacement. While the City opted to include such analysis, any defect in that analysis cannot be the basis for a challenge to EIS adequacy. The City incorporates section VI.B.2.a of its Closing Brief by reference here. Based on that discussion, the Examiner must disregard Appellants' arguments to the adequacy of the FEIS's analysis of economic displacement impacts, as the Examiner lacks jurisdiction to evaluate the adequacy of that analysis.[264]

Even if the Examiner could evaluate the issue, the FEIS adequately analyzed economic displacement impacts. As discussed in the City's Closing Brief, the FEIS discussed (and referenced substantial research demonstrating that) increased housing supply is likely to reduce upward pressure on market-rate housing costs and reduce

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[261] SUN Brief at 9–11.

[262] City Brief at 35 n.191.

[263] SUN fails to show any defect in the University District EIS (whose adequacy the Examiner upheld), but in any event Mr. Ramsey testified that the FEIS went even further in its analysis than the University District EIS and was more conservative in terms of making sure demolition was not understated. Tr. vol. 15, 220:15–221:4, Aug. 24, 2018 (Ramsey).

[264] Similarly, the Examiner is without authority to rule on the Appellants' allegations about impacts to small businesses. Only two appellants raised issues in their briefing. BHCS Brief at 8; FNR Brief at 26, 28. Even if the Examiner had jurisdiction, neither presents evidence or argument that demonstrates that the City's extraordinary analysis of impacts to small businesses is unreasonable.

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economic displacement in the city and region overall.[265] The FEIS contained a correlation analysis, using data at the census tract level for the entire city, which showed no systematic relationship between new development and loss of lower income households.[266] The FEIS acknowledged that there was nonetheless a potential that new development could contribute to economic displacement in a particular neighborhood, for example by new housing bringing in amenities that made the neighborhood more attractive.[267] However, as explained in the City's Closing Brief, there was no clear guidance or methodology available to do additional analysis on this score.[268]

The FEIS reached a nuanced conclusion regarding economic displacement impacts consistent with the foregoing analysis. The FEIS concluded that the proposal's increased housing supply compared to "no action" is "expected to reduce upward pressure on market-rate housing costs and therefore also reduce pressures that cause economic displacement."[269] However, the FEIS *also* stated that "new growth also has the potential to attract new amenities that could increase housing demand and potentially increase economic displacement in some neighborhoods, even while reducing economic displacement pressures in the city as a whole."[270]

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[265] FEIS at 3.75–3.76; FEIS at App. I. There is no basis for SCALE's suggestion that this effect would only occur at the regional level, such that low-income households would need to move to the suburbs to benefit from it. SCALE Brief at 43 n.13. The FEIS referenced Seattle-specific rent and vacancy data supporting that increased housing supply will reduce upward pressure on market-rate housing costs in Seattle. FEIS at 3.75–3.76.

[266] FEIS at 3.48–3.53 and App. M; Tr. vol. 16, 46:20–47:7, Aug. 30, 2018 (Ramsey).

[267] FEIS at 3.48, 3.77; FEIS at App. I, p. I.5.

[268] Tr. vol. 16, 27:9–27:17, Aug. 30, 2018 (Ramsey); Tr. vol. 15, 126:21–127:23, Aug. 24, 2018 (Jacobus).

[269] FEIS at 3.89, 3.91; *see also* FEIS at 3.86.

[270] FEIS at 3.86. It should be noted that the FEIS's conclusion as to the proposal's economic displacement impacts relative to "no action" also rested on the proposal's provision of new affordable units. FEIS at 3.86, 3.89, 3.91.

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SCALE challenges "the remarkable conclusion that MHA would reduce economic displacement, not exacerbate it."[271] As the preceding paragraph makes clear, SCALE oversimplifies and misconstrues the FEIS's conclusions. SCALE then contends that the FEIS is misleading because the current research literature allegedly establishes a clear connection between new development and economic displacement and because the City's own correlation analysis purportedly shows that the proposed development capacity increases will cause economic displacement in major portions of the City. However, the evidence in the record supports neither contention.

First, SCALE errs in contending that it is "well documented in the economic literature" that new development causes economic displacement.[272] Mr. Levitus refers to a 2016 study by Miriam Zuk and Karen Chapple. That study concluded that at the regional level market-rate housing production is associated with reductions in the probability of displacement.[273] The study further concluded that at the block group level, market-rate housing production did not have a significant impact on displacement, but emphasized that further research and more detailed data would be needed to better understand the mechanisms via which housing production affects neighborhood affordability and displacement pressures.[274]

An even more recent study came to similar conclusions, stating that "while it is clear that the construction of new homes will moderate price and rent increases citywide, neither theory nor empirical evidence provides clear guidance about when localized spillover effects might occur and when they might actually cause an increase in the prices

[271] SCALE Brief at 41–42.
[272] SCALE Brief at 42.
[273] Hr'g Ex. 283 at 7.
[274] *Id.* at 7, 10.

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and rents of immediately surrounding homes."[275] Thus, SCALE's contention that the FEIS erroneously attempts to "tell the public" that the proposal would not have the "standard effect" of causing economic displacement lacks any basis, because the literature does not establish that new development has any such "standard effect."[276] Rather, the literature supports the FEIS's nuanced discussion of, and conclusions regarding, economic displacement.

Nor does the testimony of Mr. Reid as to "acceleration of the affordability problem" support SCALE's characterization of the relationship between new development and economic displacement.[277] That testimony dealt with the issue of the loss of older, lower cost units (not change in households at particular income levels).[278] Mr. Ramsey comprehensively explained why the FEIS's economic displacement analysis did not need to address that specific issue in the manner desired by Mr. Reid.[279]

Moreover, SCALE's contention (based on Mr. Reid's testimony) that the City's correlation analysis actually shows that new development would cause substantial economic displacement rests on an obvious misunderstanding of the analysis.[280] The

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[275] "Supply Skepticism: Housing Supply and Affordability" (2017), Hr'g Ex. 284, p. 8. Mr. Levitus also referenced a 2015 study by Rick Jacobus. At hearing, Mr. Jacobus testified that, while he believed (as he stated in 2015) that new development can increase housing prices in a particular neighborhood even as new development generally moderates prices increases on a broader scale, there was not convincing data yet to answer the question of the effect at the local level and more research was needed. Tr. vol. 15, 123:18–126:3, Aug. 24, 2018 (Jacobus).

[276] SCALE Brief at 42. Similarly, SCALE's contention that the FEIS's conclusion that increased housing supply is likely to reduce upward pressure on market-rate housing costs and reduce economic displacement in the city and region overall "would not mean gentrification was not pushing lower income households out of Seattle neighborhoods" is fundamentally misleading. SCALE Brief at 43 n.13. Neither the economic literature (nor, as discussed below) the correlation analysis supports that new development is pushing lower income households out of Seattle.

[277] SCALE Brief at 41–42 (citing Reid at 2/2 35:13 and 36:30).

[278] Tr. vol. 2, 87:9–88:11, June 26, 2018 (Reid).

[279] Tr. vol. 16, 28:22–33:8, August 30, 2018 (Ramsey).

[280] SCALE Brief at 42. The testimony of Mr. Reid on which SCALE relies was presented in rebuttal and is inconsistent with Mr. Reid's prior testimony. On cross-examination during his testimony during Appellants' case in chief, when asked whether he had any quibble with the methodology of the correlation, he stated "I don't have a quibble with what it does, but I wouldn't use it to predict necessarily what's going to happen." Tr. vol. 2, 113:21–114:3, June 26, 2018 (Reid).

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purpose of the correlation analysis was to measure the strength and direction of the relationship between two variables: new housing production and change in the number of households at various income levels.[281] Appendix M of the FEIS (at pages M.5 through M.21) has exhibits (called scatter plots) that have change in households of various incomes on one axis and change in housing production on the other axis; each point on the scatter plot is a census tract.[282] Some census tracts have positive change in both variables and some have a positive change in housing production but a negative change in households at a particular income level. The correlation (represented by the sloping line) shows the statistical relationship between the two for the entire group of tracts.[283] As noted above, the analysis showed no systematic relationship between new development and loss of lower income households.

SCALE looks at these scatterplots and points out that some portion of the census tracts are in the lower right quadrant and thus have more housing production but a negative change in households at the given income level. SCALE then asserts that this means new development is correlated with economic displacement in those census tracts. But this fundamentally misunderstands the FEIS analysis. As Mr. Ramsey testified, it is the correlation *across the entire group of census tracts* that demonstrates the statistical relationship between the two variables and whether there is a real trend as opposed to just "noise in the data."[284] As such, SCALE's contention that, because (in its estimation) 30 percent of the dots on the scatter plot fell in the lower right quadrant, that means that the

[281] FEIS at 3.48, App. M.
[282] Tr. vol. 15, 240:6–240:14, Aug. 24, 2018 (Ramsey).
[283] Tr. vol. 15, 240:15–241:4, Aug. 24, 2018 (Ramsey).
[284] Tr. vol. 15, 240:15–241:4, Aug. 24, 2018 (Ramsey).

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proposal will result in economic displacement effects in "nearly a third of Seattle's census tracts" ignores the essence of the correlation analysis and is simply unsupported.[285]

SCALE's contention that a sentence in the Growth and Equity Analysis supports the idea that MHA would create economic displacement in "large sections of the city" is also misplaced.[286] The sentence appears in the "Limitations" section of the Growth and Equity Analysis and states: "In areas where current rents are below average, the higher price of new market-rate development can exert upward pressure on rents in the immediate vicinity, even as overall housing supply increases."[287] First, SCALE's argument that areas with below average rents refers to half of the City is not necessarily true; as a mathematical matter, very low rents in part of the City could drag the average down such that only a small part of the City had below average rents. In any event, the Growth and Equity Analysis (which predates the FEIS) contains no statistical analysis as to economic displacement, and the correlation analysis in the FEIS rejects SCALE's suggestion that the sentence proves a systematic relationship between new development and economic displacement across large portions of the City. At most, the quoted sentence acknowledges that new development could contribute to economic displacement in localized circumstances even as it helps reduce economic displacement in general—which is exactly what the FEIS acknowledges.

Moreover, SCALE's methodological critiques of the correlation analysis are unfounded. SCALE alleges a defect in the correlation analysis because area median income (AMI) shifts over time and may be rising.[288] Mr. Ramsey testified that any increase in area median income would have applied evenly to all census tracts across the

[285] SCALE Brief at 43.
[286] SCALE Brief at 44 n.15 and 43 n.14.
[287] FEIS at App. A. p. 15.
[288] SCALE Brief at 44.

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city, so it would not have affected the overall finding of the analysis.[289] SCALE cites testimony of Mr. Levitus raising timing issues as to the period covered by the correlation.[290] However, Mr. Ramsey testified that the twelve-year period covered by the correlation analysis was a long enough period to capture any anticipatory or lagging displacement that might occur.[291]

By the same token, SCALE errs in contending that other language in the Growth and Equity Analysis undermines the FEIS's conclusions as to economic displacement.[292] As noted above, SCALE errs in construing the FEIS as saying that the proposal will not result in any economic displacement. Like the language in the "Limitations" section of the Growth and Equity Analysis, the language at page 15 of that document is consistent with the FEIS's acknowledgment of the potential that new development could contribute to economic displacement in certain circumstances. The language at page 15 does not purport to, nor does it, concede a systematic relationship between new development and loss of lower income households that the FEIS neglected to disclose.

Finally, in criticizing the FEIS's analysis of economic displacement, SCALE errs in relying on a document that it contends is "the City's internal critique."[293] Nothing in this document identifies its author and the witness who testified about it could not identify who produced it.[294] In any event, SCALE errs in contending that this document undermines the FEIS's analysis of economic displacement impacts. The quoted language largely focuses on whether the City has a sufficiently effective "anti-displacement" (e.g.,

[289] Tr. vol. 16, 51:6–52:2, Aug. 30, 2018 (Ramsey).
[290] SCALE Brief at 43–44 (citing Levitus 7/3 13:58, Levitus 7/3 22:17, and Levitus 7/3 at 25:27; SCALE also cites Reid 19/3 at 1:36:08, but that tape ends at 1:34:42).
[291] Tr. vol. 16, 15:3–15:16, 19:18–20:8, Aug. 30, 2018 (Ramsey). It bears emphasis that the 12-year period studied—between 2000 and 2012—included both boom and bust times.
[292] SCALE Brief at 44 n.15, citing language at FEIS at App. A, p. 35 that "New development may put upward pressure on rents before community stabilizing investments take effect."
[293] SCALE Brief at 45, citing Hr'g Ex. 144.
[294] Tr. vol. 7, 47:5–47:8, July 24, 2019 (Batayola).

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mitigation) strategy, which is not a question that is before the Examiner. To the extent the document questions the analysis of economic displacement impacts, it does not undermine the FEIS. [295] As its title indicates, the document addresses the DEIS, not the FEIS. As discussed above, the FEIS acknowledges the potential that new development could contribute to economic displacement in a particular neighborhood.

Given the foregoing, the Examiner should reject SCALE's contention that the FEIS erred in how it analyzed or described the economic displacement impacts of the proposal. The FEIS accurately and carefully described the potential for such impacts. Based on the research as to the effect of housing supply and City-specific data on that score, the state of the economic literature on neighborhood-level effects, and the City's own correlation analysis, the FEIS appropriately concluded that the proposal's increased housing supply is expected to reduce pressures that cause economic displacement and, in conjunction with providing more affordable units, reduce economic displacement relative to "no action"— but new growth also could potentially increase economic displacement in some neighborhoods, even while reducing economic displacement pressures in the city as a whole.[296] The evidence in the record demonstrates that this was a reasonable analysis. In sum, even if the Examiner could evaluate the issue, the FEIS adequately analyzed economic displacement impacts.

3. Appellants' argument based on the distribution of payment-funded units lacks any basis.

SCALE errs both legally and factually in contending that the distribution of the affordable units funded with MHA payments would create an impact of increased

[295] A later portion of the document states: "The mitigation strategies outlined are important to address racial equity, but without a clear recognition that while MHA overall creates new units of affordable housing across the city, *increasing development at the neighborhood capacity [sic] may have impacts*." Hr'g Ex. 144 (emphasis added).

[296] FEIS at 3.86, 3.89, 3.91.

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segregation that the FEIS failed to disclose.[297] First, racial segregation is not an element of the environment, but rather a socioeconomic matter that is not required to be addressed in an FEIS.[298]

Second, SCALE utterly fails to demonstrate that development of affordable units using MHA payments would create a segregation "impact" of the sort alleged by SCALE. SCALE's claim is based on the contention that payment units would be constructed in areas where land costs are low and poorer households are already located.[299]

However, as explained in the City's Brief, the overwhelming evidence presented at hearing demonstrates that payment-funded units are unlikely to be concentrated in such a way. Emily Alvarado testified that the Office of Housing has a long track record of investing in areas with high land costs and explained the City policies that would preclude concentration of units in low cost areas, as well as the tools available to the City to obtain well-located land less expensively than private developers could.[300] Mr. Jacobus, a national housing expert, confirmed the City's prior success in locating payment-funded projects in high-cost locations, explained that the City's strong affordable housing production infrastructure reduced the concern that might arise in other cities about concentrating payment units in low cost areas, and expressed confidence the City could continue its track record as to appropriately locating payment units.[301] Thus, there is no

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[297] SCALE Brief at 46–47.

[298] SMC 25.05.444, SMC 25.05.448.B, C. Nor could racial segregation form the basis of an EIS adequacy challenge. SMC 25.05.440.G.

[299] SCALE Brief at 47.

[300] Tr. vol. 15, 66:1–66:10, 73:25–77:13, Aug. 24, 2018 (Alvarado).

[301] Tr. vol. 15, 118:16–118:21; 119:9–119:22; 133:10–133:17, Aug. 24, 2018 (Jacobus). To the extent Mr. Reid questioned the City's assumptions about land costs and leverage, Ms. Alvarado testified that the cost assumptions in the FEIS were based on land costs across the city representing low-, medium-, and high-cost areas. Tr. vol. 15, 60:23–61:5, Aug. 24, 2018 (Alvarado). She and Rick Jacobus both testified that the City's assumption as to the level of leverage it could achieve with payment funds was reasonable. Tr. vol. 15, 60:11–60:16, 61:6–63:2, Aug. 24, 2018 (Alvarado); Tr. vol. 15, 121:16–122:9, Aug. 24, 2018 (Jacobus).

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support for SCALE's contention that payment-funded units will be concentrated in lower-cost areas.

Finally, while SCALE's argument would fail in any event for the reasons discussed above, SCALE errs in contending that most developers will make a payment, rather than building affordable units. SCALE contends that "[a]s Mr. Reid explained, the price developers would pay for off-site housing was too low, so that most developers would pay that fee, rather than build units on site."[302] SCALE provides no citation to the record for this statement, and the City finds no such statement by Mr. Reid in the record. The FEIS assumed that 50 percent of developers would perform on-site and 50 percent would pay in-lieu fees, and Mr. Mefford's uncontroverted expert testimony was that this was a reasonable assumption given how the City established the relative economic burden of the performance and payment requirements.[303] SCALE's arguments regarding the distribution of payment units lack any basis.

4. The FEIS adequately addressed ownership housing.

SCALE errs in contending that the FEIS failed to address the "impact of the proposal on owner occupied housing."[304] Based on Mr. Reid's testimony, SCALE contends that increased production of rental housing would bring renters to the City who over time will increase the demand for ownership housing, causing upward pressure on housing costs and pricing people out of the ownership market.[305] First, SCALE appears to allege this is an economic displacement impact, but SEPA does not require the FEIS to evaluate economic displacement impacts.[306]

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[302] SCALE Brief at 47.
[303] Tr. vol. 10, 118:18–119:17, July 27, 2018 (Mefford).
[304] SCALE Brief at 45.
[305] SCALE Brief at 45–46.
[306] *See* section V.B.2. above.

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In any event, SCALE's claimed impact is extraordinarily attenuated and speculative. The testimony of Mr. Reid cited by SCALE does not establish that the phenomenon of increases in development capacity leading to changes in rental/ownership preference and, ultimately, to displacement "is already occurring."[307] Mr. Reid's testimony was simply that young people currently have trouble getting into the home ownership market, even prior to this proposal.[308] He alleged that the proposal would exacerbate that issue but provided no evidence specifically linking increased development capacity to renters moving out of the city because they could not become homeowners. Rather, his claim was that the FEIS failed to address this issue and "there's no understanding what the impact of any of this will be."[309]

Fundamentally, the phenomenon with which SCALE is concerned is beyond the reasonable scope of an EIS. The FEIS fully analyzed the impacts of the growth associated with the proposed increases in development capacity. Mr. Wentlandt testified that requiring the City to analyze the evolution over time of ownership versus rental preference for a certain initial increment of growth goes beyond standard EIS practice and makes little sense given that the City cannot control whether housing product would be ownership or rental. [310]

Moreover, the FEIS did not ignore the provision of ownership housing. Mr. Wentlandt testified that certain development forms are more likely to be ownership and more likely to be developed in particular zones, and that the FEIS provided examples of

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[307] SCALE Brief at 46.

[308] Tr. vol. 2, 79:1–79:21, June 26, 2018 (Reid).

[309] Tr. vol. 2, 78:14–78:25, June 26, 2018 (Reid).

[310] Tr. vol. 14, 160:24–161:14, 164:17–165:4, Aug. 23, 2018 (Wentlandt). Moreover, because the FEIS was not required to do the analysis desired by Mr. Reid, his contention that the FEIS should have evaluated the risk that renters would not be able to move into ownership on an individual urban village basis is irrelevant. SCALE Brief at 46 (citing Reid 2/2 at 33:05, 33:23): Tr. Vol. 2, 85:19–86:5, June 26, 2018 (Reid).

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this in the RSL and Lowrise zones.[311] The FEIS describes the portion of the net capacity for housing growth for each alternative that is accounted for by certain zone categories including RSL and Lowrise.[312] Further, the FEIS notes that "Housing types in the Lowrise and Residential Small Lot zones are more likely to be ground-related like townhouses, rowhouses, duplexes, and small single-family home structures."[313] The FEIS states that the action alternatives and Preferred Alternative "could result in a greater share of these types of units, which are better suited to families with children and larger households compared to Alternative 1 No Action."[314] The FEIS's treatment of ownership housing was adequate and consistent with normal EIS practice.

In sum, for all of the foregoing reasons, the FEIS's housing and socioeconomics impact analysis exceeds SEPA requirements and meets the rule of reason.

5. JuNO's new issue regarding housing unit counts and growth forecasts lacks any basis.

JuNO raises questions about the baseline housing unit counts and the growth forecasts for the West Seattle Junction.[315] First, JuNO never raised these issues in its notice of appeal, so cannot raise them now.[316] In any event, JuNO's contentions lack merit. JuNO alleges an inconsistency in the use of the same housing count (3,880) for the West Seattle Junction in FEIS Exhibit 3.1-14 and FEIS Exhibit 2–7.[317] The former exhibit

[311] Tr. vol. 14, 161:15–162:14, Aug. 23, 2018 (Wentlandt). *See* FEIS at App. F (Urban Design and Neighborhood Character Study), p. 16 (RSL zone "[e]ncourages modestly sized single family ownership homes"); *id.* p. 24 (depicting as prototype for Lowrise 1 zone "[a]n attached townhouse homeownership housing product").

[312] FEIS at 3.61, Ex. 3.1–36 and 3.1–37.

[313] FEIS at 3.62.

[314] *Id*.

[315] JuNO's Brief at 48–49.

[316] *See* JuNO's Notice of Appeal. JuNO's Notice of Appeal (at 3) incorporates SCALE's issues, but SCALE's Notice of Appeal does not raise the issues in question either.

[317] FEIS at 3.24, 2.26.

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refers to the baseline at "2015 *Year-End*" and the latter to the "Baseline (2016)."[318] There is no difference in these time periods so there is no inconsistency in use of the same number. JuNO also suggests there is some discrepancy in how pipeline projects were accounted for in the growth forecasts. However, the only testimony presented by JuNO on this issue was Mr. Koehler's testimony that he could not figure out how the numbers fit together and whether there was a problem ("I was having difficulty trying to establish whether the baseline and growth projections were underestimated . . . ").[319] The FEIS comprehensively explains its methodology for the growth projection at Appendix G. Mr. Koehler's speculation is insufficient to establish a defect in the FEIS.

C. <u>The analysis of impacts to historic resources is reasonable</u>.

Appellants SCALE, FORC, JuNO, BHCS, FNR, and SUN each assert that the FEIS's historic resources analysis is deficient. While disparate and disjointed, Appellants' attacks adopt similar tactics and common themes. Contrary to their assertions, and as discussed in the City's Brief, the City's approach to assessing and discussing historic resources was appropriate and reasonable for a city-wide nonproject EIS.[320] The City shares Appellants' concern for Seattle's historic fabric and the desire to identify and preserve historic resources, but this laudable goal does not alter the SEPA standards for a programmatic EIS or demand a level of unreasonable scrutiny. Appellants' desire to perform additional or different analysis does not render the City's historic resources analysis inadequate.

[318] *Id.* (emphasis added).
[319] Tr. vol. 8, 61:8–62:3, July 25, 2018 (Koehler).
[320] Tr. vol. 10, 189:3–17, July 27, 2018 (Wilson); Tr. vol. 10, 224:11–14 (Wilson); Tr. vol. 13, 75:10, Aug. 22, 2018 (Wilson).

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1. Appellants demand a level of detailed analysis that is unreasonable for this nonproject proposal.

Throughout this appeal, Appellants have beat the drum of "granularity" and "detail" to advocate a historic resource analysis that would be reduced to a parcel-by-parcel analysis of historic resource impacts city-wide. They reprise this argument in their post-hearing briefing, relying on the testimony of their witnesses, including Mr. Howard, Mr. Kasperzyk, Mr. Veith, and Ms. Woo, who championed such an approach.[321] But, SCALE and FORC add a new twist to bolster their argument that each building over a certain age in the study area be identified to establish a baseline for the affected environment. They suggest that this is required by the rules governing Environmental Checklists at WAC 197-11-315. Additionally, FORC and BHCS cite to WAC 197-11-960 for the proposition that the City should have mapped historic resources on the basis of age alone.[322] Appellants' reliance on the checklist's historic and cultural resource requirements to support their assertion that a parcel-by-parcel approach to identification of historic resources was required in the FEIS is simply wrong. First, this provision requires more than identification of buildings, structures or sites over a certain age. Buildings and structures must be over 45 years old and "listed in or eligible for listing in national, state, or local preservations registers."[323] Second, identification and use of such information is not required for a nonproject EIS. Appellants focus on the checklist requirements in Part B of the form.[324] They gloss over the fact that this and other sections of the checklist pertaining to elements of the environment are optional for nonproject proposals.[325] This

[321] SCALE Brief at 14.
[322] FORC Brief at 29–30; BHCS Brief at 8. SMC 25.05.315 is the City's parallel provision for WAC 197-11-315.
[323] WAC 197-11-960 (checklist section B.13(a)). SMC 25.05.960 cross references WAC 197-11-960.
[324] *Id.*
[325] WAC 197-11-315(1)(e); WAC 197-11-960 (Use of Checklist for nonproject proposals). "For nonproject proposals complete this checklist and the supplemental sheet for nonproject actions (PART D). The lead

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ability to exclude from checklists the detail otherwise required for project actions reflects SEPA's broader recognition that "the lead agency shall have more flexibility in preparing EIS's on nonproject proposals, because there is normally less detailed information available on their environmental impacts . . . ."[326]

Instead, the mandatory checklist rules for nonproject actions, found in Checklist Section D suggests a broader and less detailed analysis of historic resources:

> When answering these questions, be aware of the extent the proposal, or the types of activities likely to result from the proposal, would affect the item at a greater intensity or at a faster rate than if the proposal were not implemented. *Respond briefly and in general terms*.
>
> . . .
>
> How would the proposal be likely to use or affect environmentally sensitive areas or areas designated (or eligible or under study) for governmental protection; such as . . . historic or cultural sites . . . .

(Emphasis added); WAC 197-11-960(D); WAC 197-11-960(D)(4).[327]

Checklist Section D, which is mandatory for nonproject proposals, is consistent with the more general methodology mandated by WAC 197-11-442 for nonproject EIS's, and underscores the appropriateness of the City's approach to analyzing impacts to historic resources for this city-wide, nonproject MHA proposal.[328]

2. The City relied upon appropriate and reliable data.

Consistent with their "granularity" theme, Appellants continue to insist that virtually every speck of historic resource data in the City's possession be identified in the FEIS, despite the dubious reliability of much of that information. They contend that the

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agency may exclude any question for the environmental elements (PART B) which they determine do not contribute meaningfully to the analysis of the proposal." *See also* SMC 25.05.960.

[326] SMC 25.05.442; WAC 197-11-442.

[327] *See also* 25.05.960 (cross-referencing WAC 197-11-960).

[328] *See* WAC 197-11-442; SMC 25.05.442.

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City or its consultant ESA failed to disclose or utilize historic resource information available to it at the Department of Neighborhoods historic preservation office.[329] This is refuted by the plain language of the FEIS, which discusses the City database and the survey efforts that began in the 1970's.[330] Moreover, the City had good reason to avoid overreliance on this information. As explained by Ms. Sodt in response to questions about reliability of inventories such as those from the 1970s, "a lot has changed through the City in that time. There's been a lot of demolitions… some of these buildings might not exist, or… they might have been altered over time."[331] Ms. Sodt indicated that new site visits would need to occur to verify the existence and condition of properties.[332] Ms. Wilson agreed, stating that older data requires field level verification and that such an effort was not appropriate for a programmatic EIS.[333]

3. The City was not required to employ the same methodology used in prior EIS's.

Appellants continue to demand that the City analysis in this FEIS mirror that undertaken in the University District and Uptown EISs.[334] As discussed in the City's Brief, the fact that the City took an approach in a different situation does not limit its ability to choose to do its analysis differently, so long as its approach is reasonable. As described above, the City's use of data and level of detail is appropriate for this nonproject action. The differences between the analyses are due to the fact that significantly more detailed, reliable information about historic resources was available for the entire Uptown

[329] SCALE Brief at 14.
[330] FEIS at 3.297.
[331] Tr. vol. 2, 276:18–277:12, June 26, 2018 (Sodt).
[332] Tr. vol. 2, 276:18–277:12, June 26, 2018 (Sodt).
[333] Tr. vol. 10, 185: 2–10; 189:3–18, July 27, 2018 (Wilson).
[334] SCALE Brief at 15; FORC Brief at 40.

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neighborhood compared to the information available throughout the MHA study area.[335] The MHA FEIS was based on information that was available for all neighborhoods, in order to permit a comparative evaluation across neighborhoods at a similar level of detail and to avoid overstating or understating the impact on historic resources in particular neighborhoods. Finally, contrary to the suggestion that Ms. Johnson embraced use of the criteria used in the Uptown EIS,[336] she testified that the use of different approaches and levels of discussion in the MHA FEIS was reasonable.[337]

4. Appellants discount the value of the FEIS's entire historic resource analysis.

The historic resource analysis consists of an extensive narrative discussion of the affected environment, impacts, and mitigation measures, which Appellants largely ignore. This narrative is supported by various exhibits. The historic resources section of the FEIS contains four primary exhibits to aid in the discussion of the affected environment—two tables (Exhibit 3.5-1, which identifies National Register of Historic Places ("NHRP") eligible Historic Properties by typology and Urban Village, and Exhibit 3.5-4, which lists Historic Resources Survey Status) and two maps (Exhibit 3.5-2 and 3.5-3, which identify locations of NRHP determined eligible properties). While the maps show NRHP resources, Exhibit 3.5-4 states which neighborhoods contain properties listed in the City Historic Resources Survey Database. It also provides useful contextual information such as which neighborhoods have benefitted from a systemic inventory and/or preparation of a historic context statement. In combination, these exhibits underscore key points about the affected environment critical to decision makers: the FEIS study area contains individual

[335] Tr. vol. 13, 194:17–201:1, Aug. 22, 2018 (Johnson).
[336] FORC Brief at 40.
[337] Tr. vol. 13, 194:17–201:1, Aug. 22, 2018 (Johnson).

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historic properties that are designated Seattle landmarks;[338] there are NRHP historic districts and properties determined NRHP eligible within the urban villages or proposed expansion areas;[339] the City manages eight designated historic districts;[340] and, while the City has conducted some level of historic resource surveys by neighborhood, those efforts are incomplete.[341] The narrative description of the affected environment coupled with illustrative exhibits leaves no doubt that the entire study area contains historic resources subject to impact from the effects of the MHA, and that:

> . . . development allowed by the MHA program could impact these resources indirectly by affecting decisions to demolish or redevelop historic-aged properties or construct new properties . . ."
>
> . . .
>
> Potential impacts to historic resources could occur from demolition, redevelopment that impacts the character of a historic property, or development adjacent to a designated landmark if the development alters the setting of the landmark and the setting is a contributing element of the landmark's eligibility . . .
>
> . . .
>
> Potential decreases to the historic fabric of a neighborhood are likely to occur if historic buildings are redeveloped or demolished and new buildings are constructed that are not architecturally sympathetic to the existing historic characteristics of a neighborhood.[342]

The FEIS makes clear the scope of historic resources subject to impacts from the proposal and the nature of such impacts. Appellants' assertion that baseline data is not accounted for is mistaken. As discussed at hearing and in the City's Brief, to avoid

[338] FEIS at 3.297.
[339] *Id.*
[340] FEIS at 3.296.
[341] FEIS at 3.297.
[342] FEIS at 3.304–3.306

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misleading readers of the FEIS, the City adopted an "apples to apples" comparison between neighborhoods.[343]

None of this is good enough for Appellants. The FEIS focuses on the proverbial forest comprising the historic resources analysis, while Appellants seek to obfuscate its reasonableness by dwelling on the trees. Appellants demand inclusion of an immense amount of data contained in the City historic resource database.[344] Some would have the City undertake additional survey work and even identify "buildings and homes that add to the historic character of the neighborhood but may not rise to the level of landmark eligibility."[345] Others argue that age alone should be the sole criterion for identifying historic resources potentially subject to MHA impacts.[346] The result—a map akin to those prepared by Spencer Howard and David Kasperzyk[347]—would reveal what the FEIS already makes abundantly clear: that the subject area includes historic resources and the proposal could adversely impact those resources through redevelopment, demolition, or new construction projects that could occur in the study area as a result of the proposal[348].

Despite Appellants' suggestion to the contrary, there is no evidence that the City has the ability or resources necessary to undertake the level of effort Appellants demand. SCALE asserts that Sarah Sodt testified that funding for historic resource work is received when requested.[349] On the contrary, when asked about City Comprehensive plan policy pertaining to maintaining comprehensive survey and inventory of Seattle's historic and cultural resources, Ms. Sodt unequivocally stated "[w]e started one, and then we did not --

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[343] City's Brief at 45-46.
[344] SCALE Brief at 14; FORC Brief at 31–33; JuNO Brief at 22–25; FNR Brief at 16; BHCS Brief at 8.
[345] BHCS Brief at 8–9.
[346] FORC Brief at 29.
[347] *See, e.g.,* Hr'g Exs. 19, 20, 22 and 37.
[348] FEIS at 3.304-3.305.
[349] SCALE Brief at 16.

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we lost funding to do that."[350] Again when asked about funding for comprehensive survey work she stated that "the City currently does not have funding to do -- do that work . . . proactively."[351]

Aside from the practical limitations of the significant effort to create maps with data for every potentially impacted parcel, such graphics are not required and would be of limited utility. Color coding every lot in the City potentially impacted by the proposal would not aid in objectively assessing impacts of the city-wide zoning proposal.[352] Nor is such an approach required for a nonproject EIS.

5. Appellants' criticism of the FEIS's threshold for impacts to historic resources misses the mark.

In its post-hearing brief, SCALE renews its criticism of the FEIS's threshold for determining significant impacts to historic resources, labeling it "arbitrary."[353] Appellants' criticisms are misguided.

The Supreme Court has recognized the difficulty in defining significance, observing, "a precise and workable definition [of significance] is elusive because judgments in this area are particularly subjective—what to one person may constitute a significant or adverse effect on the quality of the environment may be of little or no consequence to another."[354] As noted in the City's Brief, the City resolved the question of the threshold of significance in a reasonable manner, relying upon estimated growth rates as indicators of potential impacts to historic resources when comparing alternatives. Applying their experience and professional judgment, the City's consultants determined that growth rates of 50 percent or greater could result in significant impacts to Historic

[350] Tr. vol. 2, 266:9–19, June 26, 2018 (Sodt).
[351] Tr. vol. 2, 273:2–11, June 26, 2018 (Sodt).
[352] Tr. vol. 10, 209:20–21, July 27, 2018 (Wilson).
[353] SCALE Brief at 17–18.
[354] *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 277, 552 P.2d 674 (1976).

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Resources.[355] Appellants infer that City staff took issue with this approach and that ESA ignored these concerns.[356] On the contrary, at hearing Mr. Weinman testified that ESA accounted for his initial concerns about ESA's approach expressed in comments to the draft DEIS.[357]

Moreover, Appellants' disagreement with the City's experts' conclusion that the impacts are not significant does not render the FEIS inadequate.[358] The question of whether an impact is significant is only germane to the question of whether or not an EIS is required.[359] It does not bear on the question of EIS adequacy. Because the FEIS discloses all probable impacts, significant or otherwise, Appellants' subjective judgments about the significance of those impacts are not grounds for finding the FEIS inadequate.

Appellants' preference for a different approach does not render the City's methodology unreasonable or the FEIS inadequate. [360]

6. The City accounted for the unique character of neighborhoods and potential edge effects.

Appellants state that the FEIS fails to alert readers to "assemblages of fine homes that are not on any register" and the potential for destruction of neighborhood fabric.[361] They are wrong. This specific issue of concern is not about historic resources. Nevertheless, the City addressed the topic in a combination of two chapters—land use and historic resources. The land use chapter of the FEIS identifies the potential impact from

[355] FEIS at 3.304. *See also* Tr. vol. 13, 189:5–190:8, Aug. 22, 2018 (Johnson).
[356] SCALE Brief at 17–18.
[357] Tr. vol. 19, 28:5–30:14 Sept. 7, 2018 (Weinman).
[358] *See* FORC Brief at 22 (stating that Mr. Wheeler's major disagreement with the FEIS was the conclusion that there would be no significant unavoidable adverse impacts); JuNO Brief at 29–30 (contesting the City's significance threshold, without citation to any industry standard or example of a significance threshold).
[359] Findings and Decision, W-17-004, Conclusion 16 at 18 (concluding "there is no requirement to use the term 'significant' to distinguish between impacts in an EIS"; once an agency has reached the threshold determination that an EIS is required, "[l]abeling an impact 'significant' is no longer required," and the EIS may address significant and non-significant impacts (citing SMC 25.05.402)).
[360] *City of Des Moines v. Puget Sound Reg'l Council*, 98 Wn. App. 23, 852, 988 P.2d 27 (1999).
[361] SCALE Brief at 16.

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the "[i]ntroduction of higher-intensity uses or building forms into an area of consistent, established architectural character and urban form, such as a historic district."[362] In addition to this general reference, the neighborhood-specific impact analyses also address specific instances of that potential impact, including in the description for the Roosevelt Urban Village, which was the subject of the most testimony on this topic.[363] The historic resources chapter also squarely addresses the potential impacts on neighborhoods that might be eligible "for consideration as a historic district" that are "likely to occur if historic buildings are redeveloped or demolished and new buildings are constructed that are not architecturally sympathetic to the existing historic characteristics of a neighborhood."[364]

7. The City has not ignored existing growth.

Appellants accuse the City of failing to assess "cumulative impacts" by not accounting for the "demise of the historic fabric" of the City "that would occur even without MHA and the additional development catalyzed by MHA."[365] This is a false premise. As Ms. Wilson testified, conditions associated with impacts on historic resources in the absence of MHA are accounted for in the no action alternative. She clarified on redirect that the no action alternative covers growth that will occur throughout the city without MHA; that the action alternatives cover growth that will occur under MHA; and, that there is no scenario where there will be both the no action alternative and the action alternatives.[366] What Appellants describe as a "cumulative impact analysis" is

[362] FEIS at 3.116.
[363] FEIS at 3.134–3.135; FEIS at 3.145; Tr. vol. 18, 39:19–40:14, Sept. 4, 2018 (Gifford).
[364] *See,* FEIS at 3.306 (discussion of impacts to "historic fabric" of a neighborhood); Tr. vol. 13, 168:3–169:12, Aug. 22, 2018 (Wilson). The historic resources chapter uses the term of art "historic fabric "to describe the concept. *Id. See also,* FEIS at 299; Tr. vol. 18, 112:12–21, Aug. 22, 2018 (Wilson).
[365] SCALE Brief at 19.
[366] Tr. vol. 13, 167:10–168:2, Aug. 22, 2018 (Wilson).

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an impossible scenario under the proposal. Impacts to historic resources due to redevelopment in areas rezoned pursuant to the proposal would occur on many of the same sites as redevelopment under the no action alternative, and so the impacts are not a simple addition relative to those under existing conditions. Rather, these impacts will replace many of those that would have occurred absent the rezone. Appellants' "cumulative impacts" argument fails to account for this reality and amounts to a mere distraction from the fact that the FEIS acknowledges existing threats to historic resources in the appropriate context. The growth projections under each alternative adequately account for a cumulative amount of impact due to growth over the 20-year study horizon.[367]

8. The City did not pre-judge the proposal's impacts on historic resources and ESA accounted for internal critiques of its early historic resources analysis.

Appellants accuse the City of prejudging the outcome of the historic resources analysis from the outset.[368] They rely upon Hr'g Ex. 237, an internal ESA e-mail that introduces the project to ESA staff and discusses anticipated level of effort for budgeting purposes. Despite their attempt to impugn the honesty of City employees and ESA staff, it is clear that those responsible for preparing the historic resources analysis approached this issue with an open mind. Katie Wilson, the principal author of the historic resources section, explained that it was common for a budget estimate to be based on what is expected at the outset of a project, but "until I've done the analysis, it -- I don't know

[367] *See, e.g.,* FEIS at 4.6 ("Action Alternatives in the MHA EIS evaluate growth patterns for the city as a whole in the context of the Seattle 2035 Comprehensive Plan.").
[368] SCALE Brief at 12; FORC Brief at 36.

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what the outcome will be."[369] She also stated that any expectations contained in the email did not dictate her level of effort.[370]

Appellants also claim that ESA failed to account for City comments about its approach to determining potential historic resource impacts in the draft DEIS. Specifically, SCALE references marginal notes prepared by Mr. Weinman contained in Exhibit 238 suggesting the use of locations of surveyed historic buildings in comparison to rezoned parcels.[371] SCALE asserts that ESA ignored this comment. As confirmed by the testimony of both Ms. Wilson and Mr. Weinman, they did not. Ms. Wilson testified that a new section was included in the FEIS to specifically address Mr. Weinman's comment.[372] This is unsatisfactory for Appellants because it did not result in an analysis of each parcel subject to rezone. As Weinman testified, however, this was not his intent and ESA's changes to the draft document satisfied his concerns.[373]

D. <u>The Biological Resources Section's Analysis of Environmentally Critical Areas Is Reasonable</u>.

FORC is the sole Appellant whose brief alleges any inadequacies in the FEIS's analysis of environmentally critical areas ("ECAs").[374] FORC's brief rests on a distorted view of SEPA's standards and on mischaracterizations of the FEIS and the witnesses' testimony. The FEIS adequately analyzes and discloses potential impacts to ECAs.

FORC's criticisms of the FEIS rely on the testimony of Professor Kern Ewing. Professor Ewing testified that he is not familiar with the City's ECA regulations,[375] which the City adopted "to promote safe, stable, and compatible development that avoids <u>and</u>

[369] Tr. vol. 13, 154:17–18, Aug. 22, 2018 (Wilson).
[370] Tr. vol. 13, 154:3–155–20, Aug. 22, 2018 (Wilson).
[371] SCALE Brief at 14.
[372] Tr. vol. 13, 160:10–165:10, Aug. 22, 2018 (Wilson).
[373] Tr. vol. 19, 28:5–30:14, Sept. 7, 2018 (Weinman).
[374] FORC Brief at 10–18.
[375] Tr. vol. 5, 236:12–15, June 29, 2018 (Ewing).

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mitigates adverse environmental impacts and potential harm[.]"[376] Further, his credentials show no indication that he has any experience related to any SEPA or EIS analysis.[377] Professor Ewing's lack of experience with these subject matters undermines the credibility of his opinions regarding potential impacts and the adequacy of the FEIS's discussion.

Professor Ewing claimed that the proposal would result in two impacts, the first being the alleged "loss" or "violation" of buffers.[378] His allegations of a loss of buffers are simply incorrect. FORC acknowledges that the City's ECA regulations define and regulate buffers, which are areas adjacent to or part of ECAs and intended to protect the ECA.[379] The City's ECA regulations define buffer areas and prohibit or limit development activities in the buffers.[380] The proposal does not call for any changes to the City's ECA regulations, and the FEIS expressly states that under the proposal, the current ECA regulations will apply to all development.[381]

To the extent that FORC is arguing that the current Code inadequately defines or protects buffers or ECAs, such arguments are irrelevant here. Appellants cannot collaterally attack the City's regulations in this EIS adequacy appeal, nor can they seek relief to address perceived deficiencies in the regulations.

The second impact that Professor Ewing attributed to the proposal was an increase in impermeable surfaces, leading to increased runoff, drainage, and water quality impacts affecting ECAs.[382] FORC ignores the fact that the FEIS discloses all of these impacts[383]

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[376] SMC 25.09.010.
[377] Hr'g Ex. 109.
[378] FORC Brief at 15; Tr. vol. 5, 225:9–21, June 29, 2018.
[379] FORC Brief at 11.
[380] *See generally* SMC Chapter 25.09.
[381] FEIS at 3.325, 3.330, 3.336 (stating that the current ECA regulations would apply under all action alternatives).
[382] FORC's Brief at 15; Tr. vol. 5, 225:9–21, June 29, 2018 (Ewing).
[383] FEIS at 3.321, 3.323–3.324.

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Contrary to FORC's claim, the FEIS's discussion of impacts is not "limited to impacts during site construction and ordinance violations,"[384] as evidenced by the FEIS subsection titled "After Construction."[385] Moreover, contrary to FORC's characterization,[386] nothing in the above discussion or other impacts discussion suggests that the impacts are limited to ECAs in urban villages. The discussion addresses all ECAs, without distinguishing between ECAs inside and outside urban villages, and the FEIS's maps show critical areas both inside and outside urban villages.[387]

FORC's demand that the FEIS specifically address potential impacts to Ravenna Park exceeds what is required under the rule of reason. SEPA does not require site-specific analysis for nonproject actions.[388] Analysis specific to Ravenna Park is particularly unnecessary here because contrary to FORC's characterization,[389] Ravenna Park is not in the study area.[390]

Lastly, Ms. Logan directly refuted Professor Ewing's opinions by concluding that the FEIS's discussion of ECAs is reasonable and adequate.[391] Ms. Logan's opinions are credible and entitled to far more weight here in light of her extensive expertise not only in

[384] FORC Brief at 17.
[385] FEIS at 3.323.
[386] FORC Brief at 17–18.
[387] FEIS at 3.326–3.327, 3.332–3.333.
[388] WAC 197-11-442(3); SMC 25.05.442.C.
[389] FORC Brief at 10.
[390] Tr. vol. 10, 30:1–16, July 27, 2018 (Logan).
[391] Tr. vol. 10, 46:18–22, July 27, 2018. FORC's claim that Ms. Logan testified that the FEIS does not address the cumulative impacts of increased impermeable surfaces is inaccurate (FORC's Brief at 18). First, as discussed above, the FEIS discusses such impacts. Second, FORC's characterization of Ms. Logan's testimony does not accurately capture the scope of the question that Ms. Logan answered – the question that FORC's counsel asked was, "So is there anything in that paragraph that talks about the cumulative impacts of increased density and increased surface area of the upzones that could occur with -- on the ground cover that you have, the increased density there with respect to any of the zoning changes?" *Id.* at 61:11–16.

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ECAs, but also in reviewing and assessing ECA ordinances and in SEPA, including the preparation of nonproject EISs.[392]

E. The Biological Resources Section's Analysis of Tree Canopy is Reasonable.

Appellants' closing briefs confirm that Appellants have failed to identify any significant impacts to tree canopy not disclosed in the FEIS.[393] First, Appellants' disagreement with the City's experts' conclusion that the impacts are not significant does not render the FEIS inadequate.[394] As noted in section V.C.5, the question of whether an impact is significant is only germane to the question of whether or not an EIS is required and does not bear on the question of EIS adequacy. Because the FEIS discloses all probable impacts, Appellants' subjective judgments about the significance of those impacts are not grounds for finding the FEIS inadequate. Here, defining the significance of impacts to tree canopy is particularly subjective because the City does not have any level of service standards regarding tree canopy coverage. Moreover, Ms. Graham testified that her team was not aware of any significance standard set forth in any other SEPA document, given the rarity of tree canopy analysis in an FEIS.[395] In that context, the City has prepared an FEIS that discloses all probable impacts, and discloses that under all action alternatives, the expected change to tree canopy cover over the 20-year planning period is less than one percent for both the high and low scenarios.[396] The City's experts' determination that these impacts are not significant is not only reasonable based on their

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[392] Hr'g Ex. 224.

[393] Three Appellants' briefs argued that the tree canopy analysis was inadequate—FORC Brief at 19–27, JuNO Brief at 26–31, and FNC Brief at 13–18.

[394] *See* FORC Brief at 22 (stating that Mr. Wheeler's major disagreement with the FEIS was the conclusion that there would be no significant unavoidable adverse impacts); JuNO Brief at 29–30 (contesting the City's significance threshold, without citation to any industry standard or example of a significance threshold).

[395] Tr. vol. 17, 122:2–7 Aug. 31, 2018.

[396] *Id.* at 3.319–3.339.

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expertise and professional judgment, but more fundamentally, the labeling of these impacts as significant or not is beside the point.[397] Appellants' witnesses' disagreement with the City's experts' opinions do not render the analysis inadequate, particularly because Appellants' witnesses lack experience with SEPA's standards and with preparing EISs.[398]

Second, Appellants' briefs contain multiple mischaracterizations or misunderstandings of the evidence:

- The 2016 tree canopy assessment provided to the City by the University of Vermont's Spatial Analysis Laboratory ("SAL") does not include every large shrub, leading to a "67% error rate" as FORC claims.[399] As Mr. Leech explained, the SAL's assessment included a manual review of the data, which entails comparing the data product with high resolution aerial imagery different from what was used for the data product, and using the aerial imagery to confirm or refine the data, including confirming whether an object is a tree or a shrub.[400] While FORC claims the City should have done an on-the-ground assessment to check for shrubs,[401] even FORC's representative conceded at hearing that this approach is "really labor intensive."[402] The SAL concluded that based on its experience, the approach used here "provides a cost-effective solution that yields high-resolution tree canopy data with unprecedented accuracy,"[403] and Mr.

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[397] *See* Findings and Decision, *supra* note 359 at Conclusion 16 at 18 (concluding that labeling an impact as "significant" is not required in an EIS).
[398] *See City of Des Moines*, 98 Wn. App. at 852, 988 P.2d at 37 (1999).
[399] FORC Brief at 27.
[400] Tr. vol. 9, 128:8–132:21, 160:14–161:25, July 26, 2018 (Leech); Hr'g Ex. 215 at 4 (proposal submitted by the SAL for the 2016 assessment, stating that the SAL's work would include "a detailed manual review of the entire tree canopy data set").
[401] FORC Brief at 25.
[402] Tr. vol. 9, 163:9–14, July 26, 2018 (Leech).
[403] Hr'g Ex. 215 at 6.

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Leech agreed with that conclusion.[404] Accuracy assessments using data from the SAL that were published in a peer-reviewed study confirmed the high degree of accuracy of SAL's methodology, with accuracies exceeding 90–99 percent.[405]

- Contrary to FNC's characterization, the +/- 3 percent margin of error referenced in the City's summary of the 2016 LiDAR assessment does not apply to the 2016 LiDAR assessment.[406] Rather, that margin of error applies to the attempt to calculate changes in tree coverage from a 2001 assessment.[407]
- The SAL's tree canopy data did not include only leaf-off data, as FNC claims,[408] but rather captured both leaf-off and leaf-on conditions citywide.[409]
- Contrary to JuNO's assertion,[410] the FEIS describes how the change coefficients for the high scenario and low scenario were calculated for the various zoning categories.[411]
- Contrary to FORC's characterization, Mr. Leech did not testify that no analysis was done for areas outside of urban villages.[412] Mr. Leech's testimony was in response to a series of questions asking whether the FEIS had done a separate analysis for areas inside and outside the urban villages.[413]

[404] Tr. vol. 9, 128:8–132:21, 160:14–161:25, July 26, 2018 (Leech).
[405] Tr. vol. 9, 128:8–132:21, July 26, 2018 (Leech).
[406] FNC Brief at 14.
[407] Hr'g Ex. 79 at 2.
[408] FNC Brief at 14.
[409] Tr. vol. 9, 101:10–102:12,104:8–17, July 26, 2018 (Leech).
[410] JuNO Brief at 30–31.
[411] FEIS at 3.317 – 3.319
[412] FORC Brief at 24.
[413] Tr. vol. 9, 156:24–158:24, July 26, 2018 (Leech).

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