BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by Seattle Coalition for Affordability, Livability, and Equity of the City of Seattle Citywide Implementation of Mandatory Housing Affordability (MHA) Final Environmental Impact Statement	Hearing Examiner File No. W-17-010 SCALE'S CLOSING REBUTTAL ARGUMENT

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I. GENERAL CONCEPTS

The City asserts (at 1) that the statutory admonition to give "substantial deference" to the adequacy of an EIS creates a "heavy burden." This claim is not followed by any citation and we are aware of none.

We agree that it is not enough for us to show that there is a different way to analyze issues. Our burden is to demonstrate that the EIS's analysis is flawed or lacking in some material respect.

The City points to testimony of its witnesses who asserted that this EIS provides as much or more analysis than others they have helped prepare.[1] Such testimony carries little or no weight. One, each EIS is unique. Even within the realm of nonproject EISs, there is a wide range of detail required, depending on the nature of the proposal, with the adoption of regulations requiring more specificity than adoption of policies. Weinman (V19 @ 54:10–55:8). Two, the other EISs the City's witnesses referenced were not admitted into evidence. There is little or no basis for the Examiner to assess the similarity of the proposals or the adequacy of the analysis. Three, nothing is known as to whether the other EISs were challenged or, if they had been, whether they would have withstood scrutiny. (In contrast, when we compared this EIS to other EISs, the proposals were virtually identical and the other EISs were introduced into the record.)

Granularity aka level of detail. The City makes the broad claim (at 2) that the rule of reason requires only a "general level of detail." This oversimplification fails to address the various factors courts use to assess adequacy, including the nature of the proposal and the magnitude of the

[1] The adequacy of an EIS is a question of law. *Barrie v. Kitsap County*, 93 Wn.2d 843, 613 P. 2d 1148 (1980). Expert opinion on questions of law is improper. *State v. O'Connell,* 83 Wn.2d 797, 816, 523 P.2d 872, 885, supplemented, 84 Wash. 2d 602, 528 P.2d 988 (1974) ("If the evidence was offered in an attempt to prove the law, it was improper, since the determination of the applicable law is within the province of the trial judge and not that of an expert witness."). Therefore, the Hearing Examiner should disregard any testimony by City experts stating that the EIS is adequate.

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impacts. *See* SCALE Closing at 7–11. The City (at n. 5) cites two cases to support its simplistic statement. Neither case is like this one. One involved the review of the EIS for a race track in Auburn. That EIS devoted 42 pages to analyzing site specific traffic impacts. The only challenge was that for intersections predicted to operate at LOS F, more detail as to the precise nature of the delays at those intersections should have been provided. The court's rejection of more detail in that context sheds no light on the level of detail needed here. *Citizens Alliance v. City of Auburn,* 126 Wn.2d 356, 369 (1995) ("*CAPOW*").

In the other, a general EIS was adequate because there was a commitment to follow it with another at the project level. "[S]taged EIS review appears to be an unavoidable necessity." *Cathcart-Maltby-Clearview Comm. Council v. Snohomish Cy.*, 96 Wn.2d 201, 210 (1981). "[O]ur approval of this EIS does not relieve the developers from ultimately complying with all SEPA requirements." *Id.* Also, there was evidence of the county denying permits when impacts were too severe. *Id.* at 211. There are no similar "later EIS" guarantees here and no similar track record here. Indeed, the opposite is true. Virtually all projects catalyzed by this proposal will be assessed without a project specific EIS and there is no evidence the city will deny any project that complies with MHA zoning. *See* SCALE Op. Br. at 4 -5.

The City asserts (at 8) that preparing adequate analysis would have been costly. But no credible cost estimates were provided nor was evidence submitted on the availability of funds.[2] Moreover, given the astronomical increase in development value embedded in the extensive

[2] Mr. Weinman's speculation that an adequate EIS might cost "as much as" $13 million should be given no weight. He arrived at that figure simply by taking the cost of Uptown EIS (which he stated, without documentation, was half a million) and multiplying it by 33 (the number of UVs). That assumes no economy of scale and that several UVs could not be considered in a single EIS.

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upzones and the potential for widespread, fundamental change to the character of the city, spending additional funds to make an informed decision would have been reasonable.

The mechanism the City decides to correct the current deficiencies is not the issue. Whether the requisite detail is provided in a single EIS or multiple ones (combining several proximate UVs) or one EIS for each UV is for the City to decide. The issue here is only whether the current EIS provides the necessary detail.[3]

II. ALTERNATIVES

SCALE challenged the scope of alternatives in the historic resources and displacement sections of our closing argument. We address here arguments the City raises concerning alternatives that apply to both the historic resources and displacement issues.

The City argues (at 8) that the scope of alternatives is limited by the details of the specific proposal described in the EIS. But SEPA directs the City to describe proposals in terms of objectives, not specific solutions. SMC 25.05.060.C.1.c. Then, based on those objectives, alternatives should be crafted that can "attain or approximate the objectives of the proposal." SMC 25.05.440.D.2. Thus, to be reasonable, an alternative need not replicate the specific mechanisms in the agency's preferred solution, but should "attain or approximate *the objectives*." *Id.* (emphasis supplied). *See also,* City Br. at 9, n. 46 (discussing cases that reference the agency's "objectives" in defining proper scope of alternatives).

The EIS starts on the right foot, with a broad statement of the City's objectives. EIS @ 1-3. It is those objectives, not the details of a specific proposal, that defines the scope of the

[3] Likewise, if the Examiner finds this EIS deficient, the remedy should not be direction that the City cure the problem by doing an EIS on a subsequent phase or project. As noted in our Opening at 1 - 6, there is no subsequent planning phase (*e.g.,* subarea plan) where programmatic and cumulative effect issues can be addressed and project level EISs are rare and will not address programmatic cumulative effects in any event.

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alternatives. But the City's lawyers stray from these precepts, arguing (at 10, n. 57) that SMC 25.05.442.D allows the City to limit alternatives to those that match the specific mechanisms for accomplishing the objectives that are set forth in the City's preferred alternative. The City overlooks the entirety of the phrase the City seeks to apply.

SMC 25.05.442.D states that a nonproject EIS "may be limited to a discussion of alternatives which have been formally proposed or which are, while not formally proposed, reasonably related to the proposed plan." (Emphasis supplied.) The City argues that this trumps the rules and cases cited and quoted above that direct that the project's objectives, not the precise mechanisms to accomplish the objectives, define the scope of alternatives. But the City's brief overlooks the concluding phrase of the rule it cites. An alternative is "reasonably related" to the proposed plan if it would "feasibly attain or approximate the objectives." SMC 25.05.440.D.2. While the City overlooks the import of the concluding phrase, the Examiner should not. The scope of alternatives is not as limited as the City now argues.

The City cites (at n. 44) *CAPOW, supra,* to support its claim that the scope of alternatives is decided by referring to the specific proposal, not the City's objectives. But that case does not say that the scope of alternatives is limited to those that match the agency's proposal. Rather, in that EIS for a new race track in Auburn, the city considered not just the preferred mechanism of accomplishing its objectives (a new track at a given site), but analyzed other sites, too. If Seattle's construction of the rule were correct, Auburn could have limited its analysis to the specific preferred alternative site. Auburn did not advance that argument and the court did not condone it.

The City is wrong in contending (at 16) that evidence is irrelevant if it shows that an omitted alternative will attain or even be superior to the preferred alternative. While the Examiner is not

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deciding which alternative is superior, evidence that an omitted alternative will attain or do a better job of meeting the City's objectives is relevant to whether the alternative is a "reasonable" alternative.

Each of the omitted alternatives proffered by the appellants meets the standard of approximating the City's stated objectives. For instance, the omitted alternative of designing the upzone areas to avoid concentrations of intact, vintage neighborhoods and historic properties would be virtually identical to the preferred alternative in terms of equitably increasing production of affordable housing. EIS at 1-3 (statement of City's objectives). That alternative would differ simply by increasing the density increases in some areas while decreasing them in others (much as the three action alternatives shift density around). A "historic preservation" alternative would attain the City's objectives to the same extent as the action alternatives – while reducing adverse impacts on some of Seattle's classic neighborhoods.

The City (at 11) attacks alternatives discussed by Mr. Levitus and Mr. Sherrard that included no upzones on grounds that the upzone is an inherent element of the proposal which must be replicated in any alternative. Here, the City most egregiously strays from SEPA's focus on objectives in defining the scope of alternatives. Nothing in the enumerated objectives (EIS at 1-3) states that equitably providing for an increase in affordable housing and housing production necessitates an upzone. Levitus and Sherrard testified that the City's objectives could be attained or approximated without an upzone. Indeed, these alternatives were included in the same list of recommendations that the City now cites as laying the foundation for its action alternatives. The HALA recommendations were intended to provide "a suite of concepts" to help accomplish the mayor's objective "to generate a net increase of 50,000 units of housing." Ex. 265 at 3, 4 (Executive Summary). Increasing density in and around UVs was a key proposal. *Id.* at 5. Housing for the poor was to be addressed through a larger housing levy and mandating inclusion of low-cost housing within their new projects: "A mandate that

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developers provide a share of the apartments in their new buildings to people who cannot compete in the market." *Id.* Among options was inclusionary zoning – a requirement that low-income housing be provided within new developments. Paying an in-lieu fee was described as "an alternative." *Id.,* App. E at 1. But now, the "alternative" has become the sole proposal and the original proposal has been omitted from the analysis. The testimony of Sherrard and Levitus establish that the non-upzone alternatives could approximate the City's objectives as well as the proposal. Better yet, the non-upzone alternatives could do so with less adverse effects. *See* SMC 25.05.440.D.2.

Critically, the tradeoffs and interactions between these and other means of accomplishing the mayor's objective have not been studied in any EIS. They should have been studied in this one, so the City could make an informed judgment as to relative benefits and environmental costs of staff's preferred alternative and these viable alternatives. As the HALA report stated:

> [W]e understand further analysis of our ideas must occur, not only to assess scale and fit in specific areas of the city, but to test and refine our assumptions. Further, the cumulative effect of the changes should be reviewed to ensure that the recommendations are appropriately packaged.

Id. at 14.

The City argues (at 15) that the alternative of drawing the lines to avoid vintage neighborhoods could be cast as mitigation instead of as an alternative. This argument is factually baseless: The City did not include revised upzone and UV expansion boundaries as a mitigation measure either. Moreover, if mitigation measures involve a "substantial change" to the proposal (*e.g., c*hanging upzone areas and UV boundaries to protect vintage neighborhoods), they must be analyzed in detail in the EIS. SMC 25.05.440.E.3.d; -660.B. That did not happen here.

The City argues (at 12) that the differences among its alternatives are "meaningful." Yet the differences the City cites are typically quite small, as the EIS acknowledges, repeatedly, or are only

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vaguely described.[4] Far more text is devoted to describing impacts common to all alternatives than to the differences among them.[5]

The failure of the EIS to analyze materially different alternatives is, itself, a deficiency requiring remand. *See, e.g., California v. Block,* 690 F.2d 753, 767 (9th Cir. 1982) (by excluding meaningfully different alternatives, the EIS "ends its process at the beginning"). It blocks the Council and the public from making choices from among a wider, reasonable array of policy options — just as SEPA intends, *see, e.g.,* SMC 25.05.060.C.1.c ("[p]roposals should be described in ways that encourage considering and comparing alternatives").[6]

The City emphasizes that not every conceivable alternative need be analyzed. That admonition appears in cases where challengers urge consideration of an alternative that, while conceivable, is infeasible, starting with *Life of the Land v. Brinegar,* 485 F.2d 460, 471 (1973) and *Vermont Yankee v. NRDC,* 98 S.Ct. 1197 (1978) and continuing to *CAPOW, supra,* 126 Wn.2d 366 (EIS has to include

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[4] *See, e.g.* EIS at 3.89 (new housing supply varies by one percent among the alternatives); 3.91 (physical displacement "about the same range" among all alternatives). Within most neighborhoods, the variation of projected new housing is slight: Greenwood (varies from 604 to 612); Ravenna (1639 to 1716); West Seattle Junction (3041 to 3351); Ballard (5467 to 5812); Northgate (4450 to 4526) Columbia City (1049 to 1205). EIS at 2.26. Larger variations are uncommon and still not that large: Madison Miller (1171 to 1533); Wallingford (1395 to 2066). *Id.*

Tree canopy impacts vary only slightly, too: All are projected to be less than one half of one percent different from the no action alternative. EIS at 3.328, 3.334, 3.338.

Aesthetic impacts also vary little. For each action alternative, the EIS states the impacts "would resemble those described under Impacts to All Alternatives." EIS at 3.192 (Alt. 2); at 3.197 (Alt. 3); at 3.202 (Preferred Alt.). (The only variation is said to be in the small areas zoned HR and RSL in the Preferred Alternative. EIS at 3.202.

[5] For instance, there are 23 pages devoted to housing impacts common to all alternatives and only two and a half pages devoted to analyzing impacts unique to the Preferred Alternative. There are four pages devoted to historic resource impacts common to all alternatives and a single paragraph ot the impacts unique to the Preferred Alternative. This pattern is repeated throughout the EIS.

[6] The City notes (at 16) that the primary point of distinction among the alternatives in the EIS was by shifting new density among areas characterized by access to opportunity and vulnerability to displacement. While this certainly could be one meaningful distinction, the reality was that the City's tool for predicting these outcomes was found to be unreliable, according to the City's own analysis, EIS at 3.42 ("areas classified to have low displacement risk and high access to opportunity have a *higher* ratio [of low-income displacements] than areas with high displacement risk and low access to opportunity") (emphasis supplied). Therefore, in the one area where the City attempted to craft meaningfully distinct alternatives it failed and in all other respects, it did not even try.

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"feasible" alternatives). That is not the situation here.[7] It is also raised when challengers suggest an alternative that lies midway between two that are being studied. *Oceana Inc. v. Evans,* 384 F.Supp. 2d 203 244 (D.C.D.C. 2005) (alternatives may not be limited to "only one end of the spectrum of possibilities") (internal citation omitted). That is not the case here. The City cites no case where the admonition has been employed to reject an alternative that is feasible and provides a truly different means of accomplishing the agency's objectives as the same or lower environmental cost – the precise situation here.[8]

III. GEOGRAPHIC SCOPE

Appellants do not dispute that the "study area" as defined in the EIS includes areas outside of urban villages. The City's Closing Brief incorrectly claims that Appellants are "confused" about this, takes Mr. Moehring's comments out of context, and tells only half of the story. When Mr. Moehring said that the FEIS "does not cover what's outside of the urban village," he was primarily talking about areas that were immediately adjacent to, but outside of the boundaries as shown by the red boxes that he drew on Exhibit 245. V11 @ 202:17-18. Mr. Moehring revealed later that he did misunderstand the extent of the study area because the EIS Exhibit 3.2-2 was ambiguous. V11 @ 216:2-18. What the City failed to mention is that, on redirect, the ambiguity was clarified when Mr. Moehring testified

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[7] The City speculates (at 18) that higher fees would not be feasible, but the evidence shows that is pure speculation. As Mr. Levitus testified and as the City has admitted, it never tested any fee between 11% (feasible) and 25% (infeasible). That means that fees that would raise 50% or 100% more than the proposal (*i.e.,* 17% and 22%) were not analyzed – even though Mr. Levitus testified that they have been successfully used in peer cities. Vol. 7 at 56:25 (peer cities have done much higher); 59:7 (EIS inconsistent with results in peer cities); 92:12 (15% very common in peer cities); 145:11 (Seattle not *sui generis*; look to peer cities); 156:13 (feasibility demonstrated by reference to peer cities; peer cities are "not so different"). The City cannot reject those reasonable alternatives based on its own, untested speculation. (Note that if higher fees were employed, less upzoning would be required to raise the same amount of money, resulting in fewer adverse impacts with no loss in housing production and affordability.)

[8] In *SWAP v. Okanogan Cy.,* 66 Wn. App. 439, 446 (1992), a failure to consider two, additional feasible alternatives was excused when the rural county lacked funds to do more. No such showing has been made by the City here. *See also* n.1, *supra* and SCALE's Closing Brief at 16.

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once and for all that the study area did indeed include areas outside of the urban villages. V11 @ 217:21-219:2. In other words, there is no dispute on this issue.

Contrary to the City's claim otherwise (at 4), Mr. Steinbrueck did not "confuse the geographic scope of the study area" and he did not testify that the EIS study area was limited to urban villages. Mr. Steinbrueck testified, correctly, that was that there is scant information in the EIS about areas outside of the urban villages other than a very difficult to read map. V3 @ 87:16-25. He testified that there was no analysis of the impacts of the "citywide broad- brush sweep of all land use regulation" that is proposed outside of the urban villages. V3 @ 88:2-3. While the City may believe that a linear description of the different sizes of buildings that will be allowed by the proposal anywhere and everywhere in the entirety of the study area constitutes an analysis of impacts, Mr. Steinbrueck clearly does not. In fact, his testimony reveals that it didn't even occur to him that this would pass as a credible analysis.

Mr. Steinbrueck is right. The EIS does not adequately disclose and analyze the existing environment of and/or the impacts to the areas outside of the urban villages. The discussion of neighborhood specific land use impacts in the EIS at pages 3.121 through 3.154, which is titled: "Impacts to Urban Villages and Expansion Areas," is focused only on the areas within the urban villages – it doesn't discuss land use impacts to areas outside of urban villages. The remaining text in the EIS and the maps do not contain adequate information to truly understand the impacts of the rezones outside of the urban villages.

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IV. LAND USE AND AESTHETICS

A. The EIS does not adequately describe the affected environment in the study area for land use or aesthetics

A central argument presented on appeal and discussed in detail in SCALE's Closing Brief is that the EIS does not adequately describe the affected environment in the study area for land use and aesthetics. *See* SCALE Closing at 23 and 32.

In it's brief, the City claimed, incorrectly, that the description of the existing conditions for aesthetics and land use was "very specific." To support its claim, the City points to page 3.122 of the EIS, which is a description of impacts in Othello that mentions that existing single-family areas near the light rail station would be changed to multi-family. City Br. at 29. That is not even an adequate discussion of existing conditions for Othello, much less an adequate discussion of existing conditions for the other neighborhoods in the study area.

Using one isolated statement made by Greg Hill about one single sentence in the EIS, the City argues that Appellants are seeking "hyper-specific details" with this claim. City Br. at 29 citing V12 @ 140:10-141:18. Setting aside that Mr. Hill's criticism of the EIS text at page 3.163 cannot fairly be characterized as "hyper-specific" because a home built 50 years ago has a completely different aesthetic and look than a home that was built 100 years ago, the City's one single isolated example cannot be relied on to characterize the entire presentation on this issue in the Closing Brief and by all of the witnesses as being "hyper specific," when in fact they were not.

B. Mr. Gifford established that the EIS analysis of land use and aesthetic impacts is not "extensive and detailed."

The City's claim in its Closing Brief that the analysis of land use and aesthetic impacts in the EIS is "extensive and detailed" is not only false, it is also the opposite of what Mr. Gifford said in his testimony. Over and over again, Mr. Gifford stated that he conducted a "generalized" review

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that was not detailed or extensive because a generalized review is "typical" and sufficient for a non-project action EIS. *See* V18, @ 12:1-13; 18: 4-11; 42:1-6; 53:19-25-54:1-9; 54:16-25; 59:8-15; 69:16-21; 104:2-19. Moreover, the EIS itself states that its review does not provide a detailed or site-specific analysis of aesthetic impacts at any specific location. Ex. 2 at 3.169.[9]

C. Appellants are not arguing that an exhaustive review of every property and every street in the study area is necessary.

The City paints a false picture of Appellants claims as "demanding" an extreme level of detail in the EIS. *See* City Br. at 1. Mr. Gifford testified that SEPA does not require an "an exhaustive review of both existing conditions and project impacts on every property in a study area" or a "street-by-street, block-by-block exhaustive list" of existing baseline and impacts. *See* V18 @ 53:19-25-54:1-9; 54:16-25. But Appellants are not arguing that an exhaustive block-by-block review of every property and every street is necessary. Neither the Uptown EIS, nor the U. District EIS (two examples of EISs provided by Appellants) contain block-by-block review of every property and every street - rather they both contain a reasonably thorough discussion of the existing conditions and the potential impacts of those zoning proposal. *See* Ex.'s 306 and 307. In contrast, the MHA EIS did not provide even this basic information and analysis.

D. There is no such thing as a "typical and standardized methodology" for analyzing the aesthetic and land use impacts of non-project actions

Kevin Gifford, the author of the aesthetics and land use chapters of the EIS, repeatedly attempted to defend his work by claiming that what he did is typical for a non-project action EIS. V18 @ 50:16-19; 53:19-25-54:1-9; 54:16-25; 59:8-15; 104:2-19; 108;13-16. The City argues that

[9] It's also worth pointing out that Mr. Weinman did not testify that the level of analysis of land use and aesthetics "exceeds the level of analysis" that is standard for non-project actions. He did say (in error) that it was "detailed and specific," which, he claimed was standard for a non-project action, but he did not say that it "exceeded" the level of analysis that is standard for a non-project action. V19 @ 36:20-37:3

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because Mr. Gifford's analysis in the EIS used "typical and standardized methodology and typology of impacts," it is reasonable. City Br. at 20, 23.

The problem with this argument is that there is no such thing as a "typical and standardized methodology" for analyzing the environmental impacts of non-project actions. The level of detail required in an EIS is a function of the severity of the anticipated impacts and the specificity of the proposal. *See* SCALE Closing at 7- 11. To answer the question of how much information is enough, "SEPA's conceptual answer is that the requisite amount of environmental information is directly proportional to an action's potential adverse environmental consequences." Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14.01 (2017). Comprehensive Plan amendments (a non-project action) are subjective directives that have less specific and less certain impacts than zoning code amendments. A Comprehensive Plan policy could, for example, generally encourage height increases within urban villages throughout the entire City of Seattle. On the other hand, zoning code amendments (also a non-project action) have specific and discernable impacts that are known and that can be described and analyzed with more certainty in an EIS. For example, a code height limit of 30 feet on specific properties in an area could be changed to 65 feet on those specific properties. Because the two different non-project proposals are different in function and specificity, an EIS for Comprehensive Plan amendments will contain different methodology and analysis of impacts than an EIS for zoning code amendments.

Mr. Gifford's testimony revealed cracks in the notion of a "typical and standardized methodology" for non-project actions. *See* City V18 @ 104:2-19; 54:16-25. Mr. Gifford himself admitted at times that the level of detail required in an EIS is a function of the severity of the

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anticipated impacts and the specificity of the proposal and there is, therefore, no "typical and standardized methodology" for analyzing the environmental impacts of non-project actions. *Id*.

E. The EIS did not adequately analyze edge impacts.

With respect to edge impacts, the City argues (at 5) that the EIS includes "extensive analysis of land use and aesthetic impacts to areas adjacent to the study area" and points to the EIS at 3.117 and 3.186-3.187. The analysis of edge impacts at those pages in the EIS can hardly be characterized as extensive. And it is certainly inadequate for the reasons explained in SCALE's Closing Brief at 37.

The graphic at EIS 3.187 (relied on by the City) shows a generic picture of what it may look like to have LR1 zoning across the street from NC-55. That's it. The impact is shown from the perspective of a person floating in mid-air down the block. The new Lowrise buildings are hidden behind an "existing" single-family home that looks nothing like the actual bungalows that exist in many of the neighborhoods that are affected by the Proposal. *See e.*g. Ex.'s 241, 249. The graphic at 3.187 does not show existing conditions of actual edge areas that exist in Seattle. It does not show steep slopes or views. It does not show the impacts to existing single-family homes that are immediately adjacent to (with no street or alley between them) NC-55, NC 65, or NC-75. There's no information about the land use impacts of having NC-55 or NC-75 introduced into an area that is currently predominantly single-family homes.

There are many locations throughout the City where the proposed NC height increases will go from 40 feet to new heights of 55 feet and 75 feet adjacent to zones that are limited to 30 feet. V11, 189:1-194:7, 206:11-24; Ex. 245. We also know that there are many locations where the proposed LR3 height increases will go from 40 feet to new heights of 50 feet adjacent to single

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family zones that are limited to 30 feet. *Id.* The EIS does not analyze the impacts that will be caused by these changes.

The single statement about Greenwood-Phinney Ridge edge impacts in the EIS at 3.148 is conclusory and does not fix the problem. It's unclear why the authors concluded that the impacts of these edge effects are "moderate" and not significant. That is an arbitrary conclusion without context or support. The same is true for the Queen Anne Urban Village conclusion at pages 3.147-8 of the EIS. Edges in these neighborhoods will have single family zones immediately adjacent to a wide range of upzones from LR 3, to NC 55, NC 65 and NC 75. *See* Ex. 245 (H.77 and H.44 with red dotted lines). It's difficult to accept that single-family zones (height limit 30 feet) adjacent to areas that will be increased to a height limit of 75 feet will only have a moderate impact. And that would be even worsened if there are slopes in the area. The EIS does not take this issue seriously and does not provide a meaningful, thorough analysis of this situation.

Furthermore, as inadequate as the discussion is about the edge impacts for Greenwood and Queen Anne, that discussion applies only to those two neighborhoods. As is plainly evident from Ex. 245, there are many areas of concern with respect to edge effects in about 25 other neighborhoods throughout the City. The EIS does not mention this.

F. Uncertainty about future development is not a viable excuse for failing to disclose environmental impacts of the proposal.

Mr. Gifford's claim that the zoning amendments will not cause direct or indirect land use impacts (V18 @ 24:25; 25:1-25) reveals a profound misunderstanding of SEPA. "Impacts," which must be disclosed and analyzed in an EIS, are the effects or consequences of actions. SMC 25.05.752. "Impacts" that must be reviewed in an EIS include direct, indirect, and cumulative impacts. SMC 25.05.792; SMC 25.05.060. Adoption of the MHA Proposal will literally establish

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new legal rights for property owners to develop at higher capacities than before. SEPA law is clear: For a non-project action that governs future project development, the probable impacts of the future development that would be "allowed" must be considered (not what would actually occur). *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd*., 176 Wn. App. 555, 579 (Div. III 2013) *See also* Dept. of Ecology SEPA Handbook, § 4.1, at 66.

The City argues that the generalized, non-specific, approach of impact analysis taken by the EIS is consistent with SEPA case law in which the courts have recognized that a rezone is causally independent of any actual development proposals and that project level impacts are impracticable to address at the rezone stage. City Br. at 23-24 *citing Cathcart-Maltby-Clearview Cmty. Council*, 96 Wn.2d at 208-210. But the City has misinterpreted and misapplies *Cathcart.*

In *Cathcart*, the court approved phasing of programmatic EIS review. *Id*. at 210. The court noted that is not appropriate to approve piecemeal EIS review when it may allow adverse consequences to go unidentified until after the project has so progressed that preventing its completion or mitigation its consequences becomes unlikely or impossible. *Id*. The court said: "Our approval of this EIS does not relieve the developers from ultimately complying with all SEPA requirements." *Id* at 211. The court upheld that EIS solely because it was clear that the legally required review would occur – it was just being done in more than one phase. The court allowed phased review because the evidence showed that the consequences of the development could not be assessed at the first phase. *Id*. at 210.

Cathcart is easily distinguishable from this case. The City has made it clear that it has no plans to conduct any additional programmatic second phase analysis of neighborhood or other impacts of this proposal. V18 @ 112:1-115:10 (Gifford). The City Council will adopt the MHA Proposal and the new zoning will take effect. The City has no plans to disclosed or analyze the

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neighborhood level impacts before the MHA Proposal is adopted. *Id*. Even if the City had proposed it, phased review would be inappropriate here because the consequences of the zoning amendments can be assessed now. The map amendments and the zoning text amendments will increase development capacity on property in Seattle in a manner that can be measured quantitatively and specifically. *See* Ex. 2 (EIS) at Appendix H; Ex. 2 (EIS) at F.1.

G. The EIS aesthetic impacts analysis is inadequate

Despite that Mr. Gifford acknowledged that context matters for purposes of determining impacts (V18 @ 123-124), the aesthetic impacts analysis in the EIS does not consider context. For that reason, it does not provide a meaningful analysis of impacts. In addition, the EIS fails to adequately address view impacts, shadow impacts, and scenic view impacts. SCALE Closing at 23-32.

The maps in Appendix H and the interactive map only tell us two things: what the existing zoning is and what the proposed zoning is going to be. Those maps do not provide any information about the existing conditions in each subarea or how the proposal will impact those subareas in the context of their unique aesthetics and land use. Those maps do not show the topography. They don't identify viewsheds, buildings of importance, neighborhood character, scenic routes, park locations, major institution locations, or anything else that is relevant to aesthetic impacts. Those maps just provide a graphic depiction of what is being proposed by the City. They do not even show us what the zoning is outside of the study area on the edges of the proposal. The graphics depicting height, bulk, scale and character at pages impacts are incomplete and not credible for reasons provided by several witnesses. The images provided in the Urban Design and Neighborhood Character Study are bird's eye view of isolated buildings provided out of the context of location and setting.

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Providing a few selected sentences of portions of witness testimony, the City argued that certain witnesses ignored analysis in the EIS of miscellaneous neighborhood specific issues. City Br. at 27-28. The City selected isolated statements that certain witnesses made about one intersection, one building, or one other single concern. For example, the City picked out a single statement from Ms. Derr's testimony about a single intersection in Queen Anne and argued that the EIS addressed that issue at 3.147. Even with that single example, the City's argument falls flat. That section in the EIS at 3.147 says only that the changes at that single intersection "could create increased scale and density impacts." That's it. We don't know what those impacts are, we don't know how significant they are, and the decisionmakers cannot discern whether the proposal should be changed to avoid those impacts.

Similarly, despite that Ms. Tobin Presser provided great detail about the existing conditions and potential impacts in West Seattle, the City zeroed in just two single statements. City Br. at 27. The first statement was taken out of context. Ms. Tobin-Presser's comment followed her description of language in 3.3.2 wherein the EIS specifically says that the EIS does not provide a detailed or site-specific analysis of aesthetic impact at any specific location. V11 @ 86:1-19. She was echoing what the EIS itself states on that page with respect to aesthetic impacts. The City also falsely stated that Ms. Tobin-Presser "ignored" the paragraphs addressing land use impacts in the FEIS at 3.124. To the contrary, she literally read the exact sentence that the City claims she ignored into the record during her testimony and explained why it was inadequate. V11 @ 139:12-141:6.

The City's attempt to attack isolated statements made by Mr. Hill was equally flawed. *See* City Br. at 28, *citing* V12 @ 77:11-78:11. When Mr. Hill testified about the difference in aesthetic impacts over time, he was clearly talking about the specific impact in the context of Wallingford, which is almost entirely currently single-family zoning with bungalow style buildings less than 30 feet

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tall primarily and then some one and two-story buildings along the commercial area. V12 @ 77:11-78:11. Mr. Hill also literally testified about exactly what the City says he ignored (City Br. at 28). V12 @ 80:1-96:19. In fact, the City objected to try to bar him from discussing very information that the City now claims he ignored. V12 @ 82:16-25.

The same logic and concepts apply to each of the other isolated examples provided by the City at 27-28 of its brief and Appellants urge the Hearing Examiner to review those not addressed here with equal scrutiny. Overall, these selected attacks on isolated statements do not address the majority of issues presented.

Apparently, there is some recognition on the part of the City that the aesthetics chapter is inadequate because the City attempts to convince the Examiner that the "full perspective" of aesthetic impacts is explained in the combination of the land use chapter and the aesthetics chapter. *See* City Br. at 23. The problem is: the aesthetic impacts are not adequately addressed in the land use chapter either.

While land use and aesthetics are interrelated, they raise distinct issues. *See e.g.* Ex.'s 306 and 307. Land use impacts relate to the overall pattern of existing development and land use in different areas, the extent and location of different uses within the context of an entire area, such as commercial use, mixed use, single-family use, multi-family use, major institutions, industrial use, and other types of uses in subareas within the study area. Id. With an analysis of land use impacts, it's important to know where the parks are, where the major institutions are, where the schools are, where the town center is. *Id*.

Aesthetic impacts, on the other hand, focus on neighborhood character, visual character, lot sizes, existing street networks, green streets, architectural aesthetic, the height, bulk and scale in

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different areas, viewsheds, scenic routes, shadows on specific public parks, historic landmarks, light and glare, and buildings and areas of visual interest. *See* Ex.'s 306 and 307.

The question is whether the EIS adequately discusses the baseline current aesthetic environment and the significant aesthetic impacts anywhere in the EIS. As Appellants demonstrated at the hearing and in the Closing Briefs, the EIS (including the land use chapter) did not adequately address aesthetic impacts.

H. The EIS does not adequately disclose and analyze land use impacts.

Essentially, what the City is arguing with respect to land use impacts, is that the EIS is adequate because it concludes that impacts may be minor in one location, moderate in another location, and significant in a third location. City Br. at 20-22 *citing* Ex. 2 (EIS) at 3.115-3.116.

That statement could be made in any EIS for any project. The point of an EIS is to actually describe and discuss the different locations that are affected and provide a meaningful discussion about what the actual impacts will be in those locations. The EIS discussion of land use impacts does not provide adequate disclosure and analysis of the actual land use impacts for each neighborhood and areas outsides of those neighborhoods throughout the entire study area that will occur as a result of this proposal. *See* SCALE Closing. at 32-38.

The discussion of "neighborhood specific" land use impacts in the EIS at pages 3.121 through 3.154, is not a reasonable or meaningful analysis of land use or aesthetic impacts. That discussion provides arbitrary, vague, incomplete thoughts about random issues in each neighborhood that have no context within the bigger picture.

A proper neighborhood specific discussion about land use impacts would be rooted in a general subarea overview of the study area, including the neighborhoods, describing the range of development and the overall pattern of existing development and land use in these subareas, the

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extent and location of commercial use, mixed uses, single family use, multi-family and other uses in these subareas, the location of major land uses of importance. Examples of what that would look like was provided by appellants witnesses at the hearing. V3 @ 160:15-168-5; V11 @ 52:11-75:3; V11 @ 227:8-236:25; V12 @ 63:21-74:5; V12 @ 185:24-195: 16; V12 @ 217: 25-227:3; V13 @ 14:24-17:24, 26:12-29:25. With that information, the EIS must discuss and assess the land use impacts associated with the range and pattern of development and extent and location of uses in each neighborhood.

A proper neighborhood specific discussion about aesthetic impacts would be rooted in a description for each neighborhood of the impacts to the existing street network, green streets, neighborhood character, visual character, lot sizes, architectural aesthetic, different height/bulk/scale in different areas, location of light rail station, viewsheds, scenic routes, shadows on specific public parks, historic landmarks, light and glare, buildings and areas of visual interest. Examples of what that would look like was provided by appellants witnesses at the hearing. V3 @ 160:15-168-5; V11 @ 52:11-75:3; V11 @ 227:8-236:25; V12 @ 63:21-74:5; V12 @ 185:24-195: 16; V12 @ 217: 25-227:3; V13 @ 14:24-17:24, 26:12-29:25. With that information, the EIS must discuss and assess the land use impacts associated with the aesthetics of each neighborhood.

I. The EIS does not take a hard look at applicable land use plans and regulations

The City's argument that SEPA does not require an "extensive policy-by-policy analysis" (City Br. at 31) to determine whether the proposal is consistent with the Comprehensive Plan might be worth discussing if the EIS actually contained a passable summary of applicable land use plan policies and/or regulations that are applicable to the Proposal. But the EIS summary of applicable policies and regulations does not pass even the most minimal test – it is appalling. The EIS did not take a "hard look" at this issue.

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The EIS does not identify or discuss neighborhood plan policies at all. The EIS did not identify or discuss the proposal's consistency or inconsistency with SMC 23.34.008 or other applicable regulations regarding rezones or other relevant issues. Out of hundreds of policies in the Comprehensive Plan, the EIS identified only a handful. And even for those few that it did identify it did not discuss whether or not the Proposal is consistent or inconsistent with those policies.

There are 10 neighborhood plan policies that mandate protection of single-family areas within the urban villages: Aurora Licton AL-P2, Fremont F-P13, Morgan Junction MJ-P13, Morgan Junction MJ-P14; North Rainier NR-P9; Northgate NG-P8; Roosevelt-LUG1; Wallingford W-P1; West Seattle Junction WSJ-P13; and Westwood/Highland Park W/HP-P3. Ex. 3 at 206, 303, 332, 349, 355, 379, 398, 405, 408. The Proposal is inconsistent with 10 neighborhood plan policies. V11 @124:20-125:6; Ex. 49. The City admits that the Proposal is inconsistent with these neighborhood policies. Ex. 243. But the EIS does not identify those policies, does not summarize them, and does not discuss how the proposal is inconsistent with those policies. *See* Ex. 2. In fact, the EIS misleads the reader on this issue. *See* Ex. 2 at 3.130 (Alt 2) 3.140 (Alt 3); 3.155 (Preferred Alt).

The Proposal is likely inconsistent with approximately 80 other comp plan and neighborhood plan policies. Ex. 8 It is also inconsistent with SMC 23.34.008. See Ex. 245. While the City disputes these claims of inconsistency, the very existence of this dispute is evidence alone that a discussion about consistency or inconsistency should have been included in the EIS.

The City's argument that this is consistent with the City's past practice and satisfies SEPA requirements is belied by the summary of land use plans and regulations in the Uptown EIS and the U. District EIS. *See* Ex.'s 306 and 307.

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V. DISPLACEMENT

In our Closing Argument, we summarized the evidence that demonstrated that economic displacement is a reality as neighborhoods gentrify, but that the EIS gave that only the slightest lip service, instead claiming that economic displacement will not occur.[10] We also demonstrated that the City bases its contrary conclusion exclusively on a regression analysis which the City misconstrues and which is invalid. The City claims (at 33) that its analysis of economic displacement is "unprecedented." But once the City undertook the analysis (unprecedented or not), it was obligated not to provide inaccurate information. Better to have remained silent than to mislead.

Moreover, the City's suggestion that it was not obligated to address the issue (at 36) is wrong. *See* SMC 25.05.444.B.2.b (housing is "element of the environment"); -440.E.5 ("EIS's shall also discuss . . . housing"); -440.E.6.a (analysis "in every EIS unless eliminated by the scoping process . . . economic factors"). The "level of detail . . . shall be proportionate to the impacts the proposal may have if approved." SMC 25.05.440.E.6.a. Given that the underlying proposal is all about housing and the City's acknowledgment that the proposal will have significant impacts on housing (for better or worse), the claim that the EIS need not provide a detailed, non-misleading assessment should be given short shrift.

Regarding the proposal's impacts on owner occupied housing (and the crucial issue of impacts on entry-level homeownership), the City argues (at 40) that the EIS appropriately "focus[ed]" on rental

[10] The City repeats this pattern in its closing (at 38), emphasizing the statistical analysis followed by a brief acknowledgment "new development could contribute to economic displacement *in a particular neighborhood.,* . . ." But here, again, the City fails to follow that with any identification of the neighborhoods where this likely will occur, the magnitude of the impact, the consequences of the impact, or possible mitigation. Mr. Jacobus testified that he could not identify a research method that would definitively identify the neighborhoods most vulnerable to gentrification (Vol.15 @ 127), but at minimum, the EIS should not have sent the false message that it would not occur. And while Mr. Jacobus said case studies (as suggested by Mr. Levitus) might not convince everyone, he did not dispute that they would provide analysis that was not misleading, unlike the EIS's frequent, misleading statement that there would be no economic displacement.

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housing. The issue is not whether the "focus" could be on rentals; the issue is whether the EIS could exclude assessing impacts on homeownership altogether. Given uncontested testimony regarding the importance of owner-occupied housing, V2 @ 77-84 (Reid); V16 @ 32:10 (Ramsey), and especially its disproportionate equity implications, V2 @ 81:24–84:7, the complete omission of any discussion of this issue renders the EIS inadequate.[11]

The City argues (at 39-40) that analysis of the proposal's impact on owner-occupied housing was not required because the City does not control whether housing is owner-occupied or rental. But that ignores that the City does not "control" whether any market rate housing will be built at all (owned or rented), yet the City did not let that stop it from analyzing the proposal's impacts on rental housing. The issue is not whether the City controls either rental or owner-occupied housing. The issue is whether the proposal will impact both (it will) and whether the EIS analyzed both (it did not).

VI. HISTORIC RESOURCES

The City's closing begins (at 41–42) by summarizing information contained in the EIS. Our complaint is not with material included in the EIS. The problem is with what was omitted – readily available information critical to a reasonably informed decision.

The City (at 43) cites EIS passages which acknowledge that adverse impacts are possible. But such statements are too general to be useful. Certainly, adverse impacts are possible under each studied and omitted alternative. But that provides no assistance to decision makers (or the public). What are the probable differences in the impacts among the alternatives? How likely are the impacts

[11] The City never directly asserts that the EIS provided any discussion of the proposal's impacts on owner-occupied housing, but it vaguely references (at 40:12) the EIS's "treatment" of the issue as being adequate. But the City does not cite a single page of the EIS where this supposedly adequate "treatment" occurred. Rather, the City is apparently arguing that zero "treatment" is adequate. For the reasons explained above, it is not.

The City also describes (at 40) testimony regarding projected growth in home ownership. That falls far short of discussing whether gentrification makes it more difficult for lower income households to enter the home ownership market.

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and how consequential are they apt to be? Simply saying that impacts are "possible" without more leaves the public and Council without the information needed to make an informed decision.

The City misconstrues the import of the "dot maps" prepared by Mr. Howard. The City attacks the map (at 44) in its citywide format as being too cluttered to be useful. The City conveniently ignores the testimony that Mr. Howard's maps are digital and can be magnified down to the block and parcel level to provide detailed information useful for drawing lines for UV expansions and upzones. V17 @ 215:3–6. Indeed, not only does the City ignore that testimony, it ignores the localized magnification on Exhibits 21 and 22.

The City (at 45, 49 (re Uptown EIS)) continues to ignore that the more detailed information would be essential to making informed decisions about where to draw lines for individual UVs, even if it cannot be used to compare one UV to another. *See* SCALE Closing at 13.

The City (at 45–46) argues that providing more information for some UVs, but not all UVs, would violate the rule that alternatives be studied in similar detail. But each UV is in each alternative. If, for instance, the greater detail available for Mt. Baker had been used in the EIS, it would have been used in each alternative's analysis of the Mt. Baker UV, maintaining conformity with the rule.

Dated this 10th day of October, 2018.

Respectfully submitted,

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