BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeals of **WALLINGFORD COMMUNITY COUNCIL, ET AL.,** of the City of Seattle Citywide Implementation of Mandatory Housing Affordability (MHA) Final Environmental Impact Statement,	Hearing Examiner Consolidated File: W-17-006 through W-17-014 APPELLANT FRIENDS OF NORTH RAINIER NEIGHORHOOD PLAN'S REBUTTAL ARGUMENT BRIEF (Appellant in No. W-17-014)

Appellant Friends of North Rainier Neighborhood Plan ("FNR") hereby submits its Rebuttal Brief, and joinder in the Rebuttal Arguments of SCALE and other Appellants.

I. REBUTTAL ARGUMENTS

Standard of Review. The City opens its Closing brief with reliance on the deference to be given to the City's self-serving determination that the FEIS satisfies all legal and technical requirements. The Hearing Examiner is not bound by the City's self-serving conclusion that its own FEIS "satisfies all legal and technical requirements and, as such, is adequate." See City Closing, Argument "A", p. 1. While the City is entitled to deference, that deference does not allow the City to

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escape its fundamental obligation under the rule of reason to take a "hard look" at the likely environmental consequences of its actions.

Overlaying all local ordinances is Washington's State Environmental Policy Act (SEPA), Chapter 43.21C RCW. SEPA is the legislative pronouncement of our State's policy regarding the environmental impacts of development.

> In essence, what SEPA requires, is that that the "presently unquantified environmental amenities and values will be given appropriate consideration in decision making with economic and technical considerations." RCW 43.21C.030(2)(b). It is an attempt by the people to shape their future environment by deliberation, not default.

Stemple v. Department of Water Resources, 82 Wn.2d 109, 118 (1973). The purpose of SEPA is "to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *King County v. Boundary Review Board*, 122 Wn.2d 648, 664 (1993). SEPA's goals are to "promote the policy of fully informed decision making by government bodies when undertaking 'major actions significantly affecting the quality of the environment.'" *Moss v. City of Bellingham,* 109 Wn. App. 6, 14 (2001) (*citing Norway Hill Preservation and Protection Assoc. v. King County,* 87 Wn.2d 267 (1976)).

Agency action "may be reversed where the agency has erroneously interpreted or applied the law, the agency's order is not supported by substantial evidence, or the agency's decision is arbitrary and capricious." *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 76 (2000). Thus, even where deference is required, "[a]n agency's view of the statute will not be accorded deference if it conflicts with the statute." *Postema v. Pollution Control Hearings Bd., supra,* 142 Wn.2d at 76. "Ultimately, it is up to the Court to determine the meaning of the statute." *Id.*

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SEPA demands that governmental decision makers be fully informed and educated about the potential impacts of their decision *before* decisions are made. Agencies must consider environmental information (impacts, alternatives, and mitigation) before committing to a particular course of action. WAC 197-11-055(2)(c). With this process, decision makers have an opportunity to attach conditions to their decisions to mitigate the adverse impacts of development to the neighbors, to the community, and to the natural environment.

Courts have warned about the consequences of a failure to conduct environmental review before key decisions are made:

> [Decisions early in the process] may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When the government decisions may have such snowballing effect, decision makers need to be apprised of the environmental consequences before the project picks up momentum, not after.

Stemple v. Department of Water Resources, 82 Wn.2d at 118.[1] SEPA, like its federal counterpart (NEPA), requires agencies to take a "hard look" at environmental issues. *PUD No. 1 of Clark County v. PCHB*, 137 Wn. App. 150, 158 (2007) (*citing National Audubon Society v. Department of Navy*, 422 F.3d 174, 184 (4th Cir. 2005). For reasons stated in the Appellants' briefs, and elaborated on below, the City's Citywide MHA FEIS does not satisfy the rule of reason. Rather than the requisite "hard look", the City has cut the corners in an effort to achieve a predetermined political outcome that was easier and cheaper to accomplish without meaningful or credible environmental review. To the extent that SEPA has meaning, the City FEIS must be rejected as inadequate.

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[1] Although a DNS, not an EIS, was at issue in *King County v. Boundary Review Board*, the principle that government action must be based upon adequately disclosed environmental impacts before decisions have a snowballing effect is applicable here.

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EIS adequacy is a question of law subject to de novo review. *Ullock v. Bremerton*, 17 Wn. App. 573, 580, 565 P.2d 1179, review denied, 89 Wn.2d 1011 (1977); *Leschi Improvement Council v. State Highway Comm'n*, 84 Wn.2d 271, 285, 525 P.2d 774 (1974). Courts review the EIS to determine whether the environmental effects and reasonable alternatives are sufficiently disclosed, discussed and substantiated. *Mentor v. Kitsap County*, 22 Wn. App. 285, 289, 588 P.2d 1226 (1978), *Ullock v. Bremerton*, supra at 580; *Leschi Improvement Council v. State Highway Comm'n*, supra at 286. Adequacy is judged by the "rule of reason." *Mentor v. Kitsap County, supra; Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976).

The "Programmatic FEIS" Mantra. In its Closing, the City continues to chant its defensive mantra about the "programmatic" nature of the Citywide FEIS, failing to address the reality that the most environmentally damaging impacts in this case are not addressed downstream at the project level. FNR incorporates the legal standards and limitations on programmatic review already provided in the summary judgment briefing provided by SCALE and others. State and federal standards make clear that the programmatic label must not be abused.

At the hearing and in their briefs, Appellants have pointed out the numerous ways in which the impacts of the proposed Citywide parcel by parcel upzone will not be addressed at the project level. The FEIS does not adequately describe the existing environment for each element of the environment in each of the neighborhoods that are affected by the proposal and it does not adequately discuss reasonable mitigation measures that would significantly mitigate the impacts for each element of the environment that are unique to each neighborhood. The FEIS instead provides a non-specific summary of the existing environment, impacts, and mitigation for a generic urban village. The City

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could have provided a village-by-village study if it had prepared an EIS for each neighborhood. The City has argued that, because this was a non-project action, the EIS is not required to describe the existing environment, the probable impacts, or reasonable mitigation measures to the level of detail that appellants claim. But that is incorrect. This is not a situation where the City will first prepare a programmatic EIS and later, before any commitments are made, prepare additional impact statements of smaller geographic areas with greater detail. These impacts will never be disclosed and analyzed if they are not disclosed and analyzed now and, even if disclosed later, it will be too late to inform the consequential and largely irreversible decisions to be made at this time. In summary, the project owner of a previously upzoned parcel will have the legal entitlement to develop their property consistent with the maximum allowed upzone. To the extent a project is not exempt from environmental review, it will certainly be exempt from reviewing the collective impacts associated with upzoning the entire neighborhood – such impacts must legally and logically occur at the earliest possible stage of environmental review – before the upzones are implemented.

The City's claim that it cannot afford neighborhood level environmental review is contradicted by the FEIS for this same proposal in the University District, and in Uptown. It is also contradicted by the level of environmental review demonstrated in the Sammamish and Port Gamble programmatic FEIS, which were also discussed in the hearing. See Spencer Howard and Sharese Graham testimony. These documents reflect not merely the feasibility of neighborhood level review, but also the City's interpretation of how the regulations can and should be implemented. The City's sudden departure from meaningful review cannot be excused with complaints about "affordability". With regard to affordability, the citizens of Seattle cannot afford to live in a blindly-upzoned environment where the probable impacts to human existence escape the requisite reasonable review under SEPA and the Growth Management Act (GMA).

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The City's unlawful interpretation of what is allowed under "programmatic" review must be corrected at the earliest possible stage. This case should not be a precedent allowing an effective repeal of review under SEPA by those jurisdictions who wish to rush through sweeping changes to the entire landscape of a City by slapping a "programmatic" label on an underfunded and patently sketchy FEIS. The City's decision to adopt this theory was not based on "reason", but was instead based on a "cheap" and politically motivated departure from the more robust standard of environmental review reflected in the University District and Uptown FEIS for the very same MHA proposal.

Edge Effects. In its brief, the City contends that "the combination of text in the EIS and the details provided in the maps allow a decision-maker to adequately understand the impacts of the rezones in areas outside the urban village expansion areas", and that "the FEIS includes extensive analysis of land use and aesthetic impacts to areas adjacent to the study area ..." City Closing, p. 5. These self-serving conclusions may hold together in the rarified air of a City department that politically decided to avoid neighborhood level review for its Citywide FEIS. But this conclusion falls to pieces when brought to the ground of neighborhood reality. In the FNR Closing, FNR outlined various photos and testimonies proving the incompatibility of the proposed expansion areas immediately east and west of the North Rainier station area. In contrast to the "picture" of harmony described in the FEIS, a visit to the North Rainier expansion areas will corroborate how the document fails to provide a meaningful assessment of context and impacts. While the FEIS map is flat and two dimensional, a simple set of photos would reveal how the expansion areas will impact the steep topography and tree canopy of the historic Cheasty Greenspace and Boulevard to the West, where it cradles the undeveloped parcels of the North Rainier Town Center Park; and the historic gateway landscape and hillside to the east, which holds the confluence of the Olmsted influenced Mount Baker

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Boulevard, the undisclosed historic landmark of Franklin High School, and the historically honored parcels of the Mount Baker Park Historic District.

Limited Alternatives. The City attempts to override SEPA's mandate for a reasonable range of alternatives with an argument that the City can limit review to only that proposal that was "formally proposed" in the Grand Bargain and HALA. City Closing, pp. 8-12. This truncated position is contradicted by SEPA's governing standard for the alternatives analysis.

The "heart" of an EIS is its discussion of alternatives to the proposal. *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1121 (9th Cir. 2008) (quoting 40 C.F.R. § 1502.14); see WAC 197-11-440 and 442 and *Barrie v. Kitsap County,* 93 Wn.2d 843 (1980) citing *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974). Under SEPA, "[r]easonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." SMC 25.05.440.D; see also WAC 197-11-440(5)(b). For example, in North Rainier with its undisputed gap in urban village open space, every one of the City's alternatives would blindly propose an upzone to the North Rainier Town Center Park. There is no question that the MHA's objectives of increasing development could be achieved without necessarily upzoning the City's own and only project to bridge the North Rainier open space gap. Under SEPA, the decisionmaker must be presented with at least one feasible alternative that would achieve the objective of increased development without directly undermining the essential elements of environmental livability. Under the governing standards, OPCD's failure to propose any alternative to a major upzone of the neighborhood's only park project is not only unreasonable, it is absurd.[2]

[2] As previously stated, the situation is all the more absurd when the FEIS fails to alert the decisionmaker to the fact that all the alternatives seek to upzone an interdisciplinary park project with matching

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This illustrates the absurd outcomes of the City's argument. For example, consider a hypothetical: the City adopts a "formal proposal" for a Grand Bargain that would impose substantial MHA density increases on every publicly owned or potentially available open space parcel in the City. Consistent with the proposal, the FEIS only analyzes alternatives limited to upzoning every possible open space parcel in the City, but varies the open space upzones to between 75 and 95 feet high. From the standpoint of supply-side affordability and development profiteering, a major increase in density on all available open space parcels in the City of Seattle may be a grand political bargain. But, fortunately, neither SEPA (nor the GMA) will force a Hearing Examiner to rubber stamp an inadequate range of alternatives merely because the proposal is "programmatic" or was "formally proposed" by a previous Ordinance or Resolution that escaped environmental review. While the FEIS need not consider every conceivable alternative, the FEIS must at least allow the decisionmaker to make a meaningful choice among at alternatives that can feasibly achieve the proposal's objective with significantly less environmental impacts.

Socioeconomics and Small Business Analyses. The City in closing also tries to avoid scrutiny of its Socioeconomic analysis, and the failure to address feasible and recognized alternatives for achieving its objectives without unreasonable impact. SEPA declares that the state's policy is to "fulfill the social, economic, and other requirements" of citizens. RCW 43.21C.020(1)(c). See *Barrie* citing The Requirement for an Impact Statement: A Suggested Framework for Analysis, 49 Wash. L. Rev. 939, 957 (1974) (socio-economic impacts fall within EIS requirement).

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funds from King County Conservation Futures, and integrated into the Urban Village transportation project, and designed to bridge a long standing inequitable gap in Urban Village open space. See testimony and exhibits of Craig Cundiff (North Rainier Town Center father and affordable housing resident, Jennifer Ott (former Friends of Seattle Olmsted Parks President), Michael James (former SDOT Accessible Mount Baker project manager), and Talis Abolins.

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The Socioeconomic Analysis is the lead off section of the City's FEIS. The City's decision to include Socioeconomics as a central component of the FEIS provides the Hearing Examiner with jurisdiction to review that adequacy of that analysis under SEPA. Several witnesses, including David Levitus, Peter Steinbrueck, and Talis Abolins, explained how a neighborhood-based approach to affordability upzones was not merely a feasible alternative, but would address obvious inadequacies and oversights in the Socioeconomic Analysis section of the City MHA FEIS. Yet, in their Closing Brief, the City claims that the City was free to ignore neighborhood plans when driving increased development capacity into neighborhoods. See City Closing, pp. 16-17. The testimony proved more than the existence of a "better alternative" – the testimony provided proof of alternatives that were unreasonably ignored by the City, which purposefully relied upon a predetermined political choice despite admitted limitations and demonstrably unreasonable flaws in the underlying analysis.

The Hearing Examiner is entitled to weigh the testimony presented at the hearing and judge the credibility and motives behind the analyses. Where experts disagree on the possible effects of the proposal, the EIS should set forth the responsible opposing views rather than ignoring the potential debilitating impact. *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 922 (D. Ore. 1977); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir.), *injunction denied*, 404 U.S. 917, 30 L. Ed. 2d 191, 92 S. Ct. 242 (1971). "An EIS should disclose the history of success and failure of similar projects.'" *Sierra Club v. Morton*, 510 F.2d 813, 824 (5th Cir. 1975), quoting *Natural Resources Defense Council, Inc. v. Grant*, 355 F. Supp. 280, 288 (E.D.N.C. 1973).

The evidence presented supports the conclusion that the City's own alternatives are based on a demonstrably flawed socioeconomic analysis section, creating a substantial likelihood of increased displacement, segregation and gentrification throughout the City in short order, while purporting to

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provide a meager level of subsidized rental units in the next ten to twenty years – after most of the displacement juiced up by the MHA upzones has already occurred! This may be a Grand Bargain with respect to the objectives of the select group of industry-backed signatories on the Grand Bargain document. But from the standpoint of SEPA, it is a pre-determined outcome based on a Socioeconomic analysis in the FEIS that admits its own fundamental inadequacies.

The City also lacks credibility in is position that "the overwhelming evidence demonstrates that payment-funded units are unlikely to be concentrated in a manner contrary to social equity." City Closing, p. 17. See FNR Closing Brief (on Socioeconomics), and the related testimony and exhibits of Michael Ross, Talis Abolins, and Michael James; see also testimony of Levitus and Reid. During the hearing process, the appellants discovered and revealed to the Hearing Examiner the sad and incredible disregard that City policymakers showed for the City's own interdepartmental Race and Social Justice team members. If OPCD wanted to be credible when waving the flag of race and social justice in its socioeconomic analysis, it should not have trash canned the internal memoranda from its own race and social review process, which called out the City's multiple failures to properly address issues of race and social justice in the FEIS.

The ivory tower analysis of the FEIS was prepared in a rarified air of OPCD, where the political objective was a pre-determined outcome. The analysis was completed through a process that deliberately ignored on-the-ground neighborhood level realities and Comprehensive Plan policies, and even ignored the internal race and social justice review processes that called out the inadequacies. The City's analysis also ignored the realities of the North Rainier Urban Village community, and the Comprehensive Plan provisions that were created for the very purpose of guiding increased development on its streets. Those policies and goals define a roadmap for a truly inclusive and diverse community, promoting a balanced range of housing options in a mixed-use Town Center,

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supporting a diverse and economically viable business district. The unrefuted testimony and exhibits contradict the City's conclusion that its Housing Program flush with "in lieu" payments from more economically booming areas of the City will not promote the concentration of subsidized housing in the North Rainier Town Center. The key parcels of this hoped for vibrant and diverse Town Center are continuing to experience a disproportionate level of payment-funded units, to the point that opportunities for inclusive development and economic opportunity consistent with the neighborhood plan is being stifled. See, e.g., testimony of Michael Ross.

FNR does not dispute the City's argument that the City Housing program can leverage more affordable subsidized rental units with "in lieu" MHA money. City Closing, p. 18. That is not the problem. The problem is that the City's socioeconomic analysis fails to address alternatives that are necessary to avoid the City's continued focus of subsidized housing development in economically struggling areas like the North Rainier Town Center, where land is cheaper and surplus public property is substantial.

The City FEIS reveals that the proposed MHA is based on a Socioeconomics analysis that is unreliable and flawed. The City cannot afford to be blind to the socioeconomic realities and the nationally recognized options for equitably minimizing displacement, segregation and gentrification. The City cannot rewrite the fabric of its residents' future based on an academic Growth and Equity Analysis that boldly highlights its own "Limitations", and admits it is an unreliable basis for sweeping policy changes proposed throughout the City's struggling urban villages.

Open Space Gap In North Rainier. With respect to Open Space, the City continues to ignore neighborhood level open space gaps and impacts, instead relying on a Citywide level of service standard notwithstanding the specific walkability-based open space gap analysis that continues to apply in the urban villages where MHA density is being focused. See City Closing, pp. 54-55. The

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City's own witness, Sharese Graham, acknowledged this key distinction and the FEIS analyses failure to assess the location and relationship of Urban Village specific open space gaps to the proposed upzones. The City continues to rely on the assumption that the the North Rainier Town Center Park was merely "conceptual" and without funding. Sadly, this false assumption was fed to the City's open space expert Sharese Graham, whose scope of work was to rely on this misinformation, without any communication with the Seattle Department of Parks and Recreation, and without performing an actual site visit to assess programmatic open space issues as she admitted was done on the Sammamish programmatic EIS. The testimony of Michael James, Jennifer Ott and Talis Abolins (and related exhibits) concretely and specifically proved that the North Rainier Town Center Park was not conceptual, but represented the Parks Department's existing project, developed over years of community outreach and interdepartmental processing, designed to bridge the worse open space gap in Southeast Seattle, and tied to funding via City-County matching dollars under the King County Conservation Futures program. Given the false theory that no "real" park project existed, it is too late for the City to concoct an open space impact analysis. Ms. Graham on cross examination admitted the complete lack of any analysis or evaluation of the likely impacts of a 95 foot high upzone to the desperately needed park that was sited by the agency with lead City responsibility for selecting its location, and coordinated with SDOT's Accessible Mount Baker, to the point that it resulted in the relocation of a bus stop in the designs for the SDOT project – a project projected to involve investment of over $15,000,000. That the City continues to claim this North Rainier Town Center Park proposal was a mere "theoretical" wish for the community that worked with the City in good faith to create it is an inexcusable embarrassment in equitable planning and environmental review.

The exclusion of this Park and the location of the park gap in the North Rainier Urban Village does not result in a conservative "worst-case scenario" impact analysis. Instead, it deprives the City

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decisionmakers of the information needed to appreciate that the "preferred alternative" is to impose the maximum upzone on the only viable project for bridging Southeast Seattle's worst open space gap, as confirmed by years of City park gap analyses, documented in the North Rainier Town Center Park funding applications, and corroborated in the new Seattle Parks open space policy which included a map showing the same area of North Rainier "park gap" in the North Rainier Urban Town Center as existed the last time the Growth Management Hearings Board reviewed an upzone to this area and noted the City's ongoing violations of its open space obligations and policies. Here we are again. It is time for the City to take action with its eyes open and face the consequences of its upzones.

Finally, the City tries to excuse its patently flawed open space analysis based on a legal constraint that presents a jurisdiction from depressing property values in anticipation of acquisition. See City Closing, p. 56, citing 83 Am. Jur. 2d Zoning and Planning, Sec. 48 ("Zoning to depress property values so that property may be acquired for public purposes at a future date is unlawful."). This cited Am Jur principle has no application here. No one has suggested that the City should downzone or otherwise depress values on the properties identified by the City Parks Department for the North Rainier park. The problem, as described by Michael James, is that an intentional upzone of this magnitude directly impacts the City's ability to bridge the open space gap through the only parcels the City has formally identified for acquisition for that purpose. Again, the failure to alert the decisionmakers to this self-defeating "preferred" proposal is absurd, and makes a mockery of the purpose of environmental review. While OPCD would like to make the North Rainier Town Center Park "invisible" for the decisionmakers (as it did for its own consultant, Ms. Graham), that is an unreasonable disregard for the essential elements of livability that SEPA requires consideration of. As previously noted, the Central Puget Sound Growth Management Board has already called out the

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City on its contradictory open space planning efforts during the last major upzone to the North Rainier Town Center. *Abolins vs. City of Seattle*, Central Puget Sound GMA Board Case No. 14-3-0009 – Final Decision and Order, pages 18-19 (April 1, 2015). The Board went on to state that "without the City's commitment to investment in livability, the area is just as likely to remain blighted and underdeveloped." Decision and Order, p. 38. As Craig Cundiff testified, the situation described in 2015 is worsening with increased density.

In the 2015 Order and Decision, the GMA Board noted that the City of Seattle retains a number of tools its disposal to fix the open space problem. If the City can't afford to buy its open space parcels (before or after they are upzoned), then the most obvious alternative is a system of impact fees – the tool that has been successfully and routinely utilized in so many other cities throughout Washington to achieve open space concurrency. And here, the City's open space analysis does offer up "impact fees" as an available mitigation option. But this merely highlights another shameful contradiction in the City's open space analysis. On one hand, the City blindly drives the cost of open space acquisition through the roof, with upzones that destroy the feasibility of its own park acquisition projects. Then, with the other hand, OPCD whimsically offers up the false hope of impact fees as a way to theoretically mitigate the gargantuan increase in open space acquisition needs created by one of the most sweeping increases in developability the City has ever seen. On its face, the analysis is self-defeating. How can the City credibly offer up impact fees as a viable mitigation measure for a proposal that has already given away the farm with a massive increase in development rights in every urban village? Not one of the alternative upzones proposed allows any room for an open space impact fee. Here is yet another feature of the City's open space analysis that is self-defeating and completely lacking in credibility. The Rule of Reason is not followed to the extent the City offers up a false hope of impact fees, with respect to a set of massive upzones – none of which

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attempt to include an impact fee framework that might have realistically allowed the City to work towards the open space concurrency required for a livable existence in an increasingly dense City.

In conclusion, the Friends of the North Rainier Neighborhood Plan respectfully ask that the FEIS be declared invalid and remanded for a review to protect the environmental features that will allow our City to grow in a manner that is livable and just.

DATED this 10th day of October, 2018.

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By */s/ Talis Abolins*
Talis Abolins, Co-Representative with
Marla Steinhoff

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Declaration of Service

Talis Abolins declares that on the 10th day of October, 2018, I filed with the Hearing Examiner and delivered by email as allowed by the Second pre-hearing order of February 16, 2018, Appellant FNR's Rebuttal Closing Arguments and Joinders:

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

DATED this 10th day of October, 2018, at Seattle, Washington.

/S/ *Talis Abolins*
Talis Abolins, Friends of North Rainier Neighborhood Plan

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