BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In re: Appeal by **FREMONT NEIGHBORHOOD COUNCIL (HE file No. W-17-014)** of the City of Seattle Citywide Implementation of Mandatory Housing Affordability (MHA) Final Environmental Impact Statement,	Hearing Examiner Consolidated File: **W-17-006** through **W-17-014** **FREMONT NEIGHBORHOOD COUNCIL POST HEARING RESPONSE BRIEF**

I. INTRODUCTION

The Fremont Neighborhood Council (FNC) responds to the City's Closing Brief on the subject of tree canopy/urban forest resources. City Closing Brief at 54-56. FNC incorporates the arguments of other Appellants on all other issues.

FNC argues that on three key aspects the EIS fails to present information and analysis sufficient to inform the City Council and the public regarding a major land use decision—substantially increasing the allowable density of the built environment throughout Seattle:

- The baseline condition of the City's urban forest resources is not described accurately;
- The impacts of the proposed MHA action are not described accurately; and
- The description of mitigation to prevent significant adverse impacts is not accurate.

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II. THE CITY'S CLOSING BRIEF DOES NOT REBUT APPELLANTS' URBAN FOREST CLAIMS

A. The City's Accusation of Appellant "Fly-Specking" Is Inapplicable

The City accuses Appellants' urban forest claims of being "classic fly-specking," meaning that their complaints are minor and thus cannot meet the "rule of reason" standard needed to find the EIS legally inadequate. The City cites a short state supreme court 1978 decision on an appeal of a development permit in Kitsap County; the entirety of the court's fly-specking holding is set out in the margin.[1]

More recent decisions on the "fly-specking" question serve to give a more complete description of the appropriate standard of review and how fly-specking relates to it. First, in *Oregon Natural Resources Council v Marsh*, 52 F.3d 1485, 1488 (9th Cir. 1995), the court cited the same case as the *Mentor* decision:

> Our role is to assure that the Corps took a "hard look" at the environmental consequences of its decision to complete the Elk Creek Dam under the No Conservation Pool Alternative. *Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179, 182 (9th Cir.1990). Although "we must defer to 'the informed discretion of the responsible federal agencies,' " *Marsh IV*, 490 U.S. at 377, 109 S.Ct. at 1861 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976)), and are not to " 'fly speck' environmental impact statements," *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir.1974), we will reverse an agency's decision where it is contrary to procedures required by law, 5 U.S.C. Sec. 706(2)(D); *Marble Mountain Audubon Soc'y*, 914 F.2d at 182, or where it is arbitrary or capricious, 5 U.S.C. Sec. 706(2)(A); Greenpeace Action v. Franklin, 14 F.3d 1324, 1330-32 (9th Cir.1992).

Emphasis added. Another federal case makes clear that "fly-specking" is not by itself the standard of review:

> This circuit employs a "rule of reason" that asks whether an EIS contains a " 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.' "

[1] "Petitioners also complain that the statement is faulty because it does not discuss the potential problem of hotel visitors trespassing on their property. We find that the merits of petitioners' arguments are, at best, dubious and are convinced that they are merely an attempt to "fly speck" the statement. *Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974)." *Mentor v. Kitsap Cty.,* 22 Wn. App. 285, 290 (1978).

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> Id. (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir.1974)). The district court must make "a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." Id. The reviewing court may not " 'fly speck' " an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 695 (9th Cir.1986) (quoting *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir.1974) (en banc)). But an EIS may be found inadequate under NEPA if it does not " 'reasonably [set] forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision.' " Id. (quoting *Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir.1982)).

Emphasis added.

Appellants claims concerning the MHA EIS treatment of urban forest issues are not "inconsequential, technical deficiencies." The lack of an "accuracy assessment," the City's example of Appellant "fly-specking"[2] speaks to the core of both the baseline issue (whether the EIS accurately describes the current condition and trends of the City's tree canopy) and the impact issue (whether the City's data and analysis are capable of accurately indicating likely adverse impacts.

B. The Eis Fails to Establish A Baseline For Analysis of Impacts of The Proposed Action on Urban Forest Resources

The City's position on the baseline issue is largely grounded on the expertise of the author of the 2016 Tree Canopy study. In it's Closing Brief the City even claims that Appellants' expert, Dr. Jeffrey Richardson, testified that "the head of SAL [the group that prepared the study], Professor Jarlath O'Neil-Dunne, is an expert with a "very good reputation" in the field." This attempt to bootstrap the use of the 2016 Seattle Tree Canopy Assessment[3] on Appellant's expert is misplaced:

> Q. And you're familiar with the work of Jarlath O'Neil-Dunne who heads the University of Vermont's spatial analysis laboratory?
> A. I was familiar with him before this case, yes.
> Q. Does he have a good reputation in the field?
> A. He has a reputation -- he has a very good reputation in -- he provides a lot of basically information on forums to help people learn how to do this type of assessment. I'd say his reputation is mostly based on being a helpful resource. I'm not so familiar with his reputation

[2] City Closing Brief at p. 52:18-19.
[3] Ex. 79

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as a scholar.[4]

More to the point are a series of specific flaws in the City's tree canopy study process, including: The testimony by City witnesses clearly indicates that the SAL study was prepared on a contract with limited budget and time[5], the study does not make its methodology transparent to the average reader,[6] and the work was published without peer review.[7]

Dr. Richardson was particular concerned with the City's preparation of the 2016 tree canopy assessment with "leaf-on, leaf-off" methodology. As he explained, it is much more difficult to obtain an accurate tree canopy assessment with "leaf-off." Indeed, he testified that he was invited to apply to work on the remote sensing study that lead to the 2016 Seattle Tree Canopy Assessment, but declined to do so because of the lack of accuracy of leaf-off remote sensing.[8] Dr. Richardson had a sound basis for that decision; he authored a peer reviewed report on just that problem: "Uncertainty in urban forest canopy assessment: Lessons from Seattle" (2013).[9]

LiDAR does have the capability to produce not only a high horizontal resolution (very small "pixel" areas), it can also distinguish between tall and short trees. This is a significant potential benefit for decision making. Unfortunately, the City's assessment did not use it:

> Q. Another difference that we talked about was tall versus short trees. Can you describe that?
> A. Basically that is just something that's missing from this study. They had the ability using LiDAR to get tree heights. LiDAR's all about getting information about three-dimensional structure of trees. So if you wanted to look at specific information about where the tall trees are in Seattle or if they have some sort of ecological information that relates to tall trees, that's something that could totally have been done using this LiDAR data set, but it wasn't done as far as I know from what I reviewed.

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[4] Testimony of Richardson, Vol. 6, p. 82:7-16; also, p. 84 ("there's not a lot of peer review studies that I'm aware of that I have reviewed personally that relate to work done by that Vermont lab")

[5] Testimony of Richardson, Vol. 6, p. 62

[6] Testimony of Richardson, Vol. 6, p. 62, et seq.

[7] Testimony of Richardson, Vol. 6, pp. 86, 89; Cross examination of Leech, Vol. 9, p. 158:19-25

[8] Testimony of Richardson, Vol. 6, pp. 81-2; Dr. Richardson was not aware of the relationship of that call for proposals to the MHA until he was engaged for this matter much later.

[9] Ex. 116

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> Q. So to be a little concrete, the 150-foot, 35-inch DBH Doug-fir in my front yard would -- could show up similarly to a couple of apple trees in the backyard?
> A. That's correct. They'd both be categorized by, you know, several pixels of canopy. So we're talking about a pixel being, like, a one meter-by-one meter blip on this land use/land cover map, and that would show up as just tree canopy. And then the same with the apple tree, that would show up as tree canopy.
>
> But the ecological applications of that large Douglas fir, such as providing a lot of carbon sequestration, providing a lot of rainfall interception. Those could be a lot greater from the same number of pixels. A Douglas fir would have a, perhaps, much greater ecological applications than the small apple trees, but they would show up as the same, yes.[10]

Yet another major flaw in the accuracy of the 2016 canopy assessment was discovered on cross-examination of Mike Leech, director of geospatial services (remote sensing and GIS) at City contractor ESA; despite the explicit call for as many "returns" (flights) as possible by the LiDAR planes, there was no indication of how many were actually conducted.[11] Further, Mr. Leech indicated a lack of knowledge whether any of the numerous tree canopy assessments prepared by the SAL group had been used to inform, as planned by the City of Seattle, to inform land use zoning decisions.[12]

The foregoing problems with the accuracy of the City's tree canopy assessment were compounded by the lack of any significant ground truthing to increase the accuracy of the data.[13]

Both Appellant and City witnesses admitted that "more could easily be done" to increase the utility of the 2016 canopy assessment, however lacking it is in terms of statistical accuracy.[14] In particular the lack of granularity in the analysis was noted by Dr. Richardson, and such analyses were admitted "to be very easy" to do by Mr. Leach.[15]

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[10] Testimony of Richardson, Vol. 6, p.68:9-69:12
[11] Testimony of Leech, Vol. 9, p. 133
[12] Testimony of Leech, Vol. 9, p. 136
[13] Testimony of Richardson, Vol. 6, p. 87
[14] Cf. SMC 25.05.335 Additional Information, applicable to threshold determinations
[15] Testimony of Richardson, Vol. 6, pp. 88; Testimony of Leach, Vol.9, p. 181

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The City's Opening Brief admits and touts the lack of granularity in its baseline; the City's assessment shows "the amount of tree coverage in the aggregated urban villages."[16]

C. The EIS Fails To Accurately Assess Likely Impacts Of The Proposed Action On Seattle's Trees And Tree Canopy

The foregoing described deficiencies in the City's approach to establishing a baseline inevitably led to a series of compounding deficiencies in the analysis of impacts. This failure is reflected in the uniformity of the determinations of no significant impact from the action for every alternative, including the no-action alternative.[17]

The City relies on the lack of any predefined "level of service" defining significance of impacts on trees or tree canopy to use "professional judgment"[18] to determine that there would be no significant impacts.

The City's witnesses repeatedly avoided direct responses to questions about specific impacts. For example, Mr. Wentlandt had trouble avoiding admitting there would be "significant impacts" in East Fremont from large density increasing up zones.[19] Mr. Thaler testified about the loss of right of way (ROW) trees that City processes[20]—touted in the EIS as mitigation—failed to prevent the loss of large trees. These losses are not accounted for or acknowledged by the City. FNC acknowledges the admirable effort the City is making to inventory its ROW trees, but the fact remains that the EIS does not accurately reflect the losses we see on the ground.

Dr. Richardson and the City's own documents show how important large trees are to the provision of ecosystems services, such as moderation of storm water impacts. Without an adequate

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[16] City's Opening Brief, p. 54:5-6; the overarching issue lack of granularity—or neighborhood planning—is addressed in other Appellants' briefs.

[17] EIS p. 3.322; Ex. 83

[18] Testimony of Sharese Graham, Vol. 17, p. 118:15; City's Opening Brief, p. 54:7

[19] Testimony of Geoffrey Wentlandt, Vol. 15, pp. 174-6

[20] Testimony of Thaler, Vol. 5; Ex. 212; Ex. 223

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baseline, without any significant ground truthing, and without any significant granularity of analysis, it is impossible for the MHA upzones to *not* have significant adverse impacts on specific neighborhoods. The testimony by Tawney Bates, a former U.S. Forest Service employee and 37 year resident of East Fremont, speaks eloquently about the likely loss of significant numbers of large trees in her neighborhood if the City's proposed up zoning from SF to LR2 and LR3 is approved. [21]

C. The EIS Does Not Accurately Describe Mitigation For Urban Forest Resources

In its Opening Brief, the City spends one short paragraph on the issue of tree mitigation.[22] The City brief adds little. FNC refers the Hearing Examiner to FNC's opening brief for this subject.

III. CONCLUSION

The MHA EIS is flawed with respect to all key aspects of SEPA analysis of urban forest issues—baseline of tree canopy and large tree status and trends, analysis of impacts, and description of mitigation measures.

The City could either break the MHA proposal into neighborhood specific actions, or conduct a huge study that meets the needs of widespread communities. Instead, the City chose to do an EIS on the cheap. This appeal is the result. FNC requests that the hearing examiner not allow a deficient analysis of significant impacts on resources of increasing importance in a world of changing climate be sacrificed for bureaucratic expediency.

DATED this 10th day of October, 2018.

FREMONT NEIGHBORHOOD COUNCIL

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[21] Testimony of Tawney Bates, Vol. 5, p. 183, et seq.
[22] City's Opening Brief, p. 53:6-11

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