BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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| In the matter of the Appeal of:<br><br>WASHINGTON COMMUNITY ACTION NETWORK, et al.<br><br>Of a decision by the Director of the Department of Planning and Development | CF 311936<br><br>DPD # 3012953<br><br>**RESPONDENTS' JOINT RESPONSE BRIEF** |

## 1. INTRODUCTION

The Final Environmental Impact Statement ("FEIS") for the Swedish Cherry Hill Major Institution Master Plan ("MIMP") is adequate in all respects. Guided by the State Environmental Policy Act's ("SEPA's") rule of reason, the FEIS adequately identifies and analyzes the probable significant adverse environmental impacts of a non-project action, and contains a reasonably thorough discussion of alternatives and mitigation measures. Appellants Washington Community Action Network ("Washington CAN"), Squire Park Community Council ("Squire Park"), and 19th Avenue Block Watch/Squire Park Neighbors ("19th Ave Block Watch") (collectively, "Appellants") fall far short of meeting their burden to overcome the substantial deference accorded to the SEPA lead agency, City of Seattle. Accordingly, the Hearing Examiner should uphold the Department of Planning and Development ("DPD") Director's finding of adequacy and dismiss Appellants' appeals in their entirety.

Section 2 of this brief provides an overview of well-settled SEPA principles and case law specific to the legal issues raised by Appellants. Section 3 of the brief responds to legal



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arguments raised in Washington CAN's Post-Hearing SEPA Brief. Section 4 responds to legal issues specific to Squire Park's brief, incorporating earlier arguments, where relevant. Section 5 responds to legal arguments specific to 19th Ave Block Watch's Post Hearing EIS Brief.

## 2. ARGUMENT

### 2.1 SEPA Requires Deferential Review of EIS Adequacy, Especially at the Non-Project (Programmatic) Stage

SEPA requires that the Hearing Examiner give substantial deference to the agency's determination that the FEIS is legally adequate:

> In any action involving an attack on the governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a "detailed statement," the decision of the governmental agency shall be accorded substantial weight.

RCW 43.21C.090 (emphasis added). The statute confirms that "substantial weight" is granted to the decision of the responsible official where an agency provides for administrative appeal of EIS adequacy. RCW 43.21C.075(3)(d).

The adequacy of an EIS is a question of law subject to de novo review. *Weyerhauser v. Pierce County*, 124 Wn.2d 26, 37-38, 873 P.2d 498 (1994). Although the cases pay homage to a de novo standard of review (albeit modified by the statutory command to give substantial weight to the agency decision), in practice the courts give much more deference to a determination of EIS adequacy than, say, a negative threshold determination. Richard L. Settle, The Washington State Environmental Policy Act, A Legal and Policy Analysis, § 14.01[1] at 14-20–14-21(2012).

Consistent with SEPA's purpose to inform governmental decisionmaking, the Washington Supreme Court has consistently held that SEPA is a procedural, environmental disclosure statute, and does not require any particular substantive agency decision. *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn. 2d 267, 272, 552 P.2d 674 (1976) (SEPA does not require a particular substantive decision); *Eastlake Community Council v. Roanoke Associates*, 82 Wn. 2d 475, 497 and fn. 6, 513 P.2d 36 (1973) (SEPA does



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not mandate a particular governmental choice, but mandates the evaluation of pertinent environmental factors); *Stempel v. Department of Water Resources*, 82 Wn. 2d 109, 118, 508 P.2d 166 (1973) ("SEPA does not demand any particular substantive result in governmental decision making"). As the Washington Supreme Court has explained:

> [T]he need for an EIS does not mean a proposed project cannot be built. It merely assures a full disclosure and consideration of environmental information prior to the construction of the project.

*Sisley v. San Juan County*, 89 Wn. 2d 78, 89, 569 P.2d 712 (1977). Thus, the Hearing Examiner does not rule on the wisdom of the proposed development, but on whether the FEIS gave the decisionmaker sufficient information for a reasoned decision. *Citizens Alliance v. Auburn*, 126 Wn. 2d 356, 362, 894 P.2d 1300 (1995).

Because an EIS is simply an aid to the decision-making process, an EIS's discussion of the likely significant impacts of alternatives needs to present decision makers only with "a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision." *OPAL v. Adams County*, 128 Wn. 2d 869, 875, 913 P.2d 793 (1996) (upholding EIS for regional landfill against claims of no analysis of groundwater impacts). SEPA "does not require that every remote and speculative consequence of an action be included in an EIS." *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn. App. 439, 442, 832 P.2d 503 (1992).

At the master planning stage, impacts of future projects are difficult to identify with specificity. Thus, SEPA subjects a non-project EIS, such as the FEIS before the Examiner, to different standards than a typical project-level EIS: "The lead agency shall have more flexibility in preparing EISs on non-project proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals." SMC



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25.05.442.A. SEPA does not require detailed review of the probable impacts of the individual projects identified at any level in the MIMP. Rather, the lead agency must "discuss impacts and alternatives in the level of detail appropriate to the scope of the non-project proposal and to the level of planning for the proposal. Alternatives should be emphasized." SMC 25.05.442.B. These rules establish a high bar for challenges to a non-project EIS.

Whatever an EIS contains, an opponent of the proposed action can make arguments that the EIS should have contained more. That is why the deferential "Rule of Reason" governs EIS adequacy. The Rule of Reason is a broad, flexible cost-effectiveness standard, and does not require a discussion of every conceivable impact or an exhaustive discussion of alternatives. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn. 2d 619, 641, 860 P.2d 390 (1993); *SWAP*, 66 Wn. App. at 442. Rather, because an EIS is simply an aid to the decision-making process, an EIS need only present decisionmakers with "a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision." *OPAL,* 128 Wn. 2d at 875; *Klickitat County Citizens*, 122 Wn. 2d at 633 (upholding EIS for solid waste master plan against claim that cultural resources impacts were inadequately discussed and holding that a general discussion in a document incorporated by reference was sufficient to satisfy SEPA's Rule of Reason).

Under the rule of reason, harmless error does not require reversal—if, for example, appellants allege the EIS is missing information otherwise known to the decisionmaker, the courts will affirm the adequacy determination. *Toandos Peninsula Ass'n v. Jefferson County*, 32 Wn. App. 473, 483, 648 P.2d 448 (1982) (concluding EIS adequate where record showed decisionmaker knew and considered facts not discussed in EIS).



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### 2.2 The Examiner Should Dismiss the Appeals of Dean Paton/CAC Members and the Cherry Hill Community Council.

As an initial matter, the Examiner should dismiss the appeals of Dean Paton/CAC Members and the Cherry Hill Community Council for failure to prosecute. *See, e.g., Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 95-96, 231 P.3d 1211 (2010), *as corrected on denial of reconsideration* (Apr. 20, 2010) ("Thus, because Defendants failed to develop or to support their argument on this point, we need not consider it further."); *cf. In re Appeals of Nelson, et. al.*, Findings and Decision, MUP 13-011 – 014 at Conclusion 10 (Nov. 4, 2013) (dismissing issue on appeal due to appellant's failure to present evidence on the issue). Neither of these appellants called witnesses or offered argument at the hearing. While there are efficiencies to be gained when multiple parties depend on the same witness for their cases-in-chief, as 19th Avenue Block Watch and Squire Park did with Mr. Richter, where a party poses no questions to the shared witness and then makes no argument based on that witness's testimony (or any other evidence), there is no reason for that party to remain in the case. These appellants were appellants in name only, and lending their names to the opposition to FEIS adequacy added nothing to the hearing. Their continued presence in the case as named parties is not necessary to the resolution of the appeals and they should be dismissed.

## 3. RESPONSE TO WASHINGTON CAN'S BRIEF

In its post-hearing brief and at the SEPA hearing, Washington CAN failed to meet its burden to show that the FEIS is inadequate. Accordingly, Washington CAN's appeal must be denied, and the City's determination that the FEIS is adequate must be affirmed.

### 3.1 The FEIS Adequately Identified and Analyzed the Height, Bulk, and Scale of Potential Development Under the MIMP.

The majority of Washington CAN's arguments go to the question of whether potential mitigation identified in the FEIS would adequately mitigate the adverse impacts of the MIMP. With the exception of the skybridge, Washington CAN appears to concede that the FEIS's



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treatment of height, bulk, and scale issues, as well as land use impacts, is adequate but for the mitigation discussed. Yet, no reported decision has ever held an FEIS inadequate for failure to discuss mitigation, and this should not be the first. SEPA does not require an EIS to commit to mitigation measures, and mitigation measures need not be analyzed in detail. SMC 25.05.440.E.3.d ("The EIS need not analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts, or new information regarding significant impacts, and those measures will not be subsequently analyzed under SEPA (see Section 25.05.660.B)."). Case law is in accord. *See, e.g.*, *SWAP*, 66 Wn. App. at 447. The *SWAP* court upheld the adequacy of an EIS that contained "general descriptions of mitigation measures that could be used." The *SWAP* court relied on the United States Supreme Court case of *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S. Ct. 185, 104 L. Ed. 351 (1989). In *Robertson*, the U.S. Supreme Court applied the rule of reason to hold that NEPA does not require a fully developed plan detailing mitigation measures. *Id.* at 359.

The height, bulk, and scale mitigation that Washington CAN seeks is not mitigation, it is a suggestion for another alternative with lower height, bulk, and scale impacts. But not only would such an alternative not meet SEPA's requirement to accommodate the proponent's objective, the impacts can be approximated by interpolation between Alternative 1 (the no-action alternative) and Alternative 12. SEPA case law allows the agency to select an action that is "between" alternatives studied in the EIS. *See Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 696 P.2d 1222 (1985) (EIS not inadequate where the ultimate siting of a proposed dock was literally in between the two potential locations studied in the EIS). And, as was the case in *SWAP*, an EIS is not inadequate for failing to select the exact alternatives asserted by appellants (especially where those alternatives were analyzed, just not to appellants' liking).



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### 3.2 The Hearing Examiner Should Disregard Dr. Sutton's Testimony in Favor of That Provided by Respondent's Expert, John Jex.

Although Washington CAN incorporates by reference Dr. Sutton's "entire testimony," the Hearing Examiner should decline that invitation and afford Dr. Sutton's testimony very little weight.[1] At the hearing, Dr. Sutton served not as an expert, but as an advocate for the neighborhood. Expert testimony should come from disinterested experts seeking to assist the tribunal to better understand a technical issue. ER 702. Dr. Sutton flatly acknowledged her personal bias on the stand, when she asserted that her role in the hearing was to balance the "800-pound gorilla" that is Swedish. Sutton Testimony, Day 3, Part 4 of 4 at 1:26:00. She went so far as to assert that her ignorance of the design constraints of medical institutions—in other words, her lack of experience in the field—actually *better* equipped her to opine on their design. *Id.* Dr. Sutton made her mission clear: she was not there to assist the Examiner with understanding impacts; rather, as she stated, her mission was to advance her pre-conceived notions of what was best for the neighborhood, advocating from an ideological bent that does not befit an expert. "Unreliable testimony does not assist the trier of fact." *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). Given Dr. Sutton's bias, her testimony was unreliable and should be afforded little, if any, weight.

In addition, while Dr. Sutton may be expert in some areas, hospital design is not one of them. *Cf. Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 50-51, 738 P.2d 665 (1987) (excluding expert testimony of an engineer—clearly an expert in some areas—in part because he had no experience with the particular type of "reverse engineering" at issue in the case). She has never worked on any aspect of the design of a hospital or medical center, and her only experience with medical centers was her service on the Virginia Mason CAC. And yet, other than her personal aesthetic sense, she was not able to articulate any basis for her opinion that the development proposed by Swedish was too large for the neighborhood. She could point to no industry

[1] The Examiner must evaluate the relative weight to grant to the opinions expressed by Dr. Sutton's and Mr. Jex. As discussed herein, Dr. Sutton's opinions are entitled to very little weight.



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standard on which the City could rely to set "appropriate" ground- and upper-level setbacks, and instead relied on vague reference to existing conditions (while mischaracterizing existing paved driveways and parking areas as "green open space," *see* Jex Testimony, Day 4, Tape 4 of 4 at 34:00-35:35).

Dr. Sutton's opinions were not only undermined by the CAC majority's recommendations regarding setbacks, but also by the testimony of John Jex, an architect with 35 years of experience designing medical institutions. While Mr. Jex was retained by Swedish, his testimony lacked the sort of ideological motivation Dr. Sutton displayed. He testified concerning the design realities of medical planning, concepts ignored by Dr. Sutton in her quest to raise aesthetics above all other considerations. He established how the setbacks provided in the preferred alternative avoid creating impacts in the first place—essentially providing mitigation before the fact—and also that Swedish accepted the greater setbacks advocated by the CAC. Mr. Jex testified specifically to Dr. Sutton's criticisms and explained why they were not valid. *See, e.g.*, Day 4, Tape 4 of 4 at 33:18-37:05 (addressing open space issues). Mr. Jex provided a disinterested analysis that is entitled to far more weight than Dr. Sutton's.

Council may not impose a condition reducing development capacity without reference to specific facts and standards, but Dr. Sutton's testimony does not provide them. On this record, there is no reason to conclude that the FEIS is inadequate for failure to discuss additional mitigation measures addressing height, bulk, and scale.

### 3.3 The Non-Project EIS Appropriately Analyzes Skybridge Impacts

The campus is currently served by a skybridge spanning 16th Avenue, connecting the hospital to the parking garage. In keeping with the evolving nature of the state of the art of hospital design, the MIMP proposes to reduce disease transmission and cross-contamination by separating patient flows from other flows in a two-story skybridge. Washington CAN alleges that the FEIS does not discuss the skybridge, but, as explained below, discussion of the skybridge appears throughout the FEIS. Renderings, viewpoints, and shadow diagrams all depict



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a two-story skybridge. The FEIS discusses the reasoning for the two-level skybridge as well as the extensive permitting process involved at the project level. The FEIS treatment of the skybridge is appropriate to a non-project EIS and does not constitute improper phasing.

### 3.3.1 The FEIS Treatment of Skybridge Impacts is Appropriate to Non-Project Review.

Washington CAN's assertion that the skybridge was not discussed is simply false. Section 3.4 of the FEIS, entitled, "Aesthetics/Light, Glare and Shadows," analyzes the potential aesthetic, light, shadow, bulk and scale impacts of the no-build Alternative 1 and all three action alternatives, including the Preferred Alternative. The existing, 1-story skybridge is included in the no-action alternative, and every action alternative included the same 2-story skybridge building envelope. The analysis includes figures that illustrate the skybridge's aesthetic, light, shadow, bulk and scale impacts, and supporting discussion. MIMP approval is a non-project action, and the FEIS analysis of a skybridge (that has not been designed yet) is appropriate to non-project review.

Height, bulk and scale of the skybridge alternatives are depicted graphically in the viewpoints summarized in Table 3.4-1. In particular, Viewpoint 11 looking northward from Jefferson up 16th Avenue, depicts the skybridge squarely in the center of the image. FEIS at 3.4-40 – 42. The comparison between the existing one-story skybridge and a hypothetical two-story skybridge is plainly disclosed by the renderings in Figures 3.4-42, -43, -44, and -45. Viewpoint 3 also depicts the existing skybridge, just visible through the vegetation in the distance in Figure 3.4-10, while the added bulk and height of the two-story skybridge is depicted for the Preferred Alternative on Figure 3.4-13.[2] FEIS at 3.4-15 – 17.

Shadow impacts of the building envelopes defined in the MIMP are depicted in the figures on pages 3.4-57 – 104 of the FEIS, and every one of these 48 figures includes the

[2] It appears that the image of Alternative 8 for Viewpoint 3 inadvertently omits the second story of the skybridge. This oversight is harmless, however, as the skybridge impacts are the same for Alternative 11 and 12, shown on the next page of the FEIS.



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skybridge and its anticipated shadows. These images graphically demonstrate that the shadow impacts of the two-story skybridge (such as they are known at this time) are limited, and very similar to the existing conditions. The FEIS text goes farther, noting that the existing "skybridge casts a narrow shadow onto 16th Avenue" during the autumnal equinox and the vernal equinox. FEIS at 3.4-61, 3.4-85. The FEIS goes on to say that shadows created by the development under the MIMP—which includes the two-story skybridge—"would be similar to existing conditions and Alternative 1." Table 3.4-2, FEIS at 3.4-105, 3.4-108.

The FEIS discusses the extensive review process for skybridge term permits, which includes review and recommendation by the Design Commission as well as Council approval by ordinance, on pages 3.3-67 – 69. Although Washington CAN suggests that a two-story skybridge is uniquely against City policy, in fact, City policy is silent on the appropriate number of stories for hospital skybridges. *See* SMC 15.64.010.B. As detailed in the FEIS analysis of skybridge permitting, it is appropriate for the design of the skybridge—and impacts unique to that design that are currently unknown and unknowable—to be reviewed and approved at the project level.[3]

Because the skybridge impacts are adequately discussed in the FEIS analysis of "Aesthetics/Light, Glare and Shadows," and 55 illustrated figures detail the light, shadow, bulk and scale impacts of the skybridge, Washington CAN's assertion that discussion of potential skybridge impacts "simply does not exist,"[4] is incorrect and should be rejected.

### 3.3.2 SEPA Allows Study of Non-project Actions to Precede Study of Project Actions.

In spite of the FEIS's appropriate treatment of the skybridge, Washington CAN attempts to paint the review as improper phasing. Washington CAN is incorrect, according to the very law it quotes at page 7 of its brief. Phased review may be not appropriate when the sequence is

[3] Apart from the other provisions discussed herein, the FEIS mentions the two-story skybridge at Table 2-2 (p. 2-12); ¶ 2.6.4.4 (p. 2-21, discussing Alt. 11); ¶ 2.6.1.4 (p. 2-24, discussing Alt. 12); Table 2-7 (p. 2-34); Table 3.3-1 (p. 3.3-11); p 3.3-28 (mentioning term permit requirements).

[4] Washington CAN Brief at 6:14.



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from a narrow project to a broad policy document, WAC 197-11-060, but Swedish proposes the opposite: non-project review followed by project-level review of an actual design. Neither does the subsequent review divide the hospital into exempted fragments (piecemealing), as both the MIMP and the skybridge permit will be subject to SEPA review. Neither does the division avoid discussion of cumulative impacts, as the skybridge project review will take place against the backdrop of the approved MIMP and whatever development precedes or accompanies the skybridge. Finally, the SEPA regulation expressly allows that "level of detail and type of environmental review may vary with the nature and timing of proposals and their component parts," WAC 197-11-060, which is exactly the case here.

Washington CAN's phasing argument is reminiscent of that advanced by the unsuccessful appellant in *Mentor v. Kitsap County*, 22 Wn. App. 285, 588 P.2d 1226 (1978). In *Mentor*, the court held that an EIS analyzing the impacts of a planned unit development permit for a hotel facility was not inadequate for failing to disclose the impacts of a necessary bulkhead that would be constructed later, where the bulkhead would require a shoreline substantial development permit that would carry its own environmental review. *Id.* at 289. Similarly, Swedish knows at this point that the hospital will require a skybridge, and good hospital design suggests a two-story skybridge would best suit patient needs, but it knows nothing more about the eventual design of the skybridge. The skybridge permitting process is no less rigorous than the bulkhead permitting process that would follow the programmatic review in *Mentor*. A skybridge term permit is approved by the City Council after review and recommendation by SDOT and the Seattle Design Commission. There is simply no reason to treat the proposed skybridge any differently than the bulkhead in *Mentor*.

The FEIS disclosed and analyzed the environmental impacts reasonably to be expected from MIMP adoption, including the extent of the skybridge impacts currently known at the planning stage. Whether future, project-level permitting might produce additional or different impacts is unknown at this time and can only be properly analyzed if and when Swedish seeks



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permits for a skybridge—which may not happen for 10, 20, or 30 years. At the master planning stage, there is no way to determine, for example, that identification of a two-story skybridge of unknown design will probably result in significant adverse environmental impacts that are not discussed in the FEIS. For all we can discern from the record, the skybridge could be designed with 7' floor-to-floor heights such that its total exterior envelope would resemble the existing skybridge. Or the state of the art in the future may require much more bulk. Such issues can be meaningfully analyzed only at the project level. In light of these unknowns, the programmatic FEIS analysis of the factors currently understood is appropriate.

By faulting the programmatic review of project-level impacts, and focusing so intently on the impacts of a single skybridge out of the entire development program, Washington CAN is simply flyspecking the FEIS. But an EIS should not be a "compendium of every conceivable effect or alternative to a proposed project" and that discussions of impacts need not be exhaustive. *Toandos*, 32 Wn. App. at 483. As discussed above, it is impossible at this planning stage to know the particular impacts of the skybridge. SEPA's Rule of Reason governs the sufficiency of an impact statement's disclosures and discussions, and Washington CAN's arguments fall far short of establishing inadequate disclosure of skybridge impacts.

### 3.4 The FEIS Properly Concluded the MIMP Produces No Significant Impacts to Land Use.

The FEIS properly concluded that MIMP approval creates no significant land use impacts. This should be obvious, as the MIMP does not change land *use* either inside or outside the Major Institution Overlay ("MIO"). For over 100 years, the land use at the Providence campus has remained medical institutional, and the neighboring properties to the north, south, and east have been residential. The Comprehensive Plan recognizes that the MIO permits major institution uses, and in response to the neighborhood's concerns, the MIMP does not propose to expand the MIO. No evidence in the hearing and no argument in briefing has established a significant impact to land use.



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The City's SEPA policy addressing "land use" focuses on *uses*, to the exclusion of aesthetics. *See* SMC 25.05.675.J.a (identifying the purpose of adopted land use regulations as to "minimize or prevent impacts resulting from incompatible land use."). The City's SEPA policy on land use expressly excludes "[d]ensity-related impacts of development" such as height, bulk, and scale, leaving these for analysis of height, bulk, and scale impacts. SMC 25.05.675.J.1.b. Following this structure, the FEIS also separates its discussion of land use impacts from aesthetic impacts related to height, bulk, and scale. The FEIS properly concludes that the proposed MIMP creates no significant impacts related to *land use*—the narrow "land use" considerations unrelated to aesthetics—but does produce significant impacts related to aesthetics.[5]

The thrust of Appellants' arguments on land use impacts appears to be that inconsistency with the Urban Village Strategy and other adopted land use policies alone creates a significant impact to the environment, but neither SEPA nor the Major Institutions Code require that a MIMP be "consistent" with all elements of every adopted land use plan, including the Comprehensive Plan. Indeed, the City's substantive SEPA policies limit the Comprehensive Plan goals and policies that may serve as the basis for the exercise of substantive SEPA authority to those set forth in Section B of the Land Use Element, which broadly address Land Use Categories. *See* SMC 25.05.675.J.2. The analysis in the FEIS is comprehensive. The FEIS analyzed the proposal's relationship to existing land use plans, including the City's Comprehensive Plan, the Central Area Neighborhood Plan, and the City's Land Use Code, FEIS at 3.3-28-73. This 45-page analysis of consistency with plans is exhaustive, detailing which policies support the MIMP and which do not. While the document speaks for itself, Washington CAN made the point at the hearing, as well as in its brief, that the FEIS concludes that the MIMP development is inconsistent with policies of adopted plans. However, the FEIS also identifies many Comprehensive Plan policies that do support Swedish's proposal. *See, e.g.*, UV35 at 3.3-31; LU32, 33, 34, 179, 181, 182, 183.

[5] FEIS treatment of aesthetic impacts, including height, bulk, and scale, is discussed in detail below at § 3.5.



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Washington CAN appears to conclude that the MIMP's acknowledged inconsistency with some policies necessarily creates significant adverse land use impacts, without specifying what those are (or what that term would even mean, given that there is no change to land use and aesthetic impacts are addressed separately). Washington CAN provides no analysis of the link between the premise and conclusion. Washington CAN does not explain how, when a proposal is consistent with some policies but not with others, the SEPA Responsible Official should weigh the "consistency" and determine if the proposal has a significant impact on land use. Where the Examiner must grant substantial weight to the agency's conclusions, Washington CAN has not borne its burden that the FEIS is inadequate on this point.

The FEIS must analyze and discuss the proposal's "relationship to" adopted policies. SMC 25.05.444.B.2.a; *accord* SMC 25.05.440.E.4.a (discussion of affected environment "shall incorporate, when appropriate" a summary of existing plans and how the proposal is consistent and inconsistent with them). The FEIS does so. However, that is where that element of the environment ends. The City's SEPA policies do not allow conditioning of a project to address "inconsistency with adopted land use policies." There is simply no substantive SEPA policy on point.[6]

Appellants' reliance on the Urban Village element merits special attention. The urban village element is irrelevant to major institution planning, either as part of the MIMP or as a matter of substantive SEPA policy. The City Council confirmed this years ago:

> The City's Land Use Code (SMC Title 23) **and substantive SEPA policies (SMC 25.05)** authorize reference to the City's Comprehensive Plan as a basis for review of a proposed MIMP only with respect to specific Comprehensive Plan policies identified in those ordinances, **neither of which include policies related to the 'urban village' strategy** described in that Plan. Therefore **the Council lacks authority to consider those policies** as a basis for its decision whether to approve the proposed MIMP.

[6] The City's SEPA policies conditioning of a "project" to ensure consistency with Section B of the Land Use Element, *see* SMC 25.05.675.G.2.a; J.1.a-J.2.b. However, the SEPA policies do not permit conditioning to ensure compatibility with any other (non-shoreline) portion of the Comprehensive Plan, including (without limitation) the rest of the Land Use element, the Urban Village element, or the Transportation element. There is no SEPA policy regarding "consistency with adopted land use plans."



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Ordinance No. 123263 (2010), Attachment A, Findings, Conclusion, and Decision of the City Council at Conclusion 28 (emphasis added). The Council wrote this language in response to the Hearing Examiner's analysis of the relevance of the Urban Village Strategy to MIMP adoption, specifically the Children's MIMP recommendation.[7] As the Council pointed out, the substantive SEPA policies do not reference the Urban Village element, so that element cannot inform the Examiner's opinion on these SEPA appeals.

Regardless, nothing in SEPA requires a proposal to be consistent with every aspect of every adopted land use plan, and such a standard would likely be impossible to meet in any event. In Washington, a comprehensive plan is only a general guide and not a document designed for making specific land use decisions. The zoning code controls and trumps inconsistent provisions of the comprehensive plan. *See, e.g.*, *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997).[8] Development must comply with the specific provisions of a comprehensive plan only if the zoning code expressly incorporates the comprehensive plan into the decisional criteria for a proposal. Here, the Seattle Municipal Code does not do so, *see* SMC 23.69.024-.032, and SEPA does not require more.

### 3.5 The FEIS Treatment of Height, Bulk, and Scale Mitigation is Appropriate In Light of the Alternatives Analyzed.

Washington CAN concedes the adequacy of the FEIS discussion and disclosure of height, bulk, and scale impacts, but faults the FEIS for not discussing measures that would mitigate height, bulk, and scale impacts. *See* Washington CAN Brief at 9:7-8. Yet, the very measures Washington CAN urges were incorporated into the preferred alternative, as amended at the hearing. By definition, reasonable alternatives studied in an EIS are actions that "feasibly attain

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[7] The Swedish Cherry Hill campus is outside of, but adjacent to, the nearest urban village, which terminates on 15th Avenue, at the western boundary of the Swedish Cherry Hill MIO.

[8] *See also, e.g.*, *Tugwell v. Kittitas County*, 90 Wn. App. 1, 8, 951 P.2d 272 (1997); *Hansen v. Chelan County*, 81 Wn. App. 133, 138, 913 P.2d 409 (1996); *Weyerhaeuser v. Pierce County*, 124 Wn. 2d 26, 43, 873 P.2d 498 (1994); *Bassani v. Board of County Commissioners for Yakima County*, 70 Wn. App. 389, 396, 853 P.2d 945 (1993); *Lakeside Industries v. Thurston County*, 119 Wn. App. 886 (2004); *Pinecrest Homeowners Association v. Cloninger & Associates*, 151 Wn. 2d 279 (2004); *Cingular Wireless v Thurston County*, 131 Wn. App. 756, 129 P.3d 300 (2006).



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or approximate a proposal's objectives, but at a lower environmental cost." SMC 25.05.786. In other words, the alternatives represent different ways to reach the applicant's goal while avoiding environmental impacts before they happen—essentially mitigation before the fact. Mr. Jex testified that the Preferred Alternative, as amended at the hearing to adopt the CAC's recommended setbacks, included each of the relevant mitigation measures listed at SMC 25.05.675.G.2[9] (the section cited by Washington CAN at page 9 of its brief):

- "Limiting the height of the development": Alternative 8, similar to the alternatives that preceded it, included 240-foot height limits, while the proposed alternative ratchets that down to 160', and allows such height only in the center of campus.[10]
- "Modifying the bulk of the development": Alternative 12 proposes façade modulation not to exceed the existing condition of 125'. The Preferred Alternative imposes setbacks, modulations, and design guidelines.[11]
- "Modifying the development's façade including but not limited to color and finish materials": Design guidelines specifically these considerations as the intent for project design.[12]
- "Repositioning the development on the site": The Preferred Alternative pushes the tallest and bulkiest buildings toward the center of the campus and downhill, toward the border with Seattle University and the 12th Avenue Urban Village. This allowed the height limits at the campus edges to remain largely unchanged from the current limits (that have existed since the 1994 plan).[13]
- "Modifying or requiring setbacks, screening, landscaping, or other techniques to offset the appearance of incompatible height, bulk, and scale": While the Major

[9] Note that the SEPA policy, in common with several others, applies to "a project," not to a non-project action like MIMP approval. SMC 25.05.675.G.2.
[10] *See* Jex Testimony, Day 4, Tape 4 of 4 at 31:08-31:21.
[11] *Id.* at 31:22-31:30.
[12] *Id.* at 30:31-31:45; *accord* MIMP App'x H, Design Guidelines at 159-162 (including § B2.2.2, "Color and Material Guidelines").
[13] Jex Testimony, Day 4, Tape 4 of 4 at 31:46-32:05.



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Institutions Code sets no minimum setback requirement,[14] the applicant proposes to adopt the CAC-recommended setbacks.[15] An example of a landscaped buffer in Alternative 12 appears along the MIO boundary to the east, a 25'-wide, generously landscaped buffer to the neighbors across the property line.[16]

*See generally* Jex Testimony, Day 4, Tape 4 of 4 at 30:03-32:33. In short, the Preferred Alternative already has this mitigation "baked in," limiting both the actual bulk and the appearance of the bulk to the maximum extent possible while still providing development capacity adequate to meet Swedish's institutional needs.

This approach is consistent with SEPA's direction, which allows DPD to "[m]odify alternatives including the proposed action" or "[d]evelop and evaluate alternatives not previously given detailed consideration by the agency" in response to comments on the project. SMC 25.05.560.A.1-2. Here, in response to comments, Swedish proposed and DPD studied new alternatives that served Swedish's needs while reducing height, bulk, and scale impacts by lowering allowable height limits, increasing setbacks, and all the other measures addressed above. SEPA does not encourage the agency to stand pat and await conditioning—essentially the approach Washington CAN suggests Swedish should have taken here.

Additional mitigation, beyond that already "baked in," would further cut into the institutional development capacity and would therefore not be reasonable, in contravention of SEPA's requirement that "[m]itigation measures shall be reasonable and capable of being accomplished." SMC 25.05.660.A.3. Swedish established its need for expansion through consultation with a respected consultant in the field, then had another, highly experienced and

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[14] This was not always the case. Prior to 2001, the Major Institutions Code required MIO setbacks to at least match the setbacks of the underlying zone. *See* former SMC 23.12.120 ("In no case shall a setback from the boundary be less than required by the greater of the underlying zoning, or the zoning for property adjacent to or across a public right-of-way from the institution.") (eliminated by Ord. 120691 § 2 (2001)).

[15] While Swedish agreed to the setbacks after the FEIS was published, the subsequent agreement does not render the FEIS inadequate. Greater setbacks lessen the environmental impacts, meaning the resultant impacts remain within the scope of those analyzed in the FEIS.

[16] Jex Testimony, Day 4, Tape 4 of 4 at 32:06-32:33.



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respected expert in the field peer review that analysis—and that expert, Jeff Hoffman, testified at the hearing that the needs analysis was actually conservative in several respects.

Over the course of CAC evaluation of the MIMP, Swedish's design team refined its understanding of how to design for the space necessary to serve the established need, resulting in a series of alternatives that "feasibly attain or approximate a proposal's objectives" through ever-decreasing height, bulk, and scale. These alternatives, including the preferred alternative, already provide less floor area than necessary to serve Swedish's established need, but still approximate Swedish's objectives. Yet, Washington CAN suggests that the FEIS is inadequate because it does not analyze or recommend conditions further limiting height limits and increasing setbacks, which would further reduce development capacity by some unknown amount. Although it bears the burden on appeal of establishing FEIS inadequacy, Washington CAN offered no evidence to establish what effect its suggested mitigation would have on project yield. In light of Swedish's need for expansion, the Examiner cannot conclude that the FEIS is legally inadequate on a record devoid of evidence that the allegedly necessary mitigation would satisfy SEPA's "reasonableness" requirement.

Washington CAN takes the City to task for writing that the significant impacts of the preferred alternative are "unavoidable," arguing that the impacts could be avoided by lessening the development capacity of the MIO. This is a semantic argument. The FEIS analyzes the impacts of the proposal under review—a medical center containing enough floor area to meet the established need—and correctly concludes that if the preferred alternative is built to the scale identified, certain significant impacts will unavoidably result. It does not analyze the impacts of some hypothetical smaller proposal that Appellants would prefer. The unavoidable impacts of "the Proposal" cannot be mitigated by imposing lower height limits, larger setbacks, and the like, because the project that results from such mitigation would no longer be "the Proposal," but some smaller project that cannot support the established needs of the institution. The impacts of any development may be avoided or lessened by decreasing the scale of the development.



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Adverse impacts may be eliminated entirely by abandoning the project. But SEPA does not require that the Responsible Official alert the ultimate decision maker to the fact that a project smaller than the one under review will produce smaller impacts.

On this record, there is no reason to conclude that the FEIS discussion of height, bulk and scale impacts is inadequate.

### 3.6 The FEIS Properly Identified and Analyzed Transportation Impacts.

Washington CAN acknowledges that the FEIS "correctly" identifies the significant adverse traffic impacts of the proposal. Nevertheless, Washington CAN asserts that the FEIS is inadequate. Washington CAN offers no argument or authority for this claim, instead simply incorporating by reference the entire testimony of Ross Tilghman. Washington CAN's argument fails as a matter of law. Since Washington CAN failed to brief this issue, the Hearing Examiner should not consider it. *Hamilton v State Farm Insurance Co.*, 83 Wn.2d 787, 795, 523 P.2d 193 (1974) (assignments of error unsupported by citation of authority or legal argument will not be considered). *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (issues first raised in reply are too late to warrant consideration).

Furthermore, the testimony of Mr. Tilghman does not establish that the FEIS is inadequate. Mr. Tilghman alleged that the FEIS's analysis of transit capacity, pedestrian safety, impacts to a potential future greenway on 18th Avenue, and traffic delays on nearby streets. *Tilghman Testimony*, Day 3, Tape 2 of 4 at 6:00 – 1:05:00, Day 2, Tape 3 of 4 at 36:05 - 54:29.[17] The FEIS analysis of each of these issues satisfies the Rule of Reason.

The FEIS contains a thorough discussion of impacts to transit. FEIS, pp. 3.7-10, 3.7-18 – 20, 3.7-30 – 31, 3.7-41 – 42, 3.7-58. An analysis of available transit capacity will occur when specific projects are proposed. Washington CAN claims that analysis of transit capacity cannot be conducted at the project level. However, as previously discussed, this is a non-project EIS.

[17] Mr. Tilghman also discussed TMP; however, the goal to be achieved by the TMP and measures necessary to accomplish this goal are MIMP issues.



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By definition, the level of analysis in the FEIS is less detailed than the analysis that will occur later, at the project level. Transit capacity, in particular, varies over time, as Mr. Tilghman admitted on cross examination. *Tilghman Testimony*, Day 3, Tape 2 of 4 at 53:40 – 55:42. Accordingly, analysis of transit capacity is appropriate at the project level.

The FEIS also contains a thorough discussion of pedestrian safety. Mitigation is proposed to address the impacts discussed by Mr. Tilghman. See FEIS pp. 3.7-12 – 13, 3.7-24, 3.7-36 – 37, 3.7-45. *Swenson Testimony*, Day 4, Tape 2 of 4 at 27:57-34:49.

Similarly, the FEIS contains a thorough discussion of traffic as it relates to the potential future greenway on 18th Avenue. No party disputes that the location of the greenway has not yet been determined. Nevertheless, the FEIS analyzes traffic impacts in relation to the greenway should it be located on 18th Avenue in the future. FEIS, pp. 3.7-18, 3.7-28 – 30, 3.7-40. The FEIS also identifies potential mitigation incorporated into the project design, including a reduction in the number of driveways that currently exist along this segment of 18th Avenue. FEIS, p. 3.7-29. *See also*, *Swenson Testimony*, Day 4, Tape 2 of 4 at 10:45 – 12:14. SEPA requires no more.

In addition, the FEIS thoroughly discloses potential increases in traffic delays on nearby streets. FEIS, pp. 3.7-31 – 36; 3.7-42 – 45; *Swenson Testimony*, Day 4, Tape 2 of 4, at 5:10-5:43 and 16:20. Washington CAN's true complaint is not that the EIS does not disclose this impact, but rather the scope of mitigation. Washington CAN asserts the FEIS incorrectly determined that traffic impacts are unavoidable, claiming that these impacts can simply be avoided by reducing the scale of the proposal. Washington CAN misunderstands the law. As discussed previously, mitigation measures must be reasonable and capable of being accomplished (SMC 25.05.660.A.3). Alternatives must feasibly attain or approximate a proposal's objectives." SMC 25.05.786. The reduction in scale sought by Washington CAN is not reasonable and does not attain project objectives because it does not accommodate the square footage necessary for Swedish Cherry Hill's needs.



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Washington CAN fails to meet its burden to show that the discussion of traffic impacts in the FEIS is inadequate. The Hearing Examiner must reject this claim.

## 4. RESPONSE TO SQUIRE PARK'S POST HEARING BRIEF

Respondents incorporate, by reference, the arguments advanced in defense of claims raised in the Washington CAN and 19th Avenue Block Watch briefs. To the extent Appellant Squire Park raises distinct issues, they are addressed below.

In its post hearing brief and at the SEPA hearing, Squire Park failed to meet its burden to show that the FEIS is inadequate. The appeal must be accordingly denied and the City's determination that the FEIS was adequate must be affirmed.

### 4.1 The FEIS Adequately Identifies and Analyzes Appropriate Alternatives for Accomplishing the Proposed Action.

The FEIS discusses a range of reasonable alternatives for accomplishing the Proposed Action. The FEIS is not inadequate, as Squire Park suggests, merely because it did not include a "decentralization option" or similarly stated FEIS alternative. Squire Park Brief at p. 2.

SEPA does not require analysis of an alternative involving decentralization of hospital functions to different Swedish campuses or elsewhere in the "Swedish/Providence System." For private proposals on specific sites, SEPA specifically requires analysis of on-site alternatives only, even where a rezone is proposed, as long as the use is allowed by the comprehensive plan. SMC 25.05.440.D.4. All of these elements apply here: the applicant is private, the proposal is for a specific site (the existing MIO), and the Comprehensive Plan identifies the site for major institutional uses. In light of this clear Code direction, the FEIS cannot be inadequate simply because it did not analyze a "decentralization" alternative.

Squire Park appears to be operating under the false premise that the "Purpose and intent" provision in SMC 23.69.002(C), "[e]ncouraging the concentration of Major Institution development on existing campuses, or alternatively, decentralization of such uses…" (emphasis added), somehow requires development of off-site alternatives. It does not. "Reasonable



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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." WAC 197-11-440(5)(b) (emphasis added); SMC 25.05.440D.2. The Proposed Action in the FEIS is to adopt a Major Institution Master Plan for the Swedish Medical Center, Cherry Hill Campus. Exhibit 3 at iv. Both the MIMP and the testimony of Andy Cosentino establish that Swedish Cherry Hill is a Specialized Regional Medical Center. Exhibit 2, MIMP at 67; Testimony of Andy Cosentino, Day 1, Tape 5 of 5 at 35:43 – 42:43. The testimony of both Mr. Cosentino and Jeff Hoffman established that decentralization of the level of specialty neuroscience and heart and vascular care delivered at Cherry Hill would not "feasibly attain" the proposal's objectives. Cosentino Testimony, Day 1, Tape 5 of 5 at 43:21 – 46:33; Hoffman Testimony, Day 2,Tape 2 of 5 at 20:35 – 24:06; *See* WAC 197-11-440(5)(b). Thus, the range of alternatives studied in the FEIS was reasonable under SEPA.

Not only is study of an off-site alternative not required by SEPA, doing so would not "feasibly attain" the proposal's objectives and would not meet the definition of "reasonable alternative." On this record, there is no reason to conclude that the FEIS's discussion of alternatives is inadequate.

### 4.2 The EIS Adequately Addresses SEPA's Requirement to Discuss Existing Plans And How The Proposal is Consistent With Them.

The FEIS must "incorporate, when appropriate," a discussion of the proposal's consistency or inconsistency with existing plans. WAC 197-11-440(6)(d)(i); SMC 25.05.440.E.4.a. This is precisely what the FEIS does in Section 3.3.4. As stated above, the City's SEPA policies do not allow conditioning of a project to address an instance of inconsistency with adopted land use policies; there is simply no substantive SEPA policy on point.

Despite Squire Park's argument to the contrary, the FEIS contains extensive discussion of the proposal's consistency with City goals and policies addressing the single-family and low



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density multifamily-zoned areas. This discussion begins at page 3.3-30 in the FEIS. The FEIS addresses both the Central District Plan and consistency with UVG 28, UV35, and UV36, goals and policies that address impacts to single-family and multifamily areas. The FEIS discusses how the proposal protects against encroachment into the single-family and multifamily neighborhoods and further mitigates impacts to the neighborhood. See FEIS at 3.3-30. The "Discussion" sections following UV35 and UV 36 specifically address the protection of single-family and multifamily areas "directly adjacent to the Swedish Cherry Hill Campus," and discusses mitigation of impacts related to the environment, such as traffic and aesthetics. See FEIS at 3.3-31.

The protection of single-family and multifamily areas also received detailed treatment in the FEIS's discussion of the Land Use element of the Comprehensive Plan, beginning on page 3.3-37 (discussion of LG8 and LUG9). Likewise, the FEIS contains a comprehensive discussion of three applicable Comprehensive Plan Polices governing multifamily residential areas at pages 3.3-38-39 of the FEIS. As stated earlier, nothing in SEPA requires a proposal to address every provision of every adopted land use plan. However, Squire Park's claim that the FEIS "does not meaningfully discuss" impacts of the proposed institutional development on the single-family and multifamily areas is directly contravened by the extensive disclosure and discussion contained in the FEIS sections cited above.

On this record, there is no reason to conclude that the FEIS's discussion of the proposal's relationship to existing land use plans is inadequate.

### 4.3 The FEIS Adequately Analyzes Traffic Impacts.

Squire Park alleges that the FEIS should have discussed Comprehensive Plan policies relating to traffic, does not adequately discuss transit capacity, street capacity impacts and impacts on the potential greenway, does not identify all pipeline projects, and that the scale of the proposal must be reduced to mitigate traffic impacts. Appellant Squire Park Community Council's Post-Hearing Argument ("Squire Park Brief"), pp. 5-6. These claims have no merit.



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The FEIS contains a thorough and lengthy 35-page discussion of Comprehensive Plan policies. FEIS, pp. 3.3-29 – 65. Indeed, the discussion in the FEIS goes beyond what the City's substantive SEPA policies require, which limit consideration to the Comprehensive Plan policies set out in Section B of the Land Use Element regarding Land Use Categories. SMC 25.05.675.J.2. The FEIS contains a reasonably thorough discussion of consistency with the Comprehensive Plan. The omission of a few policies that Squire Park believes are significant does not render the FEIS inadequate.

The FEIS analysis of transit capacity, street capacity impacts and impacts on the potential greenway is also adequate. These claims are discussed above, in relation to Washington CAN's brief.

The FEIS analysis of pipeline projects is similarly adequate. The FEIS identified a large number of pipleline projects including those known to the City at the time of EIS preparation. Since this is a programmatic EIS, additional traffic review will occur at the project level. Subsequent traffic analysis will include consideration of projects in the "pipeline" at those future dates. *Shaw Testimony*, Day 4, Tape 3, 48:15-51:23. Although Squire Park argues in its brief that many more projects should have been included as "pipeline," it did not establish adequate foundation for that conclusion. Although its witness listed project locations and size, Squire Park offered no evidence of when the City received applications for those projects or any other information from which the Examiner could conclude that they should have been included. For example, Mr. Shaw testified that no analysis was provided by the Appellants demonstrating whether what is proposed to be built exceeds trip generation for what is proposed to be demolished and, therefore, it is unknown whether any net increase in trips may, in fact, occur. *Shaw Testimony*, Day 4, Tape 3/4, 48:15-51:23. Mr. Shaw testified that he did not believe the specific projects cited by the Appellant's witness would "substantially affect the accuracy of the future year condition for the EIS" and that they "were scattered over a very wide area." *Shaw Testimony*, Day 4, Tape 4, 48:15-51:23. Because Squire Park bears the burden on its own



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appeal, its failure to offer this foundational evidence is fatal to its argument. The FEIS analysis of pipeline projects is reasonable and satisfies the requirements of SEPA.

Squire Park's assertion that the scale of the proposal should be reduced was addressed previously in connection with Washington CAN's brief.

The Hearing Examiner should reject Squire Park's claims regarding traffic.

### 4.4 The FEIS Analysis of Greenhouse Gas Emissions is Adequate.

Squire Park claims that the FEIS's analysis of greenhouse gas emissions is inadequate. Squire Park's Brief, p. 7. The FEIS thoroughly addresses this subject. FEIS, Chapter 3.1 (pp. 3.1-1 – 10). Moreover, Appellants offered no testimony or exhibits regarding greenhouse gasses at hearing. Since the FEIS contains a thorough analysis, and Squire Park's claim is entirely unsupported by evidence, the Hearing Examiner must reject this claim.

## 5. RESPONSE TO 19th AVE BLOCK WATCH

Respondents incorporate, by reference, the preceding arguments advanced in defense of claims raised in the Washington CAN and Squire Park Community Council's brief. To the extent Appellant 19th Avenue Block Watch raises distinct issues, they are addressed below.

In its post hearing brief and at the SEPA hearing, 19th Avenue Block Watch failed to meet its burden to show that the FEIS is inadequate. The appeal must be accordingly denied and the City's determination that the FEIS was adequate must be affirmed.

### 5.1 The FEIS Properly Identified and Analyzed Groundwater Impacts at a Non-Project Level.

Appellant failed to meet its burden of proof with regard to groundwater and stormwater impacts.

19th Avenue Block Watch alleged in its closing brief that the FEIS did not consider flooding[18] and that it did not provide adequate mitigation for the neighborhood. However,

[18] The environmental element, "Floods," was specifically excluded in the EIS scope of work. This element of the environment is typically studied when a project is located in a floodplain. The Swedish Cherry Hill campus is not located in a floodplain. However, the topics in which Appellant 19th Avenue provided testimony, stormwater and



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Appellant 19th Avenue failed to provide evidence of this alleged flooding or opine on its cause. Instead, 19th Avenue Block Watch presented testimony from a hydrogeologist, Scott Kindred, whose testimony was limited to a primer on how stormwater and groundwater interact in certain soil conditions and recommended stormwater management techniques. Mr. Kindred did not conduct an independent study of the campus or even a specific site within the campus. *Kindred Testimony*, Day 3, Tape 1 of 4 at 1:16:54-1:17:44. Mr. Kindred did not testify that the FEIS failed to disclose significant adverse groundwater, stormwater, or flooding impacts. Indeed, Mr. Kindred testified that any site-specific issues relating to stormwater and groundwater are appropriately considered at the project stage—not during a non-project EIS. *Id.* at 1:18:35-1:19:00.

What is most notable about Mr. Kindred's testimony is the level of agreement between his testimony and the conclusions of the FEIS. Mr. Kindred testified that the predominant soil type throughout the campus is glacial till, which does not allow water to percolate. *Kindred Testimony*, Day 3, Tape 1 of 4 at 1:01:50-1:02:10. The FEIS discloses the same. Exh. 3 at p. 3.9-3. Mr. Kindred testified that water tends to perch on glacial till. *Kindred Testimony*, Day 3, Tape 1 of 4 at 1:09:50-1:09:58. The FEIS discloses the same. Exh. 3 at p. 3.9-3. Mr. Kindred testified existing stormwater and groundwater issues can be addressed as part of any future development application. *Kindred Testimony,* Day 3, Tape 1 of 4 at 1:18:35-1:18-43. The FEIS recommends that approach. Exh. 3 at pp. 3.8-13-14, 3.9-13. Nothing in the FEIS forecloses the applicant from following Mr. Kindred's advice at the project stage, and indeed, the FEIS recommends additional study appropriate to projects as they are proposed.

Indeed, all substantial evidence in the record shows that the FEIS adequately reviewed and disclosed the potential for groundwater and stormwater impacts, and adequately discussed

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groundwater, are addressed in the FEIS. In fact, in response to public comments regarding flooding, the FEIS discusses that stormwater management is provided by Seattle Public Utilities and that a geotechnical report would be prepared for each future site specific building as part of a MUP application. The FEIS states the report would identify subsurface soil and groundwater conditions and would include measures for mitigating any identified impacts.



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possible mitigation measures. The FEIS adequately considers community comments regarding flooding, the potential for impacts of groundwater and stormwater, and the potential protective measures to mitigate a potential future impact. See Exh. 3, Appendix D, at pp. I-36, I-51, I-55, I-197, I-198, I-205, I-214; Exh. 3 at pp. 3.8-12-14, 3.9.2-3 3.9-7, 3.9-13. In the future, each building will seek a MUP approval, additional site-specific environmental review will be conducted, and more detailed geotechnical, groundwater, and stormwater information will be provided and reviewed by DPD at that time. Exh. 3 at pp. 3.8-13-14, 3.9-13.

Moreover, DPD recommended a condition that requires the application to submit a geotechnical report for each future site-specific building as part of the MUP application that identifies subsurface soil and groundwater conditions and would include measures for mitigating any identified impacts. Exh. 6 at p. 115. Such a condition recognizes the potential for an increase stormwater and groundwater flow, as outlined in the FEIS, and emphasizes the need to review groundwater and stormwater at the appropriate time. Even Mr. Kindred admitted that a good team would be able to remedy any potential for stormwater and groundwater at the time of a site-specific project application, and may improve existing conditions. *Kindred Testimony*, Day 3, Tape 1 of 4 at 1:18:35-1:19:00 and 1:23:57-1:24:40. Accordingly, DPD's proposed condition adequately addresses 19th Avenue Block Watch's concern raised at the hearing.

Nevertheless, in recognition of 19th Avenue Block Watch's concerns, Respondents are willing to entertain a more detailed condition than the one set forth by DPD. In the spirit of cooperation, Respondents offered to 19th Avenue Block Watch the following revised condition (new text double underlined):

> The applicant shall submit a geotechnical report for each future site-specific building as part of the MUP application. The report would identify subsurface soil and groundwater conditions and would include measures for mitigating any identified impacts <u>and a discussion of whether low impact development (LID) techniques are appropriate in light of site specific conditions</u>.



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As set forth in 19th Avenue Block Watch's closing brief, the appellant countered with the following addition to the Respondents proposed revised condition:

> Previous subsurface explorations at the campus have identified the presence of glacial till near the ground surface. This type of soil is relatively impermeable and generally results in shallow groundwater mounding. Issues with groundwater mounding, including basement flooding and the need for sump pumps, have been documented in nearby neighborhoods. In order to avoid additional impacts associated with groundwater mounding, it is expected that LID facilities will be lined to prevent stormwater infiltration. Any LID facilities proposal must include its asset management analysis and operations and maintenance plan for the life of the site-specific building.

Appellant 19th Avenue Block Watch Closing Brief, at p. 1.

Unfortunately, 19th Avenue Block Watch's proposed condition inappropriately limits the possible stormwater management techniques without support or scientific basis of a particular site, and does not recognize the varied site conditions throughout the campus. *Kindred Testimony*, Day 3, Tape 1 of 4 at 1:18:13-1:18:35. A blanket prohibition of green infrastructure is not warranted, and 19th Avenue Block Watch has not provided affirmative evidence that significant impacts will result at all areas of the campus if green infrastructure is implemented. It is possible that the project engineers will institute stormwater management techniques that mirror 19th Avenue Block Watch's suggestion above. However, it is far too early in the project development process to make such a prescription. Even 19th Avenue Block Watch's witness stated that a site-specific review is the appropriate time to assess site conditions and appropriate address stormwater and groundwater. Accordingly, Respondents' proposed condition should be implemented and the condition proposed by 19th Avenue Block Watch should be rejected.

On this record, there is no reason to conclude that the FEIS is inadequate for failure to outline the possible limitations of low-impact development stormwater management techniques at this non-project stage.



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### 5.2 The FEIS Properly Identified and Analyzed Loading Dock Noise Impacts at a Non-Project Level.

19th Avenue Block Watch alleges in its closing brief that "loading berth plan" conflicts with the "traffic plan." However in its brief, Appellant neither describes how the mitigation measures discussed in the FEIS conflict with one another nor explains how the FEIS is inadequate as a result. While not noted in its closing brief, 19th Avenue Block Watch's claim is based on the testimony of Lindsey Amtmann, whom the Hearing Examiner determined was not a noise expert. To the extent Appellant is referring to Ms. Amtmann's testimony that potential mitigation for loading dock traffic or noise may differ, such "conflict" is not within the Hearing Examiner's jurisdiction to resolve. Hearing Examiner Order on Joint Motion to Dismiss, at p. 7. Also, as noted *supra*, SEPA does not require an EIS to commit to mitigation measures, and mitigation measures need not be analyzed in detail. SMC 25.05.440.E.3.d. This is especially true at a nonproject EIS stage when project impacts are unknown and mitigation measures have not yet been imposed.

Moreover, the FEIS notes that, depending on the locations of loading docks in relation to sensitive offsite uses and the timing of the activities, the noise from the loading docks could result in on- and offsite noise impacts. The FEIS discusses certain potential mitigation measures, such as requiring that loading docks be designed and sited to ensure compliance with City Noise limits, and limiting noisy deliveries to daytime hours. Exh. 3, at pp. 3.2-8-9. As the FEIS makes clear, all construction and operational noise activities must meet the City noise limits for offsite noise receivers, found at Chapter 25.08 SMC. To ensure compliance with the noise limits, a noise study will be conducted at the project level. Exh. 3, at pp. 3.2-8-9. The SEPA policies for noise presume compliance with the noise control ordinance, and permit the City to condition or mitigate a project under limited circumstances. SMC 25.08.675.L. 19th Avenue Block Watch provides no evidence that the analysis and discussion of loading dock noise mitigation was inadequate.



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On this record, there is no reason to conclude that the FEIS discussion of noise from loading docks is inadequate.

### 5.3 The FEIS Properly Identified and Analyzed Transportation and Pedestrian Safety Impacts at a Non-Project Level.

19th Avenue Block Watch raise a number of transportation and pedestrian and traffic safety claims in its closing brief. However, 19th Avenue Block Watch submits absolutely no evidence that could show that there are significant adverse impacts not disclosed in the EIS.

Traffic

Appellant alleges, without support or study, that the FEIS fails to consider traffic redirection and the existing one-way change to 14th Avenue. This conclusory statement has no support in the record and ignores the fact that the existing street system, as well as the future street system in the future without the Proposal, is taken into account and incorporated into the traffic model. *See* Exhibit 3, Appendix C, at p. C-31 and Table 5.

19th Avenue Block Watch also alleges that the FEIS does not study the impacts at 19th Avenue, and questions why the FEIS looked at the impacts at 13th Avenue instead. However, Appellants misunderstand the FEIS study area. The FEIS studied the potential for impacts at both the 19th Avenue and Cherry Street and the 19th Avenue and Jefferson Street intersections. *See* Exhibit 3, Appendix C, Figure 1. The FEIS also specifically studied the existing, no-build, and build traffic volumes on 19th Avenue. *Id.*, at Figures 6, 17, and 33. 19th Avenue Block Watch also alleges, without support or independent study, that 19th Avenue has higher volumes of traffic and more reported accidents than 13th Avenue, and summarily concludes that the traffic coming from the east of campus is ignored. These allegations are untrue. The FEIS undertakes a thorough analysis, which includes likely trip generation, mode split, and trip distribution patterns to specific corridors and intersections, utilizing well-established survey information, models, and techniques that are reviewed and approved by DPD.



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Despite 19th Avenue Block Watch's argument to the contrary, the FEIS contains extensive discussion of the potential transportation impacts. Specific to Appellant 19th Avenue's claims, the testimony of Michael Swenson, a traffic expert with years of experience in transportation review, testified that:

- The Proposal's Alternatives 8, 11, and 12 would result in significant adverse impacts at four additional locations in the AM peak hour and five additional intersections in the PM peak hour. Exh. 3 at pp. 3.7-32-35.
- The Proposal will not cause significant adverse impacts at 19th and Cherry and 19th and Jefferson. Exh. 3, Appendix C at Figures 37-39.
- In addition to examining primary routes to and from the campus, the FEIS analyzed the neighborhood streets and the north-south connectivity by looking at unsignalized intersections along Cherry and Jefferson Streets. In fact, neighborhood connectivity was a primary focus of the FEIS, as requested by DOT and DPD. Swenson Testimony at Day 4, Tape 2 of 4 at 5:10-5:43.

John Shaw, the City's transportation reviewer, and John Perlic, a traffic expert with more than 20 years' experience, concurred in the analysis. *Shaw Testimony*, Day 4, Tape 3 of 4 at 46:10-47:42; *Perlic Testimony*, Day 4, Tape 3 of 4 at 39:40-41:29. Appellant fails to present evidence showing that the experts' conclusions were incorrect. 19th Avenue Block Watch's traffic issues must be dismissed.

Greenway

19th Avenue Block watch claims that the FEIS failed to study its proposed mitigation to move the proposed 18th Avenue Greenway to either 19th or 20th Avenue. The FEIS found that, if the Seattle Department of Transportation ("SDOT") decides to locate its proposed greenway on 18th Avenue, there could be increased conflicts between cars and users of the Greenway. To address these conflicts, the FEIS identified a number of possible mitigation measures, including moving the greenway to 19th or 20th Avenue. However, as Mr. Swenson testified, the location of the greenway is ultimately a decision for SDOT, who will undertake its own review of the final route. *Swenson Testimony*, Day 4, Tape 2 of 4 at 56:30-57:24.



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For this non-project FEIS, SEPA does not require the FEIS to analyze the yet to be determined route, including alternative locations that serve as mitigation, of the Greenway in great detail. SMC 25.05.440.E.3.d. SDOT will review and study the final route, taking into account the existing and future conditions surrounding the route. Accordingly, 19th Avenue Block Watch has not met its burden to demonstrate the FEIS discussion of alternative locations for the Greenway was inadequate.

Loading Berths

19th Avenue Block Watch also takes issue with the number of loading berths required by the City's Land Use Code.[19] This code issue, however, is not properly before the Hearing Examiner. In her Order on the Joint Motion to Dismiss, the Hearing Examiner dismissed 19th Avenue Block Watch's Issue 2.B, which includes the same allegation raised in this closing brief. Order on Joint Motion to Dismiss, p. 5. To the extent Appellant 19th Avenue tries to raise this issue for the first time in its closing brief in the context of an EIS claim, it is too late. HE Rule 3.01.d.4. ("An appeal must be in writing and contain . . . [a] brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed").

Also for the first time, Appellants suggest specific mitigations to be implemented. However, as noted by the Hearing Examiner in her Order on the Joint Motion to Dismiss, the adequacy of the proposed SEPA mitigation, as opposed to the FEIS's discussion of mitigation measures, is not an issue within the Hearing Examiner's jurisdiction. Order on Joint Motion to Dismiss, p. 7.

[19] 19th Avenue Block watch did not provide a citation in support of its allegation that "[t]he FEIS consultant did not know why Swedish/Sabey is out of compliance with the Code and did not locate any documentation from the City to show some type of waiver." 19th Avenue Block Watch Closing Brief, at pp. 2-3. Based on Respondent's review of the record, the FEIS Consultant, Katy Chaney, said no such thing. Moreover, this issue was specifically dismissed by the Hearing Examiner and was not raised at the hearing.



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Healthwalk

Appellant 19th Avenue raises, for the first time in its closing brief, that the "proposed to incorporate a Healthwalk along the major entrances for cars into underground garages and loading berths for truck [sic] is unsafe and was not considered." It is too late for Appellant 19th Avenue to raise a new claim and the Hearing Examiner should accordingly dismiss the claim. HE Rule 3.01.d.4. Even if 19th Avenue Block Watch would have properly and timely raised concerns regarding the Healthwalk, it provides no evidence regarding potential for pedestrian safety impacts, and does not articulate how the FEIS is deficient in its consideration of the Healthwalk. Accordingly, 19th Avenue Block Watch has not met its burden to demonstrate that the FEIS discussion of the Healthwalk is inadequate.

## 6. CONCLUSION

For the reasons stated above, Respondents respectfully request that the Examiner dismiss the Appellants' appeals in their entirety and affirm the DPD Director's decision concerning the adequacy of the Swedish Cherry Hill FEIS.

DATED this 5th day of August, 2015.

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