BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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

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I. INTRODUCTION

Pursuant to Hearing Examiner Rules of Practice and Procedure 1.03 and 3.02, Respondent City of Seattle ("City") brings this Motion to Dismiss certain issues raised in the Notices of Appeal brought by nine appellants (collectively, "Appellants").

This case addresses the adequacy of the City's environmental review under the State Environmental Policy Act ("SEPA") of its legislative proposal to implement Mandatory Housing Affordability ("MHA") requirements for new commercial and multifamily developments in certain areas of the City. The City's proposed action consists of several related components, including: (1) a "performance or payment" requirement for developers either to build on-site, or to make an in-lieu payment to support the development of, rent- and income-restricted housing; and (2) area-wide zoning map changes and modifications to the Land Use Code's development standards to provide additional development capacity, such as increases in maximum height and floor area ratio limits.[1] Because the proposal does not involve a specific development project, the proposal is a non-project action under SEPA.[2]

On November 7, 2017, the City's Office of Planning and Community Development ("OPCD") issued the subject Final Environmental Impact Statement ("FEIS") and determination of adequacy of the FEIS under SEPA. On November 27, 2017, nine appellants filed nine separate appeals challenging the adequacy of the FEIS. With this Motion, the City seeks to dismiss several issues in the appeals that are without merit on their face and for which there is no genuine issue as to any material fact such that the City is entitled to a judgment as a matter of law.

[1] FEIS at 1.2
[2] *See* WAC 197-11-704(2)(b).

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II. RELIEF REQUESTED

As detailed in the sections that follow, the City seeks dismissal of the following issues and corresponding portions of the Appellants' Notices of Appeal:

1. Issues relating to the adequacy of the City's range of alternatives and alternatives analysis, as stated in:
   - W-17-006 (Wallingford Community Council), Section 2.a at p. 4-5;
   - W-17-007 (Morgan Community Association), ¶ 5 of 6 at p. 2;
   - W-17-009 (West Seattle Junction Neighborhood Organization ("Junction Neighborhood Organization")), Section 2, ¶ 4 and ¶ 9 at p. 4;
   - W-17-010 (Seattle Coalition for Affordability, Livability, and Equity ("SCALE")), ¶ 17-18 at p. 11-12;
   - W-17-011 (Seniors United for Neighborhoods), at p. 3, lines 40-43 and p. 4, lines 15-16; and
   - W-17-013 (Friends of the North Rainier Neighborhood Plan), at p. 3, lines 21-23; and
   - W-17-014 (Fremont Neighborhood Council), Section 2 ¶ B-C at p. 4.
2. Issues relating to the City's prior environmental review of different proposals, as stated in W-17-006 (Wallingford Community Council), Section 2.b at p. 6-7.
3. Issues relating to the City's ability to amend its Comprehensive Plan, as stated in W-17-008 (Friends of Ravenna-Cowen), ¶ 7 at p. 7.
4. Issues relating to the adequacy of mitigation measures, as stated in:
   - W-17-008 (Friends of Ravenna-Cowen), ¶ 3-4, at p. 5-6;
   - W-17-010 (SCALE), ¶ 4 at p. 5, ¶ 6 at p. 6, ¶ 8 at p. 7, ¶ 10.a at p. 8, ¶ 15 at p. 11, ¶ 25 at p. 13 ¶ 29 at p. 14, and ¶29-30, 32 at p. 15, ¶ 38 at p. 15;
   - W-17-012 (Beacon Hill Council of Seattle ("Beacon Hill Council")), ¶ 3-4 at p. 6-7; and

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- W-17-013 (Friends of the North Rainier Neighborhood Plan), ¶ 4 at p. 6; ¶ 9 at p. 8-9.

5. Impacts not attributable to the proposed action, as stated in W-17-012 (Beacon Hill Council), last paragraph of p. 4; W-17-007 (Morgan Community Association), ¶ 6 of 6 at p. 2.

6. Issues relating to the City's use of phased review, as stated in W-17-006 (Wallingford Community Council), ¶ 5 at p. 4; W-17-014 (Fremont Neighborhood Council), Section 2 ¶ C at p. 4.

As identified above, the City seeks to dismiss all of the issues raised in the Notices of Appeal filed by Wallingford Community Council in W-17-006 and by Fremont Neighborhood Community Council in W-17-014.[3] If the Examiner dismisses all of the issues raised in W-17-006 and W-17-014 as requested, the City requests that the Examiner dismiss Appellants Wallingford Community Council and Fremont Neighborhood Council from this matter.

III. STATEMENT OF FACTS

The City's Motion is based on the following uncontested facts.

A. Background of MHA.

MHA is part of Seattle's Housing Affordability and Livability Agenda ("HALA"). The City developed MHA as a policy proposal to help confront the City's affordable housing crisis. As discussed below, MHA emerged from years of community engagement, policy analysis, and input from stakeholders of the City.

[3] *See* Motion at II.1 (seeking dismissal of issues in W-17-006, Section 2.a and W-17-014, Section 2 ¶ B-C); II.2 to II.3 (dismissal of issues in W-17-006, Section 2.b); and II.7 (dismissal of W-17-014, Section 2 ¶ C). In addition to the specific issues referenced in the preceding sentence, Fremont Neighborhood Council's notice of appeal also attempts to incorporate by reference issues not stated in that notice but stated in the notice of appeal filed by SCALE. If all of the specific issues raised by Fremont Neighborhood Council are dismissed, Fremont Neighborhood Council's appeal should be dismissed, as SCALE (of which Fremont Neighborhood Council is a member) is the appropriate party to pursue issues listed in SCALE's notice of appeal (apart from any such issues dismissed through this motion).

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1. City Council and the Mayor establish the Seattle Housing Affordability and Livability Agenda Advisory Committee.

In September 2014, the City Council and then-Mayor Edward B. Murray adopted Resolution 31546, calling for the establishment of the Seattle Housing Affordability and Livability Agenda Advisory Committee ("HALA Advisory Committee" or "Committee") to be jointly convened by the Mayor and Council.[4] The resolution noted that the City has "a severe shortage of very low- and low-income housing," and that although the City has a variety of existing programs and policies, the existing programs and policies are unlikely to meet future affordable housing needs.[5]

The Mayor and Council convened the Committee to help formulate policy proposals to address the City's affordable housing crisis. The Committee consisted of a 28-member stakeholder group that included housing experts, affordable housing advocates, for-profit and non-profit developers, and others.[6] The Resolution tasked the Committee with an agenda that included studying current and estimated housing needs and development, and developing recommendations for new programs, policies, and funding for market-rate and affordable housing production and preservation. Mayor Murray challenged the Committee to develop proposals that would produce or preserve at least 50,000 housing units—20,000 rent and income-restricted homes and 30,000 market-rate homes—within the next ten years.[7]

2. The HALA Advisory Committee issues its recommendations.

In July 2015, the Committee issued its "Final Advisory Committee Recommendations to Mayor Murray and the Seattle City Council" ("HALA Report"). The

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[4] Declaration of Jeff Weber ("Weber Dec."), Exh. A.
[5] *Id.* at p. 2.
[6] Weber Dec., Exh. B, at p. 1.
[7] *Id.* at p. 3-4.

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HALA Report described the City's housing affordability crisis as "a true Gordian Knot," complicated by many competing interests and positions.[8] In this challenging context, the HALA Report presented 65 recommendations on which the Committee had found consensus and intended to present as "a comprehensive package of strategies."[9]

The HALA Report included a list of "highest impact recommendations"—the recommendations that the Committee believed had the greatest potential to impact housing affordability. At the top of this list were the backbones of what would eventually become known as MHA.[10] In particular, the Committee recommended that the City: "(1) boost market capacity by extensive citywide upzoning of residential and commercial zones; and, (2) match this increased capacity with a mandate to build affordable housing" via a "performance-or-payment" requirement—a mandate that new development either build, or make an in-lieu payment to support the development of, rent- and income-restricted housing.[11] The Committee recommended two separate frameworks for imposing this mandate—one for new residential development and one for new commercial development.[12]

The Committee encouraged the City to implement MHA expeditiously by implementing it in several specific neighborhoods where upzones were already in progress and where environmental review had been completed.[13] The Committee found that within ten years, the proposal "is expected to yield approximately 6,000 affordable units at or

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[8] *Id.* at p. 4.

[9] *Id.* at p. 4.

[10] *Id.* at p. 7. At the time, the Committee did not use the term "MHA." The Council began using the term MHA later, beginning with Resolution 31622 discussed below. However, the HALA Report set forth the key tenets of MHA, including citywide upzoning and a mandate to build affordable housing through either payment or performance.

[11] *Id.*, p. 15 and Appendix E.

[12] *Id.* Appendix E.

[13] *Id.* at Appendix E.

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below 60% of AMI [Area Median Income], in numbers exceeding other proposed strategies,"[14] contributing to the Mayor's larger goal of producing 50,000 homes.

Leading up to the HALA Report, some members of the HALA Advisory Committee worked with stakeholders to identify and refine policy proposals contained in the HALA Report. An outgrowth of this effort was the "Statement of Intent for Basic Framework for Mandatory Inclusionary Housing and Commercial Linkage Fee." The Statement of Intent reiterated the key tenets of MHA (increased development capacity through upzones and the "performance-or-payment" requirement) and its 6,000-affordable-unit production goal, while developing more detail on topics such as proposed payment and performance amounts and timelines for environmental review, the legislative process, and implementation.[15] As noted above, these key tenets of MHA (as well as many similar details) were recommendations of the HALA Report as well.[16] On its face, the Statement of Intent recognized that further analysis and process would be required, and modifications of the Statement might occur, before MHA could be implemented. The Statement of Intent, commonly referred to as the "Grand Bargain," was signed by Mayor Murray, Councilmember Mike O'Brien, the Co-Chairs of the Committee, certain other members of the Committee, and other stakeholders.

3. Mayor and City Council endorse and resolve to consider the HALA Advisory Committee's recommendations, including MHA.

Based on the HALA Report, and consistent with his support of the "Grand Bargain," the Mayor released his "Action Plan to Address Seattle's Affordability Crisis" embracing the Committee's key recommendations.[17] While the Action Plan included

[14] *Id.*, p. 15 and Appendix E.
[15] Weber Dec., Exh. C.
[16] Weber Dec., Exh. B, p. 15 and Appendix E.
[17] Weber Dec., Exh. D.

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MHA as a critical component of the City's efforts, the Mayor's plan was broad and called for a "multi-pronged approach" to encourage affordable housing, such as increasing funding sources like the Seattle Housing Levy, providing assistance to low-income homeowners, and reforming permitting processes.[18] The Action Plan also reiterated the Mayor's broader goal of producing 50,000 housing units over the next ten years, including 30,000 market-rate units and 20,000 affordable housing units.[19]

In October 2015, the City Council adopted Resolution 31622. In the resolution, the Council concurred with the 50,000-unit production goal and declared its intent to consider the HALA Advisory Committee's recommendations.[20] The Council attached to the resolution its "Council Work Plan for HALA Recommendations."[21] The Work Plan outlined the strategies the Council intended to consider, and the Council's timeline for action. The plan incorporated many of the Committee's recommendations, including implementing Mandatory Housing Affordability for both commercial and residential development, considering modifications to the City's Multifamily Property Tax Exemption program; significantly increasing the Housing Levy; adapting single family homes and removing barriers to accessory dwelling units; protecting renters from discrimination; and expanding rental and operating subsidies.[22] With respect to the Committee's MHA recommendations, the Council planned to develop a policy resolution for the residential component of MHA by 3rd quarter 2015, develop framework legislation

[18] *Id.*, p. 1, 3-4.
[19] *Id.*, p. 2.
[20] Weber Dec., Exh. E.
[21] *Id.*, Attachment A.
[22] *Id.*

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to implement the commercial component of MHA by 4th quarter 2015, and implement upzones or changes in development standards by 2017.[23]

Consistent with its work plan, in November 2015 the Council adopted Resolution 31612. In the resolution, the Council committed to the goal of producing 6,000 development-driven affordable units and resolved to consider the commercial and residential components of MHA.[24] The Council endorsed MHA's key tenets, including the payment-or-performance requirement and upzones to increase development capacity.[25] The Council also endorsed citywide implementation and attached a map to the resolution showing the general areas intended for implementation of MHA citywide.[26]

To prepare for such zoning and land use changes, the Council set forth a detailed implementation plan, with a goal of fully implementing the program by September 2017.[27] The Council requested that the Mayor conduct outreach and convene meetings in every urban center and village. Consistent with the HALA Advisory Committee's recommendation, the Council's implementation timeline envisioned environmental review and implementation in certain neighborhoods, including Downtown and South Lake Union, before preparing an EIS for, and undertaking citywide implementation.[28]

4. City Council passes the framework ordinances for MHA.

Starting in late 2015, the Council passed two ordinances that set up the framework for the commercial and residential components of MHA, without implementing them in any zoning district. First, in November 2015, the Council adopted Ordinance 124895, adding a new Chapter 23.58B of the Seattle Municipal Code ("SMC"), which established

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[23] *Id.*
[24] Weber Dec., Exh. F, p. 1.
[25] *Id.*, p. 1-4.
[26] *Id.* Attachment A.
[27] *Id.*, p. 6.
[28] *Id.*, Attachment B.

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the framework for the commercial component of MHA, including the payment-or-performance requirements on new commercial development. The ordinance did not yet implement the MHA-C requirements in any part of the City, however, because its provisions would take effect only if the City adopts zoning and land use changes that increase commercial development capacity and incorporate SMC Chapter 23.58B.[29]

Then, in August 2016 the Council passed Ordinance 125108, adding a new Chapter 23.58C of the SMC, also known as Mandatory Housing Affordability for Residential Development ("MHA-R"), which established the framework for the residential component of MHA. This ordinance set forth the structure of the payment-or-performance requirements on new residential development, and expressly provided that its provisions do not apply and have no effect unless incorporated into zoning and land use changes.[30]

5. City Council begins implementing MHA in parts of the City.

SMC Chapters 23.58B and 23.58C, as adopted by the framework ordinances, set forth the MHA program elements but did not actually implement the requirements in any area of Seattle. Beginning in March 2017, following environmental review,[31] the Council enacted ordinances implementing MHA in six neighborhoods: the University District,[32]

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[29] Weber Dec., Exh. G, at p. 4, 9.

[30] Weber Dec., Exh. H, at p. 4-5, 12.

[31] The implementing Ordinances describe the environmental review that the City conducted for each implementation. For the University District implementation, the City prepared a programmatic EIS upheld by the Examiner. The City also prepared an EIS for the Uptown implementation, also upheld by the Examiner. For Downtown and South Lake Union, the Chinatown-International District, and the 23rd Avenue Corridor, the City issued a DNS.

[32] Ordinance 125267, passed March 2, 2017. City ordinances are subject to judicial notice under Civil Rule 9(i). Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure states that the Examiner "may look to the Superior Court Civil Rules for guidance."

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Downtown and South Lake Union,[33] Chinatown-International District,[34] at three nodes within the 23rd Avenue corridor in the Central Area,[35] and Uptown.[36]

B. The FEIS and Citywide Implementation of MHA.

To implement MHA throughout the remainder of the City, OPCD prepared the EIS that is the subject of this appeal.

On November 9, 2017, the City published the subject FEIS. The FEIS analyzes the City's proposal to implement MHA in the remaining parts of the City—specifically, in existing multifamily and commercial zones in the City, areas currently zoned Single Family Residential in existing urban villages, and areas zoned Single Family in potential urban village expansion areas identified during the Seattle 2035 Comprehensive Planning process.[37]

The EIS assesses four alternatives based on the following assumptions:

- **Alternative 1 (No Action):** Assumes MHA payments and production generated in the neighborhoods where the City had already implemented MHA by other prior action but not in the remaining portions of the City—i.e., no area-wide rezones, development capacity increases, or MHA payments or production of affordable housing units.

- **Alternative 2 (Implement MHA in the Study Area):** Implements MHA and applies zoning and development capacity increases using basic planning concepts, Comprehensive Plan policies and Land Use Code criteria, and MHA implementation principles. This would generally continue the overall pattern and distribution of growth anticipated in the Seattle 2035 Comprehensive Plan.

- **Alternative 3 (Implement MHA with Distinctions for Displacement Risk and Access to Opportunity Areas):** Implements MHA and applies zoning and development capacity increases based on the same guiding principles applied in Alternative 2, but with explicit consideration of each urban village's Displacement

[33] Ordinance 125291, passed April 14, 2017.
[34] Ordinance 125371, passed August 2, 2017.
[35] Ordinances 125359, 125360, and 125361, all passed August 2, 2017.
[36] Ordinance 125432, passed October 11, 2017.
[37] FEIS at 2.2.

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Risk and Access to Opportunity, as identified in the Growth and Equity Analysis prepared as a companion document to the Seattle 2015 Comprehensive Plan EIS.

- **Alternative 4 (Preferred Alternative):** Similar to Alternative 3, implements MHA with distinctions for displacement risk and access to opportunity, but includes different emphases based on a combination of community input, environmental constraints, and additional analysis. Emphases include increasing housing options near transit nodes and in high-opportunity urban villages, and increasing development capacity on known potential affordable housing sites.

FEIS at 2.28 – 2.35. In short, each alternative differs in the intensity and location of development capacity increases and the patterns and amounts of housing growth across the City that could result.

IV. ARGUMENT

A. Standard of Review.

The Hearing Examiner Rules of Practice and Procedure ("HER") authorize the Examiner to dismiss all or part of an appeal if it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is "without merit on its face." HER 3.02. *See also ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979) (Quasi-judicial bodies like the Hearing Examiner may dispose of an issue summarily where there is no genuine issue of material fact). HER 1.03 states that for questions of practice and procedure not covered by the HER, the Examiner "may look to the Superior Court Civil Rules for guidance." Civil Rule 56(c) provides that a motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

When reviewing an EIS, the Examiner must give substantial weight to OPCD's determination that the EIS is adequate. The burden of establishing the contrary rests with

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the Appellants.[38] EIS adequacy is reviewed under the "rule of reason," a "broad, flexible cost-effectiveness standard" that requires that the EIS include a reasonably thorough discussion of the significant aspects of the probable environmental consequences of an agency decision.[39]

This deference ensures that reviewing tribunals achieve SEPA's statutory purpose. SEPA is "primarily a procedural statute" intended to promote fully informed government decision-making and ensure that environmental values are given appropriate consideration.[40] It does not compel a particular substantive result in government decision making.[41] SEPA further acknowledges that environmental considerations "may be rationally subordinated to weightier non-environmental values."[42] Thus, the Examiner and the courts do not "rule on the wisdom of the proposed development," but only on whether the EIS provides the decision-maker with sufficient information to make a reasoned decision.[43]

B. The City's alternatives analysis is legally adequate and includes a reasonable range of alternatives.

Nearly all of the Appellants challenge the City's alternatives analysis in the EIS. Most argue that the City should have considered alternative proposals for creating affordable housing besides MHA,[44] while several additionally argue that the City should

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[38] SMC 25.05.680; SMC 23.76.022.C.7 and SMC 23.76.006.C.1.b.

[39] *Citizens All. To Protect Our Wetlands v. City of Auburn* ("CAPOW)", 126 Wn.2d 356, 362, 894 P.2d 1300 (1995); SMC 25.05.402.A.

[40] *Glasser*, 139 Wn. App. at 742 (quotation marks and citations omitted); *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001).

[41] *Glasser*, 139 Wn. App. at 742

[42] Settle, *supra*, § 14.01, at 14-9.

[43] *CAPOW*, 126 Wn.2d at 362.

[44] A complete list of each issue is listed in the request for relief. By way of example, the Wallingford Community Council's appeal states, "The EIS fails to consider and present genuine alternatives as required by SEPA. The 'alternatives' presented in the EIS are not alternative ways to meet the housing objectives, but only alternative ways to implement a single alternative represented by the MHA framework." W-17-006, Notice of Appeal, at p. 5-6. Similarly, SCALE asserts, "The FEIS explicitly declines to consider

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have considered different alternatives for implementing MHA.[45] As explained below, the Examiner should dismiss these issues because the Appellants' underlying arguments are without merit on their face, there are no genuine issues of material fact, and the City is entitled to judgment as a matter of law. The City has chosen a reasonable range of alternatives that achieve the City's "formally proposed" policy objective. SEPA does not allow Appellants to force the City to consider entirely different legislative proposals under the guise of an "alternatives analysis," nor does it require the City to prepare a compendium of every possible alternative.

1. SEPA requires the Examiner to defer to the City's choice of alternatives, especially in the context of a non-project action, and expressly allows the City to limit its alternatives to those that achieve a proposal that was "formally proposed."

In general, lead agencies are given broad discretion in identifying an objective and defining alternatives. Pursuant to SEPA, an agency must identify the "proposal" that is the subject of the EIS and ensure that it is "properly defined." The agency may put forward its proposal as "an objective, as several alternative means of accomplishing a goal, or as a particular or preferred course of action."[46] Because SEPA defines "reasonable

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specific alternatives to the MHA proposal . . . . The FEIS alternatives only consider how much and where to up-zone, not alternative ways to reach the objectives." W-17-010, Notice of Appeal, at p. 11-12. *See also* W-17-007, Notice of Appeal (Morgan Community Association), at p. 2 ("[B]oth the DEIS and the FEIS fail to acknowledge any other way of achieving housing goals within existing zoning designations other than the upzone. This lack of any alternative actions to the HALA goals will result in further adverse impacts . . . ."); W-17-009, Notice of Appeal (Junction Neighborhood Organization), at p. 4 ("The City characterizes its alleged non-project proposal with a preferred solution yet fails to consider and compare meaningfully different alternatives to such proposal."); W-17-013, Notice of Appeal (Friends of the North Rainier Neighborhood), at p. 3 (The FEIS "failed to discuss reasonable alternatives that could accomplish the city's goals with less adverse impacts to the city's existing quality of life."); W-17-014, Notice of Appeal (Fremont Neighborhood Council), at p. 4 ("The City constrained the range of alternatives by improperly narrowing the definition of the objective (also called purpose and need) for the proposed action.").

[45] In W-17-010, Notice of Appeal, at p. 12, SCALE asserts the City should have considered "phasing in the density increases discussed in the action alternatives so that each area can be evaluated in a finer-grained analysis (as has been done for the University District and lower Queen Anne)." In W-17-011, Notice of Appeal, at p. 4, Senior United for Neighborhoods allege the City should have considered "a limited growth alternative curtailing upzones and raising the affordable housing requirement to achieve more low cost housing production with less displacement and housing loss."

[46] WAC 197-11-060(3); SMC 25.05.060.

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alternatives" as "actions that could *feasibly attain or approximate a proposal's objectives*,"[47] the agency's proposal and objectives necessarily shape the alternatives the agency considers. An agency's choice of proposals and objectives are policy decisions, not environmental decisions.[48] Courts generally defer to the agency's reasonable definition of its objective and of its alternatives.[49] An EIS need not include a compendium of every possible alternative.[50] "The word 'reasonable' is intended to limit the number and range of alternatives[.]"[51] Thus, Appellants must not only show that their proposed alternative(s) are reasonable, but also that the FEIS's failure to include any such alternative is so unreasonable that it overcomes the substantial deference given to the agency.[52]

The agency is given even more discretion and deference in an EIS for a non-project action. In this context, SEPA accords the lead agency "more flexibility in preparing EISs" because "there is normally less detailed information available on their environmental impacts and on any subsequent project proposals."[53] Moreover, SEPA specifically acknowledges that the lead agency may limit its alternatives for a non-project action to those that have been "formally proposed":

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[47] SMC 25.05.440.D.2 (emphasis added); *see also* Settle, *supra*, at § 14.01[2][b], 14-65 ("[T]he proponent's proposal is necessarily the starting point in identifying reasonable alternatives.")

[48] *Solid Waste Alternative Proponents v. Okanogan County* ("SWAP"), 66 Wn. App, 439, 445, 832 P.2d 503, review denied, 120 Wn.2d 1012 (1992) (stating that the County's decision to narrow its objectives and alternatives was a policy rather than an environmental decision).

[49] *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011); *see also SWAP*, 66 Wn. App. at 445 (giving "great weight" to the agency's alternatives decision). Thus, for example, in two cases where the agencies had established, as a matter of policy, the objectives of an in-county landfill and a four-lane bypass highway, the courts upheld exclusion of alternatives that would not have attained the agencies objectives, such as an out-of-county landfill or a two-lane bypass highway. *SWAP*, 66 Wn. App. at 444-45; *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp.*, 90 Wn. App. 225, 230, 951 P.2d 812, 815 (1998) (upholding the State's commitment to building a four-lane bypass highway).

[50] *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp.*, 90 Wn. App. 225, 230, 951 P.2d 812, 815 (1998)

[51] WAC 197-11-440(5)(b)(i).

[52] RCW 43.21C.090 (stating that an agency's EIS adequacy decision must be given "substantial weight").

[53] WAC 197-11-442; SMC 25.05.442.D.

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> (2) The lead agency shall discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal. Alternatives should be emphasized. In particular, agencies are encouraged to describe the proposal in terms of *alternative means of accomplishing a stated objective* . . . .
>
> (4) . . . The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures but should cover a range of such topics. *The EIS content may be limited to a discussion of alternatives which have been formally proposed* or which are, while not formally proposed, reasonably related to the proposed action.

WAC 197-11-442; SMC 25.05.442.D (emphases added). Proposals to amend the Seattle Comprehensive Plan and development regulations are examples of "formal proposals" that can be used to shape the alternatives.[54]

This flexibility and discretion to identify alternatives for a non-project action in the SEPA context is consistent with the more general principle that local governments are entitled to an extremely broad range of legislative discretion when choosing policy direction. The City's policy decisions about how the City will address the housing affordability crisis are a valid and appropriate exercise of the City's broad police powers, as established in the Washington Constitution.[55] Washington's courts have long recognized the breadth and flexibility of these powers, stating, "The power has always been as broad as the public welfare, and as strong as the arm of the state."[56] In the context

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[54] *In the Matter of the Appeal of Citizens for Livability in Ballard*, W-16-003, Sept. 7, 2016, Conclusions 6-7. *See also CAPOW*, 126 Wn.2d at 365 (recognizing a private applicant's proposal to amend the city's zoning code as a "formally proposed" alternative). In *Citizens for Livability in Ballard*, the Examiner addressed the adequacy of an EIS regarding proposed amendments to the Seattle Comprehensive Plan. Like the subject FEIS, the Comprehensive Plan EIS's alternatives each provided different patterns of growth based on factors such as proximity to transit, risk of displacement, and access to opportunity. *Id.*, Findings 4-5. Because the alternatives had been "formally proposed by the Mayor and OPCD" as ways to distribute the City's projected growth, the Examiner rejected the appellant's claim that the EIS should have studied different proposals or different policy changes. *Id.*, Conclusions 6-11.

[55] Wa. Const. art. XI, § 11 ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.").

[56] *State v. Mountain Timber Co.*, 75 Wash. 581, 588, 135 P. 645, 648 (1913), *aff'd sub nom. Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (1917). *See also Smith v. City of Spokane*, 55 Wash. 219, 220, 104 P. 249, 250 (1909) ("In all matters pertaining to the public health nearly if not the entire police power of the state is vested in municipal corporations of the first class.").

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of zoning regulation, the Washington Supreme Court has stated that so long as the governmental action "tends to promote the public health, safety, morals or welfare[,] . . . the wisdom, necessity and policy of the law are matters left *exclusively* to the legislative body."[57]

The broad discretion to choose alternatives for a non-project action is also consistent with case law under NEPA,[58] where courts have recognized that legislation is a reasonable basis for defining the range of alternatives. As the D.C. Circuit explained, "When Congress has enacted legislation approving a specific project, the implementing agency's obligation to discuss alternatives in its [EIS] is relatively narrow. . . . [S]uch action does have a bearing on what is considered a reasonable alternative, and a reasonable discussion."[59]

2. The FEIS's alternatives analysis is reasonable and legally adequate.

The range of alternatives discussed in the FEIS is appropriate under the circumstances and satisfies the requirements of WAC 197-11-442 and SMC 25.05.442.D. MHA is a specific proposal that has been "formally proposed" by the City. MHA and its key elements—including the mandate to build or pay to support rent- or income-restricted housing, changes to zoning and land use to increase development capacity in conjunction

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[57] *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 26-27, 586 P.2d 860 (1978) (emphasis added).

[58] "Because NEPA is substantially similar to SEPA, . . . [courts] may look to federal case law for SEPA interpretation." *Int'l Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 525, 309 P.3d 654 (2013).

[59] *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 372 (D.C.Cir.), *cert. denied*, 454 U.S. 1092 (1981) (ruling that rehabilitation of a locks and dam was not a reasonable alternative, when legislation explicitly called for replacing the locks and dam); *see also League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1070 (9th Cir. 2012) (rejecting a claim that the Forest Service's action alternatives were too limited (where the action alternatives consisted only of variations of an experiment proposed in a study plan), because by statute the project area was intended to be an experimental forest for research, which "necessarily narrowed consideration of alternatives").

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with imposing that mandate, and the production goal of 6,000[60] developer-leveraged affordable homes—were "formally proposed" not only by the Mayor, OPCD and the HALA Advisory Committee, but also by the City Council through its resolutions and the ordinances establishing the framework for MHA. The formal proposal to implement MHA developed and unfolded over time in a public process, supported by public participation and planned outreach appropriate for a proposal of this scale and importance. The subject FEIS is the next stage in the process, providing decision-makers with environmental review of the City's proposal to implement MHA citywide.

The FEIS uses the City's proposal as the necessary "starting point" in identifying reasonable alternatives, as SEPA allows.[61] Thus, all of the FEIS's action alternatives assume and reflect the MHA program elements and objectives already established in the City's MHA framework ordinances and the enactments leading up to the ordinances.[62] The alternatives are also consistent with SEPA's directive to provide different means of accomplishing the City's stated proposal.[63] The alternatives guide growth in different ways by using distinct patterns of zoning and land use changes,[64] and collectively present reasonable alternative means of implementing MHA.

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[60] As explained in the FEIS, the FEIS's objective—creating at least 6,200 new rent- and income-restricted units in the study area in 20 years—is framed differently but consistent with HALA's goal of 6,000 units in 10 years. The FEIS translated HALA's 10-year timeline into a 20-year timeline to use a consistent timeline for environmental analysis, and also adjusted the goal to account for the production estimated in the environmental documents for the rezoned portions of the University District, Uptown, Downtown, and South Lake Union Urban Centers. FEIS at 2.18.

[61] *See* Settle, *supra*, at § 14.01[2][b], 14-65.

[62] FEIS at 2.18.

[63] *See* WAC 197-11-442(2) (encouraging agencies to consider "alternative means of accomplishing a stated objective"); WAC 197-11-060(3) (allowing a lead agency to put forward its proposal as an objective).

[64] *See* FEIS Appendix H (providing alternative maps for each action alternative).

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3. The City was not legally required to consider fundamentally different proposals in this FEIS.

In their Notices of Appeal, Appellants appear to argue that the City's alternatives should have included other, different proposals to address affordable housing beyond MHA. It is not sufficient to simply advocate for "different" policy alternatives. Appellants' disagreement with the City's proposal contravenes WAC 197-11-442(4) and SMC 25.05.442.D, which expressly allow limiting discussion to alternatives that achieve a "formally proposed" proposal. If the Examiner were to rule in the Appellants' favor, the City would be required to expand its scope of alternatives to include proposals beyond that which has been formally proposed. It would usurp the City's broad legislative discretion in choosing a policy objective for this non-project action. While SEPA requires an analysis of alternatives to achieve a specified proposal, it does not require the local jurisdiction to consider fundamentally different proposals.[65] As a matter of law, Appellants cannot establish that the EIS is inadequate simply because it addresses alternatives that only implement the identified policy proposal—the implementation of MHA.

For the most part, Appellants vaguely assert that the City should have considered proposals other than MHA, but fail to identify any specific alternative proposals that the City did not consider. However, SCALE's Notice of Appeal did identify certain alternatives, which demonstrate their fundamentally flawed legal premise. SCALE asserts the City should have analyzed "increase in various funding sources, increased incentives in the Incentive Zoning program and other measures (including partnerships with major employers)[,] . . . . directing more growth to the areas of the city with the greatest amount of under-utilized development capacity; providing low-interest loans to small landlords

[65] *See* WAC 197-11-440(5) (defining "reasonable alternatives" as "actions that could feasibly attain or approximate a proposal's objectives" at a lower environmental cost); *In the Matter of the Appeal of Citizens for Livability in Ballard*, W-16-003.

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for major maintenance projects in exchange for limits on rent increases; [and] incentivizing homeowners to build mother-in-law apartments or accessory dwelling units."[66]

These alternative proposals are fundamentally different from MHA. The "Council Work Plan for HALA Recommendations"[67] identifies many of these as separate proposals that the Council could consider or implement. But the City is not required to analyze all possible housing affordability proposals in this FEIS. This would be inconsistent with the City's discretion to choose a policy objective. Moreover, the premise underlying the Appellants' legal argument is unreasonable, and would render the FEIS's scope impossibly broad. If Appellants were to prevail and the City were required to analyze every proposal designed to address affordable housing, "the possibilities are so numerous and the goals of the action so complex that the agency cannot possibly consider every significant alternative in a reasonable time period."[68] The test is not whether the FEIS analyzed all alternative means of addressing housing affordability, but rather, whether the City chose reasonable alternatives that achieve the objectives set forth in the City's legislation and policy decisions. Therefore, the Examiner should dismiss Appellants' claims that the City should have evaluated different proposals as part of the alternatives analysis.

4. The City was not legally required to consider alternative means of implementing MHA.

In addition to the allegation that the City should have considered completely different proposals in this FEIS, two of the Appellants, SCALE and Seniors United for Neighborhoods, also allege that the City should have considered alternative means of

[66] W-17-0010, Notice of Appeal, at p. 11-12.
[67] Weber Dec., Exh. E, Attachment A.
[68] *Oceana, Inc. v. Evans*, 384 F.Supp.2d 203, 241 (D.D.C.2005).

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implementing MHA. Specifically, SCALE asserts that the City should have considered "phasing in the density increases discussed in the action alternatives so that each area can be evaluated in a finer-grained analysis (as has been done for the University District and lower Queen Anne)."[69] Seniors United for Neighborhoods allege that the City should have considered "a limited growth alternative curtailing upzones and raising the affordable housing requirement to achieve more low cost housing production with less displacement and housing loss."[70]

To establish that the FEIS is inadequate because of its failure to consider these alternative means of implementing MHA, Appellants must not only establish that their alternatives are conceivable or a reasonable means of accomplishing the proposal and objectives. Rather, Appellants must show that the FEIS's failure to include Appellants' preferred alternative is so unreasonable that it overcomes the substantial deference given to the agency.[71]

As a matter of law, Appellants cannot meet their burden of proof. Appellants' "alternative" means of implementing MHA are not reasonable. First, while MHA is aimed at increasing the amount of rent- and income-restricted housing, part of its objective is to also increase the overall production of housing to help meet demand.[72] Since the HALA Report, the City has called for "boost[ing] market capacity by extensive citywide upzoning of residential and commercial zones"[73] to achieve an overall production goal of 50,000 units in ten years.[74] Both the Mayor's plan and Council resolution 31622 endorse

[69] W-17-010, Notice of Appeal, at p. 12.
[70] W-17-011, Notice of Appeal, at p. 4.
[71] RCW 43.21C.090 (stating that an agency's EIS adequacy decision must be given "substantial weight").
[72] FEIS at 1.3.
[73] Weber Dec., Exh. B, at p. 15.
[74] Weber Dec., Exh. B, Appendix E.

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this goal.[75] Appellants' "alternative" of phasing in housing growth or curtailing upzones will not fulfill the City's objective.

Further, it is undisputed that Appellants' "alternative" will not achieve the City's stated objective of creating 6,200 affordable units in the study area over 20 years. The Action Alternatives are expected to produce 7,400 to 7,500 affordable units, as compared with the No Action Alternative, which is expected to produce approximately 3,150 units.[76] Though the Appellants call for more gradual or phased approaches than the Action Alternatives, there is no evidence that these approaches will attain the City's objective. Based on the additional time required for phased implementation, it is reasonable to assume that the objective cannot be attained. Therefore, the Examiner should dismiss SCALE and Seniors United for Neighborhoods' claims that the EIS should have considered alternative means of implementing MHA, especially those included in the EIS.

C. The City's prior environmental review, such as its 2015 Determination of Non-Significance on a different proposal, is irrelevant to this appeal.

Wallingford Community Council's Notice of Appeal alleges that "[t]he City seeks to justify its lack of environmental review of the MHA proposal through reliance on a 2015 Determination of Non-significance," resulting in a "violation of SEPA and due process."[77] The DNS to which the Appellant refers is the "SEPA Threshold Determination for the Affordable Housing Mitigation Program and Incentive Zoning Update, and Comprehensive Plan Amendments Regarding Affordable Housing," issued on June 8, 2015 (the "2015 DNS"). The Examiner should dismiss this issue because the FEIS does not rely on the 2015 DNS.

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[75] Weber Dec., Exh. D, p. 2; Exh. E, p. 5.
[76] FEIS at 2.16 – 2.17.
[77] W-17-006, Notice of Appeal, at p. 6.

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The City agrees that the 2015 DNS addressed a different proposal. Though that proposal bears some similarity to MHA, such as a "performance or payment" requirement on developers to provide affordable housing, there are key differences. For example, the 2015 DNS proposal did not call for any changes to increase development capacity in the Land Use Code – it was a simple requirement imposed on development.[78] Recognizing that MHA is fundamentally different from the proposal analyzed in the 2015 DNS, the City prepared the subject FEIS. The FEIS does not rely on the 2015 DNS. Wallingford Community Council's claim that the FEIS improperly relied on the DNS is incorrect and should be dismissed.

Further, to the extent Wallingford Community Council or any other Appellant challenges prior environmental review or SEPA determinations or lack thereof, such matters are time-barred and are outside the scope of the appeal of this FEIS. Parties who are dissatisfied with environmental review must challenge it directly and at the appropriate time.[79] SEPA noncompliance cannot be asserted "by a litigant who passed up earlier opportunities to seek administrative or judicial review of the issue."[80]

In addition, both Wallingford Community Council's general allegation of a violation of due process related to the 2015 DNS, and its specific allegations that the City failed to provide adequate notice related to the 2015 DNS, resulting in constitutional

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[78] Weber Dec., Exh. I, at p. 3, 6-7.

[79] *See Glasser v. City of Seattle*, 139 Wn. App. 728, 738, 162 P.3d 1134, 1138 (2007) (holding that a nonproject EIS could not be challenged in a review of an EIS for a related project action).

[80] Settle, *supra*, at § 20.05[5], 20-31.

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violations,[81] are outside the Examiner's jurisdiction and should be dismissed for that reason as well.[82]

D. Amendments to the Comprehensive Plan are not barred as a matter of law.

Friends of Ravenna-Cowen argue that the City Council's "rejection" of the Roosevelt Urban Village boundary expansion as proposed in a prior Comprehensive Plan amendment precludes consideration of the expansion in the FEIS.[83] The Appellant's circular reasoning is mistaken as a matter of law. If existing elements of the Comprehensive Plan (or prior decisions not to amend the comprehensive plan) were perpetually binding, the City could never amend the plan. That is not the case. It is well-established that existing comprehensive plans can be and are regularly amended.[84]

In the context of this case, Appellants' arguments are particularly unpersuasive because the Comprehensive Plan discusses the possibility of future amendments relating to HALA and housing affordability. For example, the Comprehensive Plan notes that Seattle is in the midst of a housing affordability crisis, references HALA as "a road map to build or preserve fifty thousand housing units over the next ten years,"[85] and explicitly anticipates future amendments to address the issue.[86] The City's Equitable Development

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[81] W-17-006, Notice of Appeal, at p. 6-7 (stating, "No notice of environmental review of MHA proposals was contained in the DNS process the City now attempts to invoke. No notice of any MHA type proposals was provided to the public as required by law. The lack of appropriate notice not only violates SEPA requirements, but also constitutes constitutional violations and a denial of due process of law.").

[82] *E.g.*, *In the Matter of the Appeal of Carl Schaber and Gene Casal*, MUP-12-027 and HC-12-002, March 19, 2013, Conclusion 12 ("[T]he Examiner lacks jurisdiction to decide constitutional issues.").

[83] W-17-008 at p. 7, ¶ 7.

[84] RCW 36.70A.130(2)(a) (allowing updates and amendments to comprehensive plans no more than once a year).

[85] Weber Dec., Exh. J.

[86] *Id.* (Comprehensive Plan, p. 100 ("As housing development continues, the City will promote policies that limit displacement, stabilize marginalized populations in their communities, and encourage a net increase in affordable housing over time.").

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Implementation Plan, which is referenced in the Comprehensive Plan, includes HALA's strategies, including MHA specifically.[87]

The Hearing Examiner should dismiss Friends of Ravenna-Cowen's specious argument that past Comprehensive Plan decisions bind or preclude Comprehensive Plan amendments here.

E. The adequacy of mitigation measures is not relevant in this appeal.

Several Appellants challenge the adequacy or efficacy of the mitigation measures themselves (as distinguished from challenging the adequacy of the FEIS's discussion of mitigation measures), or assert that the City must prove that all significant impacts will be mitigated. For instance, SCALE and Friends of North Rainier Neighborhood Plan assert the FEIS is inadequate because it "fails to provide any analysis whatsoever of the effectiveness of [the proposed mitigation] measures."[88] Friends of Ravenna-Cowen and Beacon Hill Council question the City's intent to fulfill the FEIS's mitigation measures,[89] while other Appellants question the efficacy of the mitigation measures.[90] These issues are beyond the scope of this appeal and should be dismissed.

An EIS must discuss potential mitigation and indicate the mitigation's "intended environmental benefits,"[91] but an analysis of the effectiveness of mitigation measures is unnecessary. In *Glasser v. City of Seattle*, 139 Wn. App. 728, 739-42, 162 P.3d 1134

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[87] Weber Dec., Exh. K.

[88] W-17-010 at p. 14, ¶ 29.; W-17-013, at p. 6, ¶ 4.

[89] W-17-008 at p. p. 5-6, ¶¶ 3-4; W-17-012 at p. 6-7, ¶¶ 3-4;

[90] Other issues that are subject to dismissal include: W-17-008 at p. 5-6, ¶¶ 3-4 (stating, "The City's mitigation proposal . . . is not a reasonable mitigation," and "we cannot expect that there is any intent to actually fulfill the mitigation measures suggested in the FEIS."); W-17-010 at p. 5, ¶ 4; p. 6, ¶ 6; p. 7, ¶ 8; p. 11, ¶ 15; p. 13, ¶ 25; p. 15, ¶ 32 ("To some degree, the mitigation measures discussed will not mitigate the impacts"); p. 8, ¶ 10.a; p. 14, ¶ 29-30; p. 15, ¶ 38; W-17-011 at p. 3, lines 31-32 ("To some degree, the mitigation measures discussed will not mitigate the impacts"); W-17-012 at p. 6-7, ¶¶ 3-4 (stating, "The City's mitigation proposal . . . is not a reasonable mitigation," and "we cannot expect that there is any intent to actually fulfill the mitigation measures suggested in the FEIS."); W-17-013 at p. 6, ¶ 4; p. 8-9, ¶ 9.

[91] SMC 25.05.400.B, -.440.E.

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(2007), the court rejected the challenger's argument that SEPA requires "reasonable assurances" that an EIS's mitigation measures will actually occur or will actually mitigate for adverse impacts. Characterizing the argument as a substantive SEPA issue, the court reiterated that "SEPA is primarily a procedural statute" that "does not demand a particular substantive result."[92] The Examiner has also dismissed challenges to the adequacy of proposed mitigation as substantive SEPA issues outside the Examiner's jurisdiction.[93]

Similarly, in *Solid Waste Alternative Proponents v. Okanogan Cty.*, 66 Wn. App. 439, 447, 832 P.2d 503, 508 (1992), the court rejected an argument that an EIS was inadequate because it failed to assess the "cost and effectiveness" of the proposed mitigation measures. As the court noted, under WAC 197-11-440(6), the EIS generally "*need not analyze mitigation measures in detail*[.]"[94] SEPA does not require a "fully detailed plan" or a "'worst-case' analysis.'"[95] "The purpose of the EIS is to disclose, not dispose" of impacts.[96]

Agencies are accorded even more flexibility in a non-project EIS, where the lack of detailed information means that impacts and mitigation can only be discussed "at a relatively broad level."[97] Because a non-project EIS does not entail a specific development project, the EIS's discussion of mitigation may rely on more detailed project-specific

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[92] *Id.* at 742; *see also Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council,* 165 Wn.2d 275, 312, 197 P.3d 1153, 1171 (2008) (upholding adequacy of EIS's discussion of mitigation where the EIS identified the principles and variables relevant to mitigation, but did not analyze mitigation in more specificity).

[93] MUP-15-010 (W) to -015 (W), Order on Respondents' Joint Motion to Dismiss, May 21, 2015, at p. 6-7 (stating "the adequacy of the Department's proposed SEPA mitigation, as opposed to the EIS's discussion of mitigation measures, is not an issue within the Examiner's jurisdiction in these appeals").

[94] *Id.* (emphasis added).

[95] *Id.*

[96] Settle, *supra*, at §14.01[2][c], at 14-72 to 14-73.

[97] *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 514, 306 P.3d 1031, 1040 (2013) (discussing adequacy of mitigation measures discussed in a non-project EIS); WAC 197-11-442.

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environmental review or acknowledge that further actions may be necessary to mitigate impacts.[98]

Appellants seek relief to which they are not entitled in the context of this adequacy appeal based on their assertions that mitigation is inadequate. The City is under no legal obligation to analyze the effectiveness of mitigation measures or to prove that all significant impacts will be mitigated. The Examiner should dismiss those issues that suggest otherwise.

F. The FEIS need not address impacts that are not attributable to the proposed action.

Appellants allege that the EIS is flawed because it does not identify or analyze impacts that are not reasonably attributable to the proposed action. Beacon Hill Neighborhood Council alleges noise and air pollution impacts that, by its own allegations, are admittedly attributable to existing vehicular and air travel.[99] Similarly, Morgan Community Association alleges that the FEIS fails to address impacts relating to the Washington State Ferry system, noting an anticipated increase in Kitsap County passengers and a corresponding potential increase in ferry commuter traffic.[100]

SEPA requires analysis of a proposal's impacts as understood in the context of the baseline conditions. To the extent data were available, the FEIS accounted for existing conditions in discussion of the affected environment. However, existing conditions cannot be considered impacts that are attributable to the proposed action.[101]

The impacts raised by Beacon Hill Neighborhood Council and Morgan Community Association are not created by, or attributable to, the proposal under review.

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[98] *Id.* at 514-15.
[99] W-17-012 at p. 4.
[100] W-17-007, ¶ 6 of 6 at p. 4.
[101] *See Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 277, 552 P.2d 674, 680 (1976) (defining significance by an action's effects in excess of those created by existing uses).

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Increases in vehicular, air, and ferry travel unrelated to the proposal and their corresponding impacts are not attributable to the proposed action in any way. Therefore, arguments that the City was required to identify impacts from, and mitigation for, proposals unrelated to the MHA proposal should be dismissed.

G. The FEIS complies with the requirements for phased review under SEPA.

The issues raised by Fremont Neighborhood Council[102] and Junction Neighborhood Organization[103] challenging the FEIS's use of phased review should be dismissed. SEPA permits phased environmental review.[104] "The SEPA phased review regulations are designed to streamline environmental review as a proposal progresses from broad planning to narrow site-specific implementation,"[105] and assist agencies and the public by "focus[ing] on issues that are ready for decision and exclude from consideration issues already decided or not yet ready."[106] Phased review is appropriate when the sequence is from a document that is broader in scope to a document of narrower scope.[107] To use phased review, the agency must disclose that it is using phased review in its environmental document and must use existing environmental documents "as appropriate, to avoid duplication and excess paperwork."[108]

The FEIS complies with the applicable SEPA phased review regulations. The FEIS is part of a sequence of environmental documents that develop and narrow the scope

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[102] W-17-014 at p. 4, ¶ 2.C ("The City improperly constrained the range of alternatives by failing to properly invoke and apply SEPA phased review rules.")

[103] W-17-009 at p. 4, ¶ 5 ("Any assertion by the City asserts [sic] that intends to rely as phased review to justify its failure to discuss certain environmental impacts is inappropriate as such phased review improperly avoids discussion of cumulative impacts. There is no mechanism to trigger the threshold for cumulative environmental review for projects that this proposal will permit at the site-specific level.").

[104] WAC 197-11-060(5)(b).

[105] *Glasser*, 139 Wn. App. at 738.

[106] WAC 197-11-060(5)(b).

[107] WAC 197-11-060(5)(c).

[108] WAC 197-11-060(5)(e), (f).

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and specificity of environmental review toward a specific objective. The proposed action is a non-project action that more specifically and directly addresses the affordable housing topic discussed in the 2035 Comprehensive Plan. Specifically, the proposal that is the subject of the FEIS implements the broad policy in the Comprehensive Plan in favor of addressing affordable housing needs.[109] The proposed action is, therefore, a narrower non-project action that follows and implements broader policies set forth in the Comprehensive Plan, a prior non-project action. Moreover, the non-project action at issue in the EIS contemplates future site-specific development and environmental review.

The FEIS also complies with the procedural requirements for implementing phased review. The FEIS discloses that the City is following a course of phased environmental review, citing WAC 197-11-060(5) and SMC 25.05.060.E, and discloses that the FEIS adopts the existing environmental review for the Comprehensive Plan.[110]

Because the FEIS complies with the SEPA phased review regulations, its use of phased review is appropriate as a matter of law. Appellants' challenges on this basis are without merit and should be dismissed.

V. CONCLUSION

For all of the reasons set forth above, the City respectfully requests that the Examiner dismiss the issues identified in the Request for Relief, and dismiss Appellants Wallingford Community Council and Fremont Neighborhood Council.

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[109] Weber Dec., Exh. J.

[110] FEIS at ix.

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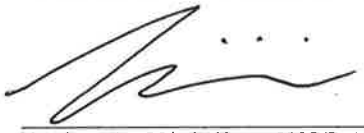
DATED this 17th day of April, 2018.

VAN NESS FELDMAN LLP



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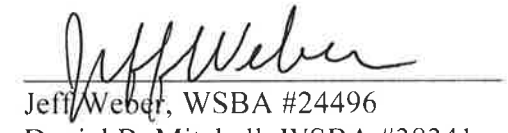

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