BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeals of)	Hearing Examiner File:
)	**W-17-006 through**
WALLINGFORD COMMUNITY)	W-17-014
COUNCIL, ET AL.)	
)	FRIENDS OF RAVENNA-COWEN'S (W-17-008)
Of Adequacy of FEIS Issued by the)	RESPONSE TO CITY OF SEATTLE'S MOTION
Director, Office of Planning and)	FOR PARTIAL DISMISSAL

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FRIENDS OF RAVENNA-COWEN
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I. INTRODUCTION AND THE APPLICABLE STANDARD OF REVIEW

The City of Seattle ("City") filed a motion for partial dismissal of "issues" raised by various appellants, including three issues raised by Appellant Friends of Ravenna-Cowen. At pages 1 – 2 of its motion the City identifies particular paragraphs in the appellant's notice of appeal that it seeks to dismiss as a matter of law. The City has not submitted any affidavits as to the underlying facts or other evidence concerning these three issues.[1] The City relies solely on City ordinances, legislative history of the ordinances and the "issues" allegations in the Appellants' Notices of Appeal.

In its argument, beginning at page 11, the City discusses the standard of review, citing a case where the hearing examiner "may summarily dispose of an issue where there is no genuine issue of fact." The City cites Hearing Examiner Rule 3.02 that states the hearing examiner may dismiss all or part of an appeal which is "*without merit on its face*." (Emphasis added.) The City then states that the hearing examiner may look to the Superior Court Civil Rules for guidance, and that Civil Rule 56(c) applies, and that rule authorizes judgment as a matter of law where there is no issue of material fact.

The City is correct that the hearing examiner may look to the Superior Court Civil Rules, but the City is incorrect as to the civil rule that applies to a motion to dismiss – which is a motion

[1] Pages 3 – 11 of the City's Motion to Dismiss are summaries of ordinances and underlying legislative history of HALA, the "Grand Bargain," and the MHA legislative process, which are submitted with the Declaration of Jeff Weber.

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on the face of the pleadings, CR 12(b)(6), the analog to hearing examiner Rule 3.02 "without merit on its face," based exclusively on the pleadings.[2]

There is a significant legal difference under Washington law as to the standard of review between CR 12(b)(6) and CR 56 (c). Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if any *possible* or *hypothetical* facts could be established to support the claims alleged in the complaint. *See Halvorson v. Dahl*, 89 Wn.2d 673, 674-675, 574 P.2d 1190 (1978), where the Court held:

> On a [CR] 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim. Brown v. MacPherson's, Inc., 86 Wn.2d 293, 545 P.2d 13 (1975); Grimsby v. Samson, 85 Wn.2d 52, 530 P.2d 291, 77 A.L.R.3d 436 (1975); Hofto v. Blumer, 74 Wn.2d 321, 444 P.2d 657 (1968); Barnum v. State, 72 Wn.2d 928, 435 P.2d 678 (1967). Therefore, any hypothetical situation conceivably raised by the complaint defeats a 12(b)(6) motion if it is legally sufficient to support plaintiff's claim. As this court has previously stated, there is no reason why the `hypothetical' situation should not be that which the complaining party contends actually exists." Brown v. MacPherson's, Inc., supra at 298 n. 2, this court also sanctioned the presentation of "hypothetical" facts which were not part of the formal record; such facts are allowed to form the "conceptual backdrop for the legal determination." Brown v. MacPherson's, Inc., supra at 298 n. 2 …the legal standard is whether any state of facts supporting a valid claim can be conceived…"

By contrast, on a motion for summary judgment under CR 56, the burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact, and all reasonable inferences from the evidence must be resolved against the moving party.

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[2] In the context of a civil suit, the "issues" would be the claims raised by the pleadings, the complaint and answer. Except for pleading special matters, CR 9, the general rules of pleading, CR 8(a) requires (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment or relief. CR 8(b) requires the party to state the defenses to the claims and deny the averments on which the party relies. [In the context of an administrative appeal, the "pleading" is the Notice of Appeal, which is normally very sparse on facts, but is similar to a claim for relief.] CR 8 (e) provides that the "averments" [of fact] shall be simple, concise and direct. Lastly, CR 8 (f), regarding the construction of pleadings, states, "All pleadings shall be construed as to do substantial justice."

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Lamon v. McDonell Douglas Corp, 91 Wn. 2d 345, 588 P. 1346 (1979). *Barber v. Bankers Life & Cas. Co*., 81 Wn.2d 140, 500 P.2d 88 (1972); *Welling v. Mount Si Bowl, Inc*., 79 Wn.2d 485, 487 P.2d 620 (1971). In Lamon (*id.* at 349) the Court, reversing summary judgment, explained, "Thus, where a motion for summary judgment is made, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in a light most favorable to the nonmovant." CR 56 normally requires the opposing party to provide actual evidence (affidavits, excerpts of depositions, etc.) to show that there are sufficient facts to support the claim. CR 56(c). Under the Rule, the motion must be denied if the declarations show that there is "a genuine issue as to any material fact." A CR 56 motion, therefore, typically occurs after the parties have had adequate time for discovery,[3] which is not the case here. (The parties have just begun the taking of depositions.)

If matters outside the pleading are presented to the court on a 12(b)(6) motion and if those matters are not excluded by the court, the motion shall be treated as one for summary judgment per CR 56. CR 12(c); *Billings v.Town of Steilacoom*, 2 Wn. App. 2d 1, 28, n. 5, 408 P.3d 1123 (2017). Here, the City submitted a Declaration of Jeff Weber appending various documents related to HALA and the "Grand Bargain." None of these are germane to the issues raised by Friends of Ravenna-Cowen, and in its motion to dismiss the City does not refer to the materials submitted by Mr. Weber. Accordingly, the City's motion to dismiss three issues from Friends of Ravenna-Cowen's Notice of Appeal should be decided under CR 12(b)(6).

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[3] CR 56(f) provides, "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgments or order a continuance to permit affidavits to be taken or discovery to be had or make such other order as may be just."

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The issue here, thus, is whether there are any conceivable hypothetical facts that could arise under the Appellants' "issues" which could sustain their claims. And, if there are, a motion to dismiss cannot be granted.

II. ARGUMENT

A. *A Good Faith Environmental Review Requires the Agency Not to Predetermine the Result, Which Is the Issue Raised In Friends of Ravenna-Cowen's Notice of Appeal, Issue 7, Which the City Does Not Address At All, But Instead, Misstates and Mischaracterizes the Issue Raised.*

SEPA and Title 25 of the Seattle Municipal Code, 25.05.02C require compliance with both "the spirit and the letter of the law." The purpose of SEPA requirements is "to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *King County v. Boundary Review Board, supra,* 122 Wn. 2d 648, 664,860 P.2d 1024 (1993). The statute is to assure that the agency provide a full and honest assessment so that the public can make meaningful input and the governing body can make knowledgeable decisions. First, the notification process in the draft EIS stage is to inform the public fully so that the public can raise concerns, propose alternatives, and point out deficiencies so that the final EIS can address these issues. Secondly, the EIS requirements are to "promote policy of fully informed decision making by government bodies when undertaking 'major actions…'" *Moss v. City of Bellingham*, 109 Wn.2d 6, 14 (2001), citing *Norway Hill Preservation and Protection Assoc. v. King County*, 87 Wn.2d 267 (1976).

The "point of an EIS is to not evaluate agency decisions after they are made, but rather to provide environmental information to assist with *making* those decisions." *King County v.*

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Boundary Review Board, supra, 122 Wn.2d at 666 (emphasis in original).[4] *See also* WAC 197-11-400. Agencies must use the EIS to make an informed decision in the first instance – not to rubber-stamp or evaluate a decision that was previously made. The SEPA regulations emphasize that an EIS must be "impartial."

At p. 23 of its motion to dismiss the City makes many statements about Issue 7 (Friends of Ravenna-Cowen's Notice of Appeal, p. 7). The City, however, *never cites the actual languag*e. Instead, without referring to the actual language at all, the City states (pp. 23-24):

> 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. 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 would never amend the plan…
>
> The Hearing Examiner should dismiss Friends of Ravenna-Cowen's specious argument that past Comprehensive Plan decisions bind or preclude Comprehensive Plan Amendments.

Issue 7, however, does not state or argue that the City Council cannot amend its Comprehensive Plan. Issue 7 does not state or argue that a prior Comprehensive Plan amendment or decision not to amend is perpetually binding. Of course the City Council can amend its Plan in the future. Either the City misread Issue 7 or it deliberately mischaracterized what the plain language states in the hope that the Hearing Examiner would not read the actual language. Issue 7 actually states:

> The timing of the City's proposal to expand the Roosevelt Urban Village boundary and its proposal of near identical up-zone boundaries proposed and rejected in the 2035 Comprehensive Plan, using the identical rationale (10-minute walking-distance to future

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

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light rail based on an algorithm), strongly suggests the public input was sought solely to give lip service to SEPA requirements. The City already predetermined what it would propose, the nearly identical proposal rejected by the City Council in the 2035 Comprehensive Plan. The City sought public input only because it was legally required to do so. Title 25 of the Seattle Municipal Code, 25.05.02C requires compliance with both "the spirit and letter of the law." In the hearing process the appellant will seek discovery concerning this issue of the City's noncompliance with the SEPA's and the City's public input objectives and intent.

Issue 7 is an allegation of fact – that the City predetermined it would propose expansion of the Roosevelt Urban Village before it even issued the DEIS. The City sought public input only because the statute requires it to do so; in other words, the entire public process as regards to expansion of the Roosevelt Urban Village was a sham, a charade. The issue here is the same as discussed in *King County v. Washington State Boundary Review Board*, *supra*, "The point of an EIS is to not evaluate agency decisions after they are made, but rather to provide environmental information to assist with *making* those decisions." The Appellant has sought in discovery and is continuing to seek, via depositions and other means, evidence regarding the City's predetermination and its disregard of the SEPA process.

As addressed above, on a motion to dismiss, the facts alleged in the pleading, indeed, any hypothetical fact or situation that could conceivably be raised by the pleading, defeats a CR 12(b)(6) motion if it is legally sufficient to support Appellant's claim. Moreover, even if the City's motion were under CR 56, the City has not by affidavit or otherwise denied the claim made at Issue 7. Accordingly, the City's motion to dismiss Issue 7 of Friends of Ravenna-Cowen's Notice of Appeal should be denied.

B. *The City's Motion to Dismiss Issues 3 and 4 of Friends of Ravenna-Cowen's Appeal Not Only Misstates What the Issues State and the Facts Alleged, But Misstates the Applicable Law.*

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1. Introduction.

The City' Motion to Dismisses Issues 3 and 4 make three assertions (pp. 24 -25): (a) it is inappropriate in an appeal to question the City's intent to fulfil the FEIS's mitigation measures; (b) an analysis of the effectiveness of proposed mitigation measures is unnecessary; and (c) its fallback position for all deficiencies – that the EIS is "programmatic" and this excuses the lack of detail. All of these assertions either misstate the language of the issue in Appellant's Notice of Appeal or do not fully examine the applicable law and facts alleged. This Response first addresses Issue 3 and the City's erroneous contention that a non-project, "programmatic" EIS absolves it from providing an adequate factual data set concerning the FEIS proposals. Issue 3 states:

> The proposed FEIS does not provide an adequate study, nor indeed any study, of the impact on buildings and areas potentially eligible for historic significance. Despite the requirement that the City has an on-going obligation to identify buildings and areas of historic significance, the City concedes it has done none and has not done any. (MHA Final-EIS, section 3.5.1 (pp. 441- 442) and various responses to comments (*e. g.*, pp.1018-1019). Tellingly, in the proposed budget for 2018, the City requested less than $20,000 for historic work. The few surveys and buildings the City references in the MHA Final EIS are out of date; some buildings no longer exist. The City is required in the first instance to identify buildings of historic significance in the EIS process; SEPA (chapter RCW 43.21C; WAC-197-11-444(1)(vi); WAC-197-11-960B-13(a) ("over 45 years old listed in or *eligible for listing* in national, state or local preservation registers" (emphasis added)). The City has not complied with this requirement. The City's mitigation proposal – after-the-fact review in the project phase - is not a reasonable mitigation and does not consider the overall effect on and significance of the area outside of the immediate project.

2. Contrary to the City's Contention, A Non-Project EIS Must Address Important Issues in Reasonable Detail.[5]

The major thrust of Issue 3 is that the City' EIS was inadequate as a matter of law because the City did not adequately study/identify actual or potential areas or structures of

[5] To the extent pertinent, Friends of Ravenna-Cowen incorporates by reference SCALE's Motion for Summary Judgment and its analysis of the requirements of a "programmatic" EIS. This Response summarizes those points.

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historic significance eligible for listing in national, state or local preservation registers. SEPA mandates the identification of such areas and structures as a part of the "affected environment." WAC 197-11-440(6); WAC-197-11-960B-13(a) (which includes historic resources as an element of the affected environment.)

The failure to identify such structures and areas is a critical omission because Seattle is a city where buildings were constructed neighborhood-by-neighborhood in the late 1800s and early 1900s; many still exist and are intact. Therefore, in areas proposed for expansion or urban villages into residential neighborhoods and up-zoning within residential urban villages, both the public and the decision makers need adequate data in order to evaluate the FEIS proposals.

The "Affected Environment" requirements for an EIS sets the 'baseline' for the environmental analysis that is the heart of the EIS, Thus, the baseline must be accurate and as complete as possible. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1163 (N.D. Cal. 2006).

SEPA's rules for environmental review of "non-project" (programmatic) decisions does not *per se* permit the City to avoid its fundamental responsibility to take a hard look at the resulting environmental impacts. A programmatic EIS addresses the same issues as an EIS for a project EIS. WAC 197-11-442. While agencies have more "flexibility" in preparing a non-project EIS, WAC 197-11-442(a), that does not necessarily equate to less detail and is not license to omit entire issues or information the City already possesses.

To the extent that greater "flexibility" translates into less detail, the degree to which details are relaxed may from one non-project to the next. The more abstract the proposal, the less detail required. Conversely, the more specific the non-project proposal, the more detail is required. "Impacts and alternatives [for non-project EISs] are to be discussed at a level of detail

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appropriate to the level of abstraction of the proposal." Settle, *Washington State Environmental Policy,* §14.01[3] at 14-74.

Here, this non-project EIS addresses not an abstraction, but a very specific proposal. Zoning maps are part of the EIS (FEIS App. H) that the City proposes be amended, parcel-by-parcel. Zoning code text is to be changed word-by-word and number-by-number (e.g., building heights; density). This is anything but abstract. Given the detailed nature of the proposal, greater detail is required in the EIS than compared to an EIS for a non-project proposal that might include, for instance, only the development of broadly stated land use policies of general applicability. See *Pacific Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1026–27 (9th Cir. 2012), *vacated as moot,* 570 U.S. 901, 133 S. Ct. 2843, 186 L. Ed. 2d 881 (2013). The federal cases and the federal Council on Environmental Quality have warned about the "shell game" played by some agencies which use the programmatic label to avoid the requisite environmental review. *Id.* at 1029 – 30.

The Washington Supreme Court confirmed that programmatic EISs are cannot be used as an excuse to give scant attention to important issues. *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.,* 122 Wn.2d 619, 860 P.2d 390 (1993), *as amended on denial of reconsideration* (Jan. 28, 1994), *amended,* 866 P.2d 1256 (1994). The Court began by acknowledging that while every conceivable impact need not be addressed, the EIS must give adequate attention to the issues that matter most, stating the "rule of reason" in somewhat more precise terms:

> *SEPA calls for a level of detail commensurate with the importance of the environmental impacts* and the plausibility of alternatives.

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Klickitat Cty., supra, 122 Wn.2d at 641 (emphasis added). The Court then emphasized that the greater flexibility allowed for a programmatic EIS was not an excuse to avoid an adequate discussion of serious impacts. The Court reiterated that while a programmatic EIS may have less detail than a project EIS, this does not allow the proposal's proponent to avoid a meaningful analysis of impacts:

> The 1990 Plan Update EIS addresses cultural and historical resources in **a** *cursory superficial manner*... Native American sites and artifacts occur throughout Klickitat County. Construction of any of the facilities considered in the solid waste management alternatives could result in disruption or loss of historic or cultural artifacts or structures. *It is not possible to meaningfully evaluate all such environmental impacts in a programmatic EIS. Such detailed review is appropriate in site-specific proposals taken to implement any portion of this 1990 Plan Update.* [Emphasis added]...
>
> Respondents are correct that a lead agency has a certain amount of flexibility in determining the level of detail appropriate for a nonproject EIS, in part because there is usually less detailed information available on its environmental impacts and on any subsequent project proposals. WAC 197–11–442(1). *However, this EIS addresses the cultural and historical impacts in only two locations, for a total of approximately 1 page of text, in a document hundreds of pages long. This is simply inadequate.* [Emphasis added]

The Washington State Supreme Court while agreeing that not every conceivable impact need be discussed, stated "SEPA calls for a level of specificity commensurate with the importance of the environmental impacts and the plausibility of alternative." "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. WAC 197–11–442(2)." *Klickitat Cty, supra,* 122 Wn.2d 619, 641, 642-643.

A programmatic EIS is not a means to avoid meaningful review. SEPA's rules for environmental review of "nonproject" (programmatic) decisions do not allow the City to avoid

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its fundamental responsibility to conduct a hard look at the resulting environmental impacts. An EIS for a programmatic decision must address the same issues as an EIS for a project EIS. WAC 197-11-442.

Additionally, the need for a hard look is magnified by Washington's adherence to a strict vesting law. An EIS must be more detailed when the consequences are greater. Under vesting law, once new zoning is adopted, applicants obtain vested rights to proceed in accordance with the new zoning, regardless of the impacts generated by their projects, individually or cumulatively. When a project application is filed, it is too late for neighbors or the community to complain that the new code is allowing development that does great harm to community resources. The regulatory die has been cast.

Therefore, the programmatic EIS must be more detailed as to the impacts, which cannot be done without adequate data. SEPA is pragmatic and requires more analysis when the consequences of the action are likely to be greater. "The level of detail shall be commensurate with the importance of the impact . . ." WAC 197-11-402(2). Of all the types of decisions encompassed within the "programmatic" definition, few, if any, are more consequential that an area-wide rezone. Given the regulatory significance of amending a zoning code and map, the level of detail must be greater here than in other programmatic situations.

3. With the Above Legal Framework In Mind, This Response Next Addresses the Actual Text of Issue 3 in Friends of Ravenna-Cowen's Notice of Appeal and the Legal Bases Underlying This Issue.

The text of Issue 3 (see full text at p.8 of this Response), except for the last sentence, addresses the City's failure in the EIS process to comply with SEPA's requirement to identify buildings and areas of historic significance. The first sentence, "The proposed FEIS does not provide an adequate study, nor indeed any study, of the impact on buildings and areas potentially

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eligible for historic significance," is an allegation of fact; the MHA FEIS did not include any information or studies of areas *potentially* of historic significance, such as the Ravenna neighborhood. The second sentence is both a statement of law and a statement of fact; the City concedes it has not done any such studies. MHA FEIS 3-299. Issue 3 cites the relevant SEPA and WAC provisions. The WACs cited require the agency to identify not only buildings identified as over 45 years old and listed in a the national, state or local preservation registers, but also buildings *eligible* for listing in such registers. The City did not comply with either of these requirements.

The purpose of these requirements is to provide the public and decision-makers with adequate information in the first instance. Without those inventories, it is impossible for the City Council to assess whether there are ways to reshape the upzones to avoid areas with higher densities of historic resources or individual historic resources with particular value. And, as discussed above, a programmatic EIS requires a level of detail commensurate with the impacts. Here, the City failed to examine a substantial amount of information that already exists without expending additional money on new historic surveys.

Appellant avers the following: There are existing inventories (a) sitting in the City's own database, (b) in binders at City Hall, (c) in reports by City consultants and (d) in other studies and inventories easily accessible to City staff and its consultants, but the authors of the EIS failed to use that information. The City has its own database of historic resources, but the EIS does not include many of them.[6] In 1978 – 1979 the City of Seattle's Historic Preservation Program of the

[6] SCALE is submitting the Declaration of Eugenia Woo in support of a motion for summary judgment that examines these facts.

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Department of Neighborhoods conducted a survey/inventory of 34 Seattle neighborhoods.[7] This inventory is less detailed than a full inventory because the surveyor mainly walked around the building noting its features. But the inventory designates on the inventory form and in the summary, those buildings the surveyor states should be designated as "Landmark" (qualifying for the National Historic or other historic registries). Thus, this inventory alerts the City to exact locations of potential historic resources. Next the City ignored the recommendations of its own consultants. In November 2002 Mimi Sheridan, Cultural Resource Specialist, submitted a *Historic Property Survey Report: Seattle's Neighborhood Commercial Districts.* The recommendations are not limited to commercial buildings; the report in City files states that the Roosevelt/Ravenna area has a wealth of single family homes that warrant a neighborhood survey.

In addition to ignoring surveys/inventories within its own database and existing City records and studies, the Appellant avers: The City also did not include data from other surveys that identify potential buildings of potentially eligible historic significance. In 1975, through the auspices of the Historic Preservation and Development Authority, Folke Nyberg and Victor Steinbrueck prepared *An Urban Resource for Seattle.* This survey includes thirteen neighborhoods, some of which are included in the SCALE Appeal, such as Eastlake, Green Lake, Wallingford, and Mount Baker. This inventory includes a map for each neighborhood that was part of the study. The map identifies, designated "landmarks," buildings "significant to the

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[7] Ballard, Beacon Hill, Broadview (northwest), Capitol Hill, Central, Columbia, First Hill, Fremont, Georgetown, Green Lake, Industrial, International District, Lake City, Lake Union, Laurelhurst (northwest), Loyal Heights, Madison Park, Madrona, Magnolia, Montlake, Mount Baker, Northgate, Phinney, Pike Place Market, Pioneer Square, Queen Anne, Rainier Beach, Rainier Valley, Ravenna, Regrade, South Park, University District, Wallingford, and West Seattle. These assertions of fact are not being submitted via an affidavit, but are assertions of fact that the Appellant believes could be presented after further discovery.

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city" that "warrant further evaluation for designation as historic landmark[s]," and "significant to the community – special quality and character in relation to the neighborhood."

In the EIS, OPCD acknowledges that the nature and location of many other historic structures exists in the City's records. The checkmarks in the first column of Exhibit 3.5-4 (EIS at 3-302) indicates that the city has its own designation of historic properties in all but one of the listed neighborhoods. Yet none of that information, readily available in the City's database, is not disclosed or utilized in the EIS.

Without inclusion of this baseline information, it is impossible for EIS readers to make informed decisions about the likely impact of proposed upzones, and it is impossible for the Examiner to conclude that OPCD took the requisite "hard look" at the project's impacts. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, *supra,* at 1163. ("[i]f numerous species are omitted from the environmental baseline, neither the Court nor the public can be assured that the BLM took a 'hard look' at the environmental impacts on those species").

Because the MHA FEIS does not include an adequate baseline, the public and City Council cannot evaluate the degree of impact to potentially eligible historic resources in each area proposed for expansion and upzoning, such as the expansion of the Roosevelt Urban Village into the Ravenna neighborhood. The City Council simply cannot make knowledgeable decisions.

The failure of the EIS to disclose a complete data set of readily accessible possible historic resources curtails decision makers' ability to assess the proposal's impacts on historic resources, not only when viewing each neighborhood in isolation under any given alternative, but also when trying to assess the different impact on historic resources among the alternatives. That is, the public and decision makers should know whether historic resources in a given neighborhood would fare better or worse under one alternative versus another.

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Additionally, the failure of the EIS to provide this comparative assessment is a critical flaw. A primary purpose, perhaps "the" primary purpose, of any EIS is to allow for an informed choice between alternatives. "The alternatives section is the heart of the EIS, 40 C.F.R. § 1502.14 (1984), and serves to insure that the decision-making body has actually considered other appropriate methods of attaining the desired goal. *Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admin.*, 772 F.2d 700, 712 (11th Cir. 1985)." If the EIS does not provide meaningful information about the extent to which impacts vary among alternatives, the EIS is a failure. This lack of information is precisely what Issue 3 addresses. The City's contention that Issue 3 should be dismissed because the EIS was "programmatic" is without merit either factually or legally. The City's motion to dismiss Issue 3 should be denied.

The City raises an entirely different point with respect to the last sentence of Friends of Ravenna-Cowen's Issue 3, which states, "The City's mitigation proposal – after-the-fact review in the project phase - is not a reasonable mitigation and does not consider the overall effect on and significance of the area outside of the immediate project." The City states (Mot. to Dismiss, p. 24), Friends of Ravenna-Cowen …question the City's intent to fulfill the FEIS's mitigation measures... These issues are beyond the scope of this appeal and the appeal should be dismissed." As with Issue 7 (see discussion above), the City misconstrues and misstates what Issue 3 states.

The last sentence of Issue 3 is directed to the City's mitigation measure at the end of its list at MHA FEIS 3.5.3:

> Requiring project proponents to nominate building for landmark review when demolition of properties that are over 50 years old is proposed, regardless of City permitting requirements, by modifying the SEPA exemptions thresholds in the Seattle Municipal Code at Table A for section 25.05.800 and Table B for section 25.50.800.

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This language was added to the FEIS due to comments, including but not limited to commentators Eugenia Woo of Historic Seattle, Friends of Beacon Hill, Lani and Larry Johnson (Friends of Ravenna-Cowen board members), and the Washington State Department of Archaeology and Historic Preservation. All pointed out that under the current Municipal Code and regulations, there is a gap between non-project level and project level SEPA review, and smaller properties fall below the SEPA review thresholds. DAHP's letter states, at para. 4, "There is concern that SEPA exempt thresholds may support projects affecting archaeological and historic properties to move forward without review."

The problem, as Issue 3 states, is that the mitigation the City suggests in no way mitigates the adverse consequences to a *potential historic district or area.* The developer would only be required to assess the historic significance of the building(s) it seeks to demolish.

The EIS explains that this "significant adverse impact" includes both the possible demolition of historic buildings and "decreases to the historic fabric of a neighborhood" and that the latter impact may make it more difficult for the neighborhood to obtain historic district status. EIS at 3-306.) The EIS acknowledges this potential and the very significant impacts to specific historic buildings and entire historic neighborhoods when SEPA-exempt projects implement the upzones, but the EIS fails to acknowledge that the exact same impacts are possible even when implementing projects are subject to SEPA. Instead of acknowledging that impact, the EIS instead trumpets the possibility that SEPA mitigation "may" be used to avoid the loss of historic resources. But the EIS fails to acknowledge or discuss the limitations in the SEPA mitigation program for historic resources:

> For projects subject to SEPA, demolition or substantial modifications to buildings over 50 years in age that are adjacent or across the street from designated Seattle Landmarks are subject to

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> review for their potential adverse impacts on the designated landmark (SMC 25.05.675H). When reviewing the project, the Landmarks Preservation Board uses the Secretary of Interior Standards as guidelines. If adverse impacts are identified, mitigation measures may be required. Measures could include sympathetic façade, street, or design treatment or reconfiguring the project and/or location of the project.

(EIS at 3-306 (underlining in original, depicting language in the FEIS that did not appear in the DEIS)). After listing possible mitigation measures, the MHA FEIS then concludes that there are no adverse impacts. The authors of the EIS either were unaware or simply could not bring themselves to admit that even when SEPA applies, historic resources and entire historic neighborhoods remain at risk, *i.e.,* historic buildings will be lost and the historic fabric of whole neighborhoods will decrease.[8] Had it candidly admitted this, decision-makers would be alerted. But the City did not face that fact, and for that reason alone, the EIS is inadequate.

In summary, Friends of Ravenna Cowen's Issue 3 simply points out that there will be adverse irremediable impacts, regardless, which the EIS fails to state. The City's motion to dismiss Issue 3 should be denied.

4. With the Above Legal Framework In Mind, This Response Next Addresses the Actual Text of Issue 4 in Friends of Ravenna-Cowen's Notice of Appeal and the Legal Bases Underlying This Issue.

Issue 4 states:

> Despite the list of mitigation measures that would be needed to preserve significant historical areas and buildings, the MHA FEIS paragraph describing significant unavoidable adverse impacts for historic resources states that "no changes will occur to existing policies and regulations regarding review historic and cultural resources under any alternative." Therefore, we cannot expect that there is any intent to actually fulfill the mitigation measures suggested in the FEIS. For example, without enacting

[8] See further discussion at SCALE's Mot. for SJ – "5. *The EIS Includes misleading information about historic resources resulting from increased development."* This is incorporated herein by reference.

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policy/regulation changes, properties under the current SEPA review threshold would not be assessed for landmark eligibility per current City regulations; accordingly, stating that "no significant unavoidable impacts to historic and cultural resources are anticipated under any of the proposed alternatives" is disingenuous. Given the City's processes there is also a time lag between when a project is permitted and the City actually adopts legislation, by which time historically significant homes could be destroyed. The "gap" between non-project level and project-level SEPA review will cause adverse impacts on, or loss of, historical and cultural resources on smaller properties that fall below SEPA review thresholds and will also adversely decrease the historic fabric of some older neighborhood areas. Additionally, area-wide sections of neighborhoods eligible for historic protection will not be considered at all. Therefore, the City's mitigation suggestion is unreasonable and not in compliance with SEPA requirements.

The City's motion to dismiss Issue 4 is that the issue "question[s] the City's intent to fulfill the FEIS' mitigation measures… [and] this is beyond the scope of the appeal and should be dismissed." The City's point is accurate as to the second and third sentences of Issue 4. These are rhetorical statements generated by years of frustration with various City processes and inaction. Appellant does not disagree that the City's intent to enact any of the mitigating factors it lists is irrelevant to the EIS. The remedy, however, is that these two sentences should be stricken, but the remainder of Issue 4 should not be dismissed. [9]

The third sentence is a statement of fact that "the time lag between when a project is permitted and the City actually adopts legislation, by which time historically significant homes could be destroyed." Given this fact, the result will be that there will adverse, irremediable consequences to historic resources and to potential historic areas, including resources in the proposed expansion of the Roosevelt Urban Village into the Ravenna neighborhood.

This fact raises a legal issue – that the City failed to state in the EIS there are irreparable adverse consequences if the City Council adopts upzoning legislation, but did not simultaneously

[9] In effect, under the civil rules, this is analogous to CR 15(a) – amendment of the pleadings – and "leave [to amend] shall be freely granted where justice so requires." Accordingly, the Appellant requests the Hearing Examiner to amend Issue 4 by striking the second and third sentences of Issue 4. If the City disagrees, a formal motion will be filed seeking such amendment.

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adopt mitigation measures, or, even if adopted, the mitigation measures were not or could not be concurrently implemented. The City did not address this scenario at all in the EIS, and, accordingly, the City Council is not on notice of potential ramifications of delay. As a result, the EIS is inadequate because it does not acknowledge there will be unavoidable adverse consequences to historic resources.

The remaining two sentences in Issue 4 are basically a re-statement of issues raised in Issue 3, which are discussed above. In summary, Issue 4 should not be stricken except for the second and third sentences.

III. CONCLUSION

For the reasons discussed in this Response and for the reasons discussed in SCALE's Motion for Summary Judgment, which are incorporated herein by reference, the City's motion to dismiss Issues 3, and 7 should be denied, and the City's motion as to Issue 4 should be granted in part, by striking the second and third sentences of Issue 4.

Respectfully submitted this 1st day of May, 2018,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that Friends of Ravenna-Cowen's Response to the City of Seattle's Motion for Partial Dismissal was served on all the parties' attorneys of record or on their authorized representatives of record at the email addresses listed below:

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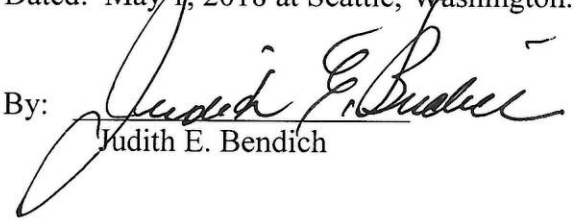
The original of this document has been filed by at the City of Seattle Office of the Hearing Examiner, 700 Fifth Avenue, Suite 4000, Seattle, WA 98104 and a hard copy provided to the Deputy Hearing Examiner, Ryan Vancil.

Dated: May 1, 2018 at Seattle, Washington.

By: 
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