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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeals of  
**WALLINGFORD COMMUNITY COUNCIL, ET AL.**  
of adequacy of the FEIS issued by the director, Office of Planning and Community Development.

Hearing Examiner File:  
**W-17-006 through W-17-014**  
**WALLINGFORD COMMUNITY COUNCIL'S RESPONSE TO MOTION TO DISMISS and CROSS-MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

The Wallingford Community Council here responds to the Director of the Office of Planning and Community Development's Motion to Dismiss WCC's appeal, and files a Cross-motion for Summary Judgment.

**A. Scope of response.**

OPCD seeks the dismissal, in whole or in part, of nine appeals brought by nine different parties in a single motion. Not all sections of the motion to dismiss are directed to all appeals. The Argument sections designated by OPCD as applying to WCC are: A, B 1-3,

1 and C. <sup>1</sup> This response will address only those sections which OPCD claims supports its  
2 request to dismiss WCC's appeal.

3 OPCD applies its arguments and authorities to multiple appellants in the same  
4 motion. Appellants are expected to file separate responses. In order to avoid duplication of  
5 common issues, WCC here incorporates by reference authorities cited by other appellants  
6 addressing common issues and basic rules of law such as summary judgment requirements,  
7 standards for the Hearing Examiner's review of this matter, and SEPA requirements,

8 **B. Summary of response.**

9 OPCD's motion acknowledges that the EIS only considered variations on the  
10 implementation of the housing program designated as MHA-R. OPCD did not attempt to  
11 consider alternatives to the MHA program for reaching the stated objectives. The claims of  
12 environmental review of MHA leading to this point are vague and inconsistent. Instead of an  
13 orderly process for SEPA review, OPCD attempts to cobble together earlier actions in an  
14 attempt to justify its not considering alternative programs as required by SEPA. As a result,  
15 there is a break in what should have been a straight forward and orderly environmental  
16 review.  
17

18 In an attempt to bridge the gap, OPCD cherry picks a few subsections of the SEPA  
19 Washington administrative code, takes those sections out of context, ignores broader rules,  
20 and misstates, misquotes and misapplies the language of those subsections. These efforts do  
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23 <sup>1</sup> The Motion to Dismiss on pg. 3, ¶ 3 lists WCC as making a claim regarding "phased review." WCC's  
24 appeal makes no reference to phased review, and the cited page and paragraph number are not from  
its filing. In the OPCD's later discussion of phased review, the issue is attributed to Fremont and  
Junction Neighborhood.

1 not justify the omissions required for environmental review under law. OPCD's arguments  
2 do not support a dismissal of WCC's appeal, nor do they excuse noncompliance with the  
3 law. As a result, the EIS should be remanded with direction to OPCD to comply with the  
4 law by identifying and analyzing reasonable alternatives to the "Grand Bargain" now known  
5 as the MHA.

## 6 7 **II. RELIEF REQUESTED**

8 WCC requests that OPCD's motion to dismiss WCC's appeal be denied, that WCC  
9 be granted summary judgment, and that the FEIS which is the subject of this matter be  
10 remanded for the SEPA review required by law including identification of reasonable  
11 alternatives to the MHA program and analysis of those alternatives.  
12

## 13 14 **III. STATEMENT OF FACTS & EVIDENCE**

15 OPCD commits three-quarters of its extensive "statement of facts" describing the  
16 HALA process. The history described does not reflect the limited and contentious nature of  
17 the process. It is also irrelevant to the legal issues before the Hearing Examiner. However,  
18 for a response to the HALA narrative, please see the Declaration of Cindi Barker.

19 The essential facts which are relevant to this matter are not disputed. Those facts  
20 concern the process leading to the FEIS and what was and was not included in it. The one  
21 fact that led to this appeal is this: The former Mayor and a small group of developers agreed  
22 to what is now known as MHA in a "Grand Bargain" signed behind closed doors. There  
23 were no alternatives identified prior to pointing to MHA as the one solution to affordable  
24

1 housing. No alternatives to this specially selected proposal have been identified by the  
2 OPCD in the FEIS, and no environmental review of those alternatives has occurred. This is  
3 contrary to the mandate of SEPA as a procedural statute that requires an open process of  
4 consideration of the various impacts of reasonable alternatives in order to make an informed  
5 decision. Instead OPCD adopted a single program and now refuses to consider any  
6 alternatives for fear of violating the “Grand Bargain” and thus face litigation.

#### 7 **IV. ISSUES, AUTHORITIES & DISCUSSION**

8 The environmental impact statement which is the subject of WCC’s appeal and  
9 OPCD’s motion was created for the purpose of the implementation of MHA. OPCD’s  
10 motion to dismiss WCC’s appeal and the community council’s cross-motion for summary  
11 judgment concern the SEPA requirement to consider alternatives as part of the  
12 environmental review process. The question here is not one of the adequacies of the  
13 government’s review of alternatives under SEPA, but whether OPCD is required to consider  
14 any alternatives to MHA at all.  
15

16 SEPA statutes, regulations and caselaw make the consideration of alternatives  
17 essential elements of environmental review. OPCD admits that it did not consider any  
18 alternatives to the MHA proposal in the EIS. Ignoring broad dictates for such consideration,  
19 OPCD contends that a review of alternatives is not required. To avoid the directives of law,  
20 OPCD relies on its strained and misleading construction of one subsection of the WACs.  
21 OPCD admits that it did not consider alternatives to MHA, and thus wrongly argues that it  
22 does not have to.  
23  
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1           A.       **SEPA requires that meaningful alternatives to MHA be considered.**

2           The law’s requirement to consider alternatives ways to meet objectives is central to  
3 the SEPA. The basic requirements of the law are set out in RCW 43.21C.030 (notably a  
4 statute not mentioned by OPCD in the motion to dismiss):

5           The legislature authorizes and directs that, to the fullest extent possible: (1) The  
6 policies, regulations, and laws of the state of Washington shall be interpreted and  
7 administered in accordance with the policies set forth in this chapter, and (2) all  
8 branches of government of this state, including state agencies, municipal and public  
9 corporations, and counties shall:...

10           (c) Include in every recommendation or report on proposals for legislation and other  
11 major actions significantly affecting the quality of the environment, a detailed  
12 statement by the responsible official on: ...

13           (iii) alternatives to the proposed action;

14 RCW 43.21C.030 (c)(iii).

15           The requirements of an EIS are detailed in WAC 197-11-440. The regulation  
16 mandates that the EIS include a section titled “Alternatives including the proposed action.”  
17 WAC 197-11-440 (5). Those requirements were summarized by the Supreme Court in  
18 *Weyerhaeuser v. Pierce Cty.*, 124 Wash. 2d 26, 873 P.2d 498, 506 (1994).

19           Not all potential alternatives must be examined. *Solid Waste Alternative Proponents*  
20 *v. Okanogan Cy.*, 66 Wn. App. 439, 443, 445, 832 P.2d 503, *review denied*, 120  
21 Wn.2d 1012, 844 P.2d 435 (1992). Adequacy is determined under the "rule of  
22 reason". *Barrie v. Kitsap Cy.*, 93 Wn.2d 843, 854, 613 P.2d 1148 (1980). There must  
23 be a reasonably detailed analysis of a reasonable number and range of alternatives.  
24 Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and*  
25 *Policy Analysis* § 14(b)(ii) (4th ed. 1993). Under WAC 197-11-440(5)(c), the  
alternatives section of the EIS must describe the objectives, proponents and principal  
features of reasonable alternatives, including the proposed action with any mitigation  
measures; describe the location of alternatives, including a map, street address and  
legal description; identify phases of the proposal; tailor the level of description to the  
significance of environmental impacts; devote sufficiently detailed analysis to each  
alternative so as to permit a comparison of the alternatives; present a comparison of

1 the environmental impacts of the alternatives; and discuss benefits and disadvantages  
2 of reserving implementation of the proposal to a future time.

3 *Weyerhaeuser* at 41, 506.

4 Other than a reference to alternatives being “reasonable,” the OPCD’s motion and  
5 the EIS ignore these requirements. Even OPCD’s reference to “reasonable alternatives” in  
6 SMC 25.05.440.D.2 (WAC 197-11-440(5)(b)) mischaracterizes the requirement as a  
7 definition and not a mandate.

8 In directing the nature of the alternatives to be considered, WAC § 197-11-060 provides:

9 Proposals should be described in ways that encourage considering and comparing  
10 alternatives. Agencies are encouraged to describe public or nonproject proposals in  
11 terms of objectives rather than preferred solutions. A proposal could be described,  
12 for example, as "reducing flood damage and achieving better flood control by one  
13 or a combination of the following means: Building a new dam; maintenance  
14 dredging; use of shoreline and land use controls; purchase of floodprone areas; or  
15 relocation assistance." [underline added]

16 Given the requirement to focus on the objectives of a proposal, it would be expected  
17 that the objectives of MHA as set out in the EIS would be a prominent consideration in  
18 OPCD’s claims of compliance with SEPA. However, OPCD’s motion never mentioned the  
19 objectives. As set out in the FEIS at pg. 1.3, they are:

## 20 1.2 OBJECTIVES OF THE PROPOSAL

21 The City’s objectives for this proposal are to:

- 22 • Address the pressing need for housing affordable and available to a broad range of households.
- 23 • Increase overall production of housing to help meet current and projected high demand.
- 24 • Leverage development to create at least 6,200 net new rent- and income-restricted housing units serving households at 60 percent<sup>1</sup> of the area median income (AMI) in the study area over a 20-year period.
- 25 • Distribute the benefits and burdens of growth equitably.

1 The City considered only one proposal in its EIS; that of MHA, the ‘Grand Bargain.’  
2 The consideration of impacts and alternative under SEPA are a central requirement of an  
3 EIS.

4 The lead agency [the city] shall discuss impacts and alternatives in the level of  
5 detail appropriate to the scope of the nonproject proposal and to the level of  
6 planning for the proposal. Alternatives should be emphasized. In particular,  
7 agencies are encouraged to describe the proposal in terms of alternative means  
8 of accomplishing a stated objective (see WAC 197-11-060(3)). Alternatives  
9 including the proposed action should be analyzed at a roughly comparable  
10 level of detail, sufficient to evaluate their comparative merits (this does not  
11 require devoting the same number of pages in an EIS to each alternative).  
12 [underline added]

13 WAC § 197-11-442 (2).

14 The requirements of the law are clear and specific with regard to required analysis of  
15 alternatives. OPCD does not claim that it complied with them. Instead, it incorrectly argues  
16 that it does not have to comply. OPCD’s argument entirely relies on a misstatement of a  
17 single subsection of the WAC – ignoring the clear mandates throughout SEPA to consider  
18 alternatives as part of an EIS.

19 This failure to comply with a central mandate of SEPA could lead to disastrous  
20 results. OPCD should have prepared an EIS to help inform decision makers – the City  
21 Council – as to what program or proposal might best meet the goal of providing affordable  
22 housing. Instead, OPCD merely specifies four different methods of implementing the same  
23 program or proposal: the MHA. Alternatives are not even identified in the EIS, let alone  
24 analyzed.

1           **B.       OPCD relies on and misstates a WAC subsection not relevant here.**

2           OPCD’s attempt to justify its lack of adequate consideration of alternatives is  
3 entirely based on the misreading and misrepresentation of WAC 197-11-444(5).

4           1.       OPCD omits critical language showing the section does not apply.

5           All three sections rely on a limited and erroneous reading of WAC 197-11-442(4).  
6 OPCD repeatedly claims that the EIS is only required to consider the MHA proposal reciting  
7 over and over again that this is a “formally proposed” action, and therefore EIS content may  
8 be limited to alternative MHA actions, and not alternatives to MHA. The subsection reads:

9           **(4) The EIS's discussion of alternatives for a comprehensive plan, community**  
10 **plan, or other areawide zoning or for shoreline or land use plans shall be limited**  
11 **to a general discussion of the impacts of alternate proposals for policies**  
12 **contained in such plans, for land use or shoreline designations, and for**  
13 **implementation measures.** The lead agency is not required under SEPA to examine  
14 all conceivable policies, designations, or implementation measures but should cover  
15 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. [underline added]

15           The language cited by OPCD over and over again is the portion underlined above.

16           In bold is the language completely ignored and cut out by OPCD in its quotation of  
17 the subsection of the regulation it relies on. The subsection is an exception to the general  
18 requirements for an EIS. The language in bold limits the application of this subsection to  
19 specific actions of a city. None are at play here. The MHA is not a comprehensive plan  
20 amendment, a community plan, an areawide zoning action, a shoreline designation or an  
21 implementation measure for the comprehensive plan. Also the subsection is limited to  
22 consideration of “alternate proposals for policies” continued in such zoning plans. MHA  
23 doesn’t fit into that limited classification either. Even a cursory look at the MHA proposal  
24



1 (Weber Dec., Ex. H; SMC 23.58C) shows that zoning is only an element of the overall  
2 MHA scheme. It is a “means” not an “objective.” OPCD attempts to show how the  
3 subsection would apply to the MHA EIS. No basis for qualifying the program for the  
4 application of this limited exception is even mentioned.

5 OPCD would have us believe that the limiting discussion to alternatives that are  
6 “formally proposed” stands alone as the general rule. The language referring to “formally  
7 proposed” is quoted repeatedly, but never defined. Until the FEIS, multiple drafts of the  
8 DEIS under the heading of Alternatives said, “None is formally proposed or preferred at this  
9 time.” (Raaen Dec. Ex. A.) That language was stricken in the FEIS, not likely because of  
10 any change in what was formally proposed, but to have the language fit the argument. The  
11 FEIS does not claim the plan is “formally proposed,” it just takes out the admission that it is  
12 not. (See FEIS pgs 1.6 and 4.15 , Relevant pages at Raaen Dec. Ex. B) It seems clear that  
13 the repeated reference to “formally proposed” now made by the City is an effort to defend  
14 its failure to identify and analyze reasonable alternatives to MHA.  
15

16 2. OPCD ignores and misquotes SEPA requirements.

17 WAC 197-11-442(2) of the same regulation setting out the “Contents of EIS on  
18 nonproject proposals” describing the general requirements states:

19 (2) The lead agency shall discuss impacts and alternatives in the level of detail  
20 appropriate to the scope of the nonproject proposal and to the level of planning for  
21 the proposal. Alternatives should be emphasized. In particular, agencies are  
22 encouraged to describe the proposal in terms of alternative means of accomplishing a  
23 stated objective (see WAC 197-11-060(3)). Alternatives including the proposed  
24 action should be analyzed at a roughly comparable level of detail, sufficient to  
25 evaluate their comparative merits (this does not require devoting the same number of  
pages in an EIS to each alternative). [underline added]

1  
2 The stated objective of the EIS is affordable housing. OPCD admits that no  
3 alternatives to MHA to encourage affordable housing were considered. “The Final EIS  
4 evaluates alternative approaches to implementing MHA.” (FEIS, “Proposed Action and  
5 Alternatives,” pg. viii; See FEIS §2.3 for summary of alternatives considered.) This  
6 admission should result in a grant of the summary judgement motion brought by the  
7 Wallingford Community Council since it considers no alternatives to MHA, only slight  
8 variations on that proposal. Alternative methods or programs of meeting the affordable  
9 housing objective of the City are required to be identified and analyzed so that decision  
10 makers can be informed prior to making a decision. The City considers the decision to  
11 move forward with MHA has already been made. Therefore, it did not identify any  
12 alternatives or analyze them during environmental review. This admission is fatal to the  
13 City’s effort to defend its actions.  
14

15 In discussing “SEPA’s directive to provide different means of accomplishing” a  
16 goal, OPCD misrepresents the regulation by changing “objective” to “proposal.”<sup>2</sup> The  
17 “objectives” set out in the EIS which should govern the scope of alternatives review are  
18 never mentioned in the OPCD motion. OPCD instead wants to claim that only the MHA  
19 proposal is to be considered. This is direct contradiction of the language of the law.  
20

21 OPCD argues that the appellants have failed to identify specific alternative proposals  
22 that the city did not consider. However, to this point, appellants have not had an opportunity  
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24 <sup>2</sup> OPCD motion. Compare pg. 17, l. 14 to the WAC language in fn. 63.

1 or responsibility to identify any such proposals. It is the responsibility of the agency to  
2 identify alternatives for inclusion and analysis in an EIS. WAC 197-11-440 (5).

3 Nevertheless, the city itself identified and advocated for alternatives as discussed in  
4 the 2015 DNS documents. (Weber Dec. Ex. 11, Raaen Dec. Ex. C.) In addition, a range of  
5 alternatives to obtain affordable housing were analyzed and discussed in a report issued by  
6 the Community Housing Caucus, *Solutions to Seattle's Housing Emergency*, (3/16/2015)  
7 sponsored by Speaker the House Frank Chopp and Councilmembers Licata and Sawant.  
8 (Raaen Dec., Ex. D). Even a cursory search of the internet for “affordable housing  
9 programs” provides a wide range of options from which to consider and analyze. Most  
10 importantly, it must be remembered that the appeal of the FEIS is not a dispute between  
11 alternatives, but is based on OPCD’s refusal to even consider alternatives to MHA.  
12

13  
14 **C. OPCD attacks a strawman of its own making.**

15 In every section of the OPCD motion concerning alternatives, OPCD repeatedly  
16 claims that the city is not required to prepare “a compendium of every possible alternative,”  
17 <sup>3</sup> “all possible” proposals, <sup>4</sup> or “every proposal.” <sup>5</sup> No such requirement has ever been  
18 advocated by WCC. The argument is irrelevant and a red herring.  
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23 <sup>3</sup> OPCD motion pg. 13, l. 8; pg. 14, l. 5.

24 <sup>4</sup> OPCD motion pg. 19, l.7,

<sup>5</sup> OPCD motion pg. 19, l. 11.

1 Nor does WCC challenge the general police power of the city.<sup>6</sup> However, the general  
2 police powers granted to cities do not provide an exemption from SEPA. The argument is  
3 irrelevant.

4  
5 **D. 2015 Determination of Non-Significance.**

6 The City in its motion acknowledges that the 2015 DNS did not constitute  
7 environmental review of MHA. Both the City and WCC agree that the 2015 DNS is for a  
8 proposal different than MHA. Since the City now admits that the DNS does not constitute  
9 environmental review for MHA and there was no other environmental review for the MHA  
10 Framework legislation, how does the City contend that the adoption of the framework  
11 complied with SEPA? The lack of environmental review of the framework makes full SEPA  
12 compliance concerning the analysis of alternatives even more critical.  
13


14  
15 **V. Conclusion: OPCD's Construction of the Law Would Gut SEPA**

16 The government admits that it did not comply with SEPA requirements for the  
17 consideration of alternatives. That noncompliance should not be given a stamp of approval  
18 here. If government agencies can avoid consideration of alternatives for proposals which  
19 might have less environmental impact simply by labeling the proposal as "formally adopted"  
20 thereby ignoring consideration of other approaches to meeting its objectives, what will be  
21 left of SEPA? Not much. The dictates of SEPA are clear. OPDC's attempts to justify its  
22 noncompliance are confusing and strained, based on incomplete quotations and clear  
23

24 <sup>6</sup> OPCD motion pg. 15, l. 13

1 misstatements of the law. OPCD finds itself in this position because environmental review  
2 of this proposal was constrained by the “Grand Bargain” and the city’s inflexible approach  
3 to this legislation. The proposal covered by the EIS will forever change the land use  
4 landscape of Seattle. The EIS should be remanded to OPCD for identification and analysis  
5 of reasonable alternatives for meeting the objectives of affordable housing. The City should  
6 be required to comply with the law.

7           Respectfully submitted this 1st day of May, 2018.

8  
9   
10 G. Lee Raaen, WSBA #6258  
11 Attorney for Wallingford Community Council

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that this document was filed on this date by E-file with the Seattle Hearing Examiner’s Office. This Response was served on the parties' attorneys or authorized representatives of record at the email addresses listed below:

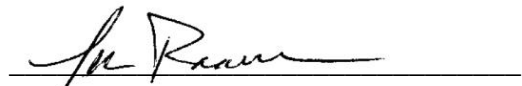
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Signed and dated by me this 1st day of May, 2018 at Seattle, WA.



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