BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by Seattle Coalition for Affordability, Livability, and Equity of the City of Seattle Citywide Implementation of Mandatory Housing Affordability (MHA) Final Environmental Impact Statement	Hearing Examiner File No. W-17-010 SCALE'S RESPONSE TO CITY OF SEATTLE'S MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

Seattle Coalition for Affordability, Livability, and Equity (SCALE) is an alliance of organizations that altogether represent thousands of Seattle residents who will be significantly and adversely impacted by the proposed Citywide implementation of the Mandatory Housing Affordability (MHA) Program. SCALE does not challenge the important objectives of the proposal – namely, the need to address Seattle's ongoing affordable housing crisis. Instead, SCALE seeks to ensure that the City's massive undertaking, impacting nearly every parcel in the City of Seattle, is properly evaluated in light of the fundamental protections and requirements of our State Environmental Policy Act (SEPA).

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

SCALE has presented forty-three legal issues to the Hearing Examiner challenging the legality of the Environmental Impact Statement for the MHA program. SCALE also expressly adopted an incorporated the issues that were presented by all of the other appellants in their appeals of the FEIS.

The City of Seattle has filed a motion for partial dismissal requesting that the Hearing Examiner dismiss eleven of the issues presented in SCALE's Notice of Appeal. City of Seattle's Motion for Partial Dismissal (Apr. 17, 2018) (hereinafter "City Motion"). The City's motion to dismiss should be denied for the reasons presented below.

II. STATEMENT OF FACTS

A. The Paragraphs in SCALE's Notice of Appeal That Are Subject to the City's Motion to Dismiss.

The City of Seattle has requested that the Examiner dismiss SCALE issues 17 and 18, which both challenge the alternatives analysis in the FEIS, and SCALE issues 4, 6, 8, 10, 15, 25, 29, 30, and 38, which all challenge the disclosure and discussion of reasonable mitigation measures for different elements of the environment in the FEIS. City Motion at 2.

Issues 17 and 18, regarding the alternatives analysis, from SCALE's Notice of Appeal state:

> 17. The FEIS's analysis of alternatives to the MHA proposal is inadequate. The alternatives that are provided do not include actions that could feasibly attain or approximate the proposal's objectives at a truly lower environmental cost or truly decreased level of environmental degradation. The stated objective of the MHA proposal is to create additional affordable housing, which MHA proposes to achieve through upzoning and funding development of rent-assisted housing. The FEIS then explicitly states that it will not be considering any alternatives to this specific means of addressing the city's need for more affordable housing for those who receive economic assistance and for those low and moderate income residents who do not qualify for rent assistance. The FEIS explicitly declines to consider specific alternatives to the MHA proposal, even though comments were presented suggesting alternatives that would have accomplished the proposal's stated objective. The FEIS alternatives only consider how much and where to up-zone, not alternative ways to reach the

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> objectives. The FEIS admits that in all cases, the MHA upzoning variants which the FEIS proposes as alternatives will fail to achieve the stated objective, yet it fails to consider other alternatives at all.
>
> 18. The FEIS (and other documents) acknowledge that there are many alternative means to addressing affordable housing shortfalls besides MHA. … The City Council cannot evaluate the relative merits and costs of the FEIS options and these other options without a full assessment of these other options in the FEIS.

See Declaration of Claudia M. Newman in Support of SCALE's Response to Motion to Dismiss (May 1, 2018), Ex. A (SCALE Notice of Appeal (Nov. 27, 2017) at 11-12).

Regarding these alternatives analysis issues, the City's motion is focused only on dismissal of issues concerning the "range" of alternatives chosen for consideration. The City has not moved to dismiss issues concerning the adequacy of analysis with respect to each of the elements of the environment for each of the alternatives that were presented in the FEIS.

Issue No. 4, regarding mitigation, in SCALE's Notice of Appeal states:

> 4. The FEIS does not adequately discuss reasonable mitigation measures that would significantly mitigate the land use impacts of the proposal. To some degree, the mitigation measures discussed will not mitigate the impacts and to another degree, the EIS fails to include other mitigation measures that could be implemented to mitigate the impacts. As one example, design review is not a reasonable mitigation tool for many, if not all, of the land use impacts that will be caused by this proposal. The EIS does not indicate what the intended environmental benefits of mitigation measures would be. The discussion of mitigation is not adequate for each neighborhood throughout the entire study area.

Id. (SCALE Notice of Appeal at 5). Paragraphs 6, 8, 15, 25, and 32 contain almost identical language as paragraph 4, but with respect to mitigation of height, bulk, and scale, traffic and transportation impacts, critical area impacts, historic and cultural resource impacts, and open space and parks impacts of the proposal. *See Id*. (SCALE Notice of Appeal at 6, 7, 11, 13-14, 15).

Paragraph 10 of SCALE's Notice of Appeal states:

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> 10. The FEIS does not adequately discuss reasonable mitigation measures that would significantly mitigate the tree canopy impacts of the proposal.
>
> a. Given the unknown impacts on tree canopy documented above, it is unknown whether the development standard amendments proposed as mitigation measures will be sufficient mitigation to avoid probable, significant, adverse impacts from the loss of tree canopy coverage.
>
> b. The FEIS fails to consider alternative tree canopy loss mitigation measures that were proposed to the City during the public comment period. This includes, but is not limited to, amendments to the code to improve tree protection.

Id. (SCALE Notice of Appeal at 8).

Paragraph 29 and 30 in SCALE's Notice of Appeal state:

> 29. The FEIS contains a laundry list of existing and possible new mitigation measures related to the loss of older and historic housing (much of which is more affordable than new construction), but fails to provide any analysis whatsoever of the effectiveness of those measures.
>
> 30. The FEIS inaccurately states that there are no significant unavoidable impacts associated with the action alternatives in terms of impacts on older and historic housing. Relying on project-specific mitigation, the FEIS asserts that all significant impacts can be avoided. That assertion is wrong. The mitigation measures identified in the FEIS are inadequate to avoid all significant impacts to historic, older neighborhoods and historic structures.

Id. (SCALE Notice of Appeal at 14).

Paragraph 38 in SCALE's appeal states:

> No analysis is provided to support the claim that significant impacts can be avoided if a variety of mitigation measures are implemented or to demonstrate that such a claim has any basis in reality.

Id. (SCALE Notice of Appeal at 15).

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Regarding the mitigation issue, the City requested dismissal of the entire paragraphs 4, 6, 8, 10, 15, 25, 29, 30, and 38 in SCALE's Notice of Appeal. *See* City Motion at 2. But, the City's actual legal argument focuses only on;

- A single phrase (not even the whole sentence) from paragraphs 4, 6, 8, 15, 25, and 32, which states "[t]o some degree, the mitigation measures discussed will not mitigate the impacts…"
- The sentence in paragraph 10(a) only; and
- The entire content of paragraphs 29 and 30.

See City Motion at 24 and at 24, fn 90.

The City's argument does not mention or challenge the other legal issues that are stated and presented in paragraphs 4, 6, 8, 10, 15, 25, and 38 in SCALE's Notice of Appeal.

SCALE also expressly adopted an incorporated the issues that were presented by all of the other appellants in their appeals of the FEIS. Newman Dec., Ex. A at 16.

B. The Narrative About the History of the Development of the MHA Proposal is Largely Irrelevant to the Issues Presented, but Compels a Response Nonetheless.

In its Statement of Facts, the City provided a narrative about the history of the development of the current Mandatory Housing Affordability Program. *See* City Motion at 3-10. While SCALE believes that this history is largely irrelevant to the issues presented in the City's motion to dismiss, the very existence of that narrative compels SCALE to clarify two points. First, despite a recognition that "further analysis and process would be required," (City Motion at 6) in the Grand Bargain, the narrative reveals on its face that the City did not, at any time, conduct environmental review of alternatives other than the MHA proposal to reach the objectives of the proposal as they are stated in the FEIS and as clearly articulated as the overarching policy goal in the City's narrative.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Second, in its narrative, the City failed to disclose significant problems with the City's decision making process that led us to the situation that we are in today. The City of Seattle released its first draft maps to the public proposing substantial rezones of 23 neighborhoods throughout the City in late 2016. *See* Declaration of Christine M. Tobin-Presser in Support of Junction Neighborhood Organization's Response to City's Motion to Dismiss, Cross Motion for Summary Judgment, and Motions for Summary Judgment (May 1, 2018) at ¶ 52. The City repeatedly assured residents through its Housing Affordability and Livability website (the HALA website) and its public statements that it would listen closely to community feedback and that this feedback would be used to shape the City's final recommendations with respect to rezoning and implementing the program. *Id.* Notwithstanding these assurances, the actual data from the City's purported outreach efforts shows the following:

- The City repeatedly misled Seattle residents Citywide regarding the proposed MHA rezone;
- The City had no intention of using the public's input to meaningfully shape the rezone it intended to have enacted into law;
- Despite the public's near universally critical response, the City continued to willfully ignore, minimize, and/or mischaracterize the neighborhood's feedback;
- The proposed rezones are in direct conflict with the City's adoption of neighborhood plans and the Seattle Comprehensive Plan;
- The proposed rezones in the maps originally proposed by the City and the maps in its environmental impact statement will substantially alter the makeup and feel of the different neighborhoods throughout Seattle. The City promotes the density of these rezones with no assurance of any investment in infrastructure, services, amenities, and/or green space – and with no protection against the displacement of existing low income and elderly

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

residents. Members of the public, thousands of people, have repeatedly and consistently articulated specific, detailed, substantive concerns and objections about this proposal.

Id.

All in all, the history of how we got here, is very complicated. There is much more to understand of the true history from SCALE's perspective, but more details will be presented by SCALE in its own motion for summary judgment and at the upcoming hearing.

In the meantime, SCALE's response to the City's narrow arguments in its partial motion to dismiss are presented below.

III. ARGUMENT

A. Standard of Review

The City brought its Motion to Dismiss pursuant to Hearing Examiner Rules of Practice and Procedure (HER) 3.02.[1] That Rule authorizes dismissal of all or part of an appeal that fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is "without merit on its face." City of Seattle's Motion for Partial Dismissal (City Motion) at 11, *citing* HER 3.02. This language reflects the language in Washington State Superior Court Civil Rule (CR) 12(b)(6), which states that a defendant may file a motion to dismiss based on a failure to state a claim upon which relief can be granted.

Defendants face a steep burden when moving to dismiss for failure to state a claim. "Dismissal under CR 12 should be granted sparingly and with care." *Swinomish Indian Tribal Cmty. v. Skagit Cty.*, 138 Wn. App. 771, 776, 158 P.3d 1179, 1181 (2007). Under CR 12(b)(6), the factual allegations in the notice of appeal must be accepted as true. *Eugster v. Wash. State Bar Assoc.*, 198 Wn. App.

[1] The City also mention HER 1.03, which indicates that when questions of practice and procedure arise that are not addressed by the HE rules, the Hearing Examiner may look to the Superior Court rules for guidance.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

758, 763, 397 P.3d 131 (2017). Any conceivable set of facts consistent with the allegations in the complaint can be used to withstand a CR 12(b)(6) motion. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190, 1191 (1978).

In a 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. *Id. citing Brown v. MacPherson's*, 86 Wash.2d 293, 545 P.2d 13 (1975); *Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291 (1975); *Hofto v. Blumer*, 74 Wash.2d 321, 444 P.2d 657 (1968); *Barnum v. State*, 72 Wash.2d 928, 435 P.2d 678 (1967). Therefore, any hypothetical situation conceivably raised by the appeal defeats a motion to dismiss if it is legally sufficient to support the claim. *Id.* at 674-75.

After stating that it had brought it motion to dismiss pursuant to HER 3.02 which contains language that is parallel to CR 12(b)(6), the City instead referred CR 56, which dictates the standard of review for summary judgment. It is well known that the summary judgment standard is significantly different from the CR 12(b)(6) standard. Under CR 56, a motion for summary judgment must be denied if the evidence presented shows that there is a genuine issue as to any material fact. CR 56(c). In making this determination, all facts are viewed in the light most favorable to the nonmoving party. *Volk v. DeMeerier*, 187 Wn.2d 241, 254, 386 P.3d 254 (2016).

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. CR12(c); *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 28, n. 5, 408 P.3d 1123 (2017). In that case, the motion must be denied if the declarations show that there is "a genuine issue as to any material fact." CR 56(c).

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

The arguments for dismissal of SCALE's issues relating to the adequacy of mitigation measures that presented by the City in its motion to dismiss refer only to the allegations in SCALE's Notice of Appeal. *See* City Motion at 24-25. The City did not present evidence outside of the pleadings to support those arguments. Therefore, those arguments should be treated as being brought pursuant to CR 12(b)(6) and the standard for dismissal under that rule as described above should be applied.

To support its arguments for dismissal of SCALE's issues relating to the alternatives analysis in the FEIS, the City attached the Declaration of Jeff Weber and accompanying exhibits that contained arguably material evidence about the MHA proposal. Because the City relied on documents outside the pleadings for its argument, the hearing examiner has the option of reviewing the alternatives analysis issues under the summary judgment standard per established case law if he so chooses. *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 28, n. 5, 408 P.3d 1123 (2017).

With respect to substantive review, the adequacy of an Environmental Impact Statement (EIS) is a question of law subject to de novo review. *Weyerhaeuser v. Pierce Cty.*, 124 Wash. 2d 26, 38, 873 P.2d 498, 504 (1994). Adequacy is assessed under the rule of reason, which requires a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision. *Id*. Even though substantial weight must be given to the Responsible Official's determination, RCW 43.21C.075(3)(d), "[a]n agency's view of the statute will not be accorded deference if it conflicts with the statute." *Postema v. Pollution Control Hearings Bd., supra,* 142 Wn.2d at 76. An agency decision is entitled to deference only "if it reflects a plausible construction of the language of the statute and is not contrary to legislative intent." *Alpine Lakes Prot. Soc. v. DNR*, 102 Wn. App. 1, 15, 979 P.2d 929 (1999).

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

B. The Range of Alternatives Analyzed in the MHA FEIS is Inadequate

There is a genuine issue of material fact between the City and SCALE about whether the MHA FEIS includes a reasonable range of alternatives. For that reason, SCALE's Notice of Appeal issues 17 and 18 should not be dismissed.

1. SEPA requires that reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation

The State Environmental Policy Act (SEPA), ch. 43.21C RCW, requires that an environmental impact statement (EIS) contain a detailed discussion of alternatives to the proposed action. RCW 43.21C.030; WAC 197-11-440(5). The "heart" of an EIS is its discussion of alternatives to the proposal. *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1121 (9th Cir. 2008) (*quoting* 40 C.F.R. § 1502.14).

The question of whether the EIS adequately discusses alternatives to the proposed project is a critical issue because it provides a basis for a reasoned decision among alternatives having differing environmental impacts. *Weyerhaeuser v. Pierce Cty.*, 124 Wash. 2d at 38. The range of alternatives considered in an EIS must be sufficient to permit a reasoned choice. *SWAP v. Okanogan County*, 66 Wn. App. 439, 444, 832 P.2d 503 (1992). The EIS must provide a reasonable range of alternatives so that the Council can evaluate whether options are available that would provide much of the desired increased development capacity with significantly less adverse impact. The SEPA rules set forth the standard for determining the range of alternatives that must be discussed in an EIS:

> (b) Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.
>
> > (i) The word "reasonable" is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> (ii) The 'no-action' alternative shall be evaluated and compared to other alternatives
>
> (iii) Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts either directly, or indirectly through requirement of mitigation measures.

WAC 197-11-440(5)(b).

For a nonproject proposal, the City must discuss 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. Agencies are encouraged to describe the proposal in terms of alternative means of accomplishing a stated objective. *Id*. citing WAC 197-11-060(3).

2. Evidence produced at the hearing will show that the MHA FEIS did not include an analysis of reasonable alternatives that could feasibly attain or approximate the proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation

The MHA FEIS did not include an analysis of reasonable alternatives that could feasibly attain or approximate the proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation as is required by SEPA rules.

We start with a look at what the "proposal's objectives" are. The MHA FEIS states:

> 1.2 Objectives of the Proposal
>
> The City's objectives for this proposal are to:
>
> - Address the pressing need for housing affordable and available to a broad range of households.
> - Increase overall production of housing to help meet current and projected high demand.
> - Leverage development to create at least 6,200 net new rent- and income-restricted housing units serving households at 60

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

percent of the area median income (AMI) in the study area over a 20-year period.

- Distribute the benefits and burdens of growth equitably.

Newman Dec, ¶ 2 (MHA FEIS at 1.3).

The FEIS does not state that the objective of the proposal is to "implement the MHA program," rather it defines the objectives far more broadly: the objectives are to address the pressing need for housing affordable and available to a broad range of households, to increase overall production of housing, to create a certain number of affordable housing units, and to distribute benefits and burdens of the growth equitably. There is no reference whatsoever in this statement of objectives to implementing the MHA program. *Id.* Because reasonable alternatives *shall* include actions that could feasibly attain or approximate a "proposal's objectives," this broad definition of the objectives of the proposal in the EIS demands a broader range of alternatives.

There are many different alternative means to reach the stated objectives besides implementing the MHA program. For instance, increase in various funding sources, increased incentives in the Incentive Zoning program and other measures (including partnerships with major employers) listed at FEIS 1-19 *et seq*. and FEIS 3-92 *et seq*., could generate more affordable housing, but none of these options are analyzed in detail. Other viable alternatives not analyzed in detail in the FEIS include the option of 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 for major maintenance projects in exchange for limits on rent increases; incentivizing homeowners to build mother-in-law apartments or accessory dwelling units (incentives would include forgiveness of permitting fees and dedicated staff to help with the permitting process); and phasing in the density increases discussed in the action

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

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).

The MHA FEIS does not consider a reasonable range of alternatives to reach these objectives that are stated in the FEIS. Because it is lacking a properly-framed set of alternatives, the City's non-project environmental review fails to provide decision makers with the information to make an informed choice about the reasonable alternatives that could feasibly attain or approximate the proposal's objectives as stated in the FEIS. *See Blair v. Monroe*, 2014 WL 5309146 (Wash. Central Puget Sound GMHB 2014).

In its motion, the City argues that when choosing the range of alternatives, SEPA rules give the City "more flexibility" in preparing an EIS for a non-project action. *See* City Motion at 14. This is not true. Nor is it accurate to say, as the City does, that the rules give the City "even more discretion and deference" in an EIS for a non-project with respect to the range of alternatives that are chosen. *See id*. The "flexibility" language in WAC 197-11-442(1) refers to the discussion of impacts, not the choice of alternatives. That rule allows some flexibility with the impacts analysis "because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals." WAC 197-11-442(1)

In fact, the SEPA rules require that the City consider a broader range of alternatives for nonproject actions than for project actions. WAC 197-11-442 states that, with a non-project action, "alternatives should be emphasized" and agencies are "encouraged to describe the proposal in terms of alternatives means of accomplishing a stated objective." Thus, for a non-project proposal, the SEPA rules emphasize alternatives and encourage agency to include a range of alternatives that are meant to accomplish a *stated objective* rather than a *specific proposal*. This makes sense. Unlike a private developer or private property owner who is limited to a specific project on a specific site, the City is

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

working on behalf of the public to shape broad policy. The City has a civic responsibility to consider its decisions in a broader context, including analyzing a broader range of alternative ways to attain stated policy goals.

The entire premise of the City's argument is the City's "MHA proposal" necessarily shapes the alternatives that the agency must consider. *See* City Motion at 14. To the contrary - it is the "objectives" that are stated in the MHA FEIS that necessarily shape the alternatives that must be considered, not the MHA proposal. The EIS does not consider a reasonable range of alternatives to reach the City's objectives of the proposal as defined in the FEIS. Notably, the City never mentioned or quoted the stated "objective" in the FEIS itself in its motion.

In no uncertain terms, the City is arguing that it made up its mind with respect to the alternatives *before* environmental review was conducted. With this, the City is telling us that it violated WAC 197-11-070, which states that no action concerning the proposal shall be taken by a governmental agency that would limit the choice of reasonable alternatives prior to conducting environmental review. Looking at the City's narrative and arguments, the City is telling us that it illegally locked itself into the MHA Alternative to reach the objectives stated in the FEIS before conducting any environmental review of other alternatives.

The City also failed to analyze any alternatives whatsoever (even within the MHA Alternative) that would have "a lower environmental cost or decreased level of environmental degradation." WAC 197-11-440(5)(b). The MHA FEIS assessed a no-action alternative (Alternative 1) plus three alternatives that all implemented the MHA program (Alternatives 2-4). Newman Dec., ¶ 2 (MHA FEIS, Volume 1 at 2.28 – 2.35.). Alternative 2 proposed implementing the MHA Program in the entire study area. *Id.* Alternative 3 proposed implementing MHA with distinctions for displacement risk and access to opportunity areas. *Id.* Alternative 4, the preferred alternative, is essentially a

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

combination of Alternative 2 and 3. *Id*. The variations between the alternatives are based on economic and displacement criteria – not on environmental impacts. There were absolutely no alternatives analyzed that could "feasibly attain or approximate the proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." This is a direct and clear violation of SEPA rules.

In addition, none of the alternatives in the MHA FEIS are "reasonable" because every Alternative violates the current City of Seattle Comprehensive Plan. *See* Junction Neighborhood Organization's Response to City's Motion to Dismiss, Cross-Motion for Summary Judgment, and Motions for Summary Judgment (May 1, 2018). As JuNO demonstrates in its brief, alternatives that are in direct conflict with the Comprehensive Plan cannot be reasonable alternatives.

Another failure of the MHA FEIS is its failure to analyze alternatives to proposed Comprehensive Plan Amendments that are mentioned, but not described in the MHA FEIS. *See* MHA FEIS, App. F at F-11. If Comprehensive Plan amendments are indeed part of the proposal that is being reviewed by this EIS, then, as a matter of law, the EIS' failure to include an analysis of alternative Comprehensive amendments is legal error. As is explained in detail in the Declaration of Christine M. Tobin-Presser in Support of Junction Neighborhood Organization's Response to the City's Motion to Dismiss and their own Motion for Summary Judgment, there is currently an entirely separate public process underway at this time for the Comprehensive Plan Amendments that are presumably anticipated as stated in the MHA EIS. *See* Declaration of Christine M. Tobin-Presser in Support of Junction Neighborhood Organization's Response to City's Motion to Dismiss and Motions for Summary Judgment (May 1, 2018). *See also* Junction Neighborhood Organization's Response to City's Motion to Dismiss, Cross-Motion for Summary Judgment, and Motions for Summary Judgment (May 1, 2018).

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

In that process, the City has announced to the public that there are three different alternatives (Options A, B, and C) being considered by the City for different Comprehensive Plan Amendments. As an example in the Junction neighborhood, the announcement was as follows:

> **Option A: Edit existing policy with focus on character and scale**
> ~~Preserve the~~ Promote character and scale ~~integrity~~ that is compatible ~~of~~ with Aurora-Licton's single-family housing areas within the boundaries of the Aurora-Licton urban village.
>
> **Option B: Edit existing policy with focus on location and development pattern**
> Maintain a pattern of development where new development ~~Protect the character and integrity of Aurora-Licton's single-family areas within~~ near the boundaries of the Aurora-Licton Springs Urban Village is a similar scale and density to single-family areas outside the urban village.
>
> **Option C: Replace existing policy with descriptions of housing choices and other land uses for lower-density areas of Residential Urban Villages**
> Maintain the physical character of historically lower-density areas of the urban village by encouraging housing choices such as cottages, townhouses, and low-rise apartments. Encourage primarily residential uses while allowing for small scale commercial and retail services for the urban village and surrounding area, generally at a lower scale than in Hub Urban Villages and Urban Centers.

Declaration of Christine M. Tobin-Presser in Support of Junction Neighborhood Organization's Response to City's Motion to Dismiss and Motions for Summary Judgment (May 1, 2018), Ex. UU.

These proposed alternatives are not analyzed, much less even mentioned, in the MHA EIS. For that reason, the alternatives analysis of the proposed Comprehensive Plan Amendments is not only inadequate, it is doesn't exist at all. That is clear legal error.

C. SCALE's Claims That Challenge the Discussion of Mitigation Measures in the MHA FEIS Should Not be Dismissed

As explained above, the question of whether to dismiss SCALE's issues relating to the adequacy of mitigation measures is presented by the City in the form of a 12(b)(6) motion to dismiss

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

because the City moved to dismiss for failure to state a claim and did not present any evidence to support its arguments outside of the pleadings. *See* City Motion at 11 and 24-25. Therefore, with respect to this issue, the hearing examiner must treat all allegations in SCALE's Notice of Appeal as true.

In its motion to dismiss, the City paints the patently false picture that the *sole issue* presented by SCALE in its appeal with respect to mitigation is whether the mitigation that is discussed in the FEIS is effective or not. *See* City Motion at 24-25. It is obvious, from looking at SCALE's Notice of Appeal itself (and the articulation of the issue in other appeals), that this is not the sole issue presented by SCALE with respect to mitigation. SCALE raised a many additional legal issues challenging the discussion of mitigation in the FEIS and the issue statements on those other issues are almost directly parallel to what the SEPA rules require. The City's request for a sweeping and complete dismissal of SCALES entire issue numbers 4, 6, 8, 10, 15, 25, 29, 30, and 38 in its request for relief based on the City's blatant misrepresentation of what those issue statements say is not only unfair, it is misleading and disingenuous.

The SEPA rules dictate clear legal parameters about what is required in an EIS with respect to the discussion of mitigation measures. The EIS must discuss "reasonable" mitigation measures that would significantly mitigate the environmental impacts that are identified in the FEIS. WAC 197-11-440(6). The EIS must clearly indicate mitigation measures that could be implemented or might be required for the proposal and the EIS must indicate what the intended environmental benefits of mitigation measures are for the significant impacts. *Id.* An EIS is required to include a discussion of mitigation measures. The discussion need not be as detailed as the discussion of impacts, WAC 197-11-440(6)(b)(iv), but "the intended environmental benefits" must be described, *id.* A "perfunctory description" is "inconsistent with the 'hard look'" required by law. *Neighbors of Cuddy Mountain v.*

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998). "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Id. (internal citation omitted).* Repeatedly, the courts have made clear that a "mere listing" of possible mitigation measures is "insufficient to qualify as the reasoned discussion" required by the statute. *Id. (quoting and citing cases)*.

Most of SCALE's issue statements on mitigation throughout its appeal very clearly state that the "FEIS does not adequately discuss reasonable mitigation measures that would significantly mitigate the impacts of the proposal," which is the exact opposite of the City's characterization of SCALE's claims. *See* SCALE Notice of Appeal at ¶¶ 4, 6, 8, 10, 13, 15, and 25.[2] These claims are made with respect to land use impacts, aesthetic (height/bulk/scale/view) impacts, traffic and transportation impacts, tree canopy impacts, critical area impacts, historic and cultural resources impacts, and more. *Id*. Most of SCALE's claims also state that the MHA FEIS fails to clearly indicate other reasonable mitigation measures that could be implemented to mitigate the impacts. *Id*. SCALE's issue statements also state that the MHA FEIS does not indicate what the intended environmental benefits of mitigation measures would be. *Id*. In addition, SCALE's issues statements claim that the discussion of mitigation is not adequate for each neighborhood throughout the entire study area. *Id*. Because of the enormous size of area that is affected by the proposal, the FEIS does not adequately discuss reasonable mitigation measures that would significantly mitigate the impacts for each element of the environment that are unique to each neighborhood.

The City completely ignored all of these claims in its motion and attempted to leave the impression with the Examiner that SCALE's issue statements raised only the question of whether the

[2] Curiously, the City did not move to dismiss issue number 13, which states that the FEIS does not adequately discuss reasonable mitigation measures that would significantly mitigate the air quality impacts of the proposal. *See* City Motion at 2.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

mitigation discussed in the FEIS was going to be effective or not. *See* City Motion at 24-25. With the full picture provided, there is no credible argument that SCALE has 'failed to state a claim" with respect to the failures of the discussion of mitigation in the FEIS. When you read the full issue statements described and accept those statements as true per the CR 12(b)(6) standard, they obviously assert a valid legal claim because the SEPA rules explicitly require that an FEIS (1) adequately discuss reasonable mitigation measures that would significantly mitigate the impacts of the proposal and (2) discuss what the intended environmental benefits of mitigation measures would be. WAC 197-11-440(6).

While it's technically unnecessary to go further than that, it's worth mentioning that are a multitude of facts and hypothetical situations which SCALE can prove, consistent with the Notice of Appeal, that would entitle SCALE to relief on these claims that the city did not challenge. The MHA FEIS should have discussed strengthening the Design Review process by, among other things, lowering the thresholds for projects to receive Design Review, requiring Design Review after SEPA review (instead of before), allowing more meaningful opportunities for public participation in the Design Review process, amending the Design Guidelines, and expanding the authority to the Design Review Board to attach conditions and require mitigation for certain land use and aesthetic impacts. The EIS should have also discussed amendments to the City of Seattle SEPA regulations that would expand and strengthen the requirements for disclosure and analysis of impacts and that would expand and strengthen SDCI's ability to attach conditions to site specific projects to mitigate land use impacts. The EIS also should have discussed amending the code to require that all site-specific projects that are proceeding in areas with an M, M1, or M2 suffix must be consistent with the relevant neighborhood plan.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

The evidence will show that the MHA EIS should have discussed expanding vanpool use and loosening the requirements for being able to use vanpools; barring and/or conditioning development that will cause arterials/intersections to exceed a certain minimum level of service; restricting issuance of Restricted Parking Zone permits to site specific projects that are exempt from parking because of the proximity to transit; expedited installation of mobility hubs adjacent to stations; requiring off-street parking for all new development; determining the number of required parking spaces based on an objective source, such as the number of cars per residential unit based on census data for each particular neighborhood; not extending Restricted Parking Zone permits to efficiency unit buildings, for which units are built with little or no parking ostensibly to encourage affordable car-free residential living; tightening City standards to identify minimum parking levels of service needed to avoid significant impacts to areas where parking is necessary to facilitate mobility for families, the elderly and individuals with disabilities, as well as access to small business and employment opportunities, and transit opportunities; and expanding and strengthening trip reduction requirements for site specific projects.

In addition, one of the central tenants of SCALE's appeal is that the City has utterly failed to identify basic impacts that will occur in each neighborhood for every element of the environment because the City produced a generic, broad based guess of impacts based on a generic "urban village" for the entire Citywide zoning proposal. It is impossible to have discussed reasonable mitigation for specific impacts in each neighborhood that haven't even been identified. There are additional reasonable mitigation measures that should have been discussed but that would have been revealed only after an adequate neighborhood by neighborhood review of impacts is conducted. For example, if you actually consider the historic resources in the Ravenna neighborhood (which the FEIS did not

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

adequately do), then you actually identify real impacts that will occur (which the FEIS did not do) and you can, only then, begin to discuss reasonable mitigation specific to that neighborhood.

Setting all of that aside, the City is also wrong in saying that SCALE cannot challenge the adequacy of the mitigation that is discussed in the MHA FEIS. In other words, the challenge of that single phrase and other mentions of this narrow issue in SCALE's appeal should be rejected. As mentioned above, the SEPA rules require that an FEIS **"**discuss reasonable mitigation measures that would significantly mitigate these impacts." RCW 43.21C.060 and WAC 197-11-660(1)(c) both state that SEPA mitigation measures that are applied to the project "shall be reasonable and capable of being accomplished." As mentioned above, a "perfunctory description" is "inconsistent with the 'hard look'" required by law. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Id. (internal citation omitted).*Under these rules, an FEIS cannot discuss mitigation measures that are unreasonable and that would not significantly mitigate the impacts of the proposal. Nor can the FEIS leave a false impression that certain mitigation will successfully address certain impacts so that they are no longer going to be significant.

The issues presented in SCALE's Notice of Appeal are different from the issue reviewed by the Court in which is relied on by the City for its argument. SCALE is not asking for the "level of detail" that was sought in *Solid Waste Alternatives Proponents* and *Glasser v. City of Seattle*, 139 Wn. App. 728, 162 P.3d 1134 (2007). SCALE is arguing that, despite the clear legal requirements of SEPA, the authors of the MHA FEIS erred because there was little to no discussion of the mitigation's effectiveness, expense, practicality, benefits, potential for being adopted, or any other feature in the FEIS. *See, e.g.'s,* Newman Dec, ¶ 2 (MHA FEIS at 3-311, 3-340 through 3-341). Incorrect statements in the EIS about mitigation led to incorrect and misleading conclusions. SCALE's assertion that "to

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

some degree, the mitigation proposed will not mitigate the impacts" (which must be assumed to be true) alos supports a claim that the FEIS inaccurately states that there are no significant unavoidable impacts associated with the action alternatives. Relying on project-specific mitigation, the MHA FEIS asserts that all significant impacts can be avoided. That is an inaccurate statement that can be challenged on the grounds that the mitigation is inapplicable, ineffective, and unreasonable. It is illegal for the FEIS to state that there are no significant unavoidable impacts associated with the action alternatives in terms of impacts on older and historic housing by relying on project-specific mitigation that will not address those significant impacts.

Overall, SCALE has stated valid legal claims with respect to the FEIS failure to adequately discuss reasonable mitigation with respect to each of the elements of the environment identified in the notice of appeal. Dismissal of SCALE's issues 4, 6, 8, 10, 15, 25, 29, 30, and 38 would be inappropriate.

IV. CONCLUSION

For the above-stated reasons, appellant SCALE respectfully requests that the Examiner deny the City of Seattle's Motion for Partial Dismissal.

Dated this 1st day of May, 2018.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

Claudia M. Newman, WSBA No. 24928
Attorneys for SCALE

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300