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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In re: Appeal by

**FREMONT NEIGHBORHOOD COUNCIL**

of the City of Seattle Citywide Implementation of  
Mandatory Housing Affordability (MHA) Final  
Environmental Impact Statement,

W-17-014, part of  
Hearing Examiner Consolidated File:  
**W-17-006**

**FNC RESPONSE TO CITY OF  
SEATTLE’S MOTION FOR PARTIAL  
DISMISSAL**

**I. INTRODUCTION**

FNC’s appeal is part of an effort by a number of people and groups from all over the City of Seattle (City) to obtain an accurate assessment of the impacts of the City’s proposed city-wide up zones under the “Mandatory Housing Affordability” program (MHA). The assessment is required by the State Environmental Policy Act (SEPA), RCW Chapter 43.21C. The City acknowledged that proposed zoning action is a significant action requiring preparation of an environmental impact statement (EIS). The City’s final EIS (FEIS) was published in November, 2017.

The City’s FEIS was challenged in a coordinated set of nine separate appeals. The nine appeals were quickly consolidated for pre-hearing discovery and hearing by the City Hearing Examiner with support from all nine appellants and the City.

1 The City now moves to dismiss a series of core issues in FNC’s appeal, purportedly under CR  
2 56 (summary judgement).<sup>1</sup>

3 **II. THE CITY ARGUES FOR DISMISSAL OF FNC’S INCORPORATED**  
4 **SCALE CLAIMS WITHOUT LEGAL AUTHORITY, IN A FOOTNOTE**

5 The City requests dismissal of FNC’s incorporation of claims made in the first paragraph of  
6 FNC’s statement of objections to the City’s decision:

7 A. FNC is a participant in a broad appeal of the adequacy of the final MHA EIS brought under  
8 the name of the Seattle Coalition for Affordability, Livability and Equity (SCALE). FNC  
9 incorporates the issues set forth in the timely filed Notice of Appeal by Seattle Coalition for  
10 Affordability, Livability, and Equity (SCALE). All such issues remain part of FNC’s appeal  
11 until dismissed by motion or dismissed by the Hearing Examiner.

12 This or very similar incorporation of SCALE claims language appears in six of the eight appeals  
13 consolidated with the SCALE appeal.

14 The City’s argument for dismissing FNC’s incorporation of SCLAE’s claims by reference is  
15 made and argued in two sentences in footnote 3 on page 3. The City’s bare argument—two sentences  
16 hardly rise to the level of a complete ‘motion’—rests entirely on the statement that if all non-  
17 incorporated claims are dismissed, “SCALE is the appropriate party to pursue claims.” No standard of  
18 review or further legal argument is made, and no supporting reference is made to any facts in the  
19 record or by declaration.

20 Incorporation by reference is a long established method to avoid unnecessary repetition in  
21 numerous contexts. Incorporation by reference is a basic legal principle applicable in Washington  
22 State in interpreting both wills<sup>2</sup> and contracts.<sup>3</sup>

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23 <sup>1</sup> Summary judgment is not available to the moving party unless “there is no genuine issue as to any material fact  
*and* that the moving party is entitled to a judgment as a matter of law.” (CR 56(c); emphasis added).

<sup>2</sup> *Baarslag v. Hawkins*, 12 Wn.App. 756, 531 P.2d 1283 (Div. 1 1975)

<sup>3</sup> *Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit  
Const. Co.*, 176 Wn.2d 502, 296 P.3d 821 (Wash. 2013)

1 More to the point, incorporation by reference expressly applies to complaints in superior court:

2 Incorporation by reference of another document is implicitly approved in *State v.*  
3 *Leach*, [113 Wash.2d 679, 782 P.2d 552 (1989)], where the document was attached to the  
4 complaint. The *Leach* court found the charging documents deficient only because an  
5 essential element was not included in the complaint or the attached police report.

6 The common law doctrine of incorporation by reference has general usage in civil  
7 law and is recognized in Washington. The burden of  
8 proving incorporation by reference is upon the party claiming it. *Baarslag v. Hawkins*, 12  
9 Wash.App. 756, 760, 531 P.2d 1283 (1975). **One of the indispensable elements**  
10 **of incorporation by reference arises out of common sense**, and that is the requirement  
11 that the incorporated document be described with sufficient specificity that it can be  
12 readily and accurately identified as the document intended to be incorporated. *Baarslag*,  
13 at 761, 531 P.2d 1283; 79 Am.Jur.2d Wills § 199 (1975).

14 *State v. Ferro*, 64 Wn.App. 195, 823 P.2d 526 (1992) (emphasis added)

15 In the absense of any allegations concerning facts, the applicable standard for the City’s  
16 motion to dismiss all of SCALE’s incorporated claims from FNC’s appeal is *not* CR 56, it is CR  
17 12(b)(6) that FNC has “fail[ed] to state a claim upon which relief can be granted.” Under CR 12(b)(6)  
18 an appellant states a claim upon which can be granted if any possible or hypothetical facts could be  
19 established to support the claims alleged in the appeal.<sup>4</sup> Here, the City is not alleging that all of  
20 SCALE’s claims must fail, but rather that FNC’s “incorporation of them by reference” must fail. In  
21 the absense of any legal argument or allegations of relevant fact, it is the City’s ‘motion’ that must  
22 fail.

23 Moreover, notwithstanding the consolidation, FNC’s appeal stands alone. If other parties  
decided to voluntarily dismiss, the incorporated claims in FNC’s appeal would not be dismissed with  
them. If the City’s motion were granted, it could deny FNC its right to obtain redress on the claims it  
knew were being included in the SCALE appeal—the undersigned helped to draft them—but chose  
not to repeat as its own appeal was prepared on a short deadline.


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<sup>4</sup> *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978).

1                   **III. FNC JOINS IN AND INCORPORATES BY REFERENCE WCC AND SCALE'S**  
2                   **RESPONSES TO THE CITY'S MOTION**

3                   FNC joins in and incorporates by reference the Wallingford Community Council response, and  
4                   the SCALE response, to the City's motion. The City's motion should be rejected.

5                   DATED this May Day, 2018.

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                  Toby Thaler, WSBA 8318

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1 Declaration of Service

2 Toby Thaler declares:

3 That on the 1<sup>st</sup> day of May, 2018, I delivered by email as allowed by the pre-hearing order of  
4 December 15, 2017 Appellant FNC’s Response to City of Seattle’s Motion for Partial Dismissal to  
5 counsel for the City of Seattle at the following email addresses:

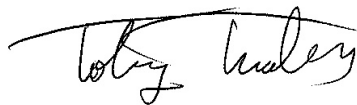
- 6 Jeff Weber < jeff.weber@seattle.gov>
- 7 Daniel B. Mitchell < daniel.mitchell@seattle.gov>
- 8 Alicia Reise <alicia.reise@seattle.gov> (courtesy copy)
- 9 Wentlandt, Geoffrey <Geoffrey.Wentlandt@seattle.gov>
- 10 Johnson <dnj@vnf.com>
- 11 Kiselius <tak@vnf.com>
- 12 PCD\_MHAEIS <MHAEIS@seattle.gov>
- 13 Park <cpark@vnf.com>
- 14 VNF LA <cat@vnf.com>
- 15 VNF LA 2 <ack@vnf.com>

16 And to Appellants:

- 17 Beacon Hill Council <mira.latoszek@gmail.com>
- 18 SCALE <newman@bnd-law.com>
- 19 Fremont NC <toby@louploup.net> [confirmation email]
- 20 Friends of North Rainier <masteinhoff@gmail.com>
- 21 Friends of Ravenna-Cowen <jebendich@comcast.net>
- 22 MOCA <djb124@earthlink.net>
- 23 SUN <booksgalore22@gmail.com>
- Wallingford CC <lee@lraaen.com>
- West Seattle Junction <rkoehler@cool-studio.net>
- West Seattle Junction Gen <admin@wsjuno.org>

18 I declare under penalty of perjury under the laws of the state of Washington that the foregoing  
19 information is true and correct.

20 DATED this 1<sup>st</sup> day of May, 2018, at Seattle, Washington.

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22 \_\_\_\_\_  
23 by Toby Thaler