BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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

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I. INTRODUCTION

With its dispositive motion (the "City's Motion"), the City seeks to focus the upcoming hearing in this appeal by eliminating six claims that are without merit on their face and to which the City is entitled to judgment as a matter of law. All nine Appellants have filed a combination of responses, joinders, cross-motions, and motions for summary judgment, some of which are accompanied by declarations. As explained in further detail below, none of the Appellants' arguments in response to the City's Motion are persuasive and they have failed to advance facts that change the legal outcome of the City's Motion. The City is entitled to judgment as a matter of law on the six issues.

Because the Appellants advance many of the same claims, the City filed a single consolidated motion to avoid confusion, to limit duplication, and for ease of the Examiner. Similarly, the City files a single, consolidated reply in support of its motion. While the City technically is entitled to additional time for its response to the Appellants' cross-motions, the City has consolidated its response to cross-motions with this reply.[1] However, the City does not in this pleading respond to Appellants' three pending motions for summary judgment.[2] The City intends to submit its response to those three motions within the timeframe anticipated by the prehearing order.

[1] Three Appellants filed cross-motions. *See* Wallingford Community Council's ("WCC") Response to Motion to Dismiss and Cross-Motion for Summary Judgment ("WCC Response and Cross-Motion") dated May 1, 2018; West Seattle Junction Neighborhood Organization's ("JuNO"): (1) Response to City's Motion to Dismiss; (2) Cross Motion for Summary Judgment As to MHA FEIS's Failure to Consider Reasonable Alternatives And Its Improper Attempts to Utilize Phased Review; and (3) Motion for Summary Judgment As to MHA EIS' Failure to Describe Inconsistencies With Comprehensive Plan and Proposed Amendments Thereto ("JuNO Response, Cross-Motion and Motion") dated May 1, 2018; Seniors United for Neighborhood's ("SUN") Response to City's Motion to Dismiss and Cross Motion for Summary Judgment ("SUN's Motion and Cross Motion"), dated May 1, 2018.

[2] To-date, two parties have filed three motions for summary judgment. JuNO and Friends of Ravenna-Cowen ("FORC") filed motions seeking judgment on their claims that the EIS is inconsistent with the Comprehensive Plan. *See* JuNO's Response, Cross-Motion and Motion; FORC's (W-17-008) Motion for Partial Summary Judgment ("FORC's Motion"), dated April 26, 2018. JuNO has also filed a motion asking for summary judgment on its claims of inadequate notice. *See* JuNO's Motion for Summary Judgment Regarding City's Failure to Provide Adequate Notice of Determination of Significance Relating to MHA EIS, dated May 1, 2018.

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II. ARGUMENT

A. The City's Motion Correctly Set Forth the Standard of Review Governing Its Dispositive Motion.

Many of the Appellants go to great lengths to define and compare standards of review for motions to dismiss under CR 12(b)(6) and motions for summary judgment pursuant to CR 56.[3] To the extent that Appellants suggest that the City's Motion did not accurately communicate these standards, Appellants are incorrect. The Hearing Examiner Rules of Practice and Procedure ("HER") are not as formal as the civil rules and do not expressly distinguish between dispositive motions pursuant to CR 12(b) or CR 56. Nevertheless, the Examiner has the authority to consider both types of dispositive motions. As stated in the City's Motion, the Examiner has the express authority to dismiss all or part of an appeal if it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is "without merit on its face," comparable to a motion under CR 12(b)(6).[4] Additionally, as noted in the City's Motion, the Examiner has the authority to grant a motion for summary judgment where "there is no genuine issue as to any material fact and… the moving party is entitled to a judgment as a matter of law."[5]

Moreover, the distinctions the Appellants try to draw out through their lengthy explanations of standards of review do not have any impact on the Examiner's resolution of the City's Motion because the City is entitled to relief under the relevant standards of review. With only one exception (described in further detail below) the City's arguments

[3] *See, e.g.,* SCALE's Response to City of Seattle's Motion for Partial Dismissal ("SCALE's Response") dated May 1, 2018, at 7-9; FORC's (W-17-008) Response to City of Seattle's Motion for Partial Dismissal ("FORC'S Response"), dated May 1, 2018, at 2-5; Morgan Community Association's ("MoCA") Response to City of Seattle's Motion for Partial Dismissal ("MoCA's Response") dated May 1, 2018, at 3-5.

[4] HER 3.02.

[5] HER 1.03 (for questions of practice and procedure not covered by the HERs, the Examiner "may look to the Superior Court Civil Rules for guidance."); CR 56(c). *See also ASARCO Inc. v. Air Quality Coalition,* 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979) (Quasi-judicial bodies like the Hearing Examiner may dispose of an issue summarily where there is no genuine issue of material fact).

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do not depend on supporting facts beyond those contained in the Appellants' notices of appeal. They are purely legal arguments about the scope of the Examiner's review and authority to address the claims raised in Appellants' issues that can be decided as a matter of law. For those issues, there are no conceivable facts in the notices of appeal that would entitle Appellants to relief.[6] These issues (or parts of issues) can be decided pursuant to HER 3.02 and, as needed, with reference to the standards governing CR 12(b)(6). As described in the City's Motion and in further detail below, the City satisfies those standards and the Examiner should dismiss because the Appellants' issues or parts of issues fail to state a claim for which the Hearing Examiner has jurisdiction to grant relief and are "without merit" on their face.[7]

The only argument for which the City has offered supporting and uncontested facts relate to the City's choice of alternatives.[8] As described below, there is no genuine issue as to any material fact relevant to that issue and the City is entitled to judgment as a matter of law." Thus, the Appellants' painstaking efforts to distinguish between motions for

[6] The Appellants have advanced as facts their subjective characterizations and opinions. *See e.g.,* SCALE Response at p. 6 (asserting as "facts" a list of subjective characterizations and accusations, including that the City "repeatedly misled Seattle residents Citywide regarding the proposed MHA rezone," that the "City had no intention of using the public's input to meaningfully shape the rezone," and alleging a "near universally critical response."); JuNO's Response, Cross-Motion, and Motion at 7 (asserting that MHA "would clearly conflict with City-adopted Neighborhood Plans" without any citation or further explanation). Where Appellants have actually cited to documentary evidence, the City encourages the Examiner to review the actual text of the supporting documentation as, in many cases it does not conform to their subjective description of those facts. Regardless of the City's concern over the Appellants' characterization of "facts," they do not change the outcome of the Examiner's determination because, even if the Examiner assumes them to be true, the City is entitled to judgment as a matter of law.

[7] FORC's assertion that a CR 56 motion typically occurs after the parties have had adequate time for discovery (FORC's Response at p. 4) is irrelevant, because the City's Motion's arguments as to FORC's appeal do not depend on supporting facts beyond FORC's notice of appeal. Moreover, written discovery is complete and FORC fails to identify any missing facts that are necessary to its opposition.

[8] Contrary to the claims of SCALE, WCC, and Beacon Hill Council of Seattle ("BHCS"), the facts are not "irrelevant." SCALE's Response at p. 5; WCC's Response and Cross-Motion at 3; BHCS's Response to Motion to Dismiss ("BHCS Response") dated May 1, 2018, at 2. As described, in section II.C, below, the facts are evidence of the City's progress towards a formal proposal which can be used to shape the alternatives for the EIS.

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summary judgment and motions to dismiss under 12(b)(6) do not affect the outcome of the Examiner's consideration of the City's Motion.

B. The City Did Not Mischaracterize the Appellants' Issues and Any Attempts By Appellants to Expand or Recast Their Issues Does Not Defeat the City's Motion and, at Best, Affects Only the Examiner's Remedy.

One Appellant accuses the City of deliberately mischaracterizing its issues or casting them in a manner inconsistent with what the Appellant intended.[9] Yet another suggests that only portions of its issues are subject to the City's Motion because the Appellants sought to advance broader issues beyond the subset that is subject to the City's Motion.[10]

To the extent there is confusion over the claims Appellants seek to advance, it stems from the way the Appellants drafted their issues. In most cases, Appellants' issues are not clear nor concise statements of legal issues that are typical in court or other administrative adjudicative proceedings,[11] Instead, Appellants have drafted lengthy narrative paragraphs that combine legal arguments with factual assertions. Indeed, one Appellant acknowledged that these issue statements even include "rhetorical statements generated by years of frustration with various city processes and inaction" that are not relevant to the issues on appeal and can be dismissed.[12] Faced with those lengthy

[9] *See, e.g.,* FORC's Response at p. 6.

[10] *See, e.g.,* SCALE's Response at p. 8. *See also* FORC's Response at p. 18.

[11] *See, e.g.*, CR 8 ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief…") (emphasis added). *See also*, WAC 461-08-350 (rules of procedure of the Shorelines Hearings Board require a petition to include "A short and plain statement showing the grounds upon which the appealing party considers such decision or permit to be unjust or unlawful" and "a clear and concise statement upon which the appealing party relies to sustain his or her grounds for appeal"); WAC 371-08-340 (rules of procedure of the Pollution Control Hearings Board similarly requires a petition to include "A short and plain statement showing the grounds upon which the appealing party considers such decision or permit to be unjust or unlawful" and "a clear and concise statement upon which the appealing party relies to sustain his or her grounds for appeal").

[12] FORC Response at p. 19.

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narrative explanations of Appellants' grievances and opinions, the City has advanced its motion to simplify and narrow the scope of the Appeal to focus the hearing and eliminate the need to spend time at hearing on issues that could be resolved on dispositive motions.

To that end, if the Examiner concludes that the City's arguments prevail, but agrees that the Appellants' issues are broader than the specific issue (or "sub-issue") that is the focus of the City's Motion, then the proper remedy is not to deny the City's Motion in its entirety. Rather, the Examiner should dismiss the specific claim that is the focus of the City's Motion. The Examiner may also strike the portions of the narrative issue statements that document those claims or grant the Appellants leave to amend their pleadings to remove those parts of the issues, as is recommended by Friends of Ravenna-Cowen.[13]

C. Appellants Have Not Demonstrated a Genuine Issue of Material Fact And the City Is Entitled to Judgment As a Matter of Law that Its Alternatives Are Not Unreasonable.

As discussed above, the City's Motion to dismiss Appellants' issues related to the adequacy of the City's alternatives analysis and range of alternatives is subject to the standard for a motion for summary judgment. Because Appellants' responses fail to raise any issue of material fact on this score, the Examiner must grant the City's Motion regarding the alternatives issues.[14]

[13] *Id*.

[14] SCALE, JuNO, SUN, and WCC presented arguments on the alternatives issue in their responses. Friends of North Rainier Neighborhood Plan ("FNR") joined SCALE's response ("FNR's Response"), and Fremont Neighborhood Council ("FNC") joined SCALE's and WCC's responses ("FNC Response"). MoCA did not present argument on the alternatives issue in its response, so the City's Motion must be granted as to MoCA for that reason.

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SUN's, WCC's, and JuNO's responses to the City's Motion contain cross motions for summary judgment on the alternatives issue.[15] This reply on the City's Motion also constitutes the City's response to those parties' cross-motions on the alternatives issue. For the same reasons that the Examiner should grant the City's Motion, the Examiner should deny those parties' cross motions. Under well-established authority, Appellants are not entitled to submit new evidence in their replies on their cross motions. Moreover, to the extent that Appellants failed to raise an issue of material fact in their responses to the City's Motion, they cannot cure that by attempting to bring in new evidence in their replies on their cross-motions.

1. SEPA expressly allows the City to limit its alternatives to those that achieve a proposal that was "formally proposed."

As set forth in the City's Motion, the City's proposal—including the key elements of a mandate to build or pay to support rent- and income-restricted housing, changes to zoning and land use to increase development capacity in conjunction with imposing that mandate, and the citywide production goal of 6,000 developer-leveraged affordable homes over ten years—was formally proposed not only by the Mayor, Office of Planning and Community Development ("OPCD"), and the HALA Advisory Committee, but also by the City Council through a series of enactments. City's Motion at 16-17. In the case of a nonproject action like this one, SEPA does not require the City to consider entirely different legislative proposals under the guise of an "alternatives analysis."

SCALE's argument that "the SEPA rules require that the City consider a broader range of alternatives for nonproject actions than for project actions" ignores the applicable law. SCALE Response at p. 13. The SEPA rules provide that "[t]he lead agency shall

[15] The fact that appellants frame their cross motions as cross motions for summary judgment belies the claim that the City's Motion on the alternatives issue should not be considered under the summary judgment standard.

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have more flexibility in preparing EIS's on nonproject proposals, because there is normally less detailed information available on their environmental impacts. . ." SMC 25.05.442.A; *see also* WAC 197-11-442(1). Contrary to SCALE's contention, nothing in the language or logic of this provision limits the referenced flexibility to discussion of impacts, as opposed to the choice of alternatives. SCALE Response at p. 13. Rather, the less detailed information typically available on the impacts of nonproject proposals strongly supports carefully tailored framing of alternatives, since overly broad alternatives will compound the problem of limited information and risk resulting in meaningless environmental review.

Moreover, SMC 25.05.442 expressly supports the City's choice of alternatives and rejects the idea that a broader range of alternatives was required based on the proposal's nonproject status or otherwise. Under SMC 25.05.442.B, ". . .agencies are encouraged to describe the proposal in terms of alternative means of accomplishing a stated objective. . ." *See also* WAC 197-11-442(2). By the terms of this provision, "proposal" and "objective" are different ways of describing the same thing, not divergent concepts. Here, the Mayor, OPCD, and City Council framed the proposal and objective through a long process culminating in a series of legislative enactments. SMC 25.05.442.B supports the City's choice of alternatives that achieve that objective.

Equally important, as explained in the City's Motion, in the nonproject context the SEPA rules expressly allow the City to limit its alternatives to those that achieve a proposal that was "formally proposed" (like the one here). SMC 25.05.442.D provides:

> The EIS's discussion of alternatives for a comprehensive plan, community plan, or other areawide zoning or for shoreline or land use plans shall be limited to a general discussion of the impacts of alternate proposals for policies contained in such plans, for land use or shoreline designations, and for implementation measures. The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures but should cover a range of such topics. *The EIS content may be*

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> *limited to a discussion of alternatives which have been formally proposed* or which are, while not formally proposed, reasonably related to the proposed plan.

Emphasis added; *see also* WAC 197-11-442(4).

Most of the Appellants ignore SMC 25.05.442.D in their response. Wallingford Community Council contends that SMC 25.05.442.D does not apply because the proposal in this case does not involve any of the specific types of enactments listed in the first sentence of SMC 25.05.442.D. WCC Response and Cross Motion at p. 8. On the contrary, the proposal here unquestionably involves area-wide zoning changes. FEIS p. 2.2.[16] The proposal also includes changes to the Comprehensive Plan (both to the future land use map and to certain policies). FEIS p. 2.2.

Moreover, any effort to circumscribe the applicability of SMC 25.05.442.D is contrary to its evident intent to apply broadly to nonproject proposals. The title of the section read "Contents of EIS on nonproject proposals," and the body of the section refers to the broad and undefined phrase "land use plans." Indeed, the Washington courts have recognized that the provision applies broadly to types of actions not specifically called out in the first sentence. *See Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 365 (1995) (characterizing zoning code text amendment as being "formally proposed" for purposes of WAC 197-11-442(4)).[17]

In sum, SEPA expressly allows the City to limit the EIS alternatives to those that achieve the proposal that was "formally proposed" by the Mayor, OPCD, and the Council. Thus, the City was entitled to choose alternatives that achieve a mandate to build or pay to

[16] As explained in the City's motion, these changes and others that increase development capacity are inextricably linked to the imposition of requirements on developers to build or contribute to affordable housing.

[17] WCC's effort to avoid the foregoing language and authority by referring to the EIS's use of the phrase "formally proposed" in an unrelated context is unavailing. WCC Response at p. 9. SMC 25.05.442.D addresses the range of alternatives in the EIS, while the language cited by WCC in the EIS refers to the process of identifying a preferred alternative between the DEIS and FEIS.

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support rent- and income-restricted housing, changes to zoning and land use to increase development capacity in conjunction with imposing that mandate, and a specific affordable housing production goal.[18]

2. Appellants fail to demonstrate that there are other reasonable alternatives that the EIS was required to review.

Appellants' contention that there are many reasonable alternatives other than those considered in the EIS is insufficient to resist the City's Motion. Even if there were other reasonable alternatives beyond those considered in the EIS, SEPA does not require that the EIS consider every conceivable alternative.[19] Fundamentally, however, Appellants cannot resist summary judgment unless they can prove that the City's failure to consider an alternative was unreasonable. In this instance, Appellants fail even to identify *some* reasonable alternative not considered in the EIS.

a. Most of Appellants' suggested "alternatives" are simply different proposals, which the EIS did not need to consider.

SCALE's notice of appeal identified certain alternatives that SCALE asserts should have been considered, which SCALE repeats in its response. SCALE Notice of Appeal at 11-12; SCALE Response at p. 12-13. However, with the exception of the last alternative mentioned by SCALE in its Response (discussed in the next subsection), these alternatives are fundamentally different from the "formally proposed" proposal. They

[18] Finally, SCALE's suggestion that the City violated WAC 197-11-070 (SMC 25.05.070) is misplaced. SCALE Response at p. 14. That section precludes an agency, prior to a FEIS, from *taking action* concerning the proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives. The issue in this appeal is whether the alternatives analysis in the EIS is legally adequate and includes a reasonable range of alternatives. The City considering in the EIS what is (in SCALE's view) an insufficient range of alternatives is not the same thing as the City taking action in violation of WAC 197-11-070. SCALE fails to explain how WAC 197-11-070 could have been violated and the Examiner lacks jurisdiction over a claim under WAC 197-11-070 in any event. The Examiner's only jurisdiction is to adjudicate the adequacy of the EIS. SMC 25.05.680.

[19] 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. SMC 25.05.440.D.2. The word "reasonable" is intended to limit the number and range of alternatives. SMC 25.05.440.D.2.a.

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might create affordable housing, but they do not combine the fundamental elements of the "formally proposed" proposal: a mandate to build or pay to support rent- and income-restricted housing imposed in conjunction with changes to zoning and land use to increase development capacity, to meet a specific affordable housing production goal. Thus, under the legal principles articulated in the preceding section, the EIS was not required to consider them.

For the same reason, WCC and SUN err in contending that the EIS was deficient because it did not consider alternatives that could achieve affordable housing, but do not involve increases in development capacity. WCC Response and Cross-Motion at p. 10 and WCC Notice of Appeal at 5; SUN Response and Cross-Motion at p. 3. Under the foregoing principles, the City was entitled to limit the EIS alternatives to those which involve imposing an affordable housing requirement in conjunction with increases in development capacity, as proposed by the Mayor, OPCD, and City Council.

SCALE attempts to avoid the foregoing legal principles by characterizing the "objectives" of the proposal as being broader than the proposal. SCALE Response at p. 12. SCALE then contends, without citation to any authority, that these broader objectives compel a broader range of alternatives. *Id.*

As a legal matter, SCALE puts more emphasis on the distinction between the proposal and its objectives than the SEPA regulations can bear. SEPA rejects the idea that there could be a fundamental divergence between the proposal and its objective (or objectives). SEPA uses the terms interchangeably in many cases. *See, e.g.*, SMC 25.05.060.C.1.b ("A proposal by a lead agency or applicant may be put forward as an objective. . ."); *see also* WAC 197-11-060(3)(a)(ii); SMC 25.05.442.B (". . . agencies are encouraged to describe the proposal in terms of alternative means of accomplishing a stated objective. . ."); *see also* WAC 197-11-442(2).

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Equally important, SCALE's characterization of the EIS's "objectives" as being materially different, and broader, than the proposal is incorrect. The key concepts of using a mandate on developers, in conjunction with increasing development capacity, in order to achieve a specified production goal for affordable units are clearly reflected in the EIS's objectives.[20] Appellants' suggestion that the "objectives" are "broader" appears to reflect the (incorrect) belief that the City's *only* objective is to increase affordable housing.[21] In so doing, Appellants ask the Examiner to take one component of the objective listed in the EIS (increase affordable housing) and give it preeminent importance, while ignoring the other elements of the objective described in the EIS.

Ultimately, SCALE's emphasis on the objectives in the EIS is unavailing because, while some of the alternatives SCALE posits in its notice of appeal would achieve some of the EIS objectives, SCALE presents no evidence that any of its alternatives would achieve all of the EIS objectives—including *both* the objective to increase overall production of housing *and* the objective to leverage development to create at least 6,200 new rent- and income-restricted housing units in the study area. Thus, the posited alternatives are not "reasonable" alternatives that the City could have been obligated to consider.

Similarly, JuNO errs in contending that the EIS alternatives are not reasonable because they all involve extensive rezoning (and thus are not meaningfully distinct given the EIS's allegedly broader objectives). JuNO Response, Cross-Motion and Motion at p. 21. This argument ignores the fact that extensive rezoning is an inherent element of the

[20] *See* FEIS, p. 2.4, Declaration of Jeff Weber, ¶ 2 (including objectives to "increase overall production of housing to help meet current and projected high demand" and "leverage development to create at least 6,200 new rent- and income-restricted housing units" in the study area over 20 years).

[21] SCALE Response at p. 12 (asserting that other alternatives "could generate more affordable housing"); WCC Response and Cross-Motion at p. 10 ("The stated objective of the EIS is affordable housing.").

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"formally proposed" proposal.[22] Equally important, JuNO fails to identify any different alternative that would achieve all of the EIS objectives—including creating at least 6,200 new rent- and income-restricted housing units in the study area.[23]

Additionally, the alternatives posited by WCC and SUN in their responses constitute different proposals and also fail to achieve all of the EIS objectives. Both WCC and SUN present a report entitled "Solutions to Seattle's Housing Emergency." WCC Response and Cross-Motion at p. 11 and Declaration of G. Lee Raaen, Exhibit D; SUN Response and Cross-Motion at p. 4 and Exhibit A. The report addresses many strategies for financing additional affordable housing and for addressing affordability issues generally. However, as noted above, simply creating affordable housing is not the sole focus of the "formally proposed" proposal nor is it the only objective stated in the EIS.

Ultimately, the report simply confirms the impracticality of Appellants' approach. An EIS evaluating even a fraction of the "alternatives" purportedly contained in this report would be extremely cumbersome to prepare and so broad and vague as to be useless as a tool for environmental review. The Examiner should reject the Appellants' theory because the standard they advance would be unworkable. If the Examiner were to conclude that the "objective" for a legislative proposal must be as abstract as Appellants assert and that the alternatives considered must include multiple and varying legislative proposals to achieve that abstract goal, the task of environmental review would be

[22] *See* HALA Report at 15 (referencing "extensive citywide upzoning of residential and commercial zones" matched with affordable housing mandate), Declaration of Jeffrey S. Weber in Support of the City of Seattle's Motion for Partial Dismissal ("Weber Decl."), Exhibit B; *see also* Resolution 31612, Section 1 and Attachment A (showing area where Council proposes to implement mandatory program), Weber Decl., Exhibit F.

[23] JuNO mischaracterizes a number of cases cited by the City. JuNO Response, Cross-Motion and Motion at pp. 21-22. *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 73 (2011), supports the Examiner deferring to the City's policy choice in framing its objective as embodied in the "formally proposed" proposal. That objective includes broad rezones across the study area. *League of Wilderness Defenders -Blue Mountains Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060, 1070 (2012), illustrates the agency's ability to frame the objective through legislative enactments like those of the Council here.

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impossibly broad. SEPA does not require that result and allows the City to define a more directed legislative objective.

b. Even as to suggested alternatives that are variations of the proposal, Appellants fail to create an issue of fact that the alternatives are reasonable.

In addition to the above-described allegation that the City should have considered completely different proposals in the EIS, SCALE and SUN also alleged in their notices of appeal that the City should have considered phasing in of density increases or curtailing upzones. SCALE Notice of Appeal at 12; SUN Notice of Appeal at 42. In its motion, the City pointed out that there was no evidence that either approach would attain the EIS's objective of creating 6,200 affordable units in the study area over 20 years. City's Motion at 21. Neither SCALE nor SUN presented any such evidence in their responses, so they have failed to create an issue of fact that their suggested alternatives are reasonable.

In its response, JuNO contends that the EIS should have considered less intense development capacity increases, which JuNO alleges would not significantly reduce the amount of affordable housing generated. JuNO Response, Cross-Motion and Motion at pp. 22-23. However, the evidence presented by JuNO (an email from a City Council staff member) on its face demonstrates that the suggested alternative would *not* attain the EIS's objective of creating at least 6,200 new rent- and income-restricted units in the study area. Declaration of Christine M. Tobin Presser, ¶ 60.[24] The 6,200-unit goal for the study area is over twenty years and corresponds to the citywide goal of 6,000 units over ten years. FEIS, p. 2.18. The email states that the suggested lower intensity of development capacity increase would result in missing the citywide 6,000-unit goal by hundreds of units.

[24] JuNO's response states that the email is at Exhibit E to the Tobin-Presser declaration. JuNO Response and Cross-Motion at p. 23, lines 1-4. That declaration actually lists the email as being Exhibit EEE to the declaration. Tobin-Presser Declaration, ¶ 60. In fact, the pertinent exhibit is labelled Exhibit EE, but appears in the declaration's exhibits immediately prior to Exhibit FFF.

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For all of the foregoing reasons, Appellants fail to create an issue of fact that there are other reasonable alternatives that the EIS was required to consider.

3. The EIS unquestionably includes alternatives that could feasibly attain the proposal's objectives, but at a lower environmental cost.

Appellants err in contending that the alternatives considered in the EIS are not reasonable because they do not vary sufficiently in terms of their impacts. SCALE Response at p. 14-15; SUN Response and Cross-Motion at p. 3. Under the SEPA rules, "[r]easonable 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*." SMC 25.05.440.D.2 (emphasis added);); *see also* WAC 197-11-440(5)(b). Washington courts have interpreted the foregoing provision to require that alternatives present greater impacts in some impact areas, and fewer impacts in other impact areas. *King County v. Central Puget Sound Growth Management Hearings Board*, 138 Wash.2d 161, 185 (1999).

On its face, the EIS meets this standard. The EIS action alternatives differ in the intensity and location of development capacity increases and the patterns and amounts of housing growth across the city that could result. FEIS, p. 2.15. The EIS extensively discloses that, because the alternatives differ in this manner, the alternatives have different impacts in different geographical areas with respect to many types of environmental impacts evaluated in the EIS. For example:

- The different land use impacts that the alternatives would have in particular areas are described at pages 3.121-3.128 of the FEIS for alternative 2; pages 3.131-3.140 for alternative 3; and pages 3.142-3.154 for the preferred alternative.

- Similarly, with respect to aesthetics, the maps at exhibits 3.3-23, 3.3-25, and 3.3-27 display the varied distributions of the (M), (M1) and (M2) zone changes in

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locations across the city, wherein the darker shades of red are the areas where greater aesthetic impacts would occur. The aesthetic impacts of increases to allowed building height limits are also identified with specific maps at exhibits 3.3-24, 3.3-26, and 3.3-28. Here again, the darker shades of red are the areas where more severe aesthetic impacts would be likely to occur. Both sets of maps are different for Alternative 2, 3 and Preferred.

- With respect to environmentally critical areas, the alternatives differ as to the acreage of ECA area that would be impacted by inclusion in urban village expansions. *See* FEIS Exhibit 3.6-1 Alt. 2; Exhibit 3.6-7 Alt. 3; and Exhibit 3.6-13 Preferred. Text at pages 3.325, 3.330, 3.336 discuss the different degrees of impacts on ECAs under each alternative.

- With respect to open space and recreation, text on pages 3.353 (Alt 2), 3.354 (Alternative 3); and 3.355 (Preferred Alternative), summarize the specific urban villages where open space impacts would be greater or lesser relative to the other action alternatives.[25]

The foregoing references to the EIS conclusively rebut SCALE's one-sentence contention that "[t]he variations between the alternatives are based on economic and displacement criteria – not on environmental impacts." SCALE Response at p. 15. They also dispose of SUN's argument, which is based on the sole allegation that the action alternatives allegedly vary little in the number of total housing units and affordable units built.[26] There is no issue of fact that the EIS includes alternatives that could feasibly attain the proposal's objectives, but at a lower environmental cost.

[25] These are only some of the examples of differing impacts in the case of the action alternatives.

[26] SUN Response and Cross-Motion at p. 3. With respect to SUN's allegation, while it is true that the capacity for housing growth between the action alternatives is similar as is the number of new affordable housing units, there are significant differences in the distribution of housing and affordable units between

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4. Appellants err in contending that the EIS alternatives are not reasonable because of alleged inconsistency with the Comprehensive Plan.

JuNO's argument that the EIS alternatives are not reasonable because they are inconsistent with the Comprehensive Plan lacks any legal basis. JuNO Response, Cross-Motion and Motion at p. 19; *see also* SCALE Response at p. 15 (incorporating JuNO's argument). JuNO contends that each action alternative is inconsistent with neighborhood plan policies regarding retaining single family zoning in urban villages and that no amendments to fix the inconsistencies have been docketed or been the subject of "neighborhood community planning." *Id.*

The EIS acknowledges that the proposed rezones of single-family-zoned areas in urban villages may be inconsistent with certain neighborhood plan policies:

> "Several policies in individual urban villages contained in the Neighborhood Plan policies section of the Comprehensive Plan may conflict with elements of the proposed action concerning changes to single family zones within urban villages. Amendments to these policies ~~will be~~ are docketed and the policies would be modified to remove potential inconsistencies. The potential impacts of these policy amendments is considered in this EIS."

FEIS, p. F.11 (underline/strikeout in original).

Modifying these neighborhood plan policies is specifically included as part of the proposal. FEIS, p. 2.2. The need for a comprehensive plan amendment cannot render an alternative unreasonable when such an amendment is part of the proposal and the EIS evaluates the impacts of the proposal including the proposed amendment. The fact that the amendment has not yet occurred is irrelevant. An alternative may be included in an EIS even if its legal status is contested; for an alternative to be considered it need not be certain or uncontested, but only reasonable. *King County v. Central Puget Sound Growth*

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different categories of urban villages. FEIS, pp. 3.84, 3.87, 3.89; exhibit 3.1-39, p. 3.67. However, it is not necessary to further parse this issue given all of the variations in impacts of other types described above.

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Management Hearings Board, 138 Wash.2d at184 ("King County"). If the City, following environmental review, took action to adopt a development regulation that was inconsistent with the Comprehensive Plan, challengers would have recourse with the appropriate body with jurisdiction (the Growth Management Hearings Board).

Similarly, JuNO's assertion that the City will violate unspecified requirements for "neighborhood community planning" in adopting amendments to the policies in question (after environmental review) is also premature and outside the Examiner's jurisdiction.[27] Whether the City follows proper non-SEPA processes has nothing to do with whether the City may include a comprehensive plan amendment in an EIS proposal, nor does the potential for defective process render unreasonable EIS alternatives that include such an amendment.

The inclusion of specific amendatory language in the EIS is also irrelevant. There is sufficient information in the EIS to understand the nature of the proposed amendments—e.g., to allow rezoning of single-family-zoned areas in urban villages to a more intensive zoning classification—as well as the particular zoning changes that are proposed based on the amendments. The EIS contains maps that show, for each action alternative and each urban village, the proposed urban village expansions as well as the proposed new zoning designations for single-family-zoned areas that are proposed to be rezoned (both within existing urban villages and within urban village expansion areas). FEIS, Appendix H. The EIS evaluates the impacts of all of the alternatives.

Finally, SCALE errs in contending that the EIS is inadequate due to its alleged "failure to analyze alternatives to" the proposed amendments to the Neighborhood Plan policies. SCALE Response at p. 15. Nothing in SEPA calls for an EIS to consider

[27] The City does not concede that it has violated, or will violate, any applicable procedural requirement for amendments to the Comprehensive Plan.

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alternatives to each specific type of enactment that is part of the proposed action, as opposed to alternatives to the proposal as a whole. The FEIS acknowledges that amendments may be needed because the proposal includes rezoning of single family areas, the proposal includes such amendments, and the FEIS considers and evaluates the impacts of alternatives to the proposal. Appellants fail to demonstrate that the EIS alternatives are unreasonable in this situation.

In sum, the Examiner must reject Appellants' contention that the EIS alternatives are not reasonable because of alleged inconsistency with the Comprehensive Plan.[28]

D. <u>The City's DNS for a Different Proposal is Irrelevant to this Hearing and the Examiner Lacks Jurisdiction to Address Any Arguments or Claims About that Environmental Review</u>.

There is no dispute between WCC and the City that a DNS the City issued in 2015 is for a different proposal. Nor is there any dispute that the City did not rely on that prior DNS to fulfill any of its responsibilities to conduct its environmental review for the instant proposal.[29] In its four sentence response on this issue, the only legal argument WCC advances related to those undisputed facts is to challenge the City's compliance with SEPA for that prior proposal.[30] While the City could present legal argument and evidence demonstrating that its environmental review of its past actions was proper, that basic legal question is outside the scope of the Examiner's jurisdiction in this appeal of the MHA EIS. Moreover, any SEPA appeal of those past ordinances is untimely. WCC has offered no facts, conceivable or otherwise, that would give the Examiner the jurisdiction to

[28] Neither of the cases cited by JuNO (Response, Cross-Motion, and Motion at p. 19) stand for the proposition that an alternative must be consistent with the Comprehensive Plan in order to be included in an EIS, and that proposition is belied by *King County*, *infra*.

[29] WCC Response and Cross-Motion at p. 12.

[30] *Id*. ("Since the City now admits that the DNS does not constitute environmental review for MHA and there was no other environmental review for the MHA Framework Legislation, how does the City contend that the adoption of the framework complied with SEPA?")

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address its SEPA challenge of a prior City action. The Examiner should dismiss WCC's claim.

E. The Appellants' Arguments Regarding Consistency with the City's Comprehensive Plan are Without Merit on Their Face.

As explained in the City's Motion, the Examiner should dismiss Appellant's claims that the EIS is inadequate because of purported inconsistencies with the City's Comprehensive Plan. Appellant's claim is without merit on its face because Appellant relies on the mistaken legal presumption that past Comprehensive Plan decisions bind or preclude Comprehensive Plan amendments here. As explained in the City's Motion, the law expressly allows the City to amend existing comprehensive plans.[31]

FORC argues vehemently in its Response that the City "deliberately mischaracterized" the issue, and suggests that its claim regarding the Comprehensive Plan is merely an "allegation of fact."[32] Yet, FORC's allegation that the City mischaracterizes its claim is directly contradicted by its separate motion for summary judgment (and that of JuNO),[33] the entire premise of which is based on FORC's legal argument that the purported "inconsistency" between the FEIS and the Comprehensive Plan is, itself, an "impact" under SEPA:

> The MHA FEIS (alternatives 2, 3 or "Preferred"), which proposes to expand the Roosevelt Urban Village boundaries east of 15th Ave., NE, is thus, inconsistent with the 2035 Comprehensive Plan and with its legislative history.
>
> The MHA FEIS does not address the 2035 Comprehensive Plan, identify inconsistencies with the Plan, does not identify impacts of the MHA FEIS proposals to the Plan… The failure to address the impacts and

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

[32] FORC Response at p. 6-7.

[33] As explained above, the City intends to file separate responses to FORC's and JuNO's Motions for Summary Judgment.

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> inconsistencies between the EIS and the 2035 Comprehensive Plan is a major deficiency.[34]

The cornerstone to FORC's and JuNO's arguments is that the Comprehensive Plan and its "legislative history" are, themselves, an element of the environment such that the policy choices documented in the plan must be protected from impacts by subsequent changes in policy direction. This assumption is fundamentally legally flawed. It would give a permanence and protection to those earlier policy documents that is inconsistent with the law that expressly authorizes subsequent amendment. While Appellants might conceivably assert that the EIS's analysis of the land use impacts of the proposal was inadequate, they cannot sustain that assertion exclusively on the purported inconsistencies between the MHA EIS and the Comprehensive Plan as they have sought to do here. The measure of a proposal's impacts on land use cannot be proven merely by showing a change to a prior land use document. Yet, that is exactly what Appellants seek to do with their claim. As a matter of law, Appellants' claim must be dismissed.

As will be explained in the City's Response to FORC's and JuNO's motions for Summary Judgment on this issue, the City contests Appellants' characterization of the facts pertaining to the City's purported decisions during the adoption of the Comprehensive Plan and their alleged inconsistency with the instant proposal.[35]

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[34] FORC Motion for Summary Judgment at p. 12 (emphasis added).

[35] The City's Comprehensive Plan (with which Appellant's claims the EIS is inconsistent) expressly invites amendments like those that are the subject of the EIS relating to housing affordability. *See* Weber Dec., Exh. J. For example, the Comprehensive Plan notes that Seattle is in the midst of a housing affordability crisis, references HALA as "a road map to build or preserve fifty thousand housing units over the next ten years,"[35] and explicitly anticipates future amendments to address the issue. *Id.* (Comprehensive Plan, p. 100 ("As housing development continues, the City will promote policies that limit displacement, stabilize marginalized populations in their communities, and encourage a net increase in affordable housing over time."). Also, as will be noted in the City's response to FORC and JuNO's motions, the City disputes Appellants' characterization of what the City considered and purportedly "rejected" in the context of the Comprehensive Plan update process. However, for purposes of deciding the City's dispositive motion on this issue. Appellants are given the benefit of their characterization of the underlying facts. As described in this section, even with the benefit of that assumption, the City is entitled to judgment as a matter of law because the Appellants rely on a fundamentally flawed legal theory.

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Nevertheless, the Examiner need not weigh disputed evidence over purported inconsistencies (or spend limited hearing time listening to testimony about the legislative history of the Comprehensive Plan) because Appellants' fundamental legal claim is without merit on its face.

F. <u>The Adequacy of Mitigation Measures is Not Relevant in this Appeal</u>.

The City's Motion sought to dismiss the portions of Appellants' appeals that allege that the FEIS is required to analyze or demonstrate the adequacy or efficacy of mitigation measures.[36] As discussed in the Motion, such issues are distinct from issues challenging to the adequacy of the FEIS's discussion of mitigation measures, and are not within the Examiner's jurisdiction in this appeal. Because SEPA "does not demand a particular substantive result,"[37] the courts and the Examiner have ruled that challenges to the adequacy or efficacy of proposed mitigation are substantive SEPA issues beyond the scope of an EIS adequacy challenge.[38]

Appellants' Responses confirm that the Appellants are attempting to hold the FEIS to incorrect standards. BHCS asserts, without citation to authority, "An EIS should provide . . . confirmation that such impacts have been avoided, minimized, or otherwise mitigated[.]"[39] SCALE asserts that RCW 43.21C.060 and WAC 197-11-660(1)(c) support

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[36] FORC dedicates a substantial portion of its Response on this issue asserting that the FEIS failed to adequately discuss historic resources and potential impacts to those resources, based on the City's alleged failure to consider existing historic inventories and surveys. *See* FORC's Response at p. 12-18. This argument is not responsive to the City's motion, which sought dismissal of issues relating to the adequacy and efficacy of mitigation measures, including mitigation measures for impacts to historic resources. The City's motion did not seek to dismiss the entirety of the Appellants' challenge to the adequacy of the FEIS's analysis of potential historic resource impacts. The purely legal question before the Examiner pertains to the extent to which the City must prove the adequacy of mitigation identified in the EIS. FORC's response is not presented as a cross-motion, and therefore arguments that are not responsive to the City's Motion need not be addressed.

[37] *Glasser v. City of Seattle*, 139 Wn. App. 728, 742, 162 P.3d 1134 (2007)

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

[39] BHCS's Response at p. 4.

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requiring that the FEIS demonstrate the efficacy of mitigation measures.[40] But RCW 43.21C.060[41] and WAC 197-11-660[42] are substantive SEPA provisions authorizing agencies to condition or deny proposals, and requiring that agencies impose "mitigation measures [that] shall be reasonable and capable of being accomplished." While FORC concedes that "the City's intent to enact any of the mitigating factors it lists is irrelevant to the EIS,"[43] SCALE maintains that the FEIS must discuss the "potential for [mitigation measures] being adopted," along with the "effectiveness, expense, practicality, [and] benefits."[44] To avoid continuing confusion at hearing about what is required in an FEIS's discussion of mitigation, the City respectfully requests that the Examiner rule that all substantive SEPA issues in the various appeals be dismissed.

SCALE spends most of its response defending its right to challenge the adequacy of the FEIS's discussion of mitigation. SCALE's assertion that the Motion broadly sought to dismiss issues challenging the adequacy of the FEIS's discussion of mitigation is incorrect. The Motion expressly distinguished challenges to the adequacy or efficacy of mitigation measures, which are beyond the scope of this appeal, from challenges to the adequacy of the FEIS's discussion of mitigation, which are issues properly before the Examiner.[45] The Motion did not seek dismissal of the latter category of issues.

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[40] SCALE's Response at p. 21.

[41] RCW 43.21C.060 (titled "Chapter supplementary—Conditioning or denial of government action") states, "Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, ... Mitigation measures shall be reasonable and capable of being accomplished."

[42] WAC 197-11-660 (titled "Substantive authority and mitigation") states, "Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations: . . . (c) Mitigation measures shall be reasonable and capable of being accomplished."

[43] FORC's Response at p. 19.

[44] SCALE's Response at p. 21.

[45] City's Motion at p. 24.

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To further clarify which issues the Motion sought to dismiss, the Motion identified some of the language in the various Notices of Appeal that appear subject to dismissal.[46] However, parsing which portions of Appellants' Notices of Appeal are subject to dismissal is not a straightforward task, and it is not the City's responsibility to clarify the Appellants' appeals. As an example, SCALE's statement of issues contains 43 paragraphs (not including subparagraphs), many of which are more than ten lines long, and each asserting multiple issues or multiple variants of issues.[47] FORC's Response confirms that the Appellants' issue statements may contain multiple "issues" in the various sentences of each paragraph, inviting a line-by-line analysis that is inconsistent with the "short" and "concise" issues typically required.[48] Should the Examiner grant the City's Motion, but seek to preserve the Appellants' ability to argue claims related to the adequacy of the discussion of mitigation, then the proper remedy is to order that the specific claim that is the focus of the City's Motion is dismissed and either strike the portions of the narrative issue statements that document those claims or grant the Appellants leave to amend their pleadings to remove those parts of the issues, as described in section C, above.

G. The FEIS Need Not Address Impacts That Are Not Attributable to the Proposed Action.

The Motion sought dismissal of claims that, by the plain language of the Notices of Appeal, sought to require the City to analyze and mitigate impacts from existing conditions as opposed to impacts reasonably attributable to the proposed action. MoCA's appeal states, in relevant part,

> During the DEIS, MoCA commented that it failed to address Washington State Ferry (WSF) related impacts on the existing transportation grid of the

[46] City's Motion at p. 24, n. 90.
[47] *Cf.* CR 8(e)(1) ("Each averment of a pleading shall be simple, concise, and direct.").
[48] FORC's Response at p. 19-20.

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> Morgan Junction Urban Village as well as the West Seattle Junction Triangle Urban Village. . . .[49]

Similarly, BHCS's appeal states, in part,

> . . . Beacon Hill is surrounded by air and noise pollution vehicular sources such as I-90 (120,000 vehicles a day), I-5 (200,000 vehicles a day), Rainier Avenue and Dr. Martin Luther King Way and overhead from airplanes flying in and out of Sea-Tac Airport, King County International and Boeing Airfield. Seattle is #10 in traffic congestion in the USA and #20 in the world and more people are moving to Seattle.[50]

MoCA's Response fails to demonstrate how ferry-related impacts are attributable to the MHA proposal. MoCA does not appear to allege (and provides no support for) a claim that the MHA proposal will increase ferry-related traffic; rather, the Response alleges that increasing density within the urban village, combined with existing ferry traffic volumes, will result in increased pedestrian and vehicle traffic. As explained in the Motion, to the extent data were available, the FEIS accounts for existing conditions as part of the baseline. However, absent the mere allegation that the proposal itself is reasonably likely to cause a change to the baseline, existing conditions cannot be considered an impact of the proposal,[51] and an EIS need not propose mitigation for baseline conditions.[52] MoCA's Response fails to even allege the necessary causality link between the proposed action and existing ferry traffic conditions. MoCA has failed to allege that its issues relating to ferry travel are related to the proposal and should be dismissed.

BHCS's Notice of Appeal and Response suffer from the same flaw. BHCS makes no attempt to show that the MHA proposal, itself, will cause noise or air pollution impacts that are the subject of its notice of appeal. Indeed, its Response concedes that such

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[49] Notice of Appeal, W-17-007, at p. 4 (¶ 6 of 6).

[50] Notice of Appeal, W-17-012, at p. 4.

[51] *See Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 277, 552 P.2d 674, 680 (1976) (defining significance by an action's effects in excess of those created by existing uses).

[52] WAC 197-11-768 (defining mitigation as actions to avoid or reduce impacts, as opposed to mitigation of existing conditions).

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conditions are "existing conditions."[53] BHCS responds by characterizing the impacts as secondary or cumulative, but fails to address the fact that all impacts, whether direct, indirect, or cumulative, require a showing of causality by the proposed action.[54] Therefore, BHCS's issues relating to noise and air pollution impacts should be dismissed.[55]

H. The FEIS Complies With the Requirements for Phased Review Under SEPA.

To apply phased review, SEPA only requires that (1) the sequence is from a document that is broader in scope to a document of narrower scope,[56] and (2) the agency must disclose that it is using phased review and must use existing environmental documents as appropriate.[57] The City is entitled to judgment as a matter of law, because, as indicated in its motion, both prongs are met and neither JuNO nor FNC assert any legitimate substantive error resulting from the purportedly improper reliance on phased review.[58]

As a preliminary matter, FNC makes no argument in its Response in defense of its claims relating to phased review and does not incorporate JuNO's arguments related to phased review. FNC has therefore failed to respond to the City's Motion. These issues should be dismissed from its appeal.

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[53] BHCS's Response at p. 5.

[54] WAC 197-11-752 (defining impacts as "the effects or consequences of actions").

[55] BHCS's Response also appeared to argue that the FEIS failed to perform an adequate analysis of existing conditions with respect to noise and air pollution. BHCS's Response at p. 4. However, this argument is non-responsive to the Motion, which did not make any argument about the adequacy of analysis of existing conditions and solely argued that noise and air pollution impacts that are the subject of BCHS's notice of appeal are not attributable to the proposal. Motion at pp. 26-27. BHCS's Response is styled as a response and not a cross-motion, and therefore arguments that are not responsive to the Motion need not be addressed.

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

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

[58] On page 3 of its Motion, the City attributed phased review issues to WCC and FNC; in fact, as set forth later in the City's Motion, the City seeks to dismiss the phased review issues raised by FNC and JuNO.

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For its part, JuNO styles its response on this issue as a cross-motion for summary judgment.[59] However its arguments are unavailing and the Examiner should deny its cross-motion and grant the City's Motion. JuNO does not dispute that the second prong of phased review has been met, but argues that the City's review did not comply with the first prong because it purportedly moves from a narrow environmental review document to a broad environmental review document. JuNO's arguments defy logic. The 2035 Comprehensive Plan is undoubtedly the broader action. A comprehensive plan addresses a wide range of planning topics and serves as a blueprint or guide[60] to uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, groundwater protection, transportation,[61] and potentially many other elements of land use and planning.[62] Comprehensive plans provide "broad policy benchmarks," not specific implementation measures.[63] By contrast, the proposal at issue in the FEIS will address a subset of topics in the comprehensive plan related to housing. Moreover, the proposed action evaluated in this FEIS is a specific policy proposal that seeks to address a general and broad policy target for subsequent action to address housing affordability that was identified in the 2035 Comprehensive Plan.[64] Specifically, the 2035 Comprehensive Plan's Final EIS identified a significant unavoidable adverse housing impact, stating that Seattle would continue to face a housing affordability challenge under all of the growth alternatives studied. The proposed action at issue in the FEIS is but one specific policy proposal the City is studying to partially mitigate the broader housing affordability

[59] JuNO's Response, Cross-Motion and Motion at p. 24-26.
[60] *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wash. 2d 421, 256 P.3d 295 (2011).
[61] RCW 36.70.330.
[62] RCW 36.70.350.
[63] *Sammamish Cmty. Council v. City of Bellevue*, 108 Wn. App. 46, 56, 29 P.3d 728, 733 (2001).
[64] *See* Motion at pp. 27-28.

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challenge identified in the comprehensive plan.[65] Thus, the use of phased review is proper because the sequence is from a document that is broader in scope to a document of narrower scope.

JuNO appears to argue the City's review improperly moves from narrow to broad solely because the proposed action is purportedly inconsistent with the Comprehensive Plan or otherwise anticipates amendments to the Comprehensive Plan, characterizing the amendments as "retroactively narrow[ing] the broader policy document."[66] However, amending some Comprehensive Plan policies directly related to the MHA proposal to achieve directives identified in the Comprehensive Plan does not equate to moving from the narrower MHA proposal back to the entire, broader Comprehensive Plan. JuNO's argument again appears to rest on the incorrect premise that all Comprehensive Plan policies are binding and are "issues already decided."[67] As discussed in section F above, those claims are without merit.

JuNO also cites no legal authority supporting its premise that changes to the prior phased action render the use of phased review improper, or renders an EIS illegal or inadequate. JuNO's argument misses the distinction between the prior phased action and the environmental review supporting that prior action. The environmental review for the 2035 Comprehensive Plan was necessarily broader than the action taken as documented in the Comprehensive Plan itself. The EIS examined alternatives, issues, and data that are not in the Comprehensive Plan. Phased review allows the City to rely on all aspects of the prior environmental review,[68] regardless of whether those aspects were part of or consistent with the final Comprehensive Plan.

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[65] FEIS at 1.3 – 1.4.
[66] JuNO's Response, Cross-Motion and Response at p. 25.
[67] *Id.* at p. 24.
[68] WAC 197-11-060(5)(f).

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Moreover, JuNO cites no facts showing that the FEIS is inconsistent with the prior environmental review for the 2035 Comprehensive Plan, or showing any other defect in the FEIS's environmental review resulting from the allegedly improper use of the phased review process. JuNO's only factual assertion is that the proposed action is inconsistent with Comprehensive Plan policies, not the environmental review of the adoption of the comprehensive plan. Even applying the CR 12(b)(6) standard and assuming that assertion to be true, the assertion is irrelevant because SEPA does not require that all phased actions be wholly consistent. Applying the CR 56 standard to its cross-motion, by failing to establish a defect in the environmental review, JuNO has failed to meet its burden of establishing the elements necessary to entitle it judgment as a matter of law.

Finally, as a practical matter, JuNO's failure to assert a substantive defect that resulted from the phased review renders the issue irrelevant. Even its underlying claims about alleged inconsistencies with the Comprehensive Plan are not alleged to result from the use of Phased Review. Even if JuNO can establish a procedural error from the use of phased review (it has not), JuNO has demonstrated no substantive consequence. Where procedural errors are harmless and of no consequence, they must be disregarded.[69] JuNO's arguments over use of phased review are noise to try to improve a meritless claim related to alleged inconsistency with the Comprehensive Plan. JuNO styled its response as a cross-motion for summary judgment yet has failed to provide any legal or factual support for this issue. Its response confirms that there are no genuine material factual disputes, and the issue should be dismissed.

[69] *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 54, 52 P.3d 522, 531 (2002), as amended on denial of reconsideration (Sept. 25, 2002)

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I. If the Examiner Dismisses FNC's Discrete Issues, FNC May Proceed as a Member of SCALE, but Should Be Dismissed as an Independent Party from This Case.

If the Examiner grants the City's Motion on the City's use of phased review and the range of alternatives presented in FNC's appeal, then no independent issues remain in FNC's appeal. If FNC has no remaining independent issues, it should be dismissed as an Appellant. Although its Response claims a right to remain as an Appellant,[70] its Response fails to acknowledge that FNC is a member of SCALE, the Appellant whose claims FNC has incorporated by reference in its Notice of Appeal. Per SCALE's Notice of Appeal, SCALE represents the interests of FNC.[71] Associations are generally presumed to be able to represent adequately the interests of all their injured members.[72] FNC does not dispute that SCALE represents its interests; has not made any showing of an individualized interest or injury warranting its status as an Appellant independent of SCALE's representation; and, if its independent issues are dismissed, has not made any showing of what evidence it would present that would not be duplicative of SCALE's presentation on SCALE's legal issues that FNC has incorporated. FNC's desire to have its own voice is not sufficient when it is already represented by an Appellant and any of its independent issues are dismissed.

That incorporation by reference is a recognized principle in interpreting wills and contracts, as the Response asserts,[73] has no relevance to FNC's right to remain as an Appellant. The Response's reliance on *State v. Ferro*, 64 Wn. App. 195, 823 P.2d 526 (1992) is also unavailing. *State v. Ferro* was a criminal case addressing the sufficiency of

[70] FNC's Response at p. 3.

[71] Notice of Appeal, W-17-101, at p. 1.

[72] *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 290 (1986) (noting that the doctrine of associational standing is based on the judicial policy of permitting an association to vindicate the interests of all of its members in a single case).

[73] *See* FNC's Response at p. 2.

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the charging document and recognizing that a charging document may incorporate another document by reference. *State v. Ferro* had nothing to do with a party's right to remain in an action when that party is already represented by another entity participating in the same litigation and the party has no independent issues. In light of the lack of factual or legal support for its standalone appeal, FNC's appeal should be dismissed.

III. CONCLUSION

For the foregoing reasons, the City requests that the Examiner dismiss the issues the City has challenged in its motions and deny the Appellants' cross-motions. Further, the City requests that the Examiner dismiss Appellants Wallingford Community Council and Fremont Neighborhood Council.

DATED this 8th day of May, 2018.

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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: **WALLINGFORD COMMUNITY COUCIL, 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 CERTIFICATE OF SERVICE

I, Amanda Kleiss, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a legal assistant with the office of Van Ness Feldman LLP, on May 3, 2018, filed the City of Seattle's Reply in Support of its Dispositive Motion and Response to Cross Motions and this Certificate of Service with the Seattle Hearing Examiner using its e-filing system and that on May 8, 2018, I addressed said documents and deposited them for delivery as follows:

Seattle Hearing Examiner Ryan Vancil Deputy Hearing Examiner 700 Fifth Avenue, Suite 4000 Seattle, WA 98104	☐ By U.S. Mail ☒ By Messenger ☒ By E-file
Wallingford Community Council G. Lee Raaen Attorney-at-Law	☒ E-mail Lee@LRaaen.com

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Morgan Community Association (MoCa) Deb Barker President	☒ E-mail djb124@earthlink.net
Friends of Ravenna-Cowen Judith E. Bendich Board Member	☒ E-mail jebendich@comcast.net
West Seattle Junction Neighborhood Organization (JuNo) Rich Koehler Representative	☒ E-mail rkoehler@cool-studio.net; admin@wsjuno.org
Seattle Coalition for Affordability, Livability, and Equity (SCALE) Claudia M. Newman David Bricklin Bricklin & Newman LLP	☒ E-mail newman@bnd-law.com cahill@bnd-law.com telegin@bnd-law.com Bricklin@bnd-law.com Talis.abolins@gmail.com
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Fremont Neighborhood Council Toby Thaler Board President and Attorney-at-Law	☒ E-mail toby@louploup.net
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on this 8th day of May, 2018.

/s/Amanda Kleiss
Declarant

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