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 MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF THE CASE

This case presents a consolidated appeal on behalf of seven appellants representing more than 25 neighborhood groups from throughout the City of Seattle. These appeals challenge the adequacy of the Final Environmental Impact Statement (EIS) for the City's proposed upzones for a city-wide implementation of the Mandatory Housing Affordability (MHA) program. The EIS does not contain a meaningful assessment of the actual environmental impact of the MHA Proposal. It was written instead to justify a decision that had already been made by the City. The City decided long ago, before public input even began, what it planned to do, and it prepared a generic EIS to rubber stamp that plan.

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

The MHA Proposal is a result of the so-called "Grand Bargain" of the Housing Affordability and Livability Agenda (HALA) Committee. The Seattle Coalition for Affordability Livability and Equity (SCALE) does not challenge the important purpose of the proposal – namely, the need to address Seattle's ongoing housing affordability crisis, increase housing capacity, and distributing the benefits and burdens of growth equitably. 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).

Rather than creating an EIS that provides meaningful discussion of the existing environment and draws useful distinctions between the impacts associated with the various alternatives, the citywide EIS retreats to meaningless generalities (*e.g.,* more development equals more risk to historic resources) and outright omissions (no discussion of impacts of text amendments and no assessment of relationship to multitudes of comprehensive plan land use policies). As discussed below, the result is an EIS that fails to serve's SEPA's central purpose of assuring that critical government decisions are preceded by a "hard look" at environmental consequences and that such decisions are made "by deliberation, not default." *Stempel, supra.*

As the City points out, the HALA Committee was confronted by a "true Gordian Knot", and struggling to develop proposals in a politically charged atmosphere of crisis, with "multiple interests" with seemingly opposed views "gathered around the HALA table." Decl. of Weber, Ex. B, p. 4. However, the "multiple interests" gathered at the HALA table included Skanska USA, Hal Real Estate Developers, Spectrum Development, Marpac Construction, Barrientos, Weber Thompson, Neiman Taber Architects, Seattle Building Trades Council and Construction Trades Council, Plymouth Housing Group, and more entities whose primary interests were in

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

development. *See* Junction Neighborhood Organization's Response to City's Motion to Dismiss, Cross Motion for Summary Judgment, and Motion for Summary Judgment (May 1, 2018) at 11-12. The members of the Committee had a keen and vested interest in the production of new market rate and affordable housing development advocates. Only one member of the Advisory Committee represented the interests of the residents of the City's urban villages and urban centers. *Id*.

A bargain is not so grand when it omits the groups who are asked to shoulder a significant part of the bargain's burden.

MHA Framework DNS. Before developing the present proposal for city-wide upzones, the City enacted the MHA's "framework" legislation for residential development (MHA-R) and commercial development (MHA-C). *See* Ordinance 124895, adding SMC Chapter 23.58B (November 2015) and Ordinance 125108, adding SMC Chapter 23.58C (August 2016). This framework legislation established fixed formulas for MHA implementation throughout the City, without any environmental review of alternatives. Instead, the City issued a Determination of Non-Significance (DNS).

MHA Implementation by Neighborhood. Starting in March of 2017, the City began rolling out MHA upzones on a neighborhood-by-neighborhood basis. The City prepared separate SEPA reviews for the MHA upzones, including for lower Queen Anne ("Uptown"), and in the University District.[1] The City's neighborhood specific environmental reviews, while not perfect, provided a neighborhood specific analysis under SEPA for the substantial upzones proposed in those neighborhoods. For example, the University District FEIS was nearly 600 pages long. See Declaration of Claudia M. Newman in Support of SCALE's Motion for Summary Judgment (May

[1] The MHA was also implemented through separate upzones in the Chinatown-International District, South Lake Union, the 23rd Avenue corridor of the Central Area, and Downtown. For each of these areas the City issued a DNS. *See* City Motion for Partial Dismissal at 9-10.

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

8, 2016), ¶¶ 7-8. The Uptown FEIS is nearly 1,500 pages long. *See* Newman Dec, ¶ 10. These environmental documents facilitated robust discussion by the public and in the City Council of specific impacts to those neighborhoods' environment.

The City Abandons Neighborhood Specific Review. With the present proposal, OPCD has abandoned its neighborhood specific approach and switched to a massive citywide series of upzones. The City's EIS reflects a fundamental departure from the neighborhood level of environmental review set forth in the prior MHA environmental documents, which were crucial for informed decisions about the dramatic zoning changes that were ultimately enacted for Uptown and the University District.

Now, with a single document, OPCD purports to analyze the broad sweep of environmental impacts associated with upzones to 30 neighborhoods across the rest of the entire City, with upzones to thousands of residential and commercial properties throughout the City. *See* Newman Dec., ¶ 5 (FEIS Appendix F (zoning text amendments) and H (upzoning maps)). In addition to sweeping upzones to the 30 neighborhoods, the proposal also would enlarge the Comprehensive Plan map boundaries of the existing urban villages. *Id*. Although not clearly identified, OPCD's proposal also includes text amendments authorizing additional development capacity on vast acreages of residential and commercial lands outside Urban Villages. *See* Newman Dec, ¶ 4 (Council Bill 119184 at 4-5, 8-11 and more).

In the Land Use section of the EIS, the City acknowledges that these sweeping Citywide zoning amendments will create inconsistencies with the Comprehensive Plan and, thus, the Comprehensive Plan will need to be amended. Newman Dec., ¶ 5 (EIS, App. F at F-11). But the EIS identifies only a small number of the Comprehensive Plan inconsistencies created by the

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

proposal. *Id*. Even as to the inconsistencies it acknowledges, the EIS fails to describe or discuss amendments that would be necessary to resolve these inconsistencies. *See id*.

II. STANDARD OF REVIEW AND SEPA'S PURPOSES AND PROCEDURES

The issue of whether an EIS is adequate is a matter of law. *Glasser v. Seattle,* 139 Wn. App. 728, 739, 162 P.3d 1134 (2007) (error to apply clearly erroneous standard to EIS adequacy challenge). "EIS adequacy refers to the legal sufficiency of the environmental data contained in the document." *Id.* Thus, 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,* 142 Wn.2d 68, 76, 11 P.3d 726 (2000). 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).

These cases show that Washington courts have put clear limits on agency deference. Most notably, the agency's interpretation must be a plausible construction of the statute (*e.g.*, the meaning of an "adequate" EIS) and not be contrary to either legislative intent or the statute itself.

The State Environmental Policy Act ("SEPA"), ch. 43.21C RCW, was promulgated to further a "state policy which will encourage productive and enjoyable harmony between man and his environment" and "to promote efforts which will prevent or eliminate damage to the environment and biosphere." RCW 43.21C.010. The Legislature has recognized that each person has a fundamental and inalienable right to a healthful environment and enacted SEPA to protect those rights. *Id.*

SEPA's requirement for an EIS "is an attempt by the people to shape their future environment by deliberation, not default." *See, e.g., Stempel v Dept. of Water Resources,* 82 Wn 2d 109, 118

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

(1973). An EIS draws together in one place the most important information about the proposal, alternatives to the proposal, impacts, mitigation measures, and unavoidable impacts. An EIS that fails to include an adequate range of alternatives and that fails to describe the different impacts associated with the various alternatives fails its most basic purpose -- assuring public officials are well-informed before making decisions with significant environmental impacts.

A. Environmental Review Must Be Done Early in the Process so Project Decisions Are Based Upon Complete, Adequate Environmental Review

Under SEPA, environmental review must be done early in the process, so project decisions are based upon a timely review of complete and adequate information. The purpose of SEPA is "to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *King County v. Boundary Review Board*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). The failure to conduct environmental review before key decisions are made can be destructive:

> [Decisions early in the process] may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When the government decisions may have such snowballing effect, decision makers need to be apprised of the environmental consequences before the project picks up momentum, not after.

King Cy v. BRB., supra, 122 Wn.2d. at 664 (internal citation omitted).[2]

The City often references the opportunity for additional environmental review when individual projects are proposed. Deferring analysis is contrary to SEPA's requirement for review

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

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

as early in the possible as possible. It precludes the public and City Council from using the information when deciding the geographic extent and magnitude of the upzones, and it precludes all opportunity for the City to consider the all-important cumulative effects of the forthcoming projects.

The character of the neighborhoods is threatened by "death by a thousand cuts." Most often, a neighborhood loses it character over time, through a progression of development. Analyzing impacts at the project level precludes consideration of the "big picture," cumulative impacts wrought by neighborhood-wide rezones. This EIS is wrong to suggest that later project-level review can take the place of the review needed now, before these sweeping changes are adopted.

B. All SEPA Analysis Must Be Based Upon Adequate Information

Under SEPA, the City has an affirmative duty to obtain the information reasonably necessary to understand the significant impacts of its proposal, and to make a reasoned choice among alternatives:

> If information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the cost to obtain it are not exorbitant, agencies **shall** obtain and include the information in their environmental documents.

WAC 197-11-080(1) (emphasis supplied). *See also* WAC 197-11-030(2)(c) ("agencies shall to the fullest extent possible: . . . prepare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made"); WAC 197-11-400 (An EIS "shall be supported by the necessary environmental analysis").

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

C. SEPA Requires Full Disclosure and a "Hard Look" at the Environmental Issues

SEPA, like its federal counterpart (NEPA), requires agencies to take a "hard look" at environmental issues. *PUD No. 1 of Clark County v. PCHB*, 158, 151 P.3d 1067 (2007) (*citing National Audubon Society v. Dept. of Navy*, 422 F.3d 174, 184 (4th Cir. 2005).[3] To comply with the "hard look" requirement, an EIS must "provide a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action." *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 37, 873 P.2d 498 (1994). *See also PUD No. 1 of Clark County v. PCHB, supra*. "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

SEPA does not require every single environmental effect or alternative to be considered, but "it must include a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision." *City of Des Moines*, *supra,* 98 Wn. App. at 35. *See also Weyerhaeuser v. Pierce County*, *supra,* 124 Wn.2d at 37; *Gebbers v. Okanogan County PUD*, 144 Wn. App. 371, 379, 183 P.3d 324 (2008); RCW 43.21C.031; WAC 197-11-400(2).

What is "reasonably thorough" is, of course, a function of the nature of the decision at hand. SEPA requires "a level of detail commensurate with the importance of the environmental impacts and the plausibility of alternatives." *Klickitat County Citizens Against Imported Waste v. Klickitat*

[3] Washington courts regularly rely on NEPA case law in construing SEPA's requirements. *PUD v. PCHB*, *supra,* 137 Wn. App. at 158 ("National Environmental Protection Act (NEPA) is substantially similar to SEPA, Washington courts may look to federal case law for SEPA interpretation"); *Des Moines v. PSRC*, 98 Wn. App.23, 37 n.28, 988 P.2d 27 (1999) ("Washington courts have followed federal NEPA cases when construing SEPA"); *Eastlake Comm. Council v. Roanoke Assoc., Inc.*, 82 Wn.2d 475, 488 n.5, 513 P.2d 36 (1973).

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

County, 122 Wn.2d 619, 641, 94 P.3d 961 (1993) *as amended on denial of reconsideration* (Jan. 28, 1994), *amended,* 866 P.2d 1256 (1994). As our Supreme Court has explained:

> The adequacy of an EIS is tested under the "rule of reason". *SEAPC v. Cammack II Orchards,* 49 Wash.App. 609, 614–15, 744 P.2d 1101 (1987); *Cheney v. Mountlake Terrace,* 87 Wash.2d 338, 344–45, 552 P.2d 184 (1976). In order for an EIS to be adequate under this rule, the EIS must present decisionmakers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the agency's decision. *Cheney,* 87 Wash.2d at 344–45, 552 P.2d 184 (quoting *Trout Unlimited v. Morton,* 509 F.2d 1276, 1283 (9th Cir.1974)). **The rule of reason is "in large part a broad, flexible cost-effectiveness standard**", in which the adequacy of an EIS is best determined "on a case-by-case basis guided by all of the policy and factual considerations reasonably related to SEPA's terse directives". R. Settle § 14(a)(i), at 156, 155.

Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty., 122 Wn.2d at 633. (emphasis supplied).

In applying this "flexible cost-effectiveness" standard, attention must be paid to the magnitude, scope and intensity of the anticipated impacts. Simply put, the bigger the environmental risks, the more thorough the analysis must be. The risks this proposal poses to neighborhood fabric, character and livability throughout the City compels more detailed analysis, not less.

D. An EIS Must Thoroughly Analyze Alternatives to the Proposal in a Section of the EIS Deemed its "Heart"

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 EIS also must inform decision makers of the impacts that would be associated with alternative levels of development. The EIS must "devote sufficiently detailed

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

analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action." WAC 197-11-440(5)(c)(v).

Basically, the EIS must have sufficient detail so that the City Council knows the impacts that reasonably can be anticipated if this massive upzone is approved. The EIS must provide a reasonable range of alternatives so that the Council can evaluate whether options are available that would meet the proposal's objectives. Is there an alternative, for instance, that provides 90% of the benefit but only 50% of the harm? That comparative analysis cannot be undertaken if none of the alternatives are not crafted to avoid some of the impacts associated with the OPCD's favored proposal. Nor can that comparative analysis be undertaken if the EIS is too general and fails to clearly identify the magnitude and character of the impacts and the difference in impacts among the alternatives.

E. Adequate Description of Existing Environment

An EIS must include a description of the "affected environment." WAC 197-11-440(6). The description is to be "succinct," *id.,* but it must not exclude environmental resources that will be threatened by the proposal. "[B]ecause the Affected' Environment' chapter of the EIS sets the 'baseline' for the environmental analysis that is the heart of the EIS, it is important that the baseline be accurate and complete." *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1163 (N.D. Cal. 2006).

In *Center for Biological Diversity*, the BLM proposed a rule to regulate off-road vehicles and prepared an EIS. An environmental group challenged the EIS claiming, *inter alia,* that ORVs would impact various endemic invertebrate species. The EIS listed five such species. But there was evidence of many more. The court rejected the EIS, finding that without a more thorough list

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

of the potentially affected species, the court could not be sure the agency has taken the requisite "hard look" at the impacts:

> If numerous species are omitted from the environmental baseline, neither the Court nor the public can be assured that the BLM took a 'hard look' at the environmental impacts on those species. . . .
>
> Not only is the record replete with evidence that numerous other endemic invertebrates are found at the Dunes, but defendants acknowledge that the BLM was aware of resource inventories describing such species. . . . Here, there is no indication from the EIS itself that the BLM considered the environmental impact of the [proposed land management plan] on the numerous endemic invertebrates that are known or likely to occur in the Dunes.

Id., 422 F. Supp. 2d at 1163–64.

We will show below an analogous situation here. With regard to historic resources, open space and other environmental resources, OPCD had inventories at hand that identified these at-risk resources, but failed to include them in the EIS. Omitting that critical information, precluded OPCD from adequately analyzing the impacts to those (omitted) resources and falls far short of meeting the "hard look" test.

III. ARGUMENT

A. Introduction.

In the Argument section of this motion, we first discuss a critical concept that overlays many of the other issues: the classification of the EIS as "programmatic" for a "nonproject" proposal did not justify the obvious failure to provide a meaningful analysis of the specific neighborhood impacts arising from the sweeping and unprecedented scope of zoning changes. While a nonproject EISs may have greater flexibility, this does not allow the authors to evade their legal responsibility to evaluate important environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. *King County*

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

v. Boundary Review Board, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). The level of detail must be tailored to the level of planning advanced in the proposal. Here, the proposal is about as specific and impactful to the human environment as a nonproject proposal can be. The proposal is for an unprecedented sweep of lot by lot rezones throughout the City. Specific text amendments have been drafted. See Newman Dec., ¶ 4. The detail of the proposal, combined with its potential for such sweeping impacts, requires a hard look at the impacts.

Second, we have identified multiple specific elements of environmental review which demonstrate, all too clearly, the EIS' failure to provide the requisite analysis. Because the inadequacy of analysis in these areas cannot credibly be disputed, a summary judgment ruling is appropriate and will provide the City with advance notice of its need to address the deficiencies without further delay. First, the analysis of Historic and Cultural Resources serves as an excellent example of blatant FEIS inadequacy (and inaccuracy). The EIS purports to provide an inventory of historic resources at risk, but then stops with the job barely done. OPCD cannot credibly dispute the simple fact that the EIS fails to describe the historic resources in each neighborhood impacted by the proposed upzone. The EIS never mentions most of the historic resources inventoried by the City and included in the City's own database. Simply put, as a matter of law, the City's EIS turns a blind eye to virtually all of the historic resources in the affected neighborhoods. The City cannot even pretend to have given the legally required "hard look." *Ctr. for Biological Diversity v. Bureau of Land Mgmt, supra.* (BLM failed to give a "hard look" when it omitted all but five endemic invertebrate species in its EIS – despite having knowledge of the existence of those other species). Because the facts are not in dispute, summary judgment is appropriate.

Third, as with Historic Resources, the EIS discussion of impacts to Tree Canopy is deficient as a matter of law. The EIS did not analyze the impacts of the "no action" alternative on tree canopy;

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

it did not discuss the impacts on tree canopies resulting from text amendments which allow increased development without a map amendment; and the EIS provide no discussion whatsoever of possible mitigation measures.

Fourth, the EIS entirely failed to discuss the proposal's undisputed impact on areas outside of the urban villages. A close reading of the EIS reveals a series of text amendments that will increase zoning capacity outside of the urban villages. With its focus on the urban villages, the EIS simply fails to discuss the impacts of those proposed text amendments on areas outside the urban villages. Because the facts on this issue are not in dispute either, summary judgment is appropriate.

Finally, there can be no dispute that the EIS failed to address the legal obligation under SEPA to address the proposals inconsistencies with the governing Comprehensive Plan. While this EIS acknowledges the existence of Comprehensive Plan inconsistencies, there is no specification of the broad range of inconsistencies or the Comprehensive Plan amendments that will be required for the proposal to be legally adopted. The EIS fails to address the majority of the Comprehensive Plan policies, covering critical issues like transportation, housing, capital facilities, utilities, parks, open space, and the environment. Incredibly, (but perhaps reflecting the not-so-grand nature of the so-called "grand bargain"), the EIS fails to discuss the proposal's relationship to any of the City's carefully crafted Neighborhood Plans (all of which are part of the citywide Comprehensive Plan). Because these facts are not in dispute either, summary judgment is appropriate.

Summary judgment avoids lengthy, expensive evidentiary hearings where the relevant facts are not in dispute. On each of the issues discussed below, the relevant facts are not in dispute. The

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

EIS simply omits to address a variety of critical issues. The parties and the Examiner should be spared a lengthy hearing when these issues can be decided now, summarily, on undisputed facts.

B. The City's OPCD Cannot Use the "Programmatic" Nature of Its EIS to Avoid Meaningful Review of the Proposal's Staggering Environmental Impacts.

OPCD's proposal, if adopted by the City Council, will shape the face of Seattle for decades to come. It would be difficult to conceive of a more momentous land use decision for this community. The impacts associated with any single plat, downtown tower, or major institution master plan pales in comparison with the consequences associated with this pending decision. In making this decision, the City Council (and the public) must have a clear-eyed, detailed understanding of the anticipated impacts. Under these circumstances, the requirement for a "thorough" EIS and a "hard look" requires more, not less, attention to the most consequential environmental issues.

1. A nonproject EIS must address important issues in reasonable detail

SEPA's rules for environmental review of "nonproject" (programmatic) decisions do not allow the City to avoid its fundamental responsibility for taking a hard look at the resulting environmental impacts. An EIS for a programmatic decision must address the same issues as an EIS for a project EIS. WAC 197-11-442.

While agencies have more "flexibility" in preparing a nonproject EIS, WAC 197-11-442(a), that does not necessarily equate to less detail and it certainly is not license to omit entire issues.

To the extent that greater "flexibility" translates into less detail, the degree to which details are relaxed will vary from one nonproject to the next. The more abstract the proposal, the less detail required. Conversely, the more specific the nonproject proposal, the more detail is required. As Professor Settle explains: "Impacts and alternatives [for nonproject EISs] are to be discussed at

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

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

Here, this nonproject EIS addresses not an abstraction, but a very specific and far reaching proposal. Zoning maps for every corner of the City are proposed to be amended, parcel by parcel. Zoning code text is to be changed word by word and number by number (e.g., building heights; density). This is anything but an abstract proposal. Given the detailed nature of the proposal, more detail is required in the EIS than compared to an EIS for a nonproject proposal that might include, for instance, only the development of broadly stated land use policies of general applicability.[4]

Likewise, while all EIS's involve forecasting, the courts have made clear that the greater uncertainty of forecasting at the nonproject stage is not license to dispense with forecasting altogether. As the Ninth Circuit explained:

> An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP [a programmatic resource management plan] merely by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific program proposed pursuant to an RMP. "[T]he purpose of an [EIS] is to evaluate the possibilities in light of current and contemplated plans and to produce an informed estimate of the environmental consequences.... Drafting an [EIS] necessarily involves some degree of forecasting." *City of Davis v. Coleman,* 521 F.2d 661, 676 (9th Cir.1975) (emphasis added). If an agency were to defer analysis ... of environmental consequences in an RMP, based on a promise to perform a comparable analysis in connection with later site-specific projects, no environmental consequences would

---

[4] The City of Seattle has run into this problem before – and lost. In *West Seattle Defense Fund v. City of Seattle,* CPSGMHB No. 96-3-0033, 1997 WL 176356 (Mar. 27, 1997), the city was attempting to amend its Comprehensive Plan and failed to analyze in detail the impact on public facilities and services of concentrating growth in its Urban Villages. The city argued that because it was amending a plan, not regulations, less analysis was required. But the Growth Management Hearings Board applied a more functional analysis. It recognized that "[u]nlike a generalized land-use policy, Seattle's Plan contains a substantial localized focus on a relatively small portion of the city." *Id.* at 12. Thus, more detail was required, not less.

While *West Seattle Defense Fund* concerned analysis requirements under the GMA, not SEPA, the same principles apply. Here, the proposal is more specific than a generalized plan for urban villages. Specific regulatory language and zoning map amendments are in the works. This greater specificity (less abstraction) warrants more detailed analysis in the EIS, not less.

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

> ever need to be addressed in an EIS at the RMP level if comparable consequences might arise, but on a smaller scale, from a later site-specific action proposed pursuant to the RMP.
>
> *Once an agency has an obligation to prepare an EIS, the scope of its analysis of environmental consequences in that EIS must be appropriate to the action in question. NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. See Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1246 n. 9 (9th Cir.1984) ("Reasonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry,'" quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1092 (D.C.Cir.1973)). If it is reasonably possible to analyze the environmental consequences in an EIS for an RMP, the agency is required to perform that analysis. The EIS analysis may be more general than a subsequent EA analysis, and it may turn out that a particular environmental consequence must be analyzed in both the EIS and the EA. But an earlier EIS analysis will not have been wasted effort, for it will guide the EA analysis and, to the extent appropriate, permit "tiering" by the EA to the EIS in order to avoid wasteful duplication.

Pacific Rivers Council v. U.S. Forest Serv., 689 F.3d 1012, 1026–27 (9th Cir. 2012) (emphasis in original), *vacated as moot,* 570 U.S. 901, 133 S. Ct. 2843, 186 L. Ed. 2d 881 (2013).

The programmatic decision at issue in *Pacific Rivers* was a Forest Service plan to increase logging in the Sierras by five billion board feet, to construct 90 more miles of new roads, and to reconstruct 855 more miles of existing roads (compared to the logging and roads contemplated by the existing forest plan). The agency's programmatic EIS failed to analyze the proposal's impact on individual fish species. The Ninth Circuit held the EIS invalid. In doing so, it pointed out that an earlier EIS had provided an analysis of an earlier plan's impact on individual fish species. The court juxtaposed the two EISs and basically said: If the agency could evaluate the impacts three years earlier, it could do it again now:

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

> What is at issue is the adequacy of the 2004 EIS. Whether or not the analysis in the 2001 EIS was adequate (a question that is not before us), the 2001 EIS shows that an analysis of environmental consequences of the 2004 Framework for individual species of fish was "reasonably possible." There is no explanation in the 2004 EIS of why it was not reasonably possible to provide any analysis whatsoever of environmental consequence for individual species of fish, when an extensive analysis had been provided in the 2001 EIS.

Id. at 1029.

The federal cases and the federal Council on Environmental Quality have warned about the "shell game" played by some agencies which use the programmatic label to avoid the requisite environmental review:

> [A]n environmental analysis must "provide 'sufficient detail to foster informed decision-making,'" *Friends of Yosemite Valley,* 348 F.3d at 800 (citation omitted), and so cannot be unreasonably postponed. In 2002, the Council on Environmental Quality ("CEQ") established a Task Force to review agency practices under NEPA. The Task Force wrote in its September 2003 report to CEQ, "Reliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often play a 'shell game' of when and where deferred issues will be addressed, undermining agency credibility and trust." The NEPA Task Force, Modernizing NEPA Implementation 39 (2003), available at *http://ceq.hss.doe.gov/ntf/report/frontmats.pdf.* An agency's compliance with the "reasonably possible" requirement in a programmatic EIS, resulting in an appropriate level of environmental analysis, ensures that a "shell game" or the appearance of such a game is avoided. Judicial review under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), in turn ensures that an agency does not improperly evade its responsibility to perform an environmental analysis when such an analysis is "reasonably possible."

Id. at 1029–30. The reasonable possibility of analyzing the environmental impacts of MHA upzones in this case is indisputably apparent from the EIS documents prepared for the MHA proposal in Uptown, and in the University District.

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

Deferring more detailed review to the project stage also eliminates the possibility to explore the nonproject proposal's cumulative effects. At the project stage, the focus is on the impacts of the specific project. The cumulative effect of many projects in one neighborhood – on tree canopy, traffic, aesthetics, historic fabric – is ignored. Only by studying these impacts at the nonproject stage can the cumulative impacts be adequately assessed and taken into account when policy decisions are made.

Our own Supreme Court has confirmed that programmatic EISs are not an excuse to give scant attention to important issues. In *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty., supra,* the Yakama Indian Tribe challenged the adequacy of a programmatic EIS for Klickitat County's solid waste management plan. Among other things, the County's plan contemplated the future development of a large regional landfill. The Tribe contended the programmatic EIS failed to adequately address the plan's impacts on cultural resources. The Court began by acknowledging that while every conceivable impact need not be addressed, the EIS must give adequate attention to the issues that matter most, stating the "rule of reason" in somewhat more precise terms:

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

Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty., supra, 122 Wn.2d at 641 (emphasis supplied). The Court then emphasized that the greater flexibility allowed for a programmatic EIS was not an excuse to avoid an adequate discussion of serious impacts:

> "The lead agency shall discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal". WAC 197–11–442(2). *See Cathcart–Maltby–Clearview Comm'ty Coun. v. Snohomish Cy.,* 96 Wash.2d 201, 211, 634 P.2d 853 (1981) (holding EIS was adequate because it identified "the potential impacts and [provided] a framework for further EIS preparation").

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

> Even at this more generalized level, however, "[s]ignificant impacts on both the natural environment and the built environment *must* be analyzed, if relevant," in an environmental impact statement. (Italics ours.) WAC 197–11–440(6)(e). One element of the built environment is "*historic and cultural preservation.*" (Italics ours.) WAC 197–11–444(2)(b)(vi).

Id. at 641–42.

The Court then applied these principles to the solid waste plan EIS. The Court reiterated that while a programmatic EIS may have less detail than a project EIS, this does not allow the proposal's proponent to avoid a meaningful analysis of impacts:

> The 1990 Plan Update EIS addresses cultural and historical resources in **a cursory superficial manner**. The only discussion of this impact is limited to a one-half-page discussion in chapter 3 and another one-fourth-page discussion in chapter 12. 1990 Plan Update vol. 1, at 3–7, 12–4. For example, the EIS states in part:
>
> > Native American sites and artifacts occur throughout Klickitat County. Construction of any of the facilities considered in the solid waste management alternatives could result in disruption or loss of historic or cultural artifacts or structures. *It is not possible to meaningfully evaluate all such environmental impacts in a programmatic EIS. Such detailed review is appropriate in site-specific proposals taken to implement any portion of this 1990 Plan Update.*
>
> (Italics ours.) 1990 Plan Update vol. 1, at 12–4.
>
> Respondents are correct that a lead agency has a certain amount of flexibility in determining the level of detail appropriate for a nonproject EIS, in part because there is usually less detailed information available on its environmental impacts and on any subsequent project proposals. WAC 197–11–442(1). **However, this EIS addresses the cultural and historical impacts in only two locations, for a total of approximately 1 page of text, in a document hundreds of pages long. This is simply inadequate.** Certainly the building of a regional landfill accepting 3 million tons of waste per year will have an impact on the residents of the County,

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

> including the Yakima Indian Nation, and impact their use of the County as a cultural and historical resource.

Id. at 642–643 (italics in original; bolding supplied). The Court also rejected the County's argument that more detailed analysis could be provided when specific projects, like the landfill, went through the permitting process:

> The EIS attempts to dodge the issue by stating these impacts can be meaningfully evaluated only in site-specific proposals. We disagree. One of the primary purposes of the 1990 Plan Update is to make an initial evaluation of whether the County wants to build a large regional landfill at all, or whether one of the proposed alternatives would be a better course of action. Postponing discussion of historical and cultural impacts to a later site-specific proposal would prevent the Board from considering these impacts in its evaluation. Although a discussion of historical and cultural impacts need not be at the level of detail needed in a site-specific proposal, we do not think a 1–page discussion is sufficient to adequately inform the Board's decision.

Id. at 643.[5]

Another illustration of the City's misuse of the programmatic EIS is found in *Better Brinnon Coalition v. Jefferson County,* which focused on Jefferson County's proposal for a subarea plan. Washington's Growth Management Hearings Board struck down the plan based on an inadequate SEPA review. While recognizing an agency's discretion in preparing a programmatic EIS, the Board was equally quick to reaffirm that this discretion is not limitless:

> The County directs our attention to WAC 197-11-442 which provides that the County shall have "more flexibility in preparing EISs on nonproject proposals." However, the flexibility afforded the County is not unlimited. All environmental documents prepared under SEPA require consideration of environmental impacts, with attention to impacts that are likely, not merely speculative. WAC 197-11-060(4). Phased review is permissible but it is not appropriate if it would "merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts". WAC 197-11-

[5] In the end, Klickitat County was saved by a more detailed analysis of cultural resource impacts included in an EIS appendix. *Id.* at 644.

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

> 060(5)(d)(ii). Furthermore, a phased approach may not be used to simply delay SEPA analysis until permitting decisions. *Butler v. Lewis County*, WWGMHB No. 99-2-0027c (Final Decision and Order, June 30, 2000).

Better Brinnon Coalition v. Jefferson Cy., WWGMHB No. 03-2-0007 (Final Decision and Order), 2003 WL 22896402, at 19.

> Simply providing, as Jefferson County has, that any impacts will be addressed on a permit basis fails to assess the cumulative impacts and to fully inform the decision makers of the potential consequences of the designations challenged here.

Id. at 4. Thus, in federal and state jurisdictions, the rule is the same. A programmatic EIS is not an excuse to escape the fundamental responsibility under SEPA for early and meaningful environmental review.

In this case, the importance of this rule is profound. The nonproject proposals involve upzones that are as sweeping as they are specific, setting the stage for City-wide impacts that will forever alter our urban environment in numerous significant areas. The obligation to analyze those impacts based on the level of planning reflected in the proposal cannot be avoided by slapping the "programmatic" label on the document. In several areas the EIS analysis of an area is less than inadequate. It is nonexistent. Fortunately, the need to correct this fundamental problem can be identified at the summary judgment level.

2. As in *Pacific Rivers*, OPCD has already demonstrated that a more detailed analysis is possible at this nonproject stage.

Just like the lead agency in *Pacific Rivers,* OPCD already has demonstrated that it can provide a more detailed analysis for this nonproject decision. OPCD analyzed impacts associated with neighborhood-wide MHA rezones in the U-District and Uptown EISs but failed to provide a similarly detailed analysis when it attempted to study the impacts across the entire city in one fell

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

swoop. See Newman Dec, Cf. ¶ 5 with ¶¶ 6-10 (compare Citywide MHA FEIS with U District and Uptown FEISs).

The contrast between the citywide EIS and the EISs prepared for the U-District and Uptown is striking. Because the U-District and Uptown EISs each covered a single neighborhood, not thirty of them plus other citywide text amendments, those EISs were able to provide significantly greater levels of detailed information, useful to the City Council and the public. We will provide more detail on this in the argument section below, but, one example here will be useful. In the University District and Uptown EISs, the discussion of impacts to historic resources started with a detailed inventory of the historic resources put in jeopardy by additional development catalyzed by the proposal. Newman Dec., ¶ 6 (U. District DEIS at 3.4-1 through 3.4-16), ¶ 9 (Uptown Draft EIS at 3.176 through 3.184). Each EIS included both a list of all the designated historic resources and a map showing their location. *Id.* The Uptown EIS included a series of maps showing the proposed blocks to be upzoned and to what degree under each alternative. Newman Dec., ¶¶ 9-10 (Uptown Draft EIS at 3.182 through 3.187 and Final EIS at 3.182 through 3.184). The designated historic resources were called out on those maps. *Id.* This allowed the public and the City Council to immediately grasp the difference in the impacts to historic resources depending on which alternative upzone (or no action) was being considered.

In contrast, the citywide EIS does not contain this information. See Newman Dec., ¶ 5 (Citywide Final EIS at 3.295 through 3.310). There is no real inventory of historic resources in the areas slated for upzones. *Id.* No effort is made to provide a meaningful discussion of the varying levels of impact that will occur under the various alternatives. The EIS simply acknowledges that more development may mean greater losses of historic resources. *Id.*

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

OPCD had it right when it prepared separate EIS's for the MHA upzones proposed for the U-District and for the Uptown neighborhoods. For no good reason, the City abandoned any attempt at neighborhood level review of environmental impact. In its place, we are confronted by a citywide EIS that retreats into a fog of meaningless generalities (*e.g.,* more development equals more risk to historic resources) and outright omissions (no discussion of impacts of text amendments and no assessment of relationship to multitudes of comprehensive plan land use policies). As discussed below, the result is an EIS that fails to serve's SEPA's central purpose of assuring that critical government decisions are preceded by an early "hard look" at environmental consequences, which is critical for the City's responsibility to ensure that impactful and sweeping decisions are made "by deliberation, not default." *Stempel, supra.*

3. Washington's vesting law increases the importance of meaningful early review of a nonproject proposal that involves sweeping upzones.

The importance of forecasting impacts of a programmatic zoning code amendment is magnified by Washington's adherence to a strict vesting law. As discussed above, an EIS must be more detailed when the consequences are greater and Washington's vesting law makes the adoption of zoning regulations far more consequential than they might otherwise be. Once new zoning is adopted, applicants can obtain vested rights to proceed in accordance with the new zoning, regardless of the impacts generated by their projects, individually or cumulatively. When a project application is filed, it is too late for neighbors or the community to complain that the new code is allowing development that does great harm to community resources. The regulatory die has been cast.

SEPA is very pragmatic and requires more analysis when the consequences of the action are likely to be greater. "The level of detail shall be commensurate with the importance of the

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

impact, . . ." WAC 197-11-402(2). Of all the types of decisions encompassed within the "programmatic" definition, few, if any, are more consequential that an area-wide rezone. Washington's vesting law means that the consequences associated with a programmatic amendment of a zoning code and map are much more consequential than other programmatic decisions, like the amendment of a comprehensive plan or a utility department's adoption of a utility plan. Given the regulatory significance of amending a zoning code and map, the level of detail must be greater here than in other programmatic situations.

C. The Inadequacy of the Citywide FEIS is Plainly Illustrated by OPCD's Cursory and Superficial Analysis of Historic Resources.

1. The EIS fails to provide a meaningful description of the proposal's impacts on historic resources.

The EIS analysis of historic resources provides a glaring example of how OPCD's misuse of the "programmatic" EIS has led to an inadequate environmental document. The analysis of existing historic resources is so superficial and misleading that, as a matter of law, this portion of the EIS should be deemed inadequate.

In very broad terms, the EIS explains the mechanism by which the proposal imperils historic resources. But explaining the mechanism of demise is not the same as describing the magnitude and location of the actual impacts. For example, the EIS explains that:

> [E]stimated growth rates under the Alternatives are indicators of potential impacts to historic and cultural resources. Areas with a higher growth rate have the potential for more redevelopment than areas with lower projected growth rates.

Newman Dec, ¶ 5 (EIS at 3-304). Essentially, the EIS merely states the obvious fact that sweeping upzones and urban village expansions for the purpose of stimulating construction of thousands of new homes has the potential for greater impact to historic resources than if the proposal were not

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

adopted. But acknowledging this "cause and effect" relationship is no substitute for the hard look needed to make an informed decision based on the upzone's likely impact to actual resources in the impacted areas. In particular, the extent and location of the expected impacts is not described.

Using this EIS, the City Council will have no basis for evaluating how the proposal might be shaped to avoid or at least minimize impacts to historic resources. The City Council presumably already knows that a greater level of development will result in greater impacts to historic resources. What the City Council needs to know is the nature and extent of those likely losses, and an understanding of opportunities to minimize harm to the historic fabric of the City. That kind of meaningful disclosure is missing from the EIS.

2. The EIS fails to the existing historic resources jeopardized by the upzone and text amendment proposals.

One critical piece of information missing from the EIS is the location of historic resources in the areas subject to the map and text upzones. Without this critical baseline information, the City Council is left blind. The City Council has no basis for assessing its options for reshaping the specific blocks to be upzoned in a way that would allow it to avoid, for instance, areas of high concentrations of historic resources or specific historic resources of particular value.

The EIS does include a map of some previously identified historic resources and lists the neighborhoods where these resources are present. Newman Dec., ¶ 5 (EIS at 3-296 (list); 3-300 and 3-301 (maps)). But the list and map are woefully incomplete in two ways.

First, the EIS acknowledges that large areas of the City subject to the upzone proposals have not been systematically inventoried. *Id*. (EIS at 3-299). Without those inventories, it is impossible for the City Council to assess whether there are ways to reshape the upzones to avoid areas with higher densities of historic resources or historic resources with particular value.

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

Second, existing inventories are sitting in the City's own database, but the authors of the EIS failed to use that information. In the EIS, OPCD acknowledges that the nature and location of many other historic structures exists in the City's records. The checkmarks in the first column of Exhibit 3.5-4 (EIS at 3-302) indicates that the city has its own designation of historic properties in all but one of the listed neighborhoods. Yet none of that information, readily available in the City's database, is disclosed or utilized in the EIS. Without disclosure of this baseline information, it is impossible for EIS readers to make informed decisions about the likely impact of the proposed upzone and it is impossible for the Examiner to conclude that OPCD took the requisite "hard look" at the project's impacts. *Ctr. for Biological Diversity v. Bureau of Land Mgmt., supra* ("[i]f numerous species are omitted from the environmental baseline, neither the Court nor the public can be assured that the BLM took a 'hard look' at the environmental impacts on those species").

As an example of the extremely limited information provided in the EIS, consider the historic resources in three neighborhoods: North Rainier (Mt. Baker), Beacon Hill, and South Park. The EIS informs the reader that there is only one historic building determined eligible for listing on the National Register of Historic Places in North Rainier. Newman Dec., ¶ 5 (EIS at 3-301 (Ex. 3.5-3)). That would likely lead the reader (*e.g.,* a City Council member) to believe that increased density in that neighborhood would have little or no impact on historic resources.

Now consider the information *in the city's own database* that is not included in the EIS. When that database is queried for historic properties in North Rainier, a list of 173 historic properties is generated. Declaration of Eugenia Woo (May 3, 2018) at ¶ 6. That information certainly is relevant to making an informed decision regarding whether and to what extent development capacity should be increased in North Rainier. Yet that information is not included in the EIS. *Id*. at ¶ 9.

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

Likewise, in Beacon Hill, the EIS shows no historic buildings. Newman Dec., ¶ 5 (EIS at 3-300 (Ex. 3.5-2)). Yet the city's own database identifies 340 historic resources in that neighborhood. Woo Dec., ¶ 7. The EIS shows only one historic building in the South Park neighborhood. *Id*., ¶ 9 (See also EIS Ex. 3.5-2). The City's database identifies 116 historic resources in the South Park neighborhood. Woo Dec., ¶ 8. The EIS is not only omitting important information, but misleads in suggesting that few historic resources exist or have been identified in this neighborhood.

These two examples are not unique. Across the entire city, the EIS maps show exceedingly few historic resources within the neighborhoods slated for map upzones, while the city's database contains troves of information on the historic resources at risk in those neighborhoods. Given this failure to provide basic and important baseline information, the EIS section purporting to analyze historic resources should be deemed inadequate as a matter of law.

3. OPCD was able to provide more detailed information when it analyzed MHA impacts in a single neighborhood.

OPCD knows how to do a better job. When the MHA proposal was analyzed for the Uptown neighborhood, OPCD's EIS zeroed in on the specific historic resources that would be at risk in the specific areas proposed for increased development intensity. The Uptown EIS gave the City Council a discussion of potential impacts that was appropriate for the neighborhood-specific level of planning reflected in the upzone proposals:

> The height limits of several blocks that include register or landmark-listed buildings are proposed to be raised 20 to 45 feet, potentially altering some characteristics that make those properties eligible (see Exhibit 3.5.3). One is the Marqueen Apartment building on the northeast corner of Queen Anne Avenue N and Mercer Street (property 21 in Exhibit 3.5.4). This is a three-story building approximately 35 feet tall. The building has been determined NRHP and WHR Eligible based on its architectural character and siting on

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

> a prominent corner in the heart of Uptown. Increasing adjacent height limits to 85 feet has the potential to significantly impact the building's prominence and regard in the neighborhood.

Newman Dec., ¶ 9 (Uptown DEIS at 3.188). The Uptown FEIS went on to describe additional specific impacts:

> The height limits of several blocks that include register-listed buildings are proposed to be raised substantially, potentially altering some characteristics that make those properties eligible, such as the Marqueen Apartment building as described in Alternative 2. Another example is the block containing the Queen Anne Post Office, where height limits would increase from 65 feet to 160 feet. One of the characteristics of this building that makes it eligible at the local level is how its architecture and landscaping was designed to blend with Seattle Center on the opposite side of 1st Avenue North. For example, the trees on the east elevation along Republican and 1st Avenue N were part of the landscape design for the Seattle Center, and were planted before construction of the Post Office began. "These sycamores were chosen in 1964 by famous Washington architect Paul Thiry and the renowned landscape architecture firm of Richard Haag and Associates" (Artifacts Architectural Consulting, 2009, p. 16). <u>The sycamores still appear healthy and well within their estimated lifespan.</u> If the height limits are increased, buildings that extend 95 feet over the existing Post Office have the potential to diminish those characteristics.

Id. (Uptown FEIS at 4.28 (underlining in original indicating FEIS modification of DEIS language)).

This important, neighborhood-specific description of historic resources at risk is missing in the current, citywide EIS. The closest the EIS gets to providing information on the historic resources that would be impacted by increased development are the two maps at 3-300 and 3-301 (exhibits 3.5-2 and 3.5-3) which show the location of a small number of historic buildings. The properties mapped on these exhibits are only those that have been determined eligible for listing on the National Register of Historic Places by the Washington State Department of Archaeology and Historic Preservation. Woo Dec., ¶ 5. These determinations of eligibility barely scratched the surface of the *known* historic properties in the 27 neighborhoods. *Id.* The City of Seattle has its

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

own database of known historic structures which contains hundreds, perhaps thousands, more historic structures. *Id*. No information regarding the location or significance of those historic resources is presented. *Id.*

In contrast to the discussion in the Uptown EIS, the City Council is now confronted with a massive set of upzones for 30 additional neighborhoods and numerous parcels in between. Despite the neighborhood and parcel-specific level of the proposed upzones, the City Council will not have the slightest clue about how its enactment of the proposal would actually impact what still remains of the City's historic fabric. The City Council will have no basis for deciding whether shifting the upzone a block here or reducing density increases there will result in protection for historic resources that remain hidden in the City's filing cabinets, instead of properly reflected on the upzone maps for the Council to review.

It is almost as if OPCD's EIS was intended to keep the City Council blind to the existence and location of the historic resources. While the zest for a solution to the affordable housing crisis is understandable, SEPA demands that there be an environmental review sufficient to ensure a reasoned understanding of the potentially staggering impacts to the many other environmental values and interests that SEPA aims to protect. This detailed, nuanced and balanced review is essential for good planning in a City that is struggling to manage unprecedented growth and change.

4. The EIS fails to describe the difference in the impacts to historic resources in specific neighborhoods as density is shifted in the alternatives.

The failure of the EIS to disclose the proposal's impacts on historic resources can be seen, not only when viewing each neighborhood in isolation under any given alternative, but also when trying to assess the different impact on historic resources among the alternatives. That is, the public and decisionmakers should know whether historic resources in a given neighborhood would fare

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

better or worse under one alternative versus another. But that information is not presented in the EIS, other than in an extremely superficial and cursory manner.

The failure of the EIS to provide this comparative assessment is a critical flaw. A primary purpose, perhaps "the" primary purpose, of any EIS is to allow for an informed choice between alternatives. "The alternatives section is the heart of the EIS, 40 C.F.R. § 1502.14 (1984), and serves to insure that the decisionmaking body has actually considered other appropriate methods of attaining the desired goal. *Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admin.*, 772 F.2d 700, 712 (11th Cir. 1985)." If the EIS does not provide meaningful information about the extent to which impacts vary among alternatives, the EIS is a failure.

The citywide EIS acknowledges that one difference among the alternatives is that areas of more intense development will vary neighborhood-to-neighborhood among the alternatives. Newman Dec, ¶ 5 (EIS at 3-304). Given the EIS's acknowledgement that more development equals more risk to historic resources, there ought to be a description of the differing risk to historic resources in the various neighborhoods as development intensity shifts among the alternatives. But there is no such description.

Thus, even though the Preferred Alternative will result in greater development opportunities in some of the 27 selected neighborhoods (compared to Alternative 2 and 3), there is not a single word in the EIS about the historic resources at risk in those neighborhoods that are placed in greater jeopardy if the Preferred Alternative is chosen. Instead, painting with an extremely broad brush, the EIS simply states:

> The Preferred Alternative estimates seven urban villages will have a housing growth rate of over 50 percent greater than could occur under Alternative 1 (Exhibit 3.5–7). The growth rates for these seven urban villages range between 54 percent and 112 percent with an average of 86.43 percent estimated housing growth rate. Two have

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

> estimated growth rates over 100 percent. The urban villages over 50 percent are: Crown Hill, Fremont, Green Lake, Madison-Miller, Morgan Junction, North Beacon Hill, and Wallingford. Of these, the oldest urban village is Madison-Miller, followed by Fremont, Green Lake, and Wallingford. These older urban villages are likely to contain a higher number of older buildings than the others which were incorporated in 1907 or later.
>
> However, all of these urban villages contain buildings 25 years or older, which would qualify for consideration as potential historic resources. Systematic inventories have been conducted for four of the seven urban villages.

Newman Dec, ¶ 5 (EIS at 3-310).

The foregoing two paragraphs set forth the entirety of the FEIS's comparative description of the impacts that will occur under the Preferred Alternative in contrast to the other alternatives. It provides the public and City Council virtually no useful information. Recall that the proposed action is much more specific than, say, a comprehensive plan amendment than simply identifies which neighborhoods should generally take more growth. Like the MHA upzones analyzed in the Uptown EIS, the current proposed action includes block-by-block rezones, albeit on a scale that is exponentially more vast and impactful than what was addressed for Uptown. Some of the rezones increase the zoning by one step. Other blocks are proposed to increase by two or three steps. *See, e.g.,* EIS at 3-304. Project applications filed in the wake of the rezones will lock-in vested rights to that greater development capacity.

Yet despite the lot by lot upzone proposals and the risk that poses to historic resources on those lots, the EIS provides no information that allows the Council to shape the rezones to reduce or eliminate increased zoning capacity on blocks with historic resources of unusual value or to avoid blocks where historic resources are clustered. To the contrary, the EIS acknowledges that systematic inventories have not been completed in three of the most impacted neighborhoods, but

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

makes no effort to fill that data gap. *See* WAC 197-11-080 (duty to fill data gaps if information is not known and costs to obtain it are not exorbitant).

Remarkably, even for the four neighborhoods where systematic inventories have been completed, the results of those inventories are not shared with the reader! Simply identifying these seven neighborhoods as those with the highest growth potential (and, therefore, highest risk to historic resources) is a wholly inadequate and misleading disclosure, given the very specific rezones, all subject to new vested rights, that are included in the proposed action.

5. The EIS includes misleading information about the impacts on historic resources resulting from increased development.

The cursory information provided by the EIS regarding impacts to historic resources is not even accurate. The EIS explains that some of the development catalyzed by the upzones will fall below SEPA thresholds and, therefore, historic resources in those situations have no protection. Newman Dec., ¶ 5 (EIS at 3-305). True.

The EIS also infers that projects above SEPA thresholds will protect historic resources through the SEPA review process. *Id*. That is simply not true.

The City ignores that the city's SEPA-based protections for historic resources are woefully inadequate. While the City may be free to adopt inadequate protections for historic resources in its SEPA regulations, the EIS must acknowledge the limitations of the SEPA-based protection, so that the public and the City Council are aware that the proposed upzones will adversely impact historic resources regardless whether the implementing development projects are below or above SEPA thresholds.

The EIS acknowledges that implementing projects that fall below SEPA thresholds could cause significant adverse impacts to historic resources:

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

> Redevelopment could result in a significant adverse impact for properties that have the potential to be landmarks if the regulatory process governing the development does not require consideration of that property's potential eligibility as a Seattle Landmark, such as projects exempt from review under SEPA. For example, projects with fewer than 20 residential units, or that have less than 12,000 square feet of commercial space, are exempt from SEPA review.

Newman Dec., ¶ 5 (EIS at 3-305). (Later, the EIS explains that this "significant adverse impact" includes both the possible demolition of historic buildings and "decreases to the historic fabric of a neighborhood" and that the latter impact may make it more difficult for the neighborhood to obtain historic district status. EIS at 3-306.)

But whereas the EIS acknowledges these potential and very significant impacts to specific historic buildings and entire historic neighborhoods when SEPA exempt projects implement the upzones, the EIS fails to acknowledge that the exact same impacts are possible even when implementing projects that are subject to SEPA. Instead of acknowledging that impact, the EIS instead trumpets the possibility that SEPA mitigation "may" be used to avoid the loss of historic resources. But the EIS fails to acknowledge or discuss the limitations in the SEPA mitigation program for historic resources:

> For projects subject to SEPA, demolition or substantial modifications to buildings over 50 years in age that are adjacent or across the street from designated Seattle Landmarks are subject to review for their potential adverse impacts on the designated landmark (SMC 25.05.675H). <u>When reviewing the project, the Landmarks Preservation Board uses the Secretary of Interior Standards as guidelines.</u> If adverse impacts are identified, mitigation measures may be required. Measures could include sympathetic façade, street, or design treatment or reconfiguring the project and/or location of the project.

Newman Dec., ¶ 5 **(**EIS at 3-306) (underlining in original, depicting language in the FEIS that did not appear in the DEIS).

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

The authors of the EIS either were unaware or simply could not bring themselves to admit that even when SEPA applies, historic resources and entire historic neighborhoods will be significantly impacted, *i.e.,* historic buildings will be lost and the historic fabric of whole neighborhoods will decrease. Again, environmental review must occur early in the process, and at a level of detail that is commensurate with the level of planning in the proposal. Here, entire neighborhoods and historic landscapes are proposed for collective upzones. The City cannot avoid its responsibility by pointing to project level review processes that are admittedly ineffective.

SEPA is a not a fail-safe in the City of Seattle's review process. The thresholds for categorical exemptions have increased significantly recently which has resulted in more potentially historic properties falling through the large cracks of review. More disturbingly, code language in place that is meant to provide a level of review for potentially historic properties is either being ignored or misinterpreted by the City, resulting in the issuance of demolition permits for potential landmarks. Woo Dec, ¶ 11.

An EIS is supposed to be an objective assessment of a project's impacts. It is not supposed to "hide the ball." Given the inherent weaknesses of the city's SEPA mitigation for historic resources, the EIS should have acknowledged that even for implementing projects subject to SEPA, significant adverse impacts will occur, including the loss of historic structures and a decrease in the historic fabric of entire neighborhoods. The EIS should be remanded for a forthright and reasonably detailed discussion of the impacts that are likely to arise from the full range of projects contemplated by the upzones, not just those that are SEPA exempt.

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

6. The EIS fails to discuss measures to mitigate the impacts to historic resources.

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. 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)*.

Despite this, the authors of this EIS have merely listed mitigation measures. No discussion of their effectiveness, expense, practicality, potential for being adopted, or any other feature is provided. *See* Newman Dec., ¶ 5 (EIS at 3-311). The EIS should be remanded for inclusion of a discussion of mitigation measures for historic resources to ensure that the City Council is able to make a reasonably informed decision.

7. The EIS fails to include a reasonable range of alternatives that are shaped to reduce impacts on historic resources.

An EIS must include a reasonable range of alternatives. The alternatives should be shaped to respond to the significant issues presented by the proposal. Here, there are various ways to increase development capacity that would result in significantly different impacts to historic resources. The city took one step in this direction by precluding any zoning map changes in historic neighborhoods that already have been formally designated. Newman Dec., ¶ 5 (EIS at 3-305). This limitation applies to all three action alternatives. *Id.*

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

But OPCD might also have considered an alternative that also avoided additional growth in historic neighborhoods that have not yet been officially designated, yet have the qualities likely to merit that designation. Such an alternative could have still achieved OPCD's purposes of increasing development capacity to a degree sufficient to address its affordable housing goals.

OPCD knows how to shift density. The three action alternatives shift density among the neighborhoods, but none of those alternatives was developed with a goal of better protecting the city's quickly diminishing historic resources. Instead, the three alternatives shift density based on two factors: displacement risk and access to opportunity. Newman Dec., ¶ 5 (EIS at 2-16). As described in the EIS, the difference between Alternative 2 and 3 is that for Alternative 3, more growth would be directed to "high opportunity" areas and less to areas with high risk of displacement. *Id*. (EIS at 2-31). (The high opportunity and high risk of displacement areas and the methods for identifying them are contained in EIS Appendix A.) In limiting alternatives to those that address areas of opportunity and displacement risk, OPCD failed to include an alternative that would allow the City Council to evaluate opportunities to modify the proposal in a way to avoid or minimize damage to historic neighborhoods, structures, or landscapes (designated or otherwise).

The final EIS includes a fourth alternative, dubbed the Preferred Alternative. It is said to be like Alternative 3, but with modifications to address additional factors, like housing near transit nodes, moderating development capacity increases in environmentally constrained areas, and increasing development capacity on known potential affordable housing sites. Newman Dec., ¶ 5 (EIS at 2-17). But this alternative does nothing to protect undesignated historic neighborhoods either. (While conceivably the reference to "environmentally constrained areas" might have included historic neighborhoods, that was not the case.) As a result, the City Council has no way

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

to assess the merits of an alternative that shields historic neighborhoods from the upzones (unless the historic neighborhoods have already been designated).

If all neighborhoods qualifying for historic designation had already been designated, this would not be an issue. But everyone involved in historic resource protection in this city knows that there are neighborhoods that likely qualify for historic designation, but have not yet sought or obtained that status. The City's Comprehensive Plan recognizes this, calling for the designation of additional historic districts to protect and perpetuate their historic identity:

> Policy LU 14.2: Support the designation of areas as historic and special review districts, and the designation of structures, sites, and objects as City of Seattle landmarks in order to protect, enhance, and perpetuate their historical or architectural identities.

2035 Comprehensive Plan at 66.

Commenters on the DEIS noted that there were additional areas of the city that maintained their historic fabric and where increased density as contemplated by the project would create unmitigable harm. For instance, petitioner JuNO's letter complained about the lack of detail at The Junction in West Seattle (intersection of Alaska Avenue and California Avenue:

> The DEIS fails to recognize the Hamm and Campbell buildings, which are historic landmarks in the upzone area, in this very intersection. It acknowledges that a private group carried out a historic survey but fails to take advantage of it. It should use it as an integral part of the analysis.[3] Six additional buildings are identified that have landmark potential, and community input and local business owners comment extensively on the culture of the Junction as it is worth preserving.

Newman Dec, ¶ 5 (EIS, Chapter 4, Comments & Responses (JuNO letter)). *See also* EIS, Chapter 4, Comments & Responses, Marked Comments G-M, pages 77 (Comment of P. Mark Hannum dated August 7, 2017), and 204 (Comment of Eve Keller dated August 7, 2017).

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

Indeed, commenters pointed out that the process had already begun to obtain historic district status for some of these worthy neighborhoods: "I think no action should be implemented in the North Rainier Urban Village area. **The neighborhood is in the process of acquiring a Landmarks designation** for the unique homes in this area and an expansion of the area boundaries and change in zoning would impede these efforts." Newman Dec., ¶ 5 (EIS, Chapter 4, Comments & Responses, Marked Comments G-M, pages 77 (Comment of P. Mark Hannum dated August 7, 2017) (emphasis supplied); *see also* The Mount Baker Park Addition: A Historic Intersection of People and Place (Friends of Mount Baker Town Center, October 19, 2017) at https://towncenterfriends.org/2017/10/19/the-mount-baker-park-addition-a-historic-intersection-of-people-and-place/

In sum, the City has recognized the importance of protecting intact historic neighborhoods and other clusters of historic resources from the increased demolitions inherent in its proposal. But OPCD failed to provide decisionmakers with an alternative that adequately addressed the reality that not all historic neighborhoods are already formally designated. If the City has not taken the time to understand the extent of its important historic resources, then that time is now – while there is still an opportunity to protect those resources from what may be the most landscape changing set of upzones the City has ever seen. The EIS should be remanded for development and analysis of an alternative that precludes upzones in neighborhoods that are probable candidates for historic district designation or otherwise include clusters of high value historic properties.

D. The EIS Fails to Adequately Address Tree Canopy Issues.

1. Background

Accommodating additional growth in Seattle is often said to have the benefit of reducing sprawl pressures on lands outside the city. But others have warned that if growth in the city is not

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

"done right," it can backfire – making the city less livable and, thereby, increasing development pressures on suburban and rural lands. A balance is needed if increased development in the city is to result not just in more housing units, but an increased demand for people wanting to live in a dense urban area. This conundrum is recognized in Seattle's *Urban Forest Management Plan* (2007):

> Accommodating growth is important in order to preserve open spaces outside of the city. However, the loss of treed relief in our built environment reduces livability and further motivates sprawl.
>
> * * *
>
> Finding the right balance is crucial to maintaining the city's livability and encouraging new development within already developed areas rather than pushing it to the metropolitan fringe.

Newman Dec, Ex. A at 1, 5.

The *Urban Forest Management Plan* also recognizes a wide variety of in-city benefits associated with maintaining and increasing the city's tree canopy. These include environmental benefits (*e.g.* habitat for songbirds and wildlife; cooling streams); economic benefits (*e.g.,* reducing stormwater runoff and thereby reduces the expense of stormwater infrastructure); and social benefits (*e.g.,* more pleasant urban environment; various health benefits). As the plan aptly notes:

> [M]any studies show that people enjoy trees and are more comfortable in the presence of trees than they are without them in a landscape. The fact that many people plant a tree in memory of a loved one is a strong indication that we see trees as symbols of life and longevity.

Id. at 21.

The *Urban Forestry Management Plan* recognizes that the amount of tree canopy is decreasing; that development pressures are one of the key causes of canopy loss; and that reversing that trend is a major challenge:

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

> One of the significant gaps in the City of Seattle's current regulations is the limited ability to ensure ongoing tree preservation and planting on private property. Balancing private property rights with the public goal of increasing a healthy urban forest is one of our biggest challenges.

Id. at 45.

A variety of regulatory improvements were recommended in the 2007 forestry plan, *id.* at 45 - 46*,* including new "regulations to protect trees on all property undergoing development," *id.* at 56,[6] but no such regulations have been adopted. The MHA proposal to incentivize additional development in this lax regulatory environment will move the city away from its goal of increasing tree retention.

The 2007 plan was updated in 2013. That plan repeated the call for increased regulation of private property to protect trees during development and beyond. Newman Dec., Ex. B (*Urban Forestry Stewardship Plan* (2013) at 70).

Late in 2017, Mayor Tim Burgess issued an executive order recognizing that as the city developed its MHA program, the city needed to respect the "L" in HALA ("livability"):

> Whereas, MHA implementation must work in partnership with the livability promises of the Housing Affordability and Livability Agenda, including urban forestry efforts to preserve and enhance access to urban trees.
>
> Whereas recent research has shown that existing urban tree protections and enforcement practices related to trees must be strengthened in order to protect Seattle's canopy coverage; . . .
>
> ***
>
> The Office of Planning and Community Development (OPCD) will collaborate with the Urban Forestry Core Team to explore how tree requirements and development standards can be updated *as part of MHA* to support advancing the City's urban forestry goals as we grow.

[6] *See also, id.* at 63: In single family zones, "[t]he city can do more to encourage tree planting and retention through . . . expanding the scope of a tree protection ordinance to include trees on private property."

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

Executive Order 2017-11 (Oct. 13, 2017) (emphasis supplied).

In sum, the urban tree canopy is important; it is at risk as development pressures grow; calls for new regulations to protect trees imperiled by development have gone unheeded; and MHA is designed to incentivize additional development in various areas of a city where regulations to protect trees remains inadequate (and where new projects can vest their increased development rights immediately upon passage of MHA before the city provides any increased regulatory protection for trees (if it ever does)). In this setting, the EIS should have included a robust discussion of the proposal's probable effects on the tree canopy in neighborhoods slated for increased development.

2. The EIS Fails to address several key aspects of MHA's impact on tree canopy

a. <u>The EIS fails to describe the impact of the no action alternative on tree canopy</u>.

The no action alternative "provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives." CEQ *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18026 (Mar. 23, 1981). If the impacts of the no action alternative are not adequately described, the comparative analysis inherent in SEPA's requirement for analysis of a range of alternatives is impossible.

Here, there is no dispute that the EIS failed to describe the impacts of the no action alternative on tree canopy. While the EIS provided that analysis for the action alternatives, EIS at 3-321, the EIS admits no such analysis was provided for the no action alternative: "This study does not quantify tree loss resulting from current development practices." Newman Dec., ¶ 5 (EIS at 3-

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

322). Because an EIS must disclose the impacts of the no action alternative, this EIS, by its own admission, is fatally flawed.

b. The EIS fails to address the impacts caused by increased development in areas where development capacity increases without a zone change.

The action alternatives all involve increased development capacity through various mechanisms. For present purposes, we identify three distinct mechanisms:

1. Zoning map changes not within the same base zoning, *e.g.*, LR to MR, or SF to LR.

2. Zoning map changes within the same base zoning, *e.g.,* a map amendment from LR 1 to LR 2 or from NC 30 to NC 40.

3. Text changes where development capacity increases without any map amendment.

The EIS limits its analysis of tree canopy impacts to the first of those three changes. It does not analyze the impact on tree cover from the other two. *See, e.g.,* Newman Dec., ¶ 5 (EIS at 3-328 (analysis of tree canopy impacts for Alternative 2 limited to impacts resulting from zoning map changes not within the same base zone); EIS at 3-335 (same for Alternative 3); EIS at 3-339 (same for Preferred Alternative)).

The EIS provides no explanation for turning a blind eye to the impacts associated with zoning map changes within the same base zoning nor to the impacts associated with the zoning text amendments. As noted above, the map amendments cover very large swaths of the city. Both the map amendments and the zoning map changes within the same base zoning are intended to catalyze additional development. The City is on record in the 2007 and 2013 tree plans and the mayor's 2017 executive order that increased development is a major threat to the city's tree canopy; that the city needs to adopt regulations to protect trees as private property is developed, but that the city has not yet done so. Given the absence of new regulations to protect trees as private property is more

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

intensively and more rapidly developed, the EIS should have addressed the impacts on the tree canopy from all three growth-inducing mechanisms included in the action alternatives. The failure of the EIS to do so renders it inadequate.

c. The EIS fails to discuss mitigation for tree canopy loss impacts.

As discussed above in the context of historic resources, an EIS must do more than simply list possible mitigation measures. It must discuss them. Just as the EIS failed to do more than list possible mitigation for impacts to historic resources, so, too, did it fail to do more than list mitigation measures for impacts to tree canopy.

Again, the facts are not in dispute. The list of potential mitigation measures is at EIS 3-340 through 3-341. There is nary a word of discussion regarding their possible benefits, limitations, feasibility, costs or other qualities. Because a mere listing is per se inadequate, the Examiner should resolve this issue without a lengthy, expensive evidentiary hearing.

E. The EIS Fails to Include an Assessment of the Impacts of the Text Amendments Outside the Urban Villages

OPCD's proposal includes text amendments to the zoning code. These amendments apply throughout the city; they are not limited in geographic scope to the Urban Villages where the map amendments apply.

The zoning text amendments increase development capacity to the same or greater extent as the map amendments. See Newman Dec., ¶ 4, (Council Bill 119184). The legislation includes height increases for existing zoning no matter where it is located in the City. Every single parcel that is currently zoned NC1-30 will be changed to NC1-40 (M). *Id*. at 5. Every parcel that is currently zoned NC1-40 will be NC1-55(M) and the list goes on and on. In total, there will be

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

automatic height increases in 30 different zones throughout the entire City of Seattle. *Id*. at 4-6. (Council Bill 119184, Table A for Section 1).

In addition to that change, the proposed legislation removes a legal restriction that currently bars height limits above 40 feet outside of urban villages. *Id*. at 11 (Council Bill 119184 at SMC 23.34.008(E)(4). In other words, if this legislation is adopted, areas outside of urban villages can be rezoned to a height limit anywhere above 40 feet when before they could not.

Another proposed change that affects areas outside of urban villages and urban centers are the changes to the provision concerning the designation of single family zones in SMC 23.34.010. *Id.* at 13-14. With respect to the criteria for rezoning all single family zones in the City, the proposed legislation changes the criteria in a wholesale manner and removes the reference that requires consistency with neighborhood plans (which currently preserve single family zoning in certain areas). *Id*. The same is true for the Residential Small Lot criteria. *Id*. at 17-18 (Council Bill 119184 at SMC 23.34.012).

The proposed legislation also requires for every single rezone that occurs at any time in the future in all zones, including single family zones, the new zone must have either an (M) suffix, an (M1) suffix, or an (M2) suffix. *Id*. at 8-9 (Council Bill 119184 at SMC 23.34.006).

These changes (and others that we have not highlighted) affect areas outside of the urban villages and urban centers.

As explained earlier, the actual amendatory language of the text amendments is not provided in the EIS, but the EIS does mention that there will be a change in development capacity is set forth in a series of tables. Each table is specific to four different sets of zones:

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

ZONES	TEXT CHANGES
RSL	Density and height limits increased
Lowrise zones	FAR, height and density limits increased
Midrise and highrise zones	FAR and height limits increased
Commercial and Neighborhood Commercial Zones	FAR and height limits increased

Newman Dec., ¶ 5 (EIS App. F, Exhibits F-1 through F-5).

These rezones apply to every block in the city falling within any of these zones. The geographic scope of the text rezones is massive, covering the entire city with any of the multi-family, RSL and neighborhood commercial zones.

The development capacity increases provided by these text amendments can be measured in various ways. Height limits for "tandem" and "cottage" uses in the RSL zone jumps from eighteen feet to 30 feet. *Id.,* Ex. F-1. In the LR3 zone, height limits move from 40 feet to 50 feet. *Id.,* Ex. F-2. In the Highrise zone, they jump from 300 feet to 440 feet. *Id.,* Ex. F-4. In the various commercial zones, they increase anywhere between ten and 40 feet. *Id.,* Ex. F-5.

Density increases by 20% for regular and tandem RSL projects. *Id.,* Ex. F-1. Density for townhouses in the LR1 zone increases by 18.5% for townhouses and 23% for rowhouses. *Id.,* Ex. F-3.

FAR increases in the LR zones by various amounts, spanning a range from 7% (townhouses in LR2) to 64% (townhouses and rowhouses in LR3); in the Midrise zone by up to 40%; in the

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

Highrise zone by up to 15%; and in the commercial zones by 25% to 65%. *Id.,* Exs. F-2, F-4 and F-5.

Given the magnitude of these increases, applied across the entire City of Seattle, one might expect the EIS to devote considerable attention to the impacts caused by these changes. Yet, in a 926-page EIS, OPCD devotes only three sentences to the impacts of these code changes:

> Denser and more intensive growth would occur in existing multifamily and commercial zones outside urban villages. In some instances, depending on the alternative, these changes would have fewer land use impacts since increases in maximum height limits would be small, resulting in only minor impacts. In other areas, the changes could be moderate or significant, depending on the location and specific change in zoning proposed by the alternative.

EIS at 3-109 – 3-110. The only one of those three sentences that addresses the impacts of the more consequential text amendments is the last one and it says very little. A variety of words come to mind to describe this disclosure of the impacts of the text amendments: Cursory. Meaningless. Superficial. Perfunctory. Of those options, "meaningless" seems to be the most relevant. An EIS is supposed to inform decisionmakers and the public. This "disclosure" of impacts resulting from the text amendments is utterly worthless. The public and City Council are not provided with the slightest piece of useful information.

Not only did the EIS completely and utterly fail to analyze the impacts of the legislative proposal outside of the urban villages on that broad scale, the EIS did not even include (at the most basic level) areas that are zoned for Single Family within the study area for the EIS in the first place. The study area for the MHA EIS is described in the EIS as follows:

> The study area for this EIS includes existing multifamily and commercial zones in Seattle, areas currently zoned Single Family Residential in existing urban villages, and areas zoned Single Family Residential in potential urban village expansion areas identified in the Seattle 2035 MHA Final EIS Nov. 2017 1.3 Comprehensive

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

> Planning process. The study area does not include the Downtown, South Lake Union, and Uptown Urban Centers; in each of these sub-areas a separate planning process has implemented or will implement increases in development capacity and MHA requirements with its own independent SEPA analysis. The study area also excludes the portion of University Community Urban Center addressed in the University District Urban Design Framework and EIS. A map of the study area is in Exhibit 2-1.

Newman Dec., ¶ 5 (EIS at 1.2-1.3).

On its own admission, the EIS study area does not include areas currently zoned Single Family Residential that are outside of existing urban villages or potential expansion areas. That is, on its face, clear legal error because, as is demonstrated above, the proposed legislation directly (and indirectly for that matter) affects areas that are zoned Single Family Residential outside of urban villages and urban village expansion areas.

Summary judgment motions are a mechanism for avoiding the time and expense of a trial when relevant facts are not in dispute. There is no need for the city and the appellants to engage in a week's long evidentiary hearing to resolve the issue of whether these three sentences in the EIS fail to adequately address the impacts flowing from the citywide upzones generated by the text amendments. The Examiner should determine on the undisputed facts of this record that the EIS fails to provide any meaningful analysis of the impacts of the proposed text amendments and that the EIS must be revised to provide the detailed, "hard look" assessment mandated by SEPA.

F. The EIS Fails to Adequately Address the Comprehensive Plan Inconsistencies and Amendments that will Be Needed to Allow the Proposal.

Development regulations, like a zoning code and zoning map, must be consistent with the adopted comprehensive plan. RCW 36.70A.040(3). In the GMA's "cascading hierarchy,"[7] the

[7] "The land use decision-making regime in counties and cities fully planning under GMA is a cascading hierarchy of substantive and directive policy. This policy direction flows first from the planning goals and requirements of

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

comprehensive plan should be adopted first and then used to guide adoption of implementing development regulations. This GMA fundamental is embraced in Seattle's Comprehensive Plan. Comp Plan at 20 (flow chart showing GMA hierarchy).

But OPCD has turned that upside down. It has developed a detailed, citywide rezone proposal which is not guided by the comprehensive plan, but rather requires amendments to it.

The EIS acknowledges that the zoning amendments will create inconsistencies with the Comprehensive Plan and, thus, the Comprehensive Plan will need to be amended. Newman Dec., ¶ 5 (EIS, App. F at F-11). But the need to amend the Comprehensive Plan is not described in the EIS's description of the proposal itself. Rather, this part of the proposal is mentioned when the project's land use impacts are discussed.

As detailed below, the EIS includes two errors regarding the proposal's inconsistency with the Comprehensive Plan that can be readily addressed on summary judgment. First, while acknowledging that the proposal will necessitate amendments to the Comprehensive Plan, the proposed amendments are not described. *Id*. Failing to completely describe the proposal (particularly regarding something as fundamental as the content of necessary comprehensive plan amendments) renders the EIS inadequate as a matter of law.

Second, in its review of the proposals consistency with the comprehensive plan, the EIS starts the job, but leaves it mainly undone. The EIS fails to consider the proposal's consistency

---

the Growth Management Act to county-wide planning policies (CPPs) (RCW 36.70A.210) and from the goals and requirements of the GMA and the SMA[6] to the comprehensive plans and development regulations of counties and cities. Policy direction then flows from CPPs to comprehensive plans, and then from comprehensive plans, including subarea plans (if any), to development regulations. Finally, direction flows from development regulations to *land use decisions*[7] and other planning activities of cities and counties. *See* RCW 36.70A.120. Land use decisions, governed by RCW 36.70B, include both site plan approvals, (including but not limited to planned unit developments, conditional use permits, and site master plans), as well as construction approvals, such as grading and building permits." *Laurelhurst v. City of Seattle*, WL 22896421, at *8 (2003).

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

with the vast majority of relevant comprehensive plan policies. The failure to consider discuss in detail the relationship between the code amendments and scores of relevant comprehensive plan policies renders the EIS inadequate as a matter of law, too.

1. The EIS fails to describe comprehensive plan amendments that are part of the proposal and, therefore, also fails to describe the impacts of those changes.

OPDC recognizes that its proposed zoning changes may conflict with the city's existing comprehensive plan. Newman Dec., ¶ 5 (EIS, App. F at F-11). The EIS states that "[a]mendments to these policies ~~will be~~ are docketed and the policies would be modified to remove any potential inconsistencies." *Id.* (alterations in original indicating changes from DEIS). But the actual EIS amendments are nowhere described in the EIS.

Because zoning codes may not be amended if the amendments create an inconsistency with the comprehensive plan, the proposed comprehensive plan amendments are a necessary and integral part of this proposal. An EIS must include the "principal features" of the proposal. WAC 197-11-440(5)(c)(i). Given the foundational and fundamental nature of the necessary comprehensive plan amendments, they must be included as 'principal features" of the proposal and analyzed in this EIS. Because this EIS fails to include a description of the proposed comprehensive plan amendments and fails to analyze their impacts, alternatives and possible mitigation measures, the EIS is inadequate as a matter of law.

The failure of the EIS to describe the proposed comprehensive plan amendments led to a legal failure to analyze alternatives to proposed Comprehensive Plan Amendments. *See* EIS, App. F at F-11. 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

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

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).

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.

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

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.

2. The EIS fails to address the proposal's consistency with all relevant comprehensive plan policies.

An EIS must address a proposal's "relationship with existing land use plans." WAC 197-11-444 (2)(b)(i). OPCD complied with this requirement to a very limited extent, omitting major parts of the analysis.

The EIS addresses the proposal's relationship with the existing comprehensive plan at 3-107 and 3-108. Those two pages address the relationship of the proposal with six land use policies in the citywide land use section of the plan (LU 1.3, LU 1.4, LU 2.7, LU 7.3, LU 8.4, and LU 8.13).

The EIS does not address the proposal's consistency with Comprehensive Plan policies other than those in the citywide chapter addressing land use policies. The Comprehensive Plan addresses many land use issues other than those collected in the land use chapter. The plan addresses related land use issues in its chapters covering transportation, housing, capital facilities, utilities, parks, open space, and the environment. The EIS fails to address the relationship of the proposal to any of these citywide sections of the Comprehensive Plan. *See* Newman Dec., ¶ 5 (EIS at 3-107, 3-108). These facts are not in dispute.

The City's comprehensive plan ("CP") is a combination of citywide policies (CP 1 to 199) and a host of subarea plans and policies prepared for each neighborhood around the city (CP 200 to 411).[8] Land use policies, including urban design, are addressed both in the citywide portion of

[8] The current Comprehensive Plan may be accessed at: http://www.seattle.gov/opcd/ongoing-initiatives/comprehensive-plan#projectdocuments

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

the plan (CP 38–70) and in each neighborhood's subarea plan (*e.g.,* CP 222–224 (Capitol Hill); 226 (Central Area); CP 241 (Crown Hill/Ballard); CP 246-47 (Delridge); CP 380-381 (Roosevelt); CP 397–398 (Wallingford); CP 4040 (West Seattle Junction). Likewise, housing is addressed in both the citywide policies (CP 95-105) and in numerous neighborhood plans (*e.g.,* CP 202 (Admiral); CP 224 (Capitol Hill); CP 239 (Columbia City)).

The EIS totally and absolutely fails to address the proposal's relationship to the neighborhood plans. Those neighborhood plan components of the Comprehensive Plan include policies like these, which (notwithstanding political pressures) mandate respect for the important role of single-family areas within the urban villages:

> **Aurora Licton AL-P2**: Protect the character and integrity of Aurora – Lichton's single-family areas within the boundaries of the Aurora – Lichton urban village. (CP 206)
>
> **Fremont F P-13**: In the area where the Wallingford Urban Village and the Fremont Planning Area overlap . . . maintain the character and integrity of the existing single-family zoned areas by maintaining current single-family zoning on properties meeting the locational criteria for single-family zones. (CP 302)
>
> **Morgan Junction MJ P-13**: Maintain the character and integrity of the existing single-family designated areas by maintaining current single-family zoning both inside and outside the urban village on properties meeting the locational criteria for single-family zones, except where, as part of a development proposal, a long-standing neighborhood institution is maintained and existing adjacent community gathering places are activated, helping to meet MJ-P6. (CP 331)
>
> **Northgate NG P-8**: Maintain the character and integrity of the existing single-family zoned areas by maintaining current single-family-zoning on properties meeting the locational criteria for single-family zones. (CP 354)
>
> **Wallingford W-P1**: Protect the character and integrity of Wallingford's single-family areas. (CP 397)

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

> **West Seattle Junction WSJ-P13**: Maintain the character and integrity of the existing single-family areas. (CP 404)
>
> **Westwood/Highland Park W/HP-P18**: Seek to maintain the character and integrity of the existing single-family areas. (CP 408)

The issue here is not whether these are wise policies. The point is that these are the currently adopted policies in effect per the adopting ordinance enacted by the City Council. If OPCD seeks to promote regulations at odds with these adopted policies, OPCD needs to come clean. The EIS needs to set forth the Comprehensive Plan policies that are inconsistent with OPCD's proposals, including these germane land use and housing policies.

This is yet another issue where the facts are not in dispute. There is no need for an extensive hearing. The EIS fails to consider the relationship of the proposal to any of the citywide policies not included in the "land use" chapter and fails to consider all of the neighborhood policies (land use and otherwise). The EIS should be found inadequate for this reason, too.

IV. CONCLUSION

The EIS is inadequate in numerous important respects. The flaws are glaring. A lengthy, expensive hearing is not necessary to identify them. The facts regarding the flaws addressed in this motion cannot be disputed; they are drawn from the city's own documents. Granting summary judgment will serve the interests of all parties by allowing the city to move past this adversarial process and refocus its resources on a planning process that, next time, is truly collaborative and responsive to SEPA's requirements.

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

Dated this 9th day of May, 2018.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: _____
David A. Bricklin, WSBA No. 7583

By: _____
Claudia M. Newman, WSBA No. 24928
Attorneys for Seattle Coalition for Affordability, Livability and Equity

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