BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: **WALLINGFORD COMMUNITY COUNCIL, ET AL.,** of the adequacy of the FEIS issued by the Director, Office of Planning and Community Development.	Hearing Examiner File W-17-006 through W-17-014 CITY OF SEATTLE'S RESPONSE TO SCALE'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Unlike the City's Motion for Partial Dismissal which sought judgment on purely legal issues and one claim for which there is no genuine issue of material fact, SCALE[1] seeks summary judgment on the central, fact-dependent, case-specific issues in this case—whether the City's analysis of impacts on specific elements of the environment is adequate. At hearing, Appellants face standards of review that are deferential to the City and a steep burden of proof. Those standards and burden are substantially harder for SCALE to overcome in the context of dispositive motions. As described below, SCALE has failed to support their request for summary judgment. Its fundamental legal arguments are unpersuasive and the facts are contested.[2] The City therefore requests that the Examiner deny SCALE's motions.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

A. SCALE bears the burden of proof, and the City's determination of the FEIS's adequacy must be accorded substantial weight.

The City has determined that the FEIS is adequate, and SCALE bears a heavy burden to establish otherwise.[3] The Hearing Examiner must give substantial deference to the agency's adequacy determination:

> In any action involving an attack on a determination by a governmental agency relative to . . . the adequacy of a "detailed statement", the decision of the governmental agency shall be accorded **substantial weight**.

[1] Two parties joined in SCALE's motion on Friday, May 11, 2018: Fremont Neighborhood Council ("FNC") and Friends of North Rainier Neighborhood Plan ("FNR"). In addition to joining in SCALE's Motion, FNR has added an additional argument related to the adequacy of the City's analysis of impacts to open space. In this Response, the City addresses all arguments raised by SCALE in which FNR and FNC have joined. The City intends to respond to FNR's additional argument in a separate pleading that will be filed and served within the timeframe established in the Examiner's pre hearing order.

[2] This Response is based on the following declarations and the attachments thereto that the City has filed concurrently with the Response: Declaration of Katherine Wilson, dated May 22, 2018 ("Wilson Dec." or "Wilson Declaration"); Declaration of Paula Johnson Burke, dated May 22, 2018 ("Burke Dec." or "Burke Declaration"); Declaration of Sharese Graham, dated May 22, 2018 ("Graham Dec." or "Graham Declaration"); Declaration of Jeff Weber, dated May 23, 2018 ("Weber Dec." or "Weber Declaration").

[3] Seattle Municipal Code (SMC) 25.05.680(B)(3).

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RCW 43.21C.090 (emphasis added).[4] The burden of an appellant challenging an EIS is high. Of the many EIS challenges in Washington State, only four reported court decisions have held an EIS inadequate.[5] Such decisions are rare because of the comprehensive nature of the EIS process and the outcome of that process, as reflected in the final environmental documents such as the FEIS at issue in this case.

B. <u>The adequacy of the FEIS is reviewed under the "rule of reason," which requires a fact-dependent, case-by-case evaluation and is not amenable to summary judgment</u>.

Summary judgment is not appropriate when reasonable minds might reach different conclusions and a question of fact exists.[6] By its very nature, EIS adequacy claims are fact-dependent and case-specific and therefore not amenable to resolution on summary judgment. EIS adequacy is judged under the "rule of reason," which is "in large part a broad, flexible cost-effectiveness standard."[7] Under the rule of reason, the adequacy of an EIS is "determined on a case-by-case basis guided by all of the policy and factual considerations reasonably related to SEPA's terse directives,"[8] and is thus inherently highly fact-dependent and specific to the underlying proposal. Accordingly, fact-dependent claims, like the adequacy of an EIS are not susceptible to summary judgment.[9] Indeed, no reported court decision has found an EIS inadequate at the summary judgment stage.[10]

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[4] *See also* RCW 43.21C.075(3)(d) (confirming that when an agency provides for administrative appeal of EIS adequacy, the responsible official's decision must receive "substantial weight").

[5] R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, 14-25 (2016); see also Weyerhaeuser v. Pierce Cty., 124 Wn.2d 26, 873 P.2d 498 (1994); *Barrie v. Kitsap Cty*., 93 Wn.2d 843, 613 P.2d 1148 (1980); and *Kiewit Const. Grp. Inc. v. Clark Cty*., 83 Wn. App. 133, 920 P.2d 1207 (1996); *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hearings Bd*., 413 P.3d 590 (Wash. Ct. App. 2018).

[6] *Owen v. Burlington N. & Santa Fe R.R. Co*., 153 Wn.2d 780, 788, 108 P.3d 1220, 1223 (2005)

[7] *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 633, 860 P.2d 390 (1993).

[8] *Id*.

[9] For example, questions under the reasonableness standard for negligence in tort law are generally fact-dependent and not susceptible to summary judgment. *Owen*, 153 Wn.2d at 788. The rule of reason under

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C. A mere example of a different reasonable approach or the conflict of expert opinion is insufficient to establish that an EIS fails to meet the rule of reason.

To ultimately prevail in its appeal, SCALE must establish that the FEIS's analysis is not reasonable. SCALE seeks to satisfy this burden, in part, by comparing the analysis in the FEIS to the analysis in either of two other city EISs and arguing that the City could "provide a more detailed analysis" as had purportedly been done in those other EISs.[11] SCALE confuses the fundamental inquiry before the Examiner. The mere existence of a different reasonable approach or methodology is legally insufficient to support SCALE's adequacy challenge of the FEIS that is the subject of this appeal (and is certainly insufficient in the context of this motion). A challenger can almost always argue that an EIS should have contained more or different analysis, but Washington's courts reject such attempts to "fly speck" the EIS,[12] recognizing that an EIS is "simply an aid to the decision making process," not "a compendium of every conceivable effect or alternative to a proposed project."[13] There could be many reasonable approaches to an EIS analysis. Providing different examples of approach and methodology on their own do not satisfy SCALE's burden of demonstrating that the approach in the FEIS was not reasonable.[14]

SCALE mistakenly relies on *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1044 (9th Cir. 2012), *vacated as moot*, 570 U.S. 901 (2013), to support its argument that the City is bound to the approach it used in two prior EISs, precluding any changes to

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SEPA is a "cousin" of the negligence standard. Settle, *supra*, at 14-18 to 14-19. Similarly, the adequacy of an EIS's analysis is not susceptible to summary judgment

[10] *Supra* note 4.

[11] SCALE's Motion at 21.

[12] *Mentor v. Kitsap Cty*., 22 Wn. App. 285, 290, 588 P.2d 1226, 1230 (1978)

[13] *Concerned Taxpayers*, 90 Wn. App. at 230.

[14] SCALE further contends that the City in this FEIS chose a different approach to assess impacts to historic resources "for no good reason." SCALE's Motion at 21. With its assertions, SCALE flips the burden of proof. The City is not required to explain why it chose a different approach. Rather, SCALE must demonstrate why the failure to follow the same approach was unreasonable. As described, below, SCALE has failed to do so.

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the analysis or approach in this FEIS.[15] In fact, the Ninth Circuit in that case stated the opposite, recognizing that the level of analysis varies by project and that the only relevant inquiry is whether the analysis is reasonable, not whether the analysis conforms with prior EISs:

> We do not require the Forest Service to provide in the 2004 EIS precisely the same level of analysis as in its 2001 EIS. We recognize that it may be appropriate to have [less] detailed analysis of environmental consequences for individual species of fish in the 2004 EIS. Indeed, if the Forest Service had explained its reasons for entirely omitting any analysis of the impact of the 2004 Framework on individual species of fish, it might have been able to show that it is reasonable to postpone such analysis until it makes a site-specific proposal.

Id. at 1012. As discussed below, the City can demonstrate that its approach was reasonable.

Similarly, the mere presence of a differing expert opinion is insufficient to satisfy SCALE's burden. Pursuant to governing case law, "when an agency is presented with conflicting expert opinion on an issue, it is the agency's job, and not the job of the reviewing appellate body, to resolve those differences."[16] Absent definitive contrary expert testimony showing that the City's experts failed to meet industry standards or the rule of reason, the reviewing body must defer to the agency and affirm its analysis of environmental impacts.[17] At the summary judgment stage, an affidavit containing

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[15] SCALE's Motion at 21–22.

[16] *City of Des Moines v. Puget Sound Regional Council*, 98 Wash. App. 23, 988 P.2d 27 (1999) (affirming hearing examiner's decision to uphold conclusions of SEPA agencies with expertise, despite contrary expert opinion).

[17] *Org. to Pres. Agr. Lands v. Adams Cty.*, 128 Wn.2d 869, 881, 913 P.2d 793, 801 (1996) (affirming adequacy of EIS where appellant's expert witness "did not testify definitively that the studies are inadequate"); Findings and Decision of the Hearing Examiner for the City of Seattle, MUP-14-016(DR,W)/S-14-001, at 15 (rejecting an appellant's challenge to an FSEIS noting, "The Appellants have shown that the transportation analysis could have been done differently. They have not shown that [the applicant's expert's] analysis failed to meet industry standards, or that it failed to present . . . a reasonably thorough discussion of the significant aspects of the proposal's probable transportation impacts.").

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admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.[18]

SCALE's arguments related to prior EISs and the accompanying declarations from its expert at most amount to claims that the City could have performed or presented its analysis differently. That is insufficient to prevail on the merits after a hearing. Especially at the summary judgment stage, SCALE's arguments are insufficient to carry their heavy burden. As discussed below, there are genuine issues of material fact precluding a judgment that the City's approach was unreasonable as a matter of law.

III. SCALE HAS NOT SUPPORTED THE BROAD RELIEF REQUESTED

SCALE inappropriately seeks relief beyond what it has argued. The Appellants assert that the Examiner can resolve this case, in its entirety, based on their motions, despite the fact that they have only offered arguments supporting several discrete issues. As explained below, SCALE's arguments fail and SCALE is not entitled to judgment as a matter of law on any of the discrete issues it raises. However, SCALE should have crafted its requested relief as motion for partial summary judgment that is more focused and specific to the issues they raise. At best, SCALE seeks the Examiner's ruling as to the adequacy of the City's analysis of impacts to historic resources, tree canopy, impacts outside urban villages, and the analysis of consistency with the comprehensive plan. Its motion does not address the vast majority of the Appellants' remaining claims.

[18] *Pagnotta v. Beall Trailers of Oregon, Inc*., 99 Wn. App. 28, 34, 991 P.2d 728, 731 (2000).

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IV. SCALE MISCHARACTERIZES THE RULES GOVERNING NONPROJECT ACTIONS

A. SEPA expressly affords lead agencies "more flexibility" in preparing nonproject EISs, and a nonproject EIS "need only analyze environmental impacts at a highly generalized level of detail."

SEPA expressly allows greater flexibility and less detailed discussion in an EIS for a nonproject action:

> (1) The lead agency **shall have more flexibility in preparing EISs** on nonproject proposals, because there is normally **less detailed information** available on their environmental impacts and on any subsequent project proposals. . . .
>
> (4) The EIS's discussion of alternatives for a comprehensive plan, community plan, or other areawide zoning or for shoreline or land use plans **shall be limited to a general discussion of the impacts** of alternate proposals for policies contained in such plans, for land use or shoreline designations, and for implementation measures. The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures but should cover a range of such topics.[19]

Washington's courts have reinforced the regulatory standard for nonproject EISs. In *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty*., the Washington Supreme Court characterized the standard as a "minimum standard," stating that a nonproject EIS "need only analyze environmental impacts at a highly generalized level of detail."[20] Similarly, in *Cascade Bicycle Club v. Puget Sound Reg'l Council*, the Court of Appeals recognized that a nonproject EIS "evaluates environmental effects at a relatively broad level."[21] *See also King Cty. v. Washington State Boundary Review Bd. for King Cty*., 122 Wn.2d 648, 664 n.10, 860 P.2d 1024, 1033 (1993) (noting that under SEPA's nonproject provisions, an agency "can limit the scope of an EIS" to deal with "[u]ncertainties in development plans").

[19] WAC 197-11-442 (emphases added).
[20] *Id* at 642, 860 P.2d 390, 403.
[21] *Id.*, 175 Wn. App. 494, 514, 306 P.3d 1031, 1040 (2013).

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The MHA proposal falls squarely within SEPA's definition of a nonproject action that does not involve site-specific development. SEPA defines a nonproject action as including "areawide zoning," and "the adoption or amendment of comprehensive land use plans or zoning ordinance."[22] The MHA proposal consists of these defining examples of nonproject actions.

B. SCALE fails to justify its demands for "more detailed analysis" than is required by law.

Despite these regulations and case law, SCALE repeatedly insists that the FEIS is required to "provide more detailed analysis."[23] SCALE's legal argument is fundamentally at odds with the text of the regulations themselves. While SCALE nominally acknowledges that agencies have more "flexibility in preparing a nonproject EIS," they nevertheless repeatedly assert "that does not necessarily equate to less detail…"[24] SCALE's assertion is directly contradicted by the express text of the regulations which provide that analysis for nonproject actions "shall be limited to a general discussion of the impacts." WAC 197-11-442. SCALE myopically focuses on the portion of the regulation that allows variability in level of detail for nonproject proposals, directing agencies to "discuss impacts and alternatives in the level of detail appropriate to scope of the nonproject proposal." However, that variability operates within the sideboards established by the more general regulatory direction to provide "general discussion" and the broad authority providing "more flexibility." Viewed under SEPA's recognition that "more flexibility" is required when preparing nonproject EISs, WAC 197-11-442(2) must be construed as giving the agency the flexibility to provide less detail when appropriate, not as a tool for imposing the level of detail demanded by SCALE.

[22] WAC 197-11-442; WAC 197-11-704(2)(b).
[23] *E.g.*, SCALE's Motion at 9 ("[T]his proposal . . . compels more detailed analysis, not less."), at 14 ("While agencies have more 'flexibility' . . . that does not necessarily equate to less detail").
[24] SCALE's Motion at 14.

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To support their argument that more detailed review is required, despite the regulations to the contrary, SCALE seeks to distinguish the proposal from other nonproject actions and improperly re-cast it as being akin to a project action on a grand scale. Specifically, SCALE suggests the proposal will change maps "parcel by parcel" and will change zoning code text "word by word and number by number" creating a "very specific and far reaching proposal," and "anything but an abstract proposal."[25] SCALE's characterization is unavailing. SCALE points to aspects of the proposal that are common to nonproject actions and therefore do not justify an approach different from other nonproject actions. Ultimately, any area-wide rezone will result in changes to specific parcels subject to that zoning. Similarly, any zoning code text amendment will change standards that apply throughout areas that are subject to the amended standards. These features are common to nonproject actions and do not justify SCALE's request that the Examiner require more specificity than is otherwise required for nonproject actions.

SCALE also argues that Washington's recognition of vested rights triggers more detailed review here.[26] Again, however, SCALE's argument fails to recognize that its vesting concerns apply equally to many types of nonproject actions, including rezones and text amendments. If concerns about vesting were sufficient to trigger more detailed review, then nearly all nonproject actions would be held to the higher standard for which SCALE advocates, eviscerating SEPA's allowance for more flexibility and generalized discussion.[27]

SCALE's theory for imposing a higher standard here destroys SEPA's clear distinction between review of project and nonproject actions.

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[25] SCALE's Motion at 15.
[26] SCALE's Motion at 23–24.
[27] Moreover, because zoning laws do not establish vested rights until the building permit or subdivision application has been filed, the policies of SEPA can still be implemented at the development permit stage. *Ullock v. City of Bremerton*, 17 Wn. App. 573, 583, 565 P.2d 1179, 1185 (1977).

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C. The case law upon which SCALE relies does not justify its demands for more specific review than required by regulation.

The cases upon which SCALE's Motion relies are inapposite and in fact demonstrate the sufficiency of the FEIS's analysis. For example, in *Klickitat County*, the Court found the nonproject EIS's discussion of historic and cultural resources inadequate because the entirety of the EIS's discussion on the issue was approximately one page long (though the Court ultimately found the EIS adequate because it incorporated by reference a more in-depth study).[28] Likewise, in *Better Brinnon Coalition v. Jefferson Cty.*, the Growth Management Hearings Board found an EIS inadequate because it had "no discussion" of listed or threatened species that relied on the project area as habitat, "no discussion" of the habitat's functions, and "no analysis" of impacts to the species or their habitat.[29]

Here, while SCALE may take issue with the data or methodology underlying the FEIS's analysis of issues such as historic resources or tree canopy, SCALE cannot dispute that the FEIS dedicates significant chapters and sections to these issues.[30] As discussed below, the FEIS's discussion of these topics is far more detailed and substantial than the scenarios in the cases described above and provides a "reasonably thorough discussion of the significant aspects of the probable environmental consequences."[31] Therefore, the FEIS's analysis cannot be compared to the discussion found inadequate in *Klickitat County* and *Better Brinnon Coalition.*

Similarly, in *Pac. Rivers Council*, 689 F.3d at 1044, the Ninth Circuit, analyzing a programmatic EIS under NEPA, found the EIS inadequate because the EIS provided "**no**

[28] 122 Wn.2d at 643, 860 P.2d 390, 404.
[29] WWGMHB No. 03-2-0007 (Final Decision and Order), 2003 WL 22896402, at *20.
[30] FEIS at Chapters 3.5 ("Historic Resources"), 3.6 ("Biological Resources"), 3.7 ("Open Space and Recreation").
[31] *Glasser v. City of Seattle*, 139 Wn. App. 728, 740, 162 P.3d 1134, 1139 (2007).

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analysis whatsoever of environmental consequences . . . for individual species of fish."[32] The complete lack of analysis was striking given that the proposal entailed amendments to Land and Resource Management Plans for the Sierra Nevada Mountains' national forests that would allow "substantial" increases in logging, grazing, and road construction activities impacting riparian environments, and the agency's own staff had flagged the missing analysis in the draft EIS.[33] Moreover, the agency had included an analysis of impacts to fish species in an EIS prepared for a prior iteration of the proposal.[34] Thus the cases do not support the position advanced by SCALE.

SCALE's reliance on *West Seattle Defense Fund v. City of Seattle,*[35] a decision of the Growth Management Hearings Board, is particularly misleading. The portion of the Board's decision to which SCALE cites as authority is not specific to SEPA whatsoever.[36] The Board ruled on the City's efforts to comply with the Growth Management Act's (GMA) specific requirements for the capital facilities element of its comprehensive plan in RCW 36.70A.070. The GMA requires the City's capital facilities plan element to include very specific details including inventories of existing facilities, forecasts of future needs of those capital facilities, proposed locations of new facilities, and a six year plan for financing facilities. *See* RCW 36.70A.070(3). Beyond its conclusory assertion that the "same principles apply," SCALE makes no effort to explain how the Board's conclusions about the compliance with the GMA's specific statutory requirements for capital facilities planning in RCW 36.70A.070 are relevant to the required scope of environmental review of a nonproject action. They are not. On their face, the specific statutory requirements for the level detailed capital facilities planning set forth in RCW

[32] 689 F.3d at 1025 (emphasis added).
[33] *Id.* at 1015–1020.
[34] *Id.* at 1024–25.
[35] CPSGMHB No. 96-3-0033, 1997 WL 176356 (Mar. 27, 1997),
[36] *See* SCALE's Motion at 15, n.4.

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36.70A.070(3) are markedly different than the regulations requiring SEPA review of nonproject actions to "be limited to a general discussion of the impacts." The Board's conclusions about compliance with a very detailed and specific element of the GMA is not persuasive, nor even relevant to the issues in this appeal.

V. SCALE HAS FAILED TO DEMONSTRATE IT IS ENTITLED TO SUMMARY JUDGMENT ON ITS CHALLENGE TO THE ADEQUACY OF THE CITY'S ANALYSIS OF IMPACTS ON HISTORIC RESOURCES

In its FEIS, the City assessed impacts to historic resources in a level of detail appropriate for this nonproject action. The City's analysis is more fully described in the roughly 20 pages of analysis dedicated to the topic in the FEIS. In summary, the City relied on available existing neighborhood-specific historic context statements as well as specific locations of resources that are determined to be eligible for listing in the National Register of Historic Place to inform its baseline of the study area, and "to provide indications of which urban villages have a higher likelihood to contain the oldest historic resources." FEIS at 3.215. This baseline included maps and tables that depicted the differences between various urban villages. The City then assessed the potential impact on historic resources for each of the alternatives and identified and discussed mitigation measures. As is described in the attached declarations, this approach and level of detail is entirely reasonable for purposes of assessing potential impacts of this nonproject action.[37] When on summary judgment, an expert's conflicting opinion attesting to the reasonableness of the City's analysis is legally adequate, on its face, to establish a genuine issue of material fact and defeat SCALE's motion.[38] Moreover, as detailed below, SCALE's arguments on the merit are based on mistaken legal theories and mischaracterizations of the City's approach.

[37] Wilson Dec.; Burke Dec.
[38] *Pagnotta*, 99 Wn. App. at 34, 991 P.2d at 731.

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A. The level of detail of the City's description of impacts is reasonable for this nonproject EIS.

SCALE grossly oversimplifies the descriptions in the EIS of potential impacts to historic resources. Specifically, SCALE claims the FEIS's discussion of impacts "merely states the obvious…" SCALE at 24. To support its oversimplification, SCALE selects and quotes out of context two summary sentences from an introductory paragraph that precedes seven pages of impact analysis. In fact, the analysis and discussion of impacts is more nuanced and extends over the course of those seven pages. For example, the FEIS discusses the differences in impacts based on variable rates of growth among the alternatives and differing potential for scale increases among the zoning tiers.[39] The analysis discusses the location of zoning changes in relation to the eight designated Seattle historic districts and seven National Register historic districts and the nature of those impacts.[40] The FEIS also discusses the nature of the impacts due to redevelopment adjacent to landmarks and properties that could be eligible for listing.[41] The FEIS specifically describes the nature of potential impacts to historic and cultural resources that are significant to racial and ethnic minority populations.[42] And, the FEIS describes and compares the impacts of each of the alternatives.[43] It is entirely inappropriate to oversimplify by choosing two summary sentences from the introductory paragraph of a section and ignore the remainder.

Similarly, SCALE incorrectly and disingenuously asserts that the FEIS sets forth in two paragraphs the "entirety of the FEIS's comparative description of the impacts that will occur under the Preferred Alternative in contrast to the other alternatives." SCALE at

[39] *See* FEIS at 3.304; *id.* at 3.306-3.307. *See also* Wilson Dec., ¶ 6.
[40] *See* FEIS at 3.305. *See also* Wilson Dec., ¶ 6.
[41] *Id*.
[42] *See* FEIS at 3.306. *See also* Wilson Dec., ¶ 6.
[43] *Id*.at 3.308–3.310. *See also* Wilson Dec., ¶ 6.

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31. The entirety of the comparison of impacts among the alternatives spans all of section 3.5.2 and includes the description of impacts of common to all alternatives and the description of impacts of each alternative, not just the two paragraphs SCALE quotes. The comparison also includes tables and maps throughout the chapter showing distinctions between the alternatives. Again, SCALE's mischaracterization is inappropriate.

As noted in the attached declarations and in testimony the City will present at hearing, the level of detail included in the discussion of impacts is reasonable and appropriate for this nonproject action. The Examiner must resolve any competing expert testimony after hearing and subject to the deferential standards of review, and not on SCALE's motion. Most importantly, however, the Examiner's decision should be based on the expert's opinions and the text of the EIS, and not on SCALE's cartoonish mischaracterization and oversimplification of the EIS.

B. <u>Contrary to SCALE's assertions, the City is not required to consider different surveys nor is it required to conduct additional surveys to comply with SEPA</u>.

SCALE challenges the data that the City considered, arguing that it was unreasonably narrow as a matter of law. SCALE's arguments fail. As demonstrated in the attached declarations from the City's experts and will be established further through testimony at hearing, the City's approach was reasonable and relied on data sets that are available in all neighborhoods to facilitate comparison and were sufficient to allow reasonable assessment of potential impacts.[44] Specifically, the City's experts identified properties listed or eligible for listing in the National Register of Historic Places and also made qualitative judgments about each neighborhood based on its time of annexation to inform its analysis of the baseline of historic resources in each neighborhood. Solely on

[44] Wilson Dec.,¶¶ 4-5, 8-14; Burke Dec., ¶¶ 3-6. *See also* FEIS at 3.295 ("The City has not conducted historic surveys or prepared historic context statements for all neighborhoods within the study area.")

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the basis of that conflicting expert opinion, SCALE's arguments fail because there is a genuine issue of material fact through competing expert testimony.[45]

More fundamentally, SCALE's legal theory does not satisfy its burden. SCALE contends that SEPA requires the City to also incorporate existing surveys of certain neighborhoods and complete its own surveys of resources in neighborhoods where those surveys were not complete. These contentions fail. SCALE's various references are to surveys prepared by City representatives in some, but not all neighborhoods. In 2000, the City began a systematic effort to survey and inventory historic resources in the City on a neighborhood by neighborhood basis, but to date, the City does not have surveys for some neighborhoods.[46] Notably, most of the urban villages in the FEIS study area have not been surveyed.[47] Those neighborhoods for which surveys were completed are identified in the tables included in the FEIS.[48] Importantly, the surveys that exist for some neighborhoods were completed in different years, ranging from 1997 at the earliest to the most recent that was completed in 2015.[49] The City's database, the Seattle Historical Sites database, contains the data from these surveys.[50]

As a preliminary matter, the City's FEIS acknowledges the existence of these very surveys.[51] SCALE's speculation that OPCD "intended to keep the City Council blind to the existing and location of historic resources"[52] is belied by the fact that the EIS acknowledges the existence of the surveys SCALE argues that OPCD intentionally sought

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[45] *Pagnotta*., 99 Wn. App. at 34, 991 P.2d at 731.
[46] *See* FEIS at 3.295 ("The City has not conducted historic surveys or prepared historic context statements for all neighborhoods within the study area."); *id.* at 3.302 (exhibit 3.5-4 identifies those neighborhoods for which a systematic inventory has been conducted); Wilson Dec., ¶ 8.
[47] *Id*.
[48] FEIS at 3.302.
[49] Wilson Dec., Exh. C.
[50] *Id*., ¶ 8.
[51] *See* FEIS at 3.295 ("The City has not conducted historic surveys or prepared historic context statements for all neighborhoods within the study area."); *id.* at 3.302 (exhibit 3.5-4 identifies those neighborhoods for which a systematic inventory has been conducted).
[52] SCALE Motion at 29.

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to suppress. Contrary to the nefarious motive SCALE assigns to the City, the City in its FEIS chose not to rely on those surveys that have been completed because the limited and incomplete data set would not allow comparison between neighborhoods for which surveys had been completed and those that had no inventory.[53] The City sought to create an "apples to apples" comparison between neighborhoods that would not be possible using that data set. Just as SEPA mandates that alternatives "should be analyzed at a roughly comparable level of detail, sufficient to evaluate their comparative merits,"[54] the EIS authors wanted to present neighborhood data at a similar level of detail.

Moreover, the City chose not to use those surveys because of concerns over their reliability. In the opinion of the City's experts, the age of some of the surveys makes them even less reliable because older surveys are less likely to accurately depict the nature of the resource, given the changes that have likely occurred in those neighborhoods.[55] Along the same lines, the Department of Archaeology and Historic Preservation's Washington State Standards for Cultural Resources Reporting provides that it is best practice to update historic property inventories every ten years, in order to account for any changes that may impact a property's eligibility for listing in a historic register.[56]

As a more general matter, the City's experts were concerned that the surveys could be prone to misrepresenting the extent of actual cultural resources in the neighborhoods that were conducted. Indeed, SCALE's description of those surveys in its brief illustrates the point. The surveys includes the surveyor's judgment about which properties might be eligible for listing and warrant further consideration, those that (in the opinion of the surveyor) do not warrant further consideration, and those for which the surveyor did not

[53] Wilson Dec., ¶ 10; Burke Dec., ¶ 5.
[54] WAC 197-11-442.
[55] Wilson Dec., ¶ 11.
[56] Wilson Dec., ¶ 11.

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render an opinion.[57] All three categories of properties are included in the inventory. Therefore the number of properties included in the survey does not accurately depict the number of historic resources. To the contrary, it includes many properties that are not potentially significant historic resources because they require further evaluation, or because the surveyor evaluated them and rejected them, or because the surveyor failed to render an opinion.[58] The City's Seattle Historical Sites database includes the data collected in the surveys, such that the database is similarly limited in its applicability to the impact analysis in this FEIS.[59] Thus, SCALE mistakenly or misleadingly characterizes those properties listed in the surveys and the database as "known historic resources." They are not. The numbers of properties in the three neighborhoods highlighted in SCALE's brief—North Rainier, Beacon Hill, and South Park[60]—fall within that category.[61]

SCALE further asserts that the City should have conducted surveys for those neighborhoods where none has been completed. Contrary to SCALE's assertions, the City is not required to "systematically inventory"[62] all areas in order to complete environmental review. The scope, scale, and cost of that level of effort is massive. The City began its effort to systematically inventory all neighborhoods in 2000 and has only completed surveys for 21 neighborhoods. Each neighborhood survey represents a significant undertaking in time and cost, and if the City were required to complete all surveys, it would significantly increase the cost of the FEIS and the time to complete it.[63] The suggestion that the City must conduct that level of effort over that many years before

[57] Wilson Dec., ¶ 12.
[58] *Id.*
[59] *Id.*, ¶¶ 8-10.
[60] SCALE at 26-27.
[61] Wilson Dec., Exh. C.
[62] SCALE at 25.
[63] Wilson Dec., ¶ 14.

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finalizing this EIS process is unreasonable. While the EIS identifies additional survey work as potential mitigation, its decision to refrain from that effort as part of the SEPA review is reasonable.[64] SCALE fails to prove that level of effort is required as a matter of law.

In summary, the City's expert's judgment about which data to use, the reliability of the data included in the inventory, and its overall approach of assessing baseline conditions is reasonable. The City's judgment is entitled to deference. On the merits, SCALE's arguments fail. Particularly in the context of summary judgment, SCALE's motion should be denied.

C. SCALE's reliance on another EIS is insufficient to satisfy its burden of proof.

SCALE describes the City's EIS for the Uptown neighborhood and suggests that the City failed to provide the same level of detail in the FEIS that is the subject of this appeal. As a preliminary matter, SCALE exaggerates a severe contrast between the EISs that is not supported by the facts. In fact, as with the MHA FEIS, the Uptown EIS did not incorporate data from the City's Seattle Historical Sites database, for the same reasons that the MHA FEIS's analysis did not rely on the database or surveys.[65]

More importantly, as described in section II.C above, the fact that there are differences between the analysis of historic resources is not alone sufficient to satisfy its burden of proof, especially at the summary judgment stage. The fact that the City took an approach that was reasonable in a different situation does not limit its ability to choose to do its analysis differently, so long as its approach is reasonable. As described above, the City's use of data and level of detail is appropriate for this nonproject action. The differences between the analyses are due to the fact that significantly more detailed,

[64] *Id.*
[65] Burke Dec., ¶ 5.

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reliable information about historic resources was available for the Uptown neighborhood than compared to other City neighborhoods.[66] Additionally, while the Uptown EIS analyzed a single neighborhood, the MHA FEIS required analysis of multiple neighborhoods. Thus, the MHA FEIS was based on information that was available for all neighborhoods, in order to permit a comparative evaluation across neighborhoods at a similar level of detail and to avoid overstating or understating the impact on historic resources in particular neighborhoods. In the opinion of the City's expert, who worked both on the Uptown EIS and the MHA FEIS, the use of different approaches and levels of discussion for the two EISs was reasonable.[67] Accordingly, and especially at the stage of dispositive motions, SCALE's reliance on the Uptown EIS is insufficient to carry its burden.

D. SCALE's concerns about the adequacy of the project-level SEPA review are based on speculation and are not relevant to this appeal.

The FEIS addresses potential impacts on historic resources from redevelopment that could follow adoption of MHA, and draws a distinction between redevelopment that is subject to SEPA review and that which is exempt. The FEIS acknowledges the protection provided by the required review of redevelopment projects that are subject to SEPA, but also acknowledges that redevelopment that is exempt from SEPA review could result in significant impacts to historic resources.[68] SCALE appears to argue that this portion of the FEIS analysis is deficient because it purportedly overstates the protections provided by project level SEPA review because the FEIS does not assume what SCALE portrays as "the inherent weaknesses of the city's SEPA mitigation for historic resources"

[66] *Id*., ¶ 6.
[67] *Id*.
[68] FEIS at 3.305–3.306.

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at the project level. SCALE Motion at 34. The Examiner should reject SCALE's unfounded collateral attack on the City's project level SEPA review.

SCALE raises two points in support of its hyperbolic characterization of the City's project-level SEPA review as "woefully inadequate." SCALE Motion at 32. Neither has merit. First, SCALE contends that the City's thresholds for categorical exemptions "have increased significantly recently" which SCALE contends results in more redevelopment projects that do not trigger SEPA review.[69] With its statement, SCALE seems to ignore the very language from the EIS that it quotes earlier in its motion.[70] Specifically, the EIS expressly acknowledges the potential impact on historic resources created by redevelopment projects that are exempt from SEPA.[71] The FEIS text that SCALE quotes includes the current thresholds for SEPA exemptions.[72] Second, SCALE asserts without any evidence that the provisions governing project level review "for potentially historic properties is either being ignored or misinterpreted by the City."[73] The declaration to which SCALE cites for authority repeats the exact same generalized assertion, without any evidence or support. The City contests that baseless assertion, but has no ability to respond meaningfully because of the lack of any details or substance to SCALE's assertion. This unsupported allegation is insufficient to support a motion for summary judgment.[74] Nor can SCALE add more detail in its reply to try to salvage its claim.[75]

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[69] SCALE Motion at 34.
[70] SCALE Motion at 33 (quoting FEIS at 3.305)
[71] FEIS at 3.305.
[72] In fact, the City has included among the potential mitigation measures a change to the regulations to address this concern:

> Requiring project proponents to nominate buildings for landmark review when demolition of properties that are over 50 years old is proposed, regardless of City permitting requirements, by modifying the SEPA exemptions thresholds in the Seattle Municipal Code at Table A for section 25.05.800, and Table B for section 25.05.800.

FEIS at 3.312.
[73] *See* SCALE Motion at 34; Woo Dec., ¶11.
[74] *Hash by Hash v. Children's Orthopedic Hosp*., 49 Wn. App. 130, 134-35, 741 P.2d 584, 586 (1987), *aff'd and remanded sub nom. Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr*., 110 Wn.2d 912, 757 P.2d 507 (1988) (expert affidavits and opinions submitted in support of a motion for summary judgment

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Perhaps most significantly, this is not the venue to address SCALE's problems with the City's implementation of SEPA review at the project level. If there are projects that SCALE or Ms. Woo believe have incorrectly applied the City's regulations, they have legal recourse through appeals. They cannot collaterally attack the City's implementation of its regulations in this EIS adequacy appeal. Finally, this ultimately is a specific example of SCALE's concern about the feasibility or implementation of a specific mitigation measure. As noted in section V.E below, that issue is not properly before the Examiner and should be dismissed.

E. SCALE's arguments regarding mitigation measures challenges their efficacy and likelihood and should be dismissed.

The FEIS identifies and describes mitigation for potential impacts to historic resources that, in conjunction with the preceding impact analysis, describe the intended benefits of the mitigation. SCALE's arguments regarding mitigation simply emphasize and underscore the City's motion for partial dismissal of their claim. In its arguments related to mitigation of historic resources, SCALE continues to conflate the need to include a "discussion" of mitigation with the need to demonstrate their "effectiveness, expense, practicality, potential for being adopted."[76] As is described in the City's Motion, SEPA case law distinguishes between those two categories of analysis and concludes that lead agencies need not analyze the efficacy and likelihood of mitigation as part of an EIS.[77] Indeed, the SEPA regulations provide permissive authority but do not require

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"must be based on the facts of the case and will be disregarded entirely where the factual basis for the opinion is found to be inadequate," and noting that "without knowledge of the factual basis for the opinion, the court may well be without any means of evaluating the merits of that opinion").

[75] *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168–69, 810 P.2d 4, 8 (1991) (any rebuttal documents submitted with a reply must be "limited to documents which explain, disprove, or contradict the adverse party's evidence," as opposed to evidence that the movant failed to file with its motion).

[76] *See* SCALE Motion at 35.

[77] *See* City's Motion at IV.E. That section of the City's motion explains the relevant SEPA case law, including: *Glasser v. City of Seattle*, 139 Wn. App. 728, 739-42, 162 P.3d 1134 (2007); *Solid Waste Alternative Proponents v. Okanogan Cty.*, 66 Wn. App. 439, 447, 832 P.2d 503, 508 (1992); *Residents*

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evaluation of feasibility and economic practicability.[78] They further specify that the EIS "need not analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts, or new information regarding significant impacts, and those measures will not be subsequently analyzed under SEPA."[79] A less detailed level of discussion of mitigation is especially warranted in the context of a nonproject EIS, where the lack of detailed information about the proposal means that impacts and mitigation can only be discussed "at a relatively broad level."[80] Because a nonproject EIS does not entail a specific development project, the EIS's discussion of mitigation may rely on more detailed project-specific environmental review or acknowledge that further actions may be necessary to mitigate impacts.[81]

SCALE does not attempt to argue why the City should be compelled to invoke its permissive authority under the rules to address feasibility or practicability. Nor does it seek to explain why it suspects the mitigation proposed would create substantial changes that cause new impacts that would not otherwise be subsequently analyzed under SEPA such that more detailed analysis should have been completed. SCALE does not address any of the controlling SEPA case law on this subject. Instead, in support of its position, SCALE simply cites to a federal NEPA case on a project action.[82] As a preliminary matter, the SEPA regulations and case law on which the City relies controls the resolution of this issue. The Examiner need not consider NEPA case law where there is SEPA case

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Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 312, 197 P.3d 1153, 1171 (2008); *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 514, 306 P.3d 1031, 1040 (2013). That detailed discussion is not repeated here, but is incorporated by reference. The City assumes the Examiner will treat SCALE's motion on the same subject matter as a cross-motion, despite the fact that it was filed well after the deadline for response to the City's motion.

[78] WAC 197-11-440(6)(c)(iv) (regulations permit but do not require evaluation of feasibility and economic practicability under certain circumstances and confirm that the EIS "need not analyze mitigation measures in detail…").

[79] *Id.*

[80] *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 514, 306 P.3d 1031, 1040 (2013) (discussing adequacy of mitigation measures discussed in a non-project EIS); WAC 197-11-442.

[81] *Id.* at 514-15.

[82] SCALE Motion at 35.

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law and regulations directly on point.[83] To the extent that NEPA case law requires more detailed analysis of the effectiveness of mitigation, those principles are not controlling or relevant to this SEPA appeal because that NEPA principle represents a divergence from SEPA regulations and SEPA case law that stems from a key difference between NEPA and SEPA. Specifically, the SEPA cases to which the City cites conclude that questions over the effectiveness of mitigation are not properly part of the scope of an adequacy appeal because the adequacy of mitigation stems from SEPA's substantive authority.[84] By contrast, NEPA does not grant substantive authority to agencies to condition or deny agency actions on the basis of environmental concerns.[85] Thus, the question of what level of analysis of mitigation is required pursuant to NEPA is not relevant in this SEPA adequacy appeal, and the Examiner must resolve this appeal relying on the controlling SEPA cases to which the City cites.

Moreover, setting aside the SEPA case law that controls here, the federal case to which SCALE cites does not support its claim that the City's discussion of mitigation was inadequate. The case to which SCALE cited, *Neighbors of Cuddy Mountain* addressed a specific project action (the Grade/Dukes Timber sale in the Cuddy Mountain area) with mitigation requirements that are governed by both NEPA and the National Forest

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[83] *E.g., Alpine Lakes Prot. Soc. v. Washington State Dept of Ecology*, 135 Wn. App. 376, 394 n.24, 144 P.3d 385, 394 n.24 (2006) (declining to apply NEPA case law because of differences between NEPA and SEPA); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 312, 996 P.2d 582, 592 (2000) (stating that federal case law is inapplicable where there are differences between state and federal statutes, or where there is contrary state authority). To the extent that there is divergence between NEPA requirements and SEPA requirements, SEPA case law controls.

[84] *Glasser v. City of Seattle*, 139 Wn. App. 728, 741, 162 P.3d 1134, 1140 (2007) (characterizing challenge to mitigation measures' ability to mitigate for adverse impacts as a "primarily substantive" challenge); *see also* William H. Rodgers, Jr., The Washington Environmental Policy Act, 60 Wash. L. Rev. 33, 60 (1984) (stating, "There is no doubt that there are duties to mitigate under SEPA, and these duties are enforceable in the ordinary course **as an aspect of substantive SEPA**." (Emphasis added.)).

[85] *See* Philip Michael Ferester, Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny, 16 Harv. Envtl. L. Rev. 207, 243 (1992) (contrasting NEPA § 105, 42 U.S.C. § 4335, with RCW § 43.21C.060, which grants substantive authority to agencies and "is rare among environmental planning statutes"). As Professor Settle explains, "NEPA focuses on process, fastidiously overseeing required environmental analyses while reluctant to directly intrude upon the substance of agency action. SEPA is less formally demanding, but not hesitant to play a substantive role." Settle, *supra*, at 18-2.

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Management Act.[86] When addressing a *nonproject* or programmatic action under NEPA, the Ninth Circuit has held that "detailed analysis of mitigation measures . . . is unwarranted at this stage."[87] Similarly, the Tenth Circuit has held that detailed quantitative assessments of possible mitigation measures are "often not appropriate when the EIS concerns a large-scale, multi-step project and the risks to be mitigated cannot be accurately assessed until final site-specific proposals are presented."[88] A court's pronouncement in a case involving mitigation for a specific project, under entirely different statutory schemes, is not applicable to the SEPA requirements for a nonproject action.

SCALE continues to seek relief to which it is not entitled. It has not responded to the controlling SEPA case law cited in the City's motion and incorporated here. Under SEPA, the City is under no legal obligation to analyze the effectiveness of mitigation measures or to prove that all significant impacts will be mitigated. The Examiner should deny SCALE's motion and grant the City's motion to dismiss on this issue.

F. SCALE's contention that the City should target its alternatives to focus on impacts to historic resources is impractical and not supported by law.

SCALE's arguments in its motion challenging the adequacy of the alternatives analysis is specific to historic resources, but can be resolved by the Examiner's decision on the City's Motion seeking to dismiss Appellants' alternatives arguments, more generally.[89] To establish that the FEIS is inadequate because of its failure to consider these alternative means of implementing MHA (whether specific to historic resources or

[86] *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) ("The NFMA requires that objectives for the maintenance (or improvement) of habitat for a management indicator species be established for each alternative action that the Forest Service is considering") (citing 36 C.F.R. § 219.19(a)).
[87] *N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992).
[88] *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1054 (10th Cir. 2011)
[89] *See* City's Motion at IV.B.

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more generally), Appellants must not only establish that their alternatives are conceivable or a reasonable means of accomplishing the proposal and objectives. Rather, Appellants must show that the FEIS's failure to include Appellants' preferred alternative is so unreasonable that it overcomes the substantial deference given to the agency.[90] In this instance, SCALE has, at most, argued that the City *could* have shaped its alternatives differently.[91] That is insufficient to carry its burden on the merits that the City was *legally required* to shape its alternatives differently and, especially in the context of this motion for summary judgment, should be denied. Indeed, in response to the City's motion on the same issue, SCALE conceded its position that there is a genuine issue of material fact.[92] It is disingenuous to now assert that there is none.

While SCALE cannot satisfy its burden in this appeal by merely identifying another reasonable manner of crafting alternatives, SCALE has not even demonstrated that its approach is reasonable. SCALE argues that the City should have "shaped" its alternatives to better assess potential impacts on historic resources. SCALE insinuates that the City is required to have crafted its alternatives to better address impacts to a specific element of the environment—namely historic resources. However, SCALE's theory emphasizes the City's duty to evaluate impacts to one element of the environment over all others. SCALE in its motion makes no suggestion how its myopic focus on one element would impact the analysis of impacts on other elements. Nor would it be practical to craft different alternatives for each element of the environment. The City has a broader obligation to review impacts to all elements of the environment identified

[90] RCW 43.21C.090 (stating that an agency's EIS adequacy decision must be given "substantial weight").
[91] *See* SCALE's Motion at 36 ("But OPCD might also have considered an alternative that also avoided additional growth in historicy neighborhoods… Such an alternative could have still achieved OPCD's purposes of increasing development capacity to a degree sufficient to address its affordable housing goals.")
[92] SCALE's Response at 10.

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through the scoping process and is required to create alternatives that it can compare and evaluate for impacts to each.

As a matter of law, Appellants cannot meet their burden of proof. Appellants' "alternative" means of implementing MHA are not reasonable. The Examiner should deny SCALE's motion, and, for the reasons identified in the City's motion, should grant the City's motion to dismiss SCALE's challenge to the City's alternatives.

VI. SCALE FAILS TO DEMONSTRATE THAT IT IS ENTITLED TO SUMMARY JUDGMENT ON ITS CHALLENGE TO THE ADEQUACY OF THE CITY'S ANALYSIS OF IMPACTS ON TREE CANOPY

SCALE's arguments regarding the EIS's discussion of tree canopy impacts are unsupported and fail to justify granting summary judgment to SCALE.

A. The EIS adequately describes the impact of the "no action" alternative on tree canopy.

SCALE erroneously asserts that the EIS failed to describe the impacts of the "no action" alternative on tree canopy. SCALE's Motion at 41. To the contrary, the FEIS states:

> "[T]here would be no change in zoning due to the MHA program. The resulting change in canopy cover is assumed to be static. In other words, changes in canopy coverage would still be expected, but as a result of the current zoning and tree protection policies, codes, and development standards. This study does not quantify tree loss resulting from current development patterns.[93]"

SCALE contends that the last sentence in the above quotation confirms that the EIS failed to describe the impacts of the "no action" alternative on tree canopy. SCALE's Motion at 41. SCALE offers no evidence, beyond the sentence itself, to support its argument. By contrast, the City's expert opined that the FEIS's analysis of the "no action" alternative is appropriate and reasonable. Graham Dec., ¶ 7. Since the most

[93] FEIS at 3.322.

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recent 2016 LiDAR data cannot be directly compared to earlier tree canopy assessments due to data limitations, it is not possible to calculate a trend for tree canopy loss or gain under existing conditions. *Id.* Furthermore, while the results of the various tree canopy cover assessments in Seattle over the last decade cannot be compared due to methodological differences, nonetheless the available data points over time suggest the possibility that Seattle's tree canopy is increasing, such that the FEIS's assumption as to canopy change for the "no action" alternative is a conservative approach. *Id.* at ¶ 8.

Since SCALE provided no declaration to support its argument regarding tree canopy impacts in the "no action" alternative, there is (at a minimum) an issue of fact precluding summary judgement for SCALE on this issue. As with its unsubstantiated assertions about the City's alleged failure to properly enforce its project level review of historic resources described in section V.D, its unsubstantiated assertions in this instance are insufficient to support its motion for summary judgment.[94] Nor can SCALE add more detail in its reply to try to salvage its claim.[95]

B. <u>The EIS adequately evaluates the tree canopy impacts of the proposal in situations where there would be no change in the base zone</u>.

SCALE's contention that the EIS's analysis of tree canopy impacts is inadequate because the EIS only analyzes impacts in situations where there is a change in the base zoning is similarly unavailing. SCALE's Motion at 42–43.

For purposes of assessing impacts on tree canopy, the FEIS aggregates the existing and proposed zones into zone categories: Single Family (SF), Residential Small Lot (RSL), Residential Low Rise (LR), Residential Mid and High Rise (MH/HR), and Neighborhood Commercial and Commercial (NC/C). FEIS at 3.317–318. The acreage

[94] *Leland v. Frogge*, 71 Wn.2d 197, 200–01, 427 P.2d 724, 727 (1967) (stating that when a party moves for summary judgment, the party "may not rest on formal pleadings, but must affirmatively present the factual evidence upon which he relies").
[95] *White*, 61 Wn. App. at 168–69.

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and percent of tree canopy cover was quantified for the existing and proposed zoning designations within each of the alternatives, and tree cover for a given zone was assumed to remain constant if the zoning designation stayed the same. FEIS at 3.318. For example, a zone change from LR to LR would not represent a change. *Id.* (The one exception was the RSL category, for which there was insufficient sample size to estimate coverage.)

First, SCALE's suggestion that the EIS does not explain how it addressed zoning changes within the same base zoning (SCALE's Motion at 42) simply ignores the language of the EIS, which states:

> The zoning categories were aggregated for the following reasons:
>
> - For NC Zones, there is not likely to be significant differences in the amount of tree canopy on redeveloped sites as lot line to lot line development is allowed in all NC zones. The changes in standards for NC zones as well as changes that increase the height of NC zones are likely to result in taller but not wider buildings.
>
> - No parcels are proposed to change from MR to HR zones. While HR is significantly taller, the bottom of these structures might not be significantly different.
>
> - There is a significant diversity of development types in LR zones (cottages, townhouses, apartments) that have different impacts on tree canopy. However, the development types do not occur exclusively in any single zone (e.g., townhouse buildings are found in different zones) and the high density does not directly relate to lower tree canopy. For example, townhouses sometimes result in lower canopy than apartments since they spread the structures out and have pavement in between.

FEIS at 3.318.

Equally important, contrary to SCALE's suggestion, the FEIS's approach does not result in any failure to adequately analyze tree canopy impacts. On the contrary, the

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City's expert opined that the FEIS's approach of assuming the tree cover remains constant for zoning changes within the same zone category (whether those changes involve a map change within that category, changes to development standards, or both) is an appropriate and reasonable approach to evaluation of tree canopy impacts. Graham Dec., ¶ 11.

For example, with respect to a zone change within the NC/C category, it is reasonable to expect that the proposed zoning changes within this zone category will result in taller but not wider buildings because lot line to lot line development is already allowed in these zones. *Id.*, ¶ 12. From the standpoint of tree canopy impacts, a taller but not wider building generally would not result in any increase in tree canopy impacts. *Id.* In addition, the proposed zoning changes within the LR category would not necessarily result in an increase in tree canopy impacts, because an increase in allowable density is not always correlated with greater tree canopy impacts. *Id.*, ¶ 13. In sum, the City's expert concluded that the approach and level of detail in Section 3.6 of the FEIS as to tree canopy, and Section 3.6's overall discussion of tree canopy impacts, were appropriate and reasonable. *Id.*, ¶ 14.

SCALE's Motion never even attempts to address the explanation provided in the EIS, nor does SCALE support its motion with any declaration that could support a conclusion that the City's approach was unreasonable. SCALE's bald assertions are insufficient to support its motion and it cannot in its reply add information that should have been provided in its motion. At a minimum, there is an issue of fact that precludes summary judgment for SCALE on this issue.

C. <u>SCALE's arguments regarding mitigation measures challenges their efficacy and should be dismissed</u>.

As in the case of SCALE's argument regarding historic resources, SCALE's arguments regarding mitigation simply underscore the City's motion for partial dismissal

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of their claim. SCALE asserts that the EIS must not just "list" mitigation measures for tree canopy impacts but must discuss "their possible benefits, limitations, flexibility, costs or other qualities." SCALE's Motion at 43. The City incorporates by reference its response in section V.E above. The City is under no legal obligation to analyze the effectiveness of mitigation measures or to prove that all significant impacts will be mitigated. The EIS's section on mitigation for tree canopy impacts is adequate under SEPA. The Examiner should deny SCALE's motion and grant the City's motion to dismiss on this issue.

VII. SCALE IS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON HOW THE FEIS ADDRESSES THE PROPOSAL'S CONSISTENCY WITH THE COMPREHENSIVE PLAN

Contrary to SCALE's assertions, the EIS sufficiently addressed issues related to the Comprehensive Plan.[96] No legal authority supports SCALE's arguments that the EIS must include specific language for the proposed amendments to Comprehensive Plan policies, or that the EIS must analyze the proposal's consistency with hundreds of policies in the Comprehensive Plan. At a minimum, the content of the EIS creates issues of fact precluding summary judgment.

A. The FEIS was not required to include specific language for the proposed amendments to Comprehensive Plan policies.

SCALE errs in contending that the EIS is inadequate due to a failure to include specific language for the proposed amendments to neighborhood plan policies in the Comprehensive Plan. SCALE's allegation that "the need to amend the Comprehensive

[96] In the City's Motion for Partial Dismissal, the City challenged a related issue. *See* City's Motion for Partial Dismissal at §IV.D; City's Reply in Support of Its Dispositive Motion at §II.D. Specifically, the City asked the Examiner to dismiss Appellants' claim that past Comprehensive Plan decisions preclude the amendments identified in this separate Proposal. With its Motion, the City challenges the cornerstone to several Appellants' arguments that the Comprehensive Plan and its "legislative history" are, themselves, an element of the environment such that the policy choices documented in the plan must be protected from impacts by subsequent changes in policy direction. *Id.* In its motion, SCALE has advanced Appellants' claims to incorporate specific arguments related to the sufficiency of the description of the proposal and the extent to which comprehensive plan policies must be analyzed to comply with regulatory requirements. As described in further detail, below, these arguments fail.

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Plan is not described in the EIS's description of the proposal itself" is incorrect. SCALE's Motion at 48. The FEIS's description of the proposed action includes an item to modify "policies in the Neighborhood Plans section of the Comprehensive Plan, concerning single family zoning in urban villages." FEIS at 2.2, Weber Dec., ¶ 2. Thus, SCALE's argument rests solely on the FEIS's failure to include specific amendatory language for the proposed amendments.

SCALE cites no authority supporting the proposition that the FEIS must contain specific amendatory language for the proposed amendments to neighborhood plan policies. On the contrary, the SEPA regulations support the City's approach. SCALE relies entirely on WAC 197-11-440(5)(c)(i), which calls for the EIS to "[d]escribe the objective(s), proponent(s), and principal features of reasonable alternatives. . ." SCALE's Motion at 49. In doing so, SCALE avoids citing the relevant SEPA regulation, which provides the full context for understanding the required amount of description and supports the appropriateness of the City's approach. SMC 25.05.055.B provides:

> Timing of Review of Proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, *at the earliest possible point* in the planning and decisionmaking process, when *the principal features of a proposal and its environmental impacts* can be reasonably identified.
>
> 1. A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one (1) or more alternative means of accomplishing that goal *and the environmental effects can be meaningfully evaluated. . .*

(Emphasis added).

Requiring the City to have specific amendatory language prior to conducting environmental review would contravene SEPA's dictate that the EIS be prepared "at the earliest possible point." Rather, under SMC 25.05.055.B, the touchstone for determining the level of detail required in the EIS's description of the proposed amendments is

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whether the environmental impacts can be reasonably identified and evaluated. Here, the nature of the proposed amendments to neighborhood plan policies is clear: they are to enable the rezoning of single-family-zoned areas within urban villages to non-single-family zoning classifications. FEIS at F.11. The FEIS provides ample and sufficient detail to enable the environmental impact of the changes to be identified and evaluated. The FEIS includes, for all action alternatives, maps showing the particular proposed rezones of single-family-zoned areas within urban villages and proposed urban village expansions. FEIS, Appendix H. The EIS provides a comprehensive discussion of the impacts of the proposed changes to single-family zoning in these areas.

Given the foregoing, SCALE is not entitled to summary judgment that the EIS is inadequate due to a failure to include specific language for the proposed amendments to neighborhood plan policies. SCALE offers only a one-sentence allegation that the EIS "fails to analyze [the] impacts" of the Comprehensive Plan amendments. SCALE's Motion at 49. SCALE's motion provides no further explanation of that allegation and does not identify *any* environmental impacts of the proposed Comprehensive Plan amendments that the EIS allegedly fails to evaluate. SCALE's contention that such impacts exist is mere speculation and cannot support summary judgment.

SCALE's contention that the EIS's alleged failure to sufficiently describe the proposed comprehensive plan amendments "led to a legal failure to analyze alternatives" to the proposed amendments is similarly unavailing. SCALE's Motion at 49. SCALE cites no authority for the proposition that an EIS must consider alternative formulations of the language for each of the enactments that are included in a nonproject proposal. Equally important, SCALE's motion fails to explain how such an approach would result in any different or better evaluation of environmental impacts than occurred in the FEIS as currently structured. Absent any such explanation, SCALE's approach stands to simply

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delay environmental review, contrary to SEPA's mandate, without serving SEPA's goal of meaningful review.

Ultimately, SCALE's contention that the FEIS must contain specific amendatory language for the proposed amendments to neighborhood plan policies is inconsistent with the very existence of the appeal opportunity of which SCALE has availed itself. Typically, an appeal of EIS adequacy shall be consolidated with a hearing or appeal on the underlying governmental action (and an EIS adequacy appeal is not allowed if such a hearing or appeal is not provided). WAC 197-11-680(3)(a)(v). However, there is an exception for an appeal of a procedural determination made by an agency on a nonproject action. WAC 197-11-680(3)(a)(vi)(C). By allowing this exception, SEPA implicitly recognizes that further elaboration of the proposed action may occur after the EIS stage and before action is taken—and rejects the idea that the exact language of a nonproject action involving plan amendments must be available at the time of the EIS.

Of course, this approach could increase the possibility that the action taken might not be covered by the environmental review. However, if that occurred, the recourse would lie in a proceeding subsequent to action being taken—not in the EIS adequacy appeal. In sum, the lack of specific amendatory language at this point does not by itself mean that the EIS is inadequate. At a minimum, given the contents of the EIS and SCALE's failure to offer anything but conclusory assertions, SCALE is not entitled to summary judgment.

B. <u>The FEIS sufficiently addressed consistency with Comprehensive Plan policies</u>.

SCALE errs in contending that the FEIS was required to discuss the proposal's consistency with a greater number of policies in the Comprehensive Plan. SCALE's Motion at 51.

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The relevant provision of the SEPA regulations (ignored by SCALE) provides that the EIS section regarding "Affected Environment, Significant Impacts, and Mitigation Measures" shall incorporate "[a] summary of existing plans (for example: land use and shoreline plans) and zoning regulations applicable to the proposal, and how the proposal is consistent and inconsistent with them." SMC 25.05.440.E.4.a. It is undisputed that the FEIS references and discusses a substantial number of Comprehensive Plan policies and discusses consistency with the Comprehensive Plan generally:

- FEIS at 2.4–2.5 (discussing general relationship between proposal and 2035 Comprehensive Plan and EIS)
- FEIS at 1.21 (stating that changes to land use patterns would be consistent with the overall Comprehensive Plan strategy); at 3.109 (same)
- FEIS at 2.23 (discussing 8 Comprehensive Plan goals and policies used to identify certain proposed development capacity increases)
- FEIS at 3.100 (discussing various Comprehensive Plan goals and policies used to assist evaluation of proposed action)
- FEIS at 3.102–103 (additional discussion of various goals/policies)
- FEIS at 3.107–108 (discussing 6 Comprehensive Plan policies governing changes in zoning for residential areas and infill development)
- FEIS at 3.117 (discussing Comprehensive Plan policy in context of zone edge transitions)
- FEIS at 3.130 ("Rezones to implement MHA under Alternative 2 would be generally consistent with Comprehensive Plan policies. . .")
- FEIS at 3.140 ("Like Alternative 2, rezones to implement MHA under Alternative 3 would be generally consistent with Comprehensive Plan policies. . .")
- FEIS at 3.155 ("Like Alternatives 2 and 3, rezones to implement MHA under the Preferred Alternative would be generally consistent with Comprehensive Plan policies. . .")
- FEIS at 3.168 (discussing Comprehensive Plan policy addressing view protection)

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- FEIS at 3.287 (stating that reducing Single Occupancy Vehicle mode share is consistent with numerous other goals and policies in the Comprehensive Plan)

The FEIS also specifies instances where the proposal includes changes to the Comprehensive Plan, including to resolve inconsistencies that would otherwise occur:

- FEIS at 2.2 (proposed action includes expanding the boundaries of certain urban villages on the Comprehensive Plan's Future Land Use Map, and modifying policies in the Neighborhood Plans section of the Comprehensive Plan, concerning single family zoning in urban villages)

- FEIS at 2.21 (referencing proposed action changing certain urban village boundaries on the Future Land Use Map and changing policies in the Neighborhood Plans section of the Comprehensive Plan

- FEIS at 2.41–2.63 (identifying proposed urban village expansions)

- FEIS at F.11 ("Several policies in individual urban villages contained in the Neighborhood Plan policies section of the Comprehensive Plan may conflict with elements of the proposed action concerning changes to single family zones within urban villages. Amendments to these policies ~~will be~~ are docketed and the policies would be modified to remove potential inconsistencies. The potential impacts of these policy amendments is considered in this EIS.") (Strikeout/underline in original)

SCALE contends, however, that the foregoing is an insufficient discussion of consistency with the Comprehensive Plan because the FEIS did not discuss the proposal's consistency with specific Comprehensive Plan policies contained in the Comprehensive Plan's "chapters covering transportation, housing, capital facilities, utilities, parks, open space, and the environment." SCALE's Motion at 51. However, SCALE cites no authority supporting this proposition. On the contrary, the use of the word "summary" in SMC 25.05.440.E.4.a rebuts any suggestion that an EIS must discuss consistency with all, or even many, of the policies contained in every "citywide" section of the Comprehensive Plan. Nor does the provision cited by SCALE impose such a requirement. WAC 197-11-

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444(2)(b)(i) simply states that an element of the environment for purposes of SEPA review is "[r]elationship to existing land use plans."

Moreover, SCALE's approach is obviously impractical and contrary to the concept of meaningful environmental review. The Comprehensive Plan's section on citywide planning is *199 pages long* and contains hundreds of policies. *See* Seattle 2035 Comprehensive Plan, Weber Dec., ¶ 3. The idea that an EIS is required to specifically discuss consistency with "the vast majority" of these policies (SCALE's Motion at 48-49) is untenable.

In addition, SCALE's allegation that the "EIS totally and absolutely fails to address the proposal's relationship to the neighborhood plans" is belied by the plain language of the FEIS. SCALE's Motion at 52. As noted above, the FEIS does identify inconsistencies with neighborhood plan policies and the proposal includes policy amendments to address these. FEIS at 2.2, 2.21, F.11. While SCALE (incorrectly) argues that the amendments should be more specifically described (*see* section VII.A, *infra*), there is no question that the FEIS addresses consistency with the relevant neighborhood plans.

Ultimately, SCALE conflates the requirements for SEPA review with the issue of whether development regulations are consistent with and implement the Comprehensive Plan for purposes of the Growth Management Act. SCALE Motion at 47. Any recourse regarding compliance with the Growth Management Act would lie with the Growth Management Hearings Board. SCALE's suggestion that an EIS's discussion of the Comprehensive Plan could or should be equivalent to a GMHB proceeding is unsupported

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and should be rejected.[97] In sum, the FEIS sufficiently addresses consistency with the Comprehensive Plan. Moreover, the foregoing references to the EIS's discussion of the Comprehensive Plan unquestionably create an issue of fact precluding summary judgment.

VIII. THE FEIS INDISPUTABLY DISCUSSES THE IMPACTS OF PROPOSED ZONING CHANGES WITHIN THE PORTION OF THE STUDY AREA LYING OUTSIDE OF URBAN VILLAGES, THUS PRECLUDING SUMMARY JUDGMENT TO SCALE ON THIS ISSUE

SCALE's contention that the EIS fails to discuss the impact of proposed zoning changes in areas outside of urban villages ignores the facts and is demonstrably incorrect. SCALE's Motion at 43–47. The FEIS clearly states that "[t]he study area for this EIS includes existing multifamily and commercial zones in the City of Seattle, areas currently zoned Single Family Residential in existing urban villages, and areas zoned Single Family in potential urban village expansion areas identified in the Seattle 2035 Comprehensive Planning process." FEIS at 2.2. The study area excludes the Downtown, South Lake Union, and Uptown Urban Centers and portions of the University Community Urban Center. *Id.*[98] Thus, the study area includes a substantial quantity of multifamily- and commercial-zoned areas that are outside of urban villages and urban village expansion areas. FEIS Exhibit 2-1 and Exhibits 2-17 through 2-27.

SCALE's argument that the EIS fails to discuss the impact of proposed zoning changes in areas outside of urban villages rests heavily on the distinction between "map amendments" and "text amendments" to Title 23. It should be noted that SCALE is incorrect to the extent it suggests that the proposed development capacity increases in areas outside urban villages are solely due to "text" amendments. SCALE's Motion at 13,

[97] To the extent that SCALE suggests, by its reference to the GMA's "cascading hierarchy" (SCALE's Motion at 47–48), that the City cannot propose rezones, and Comprehensive Plan changes that facilitate those rezones, at the same time, that suggestion is also unsupported and incorrect.

[98] Development capacity has already been increased and MHA requirements imposed in those areas.

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43. In many cases, the proposed development capacity increases in such areas reflects "map" amendments (particularly in commercial and neighborhood commercial zones where height limits are being increased, as reflected in changes to the zone names on the zoning map).

In any event, there are clearly development capacity increases proposed within the study area, outside urban villages, through "text" amendments. SCALE's suggestion that the EIS's discussion of the impact of those changes is limited to one sentence is egregiously incorrect. SCALE's Motion at 46.

First, the EIS comprehensively describes the proposed development capacity increases, including those involving text changes, both for zones inside urban villages and for zones for which changes would occur outside urban villages. Appendix F provides a detailed technical summary of the text changes to the Land Use Code that would occur under the action alternatives. It is titled *Summary of Changes to Land Use Code and MHA Urban Design and Neighborhood Character Study*. Exhibits F-1–F5 contain a detailed listing of the proposed land use code text changes, showing the existing and proposed code standards for density limits, FAR limits, height limits, and other standards for each zone that would be amended.[99] This is followed by a two-page list of other modifications to zone standards that are unique to specific zones. FEIS at F.1–F.5, Appendix F also includes a 76-page Urban Design and Neighborhood Character Study prepared by ZGF Architects, which includes development prototype models and other illustrations of buildings that could be built under existing regulations compared to buildings that could occur after the proposed text changes. This document includes maps

[99] SCALE's Motion (at 45) contains a cursory table of zones and text changes that is not contained anywhere in the EIS, but completely ignores the foregoing detailed summaries and assessments of text changes that the EIS does include.

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of the complete areas (inside and outside of urban villages) where text changes for each zone would apply.

Second, the EIS contains ample description and discussion of the impacts of the proposed changes, including text changes, both inside and outside urban villages. Visual renderings that place models of development under the proposed text changes in a neighborhood context are provided in the Aesthetics section of the EIS in the series of Exhibits 3.3-10–3.3-22. The exhibits include renderings for zone changes that would occur within or outside of urban villages. Exhibits 3.3-23, 3.3-24, 3.3-25, 3.3-26, 3.3-27, and 3.3-28 map all locations where the development capacity increases would occur. In Appendix F and the aesthetics section the EIS provides a wealth of information for assessing the impact of text changes to the Land Use Code, by modelling and illustrating the new buildings that could result.

The Land Use Section of the EIS includes an assessment methodology that identifies the nature of land use impacts that would occur for every change to zoning under an action alternative, including the text-only changes at Exhibits 3.2-3, 3.2-4, and 3.2-5 (3.2-3 contains the text-only changes). Pages 3.110–3.112 describe the characteristics of the density, intensification of use, and scale impacts that would occur due to every zone change in an alternative. It is true that more detailed and granular discussion of land use impacts is provided for urban village areas, because larger upzones and greater impacts would occur in those locations, but the land use section in no way limits the assessment of impacts to urban villages.

An impact threshold is provided to assess the degree of land use impact for each zoning change in the study area including text-only changes, at page 3.115. The (M), (M1), and (M2), rezone suffixes are used to summarize the degree of land use impacts making the discussion in the EIS more manageable and concise. Location specific factors

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that would augment the amount of land use impact are provided at page 3.116. Combined with citywide maps at Exhibits 3.3-23, 3.3-25, and 3.3-27, and the parcel specific maps at Appendix H and online, information is provided to assess land use impact to each specific parcel affected by the proposal including lands inside and outside of urban villages.[100]

SCALE attempts to avoid the existence of the foregoing analysis by ignoring the EIS's comprehensive description of the proposed development capacity increases, and instead focusing on the provisions of the Council Bill (transmitted to Council subsequent to completion of the FEIS) that proposes to make changes to the Official Land Use Map and multiple provisions of the Land Use Code. *See* Council Bill 119184, Weber Dec., ¶ 4.

SCALE's reliance on the Council Bill to characterize the proposal that is reviewed in the EIS is inappropriate in the context of this EIS adequacy appeal. The adequacy of the EIS is based on the proposal as described in the EIS. Whether the action ultimately taken by the Council varies from that proposal in a manner that means the action is not covered by the environmental review is a separate question. Indeed, as noted in section VII.A above, the very existence of the appeal opportunity of which SCALE has availed itself is based on the idea that EIS adequacy is being evaluated prior to consideration of the underlying governmental action, which may reflect further elaboration.

In any event, SCALE errs in contending that the proposal would have substantial, unevaluated impacts on single family areas outside of urban villages because it allegedly changes "the criteria for rezoning all single family zones" in the City "in a wholesale manner and removes the reference that requires consistency with neighborhood plans." SCALE's Motion at 44. The proposed amendments to the rezone criteria are included in

[100] Impacts to other elements of the environment including transportation (Section 3.4), open space (Section 3.7), Public Services and Utilities (Section 3.8), and Air Quality and Greenhouse Gas Emissions (Section 3.9), evaluate impacts using metrics and/or analyses that pertain to areas of the City that span land within and outside of urban villages. Examples of impact assessment that address areas both inside of, and outside of urban villages are too numerous to summarize here.

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Appendix F of the FEIS at pages F.6 through F.9. The proposed amendment to SMC 23.34.010.B that removes the reference to neighborhood plans on its face applies only to single family zoned areas that are located within the adopted boundaries of an urban village. FEIS at F.6. The proposed amendment to the location criteria for single family zones at SMC 23.34.011.B arguably strengthens the protection of single family zoned lands outside of urban villages by providing that a SF 5000, SF 7200, or SF 9600 zone designation is most appropriate in areas that are outside of urban centers and villages. FEIS at F.7.

In sum, the FEIS on its face discusses the impacts of proposed zoning changes within the portion of the study area lying outside of urban villages. In any event, the foregoing references to the EIS's discussion on that score create an issue of fact precluding summary judgment.

IX. CONCLUSION

For the foregoing reasons, SCALE has failed to carry its heavy burden and its Motion for Summary Judgment should be denied.

DATED this 23rd day of May, 2018.

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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: **WALLINGFORD COMMUNITY COUCIL, ET AL.,** of the adequacy of the FEIS issued by the Director, Office of Planning and Community Development.	Hearing Examiner File W-17-006 through W-17-014 CERTIFICATE OF SERVICE

I, Amanda Kleiss, declare as follows:

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

That I, as a legal assistant with the office of Van Ness Feldman LLP, on May 23, 2018, filed the City's Response to SCALE's Motion for Summary Judgment; Declaration of Katherine Wilson with Exhibits A-C; Declaration of Jeffrey S. Weber; Declaration of Paula Johnson Burke with Exhibits A-C; Declaration of Sharese Graham with Exhibits A-B; and this Certificate of Service with the Seattle Hearing Examiner using its e-filing system and that on May 23, 2018, I addressed said documents and deposited them for delivery as follows:

Seattle Hearing Examiner
Ryan Vancil
Deputy Hearing Examiner
700 Fifth Avenue, Suite 4000
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☐ By U.S. Mail
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on this 23rd day of May, 2018.

/s/Amanda Kleiss
Declarant

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