BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of the: **QUEEN ANNE COMMUNITY COUNCIL** of the Final Environmental Impact Statement for the Citywide Implementation of ADU-FEIS.	Hearing Examiner File W-18-009 SEATTLE CITY COUNCIL'S MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

Pursuant to Hearing Examiner Rules of Practice and Procedure 1.03 and 3.02, Respondent Seattle City Council ("City") brings this Motion for Dismissal of certain claims raised in the Notice of Appeal filed by Appellant Queen Anne Community Council ("Appellant"). With this Motion, the City seeks to dismiss issues for which there is no genuine issue as to any material fact such that the City is entitled to a judgment as a matter of law.

II. RELIEF REQUESTED

As detailed in the sections that follow, the City seeks dismissal of the following claims and corresponding portions of the Appellant's Notice of Appeal:

1. Claims alleging process violations or procedural due process claims;[1]
2. Claims Appellant raised or should have raised when Appellant appealed the DNS for the subject proposal and are thus barred by the doctrine of res

[1] Appellant's Notice of Appeal filed in W-18-009 ("Notice of Appeal"), ¶ 2.1 (asserting claims related to the "…guaranteed rights and opportunities to be involved in government processes" and the need for "fair and open process" and "procedural due process").

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judicata—specifically, claims challenging the cumulative impacts of the Proposal; impacts to open space and tree canopy coverage; and loss of historic buildings;[2] and,

3. Claims that are vague, overly broad, and unspecified.[3]

III. FACTUAL BACKGROUND

The Final Environmental Impact Statement ("FEIS") that is the subject of this appeal analyzes the City's proposal ("Proposal") to amend the City's Land Use Code to remove barriers to the creation of accessory dwelling units ("ADUs"). ADUs include backyard cottages, known as detached accessory dwelling units ("DADUs"), and in-law apartments, known as attached accessory dwelling units ("AADUs"). The Proposal involves several Land Use Code changes, including allowing two ADUs on some lots, changing the existing off-street parking and owner-occupancy requirements, and changing some development standards that regulate the size and location of DADUs.[4] The FEIS analyzes three action alternatives that implement the Proposal, with differences in the scale and focus of the proposed Code changes.[5]

On May 16, 2016, the City initially issued a Determination of Nonsignficance ("DNS") for the Proposal.[6] The Appellant appealed the earlier DNS in Hearing Examiner File No. W-16-004 and challenged the adequacy of the City's environmental analysis for

[2] Notice of Appeal, ¶¶ 2.3, 2.4, 2.12, 2.13, 2.15.
[3] Notice of Appeal, ¶¶ 2.2, 2.3, 2.15.
[4] FEIS at 1-2.
[5] FEIS at 2-3 to 2-4.
[6] Declaration of Tadas Kisielius ("Kisielius Decl.") at ¶ 2. The proposal analyzed in the FEIS and DNS consist of the same primary elements. In particular, while the three action alternatives differ in the scale and focus of the proposed code changes, all three action alternatives in the FEIS include the same primary elements as the Proposal that was the subject of the DNS, with Alternative 2 of the FEIS bearing the most direct correlation. Declaration of Aly Pennucci ("Pennucci Decl.") at ¶ 14; *see also* FEIS at 2-3.

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the Proposal.[7] Specifically, Appellant advanced its claim that the Proposal would create probable, significant adverse impacts such that the City should have completed an EIS.[8] Appellant specifically alleged in its notice of appeal that the proposal would have significant adverse impacts on open space, tree canopy, and historical resources, among others.[9] As a result of Appellant's prior appeal, after four days of hearing, the Examiner weighed the evidence and issued a decision on December 13, 2016, in which the Examiner rejected some of the Appellant's claims regarding the sufficiency of the City's process, but concluded that the Appellant had satisfied its burden of proving that the City failed to sufficiently analyze the Proposal's impacts on the following specific topics: housing and displacement of populations; height, bulk and scale; parking; and public services and facilities.[10] The Examiner reversed the DNS and remanded to OPCD "for preparation of an EIS consistent with" the Examiner's decision.[11]

On remand, the City prepared the FEIS required by the Examiner's prior decision addressing the specific subjects that the Examiner had identified for more analysis. As part of its EIS process on remand, the City complied with and in some respects exceeded SEPA's public process requirements, including providing public notice and opportunities to comment at several stages throughout the environmental review. First, the City prepared and issued its determination of significance, the notice of its determination of significance, and scoping notice ("DS Notice") on October 2, 2017, which invited

[7] Kisielius Decl., Exs. A, B (Appellant's Notice of Appeal and Clarification of issues filed in W-16-004, In the Matter of the Appeal of Queen Anne Community Council).
[8] *Id*.
[9] *Id.*
[10] *Id*., Ex. C. (Findings and Decision, W-16-004).
[11] *Id.*, ¶¶ 1.7-1.9. The Notice of Appeal includes a summary of this matter's procedural history, but incorrectly identifies the dates – the DNS issuance and appeal occurred in 2016, not 2018 as stated in the Notice of Appeal.

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comments on the scope of the forthcoming EIS.[12] The City filed and published the notice in various places including the Seattle Department of Construction and Inspection's ("SDCI") Land Use Information Bulletin ("LUIB"), the SEPA Public Information Center, the Daily Journal of Commerce (which is the City's official newspaper for publication of notice) and in Ecology's State SEPA Register.[13] The City circulated the DS Notice to agencies with jurisdiction and expertise and potentially affected tribes, and also provided notice through email announcements to local media outlets and by posting on social media and department newsletters.[14] The City then solicited comments from the public over the ensuing comment period, which it extended by 15 days beyond the published deadline at Appellant's request,[15] and held two scoping meetings on October 17 and October 26, 2017, at which it provided information about the Proposal and solicited comments.[16]

Following completion of the Draft EIS, on May 10, 2018 the City published its "Notice of Availability of Draft Environmental Impact Statement" ("Draft EIS Notice") in the LUIB, the SEPA Public Information Center, the Daily Journal of Commerce, and in Ecology's SEPA Register.[17] The City made the Draft EIS available online, distributed copies of the Draft EIS to all agencies with jurisdiction, and made copies available at SDCI's Public Resource Center and at public libraries.[18] The City solicited comments on the Draft EIS through the June 25, 2018 deadline and held an open house and public hearing on May 31, 2018.[19]

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[12] Declaration of Aly Pennucci ("Pennucci Decl.") at ¶ 3.
[13] *Id.*
[14] *Id.* at ¶ 3, 6.
[15] *Id.* at ¶ 5.
[16] *Id.* at ¶ 7.
[17] *Id.* at ¶ 8.
[18] *Id.* at ¶ 10.
[19] *Id.* at ¶ 11.

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Finally, following completion of the FEIS, on October 4, 2018, the City issued a "Notice of Availability of Final Environmental Impact Statement" ("FEIS Notice") and published the notice in the LUIB, the SEPA Public Information Center, the Daily Journal of Commerce, and in Ecology's State SEPA Register.[20] The FEIS Notice provided information about where to obtain a copy of the FEIS and how to appeal the environmental determination. The City made the FEIS available online, made copies available at SDCI's Public Resource Center and the public library, and distributed copies to all agencies with jurisdiction, agencies that commented on the Draft EIS, and affected tribes.[21]

IV. STANDARD OF REVIEW

The Hearing Examiner Rules of Practice and Procedure ("Rules") address motions to dismiss. Rule 3.02 provides that the Hearing Examiner may dismiss an appeal if it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is "without merit on its face." The Rules do not specifically address summary judgment motions or other motions that are accompanied by written declarations and attached documents, but Rule 1.03(c) provides that, in matters not covered by the Rules, the Hearing Examiner has discretion to determine the appropriate procedure and "may look to the Superior Court Civil Rules for guidance." Thus, a quasi-judicial body like the Examiner may look to Civil Rule ("CR") 56 and may dispose of an issue summarily when there is no genuine issue of material fact.[22]

A motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter

[20] Pennucci Decl. at ¶ 12.
[21] *Id.* at ¶ 13.
[22] *ASARCO Inc. v. Air Quality Coal.*, 92 Wn. 2d 685, 695-98, 601 P.2d 501, 510 (1979).

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of law."[23] Summary judgment is a procedure to avoid unnecessary trials on issues where neither party contests the facts relevant to a legal determination, and only questions of law remain for resolution.[24]

The party moving for summary judgment must show that: (1) there are no genuine issues of material fact, and (2) the moving party is entitled to judgment as a matter of law.[25] A material fact is one that will affect the outcome under the governing law.[26] If the moving party meets its initial burden of showing the absence of an issue of material fact, the burden shifts to the non-moving party to present evidence demonstrating that material facts are in dispute.[27] The non-moving party "may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."[28]

Although most issues raised in this Motion fall within CR 56's standards, issues that do not require consideration of matters outside the pleadings, such as the facial sufficiency of the Notice of Appeal's allegations, may be treated under CR 12(b)(6)'s standards.[29] CR 12(b)(6) authorizes a motion to dismiss for failure to state a claim on which relief can be granted. For purposes of deciding the defendant's motion, all of the factual allegations in the complaint will be accepted as true.[30] The motion may be granted "when the plaintiff can provide no conceivable set of facts consistent with the complaint that would entitle him or her to a relief."[31]

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[23] CR 56(c).
[24] *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990); *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).
[25] *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997).
[26] *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992).
[27] *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).
[28] CR 56(e).
[29] CR12(c); *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 28, n. 5, 408 P.3d 1123 (2017).
[30] *Dennis v. Heggen*, 35 Wash. App. 432, 667 P.2d 131 (Div. 1 1983).
[31] *Tabingo v. Am. Triumph LLC*, 188 Wn.2d 41, 45, 391 P.3d 434, 437 (2017).

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V. ARGUMENT

A. The Examiner Should Dismiss Appellant's Procedural Due Process Claim Challenging the "Fairness" of the Process Because the City Complied with All SEPA Regulations Governing Public Process.

The Examiner should dismiss Appellant's claim related to "fair process" and "procedural due process" in Paragraph 2.1 of the Notice of Appeal. Appellant's claim has no merit. As described in the Pennucci Declaration and in Section III above, the City provided and, in some cases exceeded, all notice and opportunities for comment required by the City's SEPA regulations in Chapters 25.05 and 23.76 of the Seattle Municipal Code ("SMC")[32]:

- The City published the DS Notice in the manner and in the publications specified by SMC 23.76.014 and circulated the DS to agencies with jurisdiction and the public, consistent with SMC 25.05.360.[33]
- The City solicited comments on the scope of the EIS beyond the minimum 21 day deadline set forth in SMC 23.76.014.A.1.[34]
- The City held a scoping meeting, consistent with SMC 25.05.409.[35]
- The City published its notice of availability of the Draft EIS on May 10, 2018 in the manner and in publications specified in SMC 23.76.014, which provided 21 days' notice of the public hearing on the draft, and distributed copies of the Draft EIS to all agencies and parties specified in the SMC 25.05.455.[36]

[32] SMC 25.05.510 addresses general public notice requirements under SEPA. That section indicates that Chapter 23.76's notice procedures apply to proposals requiring a Council Land Use Decision, in lieu of SMC 25.05.510's requirements. The notice procedures in Chapter 23.76 SMC are substantially similar to those in Chapter 25.05 SMC and references some of SMC Chapter 25.05's requirements.
[33] Pennucci Declaration at ¶ 2.
[34] *Id.* at ¶ 4-5.
[35] *Id.* at ¶ 7.
[36] *Id.* at ¶ ¶ 8-10.

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- The City held its hearing on the Draft EIS on May 31, 2018.[37]
- The City published notices of availability of the Final EISs in the manner and in the publications specified in SMC 23.76.018, and distributed copies to all agencies and parties specified in the SMC 25.05.460.[38]

Moreover, the City took additional actions beyond the Code's requirements. For example, the City held a second scoping meeting, which is not required by Code.[39] Further, in addition to distributing the DS Notice, Draft EIS Notice, and FEIS Notice as required under the Code, the City also provided notice using various communication tools, including email announcements to individuals on a listserv that the Office of Planning and Community Development maintains and to local media outlets, and postings in department newsletters, Facebook, and Twitter.[40]

Because the City complied with or exceeded SEPA's procedural requirements, the City's public process was reasonable and adequate as a matter of law.[41] The City's code defines the adequacy of the public process for its environmental review and Appellant cannot dispute that the City's process complied with those SEPA regulations.

Beyond compliance with the SEPA regulations, Appellant's only remaining conceivable arguments would amount to a collateral challenge to the adequacy of the City's SEPA public process regulations, over which the Examiner does not have jurisdiction in this limited appeal of the adequacy of the FEIS. In particular, Appellant's use of the phrase "procedural due process" suggests a constitutional challenge to the adequacy of the City's public process regulations under SEPA which is beyond the

[37] *Id.* at ¶ 11.
[38] *Id. at* ¶¶ 12-13.
[39] *Id.* at ¶ 7. SMC 250.05.409 requires only one scoping meeting.
[40] *Id.* at ¶ 6.
[41] *See* W-17-006 through W-17-014, In the Matter of the Appeals of Wallingford Community Council, et al., Preliminary Order on Prehearing Motions, at 4-5 (concluding that because the City complied with Code and SEPA notice requirements, the City's actions were adequate as a matter of law).

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Examiner's subject matter jurisdiction. As officials of an administrative tribunal created by the SMC, hearing examiners have only the authority expressly delegated to them by the SMC.[42] Nowhere does the SMC purport to vest the Examiner with authority to consider and rule upon legal issues implicating federal or constitutional law.[43] Consequently, in previous cases before the Examiner, the Examiner has dismissed constitutional or due process claims based on lack of jurisdiction.[44] To the extent Appellant is collaterally challenging the adequacy of the City's process requirements, on constitutional grounds or otherwise, those claims should be dismissed.

Accordingly, the Examiner should dismiss the "procedural due process" and "fair process" issues raised in Paragraph 2.1 of the Notice of Appeal.

B. Res Judicata Bars Several of Appellant's Claims

The doctrine of res judicata bars several of Appellant's claims in this appeal that were raised by Appellant or should have been raised in its earlier appeal of the DNS and cannot be re-litigated here. Specifically, the doctrine bars Appellant's claims that the FEIS failed to adequately address the following purportedly significant adverse impacts of the Proposal: cumulative impacts of the Proposal "in conjunction with other significant land use changes as proposed within HALA, MHA, and other legislation;"[45] impacts to open space and tree canopy coverage; and loss of historic buildings.[46]

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[42] *See Woodinville Water Dist. v. King Cty*., 105 Wn. App. 897, 906, 21 P.3d 309, 313–14 (2001); *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty*., 135 Wn.2d 542, 558, 958 P.2d 962, 970 (1998).

[43] *See* SMC 3.02.110 - .130; SMC 25.05.680; *see also Yakima Cty. Clean Air Auth. v. Glascam Builders, Inc*., 85 Wn.2d 255, 257, 534 P.2d 33, 34 (1975) (noting that administrative tribunals lack authority to determine the constitutionality of a statute).

[44] W-16-003, In the Matter of the Appeal of Citizens for Livability in Ballard, Order on Motion to Dismiss, at p. 2; MUP-12-027, HC-12-002, IN the Matter of the Appeal of Carl Schaber and Gene Casal, Findings and Decision Following Reconsideration, Conclusion ¶ 12.

[45] The HALA proposal, which included MHA, existed at the time Appellant filed the DNS appeal; in fact, Appellant cited the HALA proposal in its notice of appeal. Kisielius Decl., Ex. A.

[46] Notice of Appeal, ¶¶ 2.3, 2.4, 2.12, 2.13, 2.15

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Res judicata prevents multiplicity of actions by parties who have had an opportunity to litigate the same matter in a former action.[47] The doctrine prohibits the re-litigation of claims and issues that were actually litigated, as well as claims and issues that could have been litigated in a prior action.[48] Res judicata applies and gives preclusive effect to administrative quasi-judicial land use decisions.[49]

Res judicata prevents claim splitting and produces certainty as to the parties' rights, promotes judicial economy, and avoids inconsistent results.[50] "The general rule is that if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim."[51] The policy underlying the doctrine is that each party should be afforded one but not more than one fair adjudication of its claim.[52] Res judicata applies even if a party seeks different remedies[53] or asserts a different theory[54] or a technically different legal challenge.[55]

Res judicata applies when there is identity of: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the

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[47] *Karlberg v. Otten*, 167 Wn. App. 522, 535, 280 P.3d 1123, 1130 (2012).
[48] *Karlberg*, 167 Wn. App. at 535.
[49] *Id.*
[50] *Karlberg*, 167 Wn. App. at 535; *Thompson v. State, Dep't of Licensing*, 138 Wn.2d 783, 795, 982 P.2d 601, 608 (1999).
[51] *Karlberg*, 167 Wn. App. at 535 (quotation marks omitted).
[52] *Lejeune v. Clallam Cty.*, 64 Wn. App. 257, 266, 823 P.2d 1144, 1149 (1992).
[53] *Bill v. Gattavara*, 34 Wn. 2d 645, 209 P.2d 457 (1949) (recovery of treble damages in statutory trespass action precluded an action for unjust enrichment. The court stated, "While several remedies were available to Bill, he still had but one cause of action.").
[54] *Trane Co. v. Randolph Plumbing & Heating*, 44 Wash. App. 438, 722 P.2d 1325 (Div. 3 1986) (first action on unjust enrichment theory; second action on conversion theory); *see also Highway J Citizens Grp. v. U.S. Dep't of Transp.*, 456 F.3d 734, 741-44 (7th Cir. 2006) (applying res judicata when two actions focused on the adequacy of an EIS prepared in conjunction with two highway projects; although the plaintiff presented different legal theories for factually distinct projects, the preparation of the EIS was the key identical underlying factual transaction).
[55] *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 918 (9th Cir. 2012) (applying res judicata, and concluding the plaintiff's claims under the National Environmental Policy Act and the Endangered Species Act could and should have been raised in a suit the plaintiff had brought years earlier, under a different statutory scheme; the suits related to the same set of facts and the same harm—adverse impacts to sea turtles—thus the plaintiff was required to assert its NEPA and ESA claims in the earlier suit).

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claim is made.[56] All elements are satisfied here. The subject matter of both appeals is the sufficiency of the City's environmental analysis of the Proposal under SEPA, including, specifically, the extent of the Proposal's probable significant adverse impacts that are required to be analyzed in an EIS. Both appeals involve the same Appellant, the Queen Anne Community Council, maintaining the same quality or position as a challenger of the lead agency's environmental analysis.

The second element is also satisfied. The Examiner may consider four factors to determine whether two causes of action are identical: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."[57] While all four factors of the second element need not be present to bar the second claim,[58] all are present in this instance.

In its first appeal of the City's DNS for the Proposal, Appellant alleged that the City had failed to sufficiently consider the Proposal's probable significant adverse impacts such that the City should have completed an EIS. In its original notice of appeal, Appellant even included the same allegations that the City had failed to analyze a variety of impacts, including impacts to "historical and cultural preservation," "reduced open space and tree canopy," and many others.[59] The Examiner held a four-day hearing on Appellant's appeal at which Appellant presented its evidence. However, Appellant did not pursue or otherwise advance the full extent of the claims included in its notice of appeal.

[56] *Hilltop Terrace Homeowner 's Ass 'n v. Island Cty.*, 126 Wn.2d 22, 32, 891 P.2d 23 29, 35 (1995).
[57] *Rains v. State*, 100 Wn. 2d 660, 664, 674 P.2d 165, 168 (1983) (quoting *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982))
[58] *Eugster v. Washington State Bar Ass'n*, 198 Wn. App. 758, 789, 397 P.3d 131, 147 (2017).
[59] Kisielius Decl., Ex. A.

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Appellant only prevailed in convincing the Examiner that several, specific impacts had not been sufficiently analyzed: housing; displacement of populations; height, bulk, and scale (i.e., aesthetics); parking; and public services and facilities.[60] The Examiner remanded the DNS with direction to address the specific, identified potential impacts in an EIS.[61] Consistent with the Examiner's decision, the City prepared an EIS focusing on the specific impacts identified in the decision.

Now, upon completion of that EIS, at the end of the process, Appellant continues to challenge other potential significant adverse impacts that were not part of the Examiner's Order of Remand, including historical and cultural preservation, reduced open space and tree canopy, and cumulative impacts. Appellant included in its Notice of Appeal in the earlier case its claims that the Proposal will create additional significant adverse impacts to tree canopy, open space, and historic resources. However, the Examiner did not identify those issues as deficiencies in its Order of Remand.[62] With respect to cumulative impacts, the Appellant could and should have raised in its earlier appeal its claim that the Proposal would contribute to cumulative impacts that are significant, but did not. In all instances, under the doctrine of res judicata, because these claims were or should have been raised in the DNS appeal, the claims are barred here.[63]

The two appeals involve the purported infringement of the same right and arise out of the same nucleus of facts – namely, the extent to which the Proposal will have significant adverse impacts on the environment, including open space, tree canopy,

[60] Kisielius Decl., Ex. C at p. 7; Ex. D.
[61] Kisielius Decl., Ex. C at p. 14. Consistent with the "rule of reason" standard applied to an EIS, an EIS is not required to analyze every impact or element of the environment. An EIS must include only probable significant adverse environmental impacts. R. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis (2017), at 14-45.
[62] Presumably that is because Appellant failed to advance those issues beyond its Notice of Appeal, but could and should have if Appellant intended to preserve the claim.
[63] To be clear, the FEIS sufficiently addresses these claims. But Appellants are barred from pursuing them in this proceeding.

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historical buildings and cumulative impacts. The Appellant should have raised the same evidence in the first appeal that it will need to raise in the context of this appeal – namely, evidence supporting its claim that the Proposal will create significant, unavoidable adverse impacts on tree canopy, open space, historic buildings, and cumulative impacts. At the time of the DNS appeal, Appellant had the evidence and factual record giving rise to its claims – specifically, the facts of Proposal from which it would allege probable significant impacts. If Appellant believed the City should have further analyzed certain impacts, that claim was established at the time of the DNS. Indeed, the entire culmination of the Appellant's earlier lawsuit challenging the threshold determination was to define the significant impacts that must be analyzed in an EIS. Thus, both this appeal and the DNS appeal arise out of the "same transactional nucleus of facts," involve the alleged infringement of the same right, and rest on the same evidence.[64]

The fact that the City has since completed an EIS does not change the outcome. While Appellant is free to challenge the FEIS's adequacy with respect to issues and theories upon which Appellant prevailed in the DNS appeal, it cannot now use this new appeal to litigate issues it should have advanced in that earlier hearing. To hold otherwise would allow the Appellant to continue to try to move the "goal posts" from the mark that was set at the conclusion of Appellant's last appeal.

Indeed, the Examiner's limited remand in the DNS appeal established rights and interests that would be destroyed by Appellant's claims here.[65] The Examiner's decision required the City to further analyze certain specific impacts and ordered the City to prepare an EIS consistent with the decision. The Examiner's limited remand was

[64] *See Rains*, 100 Wn. 2d at 664 (identity of claims involves consideration of whether substantially the same evidence is presented in the two actions; whether the two suits involve infringement of the same right; and whether the two suits arise out of the same transactional nucleus of facts).

[65] *Id.* (whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action is another factor in determining identity of claims).

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appropriate – a limited remand "confined to particular issues is merited where the error pertains to a particular issue only and justice does not require resubmission of the entire case[.]"[66] Here, because the Examiner identified particular probable significant adverse impacts requiring further analysis, the Examiner appropriately remanded for analysis of those particular impacts only and did not require or contemplate a re-examination of the Proposal's possible impacts in their entirety.

Consistent with the Examiner's limited remand, the City has now prepared an FEIS focusing on the specific impacts raised in Appellant's appeal and in the Examiner's decision. Appellant itself admits the EIS was completed pursuant to the Examiner's decision.[67] Allowing Appellant to belatedly challenge the City's analysis on different theories including claims that were included in its earlier notice of appeal of the DNS that should have been litigated earlier would defeat the purpose of the limited remand and would destroy the considerable time, effort, and resources the City has invested into preparing an EIS consistent with the Examiner's decision.

Therefore, Appellant's claims based on alleged impacts that could and should have been raised in the DNS appeal are barred. The portions of Appellant's Notice of Appeal that allege such impacts should be dismissed, and Appellant should be precluded from raising claims based on impacts not raised in its DNS appeal.

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[66] *Olds-Olympic, Inc. v. Commercial Union Ins. Co*., 129 Wn.2d 464, 482 n.22, 918 P.2d 923, 932 n.22 (1996). *See also Dexheimer v. CDS, Inc*., 104 Wn. App. 464, 477, 17 P.3d 641, 648 (2001) (stating issues on retrial should be limited when the original issues were distinct and separate from each other and that justice does not require resubmission of the whole case); *Hough v. Ballard*, 108 Wn. App. 272, 289, 31 P.3d 6, 15 (2001) (stating that when the appellant does not appeal the amount of damages, the court will remand for retrial on the issue of liability only); *Washington Pub. Emp. Ass'n v. Cmty. Coll. Dist. 9*, 31 Wn. App. 203, 212-13, 642 P.2d 1248, 1254 (1982) (ruling that when an agency applies an inappropriate legal standard, the reviewing court must remand to the agency with instructions to apply the correct legal standard; a new hearing will not be required).

[67] Notice of Appeal, ¶¶ 1.7-1.10; Appellant's "Letter of Comment Regarding ADU DEIS" (attached as Ex. E) at p. 2 (noting that the EIS "has been completed pursuant to the hearing examiner's Decision").

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C. Vague, Overly Broad, and Unspecified Objections to the FEIS Should Be Dismissed

Rule 3.01(d)(3) provides that an appeal must set forth the "appellant's *specific* objections to the decision or action being appealed[.]" (Emphasis added.). Issues that are not clearly and specifically identified in the notice of appeal need not be addressed.[68]

Appellant's Notice of Appeal raises several overly broad and unspecified issues, as follows:

> 2.1 The FEIS fails to adequately disclose, discuss and analyze the direct, indirect and cumulative impacts of the proposed actions in conjunction with the City of Seattle and the State of Washington guaranteed rights and opportunities to be involved in government processes, especially those involving environmental and land use decisions.[69]
>
> 2.2 The FEIS fails to adequately disclose, discuss and analyze the direct, indirect and cumulative impacts . . . that include, *but are not limited to* . . . .
>
> 2.3 The FEIS fails to consider cumulative impacts of the proposed actions in conjunction with . . . *other legislation.*
>
> 2.15 The FEIS fails to adequately disclose, discuss and analyze the direct, indirect and cumulative impacts *upon the elements of the environment* (SMC 25.05.44) including . . . other population pressures *among many more*.

These allegations are not "specific objections" to the action, and they fail to provide the City with fair and adequate notice of the claims that Appellant intends to raise

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[68] *See, e.g.*, Order on OPCD Motion to Dismiss, filed in W-16-004 (dismissing Appellant's claims relating to segmentation or piecemealing and to the alternatives analysis because the issues were not raised in Appellant's notice of appeal); Findings and Decision, In the Matter of the Appeal of 255 S King Street LP from a Denial of Certificate of Approval issued by the Director, Hearing Examiner File No. R-17-002 (declining to address issues that were not clearly identified in the notice of appeal).

[69] A portion of Notice of Appeal ¶ 2.1 appears to assert claims relating to procedural due process and adherence to process, which should be dismissed as discussed above in Section V.A. If the process claims are not dismissed, the remainder of ¶ 2.1 should be dismissed for its lack of specificity.

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at the hearing. This type of unspecified placeholder text is expressly designed to allow the Appellant to continue to develop its case beyond the deadline for appeal. That type of gamesmanship should not be allowed. Appellant cannot use these broad and vague allegations to leave the door open for claims and issues that it failed to properly specify in its appeal. The City respectfully requests the Examiner strike the language identified above and limit the scope of Appellant's appeal to the issues specifically raised in the Notice of Appeal.

VI. CONCLUSION

For all of the reasons set forth above, the City respectfully asks that the Examiner dismiss the issues identified in the Request for Relief.

DATED this 30th day of November, 2018.

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