SEATTLE HEARING EXAMINER

In the Matter of the Appeal by QUEEN ANNE COMMUNITY COUNCIL of the Final Environmental Impact Statement for the proposed legislation on accessory dwelling units	Hearing Examiner File No. W-18-009 QUEEN ANNE COMMUNITY COUNCIL'S RESPONSE TO CITY'S MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

On October 18, 2018, the Queen Anne Community Council filed an appeal of the adequacy of the Final Environmental Impact Statement for proposed legislation that would allow expanded development of accessory dwelling units. The City Council has moved to dismiss certain of Queen Anne's claims: claims of procedural and due process violations; claims relating to impacts the City asserts are barred by *res judicata*; and claims the City maintains are vague.[1] The City's motion does not seek dismissal of Queen Anne's adequacy challenges to the FEIS's treatment of categories of impact on which the Hearing Examiner remanded the DNS appeal for preparation of an EIS, namely: housing and displaced populations; height, bulk and scale; parking; and public services and facilities.[2] Nor does the City move for dismissal of Queen Anne's claims at ¶¶2.5-2.11.

[1] City Motion at 1-2.
[2] Findings and Decision in No. W-16-004, Conclusions 8-17, set forth at Exhibit C to the Declaration of Tadas Kisielius.

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As Queen Anne elaborates below: it withdraws claims of procedural and due process violations in ¶2.1; claims beyond the four areas of impact addressed in the DNS proceeding are not barred by *res judicata* because the standards governing EIS adequacy substantially differ from those applicable to review of a DNS and because the City has expanded its proposal; but even if the standards were the same, impacts to open space, tree canopy and historic buildings are embraced within the four areas of impact found to be significant; and the City's claims of vagueness are not properly addressed by dismissal, but rather by a request for more definite statement, should the City remain unclear as to Queen Anne's claims.

II. ARGUMENT

A. Procedural and Due Process Violations.

While Queen Anne maintains that the public outreach and public process should have been more expansive for legislation affecting the entire portion of the City zoned for single family, it concedes that the City may have met minimum notice and meeting requirements for scoping and the release of the Draft EIS. Queen Anne further concedes that the Hearing Examiner lacks jurisdiction to consider constitutional issues. Therefore, Queen Anne voluntarily withdraws its appeal claim at ¶2.1, thereby mooting the City's claim for dismissal.[3]

[3] On Claim ¶2.1, Queen Anne would ask that an order reflect voluntary withdrawal of the claim as opposed to a ruling of dismissal on the merits, since the merits of this claim would not have been presented for review.

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B. *Res Judicata* Does Not Apply.

The City at 10-11 provides correct citations to standards applicable to the doctrine of *res judicata.* But the doctrine does not apply to issues raised in separate appeals of a DNS and an EIS, because the two determinations involve substantially different standards of agency inquiry and different standards of appellate review. Further, the preferred alternative covered in the FEIS would allow more intensive development than that reviewed by the DNS. Thus, the requirements for identity of cause of action and identity of subject matter are not met.

The issuance of a DNS involves a different standard of agency inquiry than does issuance of a DEIS. To survive appellate review of a DNS, an agency must be able to produce a decision record that demonstrates that the DNS resulted from "actual consideration of environmental factors"[4] and that the proposed action would not exceed the threshold of causing more than moderate effects upon the quality of the environment.[5] The DNS itself is reviewed under the "clearly erroneous" test.[6] The Hearing Examiner applied these standards in reversing the prior DNS.[7]

> The preparation of an EIS must meet a different standard of adequacy, whether:
>
> the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed, and substantiated by supportive opinion and data.[8]

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[4] *Norway Hill Preservation and Protection Assoc. v. King County Council*, 87 Wn.2d 267, 275-76, 552 P.2d 674 (1976).
[5] *Id.* at 277-78.
[6] *Moss v. Bellingham,* 109 Wn.App. 6, 13, 31 P.3 703 (2001).
[7] Decision in No. W-16-004, Findings 32-25 and Conclusion 1.
[8] *Citizens Alliance to Protect Our Wetlands v. City of Auburn, (CAPOW),*126 Wn.2d 356, 362 (1995) (quoting *Klickitat County Citizens Against Imported Waste v. Klickitat County, ("Klickitat County"),* 122 Wn.2d 619, 633, 860 P.2d 390, 866 P.2d 1256 (1993)).

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To assure the purposes of SEPA are properly served – including those listed at RCW 43.21C.020(2) – the adequacy of an EIS is reviewed *de novo,* as a question of law, not under the more deferential "clearly erroneous" standard applicable to DNS review.[9] Because the standard for agency inquiry into project impacts is more demanding for an EIS than for a DNS, and because the reviewing body examines the adequacy of an EIS under a less deferential standard than it does for a DNS, the legal bases for challenging each determination are not the same. The City has cited to federal cases involving sequential challenges to EISes, but to no decisions applying *res judicata* to an EIS challenge following an appeal of a DNS.

Nor is the subject matter the same. Of course, both the DNS and the FEIS purport to address impacts resulting from legislation allowing the expanded development of Accessory Dwelling Units (ADUs). But the FEIS addresses a preferred option that allows even more intensive development of ADUs than the legislation addressed in the DNS, at least in the following respects: the preferred alternative would allow two attached accessory dwelling units of 1,000 square feet each within a principal dwelling – essentially a triplex, while the DNS proposal did not; in certain circumstances the preferred alternative would allow ADUs to exceed 1,000 sq ft in floor area; and the preferred alternative increases occupancy of a single-family lot by 50%, from 8 to 12

[9] *Klickitat County at 632-33, citing to Solid Waste Alternative Proponents v. Okanogan Cy. (SWAP),* 66 Wn. App. 439, 441, 832 P.2d 503, *review denied* 120 Wn.2d 1012, 844 P.2d 435 (1992); See also, *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447 (1990).

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unrelated adults.[10] The preferred alternative proposes another change not included in the proposal reviewed in the DNS: a 50% maximum floor area ratio applied to new construction in all single-family zones.[11]

The FEIS also expanded its analysis of significant adverse impacts beyond the four topics on which the Hearing Examiner reversed the DNS. The FEIS also identifies significant impacts in the areas of socioeconomics (in addition to impacts on housing and populations), land use and aesthetics (beyond just height, bulk and scale), transportation (in addition to parking), public services (in addition to public utilities and facilities).[12] Additionally, the FEIS includes discussions of cumulative impacts,[13] as required by WAC 197-11-060 and the City's cumulative effects policy at SMC 25.05.670, and it considers the impacts of each alternative upon historic resources, tree canopy, and open space.[14]

Where the City has both increased the intensity of allowable ADUs and it has expanded the scope of environmental review, *res judicata* cannot be applied to hold Queen Anne to the issues raised at a prior proceeding, regarding a different environmental determination, prepared for a less intense proposal, using different documentation, and prepared to satisfy different legal standards. The identity of subject matter does not exist.

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[10] FEIS at Section 2.2 and Exhibit 2-2, copy available at http://www.seattle.gov/council/adu-eis#finalEIS.
[11] *Id.,* Exhibit 2-2.
[12] FEIS at Section 1.8 and Exhibit 1-2.
[13] FEIS, Section 1.9.
[14] See e.g., FEIS at 4-72 et seq. (impacts of the preferred alternative on tree canopy and vegetation, open space and historic resources); p. 4-92 et seq. (tree canopy).

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C. Queen Anne's Challenges to the FEIS Fall within the Scope of Its Prior Claims or within the Expanded Scope of the FEIS.

Even if *res judicata* did apply between appeals of the DNS and FEIS (which it does not), the doctrine would not bar the claims the City seeks to dismiss, which the City identifies as ¶¶ 2.3, 2.4, 2.12, 2.13 and 2.15. Those claims fall either within the objections Queen Anne raised in its prior appeal or within the FEIS's expanded scope of environmental review.

Queen Anne alleges at Claim 2.3 that:

> The FEIS fails to consider cumulative impacts of the proposed actions in conjunction with other significant land use changes as proposed within HALA, MHA, and other legislation.

The topic of the ADU proposal's claimed consistency with HALA, MHA, and other legislation is among the additional topics considered by the FEIS.[15] The cumulative effect of MHA and another piece of other legislation – the legislation allowing short term rentals of ADUs -- could not have been addressed within the DNS appeal because they did not yet exist. Queen Anne cannot be precluded from raising an issue that had not arisen at the time of the DNS appeal.

Queen Anne alleges at Claim 2.4 that:

> The FEIS fails to consider an adequate range of alternatives that specifically consider the geographic, topographic, and locational differentiation of the city of Seattle. The unique qualities, historical and cultural identities, average property sizes, infrastructure adequacy and mobility limitations, open space and tree canopy, parking availability and restrictions, among many others were ignored as

[15] FEIS at 3-2.

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the City proposed a one-size-fits-all conversion of all neighborhoods.

Each of the attributes within this claim falls within the scope of Queen Anne's appeal of the DNS, the Examiner's reversal and remand of the DNS, and within the FEIS on the expanded scope of the proposal. Of these attributes, the City seeks to bar Queen Anne's presentation of evidence on impacts to open space, tree canopy, and historical structures.[16] In reversing the DNS, the Examiner did not limit her opinion to just the four topics. She directed that "significant adverse impacts must be studied in an EIS in the context of the development/economic environment that would be created by the proposal."[17] As regards open space, tree canopy, and historic resources, the authors of the EIS apparently understood the Examiner's broader concern and included sections on each of those topics.[18] The City also is proposing amendments to its tree preservation ordinance, which was not part of the DNS review.

Where the City expanded both the intensity of its proposed legislation and the scope of its environmental review, Queen Anne cannot be held to issues raised in response to a different environmental determination, for a less intense proposal, based upon different documentation, reviewed under different legal standards. Queen Anne's challenge to the FEIS for failure to consider the proposal's impacts within the "geographic, topographic, and locational context" of the areas impacted by the proposed legislation falls within the scope of the Examiner's prior remand.

Queen Anne alleges at Claims 2.12 and 2.13:

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[16] City Motion at 2 and 12-13.
[17] Decision in No. W-16-004, Conclusion 10, repeated at Conclusion 13.
[18] FEIS at 4-72 et seq. (impacts of the preferred alternative on tree canopy and vegetation, open space and historic resources); p. 4-92 et seq. (tree canopy).

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> The FEIS fails to consider an adequate range of alternatives that specifically considers impacts from increasing the rear lot coverage by 50% from 40% to 60%. The FEIS fails to consider in a meaningful way the impacts to neighbors and the tree canopy as well. This increase in rear lot coverage fails to consider the cumulative impacts from allowing 2 separate 1,000 sq ft DADU's plus a home on one site while allowing an unlimited sized garage as well. While reliance upon a 35% lot coverage limitation on lots greater than 5,000 sq ft may be acceptable, the increase[d] lot coverage on smaller lots would create significant adverse impacts on neighborhood character, aesthetics, urban design and tree canopy coverage that are not sufficiently disclosed, discussed and analyzed. Proposed lots of 3,200 sq ft actually allow for a significantly higher, 46% lot coverage which has not been considered. [and]
>
> The FEIS fails to consider an adequate range of alternatives that specifically consider the impacts to preserving the tree canopy.

These claims are not precluded by *res judicata*. Between the proposed action reviewed in the DNS and the preferred alternative in the FEIS, the City has changed its proposed legislation to allow even greater intensification of ADUs, by allowing up to two attached ADUs in a principal residence, allowing those ADUs to exceed the limit of 1,000 sq ft each in certain circumstances, and by increasing allowable property occupancy by 50%.

Where the proposed action has intensified, the adequacy of the FEIS's consideration of that intensification may certainly be challenged. Even if Queen Anne were held to issues on which it prevailed in the prior proceeding (to which it should not be), issues regarding significant adverse impacts to "neighborhood character, aesthetics, urban design and tree canopy" were included in the prior appeal[19] and encompassed within the Examiner's remand of the DNS.[20]

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[19] Queen Anne's Closing Argument at 10 (increased lot coverage) and Appellant's Exhibit 10 in the prior proceeding (Architectural renditions showing the effect on neighborhood character, aesthetics and loss of tree cover from the increased lot coverage).

[20] Decision in No. W-16-004, Conclusion 13 ("On remand, the analysis of height, bulk and scale must be done in the context of the actual development environment created by the legislation…").

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Nor is Queen Anne barred from challenging the City's failure to consider an adequate range of alternatives to address preservation of tree canopy, since the alternatives analysis is an essential part of the EIS, but not a required part of DNS review.[21]

Queen Anne alleges at Claim 2.15:

> The FEIS fails to adequately disclose, discuss and analyze the direct, indirect and cumulative impacts upon the elements of the environment (SMC 25.05.444) including upon the displacement and destruction of older, more modest and affordable housing, the displacement of populations, the loss of historic buildings, the change in neighborhood character, the unstudied stresses on existing utilities and infrastructure, the amount of available on-street parking, and the ability of residents and emergency vehicles to circulate through neighborhood streets, and other population pressures among many more.

The categories of impacts alleged above were embraced within Queen Anne's appeal of the DNS[22] and were impacts on which the Examiner remanded the DNS for preparation of an EIS.[23]

D. Objections Claimed to be Vague Should Not Be Dismissed.

The City asks that Queen Anne's Claims at ¶¶ 2.1, 2.2, 2.3 and 2.15 be dismissed as vague and overly broad, principally on asserted grounds that those allegations include catch-all phrases. See e.g. Claim ¶2.2, that "the FEIS fails to adequately disclose, discuss and analyze the direct, indirect and cumulative impacts of the proposed actions in conjunction with the harms … that include, *but are not limited*

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[21] Compare SMC 25.05.330.A (considerations for issuance of DNS) and 25.05.440.3.b (EIS to include description of alternatives).

[22] Queen Anne's Closing Argument at 7-13 and cited testimony of Bill Reid, Sou Souvanny, Thomas Marshall and Martin Kaplan regarding adverse impacts to housing, lower cost housing, displacement of populations, neighborhood character, parking, circulation, and public facilities and infrastructure.

[23] Decision in No. W-16-004, Conclusions 8-17.

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to: reductions in currently available affordable housing… .” (Italics added.) Queen Anne added catch-all phrases to be sure that its selection of language to describe its objections did not exclude related areas of impact whose words may not have been specifically included in its allegations. For example, the Notice of Appeal does allege inadequate consideration of impacts to public utilities, facilities and infrastructure, which are included within elements of the environment at SMC 25.05.444.B.4, but the appeal does not specifically allege impacts to public water supplies, which is an element of the environment under SMC 25.05.444.A.3.e, even though public water supplies would logically be included within public utilities. The inclusion of catch-all phrases is not intended to broaden the appeal to elements of the environment not mentioned in the appeal at all, such as potential impacts to air quality or climate.

As to the City’s over-bredth concerns regarding the Claims at ¶2.1, Queen Anne has withdrawn that issue. As to its concerns that Claim ¶2.3 encompasses “other legislation,” Queen Anne has identified the other legislation, namely legislation modifying tree protection requirements and allowing the short term rental of ADUs. Following review of this response, any remaining questions about the bredth of Queen Anne’s appeal would be more appropriately addressed through a motion for more definite statement, rather than through outright dismissal.

III. CONCLUSION

SEPA serves to “promote the policy of fully informed decision-making.”[24] Legislation allowing the expanded development of ADUs – e.g., allowing the

[24] *Norway Hill* at 272.

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development of a triplex on any single-family lot of 3200 square feet or more and a 50% increase in occupancy – is projected to create "a fundamental change to the land use form" in the City of Seattle.[25] For purposes of transparency alone, the City Council should be willing to defend the adequacy of the FEIS on the analysis it provided, not on a constrained scope of review which it argues emerged from the DNS appeal of two years ago on a less intense proposal. The City Council's motion should be denied.

Dated this 14th day of December, 2018.

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/s/_____
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[25]Decision in No. W-16-004, Conclusions 9 and 16, quoting to testimony of Bill Reid.

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DECLARATION OF SERVICE

I am a partner in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On the date below, I served by email copies of the foregoing document upon the parties of record, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED: December 14, 2016.

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