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 REPLY IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

In its Response, Appellant Queen Anne Community Council ("Appellant") concedes that its procedural and due process claims should not proceed to hearing. However, it advances arguments in an effort to preserve claims that are barred by res judicata or that are vague and insufficiently specific. As explained in further detail, below, Appellant's arguments are unavailing and the remaining issues or parts of issues that are the subject to the City's Motion should be dismissed.[1]

II. RES JUDICATA BARS CLAIMS THAT APPELLANT COULD AND SHOULD HAVE LITIGATED IN ITS DNS APPEAL

Appellant had an opportunity in its appeal of the City's prior DNS to argue to the Examiner that the City's proposal would create significant adverse impacts that should be analyzed in an EIS. The Appellant prevailed on four identified categories of issues and triggered the EIS that is the subject of this appeal. The City has not challenged

[1] For the Examiner's ease of reference, the City has prepared Attachment A, which lists Appellant's issues and depicts as "strikethrough" those issues or portions of issues that are the subject of the City's Motion. The City has annotated each strikethrough with reference to the corresponding legal argument justifying dismissal in its Motion.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Appellant's ability to proceed to hearing in this appeal on the issues that the Examiner identified in her Findings and Decision (the "Order of Remand").[2] However, Appellant also seeks to adjudicate claims beyond those identified in the Order of Remand that the proposal creates several specific, significant adverse impacts that are required to be analyzed in an EIS including: cumulative impacts; impacts to open space and tree canopy coverage; and loss of historic buildings (collectively, the "Barred Claims").[3] Appellant raised or should have raised the Barred Claims in its DNS appeal. They are therefore barred by res judicata. Appellant's various arguments in its Response are insufficient to survive the City's Motion.

A. The distinctions Appellant advances between the DNS and the FEIS are irrelevant for purposes of res judicata.

In its Response, Appellant advances distinctions between the DNS appeal and the current appeal of the EIS to try to demonstrate that the subject matter and causes of action are different such that res judicata does not apply.[4] However, Appellant relies on an overly narrow theory of res judicata that is not supported by case law. The distinctions upon which Appellant relies are ultimately irrelevant to the analysis of claim preclusion under res judicata.

First, Appellant argues that res judicata does not apply because the earlier appeal was of a DNS, while the current appeal is of a subsequent EIS. Regardless of the distinction in the underlying decision, the legal question is the same in both the appeal of the DNS and the appeal of the EIS. In a DNS appeal, the Appellant challenges the

[2] Findings and Decision, W-16-004, attached as Exhibit C to the Motion.
[3] Mot. at 1–2.
[4] As explained in the City's Motion, 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 claim is made. *Hilltop Terrace Homeowner's Ass'n v. Island Cty.*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995) (en banc). Appellant's arguments focus on the first and second elements. By failing to respond to the remaining two, Appellant concedes those factors are satisfied here.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

agency's determination that a proposal does not have any probable significant impacts.[5] In an EIS appeal, except where the EIS itself expressly identifies a significant impact, an appellant must first meet the "high burden of demonstrating the reasonable probability of the significant impact which they allege" the EIS did not adequately address.[6] The appellant must meet that initial high burden before being able to challenge the adequacy of the EIS's analysis of that impact. Thus, Appellant had the opportunity, and the obligation, to advance the identical *claim* in the earlier appeal that it seeks to advance now—that the underlying proposal has significant adverse impacts that should be adequately analyzed in an EIS.

The causes of action and subject matter are therefore sufficiently identical for purposes of res judicata. Indeed, res judicata applies more liberally than Appellant implies.[7] Res judicata is not limited to instances involving the exact same appeal of the exact same agency determination. When applying res judicata, courts look to the substance of a claim, and apply a "pragmatic standard" to determine whether there is identity between two actions. For purposes of res judicata, a claim broadly encompasses all rights arising out of "all or any part of a transaction, or a series of connected

---

[5] SMC 25.05.300 (providing that the purpose of a threshold determination is "[d]eciding whether a proposal has a probable significant adverse impact and thus requires an EIS"). A DNS represents the agency's determination that a proposal does not have probable significant adverse impacts.

[6] In the Matter of the Appeals of Wallingford Community Council, et al., Findings and Decision, W-17-006–W-17-014, Conclusion 3 at 23 ("Under SEPA, except where the FEIS itself expressly identifies a significant impact, the Appellants must meet the high burden of demonstrating the reasonable probability of the significant impact which they allege."). *See also* SMC 25.05.402 (stating that an EIS need only analyze probable significant adverse impacts, while other impacts may be, but are not required to be, discussed).

[7] Notably, Appellant cites to no authority on the applicability of res judicata and does not address the authority to which the City cites in its Motion.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

transactions," regardless of the number of rights, substantive theories, statutory schemes, forms of relief, or variations in the evidence proffered by a party.[8]

Indeed, Appellant's own Notice of Appeal of the earlier DNS belies its assertion here that the legal bases for challenging each determination are different. Appellant does not dispute that its DNS appeal broadly alleged that the Proposal would cause a broad range of probable significant adverse impacts requiring review in an EIS, including all of the Barred Claims with the exception of cumulative impacts.[9] It is clear that at the time of the DNS appeal, Appellant could have raised all, and in fact raised most of the Barred Claims that it now seeks to advance in the current appeal (and as discussed below, failed to prevail on those claims).

Second, the difference in the standard of review for an appeal of a DNS and an EIS is also irrelevant. Appellant cites no authority for the proposition that a difference in standard of review alone precludes the application of res judicata. In fact, courts have held that res judicata is not affected by shifts or changes in the standard of review.[10]

Appellant's attempt to invent a distinction between the proposal at issue in the DNS and that in the EIS is also unavailing. In support of its theory, Appellant points to the preferred alternative and asserts that the preferred alternative includes changes beyond the

---

[8] *Sound Built Homes, Inc. v. Windermere Real Estate/S., Inc.*, 118 Wn. App. 617, 628–31, 72 P.3d 788 (2003), *as amended,* (Oct. 7, 2003) (citing The Restatement (Second) of Judgments); *see also Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 918 (9th Cir. 2012) (concluding that res judicata applies even when a litigant brings a cause of action under an entirely different statutory scheme if the underlying legal claim is the same); *Hadley v. Cowan*, 60 Wn. App. 433, 440, 804 P.2d 1271 (1991) (concluding that judgment entered in probate action had res judicata effect in subsequent in personam tort action, though probate action was ostensibly in rem).

[9] Mot., Ex. A at 3–4.

[10] *E.g.*, *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 594 (3d Cir. 1989) (explaining that a change in standards generally precludes the application of issue preclusion, but that this principle "does not translate to the realm of claim preclusion" or res judicata, because claim preclusion applies more broadly to claims that were not litigated in the first proceeding, and is based on a policy of settling disputes in a single litigation).

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

proposal that was the subject of the DNS.[11] As a legal matter, Appellant obfuscates the fundamental and basic distinction between a "proposal" and an "alternative" under SEPA. SEPA instructs the agency to consider "reasonable alternatives" that "include actions that could feasibly attain or approximate a proposal's objectives."[12] SEPA instructs agencies to describe proposals "in ways that encourage considering and comparing alternatives,"[13] and to "[s]tudy, develop, and describe appropriate alternatives to . . . any proposal[.]"[14] Thus, the underlying proposal that triggers environmental review is different than the specific alternatives that are ultimately identified for purposes of comparison and analysis. The fact that the FEIS analyzes alternatives with various features does not mean that this appeal concerns a substantially different underlying proposal, such that identity of subject matter no longer exists.[15] To the contrary, the identity of subject matter and cause of action exists and the Barred Claims are barred by res judicata.

Moreover, as a factual matter, Appellant's attempt to distinguish the DNS proposal and the preferred alternative is inaccurate and unavailing. Appellant simply asserts purported differences between the DNS proposal and the preferred alternative and claims those purported differences are significant and result in "expanded" and "more intense" development.[16] Appellant only cites to passages in the FEIS for these incorrect statements, which explain only the features of the preferred alternative. Appellant offers no factual

---

[11] Resp. at 4.
[12] SMC 25.05.440.D.2.; *see also* SMC 25.05.402.4-F (stating that an EIS must discuss the "basic features an analysis of the *proposal, alternatives*, and impacts") (emphasis added).
[13] SMC 25.05.060.C.1.c.
[14] RCW 43.21C.030(2)(e).
[15] *See Hilltop Terrace Homeowner's Ass'n.*, 126 Wn.2d at 30 (noting that "subject matters are not identical if they differ *substantially*") (emphasis added).
[16] *See* Resp. at 4–5.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

support for its comparison to the proposal that was the subject of the DNS. Unsupported assertions are insufficient to survive a motion for summary judgment.[17]

Importantly, Appellant's assertions are unfounded and incorrect. In fact, the preferred alternative includes the same principal features as the proposal in the DNS.[18] Indeed several of the purported distinctions between the proposal in the DNS and the preferred alternative that the Appellant alleges in its Response are actually not differences at all. For example, contrary to the Appellant's assertions, the proposal analyzed in the DNS allowed ADUs to exceed 1,000 square feet in floor area in certain circumstances, and also allowed up to two ADUs.[19] Those features of the preferred alternative identified by the Appellant that were not part of the proposal at issue in the DNS either do not contribute to greater significant impacts, or are actually designed to mitigate impacts. For example, the preferred alternative includes as a new feature a maximum floor area ratio limit of 0.5 (meaning the total square footage of structures on the lot cannot exceed 50 percent of the lot area) or 2,500 square feet, whichever is greater. This feature was added to mitigate impacts because it *limits* development in single-family zones, in contrast with existing conditions and with the DNS proposal, which did not limit floor area ratio.[20] And while the preferred alternative allows up to twelve unrelated residents on a lot, existing

---

[17] *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

[18] *See* Declaration of Aly Pennucci in support of the Motion (stating, "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").

[19] Declaration of Nicolas Welch ("Welch Decl."); Order of Remand, ¶ 13. The DNS proposal allowed one attached ADU ("AADU") and one detached ADU ("DADU"). The preferred alternative also allows one AADU and one DADU, but also allows the option of having two AADUs, a feature that does not contribute to any greater significant impacts. Contrary to Appellant's assertion, neither the presence of two AADUs nor the combination of an AADU and a DADU constitutes a duplex or triplex. Among other differences, the City's land use regulations categorize duplexes and triplexes as multifamily residential uses. ADUs, which are considered to be part of a single-family dwelling unit, are subject to different regulations and limitations. Welch Decl., ¶ 4.

[20] *Id.*; *see also* FEIS at 2-7.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

regulations already allow an unlimited number of related residents,[21] and in any case, most household units do not have eight people.[22] In short, Appellant's argument invents distinctions where none exist or relies on distinctions without a difference. More importantly, any differences or distinctions are irrelevant to the fundamental legal question because Appellant's argument improperly obfuscates a "proposal" and an "alternative," despite SEPA's unambiguous treatment of the two as related but distinct concepts.

B. The Claims Barred by res judicata do not "fall within" the Examiner's Order of Remand.

Appellant's attempt to resurrect the Barred Claims by asserting the claims "fall within" the Examiner's Order of Remand is also baseless.[23] As Appellant acknowledges, the Examiner remanded for preparation of an EIS that address specific categories of potential impacts, namely: housing and displaced populations; height, bulk, and scale (i.e., aesthetics); parking; and public services and facilities.[24] The Examiner's Order of Remand does not contain a single reference to open space, trees, historic buildings, or cumulative impacts.

To support its argument that the prior appeal and the Examiner's Order of Remand include the Barred Claims, Appellant takes selective quotations out of context that obscure and omit the precisely defined scope of the Examiner's decision. Specifically, Appellant emphasizes statements in the Order of Remand that "significant adverse impacts must be studied in an EIS[.]"[25] Read as a whole, however, the conclusions that Appellant cites

---

[21] *Id.; see also* FEIS at 2-6.
[22] Order on Remand at 13, ¶ 16.
[23] Resp. at 7–9.
[24] Resp. at 1.
[25] Resp. at 7, n.17 (citing Conclusions 10 and 13).

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

specifically identify housing, displacement, and height, bulk, and scale impacts only.[26] These statements to which Appellant cites were not a broad invitation to expand the narrow scope of the Examiner's Order of Remand. Appellant's interpretation stretches the Examiner's decision far beyond what the plain language can support.

Moreover, although Appellant alleged most of the Barred Claims in its notice of appeal of the DNS, Appellant provides virtually no support from the record for its assertion that it actually litigated the Barred Claims during the hearing, and that the Examiner intended to decide the Barred Claims in Appellant's favor. The Response cites to a single exhibit that it characterized as "architectural renditions" allegedly showing effects on "neighborhood character, aesthetics and loss of tree cover."[27] The Response cites no other evidence relating to any of the other Barred Claims. The evidence to which Appellant cites does not support the argument. "Architectural renderings" address the "height bulk and scale" claim that the Examiner addressed in her Order of Remand.

Similarly, Appellant's characterization of its closing statement's purported discussion on "tree canopy" is belied by Appellant's own description in the accompanying footnote of its Response that does not mention tree canopy and instead recites the same four issues that are specifically addressed in the Examiner's Order of Remand: "adverse impacts to housing, lower cost housing, displacement of populations, neighborhood character, parking, circulation, and public facilities and infrastructure."[28] Appellant has pointed to nothing in the record that directly demonstrates how either the exhibit or the

[26] Mot., Ex. C, at 11–13.
[27] Resp. at 8, n.19.
[28] Resp. at 9, n.22.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

closing statement addressed arguments related to purported probable significant impact to tree cover.[29]

More importantly, Appellant's argument is entirely beside the point. The Examiner's decision controls. To the extent that the Appellant actually argued a different claim regarding tree canopy, or any of the Barred Claims, the Examiner did not rule in the Appellant's favor on those issues. Nothing in the decision can be construed as finding a probable significant impact to tree canopy, or otherwise directing the City to take action on remand to address any other impacts alleged in the Barred Claims.

Similarly, the fact that the FEIS actually includes discussion and analysis of potential cumulative impacts and impacts to tree cover, open space, and historic resources does not provide Appellant relief from the preclusive effect of the doctrine of res judicata. An EIS may, but is not required to, discuss impacts that are not probable, significant, adverse, or environmental.[30] The FEIS's voluntary discussion of these areas is not a concession that significant adverse impacts exist. To advance its arguments, Appellant would have to first prove that these impacts are "significant," the very claim barred by res judicata because it should have been advanced earlier.

C. The underlying policy behind the judicial doctrine of res judicata supports its application in this case.

Appellant's attempt to resurrect the Barred Claims thwarts all of the fundamental principles that animate the res judicata doctrine and that are well established in common law. Res judicata prevents piecemeal litigation; ensures the finality of judgments; provides for "binding answers" and the "ordering of future affairs"; avoids inconsistent results; and

---

[29] *Cf.* FEIS at 4-52 to 4-55 (discussing tree canopy analyses based on light detection and ranging data).

[30] SMC 25.05.402; Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, at 14–45 (2017) (citing RCW 43.21C.031; WAC 197-110-402(i), -440(8), -448(4), -640).

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

promotes judicial economy, efficiency, and fairness to litigants.[31] Here, Appellant's approach brings piecemeal litigation over claims it could have litigated but failed to litigate in the earlier proceeding; allows for potential inconsistencies with the Examiner's decision addressing the proposal's probable significant adverse impacts; and undermines the answers and the order that the Examiner's limited remand provided. This appeal was a direct and foreseeable continuation of Appellant's DNS appeal. Allowing the Appellant to proceed with the Barred Claims would turn the SEPA process into an exercise of endlessly moving goalposts, with a series of expanding challenges to the environmental analysis. The City is entitled to finality of the earlier appeal process, which specified several impacts that warranted discussion in an EIS. To allow the Appellant to continue to expand its list is inconsistent with the principles of fairness and finality that are protected by res judicata.

Similarly, Appellant's argument renders the limited scope of the Examiner's remand meaningless. According to Appellant, the completion of an EIS and the required alternatives analysis is a call to re-open all issues. The Examiner's Order of Remand on its face did not invite that outcome. Res judicata prevents that outcome. Appellant may be able to challenge the FEIS's analysis of impacts associated with the alternatives, including the preferred alternative, but Appellant cannot litigate the Barred Claims that it failed to litigate.

III. VAGUE, OVERLY BROAD, AND UNSPECIFIED OBJECTIONS CANNOT BE USED TO RAISE NEW ISSUES AND SHOULD BE DISMISSED

As Appellant admits, its Notice of Appeal includes "catch-all phrases" broadly challenging the FEIS's analysis of "elements of the environment," the impacts of "other

[31] *Karlberg*, 167 Wn. App. at 535; *Hilltop Terrace Homeowner's Ass'n,* 126 Wn.2d 22 at 30–31; *Emeson v. Dep't of Corr*., 194 Wn. App. 617, 626, 376 P.3d 430 (2016).

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

legislation,"[32] and other issues not specifically raised in the Notice of Appeal. These "catch-all" phrases should be dismissed because they are not consistent with the Examiner's rules of procedure which require Appellant to plead specific objections. Hearing Examiner Rule ("HER") 3.01(d)(3) obligates the Appellant to raise "*specific* objections to the decision or action being appealed[.]" (Emphasis added.). Those rules are designed to provide fairness in the adjudicative process by giving the City notice of the scope of the Appellant's case which, in turn, allows for the City to prepare for hearing.

If the Appellant is allowed to preserve its "catch-all" phrases it would circumvent or vitiate HER 3.01(d)(3)'s requirements and potentially allow the Appellant to blindside the City with new or additional claims beyond those identified in its Notice of Appeal. Indeed, Appellant's Response already demonstrates how the Appellant would seek to use these placeholder "catch-all" phrases to expand its arguments beyond those that are identified with sufficient specificity. In its Response, Appellant claims for the first time that it intends to challenge the FEIS's analysis of the cumulative impacts of "legislation modifying tree protection requirements and allowing the short term rental of ADUs."[33] These are new issues not raised in the Notice of Appeal, and Appellant cannot and does not point to any portion of its Notice of Appeal that could be construed as specifically raising these issues except the generic phrase "other legislation." The Notice of Appeal's catch-all reference to "other legislation" does not give Appellant free rein to bring up any and all pieces of legislation that come to its mind throughout the course of the hearing. As Appellant is aware from the DNS appeal, it cannot belatedly assert new issues that it failed to specifically raise in its Notice of Appeal.[34]

---

[32] Resp. at 9; Notice of Appeal, ¶ 2.3, 2.15.
[33] Resp. at 10.
[34] 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

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

To eliminate further attempts to expand the scope of the appeal beyond the issues that are identified with sufficient specificity to allow the City to prepare for hearing, the City respectfully requests the Examiner strike the catch-all language. The City also requests that the Examiner reject the Response's belated attempt to allege issues relating to the impacts of legislation regarding tree protections and short term rentals.

IV. SUMMARY OF RELIEF REQUESTED

For all of the reasons set forth above, the City respectfully asks that the Examiner dismiss the portions of the Notice of Appeal requested in the City's Motion and as shown on Attachment A:

1. Notice of Appeal ¶ 2.1;[35]
2. The Barred Claims raised in Notice of Appeal ¶¶ 2.3, 2.4, 2.12, 2.13, 2.15 (or portions thereof); and
3. Claims that are vague, overly broad, and unspecified, raised in Notice of Appeal ¶¶ 2.2, 2.3, and 2.15, as well as the Response's belated attempt to allege issues relating to the impacts of legislation regarding tree protections and short term rentals.

---

issues were not raised in Appellant's notice of appeal); *see also* 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).

[35] Appellant concedes that the City satisfied public process required by its code. Resp. at 2. Nevertheless, rather than dismissing the issues, Appellant asks the Examiner to instead issue an Order reflecting the Appellant's "voluntary withdrawal" of the claim. The City requests that the Examiner deny the Appellant's requested form of relief and issue an order dismissing the procedural and due process claims with prejudice. Having conceded the grounds upon which the City prevails on the merits of the underlying claim, the issue has been adjudicated and should be dismissed. The specific relief Appellant requests is a thinly veiled effort to preserve the claim for some unknown future proceeding. While the City would have multiple grounds for seeking to block any subsequent effort to raise this claim in the future, it should not have to argue about it at that time.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

DATED this 21st day of December, 2018.

VAN NESS FELDMAN LLP

/s/ *Tadas Kisielius, WSBA No. 28734*
Dale Johnson, WSBA No. 26629
Clara Park, WSBA No. 52255

719 Second Avenue, Suite 1150
Seattle, WA 98104
Tel: (206) 623-9372
E-mail: tak@vnf.com; dnj@vnf.com; cpark@vnf.com; ack@vnf.com

Attorneys for Seattle City Council

PETER S. HOLMES
Seattle City Attorney

/s/Jeff Weber, WSBA No. 24496
Assistant City Attorneys
Seattle City Attorney's Office

701 Fifth Ave., Suite 2050
Seattle, WA 98104-7091
Ph: (206) 684-8200
Fax: (206) 684-8284
Email: jeff.weber@seattle.gov;

Attorneys for Seattle City Council

ATTACHMENT A

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

IN RE: THE APPEAL of the QUEEN ANNE COMMUNITY COUNCIL of the FINAL ENVIRONMENTAL IMPACT STATEMENT for the CITYWIDE IMPLEMENTATION OF ADU-FEIS	NOTICE OF APPEAL OF ADU-FEIS FINAL ENVIRONMENTAL IMPACT STATEMENT

The Queen Anne Community Council appeals the adequacy of the Final Environmental Impact Statement prepared for the proposed amendments to Accessory Dwelling Unit legislation.

APPELLANT INFORMATION

Appellant:

Queen Anne Community Council
1818 1st Avenue West, Seattle, WA 98119
(Contact only through authorized representative)

Authorized Representatives (on both of whom service is requested):

Martin Henry Kaplan, Architect AIA
360 Highland Drive, Seattle, WA 98109
206-682-8600
mhk@martinhenrykaplan.com

Jeffrey M. Eustis
Aramburu & Eustis, LLP
720 Third Ave. Ste 2000
Seattle, WA 98104
(206)625-9515
eustis@aramburu-eustis.com

DECISION BEING APPEALED

Decision: The legal adequacy of the Final Environmental Impact Statement dated October 4, 2018 for the Citywide Implementation of the ADU-FEIS, which is available at: http://www.seattle.gov/council/adu-eis.

Property Address: City wide

Elements of Decision being appealed. (Also see discussion below re objections to decision)

a. Adequacy of EIS

b. Violations of SEPA

APPEAL INFORMATION

1. Interest of Appellant in the decision (Standing)

1.1 The City of Seattle is a collection of over 30 distinct and diverse neighborhoods that form the historical heart and soul of our entire city. Each of these neighborhoods is recognized and buttressed by its unique environmental qualities, cultural and historical identities, discrete topography and challenging infrastructure, unique mixes of businesses, multi-family and single-family housing, green space and tree canopy, water and sun orientation, among a gifted host of other unequalled assets that have defined our city of Seattle for well over a century.

1.2 The Queen Anne Community Council (QACC), one of the oldest and most active community organizations in Seattle, represents over 30,000 residents and business owners within our Queen Anne neighborhood. A registered a 501(c)(4) organization, the QACC advocates on a range of issues, including urban development and planning, transportation concerns, protection of our trees and parks, etc. Like community councils city-wide, QACC is the steward or our Queen Anne Neighborhood Plan that residents have counted on since the late 1970's to guide our future development growth, along with many other issues of livability as codified within our City's Comprehensive Plan.

1.3 Our stewardship running back over 75 years, has always been characterized by welcoming growth and increased density, but also respecting the important qualities of our neighborhoods throughout our City. In fact, going back decades to when PSRC began forecasting growth as mandated by the GMA, Queen Anne has always gladly accepted more density than directed its way. Over 30 years ago we participated with thousands of Seattleites across the city in what became a national model of Neighborhood Planning.

1.4 These Neighborhood Plans grew out of incredible commitments by each Seattle neighborhood to identify and carefully craft and codify within the city's Comprehensive Plan the specific qualities, goals, issues and opportunities of each community throughout our city. Hundreds of thousands of Seattleites have relied upon these plans for decades as they chose neighborhoods within which to live, raise their families, and invest their time, public service, and personal resources.

1.5 The proposed legislation contains provisions that will eliminate single-family zoning in Queen Anne and within every neighborhood throughout the City. It ignores, disrespects, and eliminates the city-wide Neighborhood Plans. This unprecedented and wholesale land use change will negatively impact over 135,000 single family properties and over 350,000 residents that choose to live in single-family homes in Seattle's neighborhoods.

1.6 Representing its members and speaking for over 350,000 Seattleites that reside in single-family neighborhoods throughout Seattle, the Queen Anne Community Council appealed the City's SEPA determination of non-significance (DNS) on June 6, 2018 issued by the Director, Office of Planning and Community Development, Hearing Examiners File No. W-16-004.

1.7 In May 2018, The City had proposed to up-zone and eliminate every Seattle single-family zoned neighborhood without performing one environmental impact study, any citywide public meetings, and hearings focused upon the up-zone proposal, and stealthily advanced this legislation with a SEPA determination of non-significance (DNS).

1.8 On June 6, 2018, the Queen Anne Community Council appealed the determination of non-significance (DNS) issued by the City for the proposed legislation to reduce the regulations controlling the development of attached and detached accessory dwelling units (ADU).

1.9 On December 13, 2016, The Hearing Examiner rendered her decision granting Queen Anne's appeal. The City waited over six months and then committed to preparing a full EIS, which was not released in final form until nearly two years later. The Hearing Examiner's decision was crystal clear identifying many positions and policies that were proven false and/or required serious, comprehensive, and accountable studies of every environmental impact.

1.10 The Queen Anne Community Council unequivocally supports the city's goals of increasing affordability, diversity of housing choices, and considerations of equity in Queen Anne and throughout our city in every neighborhood. However, the

ADU-FEIS fails to consider many reasonable alternatives to the current Backyard Cottage policies and in doing so fails to disclose, discuss and analyze significant, adverse environmental impacts that the proposal will impose on all Queen Anne residents and within every other Seattle neighborhood, including adverse impacts 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 and loss of tree canopy, the amount of available on-street parking, and the ability to circulate through neighborhood streets, and other population pressures, which impacts would be visited upon members of the Queen Anne Community Council and other residents of the Queen Anne neighborhood should the proposed legislation be enacted.

1.11 The "alternatives" presented in the EIS are not alternative ways to meet the HALA housing objectives, but only alternative ways to implement a single goal and strategy of eliminating single-family zoning while increasing the development and conversion of every single-family neighborhood. The only alternative considered for reaching the objectives of the EIS is broad up-zoning in neighborhoods across the city. Required alternatives were not seriously considered or presented in the EIS as required by law

1.12 The EIS fails to consider and present genuine alternatives as required by SEPA. The EIS instead treats the entire city as one homogeneous landscape failing to differentiate between well over 30 individual unique neighborhoods. The EIS treats all neighborhoods exactly the same and ignores the historical context of each, the unique qualities and topography of each, the differentiation in predominant lot size, affordability, parking availability, transportation choices, adjacencies to open space and tree canopy, among many others. Additionally the EIS ignores and in fact eliminates individual Neighborhood Plans codified over three decades that served as a guaranty underpinning over 350,000 citizen investments of time and resources to leverage the best in life's quality, special neighborhood character, and a secure and safe living environment.

1.13 The only choices and alternatives presented for consideration in the EIS were up-zoning the entire city's wealth of single-family properties. As will be shown at the hearing of this matter, available alternatives were not considered in the EIS.

1.14 The only alternatives considered in the EIS were minor variations in how to eliminate single-family zoning and neighborhoods. No alternative ways to meet the City's housing goals were considered in the EIS. This is a significant deficiency and failure to fulfill the environmental review requirements of SEPA.

1.15 By failure to prepare a legally sufficient EIS, the Queen Anne Community Council and its members have suffered procedural harm in that the City has

denied them the statutory rights of producing a fully compliant EIS and is embarking upon a path of decision-making not fully informed.

2. Objections to the decision.

The Queen Anne Community Council appeals the legal adequacy of the ADU-FEIS on the following grounds:

Claims alleging procedural and due process violations; vague, overly broad, and unspecified claims

~~**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. The credibility and effectiveness of land use decisions depends upon a fair and open process. Adherence to a fair process is recognized in Washington and federal courts as requiring procedural due process.~~

Vague, overly broad, and unspecified claims

2.2 The FEIS fails to adequately disclose, discuss and analyze the direct, indirect and cumulative impacts of the proposed actions in conjunction with the harms caused to Queen Anne residents and businesses, and all Seattleites that include~~, but are not limited to~~: reductions in currently available affordable housing, an increase in housing costs with a corresponding reduction in diversity and equity for residents, increases in housing costs for existing residents penalizing those with low and fixed incomes including seniors, increases in density and its impacts without appropriate mitigation and supporting infrastructure, and a decline in quality of life and livability for current and future residents.

Barred Claims; vague, overly broad, and unspecified claims

~~**2.3** 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.~~

Barred Claims; vague, overly broad, and unspecified claims

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

2.5 The FEIS fails to consider an adequate range of alternatives that could accomplish the proposal's objectives, but at a lower level of environmental impact, as further alleged under Part 1 above.

2.6 The FEIS fails to disclose, discuss and analyze the limitations, uncertainties and

data gaps within its deficient and purposefully misleading analysis of parking and transportation and include a comprehensive city-wide, worst-case analysis. For instance, Appendix B, Exhibit B-1 illustrates the four areas of the city that were chosen to study as a representative sample of typical impacts to parking. These four study areas are located miles away from our city center and ignore neighborhoods most impacted by the ADU-EIS proposal. They bear little relationship to neighborhoods like Capitol Hill, Magnolia, Wallingford, Fremont, Queen Anne, University District, First Hill, Central Area, Columbia City, Ballard and many others.

2.7 The FEIS fails to disclose, discuss and assess the limitations, uncertainties and data gaps within its deficient analysis of environmental impacts associated with allowing 12 unrelated individuals to reside on one property. A subject property could be as small as 3,200 sq ft. John Shaw, City of Seattle Traffic Engineer testified during Queen Anne's Appeal in Case W-16-004 that the average Seattle family has at least 1:2 cars. Matt Hutchins, Architect and City expert testified that he shared a house in a single-family neighborhood with six people – all of whom had cars. The FEIS is silent and deficient in considering the potential severe environmental impacts upon parking and traffic circulations from increases in unelated residents occupying one property.

2.8 The FEIS fails to consider an adequate range of alternatives that specifically consider the removal of the Owner-Occupancy requirement. The FEIS provides no comprehensive background studies to support the EIS contention that removal of owner occupancy requirements will have no environmental impacts. Sam Lai and Matt Hutchins, the City's developer and architect experts, agreed with Appellant expert Bill Reid, Real Estate Economist, that the removal of the owner-occupancy requirement would contribute to influencing a "fundamental change to the land-use form." Mr. Lai's own company buys undervalued single-family homes and converts them to new market rate speculative investments. The FEIS is deficient in failing to address the significant environmental impacts upon the existing housing stock and its owners and occupants related to the removal of the owner occupancy requirement.

2.9 The FEIS fails to consider an adequate range of alternatives that specifically considers the potential environment impacts associated with stresses upon Public Services and Utilities. The FEIS relies upon a simple premise that this legislation will only produce a minimal number of ADUs and due to their distribution city-wide, there will be no environmental impacts. On the other hand, during the Appeal in Case W-16-004, Nick Welch, City Planner acknowledged in email that the intent of this legislations is to "unleash growth in every single-family" neighborhood. So, while the City claims, without specific neighborhood studies, data or proof, that there will be no impacts, the stated goals and objectives of the legislation absolutely contradict that assertion. OPCD's determination on the

proposal's likely public service impacts is not based on information sufficient to evaluate those impacts.

2.10 The FEIS fails to complete an adequate study of Housing and Socio Economics as presented within the EIS section 4.1. This section relies upon a study of 'Highest and Best Use' to present non-impact conclusions concerning Displacement, Affordability, Land Values, Valuations, ADU Production Forecasts, Teardowns, Owner Occupancy and other environmental impacts. On FEIS Page 4-13 the City defines: (emphasis added)

> *A **highest and best use analysis** evaluates the reasonable use of a property based on what is physically possible, is financially feasible, and results in the highest present value.*
>
> *To analyze how alternatives might affect underlying development conditions in the study area, we used highest and best use analysis. This analysis considers how the potential Land Use Code changes could alter the highest-value use of a property. In other words, this approach evaluates how the proposed alternatives would affect underlying development economics for lots in Seattle's single-family zones. **This analysis identifies the most economically productive use for a particular site, but it does not necessarily predict what will actually happen on a site.** This is because it does not consider the motivation and preferences of individual property owners or market demand for a particular real estate product (e.g., an AADU or a single-family house). Thus, highest and best use can tell us how the alternatives could change the underlying real-estate economics in the study area, but it does not predict specific development outcomes for a given parcel or tell us how the alternatives could affect overall development rates in the study area.*

The Highest and Best Use analysis, forming the basis for many of the FEIS findings of no environmental impacts, is deficient as the EIS clearly reveals that their analysis – "***does not necessarily predict what will actually happen on a site.***" It fails to consider the true impacts upon every neighborhood including the elimination of the owner-occupancy requirement and of parking requirements and the potential speculative investments that will redefine highest and best use, among many others.

2.11 The FEIS fails to consider an adequate range of alternatives that specifically considers the impacts from allowing 3 dwelling units on one property. The FEIS addresses the City proposal to up-zone every neighborhood and ignore the unique characteristics of each. In doing so, the FEIS is deficient in that it fails to recognize the extraordinary issues and opportunities associated with neighborhoods having a variety of lot sizes. While some larger properties could easily accommodate multiple units and an increased number of unrelated residents, many other neighborhoods with smaller lots would suffer from extreme

environmental impacts from increasing densities of 12 residents per property, three units on a site, and no on-site parking or ownership requirements.

2.12 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 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.

Barred Claims

~~2.13~~ ~~The FEIS fails to consider an adequate range of alternatives that specifically consider the impacts to preserving the tree canopy.~~

Barred Claims

2.14 The FEIS fails to consider an adequate range of alternatives that specifically consider the impacts from limiting the size of homes by establishing a new floor area ratio of .5 (FAR) standard that limits the maximum size of new single-family homes to 2,500 sq ft. for a 5,000 sq ft lot. 4,000 sq ft lots have a maximum of 2,000 sq ft. While the city posits that this legislation is founded upon creating higher densities in single-family neighborhoods, this new restriction limits density to those who would have no desire to add onto an existing 2,500 sq ft home.

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~~ 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.~~

Barred Claims; vague, overly broad, unspecified claims

3. What relief do you want?

The Queen Anne Community Council requests that:

3.1 The ADU-FEIS be found to be legally inadequate;

3.2 The EIS should be remanded to the OPCD to bring it into full compliance with SEPA;

3.3 Further action on the proposal be stayed pending OPCD's full compliance with SEPA;

3.4 The Queen Anne Community Council reserves the right to seek such other, further relief as may be appropriate under the law including an award of attorney's fees and costs in the appropriate forum.

Respectfully submitted this 18th day of October, 2018.

QUEEN ANNE COMMUNITY COUNCIL

BY: _____

Martin Henry Kaplan, Architect AIA

ARAMBURU & EUSTIS, LLP

_____

Jeffrey M. Eustis, WSBA 9262
Attorneys for the Queen Anne Community Council