**BEFORE THE HEARING EXAMINER**
**CITY OF SEATTLE**

In the Matter of the Appeal of

**QUEEN ANNE COMMUNITY COUNCIL**

of the adequacy of the Final Environmental Impact Statement (FEIS) issued by the Seattle City Council

Hearing Examiner File:
**W-18-009**

**ORDER ON MOTION FOR PARTIAL DISMISSAL**

On October 18, 2018, the Queen Anne Community Council ("Appellant") filed a "Notice of Appeal of ADU-FEIS Final Environmental Impact Statement." On November 30, 2018, Respondent Seattle City Council ("City") filed a motion for partial dismissal. Appellant filed an opposition brief on December 14, 2018, and the City filed a reply on December 21, 2018.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. Having considered the evidence in the record, the Deputy Hearing Examiner ("Examiner") enters the following decision and order.

Factual Background

1. The Code defines an "accessory dwelling unit" ("ADU") as one or more rooms that: 1)"are located within an owner-occupied dwelling unit, or within an accessory structure on the same lot as an owner-occupied dwelling unit;" 2) meet certain Code standards; 3) "are designed, arranged, and intended to be occupied by not more than one household as living accommodations independent from any other household;" and 4) "are so occupied or vacant."[1] A Detached Accessory Dwelling Unit ("DADU") is a secondary unit located in a separate structure from the principal dwelling unit.[2]

2. In 2016, the Office of Planning and Community Development ("OPCD") prepared a draft ordinance that would amend existing land use code provisions on ADUs and DADUs. That proposal was described as:

> Propos[ing] to change regulations in the Land Use Code to remove regulatory barriers to the creation of ADUs in single-family zones. . . 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.[3]

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[1] SMC 23.84A.002 "A" and SMC23.84A.002 "R".
[2] City of Seattle, *Accessory Dwelling Units Final Environmental Impact Statement* at 1-2 (October 4, 2018) *("FEIS").*
[3] *Id.*

3. The City issued a Determination of Nonsignificance (DNS) on the proposal as part of its environmental review process under the State Environmental Policy Act (SEPA). The DNS was timely appealed by the same Appellant as in this matter, the Queen Anne Community Council. Hearing Examiner Sue Tanner reversed the DNS and remanded the matter to OPCD, requiring an Environmental Impact Statement (EIS) be prepared.[4] Examiner Tanner determined that:

    - The proposed legislative changes would create a regulatory environment that is likely to generate entirely different impacts than considered in the DNS process, what was referred to by an expert witness as "a fundamental change in the land use form."
    - The evidence showed that the indirect impacts of the legislation would adversely affect housing and cause displacement of populations. As a significant adverse environmental impact, Examiner Tanner required these impacts to be studied in an EIS in the context of the development/economic environment that would be created by the proposal.
    - The City's documents did not accurately depict the impact of the increased height, bulk, and scale that would be created by the proposal. Examiner Tanner ordered that on remand, the analysis of the height, bulk, and scale impacts be done in the context of the actual development environment created by the legislation and include renderings that accurately represent at least the maximum height, bulk, and scale that could be constructed on at least one full block and include lots as small as 3200 square feet.
    - The determination of parking impacts was not based on sufficient evidence to evaluate those impacts, and the Appellant demonstrated more than a moderate impact on parking, and therefore it needed to be examined in an EIS.
    - The evidence in the record was insufficient to evaluate whether public services and facilities, specifically the road and utility systems, including stormwater, are sized to support the likely increase in density and attendant increase in impermeable surfaces that could result from the proposal. The Examiner required that that issue be studied in an EIS.[5]

4. The Seattle City Council issued a draft EIS on May 10, 2018, and a Final EIS ("FEIS") on October 4, 2018. The Appellant filed an appeal of the adequacy of the FEIS on October 18, 2018.

## Standard of Review

Rule 3.02(a) of the Hearing Examiner Rules of Practice and Procedure ("HER") provides that an appeal (in whole or in part) "may be dismissed if the Hearing Examiner determines that if fails to

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[4] *In the Matter of the Appeal of Queen Anne Community Council,* W-16-004 at 14 (Dec. 13, 2016).
[5] *Id.* at 11-14.

state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay." A motion to dismiss is treated as a motion for summary judgment when matters outside the pleadings are included with the motion and considered by the decision maker. *Sea-Pac v. United Food and Commercial Workers Local Union 44,* 103 Wn.2d 800, 802, 699 P.2d 217 (1985). The City included materials in its motion that are outside the pleadings, and therefore the motion will be treated as a motion for partial summary judgment.

Quasi-judicial decision makers, such as the Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO, Inc. v. Air Quality Coalition,* 92 Wn.2d 658, 696-97, 601 P.2d 501 (1979); *Kettle Range Conserv. Grp. v. Department of Nat. Res.,* 120 Wn. App. 434, 456, 85 P.3d 894 (2003). HER 1.03 (c) states that for questions of practice and procedure not covered by the HERs, the Examiner "may look to the Superior Court Civil Rules for guidance." The moving party must demonstrate the absence of a factual dispute, and all facts and reasonable inferences must be considered "in a light most favorable to the nonmoving party." *City of Lakewood v. Pierce Cy.,* 144 Wn.2d 118, 125, 30 P.2d 446 (2001) (citations omitted). Once the moving party demonstrates the absence of an issue of material fact, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for [hearing]." CR 56(e).

Analysis

The City asserts challenges to three types of claims contained in Appellant's Notice of Appeal:

1. Claims alleging process violations or procedural due process claims (Appellant's Claim ¶ 2.1);

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 judicata—specifically, claims challenging the cumulative impacts of the proposal, impacts to open space and tree canopy coverage, and loss of historic buildings; (Appellant's Claims ¶¶ 2.3, 2.4, 2.12, 2.13, 2.15); and

3. Claims that are vague, overly broad, and unspecified. (Appellant's Claims ¶¶ 2.2, 2.3, 2.15).

Each of the City's grounds are considered below, paraphrased in italics.

1. *The Examiner should dismiss Appellant's procedural due process claim challenging the fairness of the process.* (Appellant's Claim ¶ 2.1)

In response to the City's motion, the Appellant has voluntarily withdrawn Claim ¶ 2.1. The Examiner will not decide the merits of the argument brought by the City. Claim ¶ 2.1 will be dismissed.

2. *The Examiner should dismiss several of Appellant's claims because they are barred by the doctrine of res judicata.* (Appellant's Claims ¶¶ 2.3, 2.4, 2.12, 2.13, and 2.15)

The City asserts that the doctrine of res judicata bars several of the Appellant's claims in this appeal that were either raised by the Appellant in the previous appeal or "should have been" raised in its earlier appeal of the DNS.[6] Specifically, the City challenges the Appellant's claims that allege that the FEIS failed to adequately address the following purportedly significant adverse impacts of the proposal: the cumulative impacts of the Proposal "in conjunction with other land use changes as proposed within HALA,[7] MHA,[8] and other legislation; impacts to open space and tree canopy coverage; and loss of historic buildings."[9]

Res judicata is a judicially created doctrine that prohibits the re-litigation of claims and issues that were litigated, or could have been litigated, in a prior time-barred action. Application of res judicata to preclude claims in a second proceeding requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) causes of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made.[10]

In this case, the City is challenging the Appellant's ability to bring similar claims in two separate administrative proceedings, both expressly provided under the Code. SMC 25.05.680.B.1 allows appeals of a DNS and adequacy of an FEIS by "any interested person." The code does not expressly bar claims in an FEIS adequacy appeal to those that "have or could have" been brought in an appeal of an DNS.

The City is correct that the persons and parties are the same in both cases and the quality of persons for or against whom the claim is made are the same (criteria (1) and (4) above). The issue under criterion (2) above is whether the causes of action are the same. The City cites to four factors established by case law to determine whether the 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.[11]

The City argues that both appeals involved the purported infringement of the same right- namely that the proposal will have significant adverse impacts on the environment, including open space,

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[6] *Seattle City Council's Motion for Partial Dismissal at 9-10.*
[7] "HALA" refers to the "Housing Affordability and Livability Agenda," which is defined as a "multi-pronged strategy for addressing housing affordability in Seattle." *See* http://www.seattle.gov/hala/about.
[8] "MHA" is "Mandatory Housing Affordability," which "requires new development to include affordable homes or contribute to a City fund for affordable housing." This requirement is implemented by changing zoning to allow larger development and more housing. *See* http://www.seattle.gov/hala/about/mandatory-housing-affordability-(mha).
[9] *Id.* at 9 (quoting Notice of Appeal ¶¶ 2.3, 2.4, 2.12, 2.13, and 2.15).
[10] *Karlberg v. Otten,* 167 Wn. App. 522, 535, 280 P.3d 1123, 1130 (2012).
[11] *See Rains v. State,* 100 Wn.2d 660, 664, 674 P.2d 165 (1983) (quotations omitted).

tree canopy, historic buildings, and cumulative impacts. Further, it asserts that Examiner Tanner's remand limited the analysis in the EIS to four specific topics: housing and displacement of populations; height, bulk, and scale; parking and public services and facilities. The City also argues that Appellant's arguments should be limited to those four topics in Examiner Tanner's remand and maintains that the Appellant should not be allowed to "move the goal posts."[12]

Although there are some similarities between the two proceedings, and Examiner Tanner's decision guides the content of the FEIS, an adequacy appeal is a different cause of action from a DNS appeal. In a DNS appeal, the appellant argues that certain impacts of a proposal are significant and therefore should be mitigated or studied in an EIS.[13] Once an impact is deemed significant, a new governmental action is required- publication of an EIS.[14] An EIS adequacy appeal examines whether the FEIS presents decision makers with a "reasonably thorough" discussion of the significant aspects of the probable environmental consequences of the agency's decision.[15]

The City has presented no case law indicating that a court has applied res judicata in this context. The Examiner is not convinced that the case law that was cited in support of this argument demonstrates the suitability of applying res judicata to different, albeit related, SEPA processes.[16] Cases more analogous to this one find that a different governmental action, even though arising out of the same set of background facts and the same parties, does not merit application of res judicata to preclude the challenge to the second, separate governmental action. For example, a second challenge by the same plaintiff to the Central Valley Project, a federal water management project in the Central Valley of California, was not precluded by res judicata because it involved a different operational plan than the first lawsuit.[17] In another case involving bison in Yellowstone National Park, the court held that the first action challenging bison management practices did not have preclusive effect, because the earlier action challenged different governmental conduct (environmental review of a proposed action) than that involved in the later action (the subsequently adopted operational plan), even though the harm alleged was the same.[18] In both of those cases, the claims raised in the second lawsuit could not have been raised in the first lawsuit, because the governmental conduct that was the subject of the second lawsuit had not yet occurred.

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[12] *Seattle City Council's Motion for Partial Dismissal* at 11-13.
[13] WAC 197-11-330.
[14] RCW 43.21C.030(2)(c).
[15] *Klickitat Citizens Against Imported Waste, et al v. Klickitat Cy.,* 122 Wn.2d 619, 633, 860 P.2d 390 (1994).
[16] *See Turtle Island Restoration Network v. U.S. Dept. of State,* 673 F.3d 914, 918-919 (9th Cir. 2012)(plaintiff's claims barred by res judicata when the first lawsuit challenged adoption of guidelines, and second lawsuit attempted to challenge implementation of the same guidelines. The court differentiated *Fund for Animals v. Lujan,* 962 F.2d 1391, 1398 (9th Cir. 1992)(see text attached to footnote 18, above) by stating that in *Fund for Animals*, the claim raised in the second lawsuit could not have been raised in the first lawsuit, because the governmental conduct that was the subject of the second lawsuit had not yet occurred) ; *Highway J Citizens Grp. v. U.S. Dept. of Transp.,* 456F.3d 734, 741-44 (7th Cir. 2006) (holding that plaintiffs' claims were barred by res judicata because they had litigated an entire highway expansion project in the first litigation, and in the second lawsuit attempted to challenge a segment of the same highway expansion project).
[17] *Central Delta Water Agency v. U.S.*, 306 F.3d 938, 953 (9th Cir. 2002).
[18] *Fund for Animals v. Lujan,* 962 F.2d 1391, 1398 (9th Cir. 1992).

Here, just as in the above-mentioned examples, even though the alleged harm is the same and the parties are the same, the government conduct is different. The first appeal involved the issuance of a DNS, an action taken by the City under one set of standards, and this case involves the issuance of an FEIS, a different action taken by the City under a different set of standards. The Appellant could not have challenged the adequacy of the FEIS in the first lawsuit, because the FEIS did not exist, and in fact had not even been ordered by Examiner Tanner. In similar cases, courts have found that the two lawsuits do not arise from the "same transactional nucleus of facts,"[19] and therefore res judicata cannot bar the claims in the second litigation. Moreover, as Appellant notes, the goal posts underlying this appeal have also shifted with respect to the proposal since the time of the first City action, the issuance of the DNS.[20] The proposal under appeal now has evolved into a Preferred Alternative that will allow for more intensity of development than what was considered in the first appeal.

Finally, Examiner Tanner's decision stated that the evidence showed that "the proposed legislative changes would create a regulatory environment that is likely to generate entirely different impacts that OPCD has not considered, what the expert witness referred to as a "fundamental change to the land use form." [21] This finding suggests that rather than limiting the FEIS to a narrow review of isolated and discrete environmental impacts expressly identified in the decision and tied to the facts underlying the DNS when it was issued, Examiner Tanner's decision directed the City to re-examine potential environmental impacts in the context of the paradigm shift-- "the fundamental change to the land use form." This, and the fact that the preferred alternative is more intensive than the previously-considered proposal, also indicate that res judicata is inappropriate in this context.

The City's motion to dismiss on res judicata grounds should be denied.

3. *The Examiner should dismiss several of Appellant's claims because they are vague, overly broad, and unspecified objections to the FEIS* (Appellant's Claims ¶¶ 2.2, 2.3, and 2.15)

The City cites HER 3.01(d)(3) to assert that an appeal must set forth the "appellant's specific objections to the decision or action being appealed [.]"(Emphasis added). The City challenges Appellant's Claims ¶¶ 2.2, 2.3, and 2.15, specifically the language italicized below.[22]

> 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 cause to Queen Anne residents and businesses, and all Seattleites that include, *but are not limited to:* . . . .

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[19] *Central Delta Water Agency,* 306 F.3d at 953.
[20] *Queen Anne Community Council's Response to City's Motion for Partial Dismissal* at 4-5.
[21] *In the Matter of the Appeal of Queen Anne Community Council,* W-16-004 at 11 (Dec. 13, 2016).
[22] The City also challenges Claim ¶ 2.1, which has already been dismissed and therefore will not be considered.

> 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, HMA, *and other legislation.*
>
> 2.15 The FEIS fails to adequately disclose, discuss and analyze the direct indirect and cumulative impacts *upon elements of the of the environme*nt (SMC 25.05.044) *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 City is correct in alleging that the above italicized language does not meet the standard required by HER 3.01(d)(3) of "specific objections," because it purports to allow additional arguments to be raised even though not expressly articulated in the claim. The italicized language will be stricken from the Appellant's claims and Appellant may not raise any objection outside the scope of the amended claims, with respect to Appellant's Claims ¶¶ 2.2, 2.3, and 2.15.

## Order

The City's Partial Motion to Dismiss is **GRANTED** in part and **DENIED** in part.

1. The City's motion challenging Appellant's Claim ¶ 2.1 is **MOOT.**

   Appellant's Claim ¶ 2.1 is **DISMISSED.**

2. The City's motion challenging Appellant's Claims ¶¶ 2.3, 2.4, 2.12, 2.13, and 2.15 on res judicata ground is **DENIED.**

3. The City's motion challenging certain aspects of Appellant's Claims ¶ 2.2, 2.3, and 2.15 on the grounds they are vague, overly broad, and unspecified objections to the FEIS is **GRANTED** to exclude portions of the claims based on lack of specificity. Appellant's Claims ¶ 2.2, 2.3, and 2.15 are **AMENDED** as follows:

   > 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 cause to Queen Anne residents and businesses, and all Seattleites that include~~, *but are not limited to*~~: . . . .
   >
   > 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~~,~~ and HMA~~, *and other legislation*~~.

2.15 The FEIS fails to adequately disclose, discuss and analyze the direct indirect and cumulative impacts ~~*upon elements of the of the environment*~~ (SMC 25.05.044) ~~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*~~.

Entered this 30th day of January 2019.

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**BEFORE THE HEARING EXAMINER**
**CITY OF SEATTLE**

## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion for Partial Dismissal** to each person listed below, or on the attached mailing list, in the matter of **Queen Anne Community Council**, Hearing Examiner File: **W-18-009**, in the manner indicated.

| Party | Method of Service |
|---|---|
| **Appellant Legal Counsel**<br>Jeffrey Eustis<br>eustislaw@comcast.net | ☐ U.S. First Class Mail, postage prepaid<br>☐ Inter-office Mail<br>☒ E-mail<br>☐ Fax<br>☐ Hand Delivery<br>☐ Legal Messenger |
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Dated: January 31, 2019

Alayna Johnson
Legal Assistant