

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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
RESPONSE IN OPPOSITION TO
TREPAC’S MOTION TO INTERVENE

I. INTRODUCTION

Seattle City Council (“City”) respectfully requests that the Hearing Examiner deny the Motion to Intervene (“**Motion**”) filed by TreePAC in this appeal. The Motion should be denied because TreePAC has failed to demonstrate a substantial interest that is not otherwise adequately represented by the Appellant, Queen Anne Community Council (“**QACC**”), and because TreePAC’s intervention will prejudice the City.

II. ARGUMENT

The Hearing Examiner Rules of Procedure (“**HER**” or “**Rules**”) on intervention state, in relevant part:

- (a) Intervention is not a substitute means of appealing a decision for those who could have appealed but failed to do so.
- (b) A person, organization or other entity who has not filed an appeal may request by motion to participate in the appeal. The request must state how the person or entity making it is affected by or interested in the matter appealed, and must demonstrate a substantial interest that is not otherwise adequately represented.
- (c) In determining the merits of a request for intervention, the Hearing Examiner shall consider whether intervention will unduly delay the hearing process, expand the issues beyond those stated in the appeal, or prejudice the rights of the parties.

1 HER 3.09. Because TreePAC’s intervention request fails to satisfy HER 3.09’s criteria,
2 the City respectfully requests that the Hearing Examiner deny the Motion.

3 **A. TreePAC has failed to demonstrate a substantial interest that is not**
4 **otherwise represented by QACC**

5 First, to warrant intervention, a movant “must demonstrate a substantial interest
6 that is not otherwise adequately represented.” HER 3.09(b). The Rules further provide that
7 intervention cannot be a substitute for appealing a decision by those who could have
8 appealed but did not. Here, TreePAC’s interest in this matter is the same as QACC’s—
9 both parties seek a remand of the subject FEIS, and more precisely, both parties assert that
10 the FEIS’s analysis of tree canopy issues is inadequate. TreePAC’s Motion itself relies on
11 QACC’s Notice of Appeal, which states in relevant part:

12 1.2 . . . QACC advocates on a range of issues, including . . . protection of our trees
13 and parks, etc.

14 2.4 . . . The FEIS fails to consider an adequate range of alternatives that
15 specifically consider . . . open space and tree canopy[.]

16 2.12 The FEIS fails to consider an adequate range of alternatives that specifically
17 considers impacts from increasing the rear lot coverage by 50% from 40% to 60%.
18 The FEIS fails to consider in a meaningful way the impacts to neighbors and the
19 tree canopy as well. . . . [T]he increase[d] lot coverage on smaller lots would create
20 significant adverse impacts on . . . tree canopy coverage that are not sufficiently
21 disclosed, discussed and analyzed.

22 2.13 The FEIS fails to consider an adequate range of alternatives that specifically
23 consider the impacts to preserving the tree canopy.

24 Intervention is generally allowed in cases where the intervenor’s interest is
25 currently not represented at all, or in which the existing party’s position is adverse to or

1 divergent from the intervenors.¹ In this case, however, TreePAC’s interests and positions
2 are identical to QACC’s. That TreePAC might be more interested in tree canopy issues
3 than the other issues raised by QACC does not change the fact that QACC is actively
4 pursuing and litigating this issue, as evidenced by the Notice of Appeal and by QACC’s
5 Response to the City’s Motion for Partial Dismissal, which expressly preserved QACC’s
6 ability to present evidence relating to tree canopy.

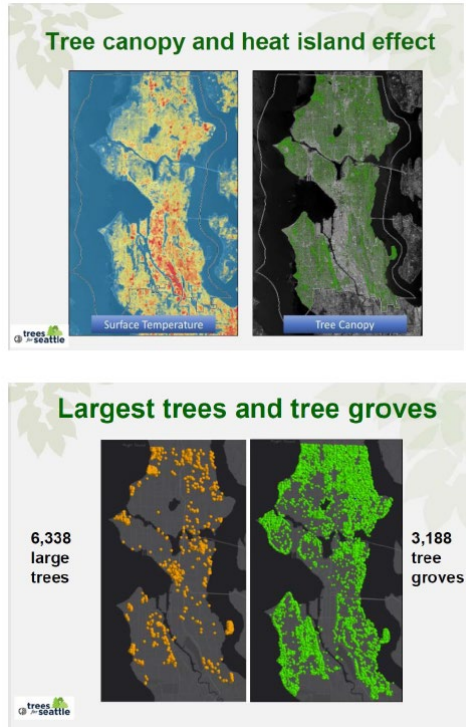
7 Moreover, TreePAC’s Motion fails to acknowledge that TreePAC’s members have
8 actively participated in QACC’s preparation and development of its case, which further
9 reinforces the fact that its interest in the matter is adequately represented. TreePAC’s
10 Motion identifies David Moehring as a board member of TreePAC. During the City’s
11 deposition of Martin Kaplan, QACC’s representative and one of QACC’s identified
12 witnesses, Mr. Kaplan testified that Mr. Moehring had played an extensive role in the
13 creation of one of QACC’s reports to which Mr. Kaplan plans to introduce and testify at
14 hearing.² Indeed, Mr. Kaplan testified that Mr. Moehring prepared “all the drawings” in
15 Mr. Kaplan’s exhibit that are not otherwise reproductions of images in the City’s EIS.³
16 That exhibit includes evidence relating to tree canopy issues, including the same

17
18 ¹ See, e.g., *Loveless v. Yantis*, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973) (permitting property owners to
19 intervene in action concerning denial of plat by county, because the owners’ interests were not adequately
20 represented by county; despite county’s obligation to represent all residents, intervenors showed a
21 “sometimes antagonistic viewpoint to that of the county as a whole”); *Fritz v. Gorton*, 8 Wn. App. 658, 661,
22 509 P.2d 83 (1973) (permitting League of Women Voters to intervene in action testing validity of
23 legislation, where League demonstrated “an interest divergent from that represented by the Attorney
24 General.”); cf. *Westerman v. Cary*, 125 Wn.2d 277, 304, 892 P.2d 1067 (1994) (affirming denial of
25 prosecutor’s request to intervene, because the existing party, the public defender’s office, “very adequately
contested” the order at issue in the case); *Spokane Cty. v. State*, 136 Wn.2d 644, 650, 966 P.2d 305 (1998)
(affirming denial of union’s motion to intervene because although the union could be affected by the
ultimate outcome of the case, its interest was not direct and the union presented no argument different from
the arguments advanced by the Public Employment Relations Commission).

² Declaration of Clara Park (“Park Decl.”), Ex. A (excerpt of transcript of deposition of Martin Kaplan, at 45–52).

³ *Id.* at 52.

1 illustration of the “heat island effect” attached to TreePAC’s Motion, as well as an
2 illustration of large trees and tree groves in the City:⁴



15 TreePAC’s involvement in QACC’s case confirms that QACC represents its
16 interests, and reveals that the Motion is at heart a late attempt to appeal the FEIS by
17 substitute means and to circumvent the deadlines for exchanging witness and exhibit lists.

18 **B. TreePAC’s intervention days before hearing would prejudice the City**

19 In determining the merits of TreePAC’s request, the prejudice to the City must
20 also be considered.⁵ Intervention should not be allowed if it would prejudice the rights of
21 the original parties.⁶ Although the Rules allow a motion to intervene to be filed up to ten
22

23 ⁴ Park Decl., Ex. B (excerpt of document identified by QACC as QACC’s Ex. 20 at 37). *See also* Park Decl.,
24 Ex. A at 68–69.

25 ⁵ HER 3.09(c).

⁶ *Wilson Sporting Goods Co. v. Pedersen*, 76 Wn. App. 300, 303, 886 P.2d 203, 205 (1994).

1 business days before hearing, this case is unique in that it has been set with an extended
2 schedule to allow the parties to conduct discovery and gather evidence. QACC filed its
3 appeal on October 18, 2018. TreePAC’s November 2018 newsletter references QACC’s
4 appeal, showing that TreePAC has known about the appeal for months.⁷ On November 9,
5 2018, the Examiner issued a Prehearing Order setting forth all of the deadlines for this
6 matter. The deadlines have all passed weeks ago, including the deadline for final witness
7 and exhibit lists (due on February 12, 2019 for QACC). The parties have completed
8 discovery, including depositions and document production.

9 Allowing TreePAC to intervene now, ostensibly to present new witnesses and new
10 evidence, would prejudice the City’s ability to prepare its case.⁸ From the time that the
11 Examiner issues a decision on TreePAC’s Motion, the City will have less than a week, at
12 most, to prepare to address TreePAC’s witnesses and exhibits, assuming TreePAC
13 provides immediate disclosures. Tellingly, TreePAC ignores the difficulties caused by its
14 intervention.⁹ A highly technical matter like an appeal of the adequacy of an FEIS, which
15 focuses on expert and technical testimony, warrants the time for preparation and discovery
16 that the Examiner gave the parties, not mere days. Given TreePAC’s knowledge of the
17 appeal months before the instant Motion, TreePAC has no justification for ambushing the
18 City days before hearing.

19

20 ⁷ Park Decl., Ex. C.

21 ⁸ *Cf. State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 767, 575 P.2d 713 (1978) (allowing
22 intervention and finding no prejudice because the motion to intervene “was made within a month of filing
the original action and well before trial”).

23 ⁹ TreePAC’s intervention would prejudice the City not only because of the difficulties of addressing as-yet
24 undisclosed witnesses and exhibits, but also because of TreePAC’s misunderstandings of the subject
25 proposal. For example, TreePAC claims the proposal would “reduc[e] minimum lot sizes (allowing
potentially increased lot subdivision within SF zones),” and would eliminate tree requirements for single-
family dwelling units. Motion at 7. The proposal does not change the current minimum lot sizes for
subdivision, nor does it eliminate tree requirements for single-family dwelling units. *See* FEIS at 2-4 to 2-7.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

III. CONCLUSION

Because TreePAC does not meet the intervention criteria set forth in HER 3.09, the City respectfully requests that the Hearing Examiner deny the Motion to Intervene. If TreePAC is allowed to intervene, its participation should be strictly limited to the exclusive issue of tree canopy as articulated in QACC's Notice of Appeal.

DATED this 14th day of March, 2019.

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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
CERTIFICATE OF SERVICE

I, Amanda Kleiss, declare as follows:

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

That I, as paralegal in the office of Van Ness Feldman, caused true and correct copies of the following documents to be delivered as set forth below:

- 1. Seattle City Council’s Response in Opposition to TreePAC’s Motion to Intervene;
- 2. Declaration of Clara Park in Support of Response in Opposition to TreePAC’s Motion to Intervene with Exhibits A–C;
- 3. Certificate of Service;

and that on March 14, 2019, I addressed said documents and deposited them for delivery as follows:

SEATTLE HEARING EXAMINER
Barbara Dykes Ehrlichman
Hearing Examiner
700 Fifth Avenue, Suite 4000
Seattle, WA 98104

By Web Portal

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

QUEEN ANNE COMMUNITY COUNCIL
Martin Henry Kaplan, Architect AIA
360 Highland Drive
Seattle, WA 98109
mhk@martinhenrykaplan.com

By eService

QUEEN ANNE COMMUNITY COUNCIL
Jeffrey M. Eustis
Law Offices of Jeffrey M. Eustis
4616 – 25th Avenue NE, No. 608
Seattle, WA 98105
Eustislaw@comcast.net

By eService

TREEePAC
Richard Ellison, Vice President
2131 N 132nd Street
Seattle, WA 98133
climbwall@msn.com; urbanbalance@activist.com;
dmoehring@consultant.com; ovaltinelatte@hotmail.com;
stevezemke@msn.com; queenannecc@gmail.com

By eService

By First Class Mail

I certify under penalty of perjury under the laws of the State of Washington that
the foregoing is true and correct.

EXECUTED at Seattle, Washington on this 14th day of March, 2019.

/s/ Amanda C. Kleiss
Declarant