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 CLOSING BRIEF

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Van Ness Feldman LLP

719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

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

I. INTRODUCTION

The City Council's ("City") Final Environmental Impact Statement ("FEIS") that is the subject of this appeal evaluates the potential adverse impacts of the City's proposal to amend rules governing development of accessory dwelling units ("ADU") in single-family zones in the City. The City staff and outside consultants that worked together to prepare the FEIS used reasonable and standard methods of their respective professions to thoroughly, objectively, and deliberately assess and disclose the potential impacts of the proposal.

Appellant and Intervenor challenge the adequacy of that FEIS, but have failed to meet their burden of proof. Many of Appellant's claims are based on Appellant's fundamental misunderstandings or misinterpretations of the FEIS that ignore the detailed and thoughtful explanations in the FEIS itself. Other claims are premised on Appellant's misleading mischaracterizations of the proposal or the potential development that could result from the proposal. At best, Appellant occasionally identifies another approach of analysis or asks for more analysis, neither of which is sufficient to prove that the City's approach was unreasonable or that the FEIS is inadequate. Accordingly, the Examiner should deny Appellant's and Intervenor's claims.

II. STANDARD OF REVIEW

A. SEPA requires deferential review of EIS adequacy and requires QACC to meet an extremely high burden of evidentiary proof

SEPA requires that the Hearing Examiner give substantial weight to the City's determination that the FEIS satisfies all legal and technical requirements and, as such, is adequate.[1] QACC bears the heavy burden to establish otherwise.[2]

[1] RCW 43.21C.090; 43.21C.075(3)(d).
[2] Seattle Municipal Code ("SMC") 25.05.680; SMC 23.76.022.C.7 and SMC 23.76.006.C.1.b.

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

EIS adequacy is reviewed under the "rule of reason," a "broad, flexible cost-effectiveness standard" that requires that the EIS include a "reasonably thorough discussion of the significant aspects of the probable environmental consequences of an agency's decision."[3] When impacts are disclosed at a general level of detail, the rule of reason is satisfied and additional detail is not required.[4]

Importantly, the mere existence of a different reasonable approach or methodology is legally insufficient to support a claim that an EIS is unreasonable or inadequate.[5] The reasonableness standard inherently accommodates a variety of potential approaches. An opponent can almost always argue that an EIS should have contained more or different analysis, but that alone does not render the approach used by the lead agency. Hence, the deferential "rule of reason" that governs EIS adequacy allows the agency to choose from a range of different, reasonable approaches. When an agency is presented with different expert opinions, "it is the agency's job, and not the job of the reviewing appellate body, to resolve those differences."[6] QACC must do more than simply provide other reasonable approaches or conflicting opinions—rather, QACC must establish that the FEIS's analysis is unreasonable.

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[3] *Citizens All. To Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300, 1304 (1995) ("*CAPOW*") (internal quotations and citations omitted); SMC 25.05.402.A.

[4] *See CAPOW*, 126 Wn.2d at 368–69 (rejecting challenge to traffic analysis as "one of detail" that "does not survive the rule of reason."). *See also Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cty.*, 96 Wn.2d 201, 208, 634 P.2d 853, 858 (1981) (upholding the adequacy of an EIS the Court described as "bare bones" for a proposed rezone to accommodate a waterfront hotel, recognizing that the rezone was causally independent of any actual development approvals).

[5] *E.g.*, Findings and Decision of the Hearing Examiner for the City of Seattle, MUP-14-016(DR,W)/S-14-001, at p. 15 (rejecting appellants' experts' critiques of EIS analysis and noting, "It is not unusual for experts to disagree on the appropriate analytical approach to a given assignment.").

[6] *City of Des Moines v. Puget Sound Reg'l Council*, 108 Wn. App. 836, 852, 988 P.2d 27, 37 (1999).

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

For nonproject actions, such as this one, SEPA gives the lead agency even more discretion and deference. SEPA expressly accords the lead agency "more flexibility in preparing [nonproject] EISs" because "there is normally less detailed information available on their environmental impacts and on any subsequent project proposals."[7] These special provisions for nonproject proposals create flexibility for the lead agency by allowing appropriate deviation from the general EIS content requirements.[8] Collectively, all of these SEPA rules set a high bar for challenges to a nonproject EIS.

In particular, it is worth noting the significant legal distinction between the standard of review and burden of proof that QACC faces in this context as compared to its prior appeal of the City's earlier determination of non-significance ("DNS") for the proposal.[9] While Appellant prevailed in that earlier appeal, the legal hurdle it faces in the present appeal is significantly different. A DNS is a "relatively superficial threshold environmental analysis"[10] that "represents an agency decision not to undertake sophisticated environmental analysis before acting on a proposal,"[11] and signifies the agency's conclusion that the proposal will not have any probable significant adverse environmental impacts.[12] By contrast, an EIS analyzes the proposal under "intense environmental scrutiny and elaborate process requirements"[13] and "is designed to systematically analyze and inform decision-makers of all relevant and material

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[7] WAC 197-11-442(1); *see also* SMC 25.05.442.D.
[8] Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14.01[3] at 14–73 (2016).
[9] On May 16, 2016, the City initially issued a DNS for the proposal. The Examiner reversed and remanded the DNS on appeal in Examiner File No. W-16-004 and provided specific instruction to the City of impacts to analyze in its EIS. *See* Findings and Decision, Case No. W-16-004, dated Dec. 13, 2016.
[10] Settle, *supra* note 8, § 14.01 at 14-2 to 14-3.
[11] Settle, *supra* note 8, § 14.01[1][b] at 14-25.
[12] WAC 197-11-340; SMC 25.05.340.
[13] Settle, *supra* note 8, § 14.01 at 14-4.

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

environmental considerations," including probable significant adverse impacts.[14] Thus, in this appeal of the City's FEIS, QACC cannot merely rely on the same claims and extent of evidence upon which it relied in the DNS appeal. Rather, QACC must make a more comprehensive and developed showing. To prevail in their appeal, QACC must definitively demonstrate that the FEIS's analysis is unreasonable,[15] "an extremely high burden of evidentiary proof."[16] As explained in further detail below, QACC fails to satisfy that burden.

B. This SEPA appeal is focused on the narrow issue of the adequacy of the FEIS and does not entertain challenges to the wisdom of the proposal

The proposal that is the subject of the FEIS seeks to remove regulatory barriers to ADU production and to increase the number and variety of housing choices in single-family zones.[17] The proposal considers changes to current Code provisions governing ADU production that are described in Exhibit 2-2 of the FEIS[18] and include changes to allow a second ADU, the elimination or reduction of off-street parking and owner occupancy requirements, and changes to certain development standards, among others. These proposed changes are the product of a years-long public process and consideration, including multiple City Council resolutions, recommendations by the Housing

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[14] Settle, *supra* note 8, §§ 14.01 at 14-9, 14.01[12] at 14-96.
[15] *Org. to Pres. Agric. Lands v. Adams Cty.*, 128 Wn.2d 869, 881, 913 P.2d 793, 801 (1996) (affirming adequacy of EIS where appellant's expert witness "did not testify definitively that studies were inadequate").
[16] Revised Findings and Decision of the Hearing Examiner for the City of Seattle, W-17-006–W-17-014 at p. 22 (addressing the challenge to the adequacy of the FEIS for the Mandatory Housing Affordability ("MHA") proposal, stating, "To prevail in an appeal of an EIS requires the Appellants to not only raise issues of concern or objections to the City's failure to consider certain information, but also requires them to meet an extremely high burden of evidentiary proof.").
[17] FEIS at 1-3. The FEIS is Exhibit 1 in the Examiner's record. Because of the amount to which this brief cites to that central document, and to avoid confusion, the City cites directly to the "FEIS" with pinpoint reference to the corresponding page number.
[18] FEIS at 2-4–2-7.

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Affordability and Livability Agenda ("HALA") committee, and Comprehensive Plan policies contemplating the regulatory changes studied in this FEIS.[19]

While proposal has engendered critics and supporters, the wisdom of the proposal is a policy choice, the merits of which are beyond the scope of this appeal. SEPA is "primarily a procedural statute" intended to promote fully informed government decision-making and ensure that environmental values are given appropriate consideration.[20] It does not compel a particular substantive result in government decision-making.[21] SEPA further acknowledges that environmental considerations "may be rationally subordinated to weightier non-environmental values."[22]

Thus, in an adequacy appeal, the Examiner and the courts do not "rule on the wisdom of the proposed development," but only on whether the EIS provides the decision-maker with sufficient information to make a reasoned decision.[23] Despite the narrow focus on the adequacy of the FEIS, much of QACC's testimony was misdirected at the merits of the proposed Code changes, rather than the adequacy of the environmental review of those changes. Such challenges are irrelevant to this appeal and should be rejected.

III. ARGUMENT

At the hearing, Appellant and Intervenor focused on five specific issues: housing and socioeconomics; parking; aesthetics; "changes to the land use form"; and tree canopy. As explained in further detail, below, none of their arguments has merit. The analysis in the FEIS of all five topics is reasonable and more than adequate to inform a decision-maker about the proposal's potential impacts on those topics.

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[19] Hr'g Tr. 35:4–38:14, March 27, 2019 (Testimony of N. Welch).
[20] *Glasser v. City of Seattle*, 139 Wn. App. 728, 742, 162 P.3d 1134, 1140 (2007).
[21] *Id.*
[22] Settle, *supra* note 8, § 14.01 at 14-9.
[23] *CAPOW*, 126 Wn.2d at 362. *See also* Settle, *supra* note 8, § 14.01 at 14–9.

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

A. The housing and socioeconomics analysis in the FEIS exceeds SEPA requirements and satisfies the rule of reason

The FEIS includes detailed and thorough analysis that informs the decision-makers of the proposal's potential displacement impacts and impacts on housing affordability. This analysis continues the City's groundbreaking work to study these important socioeconomic issues, but with precise focus on impacts from production of ADUs that might occur under the proposal.[24] Even the Appellant's socioeconomics expert, Mr. Reid, admitted that the analysis is unprecedented and the only one of its kind.[25]

The FEIS's housing and socioeconomics analysis first begins with a discussion of existing conditions, including historical population changes, geographical distribution, household income and disparity, and housing by race or ethnicity[26] (contrary to William Reid's claim that the FEIS is "silent" on that issue and provides "no information" regarding existing conditions[27]). The FEIS then uses the two independent analyses that rely on separate methodologies to answer two different sets of questions: (1) the "highest and best use" pro forma analysis ("Pro Forma Analysis"), which analyzes how the proposal could potentially change development economics; and (2) the econometric forecast analysis ("Forecast Model"), which estimates ADU production given the proposed policy changes.[28] As the City's expert Morgan Shook explained, the two

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[24] *See, e.g.*, Hr'g Tr. 126:5–127:15, March 28, 2019 (Testimony of M. Shook, the City's socioeconomics expert, describing the evolving area of scientific evaluation of displacement risks and the City's role in that effort).
[25] Hr'g Tr. 99:12–15, March 25, 2019 (Testimony of W. Reid, stating that the FEIS is the only economic analysis of ADU-related policies of which he is aware). *See also* Hr'g Tr. 131:19–132:5, March 28, 2019 (Testimony of M. Shook, stating that the analysis is "the first of its kind").
[26] FEIS at 3-12 to 3-24, 4-5 to 4-12.
[27] Hr'g Tr. 47:25–48:7, March 25, 2019.
[28] FEIS at 4-14; FEIS, App. A, at A-7; Hr'g Tr. 127:16–129:19, March 28, 2019 (Testimony of M. Shook).

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

analyses are "separate methods and separate analyses."[29] In particular, the Pro Forma Analysis results in a measure that allows decision-makers to see marginal changes to development economics across each alternative.[30] That specific approach is not a forecast or a predictive analysis.[31] By contrast, the Forecast Model is predictive and projects the total ADU production under each alternative relying on real-world factors and motivations like neighborhood context, space, and the choice between keeping one's home or tearing it down.[32]

In addition to the two analyses, the City also utilized its "Growth and Equity Analysis" to assess displacement impacts. The Growth and Equity Analysis is a data-driven analysis of displacement risk throughout the city, developed by the City as part of the 2035 Comprehensive Plan Update.[33] The Growth and Equity Analysis analyzed a wide range of data, including geospatial data for different areas of the city, demographic data, and built environment data about potential development and physical characteristics, to produce citywide maps that identify areas with a higher likelihood of displacement.[34] The FEIS incorporates the Growth and Equity Analysis's data for the FEIS's study area to identify more vulnerable neighborhoods within the study area – those specific locations where displacement is a higher risk – and examines the impact of the proposal in those specific areas, relying on both mapping and text in the EIS.[35]

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[29] Hr'g Tr. 131:11–12, March 28, 2019; FEIS, App. A, at A-7 ("The two different core research questions—1) how could the alternatives affect highest and best use, and 2) how could the alternatives affect future production of single-family homes and ADUs—call for different methodological approaches.").
[30] Hr'g Tr. 128:2–17, March 28, 2019 (Testimony of M. Shook).
[31] Hr'g Tr. 129:3–131:12, March 28, 2019 (Testimony of M. Shook).
[32] Hr'g Tr. 134:14–135:14, March 28, 2019 (Testimony of M. Shook); FEIS at 4-18.
[33] Hr'g Tr. 201:9–20, March 27, 2019 (Testimony of N. Welch).
[34] Hr'g Tr. 205:16–206:19, March 27, 2018; Ex. 36, Growth and Equity Analysis, at 13, 16.
[35] Hr'g Tr. 206:20–207:10, March 27, 2018 (Testimony of N. Welch); Hr'g Tr. 35:5–41:21, March 28, 2019 (Testimony of N. Welch); Hr'g Tr. 176:4–25, March 28, 2019

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

The FEIS provides significant detail and explanation of each alternative, but generally concludes the proposal would have "marginal benefits on housing affordability and would not increase displacement impacts."[36] The forecast estimates that the proposal would generate at most 4,430 ADUs over the ten-year study period (between 2018 and 2027), with positive impacts on affordability due to increased housing supply and options when compared with the no action alternative, Alternative 1.[37] The analysis further concludes that the action alternatives reduce the number of teardowns compared to Alternative 1 (with the Preferred Alternative have an estimated 22-percent decrease compared to Alternative 1), reducing the likelihood of physical displacement.[38] Lastly, the analysis indicates that lower-price neighborhoods would see the smallest changes in development feasibility, reducing the likelihood of displacement.[39]

QACC's expert William Reid outlined "three major issues" that he perceived in the analysis, alleging that: (1) the FEIS should have used data from Appendix M of the MHA FEIS as part of the displacement analysis; (2) the FEIS should have considered more parcel types in its parcel typology; and (3) the residual land value ("RLV") approach in the Pro Forma Analysis is incomplete because RLV is not an appropriate tool to evaluate the economic motivations of existing homeowners.[40] In addition, Mr. Reid advanced several other more minor critiques. As explained in further detail below, all of

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(Testimony of M. Shook); FEIS at 4-37 to 4-39 (stating that "…the neighborhoods in the study area with marginalized populations most vulnerable to displacement are Rainier Valley, White Center, Beacon Hill, and North Seattle. Except for Beacon Hill, these are all lower-price neighborhoods."); FEIS at 4-29 (FEIS Exhibit 4.1-15 describes estimated ADU production and new homes by neighborhood profile, including lower-price neighborhoods).

[36] FEIS at 4-41.
[37] FEIS at 4-41.
[38] FEIS at 4-29.
[39] FEIS at 4-30.
[40] Hr'g Tr. 43:13–46:17, March 25, 2019.

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

his criticisms are unsound and lack credibility because his criticisms are based on fundamental misunderstandings of the FEIS.

1. The housing and socioeconomic analysis uses a reasonable approach to assess potential displacement impacts and was not required to utilize Appendix M to the MHA.

To assess potential impacts of displacement, Mr. Reid argues that the City should have relied on a different City document that was attached to the MHA EIS as Appendix M. As a preliminary matter, Mr. Reid's criticisms of the City's analysis of displacement are not a basis for challenging the adequacy of the FEIS because the Examiner lacks jurisdiction to evaluate those claims.[41] Neither the state nor Seattle's SEPA rules identify economics as an element of the environment.[42] Indeed, Seattle's SEPA rules specifically list "economic competition, profits and personal income and wages, and social policy analysis such as fiscal and welfare policies" among "[e]xamples of information that are not required to be discussed in an EIS."[43] Socioeconomic analysis of displacement is comparable to these examples. The City has included that additional analysis in response to the Examiner's decision on the DNS and in response to scoping. However, the adequacy of the additional analysis of a topic that is not an element of the environment cannot be the subject of a SEPA appeal. Indeed, Seattle's SEPA rules specify that adequacy of additional analysis included in an EIS, like the displacement impact analysis in this FEIS, "shall not be used in determining whether an EIS meets the requirements of SEPA."[44] Thus the adequacy of the FEIS's discussion of economic displacement cannot

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[41] Revised Findings and Decision, W-17-006–W-17-014, at 32 (rejecting challenge to MHA FEIS's economic displacement analysis).
[42] *Id.*; *see also* SMC 25.05.444; WAC 197-11-444.
[43] SMC 25.05.448.C. Seattle's SEPA rules do call for analysis of *"[e]conomic factors, including but not limited to* employment, public investment, and taxation where appropriate" in an EIS unless eliminated by the scoping process. SMC 25.05.440.E.6.a (emphasis added).
[44] SMC 25.05.440(G); *see also* WAC 197-11-440(8).

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

be the subject of an Appellant's FEIS adequacy challenge and the Examiner lacks jurisdiction to evaluate the adequacy of that analysis.

Even if that were not the case, the FEIS's analysis on this subject is adequate to satisfy the rule of reason. Mr. Reid fails to establish that the City's reliance on the Growth and Equity Analysis was unreasonable. In fact, his only criticism of the Growth and Equity Analysis is factually and technically incorrect. Specifically, Mr. Reid testified that the Growth and Equity Analysis was not "data-driven."[45] However, as described above, the Growth and Equity Analysis evaluates and incorporates 14 data layers to arrive at its projections of locations of displacement risk in its "displacement risk index."[46] Mr. Reid's incorrect conclusory assertion to the contrary is not supported by the record or the document itself.[47] To the extent that Mr. Reid's criticizes the Growth and Equity Analysis for failing to use the same data set as Exhibit M, his challenge is unavailing and fails to demonstrate why reliance on the Growth and Equity Analysis is unreasonable. To the contrary, the City has established that its reliance on the Growth and Equity Analysis is reasonable and preferable. The City's witness, Nicolas Welch,[48] testified that the Growth and Equity Analysis is an appropriate basis for the FEIS's displacement analysis because it has been substantially vetted, used in various other City efforts, formally adopted by the City Council as a means for assessing displacement risk, and provides a forward-looking

[45] Hr'g Tr. 120:6–122:3, March 25, 2019 (Testimony of W. Reid).
[46] Hr'g Tr. 205:16–207:8, March 27, 2019 (Testimony of N. Welch).
[47] *Id.*; Ex. 36, Growth and Equity Analysis at 13 (14 indicators with corresponding data source), 16 (describing how the data was used to arrive at the displacement risk index mapping).
[48] Mr. Welch is a strategic advisor with the City's Office of Planning and Community Development who has worked on the City's analysis of displacement in several contexts, including the 2035 Comprehensive Plan Update and MHA. Hr'g Tr. 32:6—7, March 27, 2019 (Testimony of N. Welch); Hr'g Tr. 201:11–22, March 27, 2019 (Testimony of N. Welch).

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

analysis of future displacement risk, suitable for an FEIS with a ten-year study horizon.[49] Therefore, the FEIS's incorporation of the Growth and Equity Analysis in the displacement analysis is reasonable.

Additionally, the record conclusively demonstrates that Mr. Reid's preferred data set (Appendix M to the MHA) is not appropriate for purposes of evaluating ADU displacement impacts, and is therefore unreasonable. Mr. Reid's argument that the City should have instead used Appendix M of the MHA FEIS fundamentally misapprehends Appendix M's analysis and its limits. As Mr. Welch testified, Appendix M is neither informative nor appropriate for assessing impacts of changes to regulations governing ADU development in single-family areas.[50] Unlike the Growth and Equity Analysis's forward-looking orientation, Appendix M looks at displacement historically.[51] Moreover, the data set has limited applicability to the specific areas of concern for this proposal. Appendix M measures the statistical correlations between two variables: housing development and changes in household characteristics.[52] Most of the data of housing production that is mapped in Appendix M occurred in the multifamily and mixed-use zones and not in the single-family areas, such that it is of limited applicability to an assessment of a proposal that applies only in single-family areas.[53] Further, it is undisputed that zoning does not correspond to census tract designations,[54] and nearly all census tracts

[49] Hr'g Tr. 212:1–9, March 27, 2019.
[50] Hr'g Tr. 209:5–212:14, March 27, 2019
[51] Hr'g Tr. 212:5–14, March 27, 2019 (Testimony of N. Welch) ("So when we're looking over a ten-year period of potential displacement outcomes under each of these alternatives, it makes sense to use an analysis that is trying to estimate potential future displacement risk, not necessarily something that's looking historically").
[52] Hr'g Tr. 207:16-20, March 27, 2019.
[53] Hr'g Tr. 209:16–210:5, March 27, 2019 (Testimony of N. Welch).
[54] Hr'g Tr. 118:2–4, March 25, 2019 (Testimony of W. Reid) (admitting that census tracts do not correspond to zoning); Hr'g Tr. 210:11–16, March 27, 2019 (Testimony of N. Welch).

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

include multifamily/mixed-use zoning.[55] As such, it would be impossible to know whether changes identified in Appendix M were occurring in the multifamily zoning or in the single-family zoning in the same census tracts, which is relevant because the FEIS is focused only on potential displacement in single-family zoning where the proposal would apply.

Additionally, Mr. Reid's claim that Appendix M "in great detail establishes where actual displacement has been going on throughout the city by census tract"[56] is incorrect. Appendix M "compar[es] housing development with demographic and socioeconomic changes."[57] Crucially, however, Appendix M examines the *statistical relationship* (or correlation) between those two variables across *all* of the census tracts in the City (or groups of census tracts based on displacement risk and access to opportunity), not in particular census tracts.[58] Thus, Mr. Reid's suggestion that Appendix M identifies particular census tracts where economic displacement allegedly is occurring (or will occur) due to new development ignores the essence of Appendix M and is demonstrably incorrect. Equally important, Mr. Reid's suggestion ignores the fact that demographic and socioeconomic changes do not definitively equate to displacement.[59] For example, a household that experiences a change in income level but stays in the same house throughout the study period would not be reflective of actual displacement, but would be

[55] Hr'g Tr. 210:11–16, March 27, 2019 (Testimony of N. Welch).
[56] Hr'g Tr. 48:13–16, March 25, 2019 (Testimony of W. Reid).
[57] Ex. 23 at M.1. *See also* Hr'g Tr. 207:14–208:8, March 27, 2019 (Testimony of N. Welch).
[58] Ex. 23 at M.1. The statistical correlation is shown by the dotted sloping line in the scatterplots on pages M.5, M.7, M.9, M.11, M.13, M.15, M.17, M.19 and M.21 of Appendix M. It should be noted that Appendix M does not show a systematic relationship between new development and loss of lower-income households.
[59] Hr'g Tr. 211:3–20, March 27, 2019 (Testimony of N. Welch); Hr'g Tr. 178:1–179:7, March 28, 2019 (Testimony of M. Shook).

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

reflected in Appendix M as a household with a change in socioeconomic status.[60] Appendix M recognizes this distinction and does not claim to present definitive data of precisely where displacement is occurring. Given Mr. Reid's apparent misunderstanding of Appendix M's data and methodology, his criticism that the FEIS failed to use Appendix M is unpersuasive. Most importantly, he fails entirely to demonstrate that the EIS's reliance on the displacement risk index in the Growth and Equity analysis was unreasonable.

Even if the Examiner were to ignore Mr. Reid's misunderstanding of the limitations of Appendix M, Mr. Reid's endorsement of Appendix M over the Growth and Equity analysis is, at best, an argument that the City should have relied on a different methodology or approach, without proving that the City's methods were unreasonable. That is simply insufficient to meet Appellant's burden of proof.

2. The parcel typology was reasonable for the Pro Forma Analysis and was not used in the Forecasting Model.

Mr. Reid's criticisms of the City's parcel typology demonstrate his fundamental misunderstanding of the City's analysis. The highest and best use pro forma analysis relied on a parcel typology of four representative parcel types that were based on lot size, lot shape and size of current structures.[61] The City developed these four parcel types to be representative of the range of parcel conditions across the city and specifically to include the most common parcel characteristics across the study area and the parcel sizes that might be most affected by the changes.[62]

Mr. Reid's criticism of this typology was based on his misunderstanding that the four parcel types in the parcel typology were intended to exhaustively capture every parcel

[60] Hr'g Tr. 211:16–20, March 27, 2019 (Testimony of N. Welch).
[61] FEIS, App. A, at A-23 to A-26.
[62] FEIS, App. A, at A-24.

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

in the city.[63] They were not. Nor was the City required to comprehensively list every parcel in the single-family zoned areas of the city in order to answer the specific question that the Pro Forma Analysis sets out to address. The FEIS and Mr. Shook both explain that the parcel typology was intended to provide representative samples with controlled variables, but was not intended to capture every parcel.[64] The parcel typology identified representative parcel characteristics that allowed the City to evaluate how these variables would respond to the conditions under each alternative, thereby providing an understanding of how the alternatives would impact underlying economics.[65] Representative parcel types allowing this type of comparison are entirely appropriate for achieving the objective of the Pro Forma Analysis because it gives decision-makers information about the relative influence of the differences among the action alternatives on the underlying economics. It is especially appropriate for a nonproject action where the decision-maker is interested in evaluating the range of proposed policy changes expressed in the various alternatives and is not evaluating any specific project.

Importantly, Mr. Reid is flatly wrong when he attributes his criticism of the parcel typology to the Forecast Model.[66] The Forecast Model is not limited to the typology used in the Pro Forma Analysis and, instead, uses data for *every single parcel* in the study area.[67] Thus, Mr. Reid's criticism completely misapprehends the meaningful distinctions between the Pro Forma Analysis and Forecast Model. They are two separate and

[63] Hr'g Tr. 101:14–102:2, March 25, 2019.
[64] Hr'g Tr. 141:1–143:25, March 28, 2019 (Testimony of M. Shook); FEIS, App. A, at A-23 to A-26.
[65] Hr'g Tr. 142:15–143:22, March 28, 2019 (Testimony of M. Shook).
[66] Hr'g Tr. 100:21–101:8, March 25, 2019 (Testimony of W. Reid).
[67] Hr'g Tr. 151:11–152:2, 142:8–13, March 28, 2019 (Testimony of M. Shook). *See also* Hr'g Tr. 44:17–45:8, March 28, 2019 (Testimony of N. Welch).

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

independent analyses designed to answer different questions,[68] and the Forecast Model does not model or use the parcel typologies.[69]

For similar reasons, Mr. Reid's "case study" of 23 parcels in Columbia City, which purported to show inaccuracies in the parcel typologies, is flawed not only for failing to comprehend the role of the Forecast Model and its parcel-specific analysis, but also because his case study included parcels that were zoned multifamily.[70] Even assuming his sampling retained validity, Mr. Reid only concluded that half of the 23 parcels were within 95 percent of the typologies' parameters, and he could not characterize or articulate how the remaining half of the parcels compared with the typologies.[71]

3. The City's use of a Residual Land Value methodology in the Pro Forma Analysis is appropriate and reasonable.

Mr. Reid's third major criticism is specific to the RLV methodology used in the Pro Forma Analysis, but he misapprehends its use and context. Mr. Reid incorrectly asserts that the City was required to use a "return on cost" approach instead of the RLV methodology because, according to Mr. Reid, the RLV methodology allegedly fails to accurately consider the thought process of homeowners who already own their property. Mr. Reid is incorrect.

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[68] Hr'g Tr. 129:18–19, March 28, 2019 (Testimony of M. Shook); FEIS, App. A at A-7 (explaining that the two core research questions (highest and best use and the forecast) "call for different methodological approaches").

[69] FEIS at 4-19 (explaining that the forecast model included an "estimate [of] *each* parcel's development outcome in a given year") (emphasis added). Additionally, Mr. Reid is also incorrect when he baldly asserts that the FEIS failed to consider the possibility that the proposal would increase displacement and teardowns at lower price neighborhoods. Hr'g Tr. 66:22–67:4, March 25, 2019. In fact, the Forecast Model found that the action alternatives are likely to reduce the number of teardowns compared to the no action alternative, and further found that lower price neighborhoods would see the smallest potential changes in ADU production under any action alternative. FEIS at 4-29 to 4-30. Mr. Reid's unsupported claims stand in contrast to the analysis prepared for the EIS.

[70] Hr'g Tr. 143:16–145:1, March 29, 2019 (Testimony of A. Pennucci).

[71] Hr'g Tr. 57:15–24, March 25, 2019.

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The RLV approach is a common decision-making tool used by policy makers to assess economic impacts.[72] Mr. Shook explained that the RLV analysis entails the same math and the same inputs involved in a "return on cost" analysis, and thus can be used and has been used by economists to assess the potential motivations of property owners, and not just developers, as Mr. Reid asserted.[73] Further, Mr. Shook explained how the RLV methodology is a helpful tool in this specific context because it does not predict or model any specific landowner's costs or financing condition, which vary widely.[74] Instead, the RLV presents an analysis of how a contemplated proposal affects the underlying valuation of the land, whether owned (i.e., from the homeowners perspective) or yet-to-be acquired (i.e., from a developer's perspective), such that its analysis of valuation change is applicable to property owners and developers alike.[75] Mr. Reid's unsupported assertions that the RLV methodology is limited to the perspective of a developer evaluating whether to acquire a property, and not more broadly, is therefore incorrect. And even if Mr. Reid were correct, his arguments amount, at most, to a preference for a different methodology for the Pro Forma analysis, which is insufficient to demonstrate that the City's methodology was unreasonable.[76]

4. Mr. Reid's remaining critiques are without merit.

The other minor points that Mr. Reid identified beyond his "three major issues" lack merit. For example, Mr. Reid criticized the adjustment factors that the FEIS applied

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[72] FEIS, App. A, at A-7. *See also* Hr'g Tr. 132:6–134:13, March 28, 2019 (Testimony of M. Shook) (discussing how RLV can help make decisions).
[73] Hr'g Tr. 136:3–138:14, March 28, 2019 (Testimony of M. Shook).
[74] Hr'g Tr. 137:14–21, March 28, 2019 (Testimony of M. Shook).
[75] Hr'g Tr. 137:7–138:14, March 28, 2019 (Testimony of M. Shook).
[76] *See* Section II.A, above. *See also* Findings and Decision of the Hearing Examiner for the City of Seattle, MUP-14-016(DR,W)/S-14-001, at p. 15 (rejecting appellants' experts' critiques of EIS analysis and noting, "It is not unusual for experts to disagree on the appropriate analytical approach to a given assignment."); *City of Des Moines v. Puget Sound Reg'l Council*, 108 Wn. App. 836, 852, 988 P.2d 27, 37 (1999).

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in the forecasting model. The FEIS used these adjustment factors to account for policy changes that are not directly reflected in the historical parcel-level data on which the forecasting model relies.[77] Mr. Reid characterized these adjustment factors as "arbitrary in nature,"[78] but could not articulate what alternate methodology he would have used. His response was, "I mean, it's hard to say. . . . I mean, off the top of my head, I don't have a good answer for you. I would need to build a model."[79] Contrary to his characterization, the adjustment factors are not "arbitrary." The FEIS and Mr. Shook's accompanying testimony explain in detail how the City's economic consultants developed the adjustment factors, based in part on review of the pro forma results, feedback from architects and homeowners, professional judgment, and the use of conservative assumptions, to arrive at relatively high adjustment factors that yield reasonable upper-bound estimates of ADU production.[80] Mr. Reid's conclusory assertion that they are "arbitrary," especially when coupled with his inability to identify an appropriate substitute method, is insufficient to support Appellant's claims.

Mr. Reid is also incorrect when he claims that the analysis did not address condominiumization of ADUs (a topic more fully addressed in section III.D.2, below).[81] Both the Pro Forma Analysis and the Forecast Model consider condominiumization. As Mr. Shook explained, although the analysis does not explicitly refer to the phrase "condominiumization," the concept is embedded and captured within both analyses. The

[77] *See* FEIS at 4-28; FEIS, App. A, at A-65 to A-70.
[78] Hr'g. Tr. 59:10, March 25, 2019 (Testimony of W. Reid).
[79] Hr'g Tr. 110:5–6, March 25, 2019 (Testimony of W. Reid).
[80] FEIS, App. A at A-65 to A-70; Hr'g Tr. 156:1–162:3, March 28, 2019 (Testimony of M. Shook).
[81] Hr'g Tr. 81:23–82:19, March 25, 2019. Preliminarily, it is worth noting that Mr. Reid testified that only the Pro Forma Analysis did not address the topic of condominiumization, and conceded that the Forecast Model "made for sale a potential outcome, [and] predicted that potential outcome." Hr'g Tr. 110:15–112:8, March 25, 2019. As such, QACC's own expert does not support QACC's broader arguments that the entirety of the socioeconomic analysis ignored that possibility entirely.

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Forecast Model considers condominiumization as part of the historical data (of which Appellant provided evidence of two examples).[82] As part of the historical record upon which the forecasts are based, condominiumization is "baked into the modeling process . . . and the likelihood of condominiumization is carried forward within the forecast model . . . ."[83]

The Pro Forma Analysis also includes conversion and sale of ADUs as condominiums in its assessment of how often and under what circumstances the "for sale" option represents the highest and best use.[84] Indeed, the Pro Forma Analysis even identifies and quantifies the likelihood of that outcome. That "for sale" outcome captures the "condominiumization" option because it assumes the house and any ADUs are sold at single-family market prices per square foot for eventual ownership, distinguishing this scenario from the sale of the property for eventual rental of the ADUs. The counsel for QACC asked questions that suggest its theory that the sale of the principal unit and the ADUs as separate condominium units should not or could not be captured in the "for sale" outcome, but its theory is unsupported. Mr. Shook testified that the valuation of the sale of all three units by square footage captures condominiumization, and his opinion was unrefuted by any expert.[85] Indeed, even QACC's own economics expert did not embrace or advance counsel's theory and instead conceded that the socioeconomic analysis included the condominiumization concept in the "for sale" option.[86] To the extent QACC

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[82] Hr'g Tr. 162:4–163:10, March 28, 2019 (Testimony of M. Shook); *Cf.* Hr'g Tr. 110:15–112:8, March 25, 2019 (discussing Mr. Reid's understanding of the Forecast Model).
[83] Hr'g Tr. 162:15–25, March 28, 2019 (Testimony of M. Shook).
[84] Hr'g Tr. 144:23–145:8, March 28, 2019 (Testimony of M. Shook).
[85] Hr'g Tr. 217:7–10, March 28, 2019.
[86] Hr'g Tr. 81:23–82:17, 110:15–21, March 25, 2019 (noting first that the EIS did not address the concept "very specifically," but in response to a direct question of whether the EIS considered condominiumization, he replied, "The forecasting model made for sale a potential outcome, predicted that potential outcome.")

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believes that condominium sales should be valued differently than the per-square-foot for sale evaluation, Mr. Reid did not articulate a different valuation method or concretely demonstrate that a different method would result in a significantly different valuation.

Similarly, QACC's theory that construction of two AADUs is the most feasible or probable outcome under the proposal is unsubstantiated by any evidence or analysis, apart from Mr. Kaplan's unsupported opinion. Although the highest and best use analysis did not list the two-AADU outcome amongst the development outcomes analyzed, the FEIS expressly discloses that its list of development outcomes is "not exhaustive of every development possibility" and explains, "Although we did not model [other possible] development outcomes, their financial performance is likely to behave similarly to the outcomes we did model."[87] If anything, the data suggests that a second AADU would perform more poorly compared to a DADU—the FEIS shows that DADUs command higher rents than AADUs.[88] QACC did not present any concrete contrary evidence. The analysis's consideration of the potential development and valuation options for ADUs is reasonable.

B. The FEIS's parking analysis meets the rule of reason

The parking analysis satisfies the rule of reason. It identifies and assesses the change in on-street parking demand that could result from the proposal by comparing the existing availability of on-street parking with the expected increase in parking demand for on-street parking under each alternative. The FEIS makes this comparison using four carefully selected study locations. The City's expert Amalia Leighton-Cody testified that the study locations were chosen to capture representative conditions throughout the study

[87] FEIS, App. A at A-12.
[88] FEIS, App. A at A-20 (discussing the findings of a "detachment" premium for DADUs over AADUs, with DADUs commending an average rent per square foot that is more than 1.5 times higher than AADUs).

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area.[89] She and her team considered factors such as geographic distribution; representation of a variety of curb spaces, parcel sizes, and parcel types; and presence of unimproved streets, alleys, and transit options.[90]

The FEIS identifies the expected number of ADUs that would be produced in the study locations based on the results of the Forecast Model in the socioeconomic analysis in chapter 4.1. The FEIS develops an estimate of vehicle ownership rates for residents in ADUs and then evaluates the resulting change in parking availability. In this exercise, the parking impact analysis incorporates a number of assumptions intended to create a more conservative analysis (i.e., an analysis that tends to overstate impacts). For example, the FEIS assumes that all ADU residents would park on the street, even though ADU owners may choose to provide off-street parking for ADU residents and Alternatives 1 and 3 actually require off-street parking for new ADUs.[91] The parking analysis also assumes that all eligible parcels would develop with two ADUs rather than one (even though the ADU projection estimate concludes under all scenarios that only some of the eligible lots would develop two ADUs).[92] Further, compared to the rest of the study area, the parking study locations capture more proximity to multifamily or commercial zones, which likely overstates potential parking impacts since demand for parking is higher in these areas due to "spillover" parking from the nearby multifamily and commercial uses.[93]

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[89] Hr'g Tr. 223:7–10, March 28, 2019.
[90] Hr'g Tr. 223:7–19, March 28, 2019 (Testimony of A. Leighton-Cody).
[91] *Compare* FEIS at 4-180 ("We then applied the vehicle ownership rates, assumed each vehicle would park on the street, and evaluated the resulting change in parking availability.") *with* FEIS at 2-4, (showing that Alternatives 1 and 3 include off-street parking requirements). *See also* Hr'g Tr. 158:25–159:14, March 29, 2019 (Testimony of A. Pennucci).
[92] FEIS at 4-181 to 4-182.
[93] Hr'g Tr. 166:7–16, March 29, 2019 (Testimony of A. Pennucci). Ms. Pennucci explained that only 30 percent of the entire study area is within 400 feet of a multifamily or commercial zone, but 80 percent of the parking study locations are within 400 feet of a multifamily or commercial zone.

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The parking analysis used a methodology that complied with "Tip 117," a guidance document prepared by the Seattle Department of Construction and Inspections ("SDCI") for applicants who wish to request a parking waiver for a proposed ADU.[94] As Ms. Leighton-Cody testified, Tip 117 has a specific, project-based application, and it is not the only way to calculate parking inventory but was used here because of its applicability to ADUs today.[95]

It is undisputed that Tip 117 allows for several acceptable methodologies, including use of field observation, GIS satellite imagery, and wheels.[96] The FEIS's methodology is described as an observational method that uses both satellite imagery and measurements and field observation.[97] Mary Catherine Snyder, a strategic advisor at the Seattle Department of Transportation ("SDOT") with 20 years of experience in parking management, testified that the FEIS's methodology is reasonable and consistent with SDOT's methodology.[98] She further explained that the nature and scale of the project guides the choice of methodology, and in this case, the FEIS's methodology was appropriate give the large size of the study locations, the ten-year study period, and the nonproject policy nature of the proposal, in which there are no specific project details available.[99]

The FEIS incorporates data collected on two days, a weekday and a weekend, consistent with SDOT's methodology (and contrary to QACC's expert's claim that data

[94] Ex. 22.
[95] Hr'g Tr. 26:9–19, March 29, 2019.
[96] Hr'g Tr. 111:15–112:3, March 29, 2019 (Testimony of M. Snyder); Hr'g Tr. 206:4–210:10, March 25, 2019 (Testimony of R. Tilghman).
[97] Hr'g Tr. 32:4–8, 45:17–24, March 29, 2019 (Testimony of A. Leighton-Cody).
[98] Hr'g Tr. 108:11–113:22.
[99] Hr'g Tr. 112:4–114:24, 125:12–126:15, 135:18–136:7, March 29, 2019.

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collection occurred on one day only), and the FEIS uses the higher weekday data.[100] The FEIS's data is based on data collected on a total of 339 blocks in the study area.[101]

Ultimately, the FEIS concludes that the alternatives would not generally be expected to create parking impacts on the scale of the study areas because none of the study areas would exceed 85 percent utilization.[102] However, the EIS acknowledges and discloses that it is likely that the proposal would result in more localized impacts on specific blocks within the study area under any of the alternatives where parking utilization exceeds the 85 percent threshold.[103]

QACC failed to meet its burden of showing that the FEIS's methodology is unreasonable. While two of QACC's witnesses alleged that the FEIS parking study was flawed, all of their allegations are without merit. In general, Appellant's witnesses fail to understand the meaningful differences between studies prepared for nonproject actions like the one at issue in this case and those prepared for project proposals where detailed information is known about specific locations and specific parking demands. Fundamentally, Appellant's witnesses incorrectly assume that the City is required to study parking impacts for a nonproject the same way as a project action. It is not and it cannot.

1. The four parking study locations are representative.

First, although QACC's counsel questioned the representation of "central" neighborhoods in the study locations, QACC presented no evidence on this issue. Even Mr. Tilghman did not definitively testify that the study locations were flawed or not

[100] Hr'g Tr. 23:16–25:6, 118:12–19, March 29, 2019 (Testimony of A. Leighton-Cody and M. Snyder).
[101] FEIS at 4-167.
[102] FEIS at 4-184 (parking impacts for the no-action alternative), 4-185 to 4-186 (parking impacts for alternative 2), 4-187 (parking impacts for alternative 3), and 4-188 (parking impacts for the preferred alternative).
[103] FEIS at 4-185.

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representative,[104] and his criticisms of the study locations, claiming that there was "no distinction" made between the presence of alleys or lot size, are incorrect.[105] As Ms. Leighton-Cody testified, the "central" neighborhoods that Mr. Kaplan asserted should have been better represented in the parking study locations have several features that are not representative of the FEIS study area as a whole, such as portions that were part of the MHA EIS study area, are within urban villages, or have restricted parking zones.[106] Her testimony about the reasonableness of defining the study locations was unrefuted.

2. FEIS uses a reasonable method for calculating parking inventory.

QACC also failed to refute the City's testimony that there are several reasonable, acceptable methodologies for collecting parking data, including the observational method used in the FEIS.[107] As discussed above, SDOT accepts the observational method for its parking inventory studies, particularly for large-scale projects, because the method provides a sufficient level of detail and data, especially for the comparative purposes needed to evaluate a nonproject action with broad applicability over a wide area.[108]

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[104] Hr'g Tr. 192:8–13, March 25, 2019 ("It's hard to say that one [study area] is representative of many others.") Moreover, Mr. Kaplan's testimony was specific to his opinion about whether the parking study locations were "representative" from the standpoint of land use form and aesthetics, not traffic. Hr'g Tr. 60:17–61:9, March 26, 2019. As confirmed by Ms. Leighton-Cody, the authors of the impact analysis were attempting to choose study locations that were representative of parking conditions, not aesthetics. Hr'g Tr. 227:19–228:6, March 28, 2019.

[105] Hr'g Tr. 192:15–23, March 25, 2019; *cf.* FEIS at 4-166 ("The study locations represent a range of conditions found in single-family zones and include areas that vary by lot size; the presence of alleys, driveways, and sidewalks; and proximity to transit.").

[106] Hr'g Tr. 82:22–83:15, March 29, 2019.

[107] Mr. Tilghman's claim that he is not familiar with the observational method is based solely on semantics. He testified that he is aware that other approaches can be used to estimate parking supply, but that he is simply not familiar with a term of art for the other approaches. Hr'g Tr. 205:8–206:8, March 29, 2019.

[108] Hr'g Tr. 114:11–115:6, March 29, 2019 (Testimony of M. Snyder).

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Moreover, nothing in Tip 117 requires or even recommends the use of a wheel, as even Mr. Tilghman conceded.[109]

Ms. Leighton-Cody and Ms. Snyder explained the potential flaws and discrepancies associated with wheeling, such as differences resulting from different wheeling methods, the use of different wheels, and the use of professional judgment when identifying features.[110] The spot checks and recount performed by the FEIS's data collection consultant, IDAX, illustrate the discrepancies that may arise when using a wheel. IDAX wheeled the same blocks that Mr. Tilghman had wheeled, and its results showed that wheeling did not consistently result in a lower count of parking inventory than the observational method. In some instances, the wheel resulted in a higher count, sometimes significantly more so than the observational method.[111] Moreover, Mr. Tilghman's claim that wheeling is "more precise" is not supported by sufficient data. It is undisputed that QACC did not conduct a comparable study to that of the City. Rather, QACC's expert, Ross Tilghman, collected data on a total of only 13 block fronts (i.e., one side of a block).[112] The sample size of block fronts that Mr. Tilghman measured (13 block fronts in total) is too small to support his conclusion that the FEIS "greatly inflat[ed]" inventory on a "systematic" basis, or his methodology of applying reductions of 20 percent or more across the board.[113]

IDAX's work also confirms the invalidity of Mr. Tilghman's methodology of applying across-the-board "adjustments" to calculate inventory on blocks that he did not measure in any way (wheeled or observational). The wheeled counts for the block faces

[109] Hr'g Tr. 206:4–210:10, March 25, 2019.
[110] Hr'g Tr. 30:10–31:11; 115:17–116:2, March 29, 2019.
[111] Ex. 40. For example, on NE 98th St. between Roosevelt Way NE and 12th Ave. NE, wheeling resulted in 15 more spaces on the south side and 20 more spaces on the north side.
[112] Exs. 4, 5.
[113] Hr'g Tr. 186:3–17, March 25, 2019.

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that IDAX wheeled resulted in a count that was 91% of the observational count, higher than the adjustment rates that Tilghman applied on the vast majority of blocks in NE and NW (73%, 80%, 82%).[114] IDAX's sample size of wheeled counts is still too small to support the conclusion that wheeled counts are always lower than observational counts, but it does suggest that Tilghman's adjustment rates are inaccurate and flawed.

In short, the data does not show that the observational method was unreasonable. The reasonableness of the FEIS's methodology is further bolstered by cost considerations. Ms. Pennucci, a supervising analyst with Seattle City Council Central Staff and project lead for this FEIS, testified that wheeling is nearly ten times more costly than the observational method. Collecting data by wheel for an additional eight study areas would result in a cost of nearly $100,000.[115] As Ms. Snyder testified, the inability to use observational methods instead of wheeling would impact SDOT's ability to complete projects and studies.[116] The additional costs of wheeling are not justified, particularly when the observational method is a long-accepted industry standard, and completely appropriate for the purposes of a comparative analysis of a nonproject action. QACC has failed to show a systemic flaw in the method for the specific, comparative purposes of this nonproject study.

Finally, even if one accepts QACC's criticism of the methodology, QACC's claim amounts to a claim that utilization rates may be higher than estimated in the FEIS and may exceed the 85% significance threshold, such that the FEIS should have identified a significant impact to parking. However, whether an impact is labeled significant is irrelevant. The question of whether an impact is significant is only germane to the question of whether or not an EIS is required. It does not bear on the question of EIS

[114] Ex. 16, 17.
[115] Hr'g Tr. 169:1–173:19, March 29, 2019.
[116] Hr'g Tr. 114:3-10, March 29, 2019.

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adequacy.[117] Here, the FEIS discloses all probable impacts and discusses potential mitigation of those impacts. Whether or not the FEIS labels those impacts as significant is beside the point. Most importantly, the FEIS identifies the likelihood of localized impacts (i.e., certain blocks where utilization will exceed the 85% threshold).[118] While Mr. Tilghman appears to argue that there would potentially be more blocks that exceed the 85% threshold, the FEIS clearly discloses the impact.

3. The parking study adequately addressed the potential impacts from the proposal's potential to increase household occupancy.

QACC's claim that the FEIS inadequately assessed the impacts of the change in maximum household occupancy fails to comprehend the FEIS's existing data and analysis.

First, the existing data shows that the likelihood of multiple residents in an ADU is exceedingly rare: the average number of adults per ADU in the Portland data is 1.36,[119] and only one percent of ADUs have three residents, with the vast majority having only one resident (64.7%) or two residents (34.3%).[120] This data reflects the Portland regulations' allowance for greater occupancy and shows that very few ADUs approach the

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[117] Findings and Decision, W-17-006–W-17-014, at p. 34 (concluding that once an agency has issued a determination of significance and committed to preparing an EIS, "[l]abeling an impact 'significant' is no longer required"). No published Washington case has found an FEIS inadequate on the grounds that the FEIS should have labeled an impact as "significant" or "not significant."

[118] FEIS at 4-185 to 4-188 (analysis of all alternatives acknowledges that "Although none of the four study locations exceed the 85 percent threshold, there are likely some specific blocks within the study area where on-street parking utilization currently exceeds parking supply and would be more sensitive to changes in local population.").

[119] FEIS, App. B at B-20.The FEIS uses available data of ADU residents in Portland because there is no available data about the demographics and travel characteristics for current ADU residents in Seattle. The analysis then makes several adjustments to the Portland data to result in representative data for Seattle residents in the study locations. FEIS at 4-181.

[120] FEIS, App. B at B-20.

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maximum limit or even have more than two residents.[121] Thus, the "max occupancy" scenario reflects a "very rare occurrence."[122] Indeed, even Mr. Tilghman concedes, based on the average, that it is more likely that an ADU will have one person instead of four or five.[123] SEPA does not require analysis of remote, hypothetical, or speculative impacts.[124] SEPA only requires the analysis of "probable adverse environmental impacts that are significant"—those with "a reasonable likelihood of more than a moderate adverse impact on environmental quality."[125] An exceedingly rare occurrence need not even be considered under SEPA, much less extrapolated to every block in a study area. Indeed, Mr. Tilghman cautioned that he analyzed the impact of a maximum occupancy property on each block in the study location to act as a "sensitivity test" and did not intend to suggest with that exercise that one maximum occupancy lot would be likely to occur on each block of the study location.[126] It is telling that even Mr. Tilghman did not apply a "max occupancy" calculation for his own parking study of a specific project, which contradicts his assertion that the City should have done so in the FEIS.[127] Indeed, Mr.

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[121] While QACC may argue that Portland allows fewer residents than Seattle, as Ms. Pennucci testified, the household limits do not operate as straightforward numbers. Seattle currently allows any number of related residents, or not more than eight unrelated residents, in a unit. Portland allows any number of related residents, plus five additional residents. Thus, in either instance, a household could theoretically have a large number of residents, although the numbers suggest that that is not occurring in ADUs. Hr'g Tr. 159:15–161:3, March 29, 2019.

[122] Hr'g Tr. 160:14-25, March 29, 2019 (Testimony of A. Pennucci).

[123] Hr'g Tr. 236:4–239:3, March 25, 2019 (in a lengthy clarification, Mr. Tilghman agrees it is more likely that ADUs will have one occupant, and clarifies that his analysis is "not saying they [each block] will all each have one max occupancy lot . . . .").

[124] WAC 197-11-060(4), 197-11-782 (distinguishing "probable" from "remote" and "speculative" impacts); SMC 25.05.060.D, 25.05.782.

[125] WAC 197-11-402(1), 197-11-794(1); SMC 25.05.402.A, 25.05.794.A.

[126] Hr'g Tr. 238:1-239:3, March 25, 2019 (Testimony of R. Tilghman).

[127] Hr'g Tr. 227:14–228:10, March 25, 2019 (Testimony of R. Tilghman); Ex. 11 at 1. Notably, even though Mr. Tilghman's analysis is of a specific project (for which SEPA requires more detail and analysis than a nonproject action) Mr. Tilghman did not use the same max occupancy assumptions he argues that the City should have used in its nonproject action. While the residential uses at issue in Ex. 11 are multifamily apartments

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Tilghman's actual approach he utilized in his own parking study (in contrast to the arguments he advanced in this hearing) confirm the City's approach and is consistent with Ms. Leighton-Cody's testimony that parking generation analyses are typically based on the size of the unit, rather than the maximum occupancy of the unit.[128]

Additionally, while data shows that max occupancy scenarios are only a remote possibility, the FEIS conservatively reflects the likely maximum ADU occupancy for the parking impact analysis by assuming that all eligible lots would build two ADUs and applying the average number of occupants to each unit on the lot (principal residence and two ADUs). This effectively doubles the parking demand of the ADUs even though the ADU development forecast in Chapter 4.1 concluded that most lots will have only one ADU.[129] That approach is reasonable and conservative. It will inform decision-makers of the relative increase in parking impact from the proposal.

Finally, even in the highly unlikely event that one lot results in 12 residents, the FEIS discloses and discusses the possibility of localized impacts on some specific blocks, where parking utilization could exceed supply.[130]

4. The parking study was not required to further divide the study locations along "perceived barriers" to pedestrians.

The Examiner should also reject Mr. Tilghman's contention that the City should have further divided the study locations into smaller subarea based on purported

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and not ADUs, the code establishes maximum occupancy requirements for those units, which Mr. Tilghman did not apply. Specifically, the code creates a maximum occupancy of eight persons per apartment unit. Hr'g Tr. 45:18–46:13, 48:13–49:5, March 27, 2019 (Testimony of N. Welch); *see also* SMC 23.84A.016. Mr. Tilghman assumed the average, rather than the maximum of 8 for his study.

[128] Hr'g Tr. 63:3–19, March 29, 2019.

[129] FEIS, App. A at A-70 (Exhibit A-47 demonstrates that the total number of parcels that build exactly one ADU – including both the rows that will build either one AADU or one DADU – exceed the number of parcels that build two by a significant margin); Hr'g Tr. 159:3–20, March 29, 2019 (Testimony of A. Pennucci).

[130] FEIS at 4-185 to 4-189 (discussing potential localized impacts for Alternative 2, Alternative 3, and the Preferred Alternative).

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"perceptual barriers to pedestrians," which he claims will functionally limit people's decisions of where they should park.[131] Ms. Leighton-Cody refuted the suggestion that the "perceived barriers" should have been considered in the study location for a nonproject action, the purpose of which was to look at broader trends over a larger area.[132] Ms. Leighton-Cody also noted inconsistencies in Mr. Tilghman's selection of perceived barriers.[133]

Mr. Tilghman's argument that the City should have applied perceived barriers in its study is belied by the fact that Mr. Tilghman did not himself apply perceived barriers conducting his own study for a project action. While Mr. Tilghman sought to reconcile this inconsistent position in his testimony, the parking study he prepared speaks for itself and clearly shows that he included parking supply on both sides of a "perceived barrier" for a project located on one side of that barrier.[134]

Most importantly, the upshot of the inclusion of "perceived barriers" is inconsequential to these proceedings. At most it shows that some portions of each study location may have utilization rates higher or lower than the study area as a whole. As

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[131] *See, e.g.*, Hr'g Tr. 171:16–172:25, March 25, 2019.
[132] Hr'g Tr. 36:23–39:9, March 29, 2019.
[133] Hr'g Tr. 36:23–39:9, 57:13–58:7, March 29, 2019.
[134] Ex. 11 at 2 (map showing study area for on street parking includes areas on both sides of Greenwood Ave N and the accompanying table includes the entirety of the study area on both sides of Greenwood in the parking supply); Hr'g Tr. 228:11–230:5, March 25, 2019. Tilghman's study never uses the phrase "perceived barrier. Indeed, while Mr. Tilghman claimed that his parking study concludes that on-street parking is not available on both sides, in fact, the document concludes that "Legal curbside space is available" from both sides of Greenwood Ave N, even if spillover would be expected to favor parking west of Greenwood Ave for an easier walk to the site. Ex. 11 at 11. At no point does Mr. Tilghman espouse the same dogmatic view that he asserts in these proceedings that parking supply on another side of a "perceived barrier" should be excluded from a study area or kept separate.

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noted above, the EIS acknowledges that potential localized impacts on some specific blocks, where parking utilization could exceed supply.[135]

5. The parking study assumed reasonable vehicle ownership rates for ADUs, whether or not ADUs will be sold as condominiums.

QACC's claim that the parking analysis should have considered condominiumization also has no merit. It is undisputed that there is no data of vehicle ownership for condominiumized ADUs,[136] or even data of vehicle ownership for condominiums in general,[137] and none of Appellant's witnesses attempted to conduct this analysis or testified about any methodology to calculate vehicle ownership for condominiumized ADUs. Instead, the FEIS used available data from Portland and Seattle, with reasonable and conservative adjustments. Further, as Ms. Leighton-Cody explained, parking generation analyses are typically based on the size of the unit.[138] Using the vehicle ownership rates for owner-occupied units would not be appropriate because ADUs have greater size limitations and are generally smaller than owner-occupied units like single-family homes.[139]

6. The parking study for a nonproject EIS is not required to consider pipeline projects to provide an accurate sample that can be used in a comparative analysis.

QACC's claim that the FEIS should have considered "pipeline projects" is inconsistent with the level of analysis for most nonproject EISs. Mr. Tilghman, based on his "occasional" work on nonproject review, testified that he believed that project-level and nonproject EISs entail the same level of review.[140] Mr. Tilghman's opinion is

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[135] FEIS at 4-185 to 4-189 (discussing potential localized impacts for Alternative 2, Alternative 3, and the Preferred Alternative).
[136] Hr'g Tr. 191:16–20, March 25, 2019 (Testimony of R. Tilghman).
[137] Hr'g Tr. 64:4–14, March 25, 2019 (Testimony of A. Leighton-Cody).
[138] Hr'g Tr. 65:8–18, March 25, 2019.
[139] Hr'g Tr. 62:8–63: 19, March 29, 2019 (Testimony of A. Leighton Cody).
[140] Hr'g Tr. 135:10–12, 203:4–14, March 25, 2019.

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inconsistent with SEPA's express allowance of greater flexibility and appropriate deviations in level of detail for nonproject actions.[141] Ms. Snyder, who has worked on several nonproject EISs within the City,[142] testified that pipeline projects are typically not considered in nonproject EISs because the studies have longer timeframes, do not evaluate on specific projects, and recognize that conditions constantly change.[143] Moreover, the goal of a study like this is to identify representative conditions for purposes of evaluation and comparison. In that context, pipeline projects are simply not relevant. Thus, the fact that a specific project is proposed to be built within a study location does not alter the representativeness of the study location's current conditions or the data collected within the study location.[144]

7. Discussion of mitigation is adequate.

Finally, QACC's challenges to the adequacy of mitigation measures are not relevant in this appeal. During the hearing, Appellant's counsel questioned Mr. Tilghman about the efficacy or adequacy of the restricted parking zone ("RPZ") program or other mitigation measures discussed in the FEIS.[145] Such issues are beyond the scope of this appeal and are irrelevant. An EIS must discuss potential mitigation and indicate the mitigation's "intended environmental benefits,"[146] but an analysis of the effectiveness of mitigation measures is unnecessary. In *Glasser v. City of Seattle*, 139 Wn. App. 728, 739–42, 162 P.3d 1134, 1139–40 (2007), the court rejected the challenger's argument that SEPA requires "reasonable assurances" that an EIS's mitigation measures will actually occur or will actually mitigate adverse impacts. Characterizing the argument as a

[141] WAC 197-11-442(1); SMC 25.05.442.D.
[142] Hr'g Tr. 109:18–110:3, March 29, 2019.
[143] Hr'g Tr. 118:22–120:14, March 29, 2019.
[144] Hr'g Tr. 135:18–136:12, March 29, 2019.
[145] Hr'g Tr. 203:23–204:10, March 29, 2019.
[146] SMC 25.05.400.B;.440.E.3.d.

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substantive SEPA issue, the court reiterated that "SEPA is primarily a procedural statute" that "does not demand a particular substantive result."[147] "The purpose of the EIS is to disclose, not dispose" of impacts.[148] The Examiner has also dismissed challenges to the adequacy of proposed mitigation as substantive SEPA issues outside the Examiner's jurisdiction.[149] Therefore, any arguments regarding the efficacy of the RPZ program or any other mitigation measure need not be considered here.

Even if that were not the case, Appellant's arguments about the purported limitations of the RPZ program are not persuasive. Counsel's questions suggested a very myopic and particularized concern about the ability of the RPZ program to address a maximum occupancy scenario in which a lot includes 12 unrelated people living together.[150] As indicated in section III.B.3, above, that scenario is exceedingly rare. Even if it were to occur, even the Appellant's expert recognized that the specific facts of a particularized parking location would be important to evaluate whether the RPZ is effective or not.[151] The Examiner should reject any wholesale characterization of the effectiveness of mitigation on the basis of a speculative scenario without any project-level facts that are unavailable at this time (precisely because the subject of this EIS is a

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[147] *Glasser*, 139 Wn. App. at 742; *see also Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 312, 197 P.3d 1153, 1171 (2008) (upholding adequacy of EIS's discussion of mitigation where the EIS identified the principles and variables relevant to mitigation, but did not analyze mitigation in more specificity); *Solid Waste Alternative Proponents v. Okanogan Cty*, 66 Wn. App. 439, 447, 832 P.2d 503, 508 (1992) ("*SWAP*") (rejecting argument that an EIS was inadequate because it failed to assess the "cost and effectiveness" of proposed mitigation measures).

[148] Settle, *supra* note 8, §14.01[2][c], at 14-73.

[149] Findings and Decision, W-17-006–W-17-014, at p. 26 (noting dismissal of issues "challenging the adequacy of mitigation measures identified in the FEIS"); Order on Respondents' Joint Motion to Dismiss, MUP-15-010 (W) to -015 (W), May 21, 2015, at p. 6-7 (stating "the adequacy of the Department's proposed SEPA mitigation, as opposed to the EIS's discussion of mitigation measures, is not an issue within the Examiner's jurisdiction in these appeals").

[150] *See, e.g.*, Hr'g Tr. 203:18–204:13, March 29, 2019 (Testimony of R. Tilghman).

[151] Hr'g Tr. 209:13–210:15, March 29, 2019 (Testimony of R. Tilghman)

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nonproject action). Moreover, the EIS identifies the potential for localized impacts that are not based on consideration of mitigation measures for their conclusion. As such, even if the adequacy of mitigation were an appropriate topic in this hearing, the discussion of mitigation in the EIS is adequate.

C. The FEIS's aesthetics analysis meets the rule of reason

The aesthetic impacts analysis utilizes typical and standardized methodology to assess impacts, including the use of models to show aesthetic implications of the various development outcomes that could occur with each alternative. The FEIS discusses the potential aesthetic impacts of specific elements of the proposal described in Chapter 2, including, among others, the number of ADUs, maximum size and height, and floor area ratio ("FAR") limits.[152] The City retained an expert, Oliver Kuehne, to prepare visual representations of the development outcomes associated with each alternative. Mr. Kuehne has prepared dozens of aesthetics analysis of code and plan changes.[153] He used a computer model to illustrate the potential impacts of these elements.[154] For the FEIS, Mr. Kuehne applied the common approach for aesthetics analysis and used a three-dimensional modeling software that accurately reflects all real-life dimensions and accurately reflects differences in development regulations.[155]

The models depict a hypothetical two-block scenario carefully developed to reflect a representative range of characteristics throughout the study area, including a range of lot sizes and dimensions, parking conditions, and the presence of an alley.[156] As both Mr. Kuehne and Mr. Welch testified, the hypothetical allows for depiction of a wider range of characteristics than might exist in an actual block, and in that sense, provides better

[152] *See e.g.*, FEIS at 4-145 to 4-153.
[153] Hr'g Tr. 98:5–21, March 27, 2019 (Testimony of O. Kuehne).
[154] Hr'g Tr. 100:15–102:22, March 27, 2019. *See* FEIS at 4-93.
[155] Hr'g Tr.101:10–102:22, 106:20–107:4, March 27, 2019.
[156] Hr'g Tr. 74:15–78:22, March 27, 2019 (Testimony of N. Welch).

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representation than using an actual block. The hypothetical's results can be applied to specific properties and specific locations, and thus is a reasonable and adequate approach to inform decision-makers of potential impacts.[157]

For each alternative, the models show three scenarios: existing conditions; a ten-year scenario showing realistic estimated development within the ten-year study period, based on the ADU production estimates generated from the housing and socioeconomics analysis; and a full build-out scenario, depicting the complete redevelopment of all lots and the maximum scale of development allowed under each alternative.[158] The FEIS informs readers that the full build-out scenario is not an expected outcome of any alternative, but is included for illustrative purposes.[159] The City included this "full-build out" depiction to respond to the Examiner's decision in the earlier DNS appeal, in which the Examiner required "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 3,200 square feet."[160] The FEIS's depictions of the "full-buildout" scenario comply with and even exceed the Examiner's request.

The depictions generated by the model were specifically designed to highlight impacts. The models' depictions generally maximize the development outcomes allowed under each alternative, and in particular, the development potential for the ADUs.[161] Additionally, as Ms. Pennucci explained, the team worked with Mr. Kuehne to select illustrations that best showed changes between the no action and action alternatives.[162] Because many changes were not visible in the pedestrian- or street-level illustrations, the

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[157] Hr'g Tr. 75:25-77:15, 79:17–80:1,107:14–108:15, March 27, 2019.
[158] FEIS at 4-94.
[159] FEIS at 4-98.
[160] Findings and Decision, W-16-004, at 13.
[161] Hr'g Tr. 103:1–15, 105:6–106:4, March 27, 2019 (Testimony of O. Kuehne).
[162] Hr'g Tr. 146:17–147:6, March 29, 2019.

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FEIS includes oblique or bird's-eye views that better depict the magnitude of change, even though those views do not reflect how people will experience or view aesthetics.[163]

In general, the FEIS identifies some variation of aesthetic impacts across the action alternatives that correspond with the differences in specific development standards. For the action alternatives in general, the FEIS finds that there could be minor impacts to height, bulk and scale generally and also acknowledges potential localized impacts to the extent that ADUs are concentrated in a particular area.[164] For the Preferred Alternative specifically and for Alternative 3, the addition of an FAR limit would serve to lessen those aesthetic impacts because it would reduce the size of the largest house that someone could build on that property.[165] Finally, based on the conclusion in the Forecast Model that fewer demolitions of single-family homes would occur in all action alternatives compared to Alternative 1, the analysis recognizes a corresponding reduction in aesthetic impacts that would occur from tear-downs as compared to the no-action alterative.[166] In summary, the aesthetics analysis reasonably and conservatively discusses potential aesthetic impacts. QACC has failed to satisfy its burden to prove otherwise.

1. QACC's criticisms are based on inaccurate depictions of the proposal and fail to establish that the FEIS's analysis is unreasonable.

Throughout his testimony, Mr. Kaplan mischaracterized or misunderstood elements of the proposal in a manner that exaggerates the purported aesthetic impacts. Moreover, his testimony established that the aesthetics exhibits he presented are not accurate depictions of the proposal, and that he lacked knowledge of key aspects of both the FEIS's exhibits and even QACC's exhibits. In short, many of the factual bases for Mr.

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[163] Hr'g Tr. 146:17–148:7, March 29, 2019.
[164] FEIS at 4-142 to 4-161.
[165] FEIS at 4-155 to 4-157; 4-159 to 4-160.
[166] *See, e.g.*, FEIS at 4-159–160.

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Kaplan's opinions were proven incorrect, undermining the credibility and weight of his opinions. Mr. Kaplan's factual errors and guesswork were exposed in a number of ways:

- Mr. Kaplan admitted that his illustrations are not dimensioned and that he does not know the actual measurements of the illustrations' depictions, while also incorrectly claiming that the FEIS's models are not dimensioned. As discussed above, unlike Mr. Kaplan's illustrations, the FEIS's models accurately capture real-life dimensions.[167]
- Contrary to Martin Kaplan's testimony that the proposal would encourage small lots and lead to 3,200 square foot lots,[168] the proposal does not make any changes to subdivision laws or to minimum lot size.[169]
- Contrary to Mr. Kaplan's references to greater or increased lot coverage under the proposal,[170] the proposal makes no change to current lot coverage regulations.[171] Further, although the proposal contemplates a change to *rear yard* coverage limits,[172] the change only applies to DADUs that meet certain requirements.[173]
- Mr. Kaplan testified that in his opinion and judgment, the street widths shown in the FEIS's models are not representative of typical city streets, though he

[167] Hr'g Tr. 175:12–15; 146:5–8, March 26, 2019 (When asked about the dimensions of models Mr. Kaplan claimed to be representative of the proposal, he answered, "I know nothing about the measurements of the homes [shown in the model].").
[168] Hr'g Tr. 45:8–19, March 26, 2019. *See also* Ex. 28 at 11 (includes text stating: "Subidivsions: Reduced Min. Lot Size to 3,200 from 4,000 sq. ft.").
[169] *See* FEIS at 2-4 ("Minimum lot size to create a new single-family lot—No change from current regulations.").
[170] Hr'g Tr. 32:3–10, March 26, 2019.
[171] FEIS at 2-5.
[172] The rear yard is the area between the side lot lines extending from the rear lot line a distance of 25 feet or 20 percent of the lot depth. FEIS at 2-13.
[173] FEIS at 2-5 (requiring 60 percent rear yard coverage for a DADU whose title height is fifteen feet or less).

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admitted he did not know what the model's widths were.[174] However, Mr. Welch testified that a typical street width in single-family zones is 26 feet, and the model depicts a street width of 26 feet.[175]

- Mr. Kaplan wrongly claimed that because the FEIS never identified the lot sizes shown on the model, he calculated the lot sizes.[176] In fact, the FEIS provides an exhibit showing the sizes of each lots, and the exhibit shows that Mr. Kaplan's calculations of lot size were incorrect.[177]
- Mr. Kaplan incorrectly claimed that certain illustrations prepared by the City of Portland represented what could be built under some of the action alternatives, and in particular, showed the application of the maximum FAR limit under the Preferred Alternative.[178] Mr. Welch clarified that the Portland illustrations do not accurately reflect what could be built under the current Code, much less under the proposal. Moreover, the square footage annotations added to the illustrations alter the original numbers used in the Portland document—the Portland study stated that the illustrations depict larger square footage and FAR than QACC claimed.[179]
- Mr. Kaplan's exhibit deliberately misleads the Examiner by taking exhibits from the MHA FEIS illustrating the multifamily Lowrise 1 ("LR 1") zone and relabeling them as development that the proposal would allow to be constructed in single-family residential neighborhoods, including triplexes and apartment buildings. Mr. Kaplan further claimed that the proposal would allow

[174] Hr'g Tr.172:13–174:13, March 26, 2019.
[175] Hr'g Tr. 76:21–77:9, March 27, 2019.
[176] *See* Ex. 28 at 17; Hr'g Tr. 56:17–22, March 26, 2019.
[177] FEIS at C-2.
[178] *See* Ex. 28 at 4; Hr'g Tr. 33:11– 35:25, 145:15–146:4, March 26, 2019.
[179] Hr'g Tr. 92:1–23, March 27, 2019.

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even greater density than would be allowed in LR 1, through the change in the maximum household size.[180] Mr. Welch, who worked on the MHA FEIS, testified that the MHA drawings do not reflect what could be built on single-family zoning, for several reasons. The LR 1 drawings show a total gross area that "far exceeds" what would be allowed under the Preferred Alternative (and exceeds what is allowed under the current Code), nearly double the lot coverage in single-family zones, and allow for significantly more occupancy than single-family zoning.[181]

- The chart in exhibit 28 that purported to calculate the increase in number of occupants and vehicles per lot contains erroneous and questionable figures.[182] Initially, the spreadsheet showed an "existing average number of occupants per lot" to be 8.5 and "proposed occupants per lot" to be 16.5. Mr. Kaplan admitted the first figure was incorrect and was unable to explain initially how the estimates were generated. Mr. Kaplan ultimately apologized for and admitted the errors in the spreadsheet.[183]
- Even the corrected figures for the chart that Mr. Kaplan provided on re-direct rely on the grossly misleading assumption that max occupancy would occur throughout the entirety of the study area on literally every parcel over 3200 square feet within the two block area. As noted above, the only data in the record confirm that the maximum occupancy scenario would be exceedingly rare. Even Appellant's expert witness was unwilling to make the

[180] *See* Ex. 28 at 5-6; Hr'g Tr. 39:4–40:11, March 26, 2019.
[181] Hr'g Tr. 48:13–49:5, 176:12–178:18, March 27, 2019.
[182] *See* Ex. 28 at 18.
[183] Hr'g Tr. 52:4–56:16, March 26, 2019; Hr'g Tr. 20:3–21:7, March 27, 2019. When asked about the figures, Mr. Kaplan's responses included, "I did not come up with that number, so I can't testify to that"; "I can't recall exactly"; "I'd have to figure out that number there"; and "I didn't do that count."

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unsubstantiated leap Mr. Kaplan urges in his exhibit.[184] Mr. Tilghman's recognition that the maximum occupancy scenario is unlikely to occur once on each block contradicts Mr. Kaplan's absurd suggestion that the City should have assumed that literally every lot over 3200 square feet within a two block area would convert from the average of 2.06 people per principal dwelling unit to the maximum 12 unrelated people per lot for a 600% increase from current conditions.[185] Where the only data in the record contradicts Mr. Kaplan's assumption and where even QACC's own experts disagree with Mr. Kaplan, the Examiner should not pay any credence to his calculations.

- Mr. Kaplan's exhibit suggesting that the proposal's "loopholes" would allow single-family FAR to exceed the FAR limits of multifamily LR1 zoning is false.[186] As Mr. Welch explained, Mr. Kaplan's "loophole" is based on an incorrect understanding of lot coverage calculation under the Code, and under no circumstances would the proposal allow the FAR to exceed the LR1 FAR limits.[187]

In sum, QACC's purported aesthetics study is riddled with pervasive errors, inaccuracies, and mischaracterizations, and thus merits no weight. Mr. Kaplan's suggestion that his experience qualifies him to make judgments in the absence of his understanding of the facts[188] defies logic. Moreover, the number of times Mr. Kaplan was

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[184] Hr'g Tr. 236:4–239:3, March 25, 2019 (in a lengthy clarification, Mr. Tilghman agrees it is more likely that ADUs will have one occupant, rather than maximum occupancy, and clarifies that his analysis is "not saying they [each block] will all each have one max occupancy lot…"). Mr. Tilghman's clarification that he is not suggesting there will be even one max occupancy lot per block stands in stark contrast to Mr. Kaplan's invitation to assume that they will be on every eligible parcel in a two block location.
[185] Hr'g Tr. 27:13–29:18, March 26, 2019
[186] Ex. 28 at 35.
[187] Hr'g Tr. 186:25–188:10, March 27, 2019.
[188] Hr'g Tr. 174:1–175:13, March 26, 2019.

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proven wrong belies his claims of expertise. His methodology is unreasonable and misleading, particularly when contrasted with the level of precision in the FEIS's methodology.

2. SEPA does not compel a neighborhood-specific analysis and the City's decision to model two hypothetical blocks with representative conditions is reasonable.

None of QACC's other criticisms showed that the FEIS's methodology was unreasonable. Notwithstanding QACC's desire for neighborhood- or location-specific analysis, nothing under SEPA compels a neighborhood-specific level of analysis. On the contrary, SEPA states that where a nonproject proposal "concerns a specific geographic area [such as the City of Seattle], site specific analyses are not required[.]"[189] Thus, in the MHA FEIS, the City provided models of potential development scenarios and Code changes but did not model changes at a neighborhood- or location-specific level, and the Examiner concluded the analysis was "adequate for a general citywide discussion of aesthetic impacts."[190]

The City's witnesses confirmed that neighborhood- or location-specific analysis is not necessary. As discussed above, Mr. Kuehne and Mr. Welch explained that the model's hypothetical is in fact more representative than a location-specific model because it captures a greater variety of citywide conditions than would be possible if the model showed specific neighborhoods.[191] Further, the FEIS's team considered modeling specific locations, but reasonably decided against it for several reasons. First, the more location-specific the model is, the less helpful it is for drawing conclusions that apply broadly across the study area.[192] Second, a location-specific approach entails illustrating future

[189] WAC 197-11-442(3); SMC 25.05.442.C.
[190] Findings and Decision, W-17-006 toW-17-014, at p. 30.
[191] Hr'g Tr. 74:13–80:1; 107:9–108:10, March 27, 2019.
[192] Hr'g Tr. 78:25–80:1, March 27, 2019 (Testimony of N. Welch).

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outcomes on specific properties, could be construed by property owners as a forecast of future outcomes on their properties, and produces more distractions than a hypothetical representation.[193]

Finally, because the model is adequately representative, the additional cost of modeling actual blocks in multiple neighborhoods, as Mr. Kaplan suggested, is not justified. The two-block model alone costs $15,000, not including the cost of drafting the written analysis in the chapter. Modeling eight additional blocks would cost $120,000 for the modeling alone. Combined with the additional parking data collection that QACC proposed, the modeling and parking data alone would consume nearly the entire FEIS budget.[194] Under SEPA's "broad, flexible cost-effectiveness standard,"[195] the dramatically increased costs of analyzing to the level of detail that QACC desires cannot be justified, particularly when the FEIS's existing analysis is reasonable and sufficient to inform decision-makers of probable impacts.

3. QACC's remaining criticisms of the aesthetic impact analysis are without merit.

QACC's other criticisms amount to classic "fly-specking" that criticize the level of detail but fail to identify any probable significant adverse impacts that the FEIS failed to analyze. For example, Mr. Kaplan claims that the FEIS failed to analyze the "box" form resulting from two AADUs, which he argues is the largest aesthetic impact.[196] As a preliminary matter, it is undeniable that the aesthetic analysis depicts two ADUs,[197] even though the production numbers from the Forecast Model demonstrate that the prevalence of lots that will construct two ADUs (in those alternatives in which that outcome is

[193] Hr'g Tr. 78:25–80:1, 107:9–108:10 March 27, 2019 (Testimony of N. Welch and O. Kuehne).
[194] Hr'g Tr.169:24–170:20, March 29, 2019 (Testimony of A. Pennucci).
[195] *CAPOW*, 126 Wn.2d at 362.
[196] Hr'g Tr. 112:16 – 113:8, March 26, 2019.
[197] *See, e.g.*, FEIS at 4-144, 4-133, 4-134, 4-137, 4-138, 4-140, 4-147, 4-152, 4-156.

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allowed) is significantly lower than the number of lots that will build only one.[198] The only question is whether the aesthetic analysis should have focused more on the combination of one AADU with one DADU, or the combination of two AADUs. On that precise question, the City's experts disagree with Mr. Kaplan's fundamental premise. As Mr. Kuehne explained, the depiction of two ADUs in the form of an AADU and a DADU presents the largest aesthetic impact because the most visible aspect, and the majority of the bulk potentially resulting from the proposal, would be the addition of a DADU in the rear yard.[199] Thus, the addition of a DADU results in greater perceived impact because it produces two different volumes.[200] Mr. Kuehne's opinion and judgment is entitled to greater weight than Mr. Kaplan's, given Mr. Kuehne's extensive experience modeling code changes. The City's decision to emphasize depictions of DADUs (whether with or without an accompanying AADU) rather than two AADUs was reasonable and produces a more conservative depiction of impacts.

Importantly, contrary to Mr. Kaplan's assertions, the FEIS does illustrate the large, boxy form that is possible even under existing conditions.[201] In particular, the models of Alternatives 1 and 2 show the possibility of an existing house being torn down and replaced with a new house built to the maximum possible footprint.[202] To the extent QACC believes the proposal would result in greater footprints or forms not captured within the models, QACC has not presented credible exhibits or testimony establishing the existence of such a footprint or form. As discussed above, QACC's exhibits conveniently

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[198] FEIS, App. A at A-70.
[199] Hr'g Tr. 118:7–12, 165:12–168:15, March 27, 2019.
[200] Hr'g Tr. 118:7–12, 165:12–168:15, March 27, 2019.
[201] *See, e.g.*, Hr'g Tr. 72:11-73:4, March 27, 2019 (Testimony of N. Welch); FEIS at 4-88 (showing "boxy form" allowed under current code for single-family homes that maximizes the building envelope).
[202] *E.g.*, FEIS at 4-97, 4-98, 4-101, 4-109, 4-113.

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ignore or misapprehend the limiting regulations and standards to create the specter of a house that, in reality, simply cannot be built under the regulations.

Lastly, QACC's criticisms of the depictions of trees and cars in the aesthetics models misapprehend and mischaracterize the aesthetics analysis. As Mr. Kuehne testified, the purpose of an aesthetics analysis is to focus on showing potential changes to the built form, not to trees or cars.[203] Further, the FEIS does illustrate representative changes, including loss of trees, increase in cars, and a range of parking access conditions, while expressly directing the reader to the Land Use and Parking and Transportation chapters for the relevant impacts analyses.[204] In fact, the redevelopment scenarios show more trees removed than was necessary to accommodate the redevelopment, because in some instances, trees blocked the view of the redevelopment.[205]

In short, the FEIS's methodology is reasonable, and none of QACC's criticisms showed a probable significant adverse impact that the FEIS failed to analyze.

D. The FEIS adequately analyzed "changes to the land use form"

The Examiner should reject QACC's assertion that the City failed to adequately analyze the proposal's potential "changes to the land use form." QACC's characterization of that impact is shifting. Mr. Kaplan alleged a "fundamental change in the land use form" as a catch-all phrase to capture a variety of impacts, many of which have already been addressed in this brief in the discussion of potential parking, socioeconomic, and aesthetic impacts. To the extent Mr. Kaplan's claims of a "fundamental change in land use form" entail other categories of impacts, they are without merit.

[203] Hr'g Tr. 112:18–113:14, March 27, 2019.
[204] FEIS at 4-92, 4-94.
[205] Hr'g Tr. 112:18–115:11, March 27, 2019 (Testimony of O. Kuehne).

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1. The City's analysis of land use impacts includes discussion of "changes to land use form" and satisfies the rule of reason.

The FEIS's land use analysis satisfies the rule of reason. The analysis identifies categories of land use impacts based on a standard methodology, including intensification of use, density increase, and change in building scale.[206] Consistent with the Examiner's decision in the DNS appeal, the analysis evaluates impacts "by considering the potential for the change to constitute a fundamental change in land use form[,] centered on whether newly constructed ADUs would be incompatible with existing development in the city's single-family zones."[207] The analysis also looks at other types of impacts, such as changes to shorelines, environmentally critical areas, open space, historic resources, and tree canopy and vegetation (discussed in the next section).[208] The FEIS finds that the proposal will result in minor increases in building and population density that will unfold incrementally over ten years and would likely continue to be distributed throughout the city.[209] Combined with the reduction in teardowns associated with the proposal (which help preserve existing land use form), the FEIS anticipates no probable significant adverse impacts, though the FEIS discusses the possibility of localized impacts if ADU production is higher in a concentrated area.[210] Notably, none of QACC's witnesses challenged the adequacy or reasonableness of the FEIS's land use analysis or its discussion of changes to the land use form.

[206] FEIS at 4-62.
[207] FEIS at 4-62.
[208] FEIS at 4-64 to 4-66.
[209] FEIS at 4-64 to 4-66
[210] FEIS at 4-64 to 4-66.

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

2. The proposal does not change any statutes governing to the existing legal practice of "condominiumization" and Appellant's speculation of additional impacts to the "land use form" are not grounded in fact or reason.

As described above, the socioeconomic analysis, and the Forecast Model, specifically, incorporate the possibility of condominiumization of ADUs. The Examiner should therefore reject Mr. Kaplan's and Reid's speculation that the ADU production numbers underestimated the impact of that ownership potential. QACC's remaining allegations that condominiumization will alter the land use form are without merit.

QACC's theory is principally based on its argument that condominiumization is illegal.[211] It is not. The current Land Use Code does not distinguish between rental and condominium units, and nothing in the Code prohibits condominiumization, a process governed by state law.[212] The proposal does not change anything that would alter the legal outcome under existing Code. As summarized in the email exchange between Mr. Welch and Andy McKim, a land use planner supervisor with SDCI, SDCI has no objection to condominiumization grounded in the Land Use Code and has taken the position that it is legal under existing Code.[213] The Examiner should give deference to that agency interpretation of its own Code.[214] Indeed, QACC has presented two examples demonstrating that the practice is legal, albeit a rare occurrence.

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[211] Hr'g Tr. 102:18–24, March 26, 2019 (Testimony of M. Kaplan).

[212] Ex. 42. The email exchange predates this litigation, and thus SDCI's interpretation was not developed for or influenced by QACC's claims.

[213] *Id.* As noted in Mr. McKim's email, a condominiumized ADU would need to satisfy the owner-occupancy requirement set forth in SMC 23.44.041. With respect to the two condominium projects on which Mr. Kaplan testified, the condominium documents contain specific provisions. Ex. 29 (labeled APL EX 8A(4), at 9), Ex. 30 (labeled APL EX 8B(3), at 14) (stating, "No more than one Unit can be leased; the other Unit must be owner occupied" and "The Home constructed within Unit A is subject to a Covenant for Owner Occupancy[.]").

[214] Courts give substantial weight to an agency's interpretation of statutes and regulations within its area of expertise. An agency's interpretation will be upheld if "it reflects a plausible construction of the language of the statute and is not contrary to the legislative

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

QACC's assertions to the contrary do not appear to be based on any code, statute or case law. The only legal theory that Appellant suggested in Mr. Kaplan's testimony is QACC's belief that the establishment of a condominium in the two examples QACC entered into the record somehow violate the code's owner-occupant requirement for ADUs.[215] Pursuant to that specious theory, the owner creating the ADU violates the provision if the owner sells to another owner.[216] That theory is inconsistent with the Code and with the declarations recorded in the two specific examples that QACC entered into the record. The Code provides that "an owner" must occupy the principal house or the ADU, and the Code expressly contemplates the sale of the property, requiring recordation of a covenant of owner-occupancy to notify "all prospective purchasers" of the requirement.[217] The covenant runs with the land and is binding upon "the owner, his or her heirs and assigns, and upon any party acquiring any right, interest, or interest in the property."[218] Thus, contrary to Mr. Kaplan's interpretation of the covenant and the Code that requires it, the sale or transfer of condominium ownership does not render the projects illegal.

Moreover, there is no evidence in the record that the proposal will increase teardowns and subsequent construction of larger units that are sold as condominiums, beyond that of Mr. Kaplan and Mr. Reid's unsupported speculation.[219] The only technical

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intent." *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17, 20 (2004). In this case, as the agency charged with promulgating rules and issuing interpretations of the Land Use Code, SDCI has expertise in the matter, and its interpretations of the Land Use Code are entitled to deference. SMC 23.88.010, -.020 (authorizing SDCI to promulgate rules and issue interpretations of the Land Use Code).

[215] *See, e.g.*, Hr'g Tr. 187:22–188:23, March 26, 2019 (Testimony of M. Kaplan).

[216] Hr'g Tr. 188:4–23, March 26, 2019.

[217] SMC 23.44.041.C.

[218] SMC 23.44.041.C.

[219] Mr. Kaplan theorized that the proposal will change development incentives, such that there will be "almost zero chance" that a homeowner would preserve the existing home.

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Seattle, WA 98104
(206) 623-9372

analysis in the record demonstrates that the action alternatives are likely to *reduce* the number of teardowns compared to the no action alternative, and further finds that lower price neighborhoods would see the smallest potential changes in ADU production under any action alternative.[220] Moreover, contrary to QACC's assertions, the FEIS analyzes the likelihood of the for-sale outcome in all instances. There is simply no support for QACC's assertions that the FEIS did not consider the impacts of the for-sale outcome in the form of condominiums.

Finally, even if QACC were correct that the FEIS did not address condominiumization, it would have no legal bearing on the outcome of this case. The only evidence in the record demonstrates that ADU condominiumization is extremely rare. Mr. Kaplan testified about only two condominium projects in the city, and Mr. McKim testified that throughout his career at SDCI, he has been asked about ADU condominiumization only two or three times, despite the fact that it is legal.[221] As stated above, SEPA only requires analysis of "probable" significant impacts, not speculative or remote impacts. An outcome that has occurred only two or three times is not sufficiently frequent to be considered a probable impact that requires SEPA analysis.

3. The proposal does not change minimum lot size requirements for creation of new lots.

In several instances Appellant misleadingly suggests that the proposal will result in an increase in substandard lots, implying that the proposal, itself, will alter subdivision requirements to allow lots smaller than allowed by current code.[222] The allegation is

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Hr'g Tr. 106:18–22, March 26, 2019; *see also* Hr'g Tr. 81:23 – 82:15, March 25, 2019 (Testimony of W. Reid).

[220] FEIS at 4-29 to 4-30.

[221] Hr'g Tr. 111:24–112:7, March 28, 2019.

[222] Hr'g Tr. 45:4-19, March 26, 2019 (Testimony of M. Kaplan). *See also* Ex. 28 at 11 (includes text stating: "Subidivsions: Reduced Min. Lot Size to 3,200 from 4,000 sq. ft.").

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

patently false, as Mr. Kaplan ultimately conceded on cross-examination.[223] The proposal does not change the current city requirements regarding minimum lot size. The proposal simply extends the opportunity to construct a DADU on currently existing substandard lots (those between 3,200 and 3,999 square feet) with a principal dwelling unit, so long as other requirements are met pertaining to lot coverage, rear yard coverage, and overall size limits of structure and ADUs. Any suggestion that Appellant has advanced that the proposal will result in more substandard lots conflates the minimum requirements for constructing a DADU with the minimum lot size that can be created pursuant to City code.

Moreover, the Appellant's more specific suggestion that the proposal will facilitate reductions in minimum lot size to 3,200 square feet pursuant to the "75/80 Rule" is misguided for the same reasons. As a preliminary matter the Proposal will not change the 75/80 rule.[224] But, even the existing 75/80 rule does not allow creation of a lot as small as 3,200 square feet. The rule facilitates creation of lots smaller than the minimum lot size provided that two criteria are met: (1) the new lot cannot be smaller than 75% of the minimum lot size for the zone; and (2) the lot must be at least 80% of the mean area of the lots on the same block face that are within the same zone.[225] Both factors must be satisfied. However, the smallest lot that can be created is 75% of the smallest lot size of 5,000 square feet, or 3,750 square feet (and then only if 80% of the houses on the block are that size).[226] Thus, any suggestion that the proposal will result in creation of smaller lots is patently false.

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[223] Hr'g Tr. 160:18-162:14, March 26, 2019.
[224] Hr'g Tr. 182:15–25, March 27, 2019 (Testimony of N. Welch); Hr'g Tr. 14:8–15:5, March 28, 2019 (Testimony of N. Welch).
[225] SMC 23.44.010.B.
[226] Hr'g Tr. 14:22–15:5, March 28, 2019 (Testimony of N. Welch).

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

To the extent that the proposal allows development of a DADU on existing substandard lots, that impact is clearly identified in the EIS. Contrary to Mr. Kaplan's incorrect assertions, the City's models for aesthetic impacts show development of DADUs on lots as small as 3,200 square feet (the smallest size of lot on which DADU development is allowed).[227] As explained above, Appellant's critique of the aesthetic impacts of that development outcome is misguided and incorrect.

4. The proposal does not allow multifamily houses.

Mr. Kaplan's testimony incorrectly asserts that the proposal will allow construction of multifamily structures in single-family areas which he claims will change the land use form. That argument ignores existing Code requirements and grossly mischaracterizes the proposal's changes. The definition of duplexes in the Code expressly excludes a residence that includes an accessory dwelling unit.[228] Moreover, the Code imposes different design and development standards for each, that are designed to limit an ADU from looking like a duplex, including different lot coverage limits, FAR limits, location of doors, and other requirements.[229] While QACC has tried to pass off visual representations of duplexes as single-family lots with a principal residence and an AADU, those representations are misleading. Graphic representations ignore the restrictions that govern ADUs under all alternatives[230] and depictions of nonconforming multifamily

[227] *Compare* Hr'g Tr. 45:20–21, March 26, 2019 (Testimony of M. Kaplan) (asserting that the City's models "don't really show the 3,200 square foot lots") *with* FEIS at 4-134; Hr'g Tr. 180:11–181:7, March 27, 2019 (Testimony of N. Welch).

[228] SMC 23.84A.008. *See also* Hr'g Tr. 112:8–113:2, March 28, 2019 (Testimony of A. McKim).

[229] Hr'g Tr. 176:24–178:15, 186:25–188:10, March 27, 2019 (Testimony of N. Welch); Hr'g Tr. 112:8–113:2, March 28, 2019 (Testimony of A. McKim); *compare* SMC Chapter 23.45 (setting forth standards for multifamily development, including duplexes) *and* SMC 23.44.041 (setting forth standards for ADUs).

[230] Hr'g Tr. 176:20–178:18, March 27, 2019 (Testimony of N. Welch).

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

structures are not representative of what can be built pursuant to the proposal.[231] Therefore, QACC's arguments that the proposal would allow multifamily structures are based on misrepresentation.

E. The analysis of impacts to tree canopy satisfies the rule of reason.

The analysis of tree canopy impacts meets the rule of reason and uses standard methodologies. The City relied on its most recent assessment of tree canopy cover to analyze the impacts of the proposal on tree canopy.[232] That analysis acknowledges that most of Seattle's trees are located in residential areas.[233] The analysis drew from data on coverage on single-family zones overall and compared lots that have a permitted DADU with those that do not and those that had teardowns with construction of new homes. The review concluded that lots without a DADU had the highest coverage, on average of 38 percent, while lots with a DADU had slightly lower coverage at 28.6 percent, and lots with construction of a new single-family home had the lowest coverage of just 22.7 percent.[234]

The FEIS analyzes how the code changes proposed under the action alternatives could impact tree canopy. First, the FEIS takes the production numbers from the Forecast Model summarized in chapter 4.1 to assume that there would be 1,085 additional DADUs in the ten year horizon.[235] The FEIS then makes several conservative assumptions (i.e., tending to overstate the impact) to quantify an upper bound estimate of how much tree canopy loss could result: the EIS multiplied the number of DADUs by the maximum

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[231] Hr'g Tr. 190:19–191:5, March 27, 2019 (Testimony of N. Welch) (testimony about page 33 of Ex. 38 confirms that the lot coverage of the multifamily structure far exceeds what could be built under the proposal for an ADU, and therefore is not representative of what might be built under the proposal).
[232] Hr'g Tr. 192:19–193-20, March 27, 2019 (Testimony of N. Welch).
[233] FEIS at 4-52.
[234] FEIS at 4-54; Hr'g Tr. 193:18–194:5, March 27, 2019 (Testimony of N. Welch).
[235] FEIS at 4-66; Hr'g Tr. 195:8–12, March 27, 2019 (Testimony of N. Welch).

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719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

footprint allowed of 1,000 square feet, even though that is not likely; the EIS assumes that the entire footprint of the DADU would replace tree canopy; and the EIS assumes that exceptional tree regulations would not operate to preclude any of the canopy removal.[236] Even with these assumptions the total canopy loss would be only 25 acres, which is only 0.3 percent of the total tree canopy in the city.[237] Ultimately, while the EIS recognizes that there could be impacts to tree canopy from code changes that could result in more DADUs and that allow increases in rear yard coverage, the EIS concludes on the basis of its conservative analysis that those impacts would not be significant.[238] Notably, none of the alternatives would change current existing tree regulations, except that the Preferred Alternative would condition the increased rear yard coverage on limits to tree removal.[239]

While TreePAC did not present evidence, its questions of witnesses suggested legal arguments that are without merit. The City will respond to TreePAC's legal arguments in its response brief. Preliminarily, however, the City observes that TreePAC's criticisms of the current Code's efficacy or enforcement are outside the scope of this proposal and are irrelevant. The City did not rely on existing tree protections in the City's code to reach its conclusions, and, in fact, assumed they did not apply.[240] Moreover, while the City documented the potential for future code changes under consideration, it did not rely on them for any part of its analysis.[241] Accordingly, the City's analysis of tree canopy impacts is cautiously conservative and satisfies the rule of reason.

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[236] FEIS at 4-67; Hr'g Tr. 195:13–196:7, March 27, 2019 (Testimony of N. Welch).
[237] FEIS at 4-67; Hr'g Tr. 195:13–25, March 27, 2019 (Testimony of N. Welch).
[238] FEIS at 4-67; Hr'g Tr. 195:13–25, March 27, 2019 (Testimony of N. Welch).
[239] FEIS at 2-5.
[240] FEIS at 4-67.
[241] FEIS at 4-55, 4-67; Hr'g Tr. 200:2–20, March 27, 2019 (Testimony of N. Welch).

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

IV. CONCLUSION

The FEIS uses reasonable methods to inform the decision-makers of the potential impacts of the proposal. QACC and TreePAC have failed to meet their burden of demonstrating that the FEIS is inadequate. Accordingly, the Examiner should deny Appellant's appeal.

DATED this 16th day of April, 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

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, Cara Tomlinson, 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 a legal assistant 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 Closing Brief;
2. Hearing Transcripts March 25 – March 29, 2019;
3. Certificate of Service;

and that on April 16, 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

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

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

☒ By eService
Transcripts previously provided to Appellant)

QUEEN ANNE COMMUNITY COUNCIL
Jeffrey M. Eustis
Aramburu & Eustis, LLP
720 Third Avenue, Suite 2000
Seattle, WA 98104
Eustislaw@comcast.net

☒ By eService
(Transcripts previously provided to Appellant)

TREEPAC
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

☒ By eService
(Transcripts previously provided by E-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 16th day of April, 2019.

/s/ Cara E. Tomlinson
Declarant

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