SEATTLE HEARING EXAMINER

In the Matter of the Appeal by QUEEN ANNE COMMUNITY COUNCIL of the Final Environmental Impact Statement for the proposed legislation on accessory dwelling units	Hearing Examiner File No. W-18-009 APPELLANT'S CLOSING ARGUMENT

I. RELIEF REQUESTED

The Queen Anne Community Council (QACC) asks the Hearing Examiner to find the EIS issued for the Accessory Dwelling Unit legislation to be inadequate as a matter of law on grounds that it fails to fully consider the proposal's probable significant adverse impacts to on-street parking, housing and impacted populations, and the land use form. The EIS should be remanded back to its lead agency for correction of its errors and deficiencies prior to any action taken on any of the alternatives.

II. BACKGROUND

The proposed action is the expansion of permissible development of ADUs (a term Appellant use to include both attached and detached accessory dwelling units). While the EIS covers four alternatives – i.e., the no action (current legislation), alternatives 2 and 3, and the preferred alternative, it is the preferred alternative that appears to be the proposed action, even though a draft bill of legislation is not included within the EIS or within the City's exhibits. From the prior challenge to the Determination of Non-Significance, the testimony of witnesses, and the text of the EIS, the scope of

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the preferred action and various alternatives should be well known, and therefore those proposals not re-reviewed here.

III. STANDARDS OF EIS ADEQUACY

A. Adequacy Is Determined As a Question of Law.

1. SEPA is to be liberally construed and vigorously enforced.

The State Environmental Policy Act (SEPA) is Washington's most fundamental and pervasive environmental law. Richard L. Settle, *The Washington State Environmental Policy Act: A Legal Policy and Analysis* ("Settle") § 1.15 at 1-18 (Matthew Bender & Co, December, 2002). The statute contains both procedural requirements and substantive authority. Procedurally, the statute requires the integrated use of environmental values in the decision making by all state and local agencies. RCW 43.21C.030(2)(a). Substantively, SEPA grants governmental agencies the authority to use the environmental documentation to condition, and even deny, specific projects and other governmental actions based upon environmental impacts. RCW 43.21C.060.

The principal vehicle for assuring that environmental factors are fully considered in governmental decision making is the environmental impact statement, which is required to be prepared for all major actions that significantly affect the quality of the environment. RCW 43.21C.030(2)(c). Because complete and accurate information is a prerequisite to sound environmental action, the requirements of SEPA have been construed liberally.

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The Washington Supreme Court has declared unequivocally that SEPA is to be given "broad and vigorous construction." *Eastlake Community Council v. Roanoke Associates, Inc.,* 82 Wn.2d 475, 490, 513 P.2d 46 (1973). SEPA's declared purposes are to:

> (1) encourage productive and enjoyable harmony between man and his environment;
>
> (2) ... prevent or eliminate damage to the environment and biosphere;
>
> (3) ... stimulate health and welfare of [humans]; and
>
> (4) ... enrich the understanding of the ecological systems and natural resources important to the state and the nation.

RCW 43.21C.010. Far from hortatory, these purposes demand full government attention. It is the “continuing responsibility” of all agencies of the state, including its local governments, to “use all practicable means” to “improve and coordinate” their “plans, functions, programs and resources to the end that the state and its citizens may”:

> (a) Fulfill the responsibilities of <u>each generation as trustee of the environment</u> for succeeding generations;
>
> (b) <u>Assure</u> for all people of Washington safe, <u>healthful</u>, productive, and aesthetically and culturally pleasing <u>surroundings</u>;
>
> (c) <u>Attain the widest range of beneficial uses of the environment without degradation</u>, risk to health or safety, or other undesirable and unintended consequences;
>
> (d) <u>Preserve</u> important historic, cultural, and natural aspects of <u>our national heritage</u>;

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(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

RCW 43.21C.020(2)(emphasis supplied). These mandates are essentially a restatement of directives contained within the National Environmental Policy Act (NEPA) at 42 U.S.C. 4331(b). But SEPA goes one step beyond NEPA and declares at RCW 43.21C.020(3):

> The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Emphasis added.) SEPA's policies and mandates are exceptionally forceful and demanding. As the court noted in *Eastlake*, 82 Wn. 2d at 490:

> To fulfill these purposes of restoring ecological health to our lives, SEPA mandates governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters. The procedural duties imposed by SEPA - - full consideration to environmental protection - - are to be exercised to the fullest extent possible to insure that the "attempt by the people to shape their future environment by deliberation, not default" will be realized. *Stempel v. Department of Water Resources, supra,* 82 Wn. 2d at 118, 508 P.2d at 172 [emphasis added].
>
> The "continuing" policy and responsibility of the state is not only to maintain and enhance our environment, but to also "prevent or eliminate damage to the environment" and "restore" it. RCW 43.21C.030. (Italics ours). The maintenance, enhancement and restoration of our environment is the pronounced policy of this state, deserving faithful judicial interpretation. In view of this clear legislative mandate . . . SEPA [is to] be given a broad and vigorous construction [emphasis in original].

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See also, *West Main Associates v. City of Bellevue*, 49 Wn. App. 513, 518, 742 P.2d 1266 (1982).

2. An EIS is to be detailed.

Consistent with its policies and mandates, SEPA requires that an EIS be "detailed." RCW 43.21C.030(2)(c). The requirement for a detailed impact statement "does not invite a lackadaisical approach." *Leschi Improvement Council v. Washington State Highway Commission, (Leschi),* 84 Wn.2d 271, 280, 525 P.2d 774 (1974).

At RCW 43.21C.030(2)(c) SEPA provides that "in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment there shall be prepared detailed statement" on:

> (i) the environmental impact of the proposed action;
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (iii) alternatives to the proposed action;
>
> (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity; and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Beyond this brief set of topics, Ecology's SEPA rules at WAC 197-11-400, *et seq.* and the City's own rules at SMC 25.05.400 specify the contents of an EIS.

3. The analysis of impacts must be substantiated.

The legal test for EIS adequacy under SEPA is whether:

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> the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed, and substantiated by supportive opinion and data.

*Citizens Alliance to Protect Our Wetlands v. City of Auburn, (CAPOW),*126 Wn.2d 356, 362 (1995) (quoting *Klickitat County Citizens Against Imported Waste v. Klickitat County, ("Klickitat County"),* 122 Wn.2d 619, 633, 860 P.2d 390, 866 P.2d 1256 (1993)). See also, *Leschi* at 286.

In construing similar EIS requirements under NEPA, federal courts have held that "the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug." *Silva v. Lynn,* 482 F.2d 1282, 1285 (C.A.1973). To the same effect, see *Seattle Audubon Society v. Mosley,* 798 F.Supp. 1473, 1479 (W.D. Wash. 1992), *aff'd,* 998 F.2d 699)(9th Cir. 1993), which elaborated on the above passage from *Silva:*

> A conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.

The "rule of reason," which the City referenced in its opening statement still requires full consideration of all environmental factors involved:

> [U]nder the "rule of reason," … an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but [it] will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

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County of Suffolk v. Secy of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977) Emphasis added.) Under the rule of reason an EIS based upon materially false or inaccurate statements would be inadequate as a matter of law.[1]

4. The standard of review is *de novo*.

The adequacy of an EIS is is reviewed as a question of law, subject to *de novo* review. *Klickitat County at 632-33, citing to Solid Waste Alternative Proponents v. Okanogan Cy. (SWAP),* 66 Wn. App. 439, 441, 832 P.2d 503, *review denied* 120 Wn.2d 1012, 844 P.2d 435 (1992); *see also*, *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447 (1990). The *de novo* standard of review was first established in *Leschi* at 285. This standard continues to apply despite the direction at RCW 43.21C.090 that SEPA decisions by governmental agencies are to be accorded substantial weight.

5. The range of alternatives must allow for a reasoned choice.

SEPA mandates adequate consideration of a sufficient range of alternatives, including alternative sites and alternatives within the proposed site. "Open-minded, imaginative design and consideration of alternative courses of agency action is crucial to SEPA's ultimate quest--environmentally optimum government decisionmaking."

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[1] *Sierra Club v. U.S. Army Corps of Engineers,* 772 F.2d 1043, 1030 (2nd Cir. 1985):

> If the district judge finds that the agency did not make a reasonably adequate compilation of relevant information and that the EIS sets forth statements that are materially false or inaccurate, he may properly find that the EIS does not satisfy the requirements of NEPA, in that it cannot provide the basis for an informed evaluation or a reasoned decision.

Cited with approval in *Fund for Animals v. Norton*, 365 F.Supp.2d 394, 432 (S.D.N.Y. 2005).

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Settle, § 14.01[2][b]. The required contents of an EIS are set forth at RCW 43.21C.030(2)(c), which provides in relevant part:

> The legislature authorizes and directs that, to the fullest extent possible . . . (2) all branches of government of this state . . . shall:
> . . .
> (c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:
> . . .
> (iii) alternatives to the proposed action;

(Emphasis supplied). Even outside of an EIS, the statute requires that:

> all branches of government of this state, including state agencies, municipal and public corporations and counties shall:
> . . .
> (e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

RCW 43.21C.030(2)(e) (emphasis added).

The SEPA regulations underscore the need to discuss alternatives in order to facilitate reasoned decision making from government officials and the public. "Proposals should be described in ways that encourage considering and comparing alternatives," WAC 197-11-060(3)(a)(iii), so as to "permit a comparative evaluation of alternatives." WAC 197-11-440(5)(c)(v).

The Washington Supreme Court has found that the consideration of alternatives cannot be cast aside. "The required discussion of alternatives to a proposed project is of major importance, because it provides a basis for a reasoned decision among

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alternatives having differing environmental impacts." *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 42, 873 P.2d 498 (1994).

The range of reasonable alternatives that must be discussed in the EIS "shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-440(5)(b).

Courts have enforced the requirement for consideration of a sufficient range of alternatives sites. *SWAP*, 66 Wn. App. at 444 ("[t]he range of alternatives considered in an EIS must be sufficient to permit a reasoned choice"). See also, *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815 (9th Cir. 1987) ("[t]o be adequate, an environmental impact statement must consider every reasonable alternative"), *rev'd. on other grounds*, 490 U.S. 332 (1989).[2]

The discussion of alternatives must be sufficiently detailed to permit a comparative evaluation of different courses of action. As held by *Weyerhaeuser* at 41:

> Under WAC 197 11 440(5)(c), the alternatives section of the EIS must describe the objectives, proponents and principal features of reasonable alternatives, including the proposed action with any mitigation measures; describe the location of alternatives, including a map, street address and legal description; identify phases of the proposal; tailor the level of

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[2] **Error! Main Document Only.**Because SEPA is patterned after NEPA, our courts have regarded federal caselaw under NEPA as persuasive authority:

> At the same time, it should be noted that SEPA is patterned after the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. s 4321 et seq.) and contains language almost identical to that of the federal act. It is well settled that when a state borrows federal legislation it also borrows the construction placed upon such legislation by the federal courts.

Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn.App. 59, 510 P.2d 1140, (1973).

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description to the significance of environmental impacts; devote sufficiently detailed analysis to each alternative so as to permit a comparison of the alternatives; present a comparison of the environmental impacts of the alternatives; and discuss benefits and disadvantages of reserving implementation of the proposal to a future time.

A superficial presentation of alternatives which contains only brief, conclusory descriptions and prevents "any meaningful comparison" is legally inadequate. *Id.*

The EIS fails to present a full range of alternatives. Rather than a full range of alternatives, each of the alternatives (other than the no action alternatives) proposes the addition of a second accessory dwelling unit, but the differences among the alternatives are slight, e.g., retaining or removing the parking requirement, inclusion of a floor area ratio limitation. But substantial differences among the alternatives do not exist. The listed alternatives all present variations of the same.

6. An EIS must discuss the success and failure of similar proposals.

As an environmental full disclosure document, an EIS must provide a candid assessment of the proposed action; it must present both the successes and failures of similar proposals and the opposing views of other experts:

> An EIS " 'should disclose the history of success and failure of similar projects.' " *Sierra Club v. Morton*, 510 F.2d 813, 824 (5th Cir. 1975), quoting *Natural Resources Defense Council, Inc. v. Grant*, 355 F.Supp. 280, 288 (E.D.N.C.1973). Because experts disagree on the possible effects, the statement should set forth the responsible opposing views rather than ignoring the potential debilitating impact. *Citizens Against Toxic Sprays, Inc. v. Bergland,* 428 F.Supp. 908, 922 (D.Or.1977); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C.Cir.) *inj. den.*404 US 917 (1971).

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Barrie v. Kitsap County, 93 Wn.2d 843, 859 613 P.2d 1148 (1980).

The proposed action contemplates a combination of provisions not enacted in any other city in the US. While some US cities have allowed accessory dwelling units, none on properties as small as 3,200 sf and none have enacted policies including the breadth of those contemplated in this EIS. The City's proposed measures hide behind the veil of "non-project action" to assert that few impacts can be identified and therefore mitigated. However, the lack of any history in Seattle or anywhere else in the USA of such significant and cumulative policy changes "ignores potential debilitating impact(s)" because no such policies have been enacted anywhere in the US and therefore any associated impacts have not been feasibly researched.

7. An EIS must disclose any unmitigated, significant adverse impacts resulting from the implementation of the proposed action.

An EIS must also disclose any unmitigated significant adverse impacts that would result from development of the proposed action. In relevant part, RCW 43.21C.030(2)(c) requires an EIS to identify:

> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented; [and]
>
> ***
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

See also, SMC 25.05.440.3.e, requiring an EIS to "summarize significant adverse impacts that cannot or will not be mitigated.

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The EIS's discussion of each alternative concludes with a terse statement that no significant unmitigated impacts would result. See e.g. pp 4-42 (housing), 4-161 (aesthetics), and 4-189 (parking). As demonstrated through the testimony of Bill Reid, Ross Tilghman and Marty Kaplan, those conclusions are in error.

IV. The EIS Fails to Meet Standards of Adequacy.

A. The EIS's consideration of impacts to on-street parking is inadequate because it rests on statements that are materially false and inaccurate.

An EIS may be found inadequate where it "sets forth statements that are materially false or inaccurate…" *Sierra Club v. U.S. Army Corps of Engineers,* 772 F.2d at 1030. Such is the case with the EIS's discussion of impacts upon on-street parking. Appellant's expert, Ross Tilghman produced evidence and testified that the EIS's projections of impacts to on-street parking were based upon erroneous parking supply counts, on some blocks overstating parking supply by up to 40%. See Exhibits 11, 14 and 15 (Comparing 7009 Greenwood parking inventory to that shown in the EIS, a discrepancy confirmed by subsequent measurements by IDAX Data Solutions (IDAX).

The City's parking consultant, Amalia Leighton-Cody apparently had sufficient doubts over the parking supply data to request its sub-consultant, IDAX, to verify its prior supply figures, which were gathered through observational methods – actual methods neither Toole Design nor IDAX Data Solutions ever identified. Upon using a wheeled measuring device, IDAX came up with different parking supply counts, which on many blocks agreed with those prepared by Mr. Tilghman. See Ex. 40. IDAX's

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findings of fewer parking spaces on those blocks in turn increase the impacts of the proposed action. With fewer parking spaces available in the NW and NE study areas, the impacts of parking generated by ADU production would accordingly be greater, and on some blocks increasing parking demand to over 85% of suppl7y, as in the NW study area where the addition of just a single ADU per block would exceed 85% utilization on 64 of the 113 blocks, over half of the study area. (See EIS 4-164 & 4-185; Tip 117; and Ex. 7 (Appellant's Ex. 10B)). As used in TIP 117 and the EIS, 85% of course is the threshold for significance of impact. The EIS is in error for failing to report such significance of impact. Instead its conclusion on parking impacts at 4-189 erroneously asserts there to be no significant adverse impacts.

Not only does the parking impact analysis rely upon erroneous parking supply counts, but it also uses improper vehicle ownership figures, which has the effect of underestimating parking demand to be generated by the increase in ADUs allowed by the proposed change in legislation. The increased parking demand is based upon the incidence of vehicle ownership by ADU renters in Portland which was adjusted by the rate of vehicle ownership among renters in the City of Seattle, as shown in Exhibit 43.[3] The formula used to produce estimated numbers of vehicles does not correctly project the on-street parking demand by any of the alternatives considered because it is based upon the incidence of vehicle ownership by renters, rather than by unit owners. As testified by Mssrs Kaplan and Welch, and as effectively corroborated in the email by

[3] Exhibit 43 was offered by the City to correct Exhibit B-19, **ck** which erroneously estimated vehicles per ADU in each of the four parking study areas based upon average bedroom counts.

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Andy McKim at Exhibit 42, the City is allowing and condoning the sale of ADUs as separate condominium units. See e.g., Ex 8(A)(11)(zoning compliance for condominia at 1842 Weller Street) and Ex 8B(11)(zoning compliance for condominia at 1235 NE 88th Street). As testified to by Mr. Tilghman, those who own their housing (be they owners of single family properties, townhouses, or condominia) generally have a higher incidence of vehicle ownership. Ms Cody testified to vehicle ownership rates of 1.6 for owner occupants. Use of a rate of vehicle ownership of 1.6 cars per dwelling unit in the figures in either Exhibit B-19 (or the corrected Exhibit 42) produces much higher rates of vehicle ownership for occupants of ADU condominia. Instead of using vehicle ownership rates for renters of between 1.03 to 1.29, use of a vehicle ownership rate for owner occupants would produce an incidence of vehicle ownership of between 23 and 55% greater than used in those exhibits.[4] To account for their greater impact, the on-street parking impacts from owner-occupied ADUs should have been considered. As ADUs are currently being sold off as condominia, such greater impacts are not speculative.

The condominiumization of ADUs aside, for the preferred alternative the EIS understates on-street parking impacts in another respect because it fails to consider the proposed impact of increasing lot occupancy from 8 to 12 unrelated adults. None of the parking impact analysis addresses increasing lot occupancy by 50% (i.e., an increase of 4 over the current limit of 8). As illustrated by Mr. Tilghman, consideration of the

[4] For example, a vehicle ownership rate of 1.6 instead of 1.03 in the southwest study area would increase the rate of vehicle ownership in that area by 55%, as 1.6 is 55% greater than 1.03.

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proposed increase in occupancy could have significant effects on the availability of on-street parking for any block in which the maximum occupancy of 12 unrelated adults occurred. As shown in Exhibits 16 - 19, just one lot with an occupancy of 12 unrelated adults would increase by between 79 to 97% the blocks in the four study areas exceeding 85% utilization of on-street parking and by between 38 to 89% those blocks exceeding 100% capacity.

The City attempts to brush off these impacts by suggesting no that ill effects would result from a 50% increase in lot occupancy on asserted grounds that the rate of ADU occupancy is quite low and the code contains no limit for related adults or their minors. But such rationalizations avoid the point that the preferred alternative proposes to change maximum occupancy, and the effect of that change to on-street parking is completely ignored by the EIS. In addition, the EIS did not identify any other city in the US for study of similar regulations. Vancouver and Portland were the only other cities considered in the EIS, but neither allows 12 unrelated occupants per property without on-site parking requirements. The City's analysis in the EIS is not based upon comparative, empirical data and is speculative.

In other respects, the EIS fails to disclose the full potential impact of the proposal. In her decision rejecting the DNS, the prior Hearing Examiner directed the City to depict conditions of a full build-out of ADUs in a complete block. The EIS did prepare massing diagrams purporting show a full-build out of ADUs under each of the alternatives. However, none of those renditions of full build-out conditions shows the

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resultant impacts to on-street parking.[5] Nor do the full build-out scenarios consider impacts of full development of all single family lots on facing blocks with three units each (a principal dwelling + 2 ADUs) upon existing utilities for that block, i.e., water, sewer, cable services, etc. See SMC 25.05.440.E.5 ("Discussion of significant impacts shall include the cost of and effects on public services, such as utilities, roads, fire, and police protection, that may result from a proposal.") Discussions of impacts to utilities and services consider the additional load from the City's projection of ADU development over a ten year period, but not under the full build-out scenario.

As noted above, an EIS must also disclose any unmitigated significant adverse impacts that would result from development of the proposed action. RCW 43.21C.030(2)(c)(ii) and (v). As demonstrated by Mr. Tilghman, implementation of the preferred alternative (as well as alternatives 2 and 3) would result in unmitigated significant adverse impacts because it would increase utilization of on-street parking beyond the 85% threshold of significance. The EIS at 4-189 only identifies generic mitigation (i.e., reliance on use regulations, the creation of Residential Parking Zones, and implementation of plans to improve the transit, pedestrian and bicycle network), but these measures would do nothing to mitigate on-street parking impacts on blocks where the addition of just a single ADU would cause utilization of on-street parking to exceed 85%. An available mitigation would be a requirement that off-street parking be provided where the addition of an ADU or two ADUs would result in more than 85% utilization of

[5] Exhibit 32, Findings and Decision in W-16-004 at Conclusion 13 (December 13, 2016)(direction for consideration of height, bulk and scale impacts from full build-out on a given block).

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on-street parking. The preferred alternative, which would increase lot occupancy by 50% does not even include that mitigation.

Reasonable mitigation for ADU's resulting in more than 85% utilization of on-street parking clearly does exist. The EIS's failure to consider such mitigation (apart from a feature under just Alternative 3) fails to comply with the City's own SEPA regulations. See SMC 25.05.440.E.3.c ("Clearly indicate those mitigation measures (not described in the previous section as part of the proposal or alternatives), if any, that could be implemented or might be required, as well as those, if any, that agencies or applicants are committed to implement[.]")

B. The EIS's discussion of housing and population fails to consider impacts on those at greatest risk for displacement.

As an element of the environment, an EIS must discuss impacts of the proposed action upon the populations to be impacted, SMC 25.05.444.B.2.a, upon housing and physical blight, and significant impacts of projected population on environmental resources, which includes the built environment. SMC 25.05.440.E.5. The "significance" of impact must be measured from the perspective of those who would be impacted, because "...what to one person may constitute a significant or adverse effect on the quality of the environment may be of little or no consequence to another." *Norway Hill v. King County Council*, 87 Wn.2d 267, 277.

However, the EIS fails to consider impacts of its proposed alternatives upon the specific populations at greatest risk of displacement. As testified by Bill Reid, the EIS glosses over impacts to populations most at risk to displacement by failing to give

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1 specific consideration to areas of the City and populations within those areas at greatest
2 risk for displacement. As Mr. Reid explained, impacts on more vulnerable populations
3 are obscured by the EIS analysis: by excluding from its parcel typology consideration of
4 parcels in census tracts in which the City has already identified displacement of lower
5 income households by new market rate housing; by using Residual Land Value as the
6 basis for its pro forma model, which ignores the economics of ADU development by
7 landowner as opposed to an outside developer with no existing investment in the land;
8 and by using a forecasting model which is based upon exisiting policies and does not
9 attempt to use empirical evidence to factor in the increase in ADU development that
10 would result from implementation of the various proposed changes, such as the
11 elimination of the on-site parking, the elimination of owner-occupancy requirements, the
12 increase in the allowable number of ADUs and allowable floor area, and the apparent
13 allowance for the sale of ADU's as individual condominium units. See Hearing
14 Transcript (Tr) of May 25, 2019, pp. 45-86.
15
16 As shown by Mr. Reid, the City has the data to identify populations at greatest
17 risk for displacement, since they are revealed in Appendix M for the MHA EIS. See
18 Exhibit 23, Appendix M at Exhibits M-14 and 15. Those figures show areas of the City
19 with a negative correlation between low income households and housing supply.
20 Despite the construction of new housing in those areas, households have been pushed
21 out. Those areas would be most vulnerable to displacement because parcels within
22 those areas have a relative low value of existing housing stock to land value, making
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those parcels more attractive for demolition of existing structures and redevelopment with three units (a principal house + 2 ADUs). Such redevelopment results in the displacement of existing populations because it removes from the City's housing stock the most affordable single family housing and replaces it with market rate rental (or for sale condominium) housing, thereby reducing the supply of more affordable single family housing for owner occupancy. Tr. at 49-65 (3/25/19). Mr. Reid testified that the EIS's consideration of 12 typologies, see EIS Ex. 4.1.13 at 4.27, fails to consider the impacts of the proposed liberalization of ADU rules fails on more vulnerable populations and housing because the typology only focuses on generic lots at various price levels and does not analyze the proposal's impacts in areas known to suffer displacement of lower income people from the development of market rate housing Tr. at 55-65 (3/25/19).

Morgan Shook, the City's witness testified that the typologies considered with the pro forma model included such lots, since that typology purported to consider every lot in the study area, which is the entirety of single-family zoned areas of the City. Tr. at 139:19 and142:7-16 (3/28/2019). But that is true only in a general sense. Neither the typology matrix at EIS Ex.4.1-13 (four lot sizes within each of three neighborhood types), nor the 44 development scenarios reviewed, EIS, Appendix A, Ex. A-2, gives specific consideration to areas of the City where displacement of populations has been most prevalent. The so-called Opportunity Risk Map does not contain that information, since it offers only an ensemble of a number of risk factors over the City as a whole

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1 (taken from a separate document, Exhibit 36, Seattle's Growth and Equity report), but it
2 does not identify specific areas at risk to displacement by the intensification of
3 development potential that the proposed changes to the ADU legislation would
4 engender.
5 The EIS compounds the failure to specifically consider impacts to populations
6 and areas most at risk to displacement by relying on economic models that do not
7 reveal those impacts. As described in Appendix A, the housing and economics analysis
8 relies on two models, a pro forma model based upon a Highest and Best Use (HBU)
9 assessment and a forecasting model based on prior trends. But neither model directly
10 assesses impacts upon specific geographic areas and existing populations most at risk
11 for displacement. As explained by Mr. Reid, the HBU model is suitable for assessing the
12 redevelopment potential for a specific property by producing a Residual Land Value
13 (RLV) which gives the investor/redeveloper either a positive or negative value based
14 upon purchase price of the property, from which the investor can make a determination
15 as to the amount the investor could afford to pay for the property under various plans for
16 its redevelopment. Tr. 68-69 (3/25/19). However, the HBU or RLV model as applied to
17 the 12 categories of parcels does not help inform the determination as to whether areas
18 already known to suffer displacement would be further impacted by any of the proposed
19 actions under consideration. Tr 65-66 (3/25/19). See also Tr 85:13-23 ("If somebody
20 reviewing the EIS asks what do we know of displacement in the city and does this make
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it better or does this legislation make that better or worse, the answer is we don't know because we didn't look at it.")

The RLV model has another shortcoming. The model and the projected outcomes from the parcel typology are from the investor's perspective, whether for each of the 12 lot types a developer would have a financial incentive to build, or not build, an ADU, and/or to demolition or retain the principal dwelling unit. Tr. 71-74 (3/25/19). However, the RLV model does not consider economic circumstances more prevalent with single-family ownership, that the lot owner herself makes the decision to construct (or not) an ADU without regard to the cost of land due to the owner's exisiting ownership of the land. *Id.* at 68-71, and in particular at 71:2-8 (The "EIS … understates the likely incidence of ADU/DADU construction and, therefore, understates, potentially significantly, the risk of displacement throughout the city because it effectively ignores all the existing homeowners out there who don't have to worry about a purchase of the home itself at current market price."). The City's witness offered no defense of the failure of the RLV methodology to also consider owner (as opposed to developer) development of ADUs under the 12 scenarios considered.

The forecasting model also fails to consider impacts upon the City's geographic areas and populations most at risk to displacement. The forecasting model projects impacts of the proposed changes in legislation based upon prior trends, which the City's witness, Morgan Shook confirmed. Tr at 129:5-14 (forecasting model based on "historical record"). The City contends that the model makes a adjustments to account

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for the various proposed changes in legislation, including an increase in allowable ADUs, an increase in allowable unit area (from 800 sq ft for one unit to 1000 sq ft for each of two units), the elimination of off-street parking for ADUs, and the elimination of the owner occupancy requirement. But these adjustments are not based upon known, objective factors, since there is no empiral evidence of the effect of the combination of those factors in the City of Seattle, or for that matter, in any other urban setting in the country. Reid testimony, Tr. 78:8-17 (3/25/19). Moreover, the City did not attempt to run its forecasting model in the very neighborhoods the City's MHA documents identify as having lost of households despite an increase in housing development. Tr. 83:25 – 84:12 (Like the analysis of on-street parking impacts, the EIS should have considered displacement impacts in specific areas of the City.)

A further deficiency in the EIS's discussion of housing and economics is the failure to consider the effect of the sale of ADUs as separate condominium units, which creates the potential for the sale of each of three housing units on a single family parcel – i.e., the sale of the principal dwelling and ADUs each to separate individuals as condominium units. As testified to by Mr. Shook, none of the four possible ways of valuing the property at in Appendix A at A-13 and none of the 44 possible outcomes in the Appendix A at 1-11-12 consider that option. Tr. at 213:9 – 215:20 (3/28/19). Yet, as Mr. Reid pointed out, the prospect for sale of each of three units as a condominium greatly increases the economic incentive for redevelopment, because sale after redevelopment would allow a greater and quicker return on investment than unit rental.

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Tr. 80:10 – 81:10 (3/25/19). Evidence of this is seen in the documentation relating to the condominiumization of dwelling units 1235 NE 88th Street, where prior to the creation and sale of the condominium units the entire parcel had an appraised value in 2018 of $367,080**,** but after sale, the two units had a combined appraised value of $1,299,000**.** Ex. 30 (Appellant's Ex. 8B(2) (web-site for assessor data of 1235 NE 88th Street properties).

To sum up on this issue, the EIS fails to give specific consideration to the impacts of the proposed liberalization of ADU regulations upon the City's areas and populations most likely to be impacted, which is inexcusable both because that data was available to the City in its prior analysis for the MHA legislation and the potential for impacts to those areas was a focus in the prior challenge to the DNS and part of the reason for remand for preparation of the EIS.[6]

C. The EIS fails to fully consider impacts of the proposed ADU changes to the the land use form.

In her remand of the SEPA determination to OPCD, Examiner Tanner found at Conclusion 9 that:

> … the proposed legislative changes would create a regulatory environment that is likely to generate entirely different impacts that OPCD has not considered, what Mr. Reid referred to as a "fundamental change to the land use form." [Emphasis added; italics in original.]

Ms Tanner went on at Conclusion 13 to direct that

[6] Exhibit 32, Findings and Decision in W-16-004 at Conclusion 10 (December 13, 2016)("…the evidence here shows that the indirect impacts of the legislation would adversely affect housing and cause displacement of populations. These are significant adverse environmental impact that must be studied in an EIS in the context of the development/economic environment that would be created by the proposal.")

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> On remand, the analysis of height, bulk and scale impacts must be done in the context of the actual development environment created by the legislation (as opposed to the existing development environment, see Conclusions 9 and 10), and must include renderings that accurately represent at least the maximum height, bulk and scale that could be constructed on at least one full block and include lots as small as 3,200 square feet.

The EIS fails to implement this directive because it fails to consider height, bulk and scale impacts (and for that matter, housing and displacement impacts) within the "actual development environment created by the legislation," namely the actual single family neighborhoods where ADUs would be developed (emphasis added). Instead, the EIS addresses height, bulk and scale impacts (also referred to as aesthetic and land use impacts) by creating hypothetical streets and a neighborhood based upon a model created through the software program, SketchUp, bearing no resemblance to any actual Seattle neighborhood. As noted by Martin Kaplan, a longtime Seattle resident and Seattle architect with decades of experience in both designing and developing residential housing, a typical, near-in Seattle neighborhood would be denser and have much less building separation that the model used by the City. Exhibit 28 (Appellant's proposed Exhibit 20) at 19 (comparison of ADU build out in EIS with existing condtions of an actual city block. This exhibit demonstrates quite well the model's failure to represent the "actual development environment created by the legislation." In addition, modeling in such a way ignores the rich diversity of Seattle neighborhoods, including a 100 year difference in many neighborhorhoods which translates into ignored considerations of utility infrastructure, significant differences in lot and street sizing,

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access to public services like reliable transit, and many others not considered in one hypothetical computer model with no relationship to even one actual city block. The reliance upon defaulting to a 'non-project-action" ignores real impacts that would be easily studied if the EIS considered and reached out to actual Seattle neighorhoods.

Apart from lack of consideration of impacts upon actual neighborhoods that would be developed, representations of the potential bulk of development are also misleading. The model's various scenarios focus on the addition of small, backyard cottage-like Detached Accessory Dwelling Units (DADUs), but not the full impact of what the preferred alternative would allow, which would be two ADUs (after a year of ownership) of 1000 square feet each (in addition below-ground space and above ground parking), no additional parking, and total occupancy of 12 unrelated adults (e.g., four unrelated adults for each of three permissible units). With the City's acceptance of the condominiumization of each of the three units, as evident from Exhibits 29 and 30, the changes proposed under the Preferred Alternative would result in significant changes to the land use form not considered by any of the variations presented in the SketchUp modeling.

As Mr. Kaplan testified, a decision to develop a single family lot with three condominia (a principal dwelling and two ADUs) produces a different land use form than development of such a lot with ADUs for rental or a triplex of much greater significant bulk. Development for condominia would produce a design that would attempt to maximize the value of each of the potential units for sale, which would more likely lead

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to development of a single structure with maximum height (35' ft with peaked roof), maximum lot coverage (35% or a footprint of 1750 sq ft on a 5000 sq ft lot) and maximum floor area per unit (2500 sq ft for the principal dwelling and 1000 sq ft each for each ADU. Even though the Preferred Alternative would limit the floor area ratio (FAR) of the principal dwelling unit to .5, the actual FAR with development of two ADUs would be .9 (4500/5000) with maximum development of ADUs.[7] Even still, the actual FAR could well exceed .9 since below grade development would not count in the FAR calculations. Maximization of each of three units for sale could produce residential buildings approaching the intensity of multi-family townhouse development in LR 1 zoning. See Exhibit 28 at 6 (potential development of two ADUs on a 5000 sq ft site compared to townhouse development in LR 1). None of the modeling presented in the EIS addresses that change in land use form.

D. An inadequate EIS must be corrected before action is taken.

A finding of EIS inadequacy requires invalidation of any actions taken on the EIS. *Weyerhaeuser* at 42 and *Barrie* at 861. SEPA is an overlay statute and its compliance is a prerequisite for agency action. Action taken in the face of an inadequate EIS consequently is contrary to law. Conversely, allow agency action taken on an inadequate EIS to stand would frustrate SEPA's objectives of fully informed decision making and reduce SEPA to nothing more than an exercise in *post hoc* rationalization.

[7] The footprint of a two story structure of 2500 square feet would be 1250 square feet (1250 per floor) would allow development of an additional 500 sq ft to reach a maximum of 1750 of lot coverage.

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The noted inadequacies in the EIS must be corrected before action is taken on any of the alternative courses of action.

V. CONCLUSION

For the above reasons, the EIS should be found inadequate and remanded back to the city for issuance of a supplemental EIS that fully considers impacts of the proposed allowance of ADU development.

Dated this 16th day of April, 2019.

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/s/_________________________________
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DECLARATION OF SERVICE

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

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

DATED: April 16, 2019 /s/______________________________
Jeffrey M. Eustis

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