BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of the: **QUEEN ANNE COMMUNITY COUNCIL** of the Final Environmental Impact Statement for the Citywide Implementation of ADU-FEIS.	Hearing Examiner File W-18-009 SEATTLE CITY COUNCIL'S RESPONSE BRIEF

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I. INTRODUCTION

In their Closing Briefs, Appellant Queen Anne Community Council ("QACC") and Intervenor TreePAC ("TreePAC") advance the same flawed theories they raised at the hearing. In its Closing Brief, the City anticipated and responded to most of QACC and TreePAC's arguments. Therefore, the City does not comprehensively repeat its responses to those arguments in their entirety in this Response. Instead, the City responds to specific points of emphasis in QACC's and TreePAC's briefs that highlight the errors in QACC's and TreePAC's arguments. In their Closing Briefs, both QACC and TreePAC ignore aspects of the FEIS to support their incorrect assertion that the FEIS lacks analysis. Both ignore testimony at the hearing that completely rebuts the arguments they advance. QACC continues to rely on exhibits and evidence that were demonstrated at hearing to be false and misleading. And both mischaracterize testimony at the hearing and documentary evidence presented to the Examiner to avoid addressing the City's case on its merits. Perhaps not surprisingly, both lack citations in their brief that support many of their assertions, likely because the evidence does not support their mischaracterizations. The City points out many examples in which TreePAC and QACC ignore or mischaracterize testimony with specific citations in its Closing Brief and in this Response. The City invites the Examiner to scrutinize the parties' assertions against the evidence and testimony when evaluating their claims. Ultimately, the record supports the City's approach on all challenged aspects of the FEIS. As explained below, and in the City's Closing Brief, QACC and TreePAC have failed to meet their burden of proof. The City's FEIS is more than adequate and QACC's appeal should be denied.

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II. ARGUMENT

A. QACC wholly ignores the standards applicable to nonproject proposals and mischaracterizes SEPA's standards

QACC dedicates a sizable portion of its brief to general recitations of SEPA's role and importance. While the statements of SEPA's general principles are unobjectionable, QACC's brief fails to acknowledge the "extremely high burden of evidentiary proof" that it must satisfy. As explained in the City of Seattle's Closing Brief ("City Brief"), SEPA requires that the Hearing Examiner give substantial weight to the City's determination that the FEIS is adequate and the deferential "rule of reason" allows an agency to choose from a range of different, reasonable approaches. An appellant's burden is even higher in the context of nonproject proposals, where SEPA expressly accords the lead agency more flexibility.[1]

The "rule of reason," which QACC only nominally acknowledges (and only discusses in the context of NEPA and not the controlling SEPA case law),[2] is of particular importance to this case. It guides the Examiner's review of the FEIS. Pursuant to that "broad, flexible cost-effectiveness standard," the Examiner must uphold the FEIS if the City's approach includes "reasonably thorough discussion of the significant aspects of an agency's decision."[3] As demonstrated in the City's Closing Brief and in this Response, the City's review is more than sufficient to satisfy that standard. The City has provided citation to testimony and documentary evidence demonstrating that the City's analyses of each of the issues of concern to QACC and TreePAC are sufficient to inform a decision-maker of the impacts of this nonproject action. Importantly, even if the additional

[1] City Brief at 1-5.
[2] QACC Brief at 2-3.
[3] *Citizens All. To Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995) (internal quotations and citations omitted); SMC 25.05.402.A.

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analyses that QACC and TreePAC demand were reasonable (and, as shown in the City's brief, in most instances they are not), that extra level of review is not needed to satisfy the rule of reason. While there can almost always be more analysis or different methodologies or approaches, that fact is simply not determinative of the legal adequacy of the FEIS. Indeed, as demonstrated at hearing, especially where the City's analysis is sufficient to inform a decision-maker, the added cost of the extra analyses demanded by QACC and TreePAC are patently unreasonable and irresponsible.[4]

In addition to reciting basic SEPA principles that do not bear on the specific subject matter of this case and ignoring the rule of reason, QACC also advances an incorrect legal assertion regarding SEPA EIS requirements. Relying on a sentence in *Barrie v. Kitsap County*, QACC seems to assert that that the purported lack of any similar ADU-related policy changes "anywhere in the USA" precludes research of the impacts of the City's proposal and therefore renders the EIS inadequate.[5] QACC's arguments misapply the principles in the quoted case.

As a preliminary factual matter, QACC's claim rests on the false assertion that the City's proposal is wholly unprecedented, and that no similar proposal exists "anywhere else in the USA."[6] QACC's brief cites no evidence in support of this claim, and none of its witnesses or the City's witnesses characterized the proposal in this manner. While it is true that the level of the City's *analysis* of the impacts of ADU proposal is unprecedented,[7] QACC's claim that the proposal itself is unprecedented is incorrect.

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[4] Hr'g Tr. 170:19–173:19, March 29, 2019 (Testimony of A. Pennucci).

[5] *See* Appellant's Closing Argument ("QACC Brief") at 10-11 (citing *Barrie v. Kitsap Cty*, 93 Wn.2d 843, 859, 613 P.2d 1148 (1980))

[6] QACC Brief at 11.

[7] 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

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Contrary to QACC's claim, the FEIS itself notes that many other U.S. cities allow ADUs in their respective low-density residential neighborhoods, some with relatively high rates of ADU production.[8] The EIS also discusses ADU regulations adopted in two peer cities, Portland, Oregon, and Vancouver, British Columbia. The Portland and Vancouver regulations contain elements similar or identical to this proposal's elements (e.g., allowance of two ADUs and elimination of off-street parking and owner-occupancy requirements), and in some respects allow for greater development potential (e.g., an FAR limit of 0.6 and a lot coverage limit of 40%).[9] In short, the allowance and encouragement of ADUs is far from new and, in fact, is in line with measures adopted in other cities facing similar housing shortages.

Moreover, QACC's interpretation of the legal principle articulated in *Barrie* is also incorrect. QACC relies exclusively on the statement in *Barrie* that an EIS should "disclose the history of success and failure of similar projects." Notably that single sentence from a dated SEPA case about an EIS for a project action (a site-specific rezone) has not been cited for the same proposition elsewhere in SEPA case law.[10] Importantly, however, that statement is not an instruction that an EIS can be adequate only if the

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first of its kind"); Hr'g Tr. 18:21-25, March 29, 2019 (Testimony of A. Leighton-Cody, noting the limited statistical information available related to ADUs and vehicle ownership).

[8] FEIS at 3-34.

[9] FEIS at 3-35.

[10] The case is so outdated that other principles espoused in the *Barrie* case are not even legally correct anymore. Notably, *Barrie* concluded that EISs must review socioeconomic impacts. *Barrie*, 93 Wn.2d at 858. That legal statement of the need to analyze socioeconomic impacts is no longer good law. The Court issued its decision in *Barrie* in 1980. In 1983, the legislature adopted SEPA amendments that defined and limited the scope of the environment, and the state and Seattle's SEPA rules were amended to expressly disavow the use of the term "socioeconomic" in SEPA. WAC 197-11-448; SMC 25.05.448. Settle's treatise suggests that these amendments were adopted as a direct response to Barrie and were intended to limit compulsory inclusion of socioeconomic impacts. Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14.01[2][a] at 14–51 to 14-52 (2016).

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proposal is identical or substantially similar to past projects that have been studied, as QACC seems to assert.[11] Instead, the court offers the quoted statement as support for its conclusion that the County in that case ignored entirely the impacts of a proposed shopping center on the City of Bremerton's Central Business District and should have instead explored those impacts based on impacts of other commercial projects on the Business District.[12]

By contrast, the City here has included adequate analysis and discussion of the impacts of the proposal that is informed, in part, by experiences with and data from similar development regulations and subsequent ADU development in the city and elsewhere. Where data exists about impacts of development of ADUs, whether in Seattle or Portland, the City relied on that data, including, for example, the following:

- The City used data regarding loss of tree canopy with the construction of ADUs based on statistics in Seattle.[13]
- The City analyzed historical data on single-family development outcomes, including historical rates of ADU production, to produce a forecast of ADU production under the proposal.[14]

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[11] *See Barrie*, 93 Wn.2d at 859.

[12] *Id.* at 858-60. Similarly, the NEPA case law cited in *Barrie* involved projects in which the history of similar projects was informative of the impact analysis. In *Nat. Res. Def. Council, Inc. v. Grant*, 355 F.Supp. 280, 288 (E.D.N.C. 1973), the watershed project under review was similar to past projects in which the same project sponsors had failed to adequately perform their maintenance responsibilities, thus raising related maintenance concerns for the project under review. In *Sierra Club v. Morton*, 510 F.2d 813, 824 (5th Cir. 1975), the project under review was the sale of oil and gas leases along the Gulf of Mexico, for which consideration of damage from other offshore projects was appropriate.

[13] FEIS at 4-54.

[14] FEIS at 4-18.

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- The City used average vehicle ownership rates per ADU based on statistics in Portland and adjusted that data to reflect Seattle's characteristics, resulting in a higher rate.[15]
- The City incorporated the average occupant rates per ADU based on statistics from Portland, with an upward adjustment resulting in a conservative population increase analysis (i.e., tending to increase the potential impact).

Drawing from the available experiences from similar proposals, the FEIS appropriately uses relevant data that is available and handles uncertainty and potential unknowns by applying accepted and reasonable methodologies to deal with such uncertainties,[16] applying conservative assumptions (i.e., those that tend to overstate the impact),[17] and disclosing the possibility of localized impacts.[18] The City's approach is entirely consistent with the principle articulated in *Barrie*.

Finally, as a policy matter, QACC's overly restrictive and incorrect interpretation of the legal principle in *Barrie* would perversely bar jurisdictions from considering proposals with any new or novel aspects. QACC's extreme interpretation of the case is not

[15] Hr'g Tr. 19:1–21:2, March 29, 2019 (Testimony of A. Leighton-Cody); FEIS at B-22 to B-24.

[16] Hr'g Tr. 126:5–127:15, 156:1-16, Mar.ch 28, 2019 (Testimony of M. Shook, describing (1) the evolving area of scientific evaluation of displacement risks and the City's role in that effort, and (2) the methodology used to estimate the probability of adding a second ADU, in the absence of historical data).

[17] *E.g.*, FEIS at 4-28 to 4-30 (explaining the use of higher adjustment factors in the Forecast Model to arrive at reasonable upper-bounds estimates for ADU production).

[18] *E.g.* FEIS at 4-66, 4-186 (discussing potential localized impacts in the land use and parking analyses). In contrast, QACC's witnesses failed to conduct comparable analyses. For example, it is undisputed that Mr. Tilghman did not conduct any type of count or measurement on the vast majority of blocks studied in the FEIS, and that Mr. Reid made no attempt to prepare a displacement analysis or a forecast of ADU production. Ex's. 4-5 (showing Mr. Tilghman's data for the limited block fronts he measured); Hr'g Tr. 99:12-15, March 25, 2019 (Testimony of W. Reid). In fact, Mr. Reid in several instances was not even able to suggest a methodology or approach that would resolve his criticism. Hr'g Tr. 110:5-6, March 25, 2019. Their criticisms are classic fly-specking that fail to show that the FEIS's analysis is unreasonable.

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supported by the case itself. The FEIS includes an adequate level of discussion of similar proposals and QACC's interpretation of *Barrie* is incorrect.

B. The FEIS analyzed a reasonable range of alternatives

In its brief, QACC asserts that the FEIS fails to consider a reasonable range of alternatives.[19] It is telling that QACC's conclusory legal argument is not supported by citation to any evidence. Indeed, QACC's witnesses primarily focused on the Preferred Alternative and had nothing to say about the range of alternatives or the meaningfulness of the differences among alternatives.[20] The City's testimony on the reasonable range of alternatives is uncontested in the record. Specifically, the City's witnesses explained how the meaningful distinctions among the alternatives allow decision-makers to understand the potential impacts of the proposal.[21] Notably, Ms. Pennucci summarized how the differences among alternatives help the decision-maker make informed choices when crafting the draft legislation to implement the proposal. Decision-makers could choose to draft legislation that reflects one of the alternatives, or to adopt various components of each alternative. Using the parking analysis as an example, she explained how the FEIS's alternatives analysis allows decision-makers to assess the differing impacts of implementing a parking requirement (as provided in Alternative 3), eliminating parking requirements (Alternative 2), or considering geographical differences in applying a parking requirement.[22]

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[19] QACC Brief at 7-10.

[20] *See. e.g.*, Hr'g Tr. at 240:15-22, March 25, 2019 (Testimony of R. Tilghman, admitting he could not recall the different parking requirements between alternatives).

[21] Hr'g Tr. 39:16–40:12, March 27, 2019 (Testimony of N. Welch); Hr'g Tr. 174:2–177:7, March 29, 2019 (Testimony of A. Pennucci); Hr'g Tr. 127:16–129:19, 148:4-12, 165:13–166:4 (Testimony of M. Shook).

[22] Hr'g Tr. 176:3–177:7, March 29, 2019.

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More generally, QACC's unsupported and conclusory legal claim fails to address the governing SEPA provisions specific to nonproject proposals. In the context of nonproject proposals, SEPA expressly allows agencies to limit alternatives to those that achieve a proposal that was "formally proposed" and that provide "alternative means of accomplishing a stated objective."[23] Here, as discussed in the City's brief, the subject proposal is one that was developed and "formally proposed" through a years-long public process, including multiple Council resolutions.[24] There is no evidence to the contrary, and QACC's legal argument ignores this key consideration.

Further, consistent with the rule of reason, SEPA requires only a reasonable number and range of alternatives, not a consideration of every reasonable alternative available.[25] Thus, for example, in the appeal of the EIS for the MHA proposal, the Examiner rejected the appellants' claim that the City should have analyzed alternative proposals, citing the substantial deference owed to the City's determination and the appellants' failure to demonstrate alternatives that would accomplish the City's

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[23] WAC 197-11-442; SMC 25.05.442.D.

[24] City Brief at 4-5.

[25] WAC 197-11-440(5); SMC 25.05.440.D. QACC cites NEPA case law for the proposition that an EIS "must consider every reasonable alternative." QACC Brief at 9. However, although NEPA case law may be helpful in some circumstances, SEPA case law and regulations control when there are any divergences or differences between the federal and state standards. *Alpine Lakes Prot. Soc. v. Wash. State Dep't of Ecology*, 135 Wn. App. 376, 394 n.24, 144 P.3d 385 (2006) (declining to apply NEPA case law because of differences between NEPA and SEPA); *Drinkwitz v. Alliant Techsystems, Inc*., 140 Wn.2d 291, 312, 996 P.2d 582 (2000) (stating that federal case law is inapplicable where there are differences between state and federal statutes, or where there is contrary state authority). Here, the specific SEPA regulations governing alternatives for nonproject actions specifically state that the lead agency is not required to examine "all conceivable policies, designations, or implementation measures" and specifically allow the EIS content to "be *limited* to a discussion of alternatives which have been formally proposed…" WAC 1797-11-442 (emphasis added). Those regulations and their associated case law are controlling and the Examiner need not consider NEPA cases to which QACC cites, to the extent those cases espouse a different requirement.

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objectives.[26] Similarly, in this case, the range of alternatives is reasonable. As the City's witnesses testified, the City developed alternatives that varied in the type and intensity of policy changes, sufficient to provide decision-makers with the ability to consider the ramifications of a range of elements.[27] Moreover, the FEIS details how each of the alternatives differ and explains that Alternative 3 considers more modest policy changes compared to Alternative 2, while the Preferred Alternative combines elements of Alternatives 2 and 3.[28] Similarly, in the impacts analyses, the FEIS discusses the differences under each alternative.[29] This testimony and documentary evidence about the reasonable range of alternatives are uncontested.

QACC's criticism of the range of alternatives is conclusory and fails to even articulate an alternative that the FEIS failed to consider. The FEIS's alternatives analysis is sufficient.

C. The FEIS's parking analysis is reasonable

QACC's brief reiterates many of the same erroneous and refuted claims related to the City's parking analysis that QACC presented during the hearing and that the City addressed in its closing brief. As shown in the City's Closing Brief, the parking analysis is adequate.

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[26] Findings and Decision of the Hr'g Exam'r for the City of Seattle ("Findings & Decision"), W-17-006–W-17-014, at 5, 23-24.

[27] Hr'g Tr. 39:16–40:12, March 27, 2019 (Testimony of N. Welch); Hr'g Tr. 174:2–177:7, March 29, 2019 (Testimony of A. Pennucci).

[28] FEIS at 2-3 to 2-17.

[29] *E.g.*, FEIS at 4-41 (concluding that the Preferred Alternative would result in the fewest teardowns, reducing the potential for physical displacement); FEIS at 4-157 (concluding that the Preferred Alternative results in the greatest relative potential aesthetic impact).

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1. The City used reasonable methods to calculate parking supply for purposes of this nonproject EIS.

First, the QACC's arguments in its Brief challenging the City's methodology for parking supply data collection are unavailing. As discussed in the City's Closing Brief, the observational method used in the FEIS uses satellite imagery and measurements and field observations and is a typical and long-accepted method, particularly for large-scale and long-term studies. For example, SDOT uses the observational method for its parking inventory studies and deems it a reliable yet cost-effective methodology.[30]

QACC's entire challenge to the City's parking supply rests on discrepancies Mr. Tilghman created between his count for parking supply and that of the City's consultants. In its brief and at the hearing, QACC fails to refute the flaws in Mr. Tilghman's testimony. For example, QACC makes no attempt to explain or justify the discrepancies between Mr. Tilghman's wheeled counts and IDAX's wheeled counts or the absence of guidance requiring or recommending the use of a wheel over observational methods. QACC also makes no attempt to address the flaws in Mr. Tilghman's application of across-the-board "adjustments" to surmise inventory in the remaining hundreds of blocks that he failed to measure. Mr. Tilghman created his adjustments based on his measurements of only 13 block fronts[31] (compared to the FEIS's collection on 339 blocks[32]), and Ms. Leighton-Cody's double-checking of Mr. Tilghman's measurements refuted Mr. Tilghman's claims about the accuracy of his method and demonstrated that

[30] *See* City Brief at 21-26.
[31] Ex's. 4-5
[32] FEIS at 4-167.

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Mr. Tilghman's extrapolation of an adjustment factor across the board throughout the study area was opportunistic and overly aggressive.[33]

Moreover, perhaps recognizing that Mr. Tilghman's data cannot support such his broader conclusions, QACC's brief does not affirmatively assert that the proposal would cause any of the study areas to exceed the 85% utilization threshold.[34] Rather, QACC focuses on the possibility that some blocks may exceed the 85% utilization threshold[35]—i.e., the possibility that localized impacts may occur, which the FEIS discusses.[36] In fact, as Ms. Pennucci demonstrated, even Mr. Tilghman's data shows that the study locations had adequate space to accommodate ADU production. Each parking location represents less than one percent of the total study area, and applying those percentages to the total forecasted ADU production yields approximately 37 to 42 ADUs in each study location. In the northeast study location, Mr. Tilghman's data shows that ten percent of the total ADU production (401 ADUs) would need to occur in that study location before exceeding

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[33] Hr'g Tr. 27:1–28:23, 32:21–33:1, 34:8–35:8 (March 29, 2019); Ex. 40. As she explained in her testimony, Ms. Leighton-Cody performed that work to check the veracity of Mr. Tilghman's claims. During the hearing, QACC improperly attempted to elicit testimony from Mr. Tilghman in which he tried to ascribe an intent to Ms. Leighton-Cody's double-check and infer an admission about the accuracy of the work the EIS team performed. The Examiner sustained an objection to that testimony. Mr. Tilghman's speculation was directly inconsistent with Ms. Leighton-Cody's testimony. Hr'g Tr.199:20-200:3, March 29, 2019. QACC's brief repeats the same baseless speculation, with no citation to evidence or testimony. QACC Brief at 12. Such baseless speculation is not persuasive evidence and does not refute the City's expert testimony.

[34] Even if QACC asserted that the proposal would cause a study area to exceed the 85% threshold, that assertion alone would be insufficient to establish that the FEIS's analysis is unreasonable. As discussed in the City's Brief, whether the FEIS labels an impact significant or not is irrelevant. City Brief at 25-26.

[35] QACC Brief at 13 (claiming that in the northwest study area, "the addition of just a single ADU per block would exceed 85% utilization on 64 of the 113 blocks").

[36] *E.g.*, FEIS at 4-186.

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the 85% threshold. While the northwest study location is closer to the threshold, Mr. Tilghman's data area still suggests remaining capacity.[37]

Finally, even if the Examiner were to accept Mr. Tilghman's claim that his wheeled method is more accurate than the City's approach, QACC's more basic argument infers a requirement for a level of precision that is simply not appropriate or needed for the analysis of a nonproject action, where the City is collecting the data for larger areas and using it for comparative purposes to extrapolate conclusions across the entire single-family areas of the city.[38] The City is not reviewing a specific project in a specific location, and SEPA recognizes that meaningful distinction and invites a different approach.[39]

2. The City used an appropriate and reasonable measure for vehicle ownership rates.

QACC mischaracterizes the evidence regarding vehicle ownership rates. Preliminarily, QACC's claim that the FEIS erroneously calculated vehicle ownership based upon bedroom counts is incorrect and misleading.[40] As Ms. Pennucci explained, the City's consultant performed the calculations for EIS ownership rates upon which the EIS relies in a separate table. *See* Ex. 43. When copying that information into the EIS, the authors inadvertently transposed information related to bedroom counts per ADU from one chart in the EIS (Exhibit B-18 of the FEIS) into another chart of the EIS describing vehicle ownership rates (Exhibit B-19 of the FEIS).[41] This copy-editing error did not change the underlying calculations or the veracity of the vehicle ownership rates that are

[37] Hr'g Tr. 155:4–157:17, March 29, 2019 (Testimony of A. Pennucci).
[38] City Brief at 21-25.
[39] WAC 197-11-442(1); SMC 25.05.442.D; *see also* Hr'g Tr. 112:17 – 113:2, March 29, 2019 (Testimony of M. Snyder, describing the differences between project and nonproject actions and the resulting differences in methodologies that may be applied)
[40] QACC Brief at 13 n.3.
[41] *See* FEIS at B-23–B-24.

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correctly shown in both the consultant's calculations (Ex. 43) and the chart in the EIS (Exhibit B-19 of the FEIS).[42] To be clear, the final calculations shown in both exhibits—the adjusted ratio of vehicle ownership and the estimated number of vehicles per ADU—were correctly calculated and correctly shown in the EIS. Exhibit 43 is the original calculation provided by the consultants, and the exhibit in the EIS reflects the correct result of the calculation, even if one of the supporting rows in the EIS was inadvertently mis-copied.[43] QACC's misleading suggestion that this evidence somehow invalidates the EIS's conclusions about vehicle ownership rates is grossly misleading. Copy-editing errors that do not even impact the fundamental analysis are the definition of a harmless error that does not satisfy the Appellant's burden of proof.[44]

QACC's claim that the FEIS should have used vehicle ownership rates for owner-occupants to adjust for the potential for ADUs owned as condominiums also has no support in the record. First, the available census data for vehicle ownership rates in owner-occupied units does not distinguish between types of units (single-family homes, condominiums, etc.). In other words, no data for vehicle ownership rates for owner-occupied ADUs exists.[45] Additionally, as Ms. Leighton-Cody explained, the guidebook used for parking generation analyses presents data based on the size of the unit.[46] As such, using vehicle ownership rates for owner-occupied units, as QACC suggests, is not

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[42] Hr'g Tr. 78:15–81:2, March 29, 2019 (Testimony of A. Leighton-Cody).

[43] Hr'g Tr. 149:24–152:25, March 29, 2019 (Testimony of A. Pennucci).

[44] *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty*., 122 Wn.2d 619, 637–38, 860 P.2d 390 (1994) (concluding that failure to respond to comments on a draft EIS did not render the subsequent final EIS inadequate). See also *Mentor v. Kitsap Cty*, 22 Wn. App. 285, 290–91, 588 P.2d (1978) (where a final EIS failed to discuss the project site's designation under an applicable urban design study and the comprehensive plan court nevertheless deemed the omissions "unfortunate but not fatal").

[45] *See* City Brief at 29-30; Hr'g Tr. 64:4-14, March 29, 2019 (Testimony of A. Leighton-Cody).

[46] Hr'g Tr. 65:8-23, March 29, 2019 (Testimony of A. Leighton Cody).

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appropriate and would significantly overstate the vehicle ownership rate for ADUs, because it would apply the same rates used for single-family homeowners. ADUs are generally smaller than traditional owner-occupied units and would be expected to have fewer cars per unit than the broader class of owner-occupied units.[47]

Moreover, the City did not simply accept the smaller vehicle ownership rate for ADUs identified in Portland and instead adjusted it higher. Specifically, the City compared average number of bedrooms in rental units in Portland and Seattle, and used that rate to adjust upward the Portland rate for vehicle ownership per ADU. Thus, instead of using the only data for vehicle ownership for ADUs, which suggests it is even lower than vehicle ownership rate for rentals, generally,[48] the City chose a more conservative path (i.e., tending to overstate the vehicle ownership rate for its study). Indeed, QACC's criticism of the vehicle ownership rates (and of the parking study, generally) ignores the City's use of other conservative assumptions that tend to overstate impacts.[49]

It is significant that even Mr. Tilghman did not affirmatively offer testimony supporting QACC's challenge to the vehicle ownership rates that the FEIS used in its study. Mr. Tilghman only speculated that condominiumized ADUs would result in higher vehicle ownership rates than rental units.[50] Notably, however, Mr. Tilghman did not opine that the FEIS should have used the vehicle ownership rate for owner-occupants, did not articulate a method for calculating vehicle ownership rates for owner-occupied ADUs, and did not testify as to any flaws in the City's methodology for calculating vehicle ownership

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[47] Hr'g Tr. 63:11-19, March 29, 2019 (Testimony of A. Leighton-Cody).

[48] FEIS at B-22.

[49] City Brief at 20. The FEIS assumed that all ADU residents would park on the street and that all eligible parcels would develop with two ADUs rather than one, and its study locations capture more proximity to multifamily and commercial zones.

[50] Hr'g Tr. 187:17–188:8, March 25, 2019.

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rates for owner-occupied ADUs.[51] QACC's parking expert could have supported the challenges to the City's vehicle ownership rates that QACC advances in its brief if he agreed with them. But he did not advance those arguments.

3. The City appropriately accounted for the potential increase in occupants in its parking analysis.

QACC's claim that "[n]one of the parking impact analysis addresses increasing lot occupancy by 50%"[52] is patently false. The parking analysis increases the lot occupancy to account for the greater potential for ADU residents under the proposal. It simply does it in a manner different than that which QACC would prefer. In fact, the FEIS conservatively doubles the parking demand of potential ADU residents by assuming that all eligible lots would build two ADUs and applies the associated increase in cars per ADU, even though the ADU development forecast concluded that most lots would have only one ADU.[53] That doubling of ADU occupants (using an average number of ADU occupants and vehicles per ADU) accounts for the "50%" increase that reflects the increase in allowed occupancy and vehicle ownership per lot.

QACC's related claim that the analysis should have assessed impacts by assuming a maximum occupancy of 12 adults per lot is unsupported even by Mr. Tilghman's testimony. In his testimony in this case, Mr. Tilghman was more cautious than QACC's brief admits, clarifying that his "max occupancy" calculation was not a suggestion that the situation was likely, and was merely a "sensitivity" test.[54] More tellingly, Mr. Tilghman did not himself assess "maximum occupancy" impacts in a prior project-specific parking study that he prepared, vitiating any claim that the City should have done such an

[51] Hr'g Tr. 178:17–179:3, 186:18–188:17, March 25, 2019 (Testimony of R. Tilghman, discussing the FEIS's calculation
[52] QACC Brief at 14.
[53] City Brief at 28.
[54] Hr'g Tr. 74:6-8, March 29, 2019.

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assessment in this FEIS. Instead, Mr. Tilghman's methodology in his study confirms 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.[55]

4. Neither the Examiner's prior decision on the DNS nor SEPA, generally, requires an analysis of the parking impacts from the "full buildout" scenario.

QACC's claim that the Examiner's decision in the DNS appeal requires a full build-out analysis of parking impacts mischaracterizes the Examiner's prior decision.[56] The decision calls for an analysis of full build-out conditions only in the context of aesthetics. Specifically, the decision calls for renderings showing the "maximum height, bulk and scale that could be constructed on at least one full block," and the relevant conclusion solely discusses height, bulk, and scale impacts.[57] Height, bulk, and scale are concepts used to analyze and describe visual and aesthetic impacts only, and have no relation to parking analysis.[58] QACC's attempt to require a full build-out analysis of other impacts, such as parking impacts, has no basis in the Examiner's decision.

More generally, SEPA also does not require parking analysis of full build-out conditions. While the City prepared that level of aesthetic analysis to address the Examiner's decision on the DNS, SEPA does not require analysis of speculative and remote impacts. Information about the probability of a full build-out was not available at the time of the DNS appeal. However, the City has since completed an EIS that shows with empirical evidence that the "full build out" scenario is speculative and remote. The study on which the City relies shows that the average number of residents per ADU is 1.36 adults. A large majority of ADUs in that study had only one resident, while another

[55] City Brief at 27-28; Ex. 11.
[56] QACC Brief at 15-16.
[57] Ex. 32, at 13-14.
[58] *See* FEIS at 4-92.

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significant portion (34.3%) had two residents. Only one percent of ADUs had three residents, and none was reported to exceed that number.[59] Additionally, the City has empirical data demonstrating the limited number of instances in which eligible lots would actually produce two ADUs (the only scenario in which the total maximum occupancy of unrelated adults could exceed the current regulation of 8 and go as high as 12). Those facts from empirical studies prove that the "max occupancy" scenario that QACC warns about is remote and speculative. SEPA does not require analysis of that type of impact. In this FEIS, the City complied with the Examiner's direction to study aesthetic impacts of the full build-out scenario, which the Examiner ordered without the benefit of the evidence about the likelihood of that scenario.[60] But it is incorrect to assert that the Examiner's direction should be more broadly applied to other impacts, and in fact, it would be inconsistent with SEPA to require a broader application to other impacts, in light of the speculative and remote nature of that scenario.

5. The efficacy and likelihood of proposed mitigation is not within the Examiner's jurisdiction in this EIS adequacy appeal.

QACC's argument that the FEIS's identified mitigation measures "would do nothing to mitigate on-street parking impacts"[61] is a challenge to the efficacy of mitigation measures, an issue beyond the scope of this appeal.[62] Setting aside the jurisdictional limitation, the FEIS provides a discussion of mitigation measures (both existing regulations and other potential measures that could be adopted),[63] and QACC's challenges to the efficacy of the mitigation measures are based solely on speculation.[64]

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[59] FEIS at B-20.
[60] Hr'g Tr. at 81:3-22, March 27, 2019 (Testimony of N. Welch).
[61] QACC Brief at 16.
[62] City Brief at 31-32.
[63] FEIS at 4-189.
[64] City Brief at 32-33.

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D. The FEIS's housing and socioeconomics analysis is reasonable

Preliminarily, QACC's assertion that "the significance of impact must be measured from the perspective of those who would be impacted" is not supported by the case it cited, *Norway Hill Preservation & Protection Ass'n v. King Cty Council*, 87 Wn.2d 267, 277, 552 P.2d 674 (1976).[65] In *Norway Hill*, the court noted the difficulty in defining significance, calling it a "particularly subjective" judgment for which a "general guideline" would be more appropriate than a "value-laden definition."[66] The court did not attempt to define the perspective from which significance should be measured. Moreover, as discussed in the City's brief, the FEIS's analysis of economic displacement cannot be used to determine whether the FEIS meets SEPA's requirements, and the Examiner lacks jurisdiction to evaluate the adequacy of that analysis.[67]

Notwithstanding the jurisdictional limitation, the FEIS adequately analyzed such impacts. QACC's arguments regarding the housing and socioeconomics analysis reflect the same fundamental misunderstandings of the FEIS's analysis that Mr. Reid presented at the hearing, and wholly ignores the City witnesses' testimony the completely refute Mr. Reid's claims. First, QACC's criticisms of the displacement analysis ignore the FEIS's incorporation of and reliance on the Growth and Equity Analysis, a data-driven, forward-looking analysis that has been substantially vetted, formally adopted as a means for assessing displacement risk, and used in other City efforts.[68] The FEIS incorporates the data in the Growth and Equity Analysis for the FEIS's more limited study area to identify

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[65] QACC Brief at 17 (internal quotation marks omitted).

[66] *Id.* at 277-78.

[67] City Brief at 9-10. As discussed in footnote 9, above, the contrary principle articulated in *Barrie* (upon which QACC relies for different argument) is no longer good law on this specific subject.

[68] City Brief at 10-11.

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more vulnerable neighborhoods within the FEIS study area and to examine impacts in those specific areas.[69]

QACC ignores the FEIS's displacement analysis and, instead, echoes Mr. Reid's conclusory dismissal of the Growth and Equity Analysis and his flawed arguments that the City should have used Appendix M of the MHA FEIS. Specifically, QACC's brief repeats his false assertion that Appendix M of the MHA FEIS identifies "census tracts in which the City has already identified displacement of lower income households[.]"[70] As discussed in the City's brief, Mr. Reid's understanding of and reliance on Appendix M is flawed because: Appendix M examines the correlation between housing and demographic and socioeconomic changes across *all* census tracts (or groups of tracts as categorized in the Growth and Equity Analysis), not within particular census tracts; it looks at displacement historically rather than being forward-looking; it uses a data set with limited applicability to the single-family zones studied in this FEIS; and it improperly equates Appendix M's data of demographic and socioeconomics changes with displacement.[71]

Second, QACC's claim that the City gave "no defense" of the alleged failure of residual land value ("RLV") to consider owner-development[72] wholly ignores the testimony of Mr. Shook, who directly responded to this claim by Mr. Reid. As Mr. Shook explained, the RLV methodology analyzes how a proposal affects the underlying valuation of land, whether owned or yet-to-be-acquired.[73] That refutation of Mr. Reid's

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[69] City Brief at 7-8.

[70] QACC Brief at 18.

[71] City Brief at 11-13. Moreover, as pointed out in the City's Brief, Appendix M does not show a systematic relationship between new development and loss of lower-income households in any event. *Id.* at 13-15.

[72] QACC Brief at 21.

[73] City Brief at 15-16.

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conclusory assertion and Mr. Shook's accompanying explanation of Mr. Reid's flawed argument is unrebutted.

Third, QACC's criticism of the forecast model misapprehends the analysis in the same manner as Mr. Reid.[74] QACC echoes Mr. Reid's claim that the adjustment factors are arbitrary but fails to address Mr. Shook's testimony explaining how the adjustment factors were developed and adjusted upward to yield upper-bound estimates of ADU production.[75] Again, Mr. Shook's refutation of Mr. Reid's conclusory assertion is unrebutted. Moreover, Mr. Reid made no attempt to articulate an alternate methodology, in effect conceding that he cannot show that the FEIS's methodology is unreasonable.

Similarly, QACC's claim that "the City did not attempt to run its forecasting model" in the neighborhoods allegedly susceptible to displacement identified in Appendix M[76] both misapprehends Appendix M's data and the Forecast Model's methodology. As stated above, Appendix M does not identify specific neighborhoods susceptible to displacement, though the Growth and Equity Analysis on which the City relied does. Moreover, the Forecast Model uses data for every single parcel in the study area, and thus captures the parcels in the neighborhoods that QACC claims were missing from the analysis.[77]

More fundamentally, the FEIS includes the precise displacement analysis that QACC claims is missing. As Mr. Welch testified, the FEIS specifically analyzes displacement risk in neighborhoods susceptible to displacement. The FEIS incorporates the Growth and Equity Analysis's assessment and identifies Rainier Valley, White Center, Beacon Hill, and North Seattle as the neighborhoods most susceptible to displacement.

[74] QACC Brief at 21-22.
[75] City Brief at 16-17.
[76] QACC Brief at 22.
[77] City Brief at 14-15.

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The FEIS identifies these neighborhoods as lower-priced neighborhoods, except for Beacon Hill. The FEIS then quantifies the number of teardowns and discusses associated displacement impacts expected under each action alternative, specifically in lower-priced neighborhoods where the risk of displacement is higher.[78]

Finally, QACC's claim that the FEIS failed to consider the sale of ADUs as separate condominium units ignores Mr. Shook's testimony explaining how both the Pro Forma Analysis and the Forecast Model capture the potential condominiumization of ADUs.[79]

In sum, the City's evidence and brief thoroughly explained the reasonableness and adequacy of the FEIS's housing and socioeconomics analysis. QACC's brief reiterates the same flawed criticisms it raised at hearing, which are insufficient to meet its burden.

E. The FEIS's land use and aesthetics analyses are reasonable

As discussed in the City's brief, the aesthetics analysis is based on precise, accurately dimensioned modeling exercises designed to maximize the development outcomes (particularly ADU development) and to show changes as clearly as possible.[80] In contrast, Mr. Kaplan presented flawed, misleading, error-ridden exhibits that do not depict the proposal.[81] QACC's brief relies on the same flawed exhibits and testimony. For

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[78] Hr'g Tr. 36:12–38:15, March 28, 2019.

[79] City Brief at 17-19. One of QACC's assertions regarding the risks of condominiumization demonstrate the carelessness with which QACC describes the facts in the record. QACC fails to provide evidentiary support for its claim regarding the valuation of the property located at 1235 NE 88th Street. Citing Exhibit 30, QACC claims that the pre-condominiumization valuation of the parcel was $367,080. However, nothing in the exhibit supports that valuation, and there is no evidence in the record explaining the parcel's appraised value following its condominiumization (for example, to what extent the valuation was based on increased property values between appraisals, substantial remodeling, the construction of additions and expanded living area, or the fact that the units were converted to condominiums).

[80] City Brief at 34-35.

[81] City Brief at 36-39.

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example, QACC's brief cites an illustration that Mr. Kaplan took from the MHA FEIS and re-labeled to purport to depict ADU development, and claims that this exhibit shows that the proposal would "approach[] the intensity of multi-family townhouse development in LR1 zoning."[82] As explained in the City's brief, the LR1 illustration shows total gross area that far exceeds what would be allowed under the Preferred Alternative, depicts nearly double the lot coverage, and allows for significantly more occupancy.[83] While QACC continues to overlook or ignore the flaws in its evidence, the Examiner should not.

At the outset, QACC again mischaracterizes the DNS decision by inferring that the decision precluded the use of modeling of representative, hypothetical conditions.[84] The decision's language does not support such an interpretation. QACC infers a meaning from the word "actual" that precludes use of a hypothetical model. But their inference is not supported by the entirety of the sentence, which prescribes depiction of legislative changes that do not currently exist and are not allowed by code. The cited clause and the rest of the relevant conclusion convey a contrast between the development environment created by the legislation and that of the existing environment. The decision does not address much less preclude the use of hypothetical modeling, a common and reasonable practice that avoids the confusion and distraction associated with modeling future outcomes on specific properties.[85]

More fundamentally, as Mr. Kuehne and Mr. Welch testified, the hypothetical model accurately depicts conditions of the actual development environment created by the

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[82] QACC Brief at 26.

[83] City Brief at 38.

[84] QACC Brief at 24.

[85] Ex. 32, at 12-13 (noting, "Neither the Checklist nor the DNS included any illustrations to show the impacts of the proposed changes to allowed height, bulk and scale," and that the appellant's complaint was that the City had not adequately shown the proposal's likely impacts to height, bulk, and scale); City Brief at 33-34, 40-41.

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legislation and compares it against the existing development environment. In fact, the hypothetical depicts a wider range of representative conditions than might exist in an actual block, such as a variety of lot sizes and dimensions. That range of representative conditions, which reflect various conditions throughout the city, can be applied to specific properties and locations.[86] For example, the model depicts several lots as small as 3,200 square feet side-by-side,[87] thus capturing the potential effects on areas with lots that are smaller and denser than average.[88] Thus, QACC is simply wrong when it asserts that the City's hypothetical bears "no resemblance to any actual Seattle neighborhood."[89] To the contrary, it deliberately includes elements that bear resemblance and allow comparison to multiple Seattle neighborhoods in a manner that no one real block could.

With no citation to evidence or testimony, QACC also generally claims that the FEIS's modeling is "misleading" and fails to capture the "full impact" of the proposal.[90] QACC's claim ignores the testimony of Mr. Kuehne and Ms. Pennucci explaining how the team designed and selected models that maximize the development outcomes for the various lots under each alternative.[91] Moreover, the models depict the precise scenario that QACC claims is missing—the models show two ADUs of 1,000 square feet each (or the maximum size allowable given the circumstances of a particular lot).[92] QACC's perception that the depictions are "small [and] backyard cottage-like"[93] is not reflective of a flaw in the modeling, nor is it evidence of a footprint or form not captured within the

[86] City Brief at 33-34.
[87] FEIS at C-2 (showing distribution of lot types depicted in the hypothetical blocks).
[88] Hr'g Tr. 180:11–181:4, March 27, 2019 (Testimony of N. Welch).
[89] QACC Brief at 24.
[90] QACC Brief at 25.
[91] City Brief at 34-35.
[92] Hr'g Tr. 104:20–106:4, March 27, 2019 (Testimony of O. Kuehne); *see also, e.g.*, 4-138, 4-147.
[93] QACC Brief at 25.

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models. Rather, it is evidence that proves the proposed code changes will not have the aesthetic impacts that QACC fears might occur. The only evidence QACC presented at hearing of the types of aesthetic impact of development outcomes it fears are actually images of development that the proposed code changes would not allow.[94] QACC's fears of aesthetic impacts are unsubstantiated, and its conclusory questioning of the accuracy of the City's analysis is not supported by evidence. QACC's arguments rest primarily on their distrust of the City's analysis – distrust that is not supported by any credible testimony or documentary evidence and is borne from QACC's misrepresentations of potential development outcomes.

Finally, QACC's arguments relating to condominiumization epitomize QACC's inability to articulate or demonstrate a fundamental change in the land use form. QACC's arguments rely solely on Mr. Kaplan's opinion that condominiums would change the development economics, resulting in greater teardowns and construction of larger structures.[95] The proposed code changes do not allow owner-occupied units to have different land use or aesthetic impacts in the form of different or larger structures than those built for any other occupant (rental or use by the owner of the principal unit).[96] The code changes are agnostic as to ownership or rental. To the extent that QACC's concern is that ADUs sold as condominiums will incentivize the construction of larger structures, that development outcome is portrayed in the aesthetic analysis, which depicts the maximum footprint and size of structures that could be built under the proposed code changes.[97] To the extent that QACC's concern is a purported incentive to tear down and

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[94] *See* City Brief at 36-39 (summarizing City testimony refuting the exhibits that Mr. Kaplan incorrectly proffered as depictions of the proposal).

[95] QACC Brief at 25-26.

[96] Hr'g Tr. at 192:17–193:7, March 26, 2019 (Testimony of M. Kaplan).

[97] Hr'g Tr. at 103:1-15, 105:6–106:4, March 27, 2019 (Testimony of O. Kuehne)

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construct new homes and ADUs, that issue is squarely addressed in the housing and socioeconomics analysis, which considered condominiumization both as part of the historical data in the Forecast Model and in the Pro Forma Analysis's measure of development economics changes.[98] The results of this analysis showed that the proposal would result in a relatively modest increase in ADU production over the ten-year study period, and would result in fewer teardowns compared to the no action alternative (meaning more existing houses would be preserved rather than rebuilt as larger structures).[99] QACC offers no empirical analysis or technical testimony to explain why that analysis is incorrect, other than generalized statements.[100] In short, there is simply no evidence of change of land use form from condominiumization that is not addressed in the FEIS.

F. The FEIS's tree canopy analysis is reasonable

As discussed in the City's brief, the City's EIS team included technical experts that helped prepare a reasonable analysis of tree canopy impacts using conservative assumptions that tend to overstate the potential impacts from ADU construction on tree canopy.[101] TreePAC's brief fails to prove that the FEIS's analysis is unreasonable.

Fundamentally, the weight of the evidence supports the City's position. As a condition of its intervention, TreePAC imposed on itself limits to avoid potentially impairing the rights of the City. Specifically TreePAC could not present any witnesses or new evidence at the hearing.[102] As a result, TreePAC presented no testimony rebutting the City's arguments on the adequacy of the FEIS. Its brief presents arguments that convey

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[98] City Brief at 17-18.
[99] City Brief at 8.
[100] QACC Brief at 25-26.
[101] City Brief at 50-51.
[102] TreePAC's Resp. to City regarding its Mot. to Intervene at 3 (Mar. 18, 2019).

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the same misunderstandings of the proposal, the FEIS, and SEPA that TreePAC presented at the hearing.

First, TreePAC raises several arguments that reflect fundamental misunderstandings of SEPA and are outside the scope of this appeal:

- TreePAC asserts the FEIS should have provided additional analyses such as neighborhood-specific analyses, canopy illustrations, and analyses of the "urban heat island effect.[103] But those conclusory assertions are not supported by any evidence in the record that the level of analysis demanded is required to reasonably inform decision-makers of the potential impacts. Moreover, as a matter of law, SEPA does not require such analyses for EIS adequacy. Preliminarily, elements of the environment that are not significantly affected "may be discussed" but "need not be discussed."[104] The FEIS employed a cautiously conservative, reasonable analysis and found no significant impacts to tree canopy,[105] and no further analysis is required.[106] Further, SEPA provides that "site specific analyses are not required" for nonproject proposals that concern specific geographic areas,[107] and clarifies that graphics or illustrations are not required.[108]
- TreePAC argues that the FEIS failed to address specific Comprehensive Plan policies relating to trees.[109] But SEPA does not require a detailed discussion of specific policies; SEPA only requires, "when appropriate," "[a] summary of

[103] TreePAC Closing Statements ("TreePAC Brief") at 10-12, 19-20.
[104] WAC 197-11-440(6); SMC 25.05.440.E.
[105] City Brief at 50-51.
[106] Hr'g Tr. 91:15–92:9, March 28, 2019 (Testimony of N. Welch).
[107] WAC 197-11-442(3); SMC 25.05.442.C.
[108] WAC 197-11-440(4); SMC 25.05.440.D.
[109] TreePAC Brief at 3.

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existing plans . . . and how the proposal is consistent and inconsistent with them."[110] It is undisputed that the FEIS discusses and incorporates a substantial number of Comprehensive Plan policies, including policies specific to trees, the preservation and expansion of tree canopy, and the City's "long-standing commitment to its urban forest."[111] TreePAC's arguments that the EIS should have discussed more Comprehensive Plan policies is simply not supported by the law.

- In its brief, TreePAC claims for the first time that the FEIS's ten-year study period is inadequate.[112] QACC did not raise this issue in its Notice of Appeal, and TreePAC cannot expand the issues beyond those stated in the appeal, because intervention is not intended to provide a substitute means of appealing a decision for those who failed the appeal.[113] Further, TreePAC failed to elicit testimony from any witness supporting its challenge to the study period. The ten-year study period used in the tree canopy analysis is consistent with the study period applied throughout the FEIS's analysis.[114] Especially in the absence of any evidence, that choice is reasonable and survives challenge.

  Further, to the extent that TreePAC asserts that the City should have considered the impact of the full build-out scenario on tree canopy—that

[110] WAC 197-11-440(6)(d); SMC 25.05.440.E.4.a. *See also* Findings & Decision, W-17-006–W-17-014, at 31-32 (rejecting appellants' call for a more detailed analysis of Comprehensive Policies, citing the "loose requirements of SMC 25.05.440.E.4").

[111] FEIS at 4-52, 4-78 to 4-84.

[112] TreePAC Brief at 10-11.

[113] Hearing Examiner Rules of Procedure 3.09; Order Granting Intervention filed March 21, 2019.

[114] *E.g.*, FEIS at 4-19 (stating that the FEIS's forecast of ADU production is based on a ten-year forecast period).

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argument also fails. As described above, it mischaracterizes the limited scope of the Examiner's direction in the Order on the Appeal of the DNS (which directed the City to evaluate impacts of full build-out on height, bulk, and scale, not trees) and is not required by SEPA, more generally, because of the remote and speculative nature of the full build-out scenario.

- TreePAC's brief re-argues issues outside the scope of this appeal that TreePAC unsuccessfully sought to raise during hearing, and on which the Examiner has already ruled, such as issues relating to stormwater impacts or to Executive Order 2017-11.[115]

TreePAC's remaining arguments reflect fundamental misunderstandings of the proposal and the analysis and have no merit:

- TreePAC improperly conflates the aesthetics analysis with the tree canopy analysis.[116] Mr. Kuehne's testimony and the FEIS make clear that the models illustrate representative changes, but the aesthetics analysis was not intended to act as a tree canopy analysis. Moreover, the models depict a greater degree of change, because the models eliminate trees that obscure the views of redevelopment.[117] Instead, the analysis of impacts on tree canopy are located elsewhere in the EIS in chapter 4.2. While TreePAC may want different or more graphic illustrations included in that specific impact analysis, SEPA does not require graphics or illustrations.[118]
- TreePAC continues to conflate its criticisms of the current Code's efficacy or enforcement with the proposal. For example, the current Code contains

[115] TreePAC Brief at 14, 26.
[116] TreePAC Brief at 6-10.
[117] City Brief at 43.
[118] WAC 197-11-440(4); SMC 25.05.440.D.

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regulations governing root zones.[119] The proposal would not change those regulations, and in fact conservatively assumed that the Code's protections would not apply.[120] While TreePAC may believe the current Code does not adequately protect root zones, such concerns are not relevant here.

- In its effort to challenge the adequacy of the existing regulations, TreePAC's brief discusses and attaches a transcript excerpt from the MHA proceedings. As a fundamental matter, a transcript of testimony about the adequacy of the City's analysis of impacts of an entirely different legislative proposal are entirely irrelevant to the City's analysis of tree canopy in the FEIS. Similarly, testimony about the adequacy of the City's existing regulations that are unchanged by the proposal and not relied upon in the tree canopy analysis is irrelevant. Moreover, TreePAC cannot add evidence to the record at this point. The transcript is from an unknown source, is not a certified transcript prepared by a court reporter, has no indicia of reliability or authenticity, and is not subject to judicial notice.[121] The City respectfully requests that the Examiner strike the transcript excerpt, attached as page 35 to TreePAC's brief.
- TreePAC conflates the results of the City's 2016 LiDAR tree canopy assessment, which does not address ADUs at all, with the FEIS's use of that LiDAR data to assess impacts of the proposal, claiming the 2016 assessment show a larger loss of trees resulting from the proposal.[122] Nothing in the 2016 study addresses or analyzes ADUs, however.[123]

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[119] SMC 25.11.050.
[120] City Brief at 51.
[121] Rules of Evidence 201.
[122] TreePAC Brief at 13, 20 (citing figure 19 of the 2016 study).
[123] Ex. 37 at 14 (discussing figure 19).

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- TreePAC misunderstands differences between statistics reported in the FEIS. For example, TreePAC incorrectly asserts an inconsistency between the reported average loss of tree canopy on a single-family lot (presented in Exhibit 4.2-9 of the FEIS) with the potential tree loss in the single-family zones, in the aggregate, based on the ADU production forecasts.[124] These statistics present different information and are not intended to be the same. One is the average tree canopy loss on a lot experiencing development, while the other is the total canopy loss over a larger area, with the understanding that the vast majority of single-family lots would not experience development at all.

To the extent that TreePAC questions the veracity of the production estimates, they present no evidence and rely exclusively on the testimony of Mr. Reid. As discussed above and in the City's Closing Brief, Mr. Reid's testimony is based on a fundamental misunderstanding of the EIS analysis and is insufficient to demonstrate that the EIS's forecast model is inadequate.

TreePAC then adds together the percentage canopy loss shown in Exhibit 4.2-9 for study area lots with a DADU and for lots with new single-family homes, arguing that the sum results in a greater loss in canopy. TreePAC fails to understand that the data for new single-family homes reflects new houses built *without* DADUs, which generally result in a larger footprint than the existing

[124] TreePAC Brief at 12.

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home and a substantial reduction in canopy on the lot.[125] In contrast, the addition of a DADU necessarily limits the principal house's footprint and, as shown in Exhibit 4.2-9, generally results in a much smaller reduction in canopy.[126] TreePAC's calculation is not an accurate reflection of the development outcomes allowed under the proposal. Moreover, TreePAC also wholly ignores the fact that all action alternatives would *reduce* teardowns, and thus would reduce the construction of new homes with larger footprints and the associated larger canopy loss.[127]

In short, the FEIS's analysis of tree canopy impacts is reasonable, and TreePAC has failed to meet its extremely high burden of showing otherwise.

G. QACC presented no evidence or argument on several of their appeal issues, and have thus waived the issues

QACC presented no evidence on several of the issues it appeared to raise in its Notice of Appeal, such as the adequacy of the FEIS's analysis of public utilities and services, historical resources, and open space. Accordingly, these issues are waived and should be dismissed as a matter of law.[128] Moreover, QACC cannot raise any new issues in its response brief.[129]

Notwithstanding the total absence of evidence challenging the public utilities analysis, QACC's brief makes two passing references to the public utilities: first, to claim that the FEIS was required to analyze impacts to utilities under the full build-out

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[125] Hr'g Tr. 193:14–194:16, March 27, 2019 (Testimony of N. Welch).
[126] Hr'g Tr. 89:5-20, March 27, 2019 (Testimony of N. Welch).
[127] FEIS at 4-29.
[128] *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988) (concluding that a party's failure to present evidence on an issue during trial resulted in waiver of that issue).
[129] *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991) (noting that raising new issues in rebuttal briefing is not allowed because the other party is deprived of an opportunity to respond).

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scenario,[130] and second, to claim that the aesthetics modeling "ignored considerations of utility infrastructure."[131] As explained above, however, nothing in SEPA or in the DNS decision compels a full build-out analysis of any subject, with a limited exception for the Examiner's direction to prepare aesthetics analysis of the height, bulk, and scale impacts. SEPA does not compel analysis of that remote and speculative scenario. Moreover, QACC makes no attempt to articulate a connection between the aesthetics modeling and utility infrastructure and presented no evidence to support a connection, much less an impact. Thus, even if the Examiner considers QACC's arguments, they have no merit.

III. 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 26th day of April, 2019.

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[130] QACC Brief at 16.
[131] QACC Brief at 24.

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 Response Brief;
2. Certificate of Service;

and that on April 26, 2019, I addressed said documents and deposited them for delivery as follows:

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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 26th day of April, 2019.

/s/ Cara E. Tomlinson
Declarant

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