

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

RESPONSE TO CITY'S CLOSING BRIEF  
From TreePAC

Relative to TreePAC's Intervention in the  
appeal proceedings of the Queen Anne  
Community Council

HE File Number: W-18-009

Non-Project Action of the Department,  
Seattle City Council Accessory  
Dwelling Units FEIS

**I. INTRODUCTION to REBUTTAL**

On April 16<sup>th</sup>, 2019, the Seattle City Council issued their closing brief for the Matter of the Appeal of the Final Environmental Impact Statement for the Citywide Implementation of the Accessory Dwelling Units (hereafter 'ADU') Final Environmental Impact Statement (hereafter 'FEIS'). As evident in their closing brief, the City has expended little effort to identify the aesthetic and environmental impacts to the loss of the tree canopy resulting from this proposal.<sup>1</sup> The FEIS and its defense relative to the tree canopy is woefully inadequate and erroneously contradicting on many levels as enumerated in the TreePAC closing statements with emphasized facts.

After these proceedings, TreePAC can confidently declare that not one judicial body within the State of Washington would be convinced of the City's claims of only a minuscule net impact to Seattle's tree canopy. Namely, the City Council's erroneous claim is that only 25 acres of tree canopy will be lost by allowing three (3) residential dwellings on Seattle's eligible 120,000 single-family properties (which include the high-percentage of the city's tree canopy), and that there will result no significant environmental impacts.

As TreePAC's original intervention was based on a perceived lack of expert witnesses and exhibits relative to Seattle's tree canopy, the hearing proceedings and lack of credible testimony from qualified experts has only confirmed the basis of the intervention. With these facts, the City has not demonstrated they have met their obligations, and that the City-quoted Rules of Reason<sup>2</sup> have not been satisfied beyond a doubt.

---

<sup>1</sup> There is no mention of the impacts to the tree canopy within the Queen Anne Community Council closing statement, thus there is nothing for TreePAC to respond to.

<sup>2</sup> "Rules of Reason" is defined by Merriam-Webster as a "standard used in restraint of trade actions that requires the plaintiff to show and the factfinder to find that under all the circumstances the practice in question unreasonably restricts competition in the relevant market."

## II. SUMMARY of CITY'S CLOSING ARGUMENTS

- A. The City's representative argues that none of the appeal arguments, including those discussing the tree canopy, have merit, stating that the "analysis in the FEIS of all five topics is reasonable and more than adequate to inform a decision maker about the proposal's potential impacts on those topics." (City Council Closing Brief, Page 5, line 18-22). TreePAC's arguments to the criteria of the FEIS and contradictions in the evidence have refuted the City's argument.
- B. The City claims the FEIS analysis of impacts to tree canopy satisfies the rule of reason. The Examiner must consider this as a self-serving statement that has no basis of merit. The proclaimed "rule of reason" must not only include reasonable alternatives, but also a reasonable extent to which the impacts must be measured. The City falsely claims that their brief analysis of tree canopy impacts and extempore explanations and testimony meets the rule of reason by using unprecedented, but "standard", methodologies.<sup>3</sup> The City of Seattle has failed to achieve the meeting the Rules of Reason in both quantifying the amount of properties impacted, the amount of land impacted within each development, and the duration for which the environmental impacts of the loss of tree canopy must be evaluated<sup>4,5</sup>
- C. The FEIS grossly underestimates the area to be impacted by ignoring intrusion by the ADU footprint into a trees Critical Root Zone. This may be the entire rear yard area if it includes an exceptional tree on a smaller lot. No matter how small an ADU's footprint might be, due to lot size limitations limiting the size of the ADU's footprint,

---

<sup>3</sup> The adequacy of an EIS is subject to the rule of reason. *Cheney v. Mountlake Terrace*, 87 Wash.2d 338, 344, 552 P.2d 184 (1976). The mandate of the State Environmental Policy Act of 1971 (SEPA), RCW 43.21C, does not require that every remote and speculative consequence of an action be included in the EIS. *Cheney*, at 344, 552 P.2d 184. A reasonably thorough discussion of the significant aspects of probable environmental consequences is all that is required. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir.1974). The discussion of alternatives in an EIS need not be exhaustive; the EIS must present sufficient information for a reasoned choice among alternatives. *Toandos Peninsula Ass'n v. Jefferson Cy.*, 32 Wash.App. 473, 483, 648 P.2d 448 (1982)

<sup>4</sup> Case law example includes the city of Toledo that wanted to add a cargo hub to one of its airports, with the objective that the addition would create thousands of new jobs and added revenue to the local economy. The city's Port Authority submitted its proposal to the FAA for approval, and then hired a consulting firm to prepare an EIS. The EIS addressed only two alternative actions: approve the expansion, or not approve the expansion. The FAA approved both the EIS and the expansion plan. Plaintiffs argued, inter alia, that the FAA, in not assessing other reasonable alternatives, violated NEPA and the CEQ regulations. FINDINGS: The court stated that a court will uphold an agency's definition of objectives as long as they are reasonable. Further, an agency need follow only a rule of reason in preparing an EIS, and this rule of reason extends both to which alternatives the agency must discuss, as well as the extent to which it must discuss them. The dissent found this reasoning contra to CEQ's regulations, noting that the FAA failed to examine all practical or feasible alternative, and it had "the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Citizens Against Burlington v. Busey*, 938 F.2d 190 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 112 S.Ct.616 (1992)

<sup>5</sup> *Weyerhaeuser v. Pierce County*, 124 Wash.2d 26, 873 P.2d 498 (1994)

intrusion into the Critical Root Zones is ignored and may magnify the impacts to include all the rear yard area as lost canopy.

- D. The City claims to have relied on its most recent assessment of tree canopy cover to analyze the impacts of the proposal on tree canopy. That analysis acknowledged that most of Seattle's trees are located in residential areas. The analysis was to draw from data on coverage on single-family zones overall and compared lots that have a permitted DADU with those that do not and those that had teardowns with construction of new homes. Even though the analysis drew upon actual data from land use activity to measure canopy losses in some tables, it did NOT utilize this data in calculating canopy losses.
- E. Although TreePAC's closing statement echoes Section E of the City's Closing Brief (page 50), we reach opposite conclusions. Both reference the testimony and evidence that the "analysis drew from data on coverage on single-family zones overall and compared lots that have a permitted DADU with those that do not and those that had teardowns with construction of new homes. The review concluded that lots without a DADU had the highest coverage, on average of 30.8 percent<sup>6</sup>, while lots with a [just one] DADU [without an AADU] had slightly lower coverage at 28.6 percent, and lots with construction of a new single-family home had the lowest coverage of just 22.7 percent." (*Clarifications added.*) In contrast to this variance (from FEIS Exhibit 4.2-9), the City is indifferent to the evidence compared to the assumptions of the FEIS by stating "Even with these assumptions the total canopy loss would be only 25 acres, which is only 0.3 percent of the total tree canopy in the city (*emphasis added*). The City's assumptions have been effectively challenged by examining the actual tree loss LiDAR evidence. The City's closing brief continues to suggest while the EIS recognizes that there could be impacts to tree canopy from code changes that could result in more DADUs and that allow increases in rear yard coverage, the EIS concludes on the basis of its conservative analysis that those impacts would not be significant." The logic for this conclusion has been successfully challenged by TreePAC and the appellant, and the logic not been sufficiently substantiated by the City as required within the rules of reason.<sup>7</sup> Furthermore, the "standard methodologies" to derive at the total area of 25 acres of canopy loss (number of proposed new ADU's multiplied by 1,000 sq. ft. footprint) is not a normal scientific means of evaluating impacts to tree canopy. The City fails to show evidence this is a

---

<sup>6</sup> Corrected the value of 30.8% was incorrectly noted to be a higher 38% in the City's closing brief.

<sup>7</sup> As provided in the testimony, the footprint of an ADU, no matter if 1000 square feet or substantially less, including trenching and other construction impacts surrounding the ADU footprint, will likely intrude into the Critical Root Zones, either damaging the tree so it will die within 10 years of construction activities, or requiring the tree to be removed in anticipation that construction would likely result in the trees death.

- standard method to evaluate impacts, nor cites any references as to any acceptance of its “standard methods” within the scientific or arboricultural community. One would bet that a discussion with professors from the University of Washington’s Center for Urban Horticulture would find these “standard methods” as unacceptable.
- F. The hearing evidence dismisses the claims of the FEIS production numbers from the Forecast Model summarized in chapter 4.1 assuming that there would only be 1,085 additional DADUs within the ten year horizon. In addition, the Appellant’s rebuttal to the inadequate quantity of DADU and AADU within the FEIS, TreePAC has adequately challenged the ten-year horizon as being inadequate period of time.<sup>8</sup> The City erroneous claims that the FEIS makes “several conservative assumptions (i.e., tending to overstate the impact) to quantify an upper bound estimate of how much tree canopy loss could result” when, in fact, evidence within the 2016 LiDAR study contradicts the methodology used within the FEIS that multiplied the under-estimated number of DADUs by the grossly under-estimated site area impacted in single-family construction, with or without a developer profit-driven scenario.
- G. Accumulative impacts has not been considered with the FEIS proposed as required given the ADU proposal’s duration is indefinite.<sup>9</sup> TreePAC’s inquiry has demonstrated the City’s measure of being ‘conservative’ contrasts the evidence of tree loss caused by residential development.
- H. The City’s assumption for measuring impacts after only 10-years is not reasonable as the terms of the proposal has no time limit. WAC 197-11-080 states that “If information relevant to adverse impacts is important to the decision and the means to obtain it are speculative or not known; then the agency shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty. If the agency proceeds, it shall generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed.”<sup>10</sup>

---

<sup>8</sup> Per WAC 197-11-060.4(c), “Agencies shall carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer.”

<sup>9</sup> Case file of National Wildlife Federation v. Federal Energy Regulatory Commission, 912 F.2d 1471 (D.C. Cir. 1990): The Court of Appeals for the District of Columbia Circuit upheld a license issued by FERC for the first phase of a hydroelectric plant in Arkansas. The EIS prepared for the project looked only at the environmental impacts of Phase I, although construction of Phase II, while not inevitable, was reasonably foreseeable. Once the scope of the EIS has been determined the agency is required to look at cumulative impacts "of other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR § 1508.7. <http://www.Ihope.org/nepacase.htm>

<sup>10</sup> Per WAC 197-11-440 EIS contents, the word "reasonable" is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative. Rules of reason, therefore, do not explicitly limit the impact of a decision to just 10-years.

- I. SEPA describes reasonable actions relative to the tree canopy within WAC 197-11-440 EIS contents (6) “Affected environment, significant impacts, and mitigation measures.” Tree canopy that cannot be replaced given that the land area is being replaced by one or more permanent structures (ADU, garage, shed) is included per (iii) “Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.”
- J. The City was silent on the fact that Seattle’s tree canopy has an important aesthetic value to residents of single family properties and the communities. The City was silent on the psychological or emotional aesthetic component to a neighborhoods tree canopy.
- K. Both the Appellant and TreePAC debunked the depictions of trees in the aesthetics’ models of the FEIS. These models were allegedly created to inform a decision maker about the proposal’s potential impacts not only on the built form, but on the consequences of the built form – which includes the impacts to the tree canopy. The City failed to admit that there was no disclaimer provided within the FEIS for these aesthetic models to avoid the misapprehension and mischaracterization of the aesthetics analysis by a decision maker as the images not also applying to the tree canopy. The testimony provided attempted to explain the flaw, but only revealed the errors in the graphics that decision makers are to rely on. The City should have outright excluded trees completely from the models. Instead, *every image* for the Preferred Alternative shows trees within the model as prepared by Mr. Kuehne and the firm of HDR. Images referenced with trees includes the Plan view of Exhibits 4.3-32 to -32, the block perspective views of Exhibits 4.3-35 to -37, and the visual representations from a ‘Rear Yard under the Existing Conditions, 10-Year, and Full Build-Out Scenarios’ of Exhibit 4.3-40. All of these three-dimensional images used to inform decision makers include trees. Furthermore, these three-dimensional images of backyards showed trees even when the majority of the overall block plan views showed the vast majority of lots without trees in the backyard with the development of AADU and DADU. In other words, the three-dimensional views were not representation the plan views relative to canopy cover by showing trees in every image – thus softening the actual impact resulting from the increased number of ADU on lots as small as 3,200 square feet.
- The City’s closing brief states the “redevelopment scenarios show more trees removed than was necessary to accommodate the redevelopment, because in some instances, trees blocked the view of the redevelopment.” Yet, there is no evidence in the FEIS plans that there was space within the provided property to add more trees, to provide an adequate, legally proscribed equivalent canopy to what was being lost,

given the physical required space for tree root zones as identified within SMC 25.11. Contrary to removing trees when they ‘blocked the view’, the FEIS renderings actually show the trees transparently to show both trees and the built form, not just the built form.

- L. Instead of suggesting the trees are not represented in the FEIS Exhibits, Mr. Kuehne testified, “I actually counted the trees just the other day, so I came somewhat prepared for this [testimony].” (Transcripts 3/27/2019, Page 149, line 5). He continues “And in the existing conditions, the whole model (the two-block model) in that Alternative had 121 trees. In the 10-year scenario, it's 115. In the Full Build-out, 86 trees that are shown in the model.” (ditto, lines 9-12). The City has not explained why their witness came prepared counting trees if the trees in the Exhibit did not matter for the purpose of the rendering.
- M. Further demonstrating that these images did suggest an impact to tree canopy loss is apparent by counting the trees in the FEIS exhibits (in a similar manner that Mr. Kuehne had testified), there is a noticeable number of trees lost between FEIS Exhibit 4.3-35 and 4.3-37. The evidence clearly shows that approximately eighteen (18) trees may be counted within the yards of forefront block in Exhibit 4.3-35 whereas only five (5) appear to remain in Exhibit 4.3-37 (repeated below for easy reference).

Exhibit 4.3-37 Visual Representation of Development Outcomes in the Preferred Alternative in the Full Build-Out Scenario\*



4-138

New in the FEIS Exhibit 4.3-37 is new in the Final EIS.

Figure 1 – (above) FEIS Exhibit 4.3.37 of the Preferred Alternative in the Full Build Out Scenario(# added).

- N. The Hearing Examiner should clearly acknowledge that the FEIS does *not* illustrate representative changes, including the loss of trees, for relevant impacts analysis. (Contrasting SCC Closing Brief Page 41, lines 3-43). The testimony and claims of what the aesthetics analysis are, are in direct conflict, and the City has not been diligent about the purpose of the FEIS relative to assessing the impacts to the tree canopy.
- O. The Hearing Examiner should acknowledge that City did *not* present a qualified witness as to the impact of this proposal on tree loss and the environmental consequences. Mr. Welch is not an arborist. Nor did the City engage an arborist in the preparation of the FEIS. Nor did the City provide the expert testimony of an arborist to dispute the tree canopy issues identified in the appeal. By public disclosure, Mr. Welch wrote to an OPCD colleague Vera Giampietro on March 15, 2017 at 9:42am “Under MHA, trees will be inside.” This was their conclusion about the proposed ADU changes and the impact of construction to the tree canopy. As the disclosure demonstrates that the witness was aware there are problems with siting ADU’s in regards to impacts to trees, Mr. Welch’s testimony claiming that trees are unlikely to be significantly impacted by the ADU proposal must be impeached.<sup>11</sup>
- P. The City failed to meet the objectives of the EIS. WAC 197-11-960, Part D, requires that an FEIS be adequately completed for non-project actions in regards to question 2: “How would the proposal be likely to affect plants, animals, fish, or marine life?” Yet, the FEIS Chapter 4 misses this criteria to describe the existing conditions within the EIS study area and potential environmental impacts to plants (tree canopy) and wild life.

---

<sup>11</sup> From Appellant’s request for disclosure:

Welch, Nicolas: in fact on arborist at a UFC meeting raised an issue I hadn’t heard before, which it that because large trees need a large undivided area to grow, encouraging DADUs could make it harder to have large trees even though we haven’t changed lot coverage limits.

Giampietro, Vera: la large undivided area.. as in a juge area for their roots?

Welch, Nicolas: yeah

Giampietro, Vera: tradeoffs, man

Welch, Nicolas: in other words, not all uncovered lot area is equal... because if it isn’t contiguous, it cant accommodate a large tree...

Giampietro, Vera: like a large tree can’t make due with my two side yards and the planting strip out front, even though that’s tons of uncovered areas

Welch, Nicolas: exactly... which is totally obvious, but hadn’t dawned on me... so my defense of ‘BUT WE ARENT CHANGING LOT COVERAGE’ didn’t really resonate.

Giampietro, Vera: in once accidently included a tree in the living room of the site plan for a new house... so... trees not just outside anymore

Welch, Nicolas: “under MHA, trees will be inside”

Giampietro, Vera: HA.... that is good

Instead, the FEIS only includes the following elements of the environment:

- a. 4.1 Housing and Socioeconomics
- b. 4.2 Land Use
- c. 4.3 Aesthetics
- d. 4.4 Parking and Transportation
- e. 4.5 Public Services and Utilities

- Q. FEIS page 4-92 on ‘Tree Canopy’ states: “Tree canopy provides aesthetic and health benefits to residents and contributes to the overall livability of communities. The Comprehensive Plan establishes goals and policies for the preservation and expansion of Seattle’s tree canopy (Seattle 2017). See Section 4.2, Land Use, for a discussion of existing tree canopy cover and vegetation and potential impacts resulting from the alternatives.” The City’s analysis either avoids discussing these goals and policies completely, or selectively ignores and even worse, dismisses them as not relevant or ‘outside the scope’ of this intervention. A key purpose of this intervention is making this very important point, that the City is not following its own laws or paying attention to its own stated Comprehensive Plan goals and policies in pushing through these proposed ADU rules.
- R. The FEIS references concurrent tree protection codes being implemented (FEIS page 4-55), yet the City’s briefing refers to testimony that suggests tree protections were not necessary. The City’s brief states “While TreePAC did not present evidence<sup>12</sup>, its questions of witnesses suggested legal arguments that are without merit.” The City’s briefing continues “TreePAC’s criticisms of the current Code’s efficacy or enforcement are outside the scope of this proposal and are irrelevant. The City did not rely on existing tree protections in the City’s code to reach its conclusions, and, in fact, assumed they did not apply. Moreover, while the City documented the potential for future code changes under consideration, it did not rely on them for any part of its analysis. Accordingly, the City’s analysis of tree canopy impacts is cautiously conservative and satisfies the rule of reason.” The Hearing Examiner should note that the testimony stating that Seattle Code Tree Protections being ‘irrelevant’ has not been identified as a condition within the FEIS, and such testimony would require broadening the scope of FEIS to study the impacts of no tree protection requirements. Such testimony must be dismissed accordingly, or be remanded to the City with a revised FEIS.

---

<sup>12</sup> Correction: as an intervener, TreePAC was not allowed to present evidence. The City actually attempted to withhold the evidence of the LiDAR study until the Appellant moved it into the hearing record.



- S. By not identifying or addressing the environmental impact to tree canopy loss, the appeal defense by the City representatives has failed to address Seattle's 2035 Comprehensive Plan for Growth Requires Mitigating Impacts.
- T. The appellant and the City of Seattle have failed to present witnesses with exhibits relative to trees within this appeal, despite the fact that tree canopy issues have been delineated within the appeal. Respectfully, TreePAC asks that the Hearing Examiner remand the FEIS to the City Departments to adequately consider the environmental impacts to tree canopy loss with this proposal, making modifications as necessary.

On behalf of the TreePAC this 25th day of April, 2019.

By: \_\_\_\_\_  
Richard Ellison, Vice-President of TREEPAC.  
c/o TreePAC at 2131 N 132nd St, Seattle, WA 98133

## Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on this date, 25<sup>th</sup> of April 2019, I sent true and correct copies, via e-mail, of the attached Rebuttal to City's Closing Brief from TreePAC regarding the Appeal Proceedings in the appeal of the Queen Anne Community Council for the Hearing Examiner File No. W-18-009. (Case Name: Appeal by Queen Anne Community Council on the Accessory Dwelling Units FEIS) Filed: 10/18/2018

### Appellant:

Queen Anne Community Council  
1818 1st Avenue West  
Seattle, WA 98119  
Email: [mhk@martinhenrykaplan.com](mailto:mhk@martinhenrykaplan.com)  
Phone: (206) 682-8600

### Appellant Legal Counsel:

Jeffrey Eustis  
4616 25th Ave NE No. 608  
Seattle, WA 98105  
Email: [eustislaw@comcast.net](mailto:eustislaw@comcast.net)  
Phone: (206) 919-9383

### Department:

Aly Pennucci, Seattle City Council  
Email: [ADUEIS@seattle.gov](mailto:ADUEIS@seattle.gov)  
Phone: (206) 684-8148  
Mailing: Cara Tomlinson  
Van Ness Feldman LLP  
Email: [cat@vnf.com](mailto:cat@vnf.com)  
Mailing: Amanda Kleiss  
Van Ness Feldman LLP  
Email: [ack@vnf.com](mailto:ack@vnf.com)

### Department Legal Counsel:

Tadas Kisielius  
Van Ness Feldman LLP  
719 Second Ave, Ste 1150  
Seattle, WA 98104  
Email: [tak@vnf.com](mailto:tak@vnf.com)  
Phone: (206) 623-9372

and

Dale Johnson  
Van Ness Feldman LLP  
Email: [dnj@vnf.com](mailto:dnj@vnf.com)  
Department Legal Counsel: Clara Park  
Van Ness Feldman LLP  
Email: [cpark@vnf.com](mailto:cpark@vnf.com)

And:

Jeff Weber, Assistant City Attorney  
701 Fifth Ave, Ste 2050  
Seattle, WA 98104  
Email: [jeff.weber@seattle.gov](mailto:jeff.weber@seattle.gov)  
Phone: (206) 684-8200  
Mailing: Donna Hammonds  
Van Ness Feldman  
Email: [d.hammonds@vns.com](mailto:d.hammonds@vns.com)

Copy Steve Zemke  
President of TREEPAC

Copy Kevin Orme  
Board Member of TREEPAC

Copy David Moehring  
Board Member of TREEPAC