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BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the Matter of the Appeal of the:

Hearing Examiner File W-18-009

**QUEEN ANNE COMMUNITY  
COUNCIL**

**SEATTLE CITY COUNCIL’S MOTION  
TO STRIKE EXTRA-RECORD  
EVIDENCE AND ARGUMENT  
SUBMITTED BY TREEPAC**

of the Final Environmental Impact  
Statement for the Citywide Implementation  
of ADU-FEIS.

**I. INTRODUCTION**

On March 29, 2019, the Hearing Examiner closed the hearing and left the record open for the limited purpose of receiving written closing briefs from the parties.<sup>1</sup> In its “Response to City’s Closing Brief” filed April 26, 2019 (“TreePAC’s Response Brief”), TreePAC attaches and argues from an extra-record document that consists of a transcription of a conversation between City employees (the “Extra-Record Document”).<sup>2</sup> Neither TreePAC nor QACC entered the Extra-Record Document into evidence as an exhibit during the hearing.

The Seattle City Council (“City”) moves to strike that Extra-Record Document and the corresponding arguments in TreePAC’s Response Brief. TreePAC’s submission of the Extra-Record Document and TreePAC’s corresponding arguments in its Response Brief circumvent TreePAC’s self-defined, limited role in this hearing. It violates the rules governing the Examiner’s process which limit the Examiner’s consideration and

<sup>1</sup> See Hr’g Tr. 213:3 – 219:20, March 29, 2019.

<sup>2</sup> See TreePAC’s Response Brief at 7, paragraph O.

1 deliberation to evidence that was presented at hearing. Finally, TreePAC’s improper  
2 submission of the Extra-Record Document this late in the proceeding also effectively  
3 deprives the City of an opportunity to respond through testimony or presentation of  
4 responsive evidence.

## 5 II. ARGUMENT

6 TreePAC’s attempt to submit extra-record evidence should be stricken as improper  
7 on several grounds.

8 First, in its pleadings to intervene in this hearing, TreePAC imposed limits on  
9 itself and committed to refrain from presenting any witnesses or new evidence at the  
10 hearing.<sup>3</sup> TreePAC imposed these limits on its participation to avoid the significant  
11 prejudice to the City that would have otherwise resulted if TreePAC would have been  
12 allowed to call witnesses and present exhibits with disclosure to the City only days before  
13 the hearing.<sup>4</sup> The Examiner’s Order reflects and memorializes that commitment as a  
14 condition of granting intervention.<sup>5</sup>

15 Notwithstanding its commitment, TreePAC has repeatedly attempted to introduce  
16 new evidence into the record throughout the hearing and in its briefing. In its closing brief,  
17 TreePAC attached a purported transcript excerpt from the MHA proceedings,<sup>6</sup> and the  
18 City’s response brief moved to strike the exhibit.<sup>7</sup> Now, in its response brief, TreePAC  
19 again attempts to introduce new evidence in the form of the Extra-Record Document.  
20

21 <sup>3</sup> TreePAC’s Resp. to City regarding its Mot. to Intervene at 3 (Mar. 18, 2019).

22 <sup>4</sup> *Id.* at 3 (stating, “TreePAC intervention status in the Appeal will not prejudice the rights  
23 of the parties. Without introducing new witnesses or evidence, TreePAC has no interest  
24 nor any ability nor any authority to prejudice the rights of any party.”).

23 <sup>5</sup> Order Granting Intervention (Mar. 21, 2019) (stating, “Since TreePAC will not be  
24 introducing new exhibits or testimony, there is no prejudice to the City in granting this  
25 motion.”).

24 <sup>6</sup> TreePAC Closing Statements (Apr. 16, 2019).

25 <sup>7</sup> Seattle City Council’s Response Brief at 29 (Apr. 25, 2019).

1 Both attempts are improper attempts to circumvent TreePAC’s self-imposed limited role  
2 and should be denied.

3 Second, even if TreePAC had been permitted to introduce evidence at the hearing,  
4 its attempt to introduce the Extra-Record Document now after the hearing is untimely and  
5 contrary to the Hearing Examiner Rules of Procedure (“HER” or “Rules”) regarding  
6 submission of evidence. HER 2.21 provides:

7 (a) At the conclusion of the hearing, the Examiner may close the hearing, but  
8 leave the record open to receive argument or for other good purpose. Parties  
9 shall be provided notice of any evidence received after hearing and shall  
10 have an opportunity to review the evidence and file rebuttal evidence or  
11 argument.

12 (b) Except as provided in this Rule, HER 2.20 and HER 2.23 [providing  
13 exceptions not applicable here], *information submitted after the close of the  
14 record shall not be included in the hearing record or considered by the  
15 Examiner.*

16 HER 2.21 (emphasis added). In cases in which the Examiner has left the record open after  
17 a hearing for a limited purpose, the Examiner has stricken evidence outside the scope of  
18 the limited purpose.<sup>8</sup> Similarly, in this case, although the Examiner left the record open for  
19 the limited purpose of receiving written briefing, the Examiner did not invite submission  
20 of additional documentary evidence or information after the hearing. Moreover, by  
21 submitting evidence after the close of the hearing, TreePAC improperly attempts to  
22 circumvent the requirement to lay foundation and authenticate the Extra-Record

23 \_\_\_\_\_  
24 <sup>8</sup> Findings and Decision of the Hr’g Exam’r for the City of Seattle, MUP-06-012 (W, DR)  
25 (striking declaration and evidence submitted with a party’s closing statement because  
“[t]he record was held open after the hearing to conduct the site visit and to receive  
written closing statements but not additional evidence from the parties”).

1 Document.<sup>9</sup> Pursuant to Rules, the Extra-Record Document and corresponding arguments  
2 should not be included in the hearing record or considered by the Examiner.

3 Finally, TreePAC's improper submission of evidence deprives the City of any  
4 opportunity to respond. In particular, Mr. Welch testified as a City witness, and had this  
5 evidence been submitted during the hearing, Mr. Welch could have provided testimony  
6 addressing the exhibit and explain how it does not change the FEIS's analysis or  
7 conclusions. TreePAC's untimely submission deprives the City of the safeguards for  
8 procedural fairness provided during hearing.

9 **III. CONCLUSION**

10 TreePAC's submission of the Extra-Record Document is improper. The City  
11 respectfully requests that the Examiner strike the Extra-Record Document and the  
12 corresponding argument set forth on page 7, paragraph O of TreePAC's Response Brief.

13  
14 DATED this 29th day of April, 2019.

15 VAN NESS FELDMAN LLP

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24 <sup>9</sup> Cf. HER 2.17 (providing that evidence may be admitted if it "comes from a reliable  
25 source"). The Response Brief Exhibit has no indicia of authenticity or reliability –  
TreePAC did not submit a declaration to authenticate the exhibit or to attest to the  
apparent alterations, and its brief is unsigned.

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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 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 Motion to Strike Extra-Record Evidence and Argument Submitted by TreePAC;
2. Certificate of Service;

and that on April 29, 2019, I addressed said documents and deposited them for delivery as follows:

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

By Web Portal

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By eService

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 29th day of April, 2019.

/s/ Cara E. Tomlinson  
Declarant