

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

RESPONSE TO CITY'S MOTION TO  
STRIKE

Relative to TreePAC's Reply to the City's  
Response Brief 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

The Motion was made on Monday, April 29, 2019 by the Seattle City Council to strike extra evidence and argument submitted by TreePAC. Per HER 2.16(b) Motions, TreePAC is replying within 7 days after service of a written motion. We understand that after the Hearing Examiner has received any written responses, or the 7 days or other designated time has elapsed, the Hearing Examiner may rule on this motion.

Per Hearing Examiner Rule (HER) 2.16 (e), motions to dismiss all or part of an appeal, other dispositive motions, and motions to exclude evidence (testimony or exhibits) shall be filed at the earliest possible time in the proceedings in order to allow time for the other party to respond, as provided in subsection 2.16 (b) and to ensure that the Examiner will consider the motions *on the merits* (with emphasis added). As indicated below, the motion of the City has no merit.

Per the Hearing Examiner Rule (HER) 2.14 (a), TreePAC is rightfully bringing forth to the Hearing examiner that a witness's testimony has contradicted documented evidence of other correspondence from that witness, and by doing so, has failed to keep their oath made at the hearing. All witnesses testifying at hearing must take an oath or affirmation to be truthful in their testimony. All witnesses are subject to cross-examination by the other party.

Per HER 5.04, (a) A public hearing shall include, but need not be limited to, the following:

- (1) Examiner's introductory statement;
- (2) Report by the Director (including introduction of the official file, reference to exhibits, and a summary of the recommendation of the Department);
- (3) Testimony by the applicant or petitioner;
- (4) Public comment on the application or petition;
- (5) Opportunity for parties and Examiner to ask questions;
- (6) *Opportunity for presentation of additional information as rebuttal.* (Emphasis added).

Accordingly, TreePAC has exercised procedural protocol to present additional information as an offer of proof to the rebuttal. This evidence of Mr. Welch's observation with an OPCD colleague about no space for trees should therefore be accepted as an offer of proof. TreePAC understands typically the parties present the rebuttal before the end of the hearing, with the post-hearing

briefing limited to evidence (including rebuttals) submitted during the hearing. The City favored a written rebuttal and the Hearing Examiner closed the hearings before 4pm on the final scheduled hearing day without closing briefs and rebuttals. Being prevented from presenting this evidence during the hearing for some reason, TreePAC wishes to make this "offer of proof" on the record. TreePAC did request of the Hearing Examiner about being able to present an offer of proof. This evidence is important in impeaching any testimony by Mr. Welch referenced in the City's Response Brief referring to the tree canopy testimony within section II. F (page 25+ with multiple footnotes) as multiple footnotes. The City's motion to strike this evidence is allowed by the Hearing Examiner Rules during TreePAC's rebuttal. TreePAC seeks, as noted in the Hearing Examiner rules, the opportunity for presentation of additional information as rebuttal.

Per HER 3.16, this communication is permitted within the proceedings and must not be struck. After considering any objections of the parties and determining that undue delay or prejudice will not result, the Examiner may permit relevant oral or written statements or both, by persons who are not parties or called by parties as witnesses. Limitations were imposed on the length of TreePAC's statements, and cross-examination by the parties is permitted.

It should be made clear to the Hearing Examiner and all parties of the appeal that there have been repeated actions within these proceedings limiting TreePAC's ability to make the case relative to Seattle's tree canopy. The City's recent motion is yet another example. TreePAC challenges such proceedings as dismissive to the evidence. Contrary to what is suggested in the City's motion, TreePAC's corresponding arguments in its Response Brief DOES NOT circumvent TreePAC's self-defined, limited role in this hearing. TreePAC's intervention leaves the discretion to the Hearing Examiner the extent of our involvement not to extend the duration of the proceedings, which it did not.

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

TreePAC objects to the above suggestion as follows:

- 1) TreePAC was provided only a limited duration of cross examination of Mr. Welch, not to mention being completely denied the opportunity to cross examine of the key City witness and Party to the appeal, Aly Pennucci. Moreover, TreePAC's cross examination of Mr. Welch was cut off under motion by the City and the Appellant.
  - a. It was TreePAC's intention to first cross-examine the witness for what they had testified so that the merits of that testimony could be fairly evaluated by the Hearing Examiner.
  - b. TreePAC's began a line of questions regarding the adequacy of the remaining yard space for retaining and re-planting trees.

- c. It was also our intention to make sure Mr. Welch had the full opportunity to make his position and knowledge made clear during his testimony.
  - d. Finally, although cross-examination was terminated, TreePAC's intention was to indeed ask Mr. Welch about his recollection of the presented written conservation with OPCD colleague, Vero Giampietro, where they clearly conclude the tree canopy is impacted with the ADU proposed action.
    - Mr. Welch states in the record proposed to be struck by the City, "*in fact one arborist at a UFC [Urban Forestry Commission] meeting raised an issue I hadn't heard before, which is 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.*"
    - And "*in other words, not all uncovered lot area is equal because if it isn't contiguous, it can't accommodate a large tree.*"
    - And "*which is totally obvious, but hadn't dawned on me.*"
- 2) In the transcripts of March 28, 2019, page 75 line 13, Mr. Ellison substantiates his questions of Mr. Welch stating: "I'm concerned about the lack of transparency on how you're interpreting the greater than a thousand-square-foot footprint of the new lot." Mr. Ellison continued: "For a thousand-square-foot [structure], how large would the footprint be for any construction impacts to construct that 1,000-square-foot structure?" And: (page 78 bottom) "My concern would be that the construction of new DADUs would remove most of the remaining open space on that lot [for a tree]." And: (page 79. Line 4 By Mr. Ellison) "How much open space would be available after the construction of a DADU on a lot?" Mr. Welch (despite the dialogue with OPCD colleague noted above), states "That is *impossible to say as an overarching statement*. It depends on a myriad of different factors across 135,000 lots." Mr. Welch clearly avoided the answer which became obvious to him in the record that is subject to the City's motion.
- 3) It is very important for the Hearing Examiner to consider the merits of this evidence. Testimony was provided by Mr. Welch in direct contrast to what the witness knew but failed to make known. For example, the testimony of March 28, 2019 (hearing transcription page 70-72) states:
- (Line 20) Ellison: "So in that sense, if the maximum lot coverage has not been met yet, then that exceptional tree could be removed for (inaudible) development proposal?"
  - Welch: "I think there are -- well, depending on the zone, at least, and maybe depending on the permit type, there is sometimes flexibility in other standards so that it's not just a comparison of existing and proposed lot coverage that would immediately enable an exceptional tree to be removed. Sometimes there's flexibilities that allows siting or locating a structure in a different area or

flexibility from some other development standards with an eye towards preserving that tree. And then even if at some point to achieve maximum lot coverage, it would be required to remove an exceptional tree mitigation for that requirement.”

- Ellison: “So, basically, the code allows for removal of the trees unless the...the developer or homeowner wishes to find some need to preserving the tree if they so desire; is that correct?”
- Welch: “... confirm it with you, so I can't say firsthand how this proceeds. But my understanding of the way these code provisions are applied is that, first, the applicant has to try to reconfigure the proposal in some reasonable way to avoid impacts to the tree. And then, as I said, if that's not possible to achieve maximum lot coverage, removal of the exceptional tree can occur with mitigation and replacement.”

Again, Mr. Welch clearly avoided answers which became obvious to him as documented within the record that is the subject to this City’s motion.

- 4) The credibility of Mr. Welch must be sincerely questioned by the Hearing Examiner relative to the proposed ADU FEIS impacts upon Seattle’s tree canopy with both his lack of arborist credentials and not honoring his oath or affirmation to be truthful in his testimony. Mr. Ellison asked a series of related questions that would allow Mr. Welch to confess his prior realization<sup>1</sup> that even without changing the 35% lot coverage, large trees simply cannot be accommodated (except perhaps on larger lots). He could have easily replied to one of Mr. Ellison’s multiple questions his true understanding that “not all uncovered lot area is equal... because if it isn’t contiguous, it can’t accommodate a large tree” and that his “defense of ‘but we [the City] are not changing the lot coverage’” does not really mean the severity of impact to trees will be minimal. Nor did Mr. Welch reply with his previous acknowledgement “which is 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.” All of this testimony would have indicated that the ADU FEIS was inadequate in identifying the quantity of the tree canopy loss and thereby trigger the need for a throughout environmental impact assessment. Instead, Mr. Welch was claimed to have testified - as hypnotically repeated by the City Council legal representative – that the City’s assumptions to arrive at only 0.3% of the Seattle’s tree canopy being affected was “cautiously conservative.”<sup>2</sup> In combination with the record and multiple points made through this hearing’s proceedings, Mr. Welch’s testimony on the impacts to the Tree Canopy was deflective, not truthful, self-serving, and thereby impeachable by the Deputy Hearing Examiner.
- 5) Cross-examination of witnesses called by the opposing party is an absolute right. It usually consists of two kinds of questions -- (1) those designed to bring out additional

---

<sup>1</sup> Documented Mr. Welch’s dialogue shared with his OPCD colleague within the TreePAC’s rebuttal to the City’s closing brief on page 7 of footnote 11.

<sup>2</sup> Hearing Transcript 91:15–92:9, March 28, 2019 (Testimony of Mr. Welch)

facts and details about the events that were not brought out during the direct examination, and (2) those intended to raise questions about the credibility of the witness. The second category is known as “impeachment,” and is the issue being raised here with the witness for the, Mr. Welch. A witness's testimony may be unreliable for three quite different reasons:

- a. the witness may be deliberately lying and therefore knowingly committing the crime of perjury.
  - b. the witness is trying to tell the truth, but happens to be mistaken because they saw the event incorrectly.
  - c. the witness may be telling half-truths, exaggerating parts, or omitting details out of embarrassment, political beliefs, or other emotions.
- 6) Due to this witness being a City staff member whose direct testimony may impact the job security of two city employees, we suspect the witness omitted testifying what the correspondence indicates: that there will be no room for trees with development.
- 7) Perhaps the most common form of impeachment is evidence showing that a witness has a bias for or against a party, an interest in the outcome, a financial stake, or any other motive to testify falsely. Washington Rule ER 607 on ‘Who may impeach’ states that “The credibility of a witness may be attacked by any party, including the party calling the witness.”
- 8) The Hearing Examiner should take judicial notice of the City’s legal representative making an unusual number of interruptions during TreePAC’s Day 4 cross-examination of Mr. Welch. In fact, Mr. Tadas Kisielius had made at least 18 objections within the hour of cross-examination (about one objection every 3.5 minutes on average), with all but one objection being sustained:


10:56:06 AM Ellison begins cross examination of Welch.  
11:07:20 AM Kisielius objects; mischaracterizing testimony.  
11:07:31 AM Sustained. Question rephrased.  
11:15:50 AM Kisielius objects; testimony.  
11:16:06 AM Sustained.  
11:18:16 AM Kisielius objects; relevance.  
11:18:28 AM Overruled.  
11:22:45 AM Kisielius objects; testimony. Sustained.  
11:27:29 AM Kisielius objects; testimony.  
11:27:38 AM Sustained.  
11:28:34 AM Kisielius renews objection.  
11:28:39 AM Sustained.  
11:33:03 AM Kisielius objects; testimony.  
11:33:12 AM Sustained.  
11:33:50 AM Kisielius objects; testimony. Sustained.  
11:37:35 AM Kisielius objects; relevance.  
11:39:18 AM Kisielius objects.

11:39:27 AM Sustained.  
11:40:01 AM Eustis joins city objection in terms of his concern for the passage of time (not the merit of the questioning).  
11:40:47 AM Sustained.  
11:44:19 AM Kisielius objects; relevance.  
11:44:32 AM Sustained.  
11:45:07 AM Kisielius objects; relevance.  
11:45:23 AM Overruled.  
11:46:02 AM Kisielius objects. Sustained.  
11:46:30 AM Kisielius objects. Sustained.  
11:47:59 AM Eustis objects to heron rookeries as being outside scope of appeal. City joins in objection.  
11:48:41 AM Sustained.  
11:49:17 AM Kisielius objects; vague.  
11:49:28 AM Sustained.  
11:51:50 AM Kisielius objects; relevance.  
11:52:07 AM Sustained.  
11:54:11 AM Kisielius objects; relevance.  
11:54:29 AM Sustained.  
12:00:21 PM Kisielius objects.  
12:00:32 PM Sustained.  
12:02:03 PM Ellison cross examination is terminated per transcripts:  
HEARING EXAMINER: "That's the end. Mr. Ellison?"  
HEARING EXAMINER: "We're done. Okay. Redirect?"  
12:02:08 PM Kisielius begins redirect examination of Welch.

The many attempts to obstruct the answer's to TreePAC's line of questioning in the specific relationship to Mr. Welch's previously recorded confession to inevitable tree loss impacts cannot go un-noticed here. Once again, TreePAC asks for the Hearing Examiner to allow this evidence with its demonstrated merit. It is evident that the City continues to attempt to conceal the issues of the environmental impacts to Seattle's tree canopy with the ADU FEIS. It is clearly evident that the witness is omitting details out of embarrassment, political belief, or assumed duty to Mr. Welch's employer, the City of Seattle. The City of Seattle have failed to present credible witnesses relative to trees within this appeal despite the fact that tree canopy issues have been delineated within the appeal. Respectfully, along with denying the City's motion to strike evidence, TreePAC continues to ask 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 6th day of May, 2019.

By: \_\_\_\_\_

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

### Certificate of Service

I, Richard Ellison, certify under penalty of perjury under the laws of the State of Washington that on this date, 6<sup>th</sup> of May 2019, I sent true and correct copies, via e-mail, of the attached Response to the City's Motion to Strike 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

Copy Steve Zemke  
President of TREEPAC

Copy Kevin Orme  
Board Member of TREEPAC

Copy David Moehring  
Board Member of TREEPAC

**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)