

1 SEATTLE HEARING EXAMINER

2
3 In the Matter of the Appeal by
4 QUEEN ANNE COMMUNITY COUNCIL
5 From a determination of non-significance
6 issued by the Office of Planning and
Community Development

Hearing Examiner File
No. W-16-004

OPPOSITION BY QUEEN ANNE
COMMUNITY COUNCIL TO CITY'S
MOTION TO DISMISS

7 For the reasons below, the Queen Anne Community Council (QACC) opposes
8 the Motion to Dismiss by the Office of Planning and Community Development.

9
10 **A. Dismissal Would Improperly Deprive QACC of the Opportunity to
Examine the Record on Which the DNS Was Rendered.**

11 Granting OPCD's motion would constitute reversible error because it would
12 prevent inquiry into whether the office had properly exercised its responsibilities in
13 rendering its threshold determination. In *Norway Hill Preservation and Protection Assoc.*
14 *v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976) the court established the
15 standard of review for threshold determinations to not require preparation of an EIS:

16 The SEPA policies of full disclosure and consideration of environmental
17 values require **actual consideration** of environmental factors **before** a
18 determination of no environmental significance can be made. See *Juanita*
19 *Bay Valley Community Ass'n v. Kirkland*, *supra*, 9 Wn. App. [59] at 73, 510
20 P.2d [1140], at 1149 [1973]; *Cf. Arizona Pub. Serv. Co. v. Federal Power*
21 *Comm'n*, 157 U.S.App.D.C. 272, 483 F.2d 1275, 1282 (1973);
22 *Narrowview Preservation Ass'n v. Tacoma*, 84 Wn. 2d 416, 422, 526
23 P.2d 897 (1974). As a result, a reviewing court will always have a
24 complete record upon which to review a 'negative threshold
25 determination.' **In the absence of a record sufficient 'to demonstrate
that environmental factors were considered in a manner sufficient to
amount to prima facie compliance with the procedural requirements
of SEPA,'** *Juanita Bay Valley Community Ass'n v. Kirkland*, *supra*, a
'negative threshold determination' could not be sustained upon review
even under the 'arbitrary or capricious' standard because the
determination would lack sufficient support in the record.

Id. at 275-76 (Emphasis added).

1 Under the *Norway Hill* test, the initial burden is on the governmental agency to
2 demonstrate that it has given "actual consideration" to environmental factors. This was
3 restated in *City of Bellevue v. King County Boundary Review Board*, 90 Wn.2d 856,
4 867, 586 P.2d 470 (1978):

5 The **burden is upon the governmental body** subject to SEPA to show
6 that it made a threshold determination which "demonstrate(s) that
7 environmental factors were considered in a manner sufficient to be prima
8 facie compliance with the procedural dictates of SEPA. . . .

8 (Emphasis added; citations omitted.) To the same effect, see *Sisley v. San Juan*
9 *County*, 89 Wn.2d 78, 83-84, 569 P.2d 712 (1977), *Juanita Bay Valley Com. v. Kirkland*,
10 *supra*, 9 Wn. App. at 73, 510 P.2d at 1149, and *Narrowsview Preservation Ass'n v.*
11 *Tacoma*, 84 Wn. 2d 416, 422, 526 P.2d 897 (1974).¹ The consideration of
12 environmental factors may not be superficial; it must be substantiated by supportive
13 opinion and data. Cf. *Leschi Imp. Council v. Washington State Highway Commission*, 84
14 Wn.2d 271, 525 P.2d 774 (1974)

15
16 Consistent with these holdings, a threshold determination that is not based upon
17 "actual consideration of environmental factors" fails to pass the clearly erroneous
18 standard of review:

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20 Since the Norway Vista project on its face involves the size and type of
21 environmental change to which the full information requirement of SEPA was
22 obviously meant to apply, an environmental impact statement should have
23 preceded the decision to approve the preliminary plat application.

24 The judgment of the Superior Court is hereby reversed. Since the "threshold

25

26 ¹ See also *Gardner v. Pierce County*, 27 Wn. App. 241, 246, 617 P.2d 743 (1980) in which the
27 court concluded:

28 Without a clear record on this point, the County has failed to demonstrate a
29 justification for its negative declarations under SEPA. The lack of a record
30 renders the County's determination [of nonsignificance] clearly erroneous.

1 determination" made by the King County Council was "clearly erroneous," this
2 case is remanded for further proceedings not inconsistent with the above
3 opinion.

4 *Norway Hill* 279 -280. Accord, *Gardner*, 27 Wn. App. at 246.

5 Through public records requests, QACC has requested copies of records
6 containing analysis and data upon which the Determination for Significance was based.
7 Copies of those requests are set forth at Appendix A to this memorandum. The review
8 of this information would enable QACC and the Hearing Examiner to examine the
9 record on which the DNS was rendered and to determine if that record is "sufficient to
10 demonstrate that environmental factors were considered in a manner sufficient to
11 amount to prima facie compliance with the procedural requirements of SEPA," *Norway*
12 *Hill*, 87 Wn.2d at 275-76. It is OPCD's obligation to produce its full record, not simply to
13 choose the documents it believes to best support its determination. Its failure to do so
14 would amount to clear error. *Gardner*, 27 Wn. App. at 246.

15 **B. The Notice of Appeal Contains Allegations of Error.**

16 QACC's Notice of Appeal was prepared by the chair of its Land Use
17 Review Committee, who is a Seattle architect and a past member of the Seattle
18 Planning Commission, but not an attorney. This office was not retained until two
19 weeks after the appeal was filed. See Notice of Appearance (June 23, 2016).
20 Accordingly, the drafting of the Notice of Appeal is not held to the same standard
21 that might apply to a land use attorney steeped in the principles of SEPA. See
22 *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d
23 1208 (1997)("Individual citizens did not have to raise technical, legal arguments
24 with the specificity and to the satisfaction of a trained land use attorney..."). Even
25 still, QACC's Notice of Appeal cites error reviewable through the challenge to the
DNS.

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1. Failure to engage the public.

A proposal's impacts may be significant because they "conflict with local, state, or federal laws or requirements for the protection of the environment." SMC 25.05.330.C.5.c. Under RCW 36.70A.035 of the Growth Management Act, amendments to development regulations should only occur through robust interactive and iterative public participation, a requirement that serves to advance protection of the natural and the built environments. QACC's Notice of Appeal at ¶2a properly questions the DNS record for lack of full public participation. More particularly, "actual consideration" of the environmental impacts upon affected populations, SMC 25.05.444.B.2.a, could not be fully given without considering their input.

2. Failure to give "actual consideration" to environmental impacts.

OPCD faults QACC's Notice of Appeal for lack of specific allegations of error. In fact, the Notice at ¶2d does cite to at least 17 elements of the environment whose impacts were not considered in the Environmental Checklist. The status of the proposal as a non-project action does not relieve OPCD from the need to consider ultimate impacts of its proposal. SMC 25.05.960 requires that "City departments shall use an environmental checklist substantially in the form set forth in WAC 197-11-960." That section of the SEPA regulations provides:

For nonproject proposals complete this checklist and the supplemental sheet for nonproject actions (Part D). The lead agency may exclude any question for the environmental elements (Part B) which they determine do not contribute meaningfully to the analysis of the proposal.

OPCD incorrectly construes this provision to completely relieve it of any obligation to answer the Part B questions, as its checklist answers "not

1 applicable” to practically every question. The QACC disagrees and intends to
2 show at the hearing that responses to a number of questions would “contribute
3 meaningfully to the analysis of the proposal[,]” such as (but not limited to)
4 questions regarding: impacts to vegetation, as backyard lot coverage would be
5 increased; energy, utilities and services, as demands would be increased by
6 allowing up to three dwelling units per lot; housing and income brackets served,
7 as economics may necessitate use for short-term rentals; aesthetics, as the
8 amendment would affect housing design; and parking impacts created by
9 additional units without additional off-street parking. The significance of these
10 and other impacts involves consideration of factual evidence and cannot be
11 resolved or dispensed with on a motion to dismiss.

12 Even if a zoning text amendment would not by itself create a direct impact,
13 it would result in indirect impacts which must be considered. SMC
14 25.05.060.D.4.² Cf, *Ullock v. City of Bremerton*, 17 Wn. App. 573, 581, 565 P.2d
15 1179 (1977)(EIS for non-project zoning action must consider maximum potential
16 development allowed by proposed zoning).

17 **3. Improper segmentation of the ADU/DADU proposal.**

18 The QACC Notice of Appeal at ¶12c alleges that the Accessory Dwelling
19 Units (ADU) and Detached Accessory Dwelling Unit (DADU) amendments were
20 part of a larger proposal to implement the Mayor’s HALA recommendations, that
21 they were pulled out of those recommendations, and that they have been now
22 advanced as a separate proposal. Nonetheless, they remain a part of the larger

23 _____
24 ² SMC 25.05.060.D.4 provides in part:

25 A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions. For example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects ...”

1 proposal to address housing needs. SMC 25.05.060.C.2 provides that:
2 "Proposals or parts of proposals that are related to each other closely enough to
3 be, in effect, a single course of action shall be evaluated in the same
4 environmental document." Under SMC 25.05.060.C.2.b (interdependent parts),
5 the ADU/DADU amendments are part of a larger proposal (the HALA
6 recommendations), they rely on those recommendations for their justification
7 because they purport to respond to the need for more affordable housing, and as
8 a result their environmental review should be conducted through the review of
9 the larger proposal.

10 **4. Failure to consider alternatives.**

11 The Notice of Appeal at ¶2c questions the proposal's claimed purpose of
12 removing barriers to the development of more affordable housing. The City's
13 SEPA regulations at SMC 25.05.060.C.1.c. direct that "Proposals should be
14 described in ways that encourage considering and comparing alternatives [and
15 that] Agencies are encouraged to describe public or nonproject proposals in
16 terms of objectives rather than preferred solutions." More broadly, the SEPA
17 statute requires the consideration of alternatives even outside the context of an
18 EIS:

19 The legislature authorizes and directs that, **to the fullest extent possible:**
20 (1) The policies, regulations, and laws of the state of Washington shall be
21 interpreted and administered in accordance with the policies set forth in
this chapter, and (2) **all branches of government** of this state, including
state agencies, municipal and public corporations, and counties **shall:**

* * *

22 (e) **Study, develop, and describe appropriate alternatives** to
23 recommended courses of action in any proposal which involves
unresolved conflicts concerning alternative uses of available resources;

24 RCW 43.21C.030 (Emphasis added.).

25 QACC's Notice of Appeal at ¶2b-c points out that the expansion of ADUs
and DADUs does involve unresolved conflicts. It was closely examined in 2009;

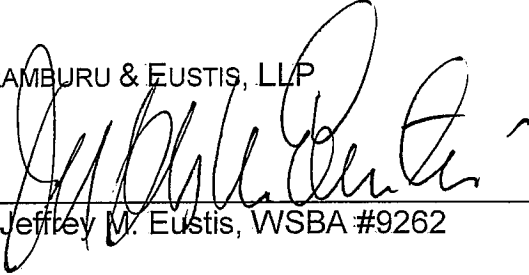
1 the Mayor's HALA recommendations first included, and subsequently withdrew
2 proposals to change single-family zoning; and then Councilmember O'Brien
3 proposed to proceed with such changes anyway. The determination to proceed
4 with legislation to liberalize the standards for Accessory Dwelling Units and
5 Detached Accessory Dwelling Units violates SEPA because it was made without
6 the consideration of alternatives to the proposed action. If OPCD intends to rely
7 on the HALA process for consideration of those alternatives, the DNS should
8 then reflect actual consideration of those alternatives. More correctly, a threshold
9 determination should be prepared on the entirety of those recommendations, not
10 on isolated actions reviewed in a piece-meal fashion.

11 **C. Conclusion**

12 OPCD's Motion to Dismiss should be denied.

13 Dated this 14th day of July, 2016.

14 ARAMBURU & EUSTIS, LLP

15 
16 By _____
17 Jeffrey M. Eustis, WSBA #9262

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DECLARATION OF SERVICE

I am a partner in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the foregoing document upon parties of record, addressed as follows:

Nick Welch
City of Seattle Office of Planning and Community Development
Nicolas.Welch@seattle.gov
 first class postage prepaid,
 email facsimile
 hand delivery / messenger

Geoff Wentlandt
City of Seattle Office of Planning and Community Development
Geoff.Wentlandt@seattle.gov
 first class postage prepaid,
 email facsimile
 hand delivery / messenger

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

DATED: July 14, 2016.



Jeffrey M. Eustis

Appendix A

Jeff Eustis

From: Jeff Eustis <eustis@aramburu-eustis.com>
Sent: Friday, July 08, 2016 9:58 AM
To: 'Kristian.Kofoed@seattle.gov'; 'Wentlandt, Geoffrey'
Cc: Martin Henry Kaplan (mhk@martinhenrykaplan.com)
Subject: Public Records Request to Office of Planning and Development

Greetings,

Pursuant to the Public Records Act, Ch. 42.56 RCW, I am requesting copies of documents containing the following information concerning the legislative proposal and environmental determination regarding amendments to the attached accessory dwelling unit and detached accessory dwelling unit provisions of the land use code:

- All analysis and data upon which the determination was rendered, including, but not limited to:
 - Impacts upon infrastructure
 - Parking and traffic impacts
 - Impacts on property values, affordability of housing and population pressures
 - Impacts upon land use, residential design, neighborhood character and aesthetics
- All data considered in the preparation of the Director's Report titled, *Removing Barriers to Backyard Cottages & Accessory Dwelling Units* (May 2016)

Regarding the Mayor's Action items for the HALA Recommendations, I am requesting documents containing the following information:

- Proposals for legislation or rulemaking, whether in conceptual or draft form
- The review of environmental impacts of such proposals, including draft environmental checklists and underlying documents
- Plans, programs, calendars or other schedules for presentation and/or consideration of such proposals

The requested information is time sensitive because it is necessary in order to prepare for the appeal hearing on August 31, 2016. We would appreciate receiving the requested documentation within two weeks of the date of this request.

Thank you for your attention to this,

Jeffrey Eustis
Aramburu & Eustis, LLP
720 Third Avenue, Ste 2000
Seattle WA 98104
Phone: (206)625-9515
Fax: (206)682-1376

This message may contain attorney-client or work-product protected information, which are not waived by this transmission. If you have received this message in error, please delete and discard it without forwarding it to others. Thank you.

Jeff Eustis

From: Jeff Eustis <eustis@aramburu-eustis.com>
Sent: Friday, July 08, 2016 10:26 AM
To: 'LEGPDR@seattle.gov'
Cc: geoffrey.wentlandt@seattle.gov; Martin Henry Kaplan (mhk@martinhenrykaplan.com)
Subject: Public Records Request - ADU-DADU legislation & HALA recommendations

Greetings,

Pursuant to the Public Records Act, Ch. 42.56 RCW, I am requesting copies of documents containing the following information concerning the legislative proposal for amendments to the attached accessory dwelling unit and detached accessory dwelling unit provisions of the land use code:

- All communications (including letters, memoranda, email messages and attachments) in the period between July 2015 and the present, between Councilmember O'Brien and the following:
 - Office of Planning and Community Development and its staff
 - The Mayor's office and its staff
 - Members of the public

Regarding the Mayor's Action items for the HALA Recommendations, I am requesting documents containing the following information:

- Proposals for legislation or rulemaking, whether in conceptual or draft form
- Plans, programs, calendars or other schedules for presentation and/or consideration of such proposals

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Thank you for your attention to this,

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Fax: (206)682-1376

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Jeff Eustis

From: Jeff Eustis <eustis@aramburu-eustis.com>
Sent: Friday, July 08, 2016 10:30 AM
To: 'EXECPDR@seattle.gov'
Cc: geoffrey.wentlandt@seattle.gov; Martin Henry Kaplan (mhk@martinhenrykaplan.com)
Subject: Public Records Request relating to HALA recommendations

Greetings,

Regarding the Mayor's Action items for the HALA Recommendations, I am requesting documents containing the following information:

- Proposals for legislation or rulemaking, whether in conceptual or draft form
- Plans, programs, calendars, timelines, and other schedules for presentation and/or consideration of such proposals

The requested information is time sensitive because it is necessary in order to prepare for the appeal hearing on August 31, 2016. We would appreciate receiving the requested documentation within two weeks of the date of this request.

Thank you for your attention to this,

Jeffrey Eustis
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