

1 SEATTLE HEARING EXAMINER

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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
REVISED MOTION TO DISMISS

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8 The Office of Planning and Community Development (OPCD) moves to dismiss
9 Queen Anne Community Council's appeal under HER 3.02, which allows the Hearing
10 Examiner to dismiss an appeal that "fails to state a claim for which the Hearing
11 Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or
12 brought merely to secure delay." As none of the circumstances apply, OPCD's motion
13 should be denied. QACC bases its opposition to OPCD's motion on this memorandum,
14 its opposition to OPCD's prior motion, its Notice of Appeal, and its Clarification of
15 Issues.
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17 **A. The Examiner Has Jurisdiction to Grant the Relief Requested.**

18 Beyond dispute, the Hearing Examiner has jurisdiction over the action appealed
19 (the DNS)¹ and has authority to grant the requested relief (reversal of the DNS and
20 direction to prepare an EIS).² With jurisdiction clearly established, OPCD's motion
21 really seeks dismissal on the merits of QACC's claims, without either producing a
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25 ¹ SMC 25.05.680.A.2.

² Notice of Appeal, Part C(3).

1 record in support of its decision or allowing QACC the opportunity to present evidence
2 in support of its claims. OPCD's motion lies beyond the scope of HER 3.02.

3 Even if the Hearing Examiner Rules allowed for summary judgment (which they
4 do not), the issues presented by QACC's Appeal (including whether OPCD's record
5 shows actual consideration of environmental factors and the significance of the
6 proposal's impacts) are intensely factual and would not be amenable to resolution on
7 summary judgment.
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9 **B. QACC's Issues Are Meritorious.**

10 On its face, QACC's appeal is meritorious, it is not frivolous, and it has not been
11 brought to secure delay. The issues raised in QACC's Notice of Appeal, as defended
12 within its Opposition to OPCD's first Motion to Dismiss, and as clarified within its
13 Clarification of Issues, are all well-founded upon SEPA statutory and caselaw³ and
14 concisely stated.⁴ A Notice of Appeal does not require the citation to legal authority or to
15 evidence.⁵ The appeal does not seek review of any issue lying beyond the Examiner's
16 authority to consider. OPCD's claims relating to the merits of those issues are beyond
17 the scope of HER 3.02 and should be rejected.
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22 ³ Without repeating them here, please see the citations to authorities within the Opposition by Queen
23 Anne Community Council to City's Motion to Dismiss.

24 ⁴ SCC 25.05.680.A.2.b.

25 ⁵ The Notice of Appeal at Part C.2.b & c reference 12 aspects of the proposed legislation that would
potentially create significant adverse impacts and 17 impacted elements of the environment. Neither the
City code nor the Examiner's rules require a Notice of Appeal to also set forth evidence to prove out its
allegations.

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1. QACC is entitled to seek review of the DNS for actual consideration of environmental factors.

QACC's Issues 1a-1f seek review of the DNS for lack of consideration of environmental factors, which of course is the pivotal issue in the review of a threshold determination. *Norway Hill Preservation and Protection Assoc. v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976). OPCD carries the initial burden of demonstrating *prima facie* compliance with this standard. *Gardner v. Pierce County*, 27 Wn. App. 241, 246, 617 P. 2d 743 (1980). Upon such a showing, QACC is entitled to examine the record, cross-examine OPCD's witnesses, and produce evidence and argument of its own. HER 3.13(a). OPCD's satisfaction of these requirements cannot be accepted simply on its say-so. OPCD seeks dismissal of Issues 1a-f upon mere assertions that: its public outreach was adequate; answers to Part B of the Checklist would not add meaningful analysis; the full extent of allowed development need not be considered; and the existing record suffices. If such assertions were sufficient to satisfy the actual consideration standard, the courts never would have placed the affirmative obligation on lead agencies to actually produce a record to demonstrate *prima facie* compliance. With regard to the Environmental Checklist, QACC challenges the responses to both Parts B and D.⁶

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2. OPCD has piecemealed review of the proposal.

Although not phrased in SEPA's terminology, QACC's Notice of Appeal at part C(2)(c) does raise the issue that the proposed ADU/DADU legislation is part of a larger

⁶ Notice of Appeal, Part C(2)(b)(alleging significant impacts resulting from 12 changes proposed in amendments) and Part C(2)(d)(objecting to responses to Checklist questions relating to 17 elements of the environment, topics included in both Parts B and D).

1 proposal to implement the recommendations from the Housing Affordability and
2 Livability (HALA) Report. The Mayor's 15 Action Steps include a number of measures
3 affecting land use, including placing multi-family housing near transit, expanding Urban
4 Villages, boosting production of accessory dwelling units, and increasing housing types
5 in single family zones, which are all under concurrent review.⁷

6 Even though the appealed DNS considers only the proposed ADU/DADU
7 legislation and even though its Environmental Checklist at ¶A.7 represents there to be
8 "no further activity related to or connected with this proposal[,]” in fact the expansion of
9 accessory dwelling units is part of a larger proposal to address housing and it relies
10 upon that larger proposal for its justification, i.e., to increase affordable housing.
11 Accordingly, under SMC 25.05.060.C.2.b, environmental review should have been
12 conducted on the larger proposal, and not the ADU/DADU legislation in isolation. At the
13 very least, QACC is entitled to present evidence and make a record on this issue. It is
14 meretorious and should not be dismissed for lack of jurisdiction. None of the court
15 decisions cited by OPCD have any bearing since they all arose out of project-specific
16 proposals.
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19 **3. OPCD has failed to consider alternatives.**

20 While the Notice of Appeal does not phrase the issue in SEPA's terminology,
21 Part C(2)(c) does question whether the proposal would accomplish the claimed
22 objective of removing a barrier to affordable housing. As shown in QACC's Opposition
23 to OPCD's prior motion to dismiss, SEPA requires the consideration of alternatives at
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⁷ See Timeline for Addressing the Housing Affordability Crisis set forth at Appendix A to this memorandum.

1 the threshold determination stage for “any proposal which involves unresolved conflicts
2 concerning alternative uses of available resources.” RCW 43.21C.030(2)(e). Contrary to
3 OPCD’s arguments, the requirement to consider alternatives under subsection
4 .030(2)(e) stands apart from the requirement to consider alternatives in an EIS. See
5 *Yakama Indian Nation v. Ecology, et al.*, PCHB No. 93-157, Order on Motion for
6 Summary Judgment (October 9, 1998) and *Marine Environmental Consortium*, PCHB
7 No. 96-257. The application of subsection .030(2)(e) at the threshold determination
8 stage is also supported by federal caselaw applying NEPA’s similar provision. *Bob*
9 *Marshall Alliance v. Holdel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988) and *Calvert Cliffs,*
10 *etc. v. U.S. Atomic Energy Cmm’n*, 449 F.2d 1109 (D.C.Cir. 1971). For the same
11 proposition, these authorites are cited within Settle, *The Washington State*
12 *Environmental Policy Act, etc.* §13.01[4][d] at pp 13-50.3 – 50.4 (2014).

14 QACC is aware of the holdings cited by OPCD, but those holdings either did not
15 address subsection .030(2)(e) – e.g., *Chuckanut Conservancy, Murden Cove and San*
16 *Juan County*⁸ – or they did not involve unresolved conflicts over available resources, In
17 the *Ballard Business Appellants* case, the Examiner found that conflicts over the use of
18 the trail had been resolved by a prior City Council resolution and through the Ballard
19 Corridor Study. See Order on Second Motion for Reconsideration at 4. In the *Appeal of*
20 *Fremont Neighborhood Council*, the Examiner at Conclusion 3 found that alternatives
21 had been considered in prior environmental documents. The *In re Donnelly* decisions
22 did not address subsection .030(2)(e). And the decisions in the *Aurora Avenue*
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⁸ Those decisions addressed the EIS alternatives requirement under RCW 43.21C.030(2)(c)(iii) and not subsection .030(2)(e).

1 *Merchants Association* and the *In re Marino* decisions could not be located on the
2 webpage for the Examiner's decisions. In any event from QACC's review, these rulings
3 were rendered in appeals involving project specific actions, not proposed legislation
4 setting new policy. Further, as a general principle, administrative rulings are not given
5 *stare decisis* effect.⁹

6 The issue is not whether subsection .030(2)(e) applies at the threshold
7 determination stage, because it clearly does. The issue is whether a proposal to
8 address the need for affordable housing through the expansion of accessory dwelling
9 units involves "unresolved conflicts concerning uses of available resources." That issue
10 lies squarely within the Examiner's review of the DNS. QACC is entitled to make a
11 record on that issue and it should not be dismissed for lack of jurisdiction.
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13 **C. Conclusion**

14 OPCD's Revised Motion to Dismiss should be denied.

15 Dated this 57th day of July, 2016.

17 ARAMBURU & EUSTIS, LLP

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19 By 

Jeffrey M. Eustis, WSBA #9262

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25 ⁹ *Vergeyle v. Dep't of Emp't Sec.*, 28 Wn.App. 399, 404, 623 P.2d 736 (1981) (recognizing limited role of *stare decisis* in the administrative decisionmaking).

DECLARATION OF SERVICE

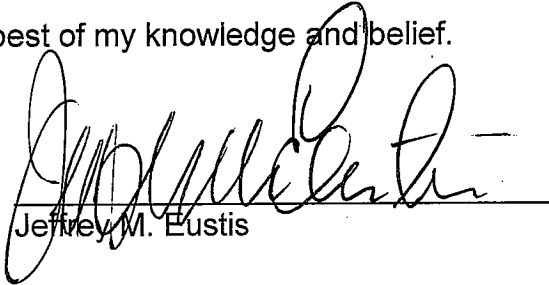
I am a partner in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the foregoing document upon parties of record, addressed as follows:

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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 27, 2016.


Jeffrey M. Eustis

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