

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

CLOSING ARGUMENT BY QUEEN
ANNE COMMUNITY COUNCIL

7 For the reasons given below and through the testimony of witnesses, the
8 Determination of Non-Significance issued on the proposed expansion of Accessory
9 Dwelling Units (ADU) and Detached Accessory Dwelling Units (DADU) should be
10 vacated.

11 **A. Standards of Review.**

12 A threshold determination is reviewed for compliance with three standards.

13 First, the decision record must show that the determination was the result of
14 "actual consideration of environmental factors." *Norway Hill Preservation and Protection*
15 *Assoc. v. King County Council*, 87 Wn.2d 267, 275-76, 552 P.2d 674 (1976). The
16 burden rests upon the governmental agency to demonstrate that it has given actual
17 consideration to environmental factors. *City of Bellevue v. King County Boundary*
18 *Review Board*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978). Conversely, the lack of a
19 record demonstrating actual consideration of environmental factors renders the
20 agency's determination clearly erroneous. *Gardner v. Pierce County*, 27 Wn. App. 241,
21 246, 617 P. 2d 743 (1980).

22 Second, to survive judicial scrutiny consideration of environmental factors may
23 not be superficial; it must be sufficient "to allow decisions to be based upon complete
24 disclosure of environmental consequences." *King County v. Washington State*
25 *Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993).

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1 See also, SMC 25.05.330(A)(threshold determination to be based upon review of
2 environmental checklist, supporting documents and additional documentation);
3 *Anderson v. Pierce County*, 86 Wn.App. 290, 299, 936 P.2d 432 (1997) (“[A]n
4 Environmental Checklist ...must provide information reasonably sufficient to evaluate
5 the environmental impact of the proposal[,]” citing to WAC 197-11-315 to 335.).

6 And third, a Determination of Non-Significance should be put aside and an
7 Environmental Impact Statement required whenever a proposed action creates the
8 reasonable probability of causing more than moderate effects upon the quality of the
9 environment. *Norway Hill*, *supra* at 277-78; SMC 25.05.360(A).

10 Satisfaction of these standards is reviewed under the “clearly erroneous” test,
11 whether the Examiner is left with “a definite and firm conviction that a mistake has been
12 made.” *Moss v. Bellingham*, 109 Wn.App. 6, 13, 31 P.3 703 (2001). Under these
13 standards, the DNS rendered on the proposed ADU/DADU expansion is clearly
14 erroneous and must be vacated.

15 **B. Issuance of the DNS Was Clearly Erroneous.**

16 **1. Proponents of the proposed legislation improperly conducted**
17 **environmental review on their own proposal.**

18 SEPA compliance should be the product of objective review, not the result of the
19 promotion by the proposal’s proponents. Accordingly, the City’s SEPA procedures at
20 SMC 25.05.926(B) require that when the City is conducting review of its own proposal,
21 “[w]henever possible, agency people carrying out SEPA procedures should be different
22 from agency people making the proposal.”

23 The DNS for the ADU/DADU legislation was tainted from the outset because that
24 separation was not respected. Numerous email messages demonstrate that the author
25 of the Environmental Checklist (Nicholas Welch) and the decisionmaker on the DNS

1 (Geoffrey Wentlandt) were proponents of the proposed legislation, and not neutral,
2 objective reviewers.

3 Nicholas Welch drafted the legislation,¹ he organized groups of DADU owners to
4 speak in favor of the legislation, he surveyed only DADU owners and those interested in
5 building DADUs, rather than attempting to survey the sentiment of the population at
6 large, and he drafted the *Removing Barriers* reports directed at building a case for the
7 expansion ADUs and DADUs. His bias is reflected in his response to a question of
8 whether the proposed legislation would “unleash tremendous growth in single family
9 areas”, it which he answered, “Hope so!”²

10 Geoffrey Wentlandt testified on the last day of hearing to the effect that it was no
11 secret that OPCD favored the legislation. After receiving a 20% response to survey
12 questions sent to a select group of owners of backyard cottages, Mr. Wentland
13 assumed the role of pitchman and suggested to the bill’s sponsor, Councilmember
14 O’Brien, that the survey results “might be a chance to ‘tell a positive story’ about
15 DADUs.”³ Mr. Wentlandt participated in discussions with council aides about how to
16 steer the ADU/DADU legislation away from the City Council’s land use committee and
17 into the sustainability committee chaired by Councilmember O’Brien, to allow him “to
18 shepherd it in his committee as “‘legacy’ legislation[.]”⁴

21 _____
22 ¹ City Exhibit 3, proposed ordinance.

23 ² Appellant’s Ex. 23, Proposals without analysis tab, Email No. 18.

24 ³ Appellant’s Ex. 23, Bias in public process tab, Email No. 19 and Wentlandt testimony on his perceived
25 need to “‘tell a positive story’ about DADUs.”

⁴ Appellant’s Ex. 23, Segmentation tab, Email No. 26 and Wentlandt testimony on the perceived value of
creating “‘legacy’ legislation” for Councilmember O’Brien.

1 Of the 41 listed staff within the OPCD,⁵ and the 330 listed staff in the Department
2 of Construction and Inspections (which also conducts SEPA review on land use
3 proposals),⁶ it is inconceivable that it was impossible for anyone other than Geoff
4 Wentlandt and Nick Welch to conduct SEPA review.

5 This error should be remedied through a remand back to OPCD with direction
6 that the SEPA review be conducted by people independent of the promotion of the
7 legislation, as Queen Anne requested in its Notice of Appeal at paragraph C3 (request
8 for unbiased governmental review and scrutiny).

9 **2. Responses to Part B of the Environmental Checklist would**
10 **have meaningfully contributed to analysis of the proposal.**

11 The status of the proposal as a non-project action does not relieve OPCD from
12 the need to consider the proposal's ultimate impacts. SMC 25.05.960 requires that "City
13 departments shall use an environmental checklist substantially in the form set forth in
14 WAC 197-11-960." That section of the SEPA regulations provides:

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

18 OPCD incorrectly construes this provision to completely relieve it of any obligation to
19 answer the Part B questions, as its checklist answers "not applicable" to practically
20 every question. Queen Anne disagrees.

21 Queen Anne showed at the hearing that responses to a number of questions
22 would "contribute meaningfully to the analysis of the proposal[,]" including questions
23 regarding the following elements of the environment listed in Part B of the Checklist:

24 ⁵ OPCD staff directory is available at <http://www.seattle.gov/directory/deptall.asp?ID=853>

25 ⁶ SDCI staff determined from its website at <http://seattle.gov/dpd/>.

1 4b – removal of vegetation: testimony of architects Marty Kaplan and Gregory
2 Hill of lack of analysis of impact upon tree canopy of increased DADU
construction, increased lot coverage and construction of DADUs on smaller lots;

3 8j – displacement of people: testimony of planner Sou Souvanny of impacts of
4 proposed legislation upon financial ability to acquire entry-level, owner-occupied
single family properties;

5 9b – elimination of housing: testimony of economist William Reid and architect
6 Gregory Hill regarding loss of single-family housing resulting from the increased
7 economic incentive to convert lower-value single family properties into three unit
rental properties;

8 10c – aesthetic impacts: testimony of architects Thomas Marshall, Gregory Hill
9 and Marty Kaplan on increased lot coverage, and height, bulk and scale of
DADUs allowed under the proposed ordinance;

10 14c – creation/elimination of parking: testimony of and schematic drawings
11 prepared by Thomas Marshall illustrating on-street parking impacts created by
12 tripling the number of dwelling units allowed per lot and removing on-site parking
13 requirements for accessory dwelling units; testimony of John Shaw that in
14 general increasing the number of dwelling units on a single family lot would likely
increase the number of vehicles associated with that lot;

15 15 & 16 – need for public services and utilities: testimony by Marty Kaplan as to
16 the lack of any analysis of the increased load placed on city services and utilities
by tripling the number of allowable dwelling units on single family lots over the
density for which the infrastructure was initially planned.

17 This error should be remedied through a remand back to OPCD with direction to
18 to answer the Part B questions on the Environmental Checklist and render a new
19 threshold determination based upon those responses.

20
21 **3. OPCD failed to give actual consideration to attainment of the
22 proposal's stated objectives.**

23 OPCD has promoted the ADU/DADU legislation as a means for creating more
24 affordable housing without any analysis of its ability to do so. But hearing testimony
25 demonstrated that the proposed legislation would not create additional housing
affordable to those within the groups the City identified within Resolution 31547. In fact,

1 the proposed legislation would have the opposite effect of making entry-level single-
2 family housing less affordable to lower earners by allowing the conversion of such
3 housing into triplexes and driving up land values.

4 The proposed ordinance purports to advance the objectives of Resolution 31547⁷
5 and Resolution 31609.⁸ The Environmental Checklist at 14 claims the proposal would
6 advance the Comprehensive Plan Goal of providing affordable housing options.⁹ DPD's
7 October 2015 version of the *Removing Barriers* document claims that "DADUs are
8 projected to serve households earning 80 to 120% of AMI."¹⁰ The City purports to
9 support this assertion by citing to the average cost of creating a certain type of DADU,
10 one built within a converted garage.¹¹ But the stated construction cost of \$55,000 for all
11 types of DADUs is only a small fraction of the cost of building a new DADU. The City's
12 own witness, Matt Hutchins testified to construction costs of \$250 to \$350/square foot.
13 For the average DADU size of 632 square feet referenced in the City's Exhibit 7 at 4, the
14 total cost of construction at \$300/sq. ft. would be about \$190,000, or roughly 3.5 times
15 the figure given by the City. Consistent with Hutchins's cost of construction estimates,
16 Alison Van Gorp (whose husband is an architect) estimated the minimum construction
17 cost of \$250,000 for a DADU.¹² As demonstrated by Mr. Kaplan, the cost of construction
18 for a new DADU would require rents of approximately 50% above what would be

19 ⁷ City Ex. 3, proposed ordinance at recital 1, citing to City Ex. 9, Resolution 31547 at recital 3 (objective of
20 making rental housing affordable to households earning 60 to 80% of Area Median Income and making
homeownership affordable to those earning 80 to 100% of AMI).

21 ⁸ Proposed ordinance at recital 3, citing to objective within Resolution 31609 to increase affordable
22 housing by removing barriers to the development of attached and detached accessory dwellings.

23 ⁹ City Ex. 1.

24 ¹⁰ City Ex. 7 at 21.

25 ¹¹ Testimony of Nick Welch.

¹² Appellant's Ex. 23, Affordability tab, Email No. 2.

1 affordable to those earning 80 to 100% AMI.¹³ Not even Mr. Welch claimed that the
2 expansion of DADUs would increase rental housing affordable to those earning 60 –
3 80% AMI. He produced no data or analysis to support the assertion that the proposed
4 legislation would result in increased housing affordable to the categories identified by
5 Resolution 31547.

6 State and City SEPA procedures direct OPCD to analyze its proposed action “in
7 terms of objectives, rather than preferred solutions.” WAC 197-11-060(3)(a)(iii) and
8 SMC 25.05.060(C)(1)(c). OPCD has failed to do so. Rather than objectively analyzing
9 the potential for the ADU/DADU legislation to increase the availability of affordable
10 housing, OPCD has sought to advance the “legacy” of a particular councilmember by
11 pursuing a proposal the Executive chose not to advance and then attempting to justify
12 that legislation through the pretext that it would increase affordable housing when
13 OPCD’s own staff and its consultants knew that it would not.¹⁴ OPCD has failed to
14 objectively analyze the ability of the proposed legislation to attain its stated objectives.

15 **4. OPCD failed to consider the proposal’s impacts upon existing**
16 **housing.**

17 Rising land values in Seattle have increased the rate of teardowns, the
18 demolition of existing housing to make way for larger, more costly houses. Witnesses
19 generally concurred that replacement housing sells for two to three times the cost of the
20 housing it replaces.¹⁵ As Mr. Reid testified, the enactment of the proposed ADU/DADU
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22 ¹³ Appellant’s Ex. 16.

23 ¹⁴ See e.g., Appellant’s Ex. 23, Affordability, Email No. 3, message from Sugimura to Wentlandt that
24 vacation rental of ADU at 150 to 250 per night was “not affordability!!!” (Exclamations in original).

25 ¹⁵ Testimony of City’s witness Sam Lai (testifying to tripling of cost of housing that replaces teardowns);
Testimony of William Reid (concurring with tripling of cost, as reported in *The Seattle Times* article of
August 28, 2016).

1 legislation -- i.e., allowing two accessory dwellings of 1000 square feet each¹⁶ on the
2 same lot, reducing the owner occupancy requirement to one year, and eliminating the
3 on-site parking requirement for ADUs -- would greatly increase the return on a teardown
4 by effectively converting each single family lot over 3200 square feet into a potential
5 triplex, of which each unit could be rented and converted to income producing property.
6 Mr. Reid further testified that the increased step-up in value created by the proposed
7 legislation would put upward sales price pressure on lower value single family lots
8 because those lots would allow a greater return on investment. Mr. Lai agreed that the
9 creation of multiple rental units on a single family lot would increase its potential income
10 stream, make the property more attractive for investment, and have the effect of driving
11 up its property value.

12 In the absence of any study, analysis or empirical data, the City claimed that a
13 one year owner occupancy requirement would discourage speculation.¹⁷ Yet the City
14 admitted that nothing in the legislation would prevent a speculative builder from
15 satisfying the one year residency requirement by developing a principal
16 residence+ADU+DADU and having it occupied by a minority (e.g., 1%) member of the
17 LLC. Likewise, nothing in the legislation would prevent an ADU/DADU developer from
18 satisfying the 1 year occupancy requirement by regularly renting out the
19 owner/occupied unit as an Air B&B, just as do many owner/occupants around the City.¹⁸

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22 ¹⁶ Although City Ex. 6, the May 2016 *Removing Barriers* document at 8 claimed the legislation imposed a
23 total 1000 sq ft limit for both an ADU and DADU together, in fact the proposed ordinance would allow
24 each accessory dwelling unit to have 1000 sq ft, for a total of 2000 sq ft of additional rental space. See
City Ex. 3, proposed ordinance at 13 and 15. The DNS at 3 also erroneously described the legislation as
allowing only 200 sq ft of additional space when it would allow 1200 sq ft of additional space, beyond the
800 sq ft already allowed.

25 ¹⁷ City Ex. 6, May 2016 *Removing Barriers* document at 5.

¹⁸ See e.g., www.airbnb.com (advertising over 300 bnbs within Seattle)

1 The Environmental Checklist at B9 requires consideration of the proposal's
2 impacts on housing, including the type of housing impacted and the potential for
3 elimination of housing. As supported by the testimony of William Reid, Sou Souvanny,
4 Gregory Hill, Toby Thaler, and Marty Kaplan, consideration of impacts to housing would
5 have provided meaningful analysis. Yet by claiming impacts to housing inapplicable,
6 OPCD failed to give actual consideration to the potential impact of the proposed
7 legislation on existing housing stock.

8 **5. OPCD failed to consider the proposal's impacts upon the**
9 **displacement of populations.**

10 The Environmental Checklist at B(j)&(k) requires consideration of the proposal's
11 impact on the displacement of people. As with housing, OPCD claims the question to be
12 inapplicable. But as Sou Souvanny testified, the proposed legislation would potentially
13 result in the displacement of people. From her own experience of growing up in the
14 Rainier Valley, she spoke of the economic opportunities that lower cost, entry-level
15 single family housing present for immigrant communities by allowing them the
16 opportunity to invest in residential properties and of how those opportunities are
17 diminished when speculative investment drives up the cost of housing.

18 Ms Souvanny concurred with Mr. Reid's testimony that expansion of the
19 development of ADUs and DADUs would increase speculative investment in lower-
20 value single-family properties and push their prices beyond the reach of those seeking
21 their first real estate investments. She cited to examples of how development pressures
22 had resulted in members of her own family leaving their community. Yet in its rush to
23 "tell a positive story' about DADUs,"¹⁹ OPCD completely ignores that passage of the
24 ADU/DADU legislation would lead to the replacement of housing affordable by more

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¹⁹ Appellant's Ex. 23, Bias tab, Email No. 19 (Wentlandt testimony on the perceived need to "tell a positive story' about DADUs.")

1 people with higher cost housing affordable to fewer people. This displacement impact
2 was never considered by OPCD, a violation of its duty to provide "complete disclosure
3 of environmental consequences." *King County*, 122 Wn.2d at 664.

4 **6. OPCD failed to consider the proposal's impacts upon height,**
5 **bulk and scale.**

6 The DNS at 3 asserts that "[t]aken together these adjustments [to the
7 ADU/DADU limitations] amount to very minor and incremental increases to the
8 height/bulk/scale of potential structures in single-family zones." This assertion does not
9 reflect actual consideration of the height, bulk and scale of development allowed under
10 the proposed legislation. The DNS and the Environmental Checklist do not accurately
11 represent the magnitude of development allowed by the proposed ordinance.

12 The DNS at 3 erroneously claims enactment of the proposed ordinance would
13 only allow 200 sq ft of accessory dwelling unit space more than currently allowed, when
14 in fact it would allow 1200 sq ft of additional dwelling unit space. But even larger
15 buildings would be allowed, since the proposed ordinance would not count garage or
16 storage space as part of a DADU;²⁰ it would increase lot coverage by allowing DADUs
17 of a height not exceeding 15 feet to occupy an additional 20% of the rear yard and by
18 allowing rear yard lot coverage to be calculated from the centerline of an adjoining
19 alley;²¹ and it would increase the allowable building height for DADUs.²²

20 The City's illustrations,²³ which the City had prepared for purposes of the hearing
21 and not for its threshold determination, misrepresent the development allowed under

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23 ²⁰ City Ex. 3, proposed ordinance at 15, Table A.

24 ²¹ *Id.*

25 ²² *Id.*

²³ City Ex. 4 (illustrations prepared by Matt Hutchins).

1 the proposed changes by showing a principal dwelling unit and DADU on 5000 sq ft lots
2 with 35% lot coverage when the proposal would allow a principal
3 residence+ADU+DADU on lots as small as 3200 sq ft and with lot coverage as high as
4 46%.²⁴ Further, the City's illustrations do not consider the cumulative effect of the
5 development of DADUs on a number of lots within a single block, as shown by the
6 renditions prepared by Thomas Marshall.²⁵ Mr. Hutchins agreed that his illustrations did
7 not represent the effects of the ADU/DADU legislation on smaller lots or the effects of
8 potential car ownership by occupants of each of the allowable dwelling units. Instead,
9 without any supportive analysis or data, OPCD staff (Nick Welch) brushed aside the
10 need for a cumulative impact assessment on asserted grounds that future ADUs and
11 DADUs created under the proposed legislation would be evenly dispersed throughout
12 the City. Other than relying on patterns resulting from current legislation, OPCD offered
13 no evidence to refute the testimony of Mr. Reid and Ms Souvanny that lower-priced
14 single-family housing would become the target for conversion to triplexes allowed by the
15 proposed legislation.

16 **7. OPCD's assessment of impacts upon parking is not supported**
17 **by substantiated opinion and data.**

18 If enacted, the proposal would allow a second accessory dwelling unit on an
19 eligible lot (for a total of three) and remove the requirement for accessory dwelling units
20 to provide any on-site parking. Without any studies, surveys, or other documentation,
21 the DNS at 4 asserts that this "could result in minor localized impacts to the availability
22 of on-street parking... ." Without citing to any particular neighborhoods, OPCD attempts

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24 ²⁴ Lot coverage of a 3200 sq ft lot would be the sum of 15% of the lot area and 1000 sq ft, for a total of
25 1480 sq ft, which would be 46% of 3200 sq ft, a figure that does not include additional lot coverage
allowed by including a portion of an adjacent alley).

²⁵ Appellant's Ex. 10.

1 to rationalize this statement with a general claim that “neighborhoods with greater
2 constraints on on-street parking supply tend to be neighborhoods with a greater variety
3 of transportation options...” *Id.* Whether or not true, OPCD offers no data, studies,
4 reports, or analysis that those living in denser neighborhoods have a lower level of
5 vehicle ownership, and presumably less need for parking. Likewise, OPCD offers
6 nothing to support its underlying premise that the removal of the parking requirement for
7 accessory dwelling units would have little impact upon on-street parking on asserted
8 grounds that denser neighborhoods do not need the parking (on account of lower
9 vehicle ownership) and conversely that less dense neighborhoods would already have
10 ample on-street parking.

11 Mr. Marshall demonstrated the likelihood of significant parking impacts. At
12 Appellant’s Exhibit 10, he showed the cumulative effect upon on-street parking from the
13 development of a number ADUs and DADUs on a single block. His analysis gives the
14 consideration required by SEPA in that it shows the cumulative effect of full build-out
15 that would be allowed by the ordinance.²⁶ But in support of its claims of minor impacts,
16 the City did not produce any studies, pilot projects, or other documentation. OPCD’s
17 witness on parking and transportation impacts, John Shaw, was only contacted to testify
18 at the appeal and he provided no input into the DNS itself. In fact, he had not read the
19 proposed legislation and did not know its details. His testimony supported the
20 conclusion that the proposed legislation would increase parking impacts. He estimated
21 the rate of vehicle ownership to be between 1 and 2 vehicles per household and he
22 agreed that increasing the number of households would increase the number of cars in

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25 ²⁶ WAC 197-11-060(4)(d) and SMC 25.05.060(D)(4)(impacts include those effects resulting from growth caused by the proposal) and cf, *Ullock v. City of Bremerton*, 17 Wn. App. 573, 581, 565 P.2d 1179 (1977)(EIS for non-project zoning action must consider maximum potential development allowed by proposed zoning).

1 that area, which confirms what Mr. Marshall showed in Appellant's Exhibit 10.
2 Essentially, OPCD's dismissal of parking impacts is refuted by its own witness.

3 **8. OPCD fails to support its claim of negligible impacts upon**
4 **services and facilities.**

5 The Environmental Checklist at 16-17 asserts that "[a]ny localized adverse
6 impacts on transportation systems due to incremental vehicle or transit trips resulting
7 from this proposal are negligible, as are any localized impacts on utility infrastructure...
8 ." As Mr. Kaplan pointed out in his review of over 4600 email messages, attachments,
9 and other documents, absolutely no studies, reports, surveys, assessments or analyses
10 support this assertion. The road and utility systems in single-family neighborhoods
11 subject to the ordinance were laid out to support a single dwelling unit on a given lot.
12 The proposed ordinance would triple the allowed density. No study has been done to
13 determine if the existing transportation and utility infrastructure could support a tripling
14 in density. OPCD attempts to support its claims of no greater density on grounds that
15 the limit of no more than eight unrelated adults on a given lot would continue to apply.²⁷
16 But such a limit would not mean there would be no increase in density, as each single
17 family lot expanded from one principal residence to a principal residence+ADU+DADU
18 would triple the number of households on that lot. With an average of 1.97 persons per
19 household,²⁸ such development would increase the number of residents per affected lot
20 from about two to about six. In defense of its claim of negligible impacts to
21 infrastructure, OPCD has offered no data or analysis.

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25 ²⁷ Environmental Checklist at 14.

²⁸ Appellant's Ex. 14, OPCD, Population and Demographics table.

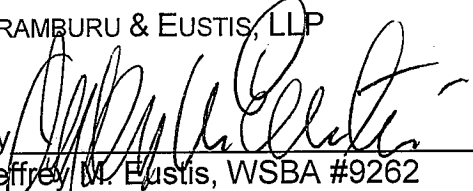
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C. Conclusion

For the reasons given above and through the testimony of witnesses, the DNS is clearly erroneous and should be vacated. The proposed legislation would create the likelihood of significant adverse environmental impacts and requires the preparation of an environmental impact statement.

Dated this 9th day of November, 2016.

ARAMBURU & EUSTIS, LLP

By 
Jeffrey M. Eustis, WSBA #9262
Attorney for Queen Anne Community Council

DECLARATION OF SERVICE

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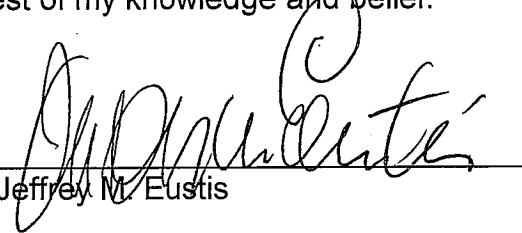
I am a partner in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the foregoing document upon parties of record, addressed as follows:

Nick Welch
City of Seattle Office of Planning and Community Development
Nicolas.Welch@seattle.gov
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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: November 9, 2016.



Jeffrey M. Eustis