

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

REBUTTAL ARGUMENT BY QUEEN
ANNE COMMUNITY COUNCIL

7 For the reasons given below and within Queen Anne's closing argument, 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 The OPCD's discussion of review standards ignores its threshold requirement to
13 produce a record "to demonstrate that environmental factors were considered in a
14 manner sufficient to amount to *prima facie* compliance with the procedural requirements
15 of SEPA," *Juanita Bay Valley Community Ass'n v. Kirkland, supra*, 9 Wn. App. 59, 73,
16 510 P.2d 1149 (1973). The OPCD has the burden of demonstrating actual
17 consideration of environmental factors. *City of Bellevue v. King County Boundary*
18 *Review Board*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978). Its failure to do so, renders
19 the agency's determination clearly erroneous. *Gardner v. Pierce County*, 27 Wn. App.
20 241, 246, 617 P. 2d 743 (1980). Queen Anne does not have the burden of proving the
21 negative. After all, SEPA's objective is fully-informed decisionmaking. *King County v.*
22 *Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860
23 P.2d 1024 (1993).
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25

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

2 **1. Impacts of the proposed legislation were not objectively**
3 **reviewed.**

4 As Queen Anne established in its opening argument, SEPA compliance should
5 produce objective review, not a one-side promotion of the proposed action. OPCD's
6 Closing Argument at 2 asserts that different people within OPCD prepared the
7 environmental review and issued the decision on grounds that Mr. Welch prepared the
8 checklist and Mr. Wentlandt signed the determination. But the division of roles between
9 the two did not achieve objective review since both were self-avowed proponents of the
10 legislation and their review was one-sided. Their survey only sought the opinions of
11 DADU owners and builders. From the survey results, OPCD organized its public
12 meetings, again involving only DADU owners and builders. OPCD made no effort to
13 gather opinions representative of the city population as a whole. By analogy, it is
14 inconceivable that OPCD or the City Council would advance legislation regarding short
15 term rentals by only soliciting input from those who rent out units through VRBO or
16 Airbnb, or that it would only consider the input of marijuana retailers in the siting of retail
17 marijuana stores. The result should be no different here.

18 OPCD begs the question as to how its analysis would be any different if
19 conducted by objective, disinterested staff. Rather than extrapolating impacts from
20 current trends based upon more restrictive standards, objective review of the proposal
21 should have considered impacts of the proposal itself, upon such elements as housing
22 design, occupancy (renter vs owner occupancy), housing supply, parking and public
23 facilities and services.

24 But instead, OPCD based its environmental determination upon conclusory
25 assertions that land use impacts would be "very minor" and that impacts on facilities

1 and services would be “minimal or negligible” DNS at 3 & 4. In support of these and
2 other assertions, there was:

- 3 a. No analysis of environmental impacts associated with minimum lot size reduction
4 from 4,000 sq ft down to 3,200 sq ft and the consequences associated with
5 allowing increased heights;
- 6 b. No analysis of the environmental impacts associated with increasing the rear
7 yard lot coverage from the current 40% to 60% and the impacts to open space,
8 tree canopy, exposure to light, etc.;
- 9 c. No analysis of environmental impacts of allowing three dwelling units on one
10 single-family lot;
- 11 d. No analysis of environmental impacts of eliminating the parking requirements
12 associated with adding an ADU and/or a DADU;
- 13 e. No analysis of environmental impacts connected with increases in utility
14 requirements associated with potential significant increases in density on
15 properties throughout Seattle that were engineered for single family occupancy
16 now allowing triplexes instead;
- 17 f. No analysis of effectively removing the current requirement for owner occupancy;
18 and
- 19 g. No analysis of any of the remaining questions outlined within the SEPA
20 Checklist.

21 Only at the hearing did OPCD attempt to buttress its determination through the work of
22 others. But these efforts come too little, too late. Matt Hutchins, John Shaw and Sam
23 Lai were not consulted prior to issuance of the DNS and were only brought in just
24 before the hearing. Even still, they offered little support: Matt Hutchins contradicted the
25 City’s claims of creating affordable housing; John Shaw supported Queen Anne’s points
regarding increased parking impacts; and Sam Lai corroborated the lack of support for
the City’s assessment of impacts to housing. Mr. Lai conceded that he had not seen
any studies of the impacts of converting a lot from occupancy by a single family to

1 occupancy by three and he agreed that current production numbers of ADUs and
2 DADUS could not portend future production numbers under a different code.¹

3 **2. Responses to Part B of the Environmental Checklist would**
4 **have been meaningful.**

5 Queen Anne showed at the hearing that responses to a number of questions
6 would “contribute meaningfully to the analysis of the proposal[,]” WAC 197-11-960,
7 including questions regarding the removal of vegetation, displacement of people,
8 elimination of housing, aesthetics, parking, and impacts upon public facilities and
9 services. As noted above, OPCD offers only conclusory responses on these elements
10 of the environment.

11 OPCD claims Queen Anne did not produce evidence to support its contention
12 that enactment of the proposed legislation would change the pattern of ADU/DADU
13 development. In fact, Queen Anne did produce such evidence of change, through the
14 opinion of William Reid. As he testified, changing the economics of real estate does
15 create direct impacts upon housing and land use. Even though none of the 59
16 jurisdictions listed by Mr. Welch liberalizes ADU & DADU restrictions to the same extent
17 as currently proposed, the effects of the proposed changes on housing, demographics,
18 and transportation can be analyzed and projected since they involve variables to the
19 cost of land and housing; this is an analysis that was OPCD’s obligation to prepare, not
20 Queen Anne’s.

21 **3. OPCD failed to consider the ability of the proposed legislation**
22 **to attain its stated objectives.**

23 The hearing testimony demonstrated that the proposed legislation would not
24 meet its intended objective of creating additional housing affordable to the segments of
25 the population identified in Resolution 31547, which OPCD’s Closing at 5 effectively

¹ Testimony of Sam Lai, August 31, 2016 (Recording 4 of 5 at 46:50 and 48:27).

1 concedes by shifting its rationale to claiming the proposed legislation would create
2 “additional opportunities for rental housing and income diversity in heighborhoods that
3 are often affordable only to high-income households.” But this too, is yet another
4 unsubstantiated assertion.

5 OPCD offered no analysis to show that construction costs of \$250 to
6 \$350/square foot would lead to income diversity, or that it would create additional rental
7 opportunities in high-income neighborhoods. On this point, Bill Reid testified that the
8 proposed legislation would have the opposite effect: under present land use regulations,
9 teardowns and reconstruction currently occurs in higher income neighborhoods where a
10 market exists for housing above \$1 million, but the proposed legislation would allow the
11 construction of three rental units, which would more likely occur in lower income
12 neighborhoods where a greater differential between the cost of land and the return on
13 rent could be achieved. OPCD offered no substantiated opinion or data to show
14 differently. Yet, OPCD continues to advance the legislation as increasing opportunities
15 for affordable housing.

16 To promote the legislation for a purpose that it would not accomplish is
17 disingenuous at best, and deceitful at worst. SEPA aims to achieve informed
18 environmental decision-making. That objective is defeated when complete disclosure is
19 not provided.

20 **4. OPCD failed to consider the proposal’s impacts upon housing.**

21 The Environmental Checklist at B9 required OPCD’s consideration of the
22 proposal’s impacts on housing, including the type of housing impacted and the potential
23 for elimination of housing. William Reid, Sou Souvanny, Gregory Hill, Toby Thaler, and
24 Marty Kaplan each gave unrefuted testimony as to the impacts of the proposed
25 legislation on current housing stock. Having no answer to their testimony, OPCD now

1 attempts to cast it aside with assertions that the testimony involves purely economic
2 issues and is beyond the scope of SEPA.

3 Contrary to OPCD's assertions, the impacts upon housing are not to methods of
4 financing, profits, personal income, and the like. As Mr. Reid testified, economic forces
5 play a significant role in land use. Even with single family zoning limits on height, bulk,
6 unit area, and lot coverage, the increased development potential created by allowing
7 triplexes and dispensing with owner occupancy and on-site ADU parking increases the
8 economic pressure for changes in land use, just as would upzoning a single-family area
9 to triplexes, which is effectively what the legislation proposes to do. The environmental
10 impact is not the wealth created for the landowners, but the transformation of land use
11 engendered by the change in zoning restrictions. OPCD was clearly aware of this effect,
12 as Mr. Welch, the author of the Environmental Checklist, affirmed that the proposal
13 would "unleash tremendous growth in single family areas."² Yet the DNS at 3 asserts
14 that its land use impacts would be "very minor."

15 At the very least, OPCD was obliged to present an objective, balanced analysis
16 of the proposed legislation.

17 **5. OPCD failed to consider impacts upon populations.**

18 Mr. Reid and Ms Souvanny testified that enactment of the proposed legislation
19 would increase speculative investment in lower-value single-family properties and push
20 their prices beyond the reach of those seeking their first real estate investments. OPCD
21 at 7 asserts that its data do not support this proposition. However, its data are based
22 upon the current legislation which does not allow an ADU and a DADU on a single lot
23 and does not allow the rental of all units. As noted above, OPCD offered no examples
24 of jurisdictions with like legislation. For example, Portland does not allow an ADU and
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² Appellant's Ex. 23, Proposals without analysis tab, Email No. 18.

1 DADU together on a single lot and for short term rentals it requires owner occupancy.
2 North Vancouver and Richmond BC allow no more than one secondary suite and North
3 Vancouver requires the occupant of the secondary suite to be a relative of the occupant
4 of th primary dwelling.³

5 OPCD's own witness on this issue generally concurred with Mr. Reid and Ms
6 Souvanny. Mr. Lai agreed that:

7 generally, tearing down existing homes and replacing them results in an average
8 of three times the original value/price for sale;

9 there is additional value to a property with multiple income streams from multiple
10 rental units, creating increased valuation and equity;

11 properties increase in value if they become associated with opportunities for
12 multiple and higher income streams;

13 investment and speculation in buying properties as a business to fund income
14 streams would have a dramatic impact on SF home values;

15 the same investment into properties with potential for multiple income streams
16 would have even greater impact;

17 competition increases price as multiple investors seeking limited properties will
18 drive up prices;

19 he had seen no studies of the impacts of converting one house and one rental
20 income stream into potentially three income streams; and

21 production numbers of ADU's and DADU's built under the current code cannot
22 portend future numbers of production under a different code.⁴

23 Mr. Lai's testimony offers no support OPCD's contention that responses to
24 Environmental Checklist questions regarding housing and displacement of populations
25 would be unhelpful.

25 ³ City Ex. 21 at page 3.

⁴ Testimony of Sam Lai, August 31, 2016, Recording 4 of 5 at 28:43 to 46:50.

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

3 Even though the proposed legislation may not increase the maximum allowable
4 lot coverage within single family zones,⁵ it would allow for increased height, bulk and
5 scale by allowing an additional 1200 sq ft (not 200 sq ft) of rental space, increased rear
6 yard lot coverage, and increased height for DADUs. None of the City's documents
7 accurately show the impact of the increased height, bulk and scale. As demonstrated
8 through the testimony of Matt Hutchins and Thomas Marshall, the City's illustrations do
9 not accurately depict height, bulk and scale impacts allowed by the proposed
10 legislation. None of the photographs, site plans, schematics, or massing drawings
11 contained in the *Removing Barriers*⁶ documents show the effect of these changes upon
12 the impacted populations, as required in conducting a threshold determination of
13 environmental impact.⁷ Likewise, Matt Hutchins's renditions do not portray
14 development on lots less than 5,000 sq ft on which greater lot coverage would be
15 allowed, and they do not show the discontinuity of scale between lots developed under
16 the proposed legislation and lots with existing single family homes, as shown by Mr.
17 Marshall.⁸

18 Construction occurring under current legislation does not accurately represent
19 the aesthetic impacts of construction under the proposed legislation. Current legislation
20 has resulted in an average DADU floor area of 632 sq ft on an average lot of 6,770 sq

21 ⁵ City Ex. 3, proposed ordinance at 15, Table A at part d.

22 ⁶ City Ex. 6 and 7.

23 ⁷ SEPA requires significance to be determined from the perspective of the population to be impacted
24 because "what to one person may constitute a significant or adverse effect on the quality of the
25 environment may be of little or no consequence to another." *Norway Hill Preservation and Protection
Ass'n v. King County Council*, 87 Wn.2d 267, 277, 552 P.2d 674 (1976).

⁸ Compare City Ex. 4 (illustrations prepared by Matt Hutchins) to Appellant's Ex. 10 (renditions prepared
by Thomas Marshall).

1 ft.⁹ The proposed legislation would nearly double the allowable DADU area and more
2 than halve the size of lots on which DADUs could be constructed.¹⁰ OPCD asserts
3 these changes to be “very minor and incremental” but offers no renditions or analysis to
4 substantiate that assertion.

5 **7. The assessment of impacts upon parking is not substantiated.**

6 OPCD’s Closing offers nothing – no studies, analysis, or expert opinion -- to
7 support its assessment in the DNS at 4 that the removal of the parking requirement for
8 accessory dwelling units would only result in “minor localized impacts to the availability
9 of on-street parking.” OPCD’s Closing defends on asserted grounds that: the existing
10 patterns of dispersion are predictive of future impacts; a concentration of ADU/DADU
11 development on a given block is implausible; Portland’s experience supports the
12 removal of on-site parking; and based upon Gregory Hill’s experience, removal of the
13 requirement may not eliminate on-site parking. OPCD obfuscates.

14 First, current development patterns are not predictive of the effects of the
15 proposed legislation, as testified to by Mr. Reid and Mr. Lai. Photographs taken of
16 DADUs under current legislation are not useful in forecasting on-street parking impacts
17 resulting from implementation of the proposed legislation. As Mr. Kaplan pointed out by
18 reference to the transformation occurring in Ballard, what may be perceived as modest
19 changes to zoning can produce dramatic changes in neighborhood character.

20 Second, the Portland experience is not analogous, because Portland allows only
21 a single accessory dwelling unit per lot (whether attached or detached) and limits it to
22 800 square feet.¹¹ By contrast, Seattle would allow two accessory dwelling units per lot

23 _____
24 ⁹ City Ex. 7, *Removing Barriers* at 5.

25 ¹⁰ DADUs could be increased to 1000 square feet and built on lots as small as 3200 square feet.

¹¹ City Ex. 7, *Removing Barriers* at 13.

1 with two and half times the rental area, thereby allowing more units, larger families, and
2 potentially more motor vehicles.

3 Third, Mr. Marshall's depiction of parking impacts on a street with multiple
4 ADU/DADU development is appropriate, since SEPA requires the complete disclosure
5 of impacts – direct, indirect and cumulative.¹²

6 And fourth, Mr. Hill did not contradict Mr. Marshall. From his own experience, Mr.
7 Hill testified that the ability to develop and rent out three units per lot for short term
8 rentals could result in the removal of tree canopy and other vegetation as developers
9 sought to accommodate the desire of short term tenants to park off street. Either way,
10 the increase in allowable accessory dwelling units, the reduction of lot size, and the
11 effective removal of the owner occupancy requirement would result in adverse impacts
12 that OPCD should have (but failed to) consider.

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

15 Without any substantiation, OPCD's Closing at 9 continues to maintain that "the
16 overall use and intensity of activity on a site with an ADU/DADU would not increase
17 significantly compared to what could otherwise occur under existing regulations." OPCD
18 rests this assertion upon the dispersion occurring under current legislation and the limit
19 of no more than eight unrelated occupants on a single lot. OPCD's reliance is
20 misplaced.

21 First, as its own witness Mr. Lai testified, the effect of the proposed changes in
22 the ADU/DADU legislation cannot be projected from current trends. Mr. Reid and Ms
23 Souvanny testified that the proposed changes would likely change the focus of
24 ADU/DADU development from higher value to lower value neighborhoods, so the

25 ¹²See *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 dispersion under current legislation could not be assumed to continued under the
2 proposed legislation.

3 Second, retention of the limit of eight unrelated persons per lot would still allow
4 the number of inhabitants to rise on a lot with a principal dwelling plus an ADU and a
5 DADU. At an average occupancy of 1.97 persons per household, the addition of two
6 households per lot with an ADU and DADU could potentially triple the number of
7 inhabitants per lot over a single family lot without an ADU or DADU. OPCD did not
8 consider the additional population impacts likely to result from the proposed legislation.

9 **C. Conclusion**

10 Over four days of hearings Queen Anne demonstrated that the proposed
11 changes would not amount to “minor adjustments,” as OPCD’s Closing at 9 contends,
12 but rather would produce significant changes to the ADU/DADU regulations. Yet the
13 proposed ordinance would make a number of changes with virtually no study or
14 analysis, as listed below:

- 15 • **Allow an ADU and backyard cottage on the same lot**
16 NO ANALYSIS - No peer city (City Ex 21, for this and following points) allows
17 three units on one single family property;
- 18 • **Remove the off-street parking requirement**
19 NO ANALYSIS – no respect for individual neighborhood opportunities or
20 challenges;
- 21 • **Modify and eliminate the owner-occupancy requirement**
22 NO ANALYSIS - No peer city allows non owner occupancy, except Portland, if
23 not rented short term;
- 24 • **Reduce the minimum lot size for backyard cottages**
25 NO ANALYSIS No peer city allows less than 4,500 sq ft;

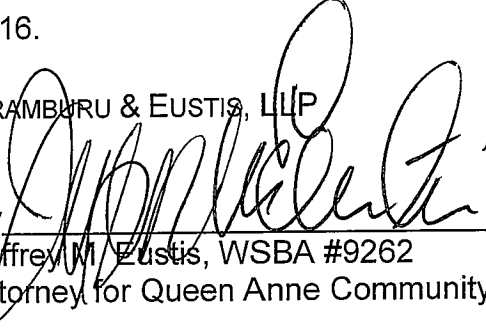
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- **Increase the maximum height limit for backyard cottages**
NO ANALYSIS- No peer city review;
- **Increase the rear yard lot coverage limit**
NO ANALYSIS - No peer city review;
- **Increase maximum gross square footage limits**
NO ANALYSIS- No peer city allows more than 800 sq ft;
- **Add flexibility for location of entry to a backyard cottage**
NO ANALYSIS- No peer city review;
- **Increase heights of roof features that add interior space**
NO ANALYSIS- No peer city review;
- **Allow for projections from backyard cottages**
NO ANALYSIS- No peer city review;
- **Increase opportunities for accessory structures in required yards**
NO ANALYSIS- No peer city review.

OPCD had failed to give "actual consideration to environmental factors." Its DNS should be vacated and an environmental impact statement should be required.

Dated this 23rd 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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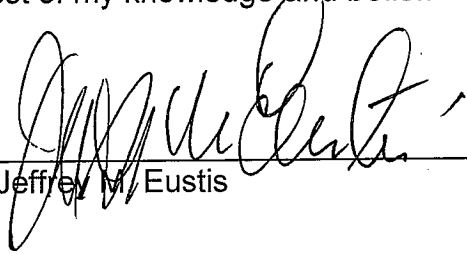
I am a partner in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the foregoing document upon parties of record, addressed as follows:

Nick Welch
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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: 11-23, 2016.



Jeffrey M. Eustis