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Hearing Examiner File No. W-16-004

REBUTTAL ARGUMENT BY QUEEN ANNE COMMUNITY COUNCIL

For the reasons given below and within Queen Anne's closing argument, the Determination of Non-Significance issued on the proposed expansion of Accessory Dwelling Units (ADU) and Detached Accessory Dwelling Units (DADU) should be vacated.

A. Standards of Review.

In the Matter of the Appeal by

Community Development

QUEEN ANNE COMMUNITY COUNCIL

From a determination of non-significance

issued by the Office of Planning and

The OPCD's discussion of review standards ignores its threshold requirement to produce a record "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*, 9 Wn. App. 59, 73, 510 P.2d 1149 (1973). The OPCD has the burden of demonstrating actual consideration of environmental factors. *City of Bellevue v. King County Boundary Review Board*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978). Its failure to do so, renders the agency's determination clearly erroneous. *Gardner v. Pierce County*, 27 Wn. App. 241, 246, 617 P. 2d 743 (1980). Queen Anne does not have the burden of proving the negative. After all, SEPA's objective is fully-informed decisionmaking. *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993).

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B. Issuance of the DNS Was Clearly Erroneous.

1. Impacts of the proposed legislation were not objectively reviewed.

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

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

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

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

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

Only at the hearing did OPCD attempt to buttress its determination through the work of others. But these efforts come too little, too late. Matt Hutchins, John Shaw and Sam Lai were not consulted prior to issuance of the DNS and were only brought in just before the hearing. Even still, they offered little support: Matt Hutchins contradicted the 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

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

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

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

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

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

The hearing testimony demonstrated that the proposed legislation would not meet its intended objective of creating additional housing affordable to the segments of 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).

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

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

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

4. OPCD failed to consider the proposal's impacts upon housing.

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

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

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

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

5. OPCD failed to consider impacts upon populations.

Mr. Reid and Ms Souvanny testified that enactment of the proposed legislation would increase speculative investment in lower-value single-family properties and push their prices beyond the reach of those seeking their first real estate investments. OPCD at 7 asserts that its data do not support this proposition. However, its data are based upon the current legislation which does not allow an ADU and a DADU on a single lot and does not allow the rental of all units. As noted above, OPCD offered no examples of jurisdictions with like legislation. For example, Portland does not allow an ADU and

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

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

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

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

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

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

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

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

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

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

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

Mr. Lai's testimony offers no support OPCD's contention that responses to

Environmental Checklist questions regarding housing and displacement of populations would be unhelpful.

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.

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

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

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

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

⁶ City Ex. 6 and 7.

⁷ SEPA requires significance to be determined from the perspection of the population to be impacted because "what to one person may constitute a significant or adverse effect on the quality of the 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).

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

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

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

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

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

⁹ City Ex. 7, Removing Barriers at 5.

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.

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

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

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

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

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

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

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).

dispersion under current legislation could not be assumed to continued under the proposed legislation.

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

C. Conclusion

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

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

DECLARATION OF SERVICE

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2	I am a partner in the law offices of Aramburu & Eustis, LLP, over eighteen years
3	of age and competent to be a witness herein. On the date below, I served copies of the
4	foregoing document upon parties of record, addressed as follows:
5 6 7	Nick Welch City of Seattle Office of Planning and Community Development Nicolas.Welch@seattle.gov ☐ first class postage prepaid, ■ email ☐ facsimile ☐ hand delivery / messenger
8	
9	Geoff Wentlandt City of Seattle Office of Planning and Community Development
10	Geoff.Wentlandt@seattle.gov ☐ first class postage prepaid,
11	■ email ☐ facsimile
12	☐ hand delivery / messenger
13	I declare under penalty of perjury under the laws of the State of Washington that
14	the foregoing is true and correct to the best of my knowledge and belief.
15	DATED: (1-23 , 2016.)
16	
17	Jeffrey W. Eustis
18	
19	