

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY ERIN L. LENNON
CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ESCALA OWNERS
ASSOCIATION,

Petitioner,

v.

CITY OF SEATTLE; JODI -
PATTERSON O'HARE; G4
CAPITAL SEATTLE
HOLDINGS, LLC, 1921-27
FIFTH AVENUE
HOLDINGS 591683; 1921-
27 FIFTH AVENUE
HOLDINGS LLC,

Respondents.

NO. 101214-4

RESPONDENTS'
RESPONSE TO
MOTION TO STRIKE

I. INTRODUCTION AND IDENTITY OF RESPONDENTS

Petitioner Escala Owners Association (“Escala”) moves to strike three declaratory statements in the Answer to the Petition for Review (“Answer”) filed by Respondent 1921-27 Fifth Avenue Holdings LLC (“Applicant”) and Respondent City of Seattle (“City” and collectively, “Respondents”). This motion to strike has no merit. The motion is also immaterial to the issue of whether the Petition for Review presents an issue of substantial public interest under RAP 13.4. As our Answer makes clear, this case is a site-specific dispute that does not present an issue of substantial public interest under RAP 13.4—Escala’s motion only serves to highlight the very site-specific nature of Escala’s dispute.

II. RELIEF REQUESTED

Respondents request that the Court deny Escala’s motion to strike.

III. FACTS RELEVANT TO PETITIONER’S MOTION

Seven years ago, Applicant applied to the City for land use approval of a 48-story hotel and residential building at 1933 5th Avenue in Seattle (the “Project”). Court of Appeals Opinion, pp. 5-6 (July 25, 2022). The Project will add over 430 new homes to Downtown Seattle. *Id.* Escala represents the condominium owners who live on the same block as the Project in a 30-story high rise. Escala has opposed this project since its inception. *See* CP 598-610 (record list of comments).

Early in this process, comments from Escala’s attorney and owners outlined Escala’s various concerns. *See Id.* Principal among them were Escala’s concerns about the height, bulk, and scale of the building, where Escala argued that the Project would cause significant adverse view, height bulk and scale, privacy, and light impacts. CP 278-291. As often occurs with litigation, Escala’s arguments have been narrowed and refined throughout the course of the five years of appeals

pursued by Escala,¹ and the only two issues addressed in the Petition for Review outlined in Respondents' Answer. *See* Answer, p. 5.

In the motion, Escala now seeks to strike two declaratory statements included in the introduction to Respondents' Answer and one declaratory statement on p. 28 of the Answer.

IV. ARGUMENT

Escala provides no basis for striking statements from Respondents' Answer regarding views. Contrary to Escala's claims, even a cursory review of the record indicates that views have been a concern to Escala from the beginning, continue to be a concern for Escala, and are intertwined with the remaining issues related to light and human health. In other words, it is clear from the record that the loss of views has explicitly and

¹ Escala inexplicably states that the "City and Developer have spent over two years litigating this matter to avoid considering alternative designs." Motion, p. 8. To be clear, Escala has been the appellant at every level of this litigation, which has lasted five years. CP 200-07.

implicitly been a key factor in the past seven years of opposition from Escala. There is nothing “false” about Respondents’ declaratory statements. Accordingly, Escala’s motion to strike should be denied.

The first sentence Escala seeks to strike is an undisputed fact recited in the introduction: “[t]he Project will impact private views from Escala’s condos.” In the EIS Addendum, the City acknowledged the impacts to private views within Escala’s units. CP 1643. Escala’s counsel has said the very same thing. In a comment letter to the City of Seattle, Escala’s counsel stated that “[t]his building will completely block the view for every resident of the Escala on the alley side of the building.” CP 283-284. Escala’s counsel then claims that the EIS determination that there would be no significant adverse view impacts is “flat out incorrect and somewhat shocking in its blind eye toward reality.” *Id.* Accordingly, there is no basis to strike an uncontroverted statement of fact in the Answer.

The final two declaratory statements Escala seeks to strike are as follows:

There is no substantial public interest in extending Escala's efforts to protect private views from their condos.

Answer, p. 3, Introduction.

Thankfully, future land use approvals throughout Washington eligible for RCW 43.21C.501(3)(b)'s protections will not need to defend themselves from litigious neighbors seeking to weaponize SEPA to protect their private views.

Answer, p. 28.

Escala's attempt to remove these declaratory statements on "views" is perplexing. Nowhere in the Answer did Respondents claim the sole reason for the appeal (or the relief sought) is to protect views, and Respondents certainly did not opine on what view Escala cares about most. Escala's motion simply made assumptions on what these statements mean.

Throughout this seven years' record of Escala's opposition to this Project, Escala has complained about the proximity of the Project to its condos, stating that residents would be "looking directly into the side of the other building." CP 8074. This comment raises concerns about residents' views. Petitioner's counsel then elaborates in its Opening Brief before the Superior Court:

[t]he examiner also criticized Escala's expert for estimating loss of light by assuming that residents would not be looking out the window. The examiner ignored that views out of those windows would be into the side of the new building (or looking into the units of those new buildings) just 20 feet away, across a narrow alley. AR 3432.

CP 8111. Petitioner's Opening Brief to the Court of Appeals repeats the complaint. Petitioner's Opening Brief, p. 60, fn. 4.

Moreover, Escala has made it clear that its view concerns are intertwined with its concerns about height, bulk and scale, aesthetics, view, privacy, and health and light. In its initial SEPA comment letter, Escala's counsel set the stage on how it

views the interconnection of the issues of height, bulk and scale, light and views, stating that:

The height bulk and scale of the building *causes* adverse aesthetic, privacy, view and shadow/light impacts. In other words, these latter impacts are caused *as a result of* the height, bulk, and scale of the proposal. The central method for mitigating these impacts would be to change the height, bulk, and scale of the proposal via SMC 25.05.675.G.

CP 280 (emphasis in original).

Escala's experts in both hearings before the Hearing Examiners also argued that views are inextricably intertwined with light and human health. In the first hearing, Professor Loveland acknowledged this connection, stating that "[v]ery little daylight and very little view, which is a very important part of vision and comfort, perception, is happening in the hotel, much less in the Escala" CP 7080, p 236. Lines 12-14. In the second hearing, Escala's expert Mr. Clark notes that, "[d]aylight is also accompanied by a view typically, so that's the bonus; right? Outside of the window provides context that you don't get from the electric light. Changing of the seasons,

variability of the moment, the sky passing by, just connection to the social, cultural aspects of the world.” CP 7751, p. 45, lines 18-23. In other words, Escala connects its concerns regarding light to its concerns regarding views. Based on the totality of record of opposition to the Project, Respondents’ statements are well-supported and should remain in the Answer.

Escala also uses its motion to make additional arguments regarding an alternatives analysis.² These arguments should be ignored under RAP 13.4(d), which does not permit Escala to submit a reply to Respondents’ Answer.

V. CONCLUSION

For these reasons, Respondents City and the Applicant respectfully ask this Court to deny Escala’s Motion to Strike.

DATED this 28th day of October 2022.

² While Escala’s alternative arguments should not be considered as part of this motion, Respondents note that their Answer explains why these arguments have no merit.

Pursuant to RAP 18.17(b), I certify that this response to the Motion to Strike contains 1,245 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that today I filed this document via the Clerk's electronic portal filing system, which should cause it to be served by the Clerk on all parties, and emailed a courtesy copy of this document to:

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Dated this 28th day of October 2022, at Seattle,
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