101201-2

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 82568-2-I
(Consolidated with No. 82569-1-I)

ESCALA OWNERS ASSOCIATION,

Respondent/Cross-Appellant,

v.

CITY OF SEATTLE; SEATTLE DOWNTOWN HOTEL & RESIDENCE LLC,

Appellants/Cross-Respondents

PETITION FOR REVIEW

David A. Bricklin, WSBA No. 7583
Claudia M. Newman, WSBA 24928
BRICKLIN & NEWMAN, LLP
123 NW 36th Street, Suite 205
Seattle, WA 98107
(206) 264-8600
bricklin@bnd-law.com
newman@bnd-law.com
Attorneys for Escala Owners Association

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A. INTRODUCTION

Although decades have passed since the Washington State Environmental Policy Act (SEPA), RCW 43.21C, was adopted by our state legislature, this court has not yet provided guidance on the legal parameters around when a government agency can or cannot adopt existing environmental documents per RCW 43.21C.034 to meet its duties and obligations under that law. Nor has this court provided any direction about the extent that an "addendum" to an existing environmental impact statement (EIS) can be used to meet certain SEPA obligations. This case provides the court with the opportunity to address these questions for the first time.

A decision by this court on the issues presented will have implications that go far beyond the concerns of the immediate controversy. If allowed to stand as is, Division I's opinion will allow every local jurisdiction and agency to rely on the adoption and addendum process to purge SEPA requirements that are

pivotal to ensuring government accountability, meaningful public involvement, and the reduction of environmental harm from their SEPA review process. To avoid that outcome, Petitioner seeks review and guidance on these issues of substantial public interest.

B. IDENTITY OF PETITIONER

Petitioner is Escala Owners Association.

C. COURT OF APPEALS DECISION

The Court of Appeals, Division I, filed its opinion on July 25, 2022.[1] *See* Appendix A hereto. The trial court's decision was filed on March 23, 2021. *See* Appendix B hereto.

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[1] On that same day, Division 1 filed another opinion in a parallel case that presented the same central legal issue that is presented in this case. *See Escala Owners Association v. City of Seattle*, 2022 WL 2915537 (July 25, 2022). Escala Owners Association has also filed a Petition for Review with this court in that case. The introduction and the legal argument on "Issue 1" are nearly identical in the two Petitions.

D. ISSUES PRESENTED FOR REVIEW

1. Did the City of Seattle hearing examiner err as a matter of law when he allowed the City to use the adoption and addendum process in a manner that violated SEPA regulations that ensure government accountability, meaningful public involvement, and the reduction of environmental harm?

2. Did the Court of Appeals erroneously interpret RCW 43.21C.500 to bar judicial review of the City's SEPA decision on traffic impacts and deprive Escala of its fundamental and inalienable rights under SEPA?

E. STATEMENT OF THE CASE

Division I's opinion is generally correct in its recitation of the facts and procedure. Op. at 4-9. However, several points bear emphasis.

Seattle Downtown Hotel & Residences has proposed to build a 54-story building with a hotel, apartment units, and retail stores at 5th Avenue and Stewart Street (the "Altitude Project")

in downtown Seattle. AR 571; AR 3601. In addition to 233 apartment units and 257 hotel rooms, the building will include retail on the ground floor, a restaurant and bar on the 50th floor, and a rooftop bar on the 51st floor. AR 3308.

Escala is a 30-story residential tower that was constructed in 2009 at the corner of 4th Avenue and Virginia Street. CP 227. The Escala shares the alley with the Altitude Project site. *Id.* Escala relies on the alley for package delivery, furniture delivery, and other services such as the United States Postal Service, Amazon, FedEx, Furniture Stores, Service vehicles, and others. AR 2186. Escala also relies on the alley for its emergency vehicle services and for solid waste/compost/recycling collection services. Residents also use the alley for parking large moving trucks when they move in and out of condominiums. CP 254.

The proposed building will result in massive traffic congestion, circulation, loading, access and safety impacts in and near the alley. Even before the traffic from the new building is

added, vehicle traffic and truck loading circulation through the alley is highly constricted given the narrow width of the alley and frequent daily need for service access. If the proposed building proceeds with its current design, the public service, traffic, and safety problems in and around the alley will be horrendous.

Since the Project was first announced, Escala Owners Association has implored the City and Seattle Downtown Hotel & Residences to make small changes to the building to address the project's significant adverse impacts. The residents of Escala never objected to development of the project site in a general sense. Indeed, Escala simply proposed a small set back slightly further from the alley to alleviate those impacts. Because of the City's truncated SEPA process, that alternative was never studied. The City failed to assess whether a design of that sort could accomplish the developer's objectives with less environmental impact—SEPA's exact purpose.

The City of Seattle employed a hollow SEPA process to check the boxes instead of engaging in a meaningful SEPA review of impacts. Rather than prepare an EIS specifically for the Altitude Project, the City relied on a final EIS from January, 2005, which was initiated in 2003 for legislative zoning proposals being considered by the Seattle City Council at that time. That EIS was meaningless for purposes of assessing the actual impacts of the Altitude Project.

As Judge Richardson said in her decision, the 2005 EIS "did not address the environmental impact of one alley serving two (potentially soon to be three) 30+ floor high rises within one block of one another with hundreds of hot and apartment units, retail, and restaurant, and potentially thousands of pedestrians, residents, and vehicles." *See* Appendix B at 5. "It did not address how the increase in population inside and outside the Project would affect the number and access of emergency vehicles, trucks, moving vans, and deliveries, as well as storage of waste

and recycling in the alley." *Id*. at 6. "There was no analysis of the effect of the Project on pedestrians." *Id.* "There was no analysis of reasonable alternatives to the Project proposals or their environmental impacts." *Id*.

Apparently recognizing that the old EIS was devoid of any meaningful assessment of impacts of the Project, the City issued an addendum to that old EIS that contained some, but not all, of the information and analysis that was required to be in the EIS. Most conspicuously absent was the heart of the SEPA analysis: a comparison of alternatives. This broken process allowed the City to avoid accountability and dodge SEPA requirements, including the requirement to consider alternative building designs, such one with an increased setback on the alley, that would have had less significant adverse impacts.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should address two important SEPA questions that each present issues of substantial statewide public interest – (1) whether a lead agency can utilize the SEPA adoption and addendum process to evade SEPA requirements that are pivotal to ensuring a comparison of alternatives, government accountability, meaningful public involvement, and reduction of environmental harm, and (2) whether the Court of Appeals erroneously interpreted RCW 43.21C.500 to bar judicial review of the City's SEPA decision on traffic impacts, which deprived Escala of its fundamental rights.

1. The Court of Appeals misinterpreted legal requirements that govern the use of the adoption and addendum process.

When it adopted SEPA, the state legislature recognized that "each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility

to contribute to the preservation and enhancement of the environment." RCW 43.21C.020. The central purpose of SEPA is to protect these fundamental and inalienable rights and local governments and state agencies are assigned the responsibility to protect those rights. *Id*.

SEPA's principal mechanism for protecting these rights is not a list of substantive mandates. Instead, SEPA is about knowledge. SEPA requires that, for any major action significantly affecting the quality of the environment, an agency must prepare an "environmental impact statement" or "EIS." RCW 43.21C.030. Detailed information about impacts and an analysis of alternative proposals must be presented in the EIS. WAC 197-11-440.

The central driving force behind these requirements is to ensure that government bodies are fully informed about the environmental impacts of their decisions before making those decisions. *Wild Fish Conservancy v. Washington Dept. of Fish*

and Wildlife, 198 Wn.2d 846, 502 P.3d 359 (2022); *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 392 P.3d 1025 (2017); *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976). The process should not become a discarded hypothetical exercise, but must instead serve practically as an important contribution to the decisionmaking process. *The Lands Council v. Washington*, 176 Wn. App 787, 803-804, 309 P.3d 734 (2013). The information and analysis in an EIS is not meant to simply rationalize or justify decisions already made. *Id. citing* WAC 197-11-406. SEPA documents are not prepared to adorn a bookshelf. An EIS must be useful. *Columbia Riverkeeper*, 188 Wn.2d at 105. "The EIS should educate decision-makers on the likely environmental consequences of the action as well as highlight 'reasonable alternatives' to the proposal." *Id.* at 105-106. Armed with the knowledge gained from the EIS process, the

result should be a project that accomplishes a proponent's objectives with less environmental harm.

The requirement that an EIS identify and assess the impacts of reasonable alternatives to the proposal, including a no-action alternative, is the heart of SEPA. RCW 43.21C.030. *See also* WAC 197-11-400; WAC 197-11-402; WAC 197-11-440(5), WAC 197-11-792(2)(b). "It is difficult to overstate the importance of reasonable alternatives to achieving SEPA's underlying policy goals, which seek to balance the needs of the environment with the inevitability of development. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d at 106) *citing* RCW 43.21C.010(1)-(4). By explaining how the action agency can achieve its project objectives at a lower environmental cost, the discussion of reasonable alternatives in the EIS carries out SEPA's core policy in the form of practical advice." *Id.* If an agency follows a process that avoids a comparison of alternatives, it has ripped the heart out of SEPA.

To avoid excessive paperwork, lead agencies are allowed to adopt an existing EIS that was prepared for a different proposal. But agencies can do this only in limited circumstances. The existing EIS must "adequately address environmental considerations set forth in RCW 43.21C.030," which includes the requirement to analyze "alternatives to the proposed action." RCW 43.21C.034; RCW 43.21C.030(2)(c)(iii). The proposal that is assessed in the existing EIS must be "substantially similar" to the new proposal, WAC 197-11-600(4)(e), and "provide[s] a basis for comparing their environmental consequences," RCW 43.21C.034. Finally, an existing EIS can be adopted for use on a new proposal only if the information in the existing EIS is accurate and reasonably up-to-date. SMC 25.05.600(B).

Reading RCW 43.21C.034 in a way that harmonizes with SEPA's overall purpose, it is clear that the legislative intent of including limitations and restrictions on the adoption of existing documents was to ensure that the existing document actually

provides meaningful information that decisionmakers can rely on about the impacts of the current project and alternatives before making a decision.

In this case, the City concluded that the Altitude Project was a major action that would significantly impact the environment under RCW 43.21C.030, which triggered the requirement to prepare an EIS for the project—including an alternatives analysis. RCW 43.21C.031; WAC 197-11-734. But instead of preparing a new EIS, the City recycled an old EIS that had been previously prepared in 2005 for zoning legislation referred to as the "Downtown Seattle Height and Density Changes." AR 1855; AR 2855-3198; AR 2218. That old EIS did not contain any assessment of alternatives to the building design at issue here. Nor did it address the impacts of the current proposal on the alley or the loss of light and related health effects on Escala's residents. The old EIS didn't provide meaningful information about or analysis of any of the impacts of the

Altitude Project. In fact, the 2005 EIS assumed that the Altitude Project site would not be developed at all. AR 2321; AR 2544-2547; AR 2584. Escala, which was built in 2009, did not even exist when the old EIS was prepared. CP 227.

The 2005 EIS was "outdated, incomplete, and irrelevant with regard to the Altitude Project." Appendix B at 6. "It does not address numerous issues that require analysis, alternatives, and debate as required by law." Id. It did not provide a meaningful or useful assessment about the specific environmental impacts of the Altitude Project on this specific project site. As Judge Richardson concluded, "Downtown Seattle has changed since 2005. The FEIS issued that year is not relevant to or indicative or the current reality….For example, the 2005 FEIS stated it was unlikely that development would even occur at the site upon which the Altitude Project is now proposed to be located." Appendix B. at 6.

If the analysis of impacts of different building designs had been presented in a Draft EIS, the public and other agencies with expertise could have provided input, critiques, or ideas for mitigation during the public comment period and the City would have been obligated to consider and respond to those comments in a final EIS. SDCI would have had to compare the impacts that would occur under the different designs. That comparison of impacts would have informed its decision to either approve, deny, or condition the Altitude Project.

These deficiencies were not minor. To cure the obvious shortcomings in the 2005 EIS, the City issued an addendum. AR 1702. The addendum did not include an analysis of alternative building designs. Nothing the City did filled that gaping hole. The broken process utilized by the City obscured the fact that SDCI did not conduct any alternatives analysis at all for the Altitude Project.

2. Guidance on these issues is a matter of substantial public interest because it involves government accountability, meaningful public involvement, and the reduction of environmental harm on a state-wide level.

A decision by this court on the issues presented will have implications that go far beyond the concerns of the immediate controversy for two reasons.

First, if it stands as is, the Court of Appeals' decision will allow agencies and local governments throughout the State of Washington to use an addendum to present the information and analysis described above that is required to be in an EIS. This is an alarming proposition that will have dire consequences to the public interest.

An "addendum" is a tool established in the Department of Ecology SEPA rules, specifically WAC 197-11-625, that can be used by a local government to add factual corrections or other information that does not warrant further public comment and input. WAC 197-11-660(4)(c). An addendum is not subject to

the same public review and process and content requirements as an EIS. *See* WAC 197-11-400 through WAC 197-11-460; WAC 197-11-500 through 570. No public comment period is required for an addendum. WAC 197-11-625. The addendum must be circulated only to the recipients of a final EIS. *Id*. (In this case, that is the people who received the Final EIS back in 2005 before Escala existed). In fact, even if someone who did not receive the FEIS asks to be notified when an addendum is issued, the lead agency has no legal obligation to provide notice of the addendum to that person despite his or her request. *Id.*

The entire review, comment, and responsiveness to comments on a draft EIS, which are the focal point of SEPA's commenting process, would be eliminated if agencies are allowed to use an addendum to provide information that is supposed to be in an EIS. WAC 197-11-500(4). The SEPA rules are meticulous and thorough in describing the information and analysis that must be presented in the EIS, such as an analysis of

impacts, an assessment of reasonable alternatives to the proposal, and consideration of mitigation measures to lessen or avoid the adverse impacts. WAC 197-11-440; RCW 43.21C.030. *See also* WAC 197-11-400; WAC 197-11-402; WAC 197-11-440(5), WAC 197-11-792(2)(b).

But if an addendum can be used to present this information, agencies can escape the requirement to prepare a draft EIS and ignore public notice and comment requirements on that draft EIS. SEPA provisions that require government accountability and meaningful review following the public comment period via the publication of a final EIS can be ignored. If they can use an addendum, agencies can dispense with the requirement to publish all of the public comments and the agency's response to those public comments in a Final EIS after the public comment period. In fact, if they use an addendum, they do not have to include all of the content that is required in an EIS that's set forth in WAC 197-11-400. By using the addendum

process in lieu of an EIS, the lead agency does not have to consider modifying alternatives; developing new alternatives; supplementing, modifying, or improving the analysis; making corrections; or explaining why the comments don't warrant further agency response. WAC 197-11-560(1).

Put simply, Division 1's holding will allow lead agencies to use the adoption and addendum process to circumvent the entire public process required by WAC 197-11-500 through 570. In fact, Seattle regularly uses addenda in lieu of supplemental impact statements, short-circuiting the detailed review mandated by the statute. That thwarts the SEPA goals of meaningful public involvement, government accountability, and the reduction of environmental harm. Government agencies and interested citizens would not have an opportunity to review and comment on the alternatives analysis, the description of the existing environment, and the impacts analysis. The lead agency and applicant would not have an opportunity to improve their project

or to encourage the resolution of potential concerns or problems prior to issuing a final statement.

The Court of Appeals decision will have dire consequences to the public interest across the entire State of Washington if it is allowed to stand as is. It is directly inconsistent with this court's description of SEPA goals and policy in *Wild Fish Conservancy v. Washington Dept. of Fish and Wildlife*, 198 Wn.2d 846, 502 P.3d 359 (2022); *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 392 P.3d 1025 (2017); and *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976). Addressing the proper--and improper--use of addenda is an important issue of first impression to be resolved by this Court.

This case also provides a unique opportunity for this court to closely examine the limiting language in RCW 43.21C.034, WAC 197-11-600(4)(e), and SMC 25.05.600(B) and provide

much needed guidance for state agencies and local jurisdictions on the legal parameters around when they can or cannot adopt existing environmental documents to meet their duties and obligations under SEPA. Aside from Superior Court Judge Richardson, the lower court and hearing examiner mistakenly considered it a forgone conclusion that a local jurisdiction can adopt an existing EIS even if the information in that EIS is unreliable, inaccurate, and outdated. The Court of Appeals opinion essentially nullifies the limiting language in RCW 43.21C.034, WAC 197-11-600(4)(e), and SMC 25.05.600(B).

While her decision is obviously not binding on this court, Superior Court Judge Richardson's decision in the Altitude appeal is persuasive because she is the only decision maker who actually focused on the two specific questions that are presented above: (1) whether an addendum can be used as a substitute for an EIS and (2) whether the limiting language of RCW 43.21C.034, WAC 197-11-600(4)(e), and SMC 25.05.600(B)

had been met by the old EIS. Once a court actually focuses on those requirements, the outcome is obvious – the old EIS is inadequate and addenda cannot be used to cure the error. Sweeping those issues under the rug as the Court of Appeals did, will allow local jurisdictions and agencies to adopt old, outdated documents that don't provide meaningful information about or analysis of proposals and then use the addendum process in lieu of preparing a proper EIS in violation of SEPA.

3. The interpretation of a new statutory provision that withholds judicial review and deprives communities of their fundamental and inalienable rights under SEPA is a matter of substantial public interest.

RCW 43.21C.501(2) is a new statutory provision that bars administrative and judicial appeals of a local jurisdiction's SEPA review of transportation impacts of development proposals unless certain exceptions are met. It was enacted in July, 2019 by

the Washington State legislature.[2] Division 1's opinion in this case provides the first (and only so far) interpretation of this new provision by a state appellate court. And Division 1 erred when it held that RCW 43.21C.501 barred judicial review of the City's SEPA decision on traffic impacts in this case.

RCW 43.21C.501(2), on its face, goes against the "very essence of civil liberty," which "certainly consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 670. As was observed by a committee's remarks leading to adoption of the federal Administrative Procedures Act: "Very rarely do statutes withhold judicial review… in such a case, statutes would in

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[2] This provision was originally erroneously codified as RCW 43.21C.500. *See* RCW 43.21C.501 (Reviser's note). Also, it appears that the word "expressly" was removed from the provision that is most relevant to this appeal when it was amended in June, 2022.

effect be blank checks drawn to the credit of some administrative officer or board." *Id*. at 671. For this reason, courts have established a strong presumption in favor of judicial review of administrative action. *McNary v. Haitian Refugee Center, Inc*., 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507 (1967). The United States Supreme Court's well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action support an interpretation by this court of RCW 43.21C.501 that avoids foreclosing meaningful judicial review. *See McNary v. Haitian Refugee Ctr., Inc*., 498 U.S. at 496.

In addition, SEPA creates a property right that is subject to constitutional procedural due process protections. SEPA grants an aggrieved person the right to judicial review of an agency's compliance with its terms. *Lands Council v. Wash.*

State Parks & Recreation Comm'n, 176 Wn. App. at 802. *See also* RCW 43.21C.075; RCW 36.70C.030. A cause of action is a form of property that is protected by the due process clause of the constitution. *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 428 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Escala therefore has a property right in the form of a SEPA appeal that is guaranteed by the state and the Legislature's choice to limit this appeal opportunity previously granted implicates those constitutional rights.

This provision clearly constitutes a deprivation of individual due process rights to protect the fundamental and inalienable rights that SEPA grants. *See* RCW 43.21C.020. Because a statute should be interpreted in a manner that sustains its constitutionality, the exceptions should be construed in a manner that is most likely to allow appeals to be heard. *In re Way's Marriage*, 85 Wn.2d 693, 703, 538 P.2d 1125 (1975) ("[I]t is our duty to avoid rendering a statute unconstitutional by

interpretation if by an alternative interpretation we may render it constitutional."); *In re Chorney*, 64 Wn. App. 469, 477,825 P.2d 330 (1992) ("Where a statute is susceptible to an interpretation which may render it unconstitutional, we are admonished to adopt a construction which will sustain the statute's constitutionality"). *See also In re Kurtzman's Estate,* 65 Wn.2d 260, 263, 396 P.2d 786 (1964) (en banc). In turn, this means that RCW 43.21C.501 must be construed in a manner that is most likely to allow an appeal to be pursued.

In addition, a court's responsibility in construing an act is to construe a statute with reference to its manifest purpose. *Leschi Imp. Council v. Washington State Highway Comm'n*, 84 Wn.2d 271, 279-280, 525 P.2d 774 (1974) (en banc). SEPA's manifest purpose is that the procedural provisions of SEPA constitute an environmental full disclosure law. *Wild Fish Conservancy v. Wash. Dept. of Fish and Wildlife*, 198 Wn.2d at 872-73; *Columbia Riverkeeper*, 188 Wn. 2d at 104; *Norway Hill*

Preservation and Protection Ass'n v. King County Council, 87 Wn.2d at 272. The right of petitioners to a healthful environment is expressly recognized as a "fundamental and inalienable" right by SEPA and the choice of this language in SEPA indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state. *Leschi Imp. Council v. Washington State Highway Comm'n*, 84 Wn.2d at 279-80. State and local governments are assigned the full responsibility to protect these rights. RCW 43.21C.020; *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 578 P. 2d 1309 (1978).

To achieve this public policy, the exceptions should have been interpreted broadly in favor of judicial review of decisions made by state and local governments. The fundamental rights of communities impacted by significant adverse traffic impacts should not be easily taken away. If they are, the goal of this provision will not be met. The goal of the legislature was not to ensure that those who suffer from the traffic impacts lose their

right to claim the protection of this law through judicial review, it was to ensure that traffic impacts would be effectively mitigated.

Division 1's opinion carelessly dismissed Escala's arguments and provided an inadequate and incomplete assessment of the issues presented. The opinion does not even mention or acknowledge the momentous impact that its decision has on individual rights to judicial review. Meanwhile, the decision hands a "blank check" to every local jurisdiction in the State of Washington to disregard public input on traffic impacts during the SEPA review process. Impacted citizens will have no recourse to challenge even the most blatant SEPA violations.

The citizens of Washington deserve a more thoughtful assessment of this new provision. At the very least, Escala has hope that this court would at least consider and acknowledge the severity of the impact this provision has on the fundamental right to judicial review, which is a matter of substantial public interest.

G. CONCLUSION

For the reasons stated above, Petitioner seeks review and guidance on these issues of substantial public interest.

Dated this 24th day of August, 2022.

Pursuant to RAP 18.17, I certify that this petition contains 4,377 words.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

Claudia M. Newman
WSBA No. 24928
David A. Bricklin
WSBA No. 7583
Attorneys for Escala Owners Association

APPENDIX A

FILED
7/25/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ESCALA OWNERS ASSOCIATION, Respondent/Cross-Appellant, v. CITY OF SEATTLE, SEATTLE DOWNTOWN HOTEL & RESIDENCE LLC, Appellants/Cross-Respondents.	)	No. 82568-2-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — This case is about the City of Seattle's review and approval of a 54-story mixed use building in the downtown core (project) proposed by Downtown Hotel and Residences, LLC (Applicant). We are asked to determine whether the City's review process complied with Washington's State Environmental Policy Act of 1971 (SEPA), ch. 43.21C RCW.

The City and Applicant (collectively City)[1] appeal a decision by the King County Superior Court reversing the City hearing examiner's determination that the City complied with the SEPA. The City argues that: (1) it properly adopted an existing 2005

[1] While recognizing that the City of Seattle and Downtown Hotel & Residences LLC are separate appellants and cross-respondents, for clarity this opinion refers to them collectively as the "City."

environmental impact statement (Downtown EIS) as part of its SEPA review, (2) it properly relied on a September 2017 SEPA addendum (Addendum) to supplement the earlier Downtown EIS, (3) the hearing examiner correctly concluded that a supplemental environmental impact statement (SEIS) was not required, and (4) that the combined Downtown EIS and Addendum were adequate.

Escala Owners Association (Escala), the petitioners below, cross appeal, arguing that the hearing examiner erred by dismissing its SEPA claims involving transportation impacts.

We agree with the City and reverse the superior court. We affirm the hearing examiner's conclusion that the City complied with SEPA. We also affirm the hearing examiner's conclusion that Escala's SEPA claims involving transportation impacts are barred by RCW 43.21C.501.[2]

I. SEPA PROCESS

Before addressing the facts specific to this case, we first provide a brief overview of the SEPA process. SEPA requires the analysis and disclosure of probable significant environmental impacts of a proposal. WAC 197-11-060(4). A proposal may either be a particular development proposal (a project action), or a legislative or policy change (a nonproject action). WAC 197-11-704. The first step in the SEPA process is for an agency to determine whether a proposal will "significantly [affect] the quality of the environment." RCW 43.21C.030(c). This step is known as a "threshold determination." RCW 43.21C.033; WAC 197-11-310. A threshold determination produces either a

[2] On September 23, 2021, this court linked Escala's appeal to that of another proposed project on the same block. See Escala Owners Association v. City of Seattle, No. 83037-6-I (Wash. Ct. App. July 25, 2022).

determination of significance (DS) or a determination of nonsignificance (DNS). WAC 197-11-310(5).

If an agency determines that a proposal may have significant adverse environmental impacts, it issues a DS. WAC 197-11-360. Issuance of a DS triggers the requirement that the agency prepare an environmental impact statement (EIS) that includes an analysis of alternatives to the proposal. RCW 43.21C.030; WAC 197-11-736. If an agency determines that a proposal will not significantly affect the environment, it issues a DNS and an EIS is not required. WAC 197-11-340.[3]

Preparing an EIS requires several steps. The agency first invites public comments on the scope of the EIS. Scoping involves identifying probable significant adverse impacts and reasonable alternatives. WAC 197-11-408. The agency then prepares a draft EIS that must be circulated to the public and affected agencies for comment. WAC 197-11-400 to -455; WAC 197-11-460; WAC 197-11-500 to -550. The agency must then prepare a final EIS that addresses and responds to the comments received. WAC 197-11-560.

Instead of preparing a new EIS for every proposal, an agency may also rely on "existing environmental documents," including an EIS prepared for an earlier proposal, to provide analysis. RCW 43.21C.034; WAC 197-11-600. SEPA allows adoption of existing environmental documents where the proposal currently being reviewed is either the same as, or different than, the proposal previously analyzed. WAC 197-11-600(2). If additional analysis is necessary, the agency can prepare an addendum "that adds

[3] While not relevant here, an alternative threshold determination is the "mitigated determination of non-significance," or "MDNS," which involves changing or conditioning a project to eliminate its significant adverse environmental impacts. WAC 197-11-350. With a MDNS, promulgation of a formal EIS is not required.

analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing document." WAC 197-11-600(4)(c). The agency must prepare a SEIS if there are "substantial changes so that the proposal is likely to have significant environmental impacts," or "new information indicating a proposal's probable significant adverse environmental impacts." WAC 197-11-600(4)(d).

II. FACTS

A. Downtown EIS

In January 2005, the City issued an EIS for a nonproject proposal to change zoning requirements for a portion of the downtown office core (Downtown EIS). Along with a "no action alternative," the Downtown EIS examined four alternatives that allowed for a significant increase in height and density for downtown development. The EIS identified and analyzed a range of environmental impacts that could arise from an increase in density. Topics addressed included growth policy and planning, housing, open space, historic preservation, height, bulk, scale, shadows, population, employment, transportation, parking, and energy impacts. The Downtown EIS recognized that the change in zoning would result in a major change to downtown land uses:

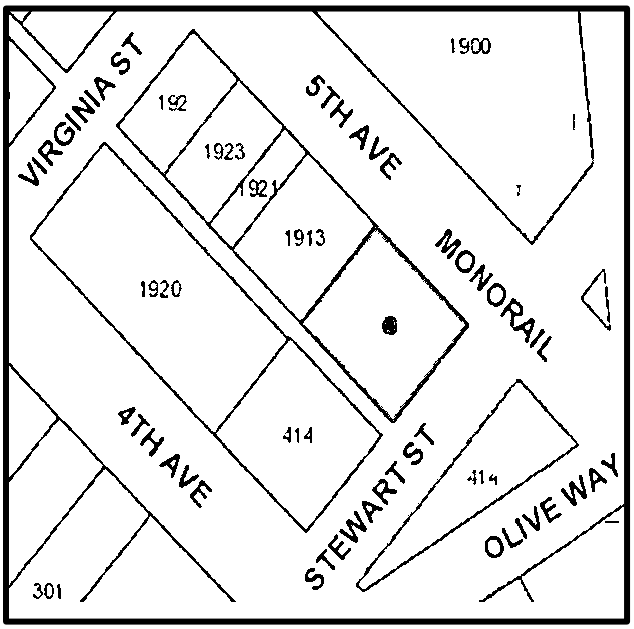
> Under all alternatives if forecasted development occurs, land uses in the study area would be significantly transformed by the increased density of residential and commercial development. This transformation is interpreted to be consistent with the City's Comprehensive Plan and neighborhood plans for the study area and is not interpreted to be a significant unavoidable adverse impact.

After issuance of the Downtown EIS, the City adopted new zoning for the downtown core consistent with the preferred alternative considered in the EIS. The

zoning for the area at issue was changed to Downtown Office Core 2 (DOC 2) which allows a maximum height of 550 feet for structures with residential uses. SMC 23.49.008.A.3.

B. Escala Condominiums

After the zoning change, in 2009, construction of the Escala Condominiums was completed. Escala is a 30-story residential tower at the corner of 4th Avenue and Virginia Street. An alley runs behind Escala, connecting Virginia and Stewart Streets and bisecting the block bounded by 4th and 5th Avenues. Escala residents rely on the alley for delivery services, emergency services, and for waste and recycling collection services. The location of Escala at 1920 4th Avenue is shown below. The alley is shown bisecting 4th and 5th Avenue.



C. The Project

In 2014, the Applicant proposed building a 49-story mixed use building with a hotel, apartment units, underground parking, and retail stores, at 5th Avenue and Stewart Street (project). The dot identifies the project location on the above sketch.

Under the proposal, hotel guests would access the parking garage from 5th Avenue. All other vehicular access to the building would be through the alley shared with Escala. Apartment residents would access parking in the alley at the northwest corner of the building; one of three loading bays in the middle of the building off the alley would receive delivery trucks.[4]

Construction of the project depends on receiving a master use permit administered by the Seattle Department of Construction and Inspections (Department). The Department determined that the project would need two approvals: (1) SEPA review to evaluate the project's environmental impacts and (2) design review, which evaluates a project's compliance with the Department's guidelines related to design. A project that is approved under the design review process is presumed to comply with the City's SEPA height, bulk, and scale policies. SMC 25.05.675(G)(2)(c).

After undergoing design review before the City's design review board, the applicant revised the project, increasing the height to 54 stories. On September 14, 2017, the Department issued a revised notice of application addressing SEPA review. The notice stated that the Department had adopted the Downtown EIS and a SEPA Addendum and:

> Determined that the referenced proposal is likely to have probable significant adverse environmental impacts under [SEPA] on the land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk, and scale; light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment.

[4] In addition to this project, the City has also approved another 48-story building with residential units, hotel rooms, and retail space on the same block (Fifth and Virginia project). The Fifth and Virginia Project will have a loading dock in the alley shared by Escala and this project. On September 23, 2021, this court linked Escala's appeal of the Fifth and Virginia project, to this matter for the purpose of oral argument. It is the subject of a separate opinion. See Escala Owners Association v. City of Seattle, No. 83037-6-I (Wash. Ct. App. July 25, 2022).

> [The Department] has identified and adopts the City of Seattle's [2005 Downtown EIS]. This [Downtown EIS] meets [the Department's] SEPA responsibility and needs for the current proposal and will accompany the proposal to the decision-maker.
>
> The Addendum has been prepared by the applicant to add specific information on the land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale, light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment from the proposal and discusses changes in the analysis in the referenced [Downtown EIS]. Pursuant to SMC 25.05.625-.630, this addendum does not substantially change analysis of the significant impacts and alternatives in the [Downtown EIS].

The notice explained how the public could obtain the relevant documents, and began a two-week public comment period. On October 9, 2017, the Department extended the public comment period another two weeks.

Over the next two years, the Department considered the public comments and additional environmental analysis prepared by the Applicant. On August 5, 2019, the Department issued a revised notice that contained the same language as the original September 2017 notice, except striking the words "is likely to" and instead stating that it determined that the project "could" have probable significant adverse impacts on the environment.

On October 10, 2019, the Department issued its analysis and decision (decision). The decision addressed the City's design review approval and SEPA review. The decision explained the Department's rationale for adopting the Downtown EIS:

> The subject site lies within the geographic area analyzed in [the Downtown EIS]. Potential impacts from the project proposed here are within the range of significant impacts that were evaluated in that [Downtown EIS]. Therefore, as authorized by State and local SEPA rules, [the Department determined that it should adopt [the Downtown EIS].

The decision also explained the Department's adoption of the September 2017 Addendum:

> In addition, an Addendum to [the Downtown EIS] . . . has been prepared to add more project-specific information and identify and analyze new potential environmental impacts from the proposed project.
>
> The Addendum adds analysis or information about the proposal and does not substantively change the analysis of significant impacts and alternatives in the [Downtown EIS]. The project produces no probable, significant, adverse environmental impacts that were not already studied in the [Downtown EIS].

D. Administrative Appeal

Escala appealed both the SEPA decision and design review decision to the City's hearing examiner. The hearing examiner denied the appeal, upholding the Department's decisions. The hearing examiner also dismissed Escala's SEPA claims involving transportation impacts, holding that they were exempt from appeal under RCW 43.21C.501.[5]

On May 26, 2020, Escala filed a land use petition before the King County Superior Court. On March 23, 2021, the superior court determined that the hearing examiner erred in upholding the project's SEPA review and remanded for preparation of an SEIS. The court affirmed the hearing examiner's dismissal of Escala's SEPA claims involving transportation impacts.

The City appeals the superior court's decision and challenges its conclusion that the hearing examiner erred in upholding the adequacy of the City's SEPA analysis.

[5] The hearing examiner and both parties incorrectly cite RCW 43.21C.501 as RCW 43.21C.500. RCW 43.21C.501 was erroneously codified as RCW 43.21C.500. RCW 43.21C.500 expired June 30, 1995, and appears in the Disposition of Former RCW Sections. Section 6, chapter 348, Laws of 2019 is now codified as RCW 43.21C.501.

Escala cross appeals the superior court's decision affirming the hearing examiner's dismissal of Escala's SEPA claims involving transportation impacts.

III. ANALYSIS

A. SEPA Compliance

The City argues that the trial court erred in reversing the hearing examiner's decision that the City complied with SEPA. The City contends that: (1) it properly adopted the Downtown EIS, (2) that it properly relied on an addendum as part of its SEPA review, (3) that a supplemental EIS was not required to satisfy SEPA, and (4) that the combined 2005 FEIS and addendum are adequate. We agree.

1. Standard of Review

This matter is before us under the Land Use Petition Act (LUPA), ch. 36.70C RCW. In reviewing a LUPA decision, we sit in the same position as the superior court and apply the LUPA standards of review directly to the hearing examiner's decision. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Our review is confined to the record created before the hearing examiner. RCW 36.70C.120(1).

Under LUPA, "a court may grant relief from a local land use decision only if the party seeking relief has carried the burden of establishing that one of six standards listed in RCW 36.70C.130(1) has been met." Wenatchee Sportsmen, 141 Wn.2d at 175. Because Escala seeks relief from the Department and hearing examiner's decision, it bears the burden on appeal. Pinecrest Homeowners Assn v. Cloninger &

Assocs., 151 Wn.2d 279, 288, 87 P.3d 1176 (2004).[6] The relevant standards of review include:

> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1)(b)-(d).

"We review the agency's factual findings under the substantial evidence standard and conclusions of law de novo." Wenatchee Sportsmen, 141 Wn.2d at 176. Substantial evidence is "a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." Wenatchee Sportsmen, 141 Wn.2d at 176. We review an application of facts to the law under the clearly erroneous standard. Wenatchee Sportsmen, 141 Wn.2d at 176. Such an application is clearly erroneous when, despite supporting evidence, "the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed." Wenatchee Sportsmen, 141 Wn.2d at 176.

2. Adoption of the Downtown EIS

The City argues first that the hearing examiner correctly concluded that the City properly adopted the Downtown EIS as part of its SEPA analysis of the project. We agree. The hearing examiner's determination that the City properly adopted the 2005

[6] Because it bears the burden on appeal, we have reviewed the arguments included in Escala's reply brief.

FEIS is an application of law to facts subject to the "clearly erroneous" standard of review. RCW 36.70C.130(1)(d).

As discussed briefly above, SEPA contemplates using existing SEPA documents for subsequent proposals. "To avoid 'wasteful duplication of environmental analysis and to reduce delay,' the SEPA rules encourage and facilitate reusing existing environmental documents." Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wn. App. 34, 50, 52 P.3d 522 (2002) (quoting RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS § 15, at 209 (2001)). "Under certain circumstances, 'existing documents may be used to meet all or part of an agency's responsibility under SEPA.'" Thornton Creek, 113 Wn. App. at 50 (quoting SMC 25.05.600(A)). SEPA authorizes the use of existing documents under these circumstances:

> Lead agencies are authorized to use in whole or in part existing environmental documents for new project or nonproject actions, if the documents adequately address environmental considerations set forth in RCW 43.21C.030. The prior proposal or action and the new proposal or action need not be identical, but must have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography. The lead agency shall independently review the content of the existing documents and determine that the information and analysis to be used is relevant and adequate. If necessary, the lead agency may require additional documentation to ensure that all environmental impacts have been adequately addressed.

RCW 43.21C.034.

Under the SEPA rules, "an agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts." WAC 197-11-600(2). "The proposals may be the same as, or different than, those analyzed in the existing document." WAC 197-11-600(2); SMC

25.05.600(A). The Seattle Municipal Code also requires that the earlier document need be "accurate and reasonably up-to-date." SMC 25.05.600.

The SEPA rules provide that existing environmental documents may be used for a new proposal by adoption, incorporation by reference, incorporating an addendum, or preparing a supplemental EIS:

> (4) Existing documents may be used for a proposal by employing one or more of the following methods:
> (a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document; or
> (b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.
> (c) An addendum, that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document.
> (d) Preparation of a SEIS if there are:
> (i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or
> (ii) New information indicating a proposal's probable significant adverse environmental impacts.
> (e) If a proposal is substantially similar to one covered in an existing EIS, that EIS may be adopted; additional information may be provided in an addendum or SEIS (see (c) and (d) of this subsection).

WAC 197-11-600(4).

Escala asserts that the Downtown EIS could not be adopted because the rezoning analysis under consideration in the EIS does not properly analyze the site-specific impacts of the project. Escala is incorrect. The City could adopt the Downtown EIS if it had similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography. RCW 43.21C.034. The hearing examiner determined that the Downtown EIS contained similar elements.

The hearing examiner found that the Downtown EIS "evaluated the probable significant environmental impacts that could result from the development, following a change in zoning to allow additional height and density in the Downtown area." The examiner also found that the project would have potential significant impacts within the range of those evaluated in the Downtown EIS including impacts on land use, aesthetic height, bulk, and scale, light and glare, and transportation. Further, "the site of the proposal [was] within the same geographic area analyzed in the [Downtown EIS]." Finally, the hearing examiner noted that the Department required the Applicant to submit the Addendum to ensure that the project would produce no probable significant impacts not addressed by the Downtown EIS. Based on these findings, the hearing examiner concluded that the Downtown EIS:

> provided environmental analysis for the upzone of the Downtown District. The rezone established the zoning under which the project application was submitted, establishing the provisions that specifically allow for the proposal. The [Downtown EIS] specifically anticipated projects of the type represented by the proposal.

The hearing examiner's conclusion is consistent with SEPA's requirement that a previous EIS may be adopted where the new proposal is consistent in timing, types of impacts, alternatives, or geography. RCW 43.21C.034. The hearing examiner's conclusion is supported by substantial evidence.

The approach taken by the City is like that considered by this court in Thornton Creek. In Thornton Creek, the court considered a site specific "General Development Plan" (GDP) proposed for a site (the Northgate Mall) within the larger Northgate "urban center." 113 Wn. App. at 43. The City's previous decision to designate Northgate as an urban center was reviewed in a nonproject EIS in 1992. Thornton Creek, 113 Wn. App.

at 43-44. When considering the newer proposal, the City determined that the GDP was within the scope of the plans analyzed in the prior urban center EIS, and adopted the older EIS along with an addendum to satisfy SEPA. Thornton Creek, 113 Wn. App. at 43-44. We affirmed the City's approach concluding that sufficient similarity existed between the nonproject EIS and the GDP because "the proposals included in the GDP fell within the scope of development analyzed in [the] existing] EIS" and "the environmental impact of the GDP was not substantially different from that analyzed in [the EIS]." Thornton Creek, 113 Wn. App. at 51.

Much like in Thornton Creek, the hearing examiner reviewed the Department's decision and determined that the Downtown EIS specifically addressed the scope and impact of development like the project for the same geographic area. This hearing examiner's decision affirming the City's adoption of the Downtown EIS was not clearly erroneous.

3. Addendum vs. Supplemental EIS

The City next argues that the hearing examiner accurately concluded that the City properly relied on the Addendum as part of its SEPA analysis of the project and that a SEIS was not required. We agree. Because the hearing examiner's determination that the City properly relied on the Addendum is an application of law to facts, it is subject to the "clearly erroneous" standard of review. RCW 36.70C.130(1)(d).

The SEPA rules provide that when an agency adopts or incorporates existing SEPA documents into its SEPA review, addenda, and supplemental EISs may be prepared to remedy shortcomings in the documents that have been used. WAC 197-11-600(4)(a), (d); SMC 25.05.600(D)(3), (4). An addendum is the appropriate vehicle

for adding analyses or information about a proposal that "adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document." WAC 197-11-600(4)(c); SMC 25.05.600(D)(3).

By contrast, an agency must prepare an SEIS if there are "[s]ubstantial changes so that the proposal is likely to have significant adverse environmental impacts," or if there is "[n]ew information indicating a proposal's probable significant adverse environmental impacts." WAC 197-11-600(4)(d)(i), (ii); SMC 25.05.600(D)(4)(a), (b).

The Addendum addressed the following impacts: land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk, and scale, light/glare/shadows, and viewshed), historical resources, wind, transportation, circulation and parking, and construction. Following review of the Downtown EIS and the Addendum, the Department determined that, consistent with WAC 197-11-600(4)(c), the impacts addressed by the Addendum did not substantially change the analysis of significant impacts and alternatives considered in the Downtown EIS.

Citing Thornton Creek and the Seattle Municipal Code, the hearing examiner rejected Escala's argument that the Addendum was neither allowed nor sufficient. The hearing examiner considered and discussed the analysis included in the Downtown EIS and Addendum relating to land use, aesthetics, height, bulk, and scale, light and glare, and transportation. Based on their review, the hearing examiner concluded that Escala had failed to meet its burden to present actual evidence of probable significant impacts—instead arguing only procedural bars. The hearing examiner correctly noted that it was commonplace to adopt existing environmental documents and supplement

them to adequately address any additional topics; such adoption is permitted by both the language of SEPA and the rules governing its implementation. The hearing examiner's approval of the Addendum was not clearly erroneous.

4. Adequacy of Downtown EIS

Escala contends that even if the City were allowed to adopt the Downtown EIS, it is still inadequate because it fails to contain information required by SEPA. We disagree.

Escala's primary contention appears to be that the City's decision adopting the Addendum rather than preparing a SEIS thwarts the public's right to consider alternatives in the project's design. We agree with Escala that an alternatives analysis is one of the key building blocks, if not the heart of SEPA. SEPA requires that an EIS identify and assess the impacts of reasonable alternatives to the proposal, including the no action alternative. RCW 43.21C.030. "The required discussion of alternatives to a proposed project is of major importance, because it provides a basis for a reasoned decision among alternatives having differing environmental impacts." Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 38, 873 P.2d 498 (1994).

Escala's argument here, however, ignores that the requirement for an alternatives analysis is only triggered where a new EIS or SEIS is required. There is no dispute that an EIS must include an analysis of alternatives including the no action alternative. See WAC 197-11-400 (EIS shall inform decision makers and the public of reasonable alternatives); WAC 197-11-402 (EIS need analyze only the reasonable alternatives); WAC 197-11-440(5) (requirement for alternatives in EIS). There is also no dispute that where a SEIS is required, it must include alternatives if they were not

considered in the previously prepared EIS. WAC 197-11-620; WAC 197-11-440. But, contrary to Escala's argument, there is no similar requirement for an analysis of alternatives when preparing an addendum. See WAC 197-11-625.

Similar to its argument about the lack of alternatives, Escala argues that the Downtown EIS failed to include additional EIS requirements including: (1) a summary of the project, (2) an analysis of the affected environment for the project, and (3) an adequate analysis of the environmental impacts caused by the project. Escala's argument focuses only on the contents of the Downtown EIS and ignores that the analysis it claims is missing in the Downtown EIS was included in the Addendum. Contrary to Escala's arguments, this is precisely the purpose of an addendum—adding analysis or information about a proposal that was not included in the original adopted EIS. WAC 197-11-600(4)(c).

The adequacy of an EIS is a question of law, which this court reviews de novo. Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn.2d 619, 632-33, 860 P.2d 390, 866 P.2d 1256 (1993). In reviewing the adequacy of an EIS, we accord substantial deference to the weight of the governmental agency's determination that an EIS is adequate. RCW 43.21C.090; Klickitat County, 122 Wn.2d at 633.

The adequacy of an EIS focuses on the legal sufficiency of its data. Klickitat County, 122 Wn.2d at 633. We judge adequacy by the "'rule of reason.'" Barrie v. Kitsap County, 93 Wn.2d 843, 854, 613 P.2d 1148 (1980) (quoting Mentor v. Kitsap County, 22 Wn. App. 285, 588 P.2d 1226 (1978)). The "rule of reason" requires a "'reasonably thorough discussion of the significant aspects of the probable

environmental consequences.'" Klickitat County, 122 Wn.2d at 633 (quoting Cheney v. Mountlake Terrace, 87 Wn.2d 338, 344-45, 552 P.2d 184 (1976)).

The Downtown EIS extensively examined five alternative legislative zoning proposals that the City was considering at the time, including a no action alternative. The Downtown EIS analyzed an array of impacts of high-density zoning in the downtown Seattle area. In its analysis, the Downtown EIS examined impacts and established provisions that specifically allowed for and anticipated developments like the project and Escala. The entire purpose of the Downtown EIS was to analyze the environmental impacts of changing the downtown office core zoning to allow for the construction of high-density developments in the geographic area where the project and Escala are located. Further, the City recognized the need for additional project specific environmental analysis. To address this need, the City relied on the analysis in the Addendum.

The City's analysis of impacts of development in the Downtown EIS, combined with the Addendum addressing project-specific impacts, meets the rule of reason.

B. Transportation Impacts and RCW 43.21C.501

On cross appeal, Escala argues that the hearing examiner erred as a matter of law in dismissing its SEPA claims involving transportation impacts. We disagree.

The legislature added RCW 43.21C.501 to SEPA in 2019. The provision states:

> (1) A project action pertaining to residential, multifamily, or mixed use development evaluated under this chapter by a city or town planning under RCW 36.70A.040 is exempt from appeals under this chapter on the basis of the evaluation of or impacts to transportation elements of the environment, so long as the project does not present significant adverse impacts to the state-owned transportation system as determined by the department of transportation and the project is:
>
> (a)(i) Consistent with a locally adopted transportation plan; or

> (ii) Consistent with the transportation element of a comprehensive plan; and
>
> (b)(i) A project for which traffic or parking impact fees are imposed pursuant to RCW 82.02.050 through 82.02.090; or
>
> (ii) A project for which traffic or parking impacts are expressly mitigated by an ordinance, or ordinances, of general application adopted by the city or town.
>
> (2) For purposes of this section, "impacts to transportation elements of the environment" include impacts to transportation systems; vehicular traffic; waterborne, rail, and air traffic; parking; movement or circulation of people or goods; and traffic hazards.

(Emphasis added).

The hearing examiner concluded that the City established that the project was consistent with subsection (a)(ii) and (b)(ii) of RCW 43.21C.501. For subsection (a)(ii), City transportation planner John Shaw testified that the project is consistent with the City's comprehensive plan because it exemplifies the precise development contemplated by the City's transportation policy focusing on density, multimodal transportation options, and pedestrian safety. As for subsection (b)(ii), expert witness and transportation engineer Marni Heffron explained why City ordinances of general application expressly mitigate the alley congestion and resulting issues the project may cause, the primary concerns raised by Escala.

Based on this testimony, the hearing examiner determined that the ordinances cited by the City addressed all impacts raised by Escala and that the project is consistent with both RCW 43.21C.501(a)(ii) and (b)(ii). The hearing examiner's findings are supported by substantial evidence and are not clearly erroneous.

C. Attorney Fees

Both parties request attorney fees on appeal under RAP 18.1. We deny fees to both.

Under RAP 18.1, a party may request reasonable attorney fees on appeal if an applicable law grants the party the right to recover. Fees and costs for an appeal of a land use decision are determined by RCW 4.84.370:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing party or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW . . .; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

An applicant may receive attorney fees under RCW 4.48.370(1) if it prevails in all forums below and is the prevailing party on appeal. Moss v. City of Bellingham, 109 Wn. App. 6, 30, 31 P.3d 703 (2001). "Under [RCW 4.84.370] . . . we award fees to the public entity that made the permitting decision only when the public entity succeeds in defending its decision on the merits."[7] Durland v. San Juan County, 182 Wn.2d 55, 78, 340 P.3d 191 (2014). Because Escala fails on appeal, and because the City did not succeed in defending its decision on the merits before the superior court, we award fees to neither party.

[7] Although the trial court upheld the hearing examiner's holding dismissing Escala's SEPA claims involving transportation impacts, the City ultimately did not "defend its decision on the merits" at trial. Thus, we do not award fees for the City's consistent success on this issue.

We reverse the superior court and affirm the hearing examiner's decision.

Mann, J.

WE CONCUR:

Bowman, J.

Appelwick, J.P.T.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

ESCALA OWNERS ASSOCIATION,
Petitioner,

v.

CITY OF SEATTLE; SEATTLE DOWNTOWN HOTEL & RESIDENCE LLC,
Respondents.

No. 20-2-09241-0 SEA

FINDINGS AND CONCLUSIONS ON PLAINTIFF'S APPEAL UNDER LUPA

This matter came before the court as an appeal by Plaintiff of a city Hearing Examiner's ruling affirming the Master Use Permit granted for the Altitude Project (the Project), a proposed high-rise building in downtown Seattle. The court has read the parties' briefing, heard oral arguments, and considered the administrative record, including the city's Comprehensive Plan, and the Hearing Examiner's findings, and now issues the following:

FINDINGS OF FACT

1. Seattle Downtown Hotel & Residences LLC (SDHR) proposes to build a 54-story building at 1903 5th Avenue, at 5th and Stewart Street in downtown Seattle. The Altitude Project would house a 257-room hotel, 233 apartments, a restaurant and bars, and retail stores on the ground floor.

2. Plaintiffs represent homeowners at Escala, a nearby 30-story residential-only building at 4th Avenue and Virginia Street.

3. There is a dispute based on the proposed shared use of an alley running between Stewart and Virginia Streets, parallel to 4th and 5th Avenues. Hotel guests in the Altitude Project would access that building's guest parking garage from an entrance on 5th Avenue. All other vehicular access to the building, e.g., parking for residents, would be through the northwest corner of the alley. A loading dock with three berths for deliveries, moving vans, trucks, etc., would be in the alley in the middle of the building.

4. Escala's parking garage for residents is off Virginia Street. All its truck traffic, deliveries, etc., occur in the alley or a loading dock with two berths. Waste and recycle containers for Escala are located in the alley. Emergency vehicles also access Escala via the alley and would do the same for the Altitude Project.

5. A third building, now in the planning stages, is proposed for a block away at 5th and Virginia. It would be a 48-story building with apartments, hotel, retail, restaurants, and bars. Its underground parking garage, as well as a loading dock, would be accessed via the alley shared by Escala and the Altitude Project.

6. The City issued a Master Use Permit (MUP) in 2019 to allow Respondent SDHR's construction of the new Altitude Project building. Petitioners appealed. After a hearing in January 2020, and a visit to the site, the city Hearing Examiner exempted part and denied the remainder of the appeal, affirming the MUP.

7. Seattle's Comprehensive Plan encourages large residences and commercial projects in the downtown core. It is not the court's role to rule or comment on the advisability or wisdom of a particular project. However, the court must determine whether the SEPA process has been appropriately followed.

TRANSPORTATION ELEMENTS

8. The Hearing Examiner found that issues regarding "transportation elements" of the Project were exempt from appeal and therefore he did not have jurisdiction to hear the Petitioner's appeal with regard to transportation effects of the Project. If "transportation elements" are implicated and consistent with the Comprehensive Plan, appeal is exempted when the concerns are "expressly mitigated" by city ordinance.

9. "Expressly" is not defined in the statute. It has been defined as "explicitly" or "for the express purpose: particularly, specifically." *Merriam Webster Dictionary*, 2020. The court adopts that definition.

LOADING BERTHS

10. The Project proposes three loading berths for trucks accessing them through the alley. Two would be 25 feet long and one would be 35 feet long. Trucks backing into the berths would be doing so without the ability to see what is behind them and have almost no room to maneuver. Trucks that can't fit into the 25-foot-long berths would have to wait, presumably in the alley, for the larger berth while it is being used by another truck.[1]

11. Under SMC 23.54.035.C.2, truck loading berths in an alley are to be at least 35 feet for "low- to medium-demand uses." There is an exception when SDCI finds, after consulting with the property user (Altitude Project), that site design and use of the property will not result in vehicles extending beyond the property line. Then loading berth lengths may be reduced to not less than 25 feet. That is what occurred in this case: the Project had an analysis done that showed most trucks could fit in the 25-foot berths, and the decision to allow them was made.

12. At the hearing below, testimony by witnesses for the Project supported the idea of the 25-foot berths, but testimony by Appellant's witnesses questioned the ability of trucks to get in and out safely and efficiently and without blocking the alley.

[1] Loading is supposed to be completed within 30 minutes. SMC 11.74.010.

13. The Hearing Examiner found that Appellants had demonstrated that most delivery vehicles will fit within the two 25-foot berths and that longer delivery vehicles will fit within the 35-foot berth.

FEIS

14. The city's Design Review Board, which makes recommendations to the Seattle Department of Construction and Inspections (SDCI), conducted four meetings on the Altitude Project between 2014 and 2016. Public comment was sought and received. Among the public concerns were that the building is too big for the site, it needs full-sized loading berths, ground floor retail space should be sacrificed in favor of loading berth space, and the alley is functionally inadequate to accommodate service needs and support for the project.

15. Respondents made multiple changes to their proposal due to design board concerns over a variety of issues ranging from alley access, to aesthetics and scale, to the effect on pedestrians at the street level. A majority of the board's members eventually voted to recommend approval of the project on August 16, 2016. This recommendation was passed on to the SDCI.

16. The SDCI issued a Determination of Significance, which is issued if SDCI believes a project has a "probable, significant adverse environmental impact." RCW 43.21C.030(1). The SDCI found in its determination that the Altitude Project was "likely to" have a probable, significant adverse environmental impact under the State Environmental Policy Act (SEPA) on the land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale; light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment.

17. This determination triggered a requirement for an Environmental Impact Statement (EIS) before the project could move forward. The purpose of an EIS is to address significant short-term and long-term environmental impacts, significant irrevocable commitments of

natural resources, significant alternatives including mitigation measures, and significant environmental impacts that cannot be mitigated.

18. Rather than prepare an EIS specifically for this Project, however, the SDCI relied on a final EIS (FEIS) from January 2005. This now 16-year-old FEIS was initiated in 2003 for five legislative proposals being considered by the Seattle City Council at the time. It addressed potential increases and alternatives to zoning, height, and density for parts of the Denny Triangle, Commercial Core, and Belltown neighborhoods in downtown Seattle.

19. Existing documents, such as an EIS prepared for a previous project, may, under certain circumstances, be used to evaluate a new proposal. Those circumstances were not met here.

20. The 2005 FEIS was issued 16 years ago and focused on zoning, height and density over a wide area of downtown. It said nothing of the Altitude Project and RCW 43.21C.030's required considerations of (1) the environmental impacts of this project, (2) any adverse environmental effects that cannot be avoided should the proposal be implemented, and (3) alternatives to the proposed action. These considerations are to be with regard to the current proposed project, not an overview of different issues 16 years ago.

21. The 2005 FEIS does not contain does not contain the required summary of the Project, description of the existing environment, or adequate discussion of the significant adverse impacts of the Altitude Project. It could not, because the Project was not the subject of the FEIS. It dealt with entirely different issues – varying proposals regarding zoning, density, and height limits.

22. The FEIS did not address the environmental impact of one alley serving two (potentially soon to be three) 30+ floor high rises within one block of one another with hundreds of hotel and apartment units, retail, and restaurants, and potentially thousands of pedestrians, residents, and vehicles.

23. It did not address how the increase in population inside and outside the Project would affect the number and access of emergency vehicles, trucks, moving vans, and deliveries, as well as storage of waste and recycling in the alley. There was no analysis of increases in potentially significant traffic impacts associated with the alley.[2]

24. There was no analysis of the effect of the Project on pedestrians.

25. There was no analysis of how to mitigate the potential effects of the Project.

26. There was no analysis of reasonable alternatives to the Project proposals or their environmental impacts. There was not a detailed analysis and comparative evaluation of alternatives.

27. Downtown Seattle has changed since 2005. The FEIS issued that year is not relevant to or indicative of the current reality (even a presumably temporary, slowed-down reality during a pandemic). For example, the 2005 FEIS stated it was unlikely that development would even occur at the site upon which the Altitude Project is now proposed to be located.

28. The 2005 FEIS is outdated, incomplete, and irrelevant with regard to the Altitude Project. It does not address numerous issues that require analysis, alternatives, and debate as required by law.

29. An Addendum to the FEIS was issued when SDCI issued its Determination of Significance on Sept. 14, 2017. The 300-page Addendum, titled "Addendum to the Final Environmental Impact Statement for the Downtown Height and Density Changes EIS prepared for the 1903 5th Ave. Development, Master Use Permit No. 3018037," was used to address issues the FEIS left out with regard to the Alpine Project. It included a fact sheet, a project description, a comparison of environmental impacts, and appendices that included a land use analysis, light and glare analysis, shadows analysis,

[2] There already are substantial issues with crowding or blocking of trucks, deliveries, etc., in the alley, now serving Escala only. Whether Escala is violating the city code in this way is not at issue and not relevant to this ruling.

transportation technical report, and other studies related to the environmental impacts of the Altitude Project.

30. An addendum to an EIS is a document that, by city ordinance, may add analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing EIS. As noted, the FEIS here did not contain an analysis of significant impacts and alternatives for the Alpine Project.

31. An addendum is not a substitute for an FEIS.

32. Comments from the public or specific individuals or agencies are ingrained in the FEIS decision making process. There is no requirement that an addendum be provided to the public or decisionmakers for review or comment at all. When the Addendum(s) to the FEIS in the instant case were released, a 15-day period for written comments was provided. The lengthy and substantial EIS process of public hearings and other systematic reviews, however, was denied to the public and decisionmakers.

33. If an FEIS is to be considered with its addendum considered part of the FEIS, as Respondents maintain, it would not be within the WACs and RCWs' apparent policy that land use decisions be made systematically, transparently, and with input not only from the public but from agencies and experts. While the Addendum carried with it public comment periods, it did not comply with the requirements of an EIS analysis.

34. If an addendum contains all the analysis required in an FEIS, and stands in its place, it would obviate the need for an FEIS altogether.

35. The court finds the intent of issuing the Addendum in this case was to make up for the failings of the FEIS and become, essentially, a new FEIS while bypassing the FEIS process required by the WACs, RCWs, and Seattle Municipal Code.

36. On August 5, 2020, two years after the Addendum was issued, SDCI issued a revised notice of Availability of Addendum, stating that this public notice "corrects" information

in the previous public notice. The revised notice had a significant change to wording from the original Determination of Significance. Where the DS originally said the project "is likely to" have probable, significant adverse environmental impacts, the revised notice said the project "could" have probable, significant adverse environmental impacts.

37. The word "could" is not helpful in determining whether there is or is not a likely impact. "Could" is conditional, the equivalent of "maybe so, maybe not." It is an ambiguous term in this context. The court assumes it was meant to indicate there is less concern about significant impacts than in the original public notice, but that is not what the statement says. The new language did nothing but inject uncertainty. It also did not change the DS into a Determination of Non-Significance ("no likely impact"), which would not have required an EIS.

38. This court's decision must be based on an adequate, thorough record. The EIS process exists for a reason. An irrelevant, outdated FEIS that does not even mention the Project and a separate Addendum that bypassed the EIS process are not a viable record upon which these important issues should be decided. A Supplemental EIS should have been prepared for this Project.

39. Appellants also challenge design review decisions because they were made before the SEPA process was completed.

CONCLUSIONS OF LAW

1. This court has jurisdiction under LUPA except as found below.

2. Government decisionmakers must "fully consider the environmental and ecological effects of major actions" before authorizing them. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 717, 47 P.3d 137 (2002).

3. SEPA was adopted to protect our "safe, healthful, productive, and aesthetically and culturally pleasing surroundings." The Legislature recognized, *inter alia*, "the profound

influences of population growth [and] high-density urbanization[.]" RCW 43.21C.020 (1), (2)(b).

TRANSPORTATION ELEMENTS

4. Under SEPA, a project action pertaining to residential, multifamily, or mixed use development is exempt from appeal on the basis of the evaluation of or impacts to "transportation elements" of the environment, so long as the project does not present significant adverse impacts to the state-owned transportation system and the project is 1) consistent with the transportation element of the city's comprehensive plan, and, if so, 2) one for which traffic or parking impacts are "expressly mitigated" by ordinance of general application adopted by the city. RCW 43.21C.500(1), (b)(ii); SMC 25.05.680H.

5. This is a mixed-use project and there is no evidence the Department of Transportation has determined the project will have significant adverse impacts to a state-owned transportation system.

6. Impacts to "transportation elements" include impacts to transportation systems, vehicular traffic, parking, movement or circulation of people or goods, and traffic hazards. RCW 43.21C.500(2); SMC 25.05.680H. Issues regarding the Alpine Project alley fall into this category.

7. Having reviewed the transportation element of the city's Comprehensive Plan, the court gives deference to the Hearing Examiner and finds no error in his finding that the project is consistent with the Plan. *See* RCW 43.21C.500(1)(a).

8. Thus, the next inquiry is whether ordinances "expressly mitigate" the impacts of transportation clements. When a statutory term – such as "expressly" – is undefined, absent a contrary legislative intent, the court gives the word its ordinary meaning and may look to a dictionary for such meaning. *State v. Gonzalez,* 168 Wn.2d 256, 263–64, 226 P.3d 131 (2010). Therefore, this court considers "expressly mitigated" to mean explicitly or specifically mitigated by ordinance.

9. Some of the ordinances cited by Respondents do not expressly mitigate the particular impacts of transportation elements with regard to the Alpine Project. For example, generalized ordinances regarding speed limits do not explicitly or specifically mitigate concerns that the intersection between Stewart Street and the alley may be frequently obstructed.

10. However, each of the concerns alleged by Appellants have at least one ordinance that expressly mitigates the impact. While not a complete list, the following are examples:

    a. Stewart Street streetcar – SMC 11.65.040, 080; 11.58.230 (must give street cars right of way, not obstruct them, and vehicles must stop when emerging from an alley).
    b. Congestion at intersection of the alley and Stewart Street – SMC 11.58.230; 11.58.310 (emerging from an alley; regard for pedestrians).
    c. Expansion of an alley – SMC 23.53.030 (when alley does not meet minimum width).
    d. Space conflicts between trucks and residents in alley – SMC 11.72.025, 110 (driveway or alley entrance shall not be blocked).
    e. Waste and refuse containers in alley – SMC 23.54.040E.3 (no blocking any pedestrian or vehicle access).
    f. Emergency vehicle traffic (among cumulative effects) – SMC 11.58.260, 270A; 11.68.100 (emergency vehicles get access)

11. While some ordinances that expressly mitigate appear to only minimally and unrealistically mitigate the concerns (e.g., SMC 11.74.010, noted *supra* at FOF 10 – loading is to be "expeditious," only up to 30 minutes), the fact remains that they do expressly mitigate the impacts.

12. Giving due deference to the Hearing Examiner's findings, the ordinances satisfy RCW 43.21C.500(1)(b)(ii)'s requirements. The impact of transportation elements is exempt

from appeal. The Hearing Examiner and this court lack jurisdiction to decide the issue of transportation impacts.

LOADING BERTHS

13. The Hearing Examiner's ruling with regard to the viability of the proposed truck loading berths is a factual one and therefore is reviewed for whether it is supported by substantial evidence. This court finds that it is. A reasonable interpretation of the testimony supports the Examiner's finding with regard to the loading berths.

14. When there is substantial evidence to support the Examiner's findings, this court cannot reweigh the evidence and substitute its judgment even if it might have resolved the factual dispute differently. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 778, 275 P.3d 339 (2012). "Conflicting evidence may still be substantial, so long as some reasonable interpretation of it supports the challenged findings." *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 411, 972 P.2d 1250, 1268 (1999). Further, the court must view the evidence in the light most favorable to the Project, because it was the prevailing party at the hearing. *State v. Living Essentials, LLC*, 8 Wn. App. 2d 1, 29, 436 P.3d 857 (2019).

15. There was conflicting evidence presented with regard to the loading berths. In the light most favorable to the Respondents, substantial evidence supports the Hearing Officer's finding.

16. Appellants also challenged the interpretation of the statute with regard to 26-foot-long trucks crossing the property line in a 25-foot berth, but SDCI's decision eliminates 26-foot trucks from servicing the Project. This appears to render the issue moot.

ADEQUACY OF FEIS

17. WAC 197-11-500 provides rules for: (1) notice and public availability of environmental documents, especially environmental impact statements; (2) consultation and comment by agencies and members of the public on environmental documents; (3) public

hearings and meetings; and (4) lead agency response to comments and preparation of final environmental impact statements.

18. Review, comment, and responsiveness to comments on a draft EIS are the focal point of the act's commenting process.

19. The court may not substitute its judgment for that of the Hearing Examiner, but it is to examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision. *Ass'n of Rural Residents v. Kitsap Cty.*, 141 Wn.2d 185, 4 P.3d 115 (2000).

20. The Hearing Examiner has jurisdiction to rule on adequacy of an EIS. SMC 23.76.022.C.6.

21. Courts analyzing claims under RCW 36.70C.130(1)(b) are directed to afford "such deference as is due the construction of a law by a local jurisdiction with expertise."

22. WAC 197-11-600(2) allows the use of existing documents, such as an EIS prepared for a previous project, to evaluate a proposal. Previously prepared environmental documents may be used "provided that the information in the existing document(s) is accurate and reasonably up-to-date." SMC 25.05.600B.

23. The information in the existing document (EIS), collected in 2003, is 18 years old. That is not "reasonably up-to-date." The information in it may have been "accurate" at the time, but it is now incomplete and inadequate as it relates to the Altitude Project.

24. Adoption of an existing EIS is authorized when "a proposal is substantially similar to one covered in an existing EIS." *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 50, 52 P.3d 522 (2002). The proposal for the Altitude Project and its environmental impacts, particular with regard to use, scale, and crowding of the Escala alley, is not substantially similar to the EIS related to zoning, height and density of various areas of downtown.

25. EIS adequacy involves the legal sufficiency of the information in the EIS. To be adequate, the EIS must present decisionmakers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the agency's decision. Adequacy is judged by the 'rule of reason,' a 'broad, flexible cost-effectiveness standard,' and is determined on a case by case basis, considering 'all of the policy and factual considerations reasonably related to SEPA's terse directives.'" *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. State, Dept. of Transp.*, 90 Wn.App. 225, 229, 951 P.2d 812 (1998) (citations omitted).

26. The principal purpose of SEPA is to provide decisionmakers and the public with information about potential adverse impacts of a proposed action. RCW 43.21C.010 et seq; Glasser v. City of Seattle, 139 Wash. App. 728, 162 P.3d 1134 (2007).

27. When considering EIS adequacy on appeal, a clearly erroneous standard is used with substantial weight given the agency determination.

28. The adequacy of an EIS focuses on the legal sufficiency of the data in the EIS. Sufficiency of the data is measured by the "rule of reason," which requires a reasonably thorough discussion of the significant aspects of the probable environmental consequences. *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn.App. 503, 539, 137 P.3d 31 (2006), as amended (May 15, 2007).

29. SEPA does not require analysis of every possible impact. *Id.*

30. The FEIS in this case was not adequate under the rule of reason. It is incomplete and covered very little of what is required by statute and ordinance to evaluate the current project. It did not provide the city with sufficient information to make a reasoned decision.

31. The FEIS and its Addendum were not the equivalent of one document to be considered for adequacy of the FEIS under SEPA. Because the Addendum did not follow the

procedure for an EIS, the FEIS must be evaluated for adequacy on its own merits with minor additions or corrections from an addendum.

32. The Addendum is not a new FEIS or plan that stands alone. When an FEIS fails to follow the requirements of SEPA, the underpinnings of the Addendum are gone. *See Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty., 122 Wn.2d 619, 631–32, 860 P.2d 390 (1993), as amended on denial of reconsideration (Jan. 28, 1994), amended, 866 P.2d 1256 (1994)*(dealing with county waste plan update and accompanying EIS).

33. The FEIS must contain everything that is identified in RCW 43.21C.030, RCW 43.21C.031, SMC 25.05.440, and WAC 197-11-440. Because it did not, the 2005 FEIS is inadequate as a matter of law.

34. A Supplemental EIS (SEIS) may be prepared if there are substantial changes so that the proposal is likely to have significant adverse environmental impacts, or new information indicates a proposal's probable significant adverse environmental impacts. WAC 197-11-600.

35. The original DS stated the Project is "likely to" have significant adverse environmental impacts; the now ambiguous finding is that it "could" have significant impacts. There are substantial changes and development to the area surrounding the potential site, as well as use of an alley that was not contemplated in the FEIS. New information is available, a result of more current and focused analysis of the Project. An SEIS is appropriate.

36. Under LUPA, a court may overturn a Hearing Examiner's decision on a local law if it is an erroneous interpretation of law, after allowing such deference as is due the construction of a law by a local jurisdiction with expertise. RCW 36.70C.130(1)(b).

37. The clearly erroneous standard applies for reversal only if the court is left with the definite and firm conviction that the Hearing Examiner made a mistake. West's RCWA 43.21C.090 et seq.

38. Under LUPA, superior court review is limited to actions defined by LUPA as "land use decisions." *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014)(citing RCW 36.70C.010, 040(1)). A land use decision is a final determination on an application for a project permit or other governmental approval, or an interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances. RCW 36.70C.020(2).

39. The Appellants' challenge to the timing of the design review board, i.e., that an FEIS should precede the design board recommendations, is not a land use decision. The board issues a recommendation, not a final determination. Thus, neither the Hearing Examiner nor the court has jurisdiction to hear this challenge. See RCW 36.70A.280; RCW 36.70A.290.

ORDERS

1. This court lacks jurisdiction to hear challenges regarding transportation elements and the design review board's recommendation.

2. The Hearing Examiner correctly found he had no jurisdiction to hear the issue of transportation elements; they were exempt from SEPA appeal. The Hearing Examiner's ruling is AFFIRMED and the Appellants' claim DISMISSED.

3. The challenge to the order in which design review should occur, before or after SEPA, is a challenge to the City Code and not a land use decision. The Hearing Examiner correctly found he had no jurisdiction to hear the issue of timing of the design review process *vis-à-vis* SEPA proceedings. The Hearing Examiner's ruling is AFFIRMED and the Appellants' claim DISMISSED.

4. Substantial evidence supports the Hearing Examiner's finding that the Project's plan for loading berths is valid. His ruling is AFFIRMED.

5. The court has accorded substantial weight to the city's determination that the FEIS is adequate under SEPA. Even according due deference, the court finds the Examiner committed clear error in finding the FEIS was adequate under SEPA. His ruling to the contrary is REVERSED.

This case is REMANDED for completion of a Supplemental EIS that specifically reviews the environmental impacts of the Altitude Project under SEPA standards.

IT IS SO ORDERED.

DATED this 23rd day of March, 2021.

K Richardson

Judge Kristin Richardson

BRICKLIN & NEWMAN, LLP

August 24, 2022 - 2:46 PM

Transmittal Information

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Appellate Court Case Title:	Escala Owners Assoc., Resp/X-App v. City of Seattle, et ano., Apps/X-Resps

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