No. 1012012

IN THE WASHINGTON SUPREME COURT

ESCALA OWNERS ASSOCIATION,

Petitioner,

v.

CITY OF SEATTLE and SEATTLE DOWNTOWN HOTEL & RESIDENCES LLC,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF RESPONDENTS

Although Petitioner Escala Owners Association ("Escala") asserts that this matter involves an issue of substantial public interest and a significant constitutional question, nothing could be further from the truth. The Court of Appeals' decision ("Opinion") properly applied the plain language of the State Environmental Policy Act ("SEPA"), Ch. RCW 43.21C RCW, and its implementing regulations ("SEPA Rules"), Ch. 197-11 WAC. The Opinion followed precedent in upholding the sufficiency of exhaustive, years-long environmental review for a single hotel and apartment building ("Project") in downtown Seattle ("City").

Escala seeks discretionary review on two grounds. First, it argues that the Court of Appeals' affirmance of the adequacy of environmental analysis raises a matter of substantial public interest. Second, Escala argues that the Court of Appeals' conclusion that Escala's traffic-related claims are not subject to appeal under SEPA raises a matter of substantial public interest

and a significant constitutional question. Neither claim provides a basis for discretionary review, *see* Rule of Appellate Procedure ("RAP") 13.4(b), and Escala's Petition should be denied.

Regarding the first claim, Escala fails to demonstrate any error in the City's meticulous application of SEPA. Escala represents the residents of a 30-story condominium building located across an alley from the Project. Escala believes the Project will contribute too much traffic to the alley. The City, however, thoroughly considered Escala's concerns and concluded that the Project will not have significant traffic impacts. The use of an alley to serve multiple high-rise buildings is consistent with the City's land use code, which *requires* buildings to take access off alleys, and it is also a common condition across downtown. The City documented its conclusion by adopting an Environmental Impact Statement ("EIS") including an analysis of downtown traffic and by supplementing the EIS with a detailed SEPA addendum

("Addendum") containing a full, Project-specific traffic study. *See* RCW 43.21C.034; WAC 197-11-600(4).

The Petition unsuccessfully attempts to frame Escala's private, fact-based disagreement with the City's SEPA determinations as a public, procedural dispute. Its assertion that the City used the wrong procedures is inconsistent with unambiguous legislative and regulatory language and prior appellate precedent directly on point. Moreover, Escala repeatedly misrepresents the record. In particular, it brazenly asserts that there was no analysis of alternatives, but the record clearly demonstrates that the Addendum analyzed four separate Project alternatives involving different heights and densities, going far beyond SEPA's requirements. Escala does not establish an issue of substantial public interest requiring review.

In its second asserted basis for discretionary review, Escala argues that SEPA's express and unambiguous prohibition against traffic-based appeals of urban residential projects, *see* RCW 43.21C.501, deprived Escala of a "fundamental and inalienable right," presenting an issue of

substantial public interest and a significant constitutional question. RAP 13.4(b). This claim also fails. The Legislature made a policy choice to streamline SEPA review of residential projects by eliminating statutory appeals. This is a decision for the Legislature to make. Escala requests an "interpretation" of RCW 43.21C.501 that is completely inconsistent with both plain language and legislative intent. Escala also erroneously argues that it has a constitutional or property right in a purely statutory cause of action, a contention this Court has long since rejected.

Neither of the arguments in Escala's Petition for Review ("Petition") can establish a basis for review under RAP 13.4(b). The City and Applicant (collectively, "Respondents") ask this Court to deny review.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the City Hearing Examiner erred when he determined that the City properly adopted an EIS and SEPA Addendum under WAC 197-11-600(4), which

provides for use of a SEPA addendum when a project will have no new significant adverse impacts beyond those that have already been analyzed in an existing environmental document?

2. Whether the City Hearing Examiner erred when he determined that Escala's SEPA traffic claims were not subject to appeal under RCW 43.21C.501, which provides that urban residential projects meeting statutory criteria are exempt from SEPA appeals on the basis of allegedly inadequate review of traffic and parking impacts?

III. COUNTERSTATEMENT OF THE CASE

The Project is a 54-story mixed-use building with apartments, hotel, retail, and parking located in an area of downtown Seattle zoned for buildings up to 550 feet in height. Contrary to Escala's claim that the City ignored its SEPA obligations, the Project was subject to exhaustive environmental review over more than five years. The City's SEPA analysis utilized the procedures established by RCW

43.21C.034 and WAC 197-11-600, which provide for the use of existing documents – *i.e.* for local jurisdictions reviewing a new proposal to adopt and incorporate relevant information from analysis of a prior proposal. Here, the City determined that potential environmental impacts from the Project were within the range of impacts that had been analyzed in an environmental impact statement ("Downtown EIS") prepared in 2005 for the adoption of the zoning regulations allowing 550-foot buildings. Accordingly, the City adopted the Downtown EIS.

Because the Downtown EIS contained no individual discussion of the Project, the City also prepared a 323-page Addendum providing extensive analysis of the Project. The analysis in the Addendum shows that the Project will have no probable significant adverse impacts beyond those analyzed in the Downtown EIS. The Addendum describes the Project and compiles a number of expert, technical analyses of its potential impacts, including the report of an experienced transportation engineer regarding traffic and alley issues. Contrary to Escala's

assertion that the Addendum contains no analysis of alternatives, *see* Petition at 15, the Addendum analyzes four alternatives (two alternatives and two sub-alternatives) varying the size and composition of the Project and the environmental impacts expected from each one. AR 1133.

Escala appealed the adequacy of the EIS for the Project to the City Hearing Examiner ("Examiner"). Respondents moved pursuant to RCW 43.21C.501 to dismiss claims alleging that the Project would have traffic impacts in the alley.[1] After hearing evidence and argument, the Examiner concluded that the Project is consistent with the criteria established by RCW 43.21C.501 and dismissed Escala's transportation claims as exempt from appeal. The Examiner then held a four-day open-

[1] RCW 43.21C.501 was enacted by the legislature in 2019 (originally codified as RCW 43.21C.500) and was amended in June 2022, after issuance of the Opinion. The version of the statute that applied when the decisions below were issued established that an urban residential or mixed-use project is "exempt from appeals" under SEPA if it is "[c]onsistent with the transportation element of a comprehensive plan" and is 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."

record hearing and issued a decision rejecting the remainder of Escala's claims. The Examiner's decision included the conclusion that the Downtown EIS:

> provided environmental analysis for the upzone of the Downtown District. This 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 this proposal.

Opinion at 13.

Escala appealed to Superior Court pursuant to the Land Use Petition Act ("LUPA"), Ch. 36.70C RCW. The Superior Court affirmed the Examiner regarding the RCW 43.21C.501 appeal exemption (along with several other issues now abandoned by Escala) but reversed regarding the City's adoption of the Downtown EIS and preparation of the Addendum. Escala and Respondents cross-appealed to the Court of Appeals, which issued the Opinion affirming the Examiner on all counts. As the Opinion states, "[a]n addendum is the appropriate vehicle for adding . . . 'analyses or information about a proposal [that] does not substantially

change the analysis of significant impacts and alternatives in the existing environmental document." Opinion at 14-15 (quoting WAC 197-11-600(4)(c)). Escala "failed to meet its burden to present actual evidence of probable significant impacts" that would require discussion in something other than an addendum. Opinion at 15.

IV. ARGUMENT

Escala incorrectly asserts that discretionary review is warranted because this case involves an issue of substantial public interest and a significant constitutional question that should be determined by the Supreme Court. RAP 13.4(b)(4). There is no factual circumstance implicating the public interest: the Project provides needed housing in the densest urban area in Seattle, consistent with the City's zoning regulations, and the City carefully and thoroughly evaluated the Project's potential environmental impacts under SEPA. Escala's claims amount to nothing more than complaints about the garden-variety downtown condition of an alley with multiple users.

Nor is there any public-interest or constitutional issue of law. First, Escala fails to establish that there is any need for "guidance" from this Court regarding the procedures for adoption of existing documents and the use of addenda, which are clearly established by the SEPA Rules and were straightforwardly applied by the City in this case. Second, Escala fails to demonstrate that the Legislature's policy choice to limit a purely statutory appeal right raises questions of public interest or constitutional concerns. On both issues, granting Escala's requests would require this Court to ignore the plain language of SEPA and its implementing regulations, contradicting legislative intent and violating the principles of judicial review. The Petition should be denied.

A. Escala Fails to Demonstrate that the City's Use of Existing Environmental Documents Raises an Issue of Substantial Public Interest.

Escala fails to demonstrate that the Court of Appeals' affirmance of the City's use of the Downtown EIS and Addendum raises an issue of substantial public interest. According to Escala, the Opinion will have the effect of

authorizing local jurisdictions to conduct insufficient environmental review, and "guidance" from this Court is necessary to prevent widespread avoidance of SEPA requirements. This misrepresents both the facts and the law. The Court of Appeals and the Examiner recognized that SEPA review had been extraordinarily thorough and had expressly addressed Escala's concerns. And the Opinion will not authorize jurisdictions to shirk SEPA's requirements because the Opinion applies the text of SEPA's requirements – in contrast to the Petition, which ignores them.

1. The City Followed the Plain Language of the Statute and Regulations.

This Court has previously found that discretionary review is merited in the public interest where there is a need to "clarify [a] statutory scheme," *State v. B.O.J.*, 194 Wn.2d 314, 321, 449 P.3d 1006, 1011 (2019) (quoting *Dunner v. McLaughlin*, 100 Wash.2d 832, 838, 676 P.2d 444 (1984)), particularly where a decision "has the potential to affect a number of proceedings in the lower courts" and "review will avoid unnecessary litigation

and confusion on a common issue." *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, (Mem)–414 (2016). Here, the Opinion will not lead to confusion, and there is no need for clarification, because the Court of Appeals, as it has previously, applied the plain text of RCW 43.21C.034 and WAC 197-11-600. *Cf. Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091, 1092 (2017) (Court of Appeals ruling merits review when "it is a watershed departure from prior practice that affects the greater public interest").

The Opinion is consistent with well-established precedent regarding the nature of SEPA review. "SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision makers." *Save Our Rural Env't v. Snohomish Cty.*, 99 Wn.2d 363, 371, 662 P.2d 816, 820 (1983) (citation omitted). "It was not designed to usurp local decisionmaking or to dictate a particular substantive result." *Id.* (citation omitted). An EIS, such as the one the City created for the Project, is reviewed for "adequa[cy]" under the "rule of reason," which is a "broad,

flexible cost-effectiveness standard." *Citizens All. to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300, 1304 (1995). As the Court of Appeals recognized, "[t]he adequacy of an EIS focuses on the legal sufficiency of its data," Opinion at 17, rather than on the format of the document or the procedures used in its creation.

Accordingly, SEPA utilizes a practical approach that does not require local governments to reinvent the wheel every time a new building is proposed but, rather, authorizes them to adopt existing analysis of a prior proposal where relevant. RCW 43.21C.034; *see* WAC 197-11-030(2)(b).[2] The current and prior proposals "need not be identical, but must have similar elements that provide a basis for comparing their environmental consequences." RCW 43.21C.034; *see also*

[2] *E.g.* WAC 197-11-402(7) ("Agencies *shall* reduce paperwork and the accumulation of background data by adopting or incorporating by reference, existing, publicly available environmental documents, *wherever possible*.") (emphasis added); WAC 197-11-640 ("Any environmental document . . . may be combined with any other agency documents to reduce duplication and paperwork and improve decision making.").

WAC 197-11-600(2) (proposal under consideration may be "different than [the proposal] analyzed in the existing documents").

Because a new proposal may differ from the prior one, "the lead agency may require additional documentation to ensure that all environmental impacts have been adequately addressed." RCW 43.21C.034. This additional documentation may take one of two forms: an addendum or SEIS, depending on whether the proposal presents probable, significant adverse impacts that were not previously analyzed. WAC 197-11-600(4)(e). An addendum "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); *see Thornton Creek Legal Fund v. Seattle*, 113 Wn. App. 34, 51, 52 P.3d 522 (2002) (agency is authorized to "remedy shortcomings of documents that have been adopted" by providing individual analysis in an addendum when there is no showing of new significant impacts).

Here, the City concluded – and the Examiner found at hearing – that there were "similar elements" between the Project and the zoning change analyzed in the Downtown EIS because the Downtown EIS had "specifically anticipated projects of the type represented by [the Project]" and discussed the impacts that taller buildings could have. Opinion at 13. The 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." Opinion at 15-16. The Examiner also "concluded that Escala had failed to meet its burden to present actual evidence of probable significant impacts" from the Project that were outside the range of impacts analyzed in the Downtown EIS, and that it thereby failed to show that use of the Addendum was improper. Opinion at 15.

In the Petition, Escala again fails to demonstrate anything incorrect about the City's use of these procedures. Escala's

narrow focus on the type of document used is inconsistent with SEPA's practical approach: Washington courts have repeatedly rejected such challenges by emphasizing the *substance* of the information conveyed by environmental review. *E.g.*, *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 631-32, 860 P.2d 390, 393 (1993) (EIS lacking discussion of historic impacts was nonetheless adequate because it incorporated by reference a "reasonably thorough" study of the issue); *Toandos Peninsula Assoc v. Jefferson Cty.*, 32 Wn. App. 473, 483, 648 P.2d 448, 454 (1982) (EIS not inadequate because it was "apparent from the long history of the permit process that the decisionmaking official was well aware" of an issue not discussed in EIS); *Citizens v. City of Port Angeles*, 137 Wn. App. 214, 225 n.10, 151 P.3d 1079, 1085 (2007) (rejecting claim for relief that "seems to derive more from the drafting of the SEPA rules rather than from any legal insufficiency in the City's review"). Escala does not dispute that the City was aware of, and thoroughly analyzed, every detail of Escala's traffic concerns.

2. The City Followed the Correct Process for Adoption of the Downtown EIS.

Escala unsuccessfully challenges both the City's adoption of the Downtown EIS and its preparation of the Addendum. Regarding adoption of the Downtown EIS, the Petition misleadingly frames the decisions below as holding that "a local jurisdiction can adopt an existing EIS even if the information in that EIS is unreliable, inaccurate, and outdated." Petition at 21. But there was no such holding. Instead, there was a factual determination by the Examiner, after multiple days of evidence, that the Downtown EIS was *not* unreliable, inaccurate, or outdated. To the contrary, the Downtown EIS "specifically anticipated projects of the type represented by [the Project]" and contained relevant analysis of the impacts of such buildings. Opinion at 13-14. Escala failed to demonstrate that the Downtown EIS was inaccurate or outdated with respect to these impacts. The Downtown EIS was not a *complete* environmental analysis of the Project, the City never suggested that it could be. Instead, as contemplated by RCW 43.21C.034,

the Downtown EIS included information applicable to the Project that formed *part of* the basis for the City's conclusions.[3]

Contrary to Escala's attempt to establish a limiting construction of RCW 43.21C.034, SEPA regulations expressly "encourage and facilitate reusing existing environmental documents" in order to "reduce paperwork" and minimize duplication. *Thornton Creek,* 113 Wn. App. at 50. In particular, where an existing document (such as an EIS for an area-wide planning change) discusses facts applicable to a later proposal, an agency may rely on that information as relevant, supplementing with new, project-specific analysis as needed. *See Thornton Creek*, 113 Wn. App. at 51 (adoption of existing EIS for area-wide plan and creation of addendum for site-

[3] Escala also misrepresents the record by stating that the Downtown EIS "assumed that the Altitude Project site would not be developed at all." Petition at 14. In reality, the Downtown EIS identified the Project's site as a "potential developable site." AR 2584-85. More importantly, the relevance of the Downtown EIS does not depend on whether it identified the Project Site as likely to be developed. The City adopted the Downtown EIS for its analysis of area-wide impacts of dense development downtown. Any gaps were addressed by the site-specific descriptions in the Addendum.

specific development plan was proper because the "proposals included in the [site-specific plan] fell within the scope of development analyzed in [the] existing [EIS]" and "the environmental impact of the [site-specific plan] was not substantially different from that analyzed in [the existing EIS]."). The Court of Appeals recognized that the City's adoption of the Downtown EIS was a routine application of RCW 43.21C.034 and WAC 197-11-600 as discussed in *Thornton Creek* – and that it was consistent with basic logic and the common-sense practice of incorporation by reference.

By contrast, Escala illogically argues that a document cannot be adopted unless it already describes the project under review – a situation that will never occur because there will never be an *existing* environmental document that describes a *new* project. *See* Petition at 13-14. Instead, that is "precisely the purpose of an addendum." Opinion at 17; *see also id.* ("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."). Escala's reading would render the procedures for use of existing documents superfluous, violating the rule against surplusage. *See Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 113, 249 P.3d 607, 620 (2011).

Escala also emphasizes the Superior Court's erroneous determination that the Downtown EIS was irrelevant. The Superior Court's ruling, however, was unsupported by the record and contradicted the Examiner's factual findings in violation of the deference required by LUPA, under which the Superior Court sat in an appellate capacity, as well as the substantial weight required by SEPA. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 64, 340 P.3d 191, 196 (2014). The Court of Appeals properly reversed the Superior Court on this point, recognizing the evidentiary and logical bases for the Examiner's conclusion. The purpose of SEPA – full analysis of relevant information – was well served in this case and will in no way be threatened by continued application of these procedures in future cases.

3. The City Followed the Correct Process for the Addendum.

Escala also asserts that this Court must intervene because the Opinion will "allow agencies and local governments throughout the State of Washington to use an addendum to present the information and analysis . . . that is required to be in an EIS." Petition at 16. This is a nonsensical, circular argument. The City did not "circumvent" the EIS process or use the Addendum "as a substitute for [creating a new] EIS." *See* Petition at 19, 21. Instead, the City simply followed the text of WAC 197-11-600(4), under which creation of an addendum was proper and *no new EIS was required*. There is no issue of substantial public interest because the City's creation of the Addendum was consistent with both the letter and the spirit of SEPA: it applied the regulations and prepared an extraordinarily thorough analysis of the Project.

Although the Petition is written as if the City ignored an obligation to create a new EIS for the Project, there was no such obligation. Instead, whether a new EIS or an addendum is used

for environmental review depends on a question that the Petition entirely ignores: whether the project under review will have new significant adverse impacts. WAC 197-11-600(4)(c). Here, the Examiner and Court of Appeals properly determined that the Project will not result in such impacts. The more streamlined Addendum process is appropriate in these circumstances under the plain regulatory language. *Id*.

Escala's argument, by contrast, is legally incoherent. Escala does not dispute that the SEPA Rules establish a process for creating an addendum and a different process for creating a new EIS. *Compare* WAC 197-11-620 *with* WAC 197-11-625. Nor does Escala dispute that no new EIS was required because no new significant impacts were shown – indeed, it abandons its earlier argument to that effect. *See* Opinion at 16-18. Instead, Escala simply prefers the procedures used to create a new EIS to those used to create an Addendum. Requiring a new EIS in this case, however, would have directly contravened unambiguous legislative language. Escala's request for "guidance," in other words, effectively asks this Court to

rewrite WAC 197-11-600 to eliminate the use of addenda and instead require preparation of a new EIS even for projects that have no new significant impacts. Escala is free to advance its policy argument for a change in SEPA's requirements before the legislative and rulemaking authorities, but this Court is not empowered to rewrite the law. *E.g. Wright v. Lyft, Inc.*, 189 Wn.2d 718, 727, 406 P.3d 1149, 1153 (2017).

Escala attempts to show an issue of substantial public interest by arguing that the Addendum was prepared according to deficient procedures – specifically, that creation of an addendum does not require the same analysis of alternative approaches or public participation as creation of a new EIS, which Escala believes would have been more consistent with the purpose of SEPA. Again, this argument is illogical: an addendum was the correct document to use, and the regulatory procedures for creating an addendum are, by definition, consistent with the law. *See State v. Kingen*, 39 Wn. App. 124, 128, 692 P.2d 215, 217 (1984) (if a statute's "language is clear, it cannot be construed contrary to its plain statement" on the

basis of "purpose and intent"). As the Court of Appeals recognized, this is simply another expression of Escala's dislike of the established regulatory procedures providing for the use of an addendum, because Escala "ignores that the requirement for an alternatives analysis *is only triggered where a new EIS or SEIS is required*." Opinion at 16 (emphasis added). "[T]here is no similar requirement for an analysis of alternatives when preparing an addendum." *Id.* at 17 (citing WAC 197-11-625). Escala's complaint that the use of an addendum does not require the same responses to comments as a new EIS, Petition at 18, is similarly tautological: the public participation processes for an EIS and an addendum differ because they are subject to different regulatory procedures. *Compare* WAC 197-11-560 *with* WAC 197-11-625. Again, Escala asks the Court to erase the procedural distinctions carefully drawn by SEPA and the SEPA Rules.

The flaws in Escala's approach are also magnified by its blatant misrepresentation of the record. Whereas Escala states that no alternatives were analyzed, Petition at 14-15, the site-

specific analysis in the Addendum went beyond SEPA requirements to include a detailed review of four alternatives (two possible building heights, and two possible density and composition alternatives for each height). AR 1133; *see also* 1133-1185. Moreover, the Downtown EIS "extensively examined five alternative legislative zoning proposals that the City was considering at the time," each of which if adopted would have resulted in a different height limit for the Project and similar buildings. *See* Opinion at 18. The City was not required to examine every design element that Escala might have preferred. Likewise, Escala had myriad opportunities to express its views, and the City repeatedly responded to comments even though it was not required to do so. AR 821-25, 826-28, 937-60, 1454-62, 1645-55, 1656-746, 1747-1854, 1960-2035, 3229-41, 3250-3302.

Escala's disregard for the plain language of the law and misrepresentation of the record do not establish an issue of substantial public interest.

B. Escala Fails to Show That Applying the Text of RCW 43.21C.501 is an Issue of Substantial Public Interest or a Significant Constitutional Issue.

Escala fails to establish that the application of RCW 43.21C.501 to the Project in the decisions below raises an issue of substantial public interest. RCW 43.21C.501 exempts housing development from SEPA appeals asserting that certain impacts were insufficiently analyzed. As originally enacted in 2019 and as applied in the decisions below, RCW 43.21C.501 removed appellate jurisdiction over transportation impacts only. In June 2022, at the urging of advocates who described how meritless SEPA appeals had delayed sorely needed housing projects, the legislature expanded the exemption to bar appeals based on alleged impacts to aesthetic and light as well. *See* H.B. Rep. on Substitute H.B. 5818, 67th Leg., Reg. Sess., at 5 (Wash. 2022). The Legislature also broadened the traffic appeal exemption: whereas the original version of the statute exempted projects for which traffic or parking impacts were "expressly mitigated by an ordinance, or ordinances, of general application," the 2022 amendment removed the word

"expressly," providing a further indication of the legislative intent to limit appeals. The Legislature has made the policy decision to amend SEPA to promote the public interest in housing production. The Court should reject Escala's attempt to rewrite RCW 43.21C.501 and substitute its view of the public interest for that of the Legislature.

In addition, Escala does not even attempt to establish error in the Examiner and Court's application of the exemption, arguing only that this Court should "consider and acknowledge the severity of the impact this provision has" on judicial review of SEPA determinations. Petition at 28. Escala is wrong to argue that the public interest would be served by this Court ignoring the legislature's express direction, which this Court, of course, is not at liberty to do. *Wright*, 189 Wn.2d at 727; *Kingen*, 39 Wn. App. at 128. The express purpose of RCW 43.21C.501 is to *exempt* projects from appeal. The Examiner and Court of Appeals properly applied the statute as written. *Anderson v. Dep't of Soc. & Health Servs., Div. of Child Support*, 196 Wn. App. 674, 681, 384 P.3d 651, 655 (2016)

("When a statute is unambiguous, [courts] look to a statute's plain language alone to determine the legislature's intent."); *accord, e.g.*, *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). In direct contravention of the statutory language, Escala asserts that it "must be construed in a manner that is most likely to allow an appeal to be pursued." That is the opposite of what the statute says. Escala's interpretation would completely nullify the legislature's choice to enact the exemption. Escala argues that SEPA's broader statutory purpose of "full disclosure" supports its preferred approach, but this fails to recognize that RCW 43.21C.501 *is also part of SEPA*. A "court may not rely on a statement of intent found in a legislative preamble to a statute" to "override the unambiguous elements" of an ordinance "or to add an element not found there." *State v. D.H.*, 102 Wn. App. 620, 627, 9 P.3d 253, 256 (2000) (internal quotations omitted).

Instead of pointing to legislative language supporting its assertions, as it cannot do, Escala offers the argument that RCW 43.21C.501 "goes against the 'very essence of civil

liberty'" and "constitutes a deprivation of individual due process rights." Petition at 23 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803), 25. Escala does not establish a significant constitutional issue. The ability to appeal the adequacy of SEPA analysis is not a constitutional or property right; instead, it is a purely statutory cause of action that was established – and may be amended – by the legislature. *See* RCW 43.21C.075. A litigant's ability to sue to challenge the environmental review of someone else's project does not present a constitutionally protected property interest that would support a due process claim. *See Durland v. San Juan County*, 182 Wn.2d at 69-75 (plaintiff must show a constitutionally protected property right to assert a procedural due process claim). As this court has repeatedly recognized, a right that "exists only by virtue of a statute" is a "creature of statute," not a constitutional right. *TCAP Corp. v. Gervin*, 163 Wn.2d 645, 653, 185 P.3d 589, 594 (2008) (en banc) (internal quotation marks and citations omitted). The appeal right provided by RCW 43.21C.075 is "'a matter of legislative grace,'" and the

legislative abolition of such a cause of action does not violate any constitutional rights. *Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 617-19, 146 P.3d 914, 922–23 (2006) (quoting *Haddenham v. State*, 87 Wn.2d 145, 149, 550 P.2d 9, 12 (1976)). Indeed, a plaintiff's statutory cause of action may be repealed even once a lawsuit is pending, so long as there is not yet a final judgment – as there is not in this case. *Id.*

V. CONCLUSION

Respondents respectfully ask this Court to deny the Petition for Review.

DATED this 23rd day of September 2022.

Pursuant to RAP 18.17(b), we certify that this answer to petition for review contains 4,997 words.

Respectfully submitted,

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Appendix A:

MUP-19-031 Findings and Decision

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

ESCALA OWNERS ASSOCIATION

of a decision, and adequacy of the FEIS and Addendum issued by the Director, Department of Construction and Inspections

Hearing Examiner Files:
MUP-19-031 (DD, DR, S, SU, W)

Department Reference:
3018037-LU

Introduction

The Director ("Director") of the Department of Construction and Inspections ("Department") issued a State Environmental Policy Act ("SEPA") Determination of Significance ("DS") and design review approval for construction of a forty eight-story structure ("Decision"). The DS was followed by the adoption of a Final Environmental Impact Statement ("FEIS") and issuing an associated Addendum. The Appellant exercised its right to appeal the Decision and the FEIS.

The appeal hearing was held on January 28, 29, 20, and 31, 2020, before the Hearing Examiner. The Appellant was represented by Claudia M. Newman and David A. Bricklin, attorneys-at-law; the Applicant, Seattle Downtown Hotel & Residence LLC ("Applicant"), was represented by Courtney A. Kaylor, and David P. Carpman, attorneys-at-law; and the Director was represented by Elizabeth E. Anderson, attorney-at-law. The Hearing Examiner subsequently visited the site. Final written closing arguments were submitted on March 6, 2020, and the record closed on that date.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated. After considering the evidence in the record and reviewing the site, the Hearing Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Site and Vicinity

1. The subject site is addressed as 1903 5th Avenue, and is located on the northwest corner of the intersection of Stewart Street and 5th Avenue. The site is approximately 12,960 square feet in size, and is currently utilized as a commercial surface parking lot.

2. The site is currently occupied by a commercial surface parking lot.

3. The site is zoned Downtown Office Core 2 with a maximum height dependent on the proposed use.

4. The site lies across the street from the twin 400-foot towers of the Westin Hotel, which is located on the east side of 5th Avenue. The site lies north/northwest of the five-story Times Square Building, a Registered Historic Landmark (1916), and directly across the alley from the three-story Centennial Building (1925). The nearly square lot constitutes the southern terminus of a block occupied by a series of two and three-story commercial buildings, aligned along 5th Avenue. The elevated Seattle Monorail runs along 5th Avenue, in the center of the street right-of-way. In addition, the site lies directly diagonally across 5th Avenue from McGraw Square, a Seattle Landmark, and diagonally across the alley from the Escala condominiums.

5. Pedestrian access is from the adjacent street, Stewart Street and 5th Avenue. Vehicle access is from the adjacent streets, and the adjacent through-block improved alley.

Proposal

6. The proposal is a 54-story building with hotel, 233 apartment units and retail. Parking for 140 vehicles is proposed. Parking for the hotel is proposed to be located below grade, with access from 5th Avenue. Parking for the apartment units is proposed to be located above grade, with access from the alley that fronts the property on the west side. The alley runs from Stewart Street to the south to Virginia Street to the north.

Design Review

7. The Downtown Design Review Board ("Board" or "DRB") held an Early Design Guidance ("EDG") meeting on the proposal on December 16, 2014, at which it heard the Applicant's analysis of the site and proposal as well as comments from the public. The Applicant requested several departures, including reduced sidewalk with on Stewart, reduced percentage of approved street-level uses, and reduced depth for two loading berths off the alley and a van-size stall near the residential elevators and other departures. The written and oral public comments included concerns that the program appeared too ambitious for the lot size, reducing sidewalk widths takes the project away from a safe, comfortable and inviting ground plane, reducing the number of loading berths is unrealistic and would further burden an alley overburdened with service and loading demands, the departure requests in no way improved the design, and other issues.

8. The Board's discussion at the December 16, 2014, EDG meeting focused on specific issues including concerns about the intention to reduce the amount of retail space at the ground level, the intention to reduce the required sidewalk widths around the proposal, whether reducing the loading capacity serving the structure would not adversely affect the functioning of the proposed building or create impacts on neighboring structures, and other issues. The Board stressed the importance of working with the neighboring Escala condominium residents to attempt to resolve their concerns regarding impacts of the proposed new structure at this location.

9. The Board held a second EDG meeting on September 29, 2015. The Applicant presented a revised design and no longer requested departures. Additional public comments were received. Design issues communicated to the Board included the overall massing of the proposal, scale as a component of adjacency consideration, and other issues. The Board's deliberations at the September 29, 2015, EDG meeting acknowledged elements of the altered design, including wider sidewalks along 5th Avenue and Stewart Street, and relocation of the hotel lobby to an upper floor allowing an increase in ground-level retail. During deliberations, the Board expressed several concerns relating to massing and design.

10. The Board held a third EDG meeting on December 15, 2015. The Board took public comment, which expressed similar concerns to those raised in the two previous EDG meetings. The Board thought the design had made improvements and recommended the proposal be allowed to proceed to MUP application. The Board stated further design development should address several concerns relating to design and asked for some additional information to be presented.

11. The Board held a Recommendation meeting on August 16, 2016. The Board took public comment at the meeting. Public comments included: that the building is too big for the site, the building needs full-sized loading berths and ground floor retail space should be sacrificed in favor of loading berth space, and that the alley is functionally inadequate to accommodate service needs and support for the project. The majority of Board members present voted to recommend approval dependent on the remaining issues being addressed by the Applicant and approved by the Department's Land Use Planner.

Director's Review and Decision

12. The Director reviewed the Board's recommendations and determined that they did not conflict with applicable regulatory requirements and law, were within the Board's authority, and were consistent with the design review guidelines. The Director, therefore, issued design review approval for the proposal with the Board's recommended conditions.

13. Following a public comment period, the Director reviewed the environmental impacts of the proposal and issued a determination of significance ("DS") pursuant to SEPA.

14. The site of the proposal is within the geographic area analyzed in the Final Environmental Impact Statement that was published for the Seattle Downtown Height and Density Changes in January 2005 ("FEIS"). The FEIS 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 Director determined that the subject proposal would have potential significant impacts that were within the range of significant impacts that were evaluated in the FEIS. As a result, the Department adopted the FEIS. In addition, an Addendum to the Final Environmental Impact Statement for the Downtown and Density Changes EIS prepared for the 5th and Virginia Development Master Use Permit No. 3018037 ("Addendum") was prepared to review more project-specific information. The Department's analysis determined that the

project would produce no probable, significant, adverse environmental impacts that were not already reviewed in the FEIS. The Addendum addressed the following areas of environmental impact: Land Use; Environmental Health; Energy/Greenhouse Gas Emissions; Aesthetics (Height, Bulk and Scale; Light/Glare/Shadows; and Viewshed); Historic Resources; Wind; Transportation, Circulation and Parking; and Construction.

15. Notices of the DS were issued on September 14, 2017, October 9, 2017, and August 5, 2019. Exhibits 40, 41, and 42. The first two notices state that the Department has determined that the referenced proposal "is likely to" have probable significant adverse environmental impacts. The August 5, 2019, notice indicates that the Director of the Department:

> has determined that the referenced proposal (is likely to) could have probable significant adverse environmental impacts 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. SDCI has identified and adopts the City of Seattle's Final Environmental Impact Statement (FEIS) Downtown Height and Density Changes, dated January 2005. This FEIS meets SDCI's SEPA responsibilities and needs for the current proposals and will accompany the proposal to the decisionmaker. The Addendum has been prepared by the Applicant to add specific information on [all of the abovementioned] elements of the environment from the proposal and discusses changes in the analysis in the referenced FEIS. Pursuant to SMC 25.05.625-630, this addendum does not substantially change analysis of the significant impacts and alternatives in the FEIS.

16. Concerning land use, the Director's SEPA analysis states:

> The FEIS included a discussion of land use impacts that were anticipated as a result of height and density changes in the various EIS alternatives, but concluded that the change was consistent with the Comprehensive Plan and neighborhood plans and was not a significant unavoidable adverse impact. The FEIS described potential mitigation including rezones of some areas to promote residential uses, tools to encourage retention and expansion of human service agencies, and using incentives to encourage landmark preservation.
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> The Addendum noted that the proposed development is consistent with development expected at this site in the Belltown Neighborhood and the Downtown Urban Center. The Addendum did not identify mitigation for this item.

> Pursuant to the SEPA Land Use Policy, SMC 25.05.675.J, no significant adverse land use impacts are anticipated from the proposal and no mitigation is necessary.

17. With regard to aesthetic height, bulk and scale impacts the Director's analysis states:

> The height, bulk and scale of the proposed development have been addressed during the Design Review process for the project proposed on the site. Per the Overview policies in SMC 25.05.665.D, the existing City Codes, and regulations to mitigate impacts to height, bulk and scale are presumed to be sufficient. Further, the project size does not present unusual circumstances such as substantially different site size or shape, or topography anticipated by applicable codes or zoning; the development proposal does not present unusual features, or unforeseen design; and the project is not located at the edge of a less intensive zone, which could result in substantial problems of transition in scale. The project is located in an area of downtown Seattle that was intentionally zoned to allow and encourage greater density and additional high-rise residential and commercial towers. Additional mitigation is not warranted under SMC 25.05.675.G.

18. In reviewing potential aesthetic light and glare impacts the Director's analysis states:

> The FEIS did not specifically address light and glare-related impacts or mitigation.
>
> The Addendum described project-specific impacts related to light and glare. The building material reflectivity and angled facades are anticipated to have minimal glare impacts. The Addendum identified potential mitigation, including compliance with Design Review Guidelines, not using excessively-reflective surfaces, street trees to disrupt glare, pedestrian scale lighting with cut-off fixtures, and the presence of nearby buildings that will shade the proposed structure and disrupt glare. Headlights from vehicles entering and exiting the garage are also anticipated to have minimal impacts, and the Addendum did not identify mitigation for this item.
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> Pursuant to the SEPA Light and Glare Policy, SMC 25.05.675.K, no significant adverse impacts are anticipated from the proposal and no mitigation is necessary.

As part of the analysis for light and glare the City considered analyses that measured the loss of light associated with the proposal. Nothing in the record demonstrates that this analysis included data concerning health impacts associated with loss of light levels identified in the analyses, or that the reviewing staff had such a level of expertise that their opinion concerning such impacts could substitute for such an analysis.

19. The Director's analysis reviewed the FEIS and Addendum transportation analyses, and in relevant part stated the following:

> The FEIS analysis considered the direct, indirect and cumulative impacts of the EIS alternatives as they relate to the overall transportation system and parking demand. The subject site is within the area analyzed in the FEIS and the proposed development is within the range of actions and impacts evaluated in the FEIS.
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> SMC 25.05.675.R provides policies to minimize transportation impacts. The FEIS analysis considered the direct, indirect and cumulative impacts of the EIS alternatives as they relate to the overall transportation system and parking demand. The subject site is within the area analyzed in the FEIS and the proposed development is within the range of actions and impacts evaluated in the FEIS.
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> The Addendum and the Transportation Technical report prepared by the Heffron Transportation Inc., estimated that the project would generate a total of 2,290 new daily vehicle trips. Of these, 74 would occur during the morning peak hour, and 130 would occur during the afternoon peak hour. The study evaluated traffic operations at nearby intersections and roadway segments and on the alley adjacent to the site to determine the likely level of impact of the additional project traffic. Future-year conditions assume traffic from other developments in the vicinity of the project.
>
> The transportation impact analysis determined that the project's likely transportation impacts were consistent with the analysis in the FEIS. Specifically, traffic operations during the afternoon peak hour were evaluated at thirteen nearby intersections, including Stewart Street and Virginia between 7th Avenue and 3rd Avenue and Olive Way between 5th and 7th Avenues and alley intersections at Steward Street and Virginia Street. The Addendum noted with or without the proposed project none of the study area intersections would operate worse than LOS D during the PM peak hour.
>
> Alley intersection with Virginia Street is estimated to operate LOS F with or without the project. Alley intersection with Stewart Street is estimated to operate LOS E without the project and LOS F with the proposed project. These operations include increased vehicle and pedestrian traffic associated with the proposed project, traffic from the proposed 5th and Virginia hotel that would share the alley, and a 1% per year increase in existing traffic volumes to provide a cumulative analysis accounting for traffic growth from other projects in the vicinity of the site. The Transportation Technical Report noted that poor operations are common for unsignalized intersections in the downtown core, and vehicles may have to wait on the alley for pedestrians and main street traffic to clear.

The driveway on 5th Avenue is expected to operate at LOS D.

The Downtown EIS concluded that, future development through the year 2020 would generate additional traffic volumes and increase congestion in portions of Downtown, most notably in the Denny Triangle area. Much of this impact would occur with or without zoning changes. Key corridors where congestion was anticipated in the Downtown EIS included Stewart Street, Denny Way, Olive Way, and Howell Street. Traffic operations with the proposed project would be consistent with those in the Downtown EIS. The project is not expected to noticeably increase delay at any of the intersections, and all future levels of service are forecast to operate at a Level of Service (LOS) D or better.

Residential project access is proposed from the alley on the west side of the site. The width of the alley varies between approximately 16' and 18'. With the development of the proposed project and a nearby project at 1933 5th Avenue, portions of the alley will be widened additional 2'.

Loading and unloading activity in the alley currently block traffic. Observations over an 11-hour weekday documented a range of delays with an average of 17 minutes. This average was increased from 6 minutes to 17 minutes as a result of one 3-hour block by a moving truck.

Delivery and loading for both the proposed project and the future development at 1933 5th Avenue would occur from access via the alley and could result in increased loading activity in the alley or potential short-term blockages. The project proposes three truck loading bays (one 35-foot long bay and two 25-foot long bays) anticipated to accommodate the expected loading demand and truck lengths without blocking the alley. In the occasional circumstance where a larger vehicle (such as a residential moving van) needs to access the site, they would be directed to obtain a street use permit from SDOT so that the truck could be parked on the adjacent streets during move-in or move-out.

The Addendum and the Transportation Technical Report, as well as, the Transportation memo dated May 8th, 2019 prepared by Heffron Transportation Inc., listed mitigation including "no stopping or standing" signage to be posted along the building adjacent to the alley, working with residents prior to move-in/move-out to ensure trucks fit in the building's loading dock, and working with others fronting the alley to establish more and/or longer commercial loading zones along 4th Avenue, 5th Avenue, Stewart Street and Virginia Street to accommodate the local truck loading needs. In addition, the Addendum recommended building management inform residents about move-in/move-out restrictions and permit requirements, and schedule use of the loading bays at times with multiple residents may be moving on the same day.

> To mitigate potential impacts from increased delivery activity on the alley, a dock management plan will be required. The objective of the management plan will be to coordinate deliveries among the residential and the commercial tenants. The management plan will provide protocols on the scheduling and timing of deliveries to minimize alley impacts of trucks waiting to access loading berths. If dock management plans are developed for other projects taking access from the segment of the alley bounded by 4th Avenue, 5th Avenue, Virginia Street, and Stewart Street, these plans shall be taken into consideration by the dock management plan prepared for this project, with goals of avoiding delivery schedule conflicts and minimizing waiting times for trucks accessing loading berths from the alley.
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> The SDCI Transportation Planner reviewed the information in the TIA and determined that a dock management plan is warranted to mitigate potential traffic impacts from alley blockages, consistent with per SMC 25.05.675.R. SDCI has analyzed and determined that the required dock management plan will mitigate potential traffic impacts from alley blockages.

20. The City has not adopted any traffic level of service standards for alleys, and vehicular mobility is not considered a function of alley access. Instead, alleys are intended to primarily serve the functions of access for parking, freight loading, and utility services (including waste and recycling services).

21. The Applicant analyzed transportation impacts of the proposal on the alley adjacent to the proposal. The Applicant's analysis included a review of the following: current alley operations; existing alley conditions; peak hour level of service for existing alley operations and for future level of service with the proposal; loading dock use; and, AutoTurn analysis of access to the proposal's loading dock.

22. The Department's Senior Transportation Planner testified that he reviewed the traffic study, and agreed with its conclusions.

23. Following review of the FEIS, the SEPA checklist, and the Addendum and its supporting information, the Department determined that the proposal would have no new probable significant negative impacts to the environment, including but not limited to impacts related to transportation.

Appeal

24. The Appellant filed a timely appeal of the Director's Decision and the DS. Appellant also requested an interpretation ("Interpretation") and appealed the resulting Interpretation. Appellant's Notice of Appeal identified 19 issues numbered III.2.1.a-m, III.2.2a-e and III.2.3.

25. The Interpretation indicated that the Department properly determined that the Project requires three loading berths and that the length of two of the Project's loading berths could be reduced to 25 feet because "site design and use of the property will not result in vehicles extending beyond the property line." SMC 23.54.035.C.2.c. Appellant challenged the decision on loading berth length.

26. As a result of a prehearing motion to dismiss Notice of Appeal issues III.2.1.b, III.2.1.c, III.2.1.d (environmental health claim withdrawn), III.2.1.e, III.2.1.h, III.2.1.j (motion granted to the extent the issue must be supported by argument beyond the contents of the documents) III.2.2.b, III.2.2.c, and III.2.2.e were withdrawn or dismissed.

27. The motion to dismiss argued that Appellant's claims related to transportation impacts should be dismissed, because such issues are exempted from SEPA appeals pursuant to RCW 43.21C.500.

28. Appellant's Notice of Appeal SEPA issues related to transportation impacts were dismissed pursuant to RCW 43.21C.500.

    RCW 43.21C.500 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.

    RCW 43.21C.500 was adopted in 2019, and there are no published decisions concerning its interpretation or application.

    In an order on the City's and Applicant's prehearing motion, the Examiner found that the Project falls within the scope of the projects described in RCW 43.21C.500(1), because it is a mixed-use project, and no evidence indicates that there has been a department of

transportation determination that the project will have significant adverse impacts to the state-owned transportation system.

The parties raised competing claims as to whether the Project was, or was not, consistent with the criteria in RCW 43.21C.500(1)(a) and (b), and as this is a fact intensive determination, the Examiner bifurcated the scheduled hearing and provided that the hearing would initiate with an opportunity for the parties to present evidence and argument as to whether the Project was or was not consistent with the criteria in RCW 43.21C.500(1)(a) and (b), and that if the Project was found to meet the criteria of RCW 43.21C.500(1)(a) and (b), then issues raised by the Appellant concerning transportation impacts would be dismissed.

At hearing, the City and Applicant demonstrated that the project is consistent with the transportation element of the City's comprehensive plan, thus satisfying RCW 43.21C.500(1)(a).

The parties presented conflicting argument and evidence concerning whether the project meets the criteria of RCW 43.21C.500(1)(b)(ii). Central to these arguments was whether the City had adopted ordinances that addressed the potential traffic impacts related to the proposal alleged by the Appellant. The City presented as part of its argument a list of various ordinances concerning Appellant's issues. The Examiner rejected the City and Applicant's argument that *any* Code that merely concerned or even named the type of impact identified by Appellant would be adequate to show compliance with RCW 43.21C.500(1)(b)(ii), because the statute requires that such ordinances "expressly" mitigate such impacts and a mere reference to or naming of an impacts fails to show such mitigation. The Examiner also rejected the Appellant's argument at the other extreme that such ordinances needed to expressly mitigate the impacts of the specific project at issue (e.g. the specific project at issue would have to be identified by the ordinance), because the statute indicates the ordinances should be of "general application."

The City's list of ordinances included ordinances of general application adopted by the City that expressly mitigated traffic or parking impacts alleged by the Appellants including, but not limited to:

a. Failure to meet applicable concurrency LOS standards;
b. traffic impacts to alleys;
c. stopping, standing, or parking of a vehicle in an alley; and,
d. generally adverse traffic impacts.

Thus, in accordance with RCW 43.21C.500(1)(b)(ii), these traffic impact issues are exempt from appeal under SEPA, and the Examiner orally dismissed them at the hearing. The Appellant argued that some of the traffic impacts it intended to address at hearing were not encompassed by the issues that were dismissed, and that the Code did not provide express

mitigation for such impacts, and the Examiner left these to be addressed later in the hearing.[1]

29. The following appeal issues were addressed at the hearing:[2]

a. The Project will have probable significant adverse impacts related to traffic and transportation, public facilities (the alley) and safety. The Project will have significant adverse traffic circulation, loading, and access impacts as well as vehicular and pedestrian safety issues associated with alley. (Notice of Appeal Issue III.2.1.a).

b. Mitigation measures were not identified in accordance with SMC 25.05.675.O and R.2 for impacts to the alley under SMC 25.05.675.F. (Notice of Appeal Issue III.2.1.d (part)).

c. The FEIS and Addendum scope is incomplete and the scoping process was not followed. (Notice of Appeal Issue III.2.1.f).

d. The FEIS and Addendum do not contain all of the information required by WAC 19711-440. There is no summary or discussion of existing environment for many elements of environment. (Notice of Appeal Issue III.2.1.g).

e. A new EIS was required instead of the Addendum because the Project received a DS. (Notice of Appeal Issue III.2.1.i).

f. The Department cannot rely on the DEIS and FEIS because they do not adequately address environmental considerations for the Project as required by RCW 43.21C.030 and RCW 43.21C.034. (Notice of Appeal Issue III.2.1.j).

g. The Department cannot rely on the DEIS and FEIS because they are not accurate and are outdated, thus contravening RCW 25.05.600. (Notice of Appeal Issue III.2.1.k).

h. A supplemental EIS is required under WAC 197-11-405, -600 and WAC 197-11-620 because there are substantial changes and new information. (Notice of Appeal Issue III.2.1.l).

i. The Department failed to conduct an alternatives analysis as required by RCW 43.21C.030, WAC 197-11-070(1)(b), WAC 197-11-400, WAC 197-11-402, WAC 197-11-440(5) and WAC 197-11-792(2)(b). The alternatives are not adequate and there is no "no action alternative." (Notice of Appeal Issue III.2.1.m).

j. The Project is inconsistent with the Downtown and Belltown Design Guideline C.6 concerning alley design. (Notice of Appeal Issue III.2.2.a).

k. SDCI erred when it concluded the Design Review Board decision is consistent with the Downtown and Belltown Design Guideline C.6. (Notice of Appeal Issue III.2.2.d).

[1] These issues were addressed as part of closing briefing by the parties, and are addressed below in the conclusions section.

[2] Consistent with the Examiner's decision to allow the parties to make a factual record, these include appeal issues dismissed under RCW 43.21C.500.

l. The Code Interpretation regarding the loading docks was incorrect under SMC 23.54.035 for the reasons stated in the request for Code Interpretation. (Notice of Appeal Issue III.2.3).

30. At the hearing, the Appellant presented testimony concerning transportation impacts in the alley relating to the Project by Ross Tilghman, Frank Rose, Ken Erickson, Megan Kruse, and John Sosnowy. Mr. Tilghman presented comments on the FEIS and Addendum and his opinions regarding loading and transportation impacts to the alley, the Interpretation and consistency with Design Guideline C6. Mr. Rose is a former truck driver and presented testimony relating to deliveries and the loading berths. Mr. Erickson is the owner of a security company and presented testimony regarding the Escala condominium's loading operations. Ms. Kruse is a communications consultant and presented testimony regarding exhibits she prepared. Mr. Sosnowy is an Escala resident and presented testimony regarding a range of topics, including the Escala condominium's loading operations.

31. The Applicant presented testimony by Marni Heffron, Marco Felice, and Ted Caloger. Ms. Heffron testified regarding her analysis of transportation impacts of the Project, including impacts in the alley, Project loading, and the Interpretation. Mr. Felice is a hotel general manager and testified about hotel loading operations. Mr. Caloger is an architect and testified regarding the Project's consistency with Design Guideline C6.

32. The City presented testimony by the Department's Senior Transportation Planner John Shaw, Seattle Department of Transportation ("SDOT") Transportation Planner Trevor Partap, the Department's Senior Planner Lindsay King, and the Department's Senior Planner Crystal Torres. Mr. Shaw testified regarding his review of the transportation analysis for the Project and Project conditions. Ms. King testified regarding the bases for the Interpretation. Mr. Partap testified regarding alley and loading operations.

33. Ms. Torres testified regarding the Project's consistency with Design Guideline C6. The project places the parking entry at the logical location considering the slope of the Project site, widens the sidewalk on Stewart, widens the alley, uses the same materials in the alley as on the street-facing facades, and provides lighting in the alley for pedestrians. These features address Guideline C6.

Applicable Law

34. SMC 23.76.022 provides that appeals of Type II MUP decisions are to be considered de novo, and that the Hearing Examiner "shall entertain issues cited in the appeal *that relate to compliance with procedures for Type II decisions as required in this Chapter 23.76*, compliance with substantive criteria," (emphasis added) and various determinations under SEPA.

35. In an appeal of an FEIS "the decision of the governmental agency shall be accorded substantial weight." RCW 43.21C.090.

36. "The requirement that only reasonable alternatives be discussed in an EIS is intended to limit the number of alternatives considered, as well as the detailed analysis required for each alternative. WAC 197-11-440(5)(b)(i). The discussion of alternatives in an EIS need not be exhaustive if the impact statement presents sufficient information for a reasoned choice of alternatives." *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn.App. 439, 446, 832 P.2d 503 (1992).

37. SMC Chapter 25.05 details the City's environmental policies and procedures, and SMC Chapter 25.05 Subchapter IV identifies requirements for an Environmental Impact Statement.

38. SEPA provides that a threshold determination shall be prepared "at the earliest possible point in the planning and decision making process, when the principal features of a proposal and its environmental impacts can be reasonably identified." SMC 25.05.055 B. "A proposal exists ... when an agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects *can be meaningfully evaluated.*" SMC 25.05.055.B.l (emphasis added). "The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts." SMC 25.05.055.B.l.a.

39. SMC 25.05.330 directs that, in making a threshold determination under SEPA, the responsible official shall determine "if the proposal is likely to have a probable significant adverse environmental impact ...." "Probable" means "likely or reasonably likely to occur...." SMC 25.05.782. "Significant" means "a reasonable likelihood of *more than a moderate adverse impact* on environmental quality." SMC 25.05.794 (emphasis added). "If the responsible official determines that a proposal **may** have a probable significant adverse environmental impact, the responsible official shall prepare and issue a determination of significance (DS) substantially in the form provided in Section 25.05.980." SMC 25.05.360.A (emphasis added).

40. SMC 25.05.335 directs the lead agency to "make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal," and where "the agency concludes that there is insufficient information to make its threshold determination" calls for the lead agency to take additional steps that may include seeking additional information from the applicant, or making its own further study.

41. SMC 25.05.402 calls for the following in EIS preparation:

> EISs need analyze only the reasonable alternatives and probable adverse environmental impacts that are significant. Beneficial environmental impacts or other impacts may be discussed.
>
> The level of detail shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or referenced.

> Description of the existing environment and the nature of environmental impacts shall be limited to the affected environment and shall be no longer than is necessary to understand the environmental consequences of the alternatives, including the proposal.

SMC 25.05.402.A, B and D.

42. The SEPA policy on height, bulk, and scale explains that the City's adopted land use regulations are intended to provide "for a smooth transition between industrial, commercial, and residential areas," and to preserve neighborhood character and reinforce natural topography by controlling development's height, bulk and scale. The policy acknowledges that "zoning designations cannot always provide a reasonable transition in height bulk and scale between development in adjacent zones," SMC 25.05.675.G.1, and affords limited authority for requiring mitigation of height, bulk and scale impacts. SMC 25.05.675.G.2. However, the policy concludes by stating that a project approved through the design review process is presumed to comply with the SEPA policy on height, bulk, and scale, and that the presumption may be rebutted "only by clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated." SMC 25.05.675.G.2.c.

43. SMC 25.05.440.D.2.f requires an EIS to "Present a comparison of the environmental impacts of the reasonable alternatives, and include the no action alternative. Although graphics may be helpful, a matrix or chart is not required. A range of alternatives or a few representative alternatives, rather than every possible reasonable variation, may be discussed."

44. SMC 25.05.448 provides:

> SEPA contemplates that the general welfare, social, economic, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives and in making final decisions. However, the environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision or to contain the balancing judgments that must ultimately be made by the decisionmakers. Rather, an environmental impact statement analyzes environmental impacts and must be used by agency decisionmakers, along with other relevant considerations or documents, in making final decisions on a proposal. The EIS provides a basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA, because it provides information on the environmental costs and impacts. SEPA does not require that an EIS be an agency's only decisionmaking document.

45. Concerning mitigation measures identified in an EIS, SMC 25.05.660.B provides:

EISs are not required to analyze in detail the environmental impacts of mitigation measures, unless the mitigation measures:

1. Represent substantial changes in the proposal so that the proposal is likely to have significant adverse environmental impacts, or involve significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; and
2. Will not be analyzed in a subsequent environmental document prior to their implementation.

46. SMC 25.05.360.D provides, "If at any time after the issuance of a DS a proposal is changed so, in the judgment of the lead agency, there are no probable significant adverse environmental impacts, the DS shall be withdrawn and a DNS issued instead."

47. The purpose of Design Review is to "[e]ncourage better design and site planning to help ensure that new development enhances the character of the city and sensitively fits into neighborhoods while allowing diversity and creativity." SMC 23.41.002.A.

48. The Citywide Guidelines and Council-approved neighborhood design guidelines "provide the basis for Design Review Board recommendations and City design review decisions." SMC 23.41.010.

49. SMC 23.41.014 describes the design review process. "Based on the concerns expressed at the early design guidance public meeting or in writing to the Design Review Board, the applicable guidelines of highest priority to the neighborhood, referred to as the 'guideline priorities,' shall be identified. The Board shall incorporate any community consensus regarding design expressed at the meeting into its guideline priorities, to the extent the consensus is consistent with the design guidelines and reasonable in light of the facts of the proposed development." SMC 23.41.014.C.1.

50. The Director must consider the Board's recommendation. If four or more members of the Board agree to a recommendation, the Director "shall issue a decision that makes compliance with the recommendation of the Design Review Board a condition of permit approval," unless the Director concludes that the recommendation inconsistently applies the design review guidelines, exceeds the Board's authority, conflicts with SEPA conditions or other applicable requirements, or conflicts with state or federal law. SMC 23.41.014.F.3.

Conclusions

1. For the Decision, the Appellant bears the burden of proving that the Director's Decision was "clearly erroneous." *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981). This is a deferential standard of review, under which the Director's decision may be reversed only if the Hearing Examiner, on review of the entire record, and in light of the public

policy expressed in the underlying law, is left with the definite and firm conviction that a mistake has been made. *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001).

2. The Examiner has jurisdiction over the EIS appeal pursuant to Chapter 23.76 SMC. Appeals are considered de novo, and the Examiner must give substantial weight to the Director's decisions. SMC 25.05.680.B.3. The Appellant bears the burden of proving that the FEIS is legally insufficient within the standards set by SEPA. In reviewing the adequacy of the FEIS, the Examiner does "not rule on the wisdom of the proposed development but rather on whether the FEIS [gives] the City . . . sufficient information to make a reasoned decision." *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass*, 90 Wn.App. at 362. In this case, the Appellants hold reasonable concerns regarding the proposal, and its impacts on their residences. However, it is not the Examiner's role to determine that such impacts should not be allowed, but only to determine if the City's environmental review of those impacts is adequate under the standards of SEPA in the context of the legal issues raised by the Appellant.

3. "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). "In determining whether a particular discussion of environmental factors in an EIS is adequate under the rule of reason, the reviewing court must determine whether the environmental effects of the proposed action are sufficiently disclosed, discussed, and substantiated by supportive opinion and data." *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 644, 860 P.2d 390 (1993).

4. To meet its burden of proof under SEPA, the Appellant must present actual evidence of probable significant adverse impacts from the proposal. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002); *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001). As noted above, "significance" is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197–11–794. This burden is not met when an appellant only argues that they have a concern about a potential impact, or an opinion that more study or review is necessary.

5. To the degree Appellant has argued that the City is procedurally barred by SEPA from adopting the FEIS and using the Addendum, the appeal is denied, because the City is permitted to take these actions to fulfill its SEPA procedural requirements. *See e.g.* SMC 25.05 Sub-chapter IV; WAC 197-11-625: and WAC 197-11-630. Courts have consistently upheld SEPA's rules allowing for reuse of existing environmental documents "[t]o avoid 'wasteful duplication of environmental analysis and to reduce delay." *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 50, 52 P.3d 522 (2002).

> Adoption of an existing EIS is explicitly authorized when "a proposal is substantially similar to one covered in an existing EIS." If an agency adopts existing documents, it must independently assess the sufficiency of the document, identify the document and state why it is being adopted, make the adopted document readily available, and circulate the statement of adoption.

Id. at 51. (citations omitted).

Generally, there is no procedural error under SEPA simply because an Addendum does not include the items of concern to Appellant where the adopted FEIS the Addendum is supplementing has adequately addressed these issues. The Appellant cites no authority showing that where an EIS is adopted and an Addendum has been issued, that a new alternatives analysis, discussion of WAC 197-11-440 components, scoping process, or comment period are required under SEPA. Finally, the City specifically provides for the use of an Addendum to satisfy SEPA requirements stating "Existing documents may be used for a proposal by employing one (1) or more of the following methods . . . [a]n 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." SMC 25.05.600.D.3. In addition, for these reasons and the conclusions regarding impacts below, the Appellant's argument that the City was required to develop a Supplemental Environmental Impact Statement instead of an Addendum should be denied.

6. The FEIS included an analysis of a no action alternative, and as the lead agency the City may rely on an adopted environmental document for all its procedural requirements under SEPA, including the alternatives analysis. Courts have held an EIS to be adequate when it included *no* alternatives other than the no action alternative. *Coalition for a Sustainable 520 v. U.S. Dep't of Transportation,* 881 F. Supp. 2d 1242, 1258-60 (2012); *Citizens All. to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 894 P.2d 1300 (1995). Appellant has not demonstrated this was not adequate to meet SEPA's alternative analysis requirement.

7. The Appellant argues that the notices of the DS issued September 14, 2017, and October 9, 2017, indicate that the proposal would have certain probable adverse environmental impacts, and lists the impacts that the City has identified for the DS. The Appellant argues that the City has decided any such impacts listed in the notice would occur, and as a result, the Appellant can then avoid its burden of proof and need not demonstrate the probability or significance of any such impacts. However, Appellant fails to cite to the final revised notice for the DS issued on August 5, 2019, which only identifies certain probable significant negative environmental impacts that *could* occur. Appellant's argument assumes that because a DS was issued that the Department found that the proposal would have new probable significant adverse environmental impacts that were not identified in the FEIS, and that these were listed in the notice. This goes explicitly against the Director's determination in the Decision, and the record of the hearing where there is no evidence of any probable significant adverse environmental impacts except those originally addressed

in the FEIS. The notice merely lists potential significant impacts that could occur. It is not a definitive listing of probable significant adverse environmental impacts that the Director attributes to the proposal.

8. At no time did the Department determine that there would be no probable significant adverse environmental impacts for purposes of WAC 197-11-340. Instead, the Department determined that the proposal could have probable significant adverse environmental impacts as detailed in the FEIS, but that the proposal would have no new probable significant adverse environmental impacts beyond those addressed in the FEIS.

9. Appellant argues that the FEIS as a programmatic EIS cannot substitute for a projectspecific EIS. Appellant argues that as a programmatic EIS the FEIS has failed to address required SEPA project level analysis. The FEIS 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 FEIS specifically anticipated projects of the type represented by the proposal. The DS reflects the Department's determination that it is probable, that the proposal will have certain negative environmental impacts that were identified in the FEIS. The Department did not find that there would be any new probable significant environmental impacts at the project level. In addition, Appellant has not demonstrated that there would be any probable significant environmental impacts caused on the site specific level, and has therefore failed to meet its burden in demonstrating that the Department's analysis of such impacts was inadequate.

10. The Appellant argues that the proposal's SEPA analysis is inadequate, because it fails to identify mitigation for the types of significant impacts that are listed in the notice for the DS. However, Appellant has not demonstrated that there will be any new probable significant environmental impacts that were not identified, analyzed, and mitigated for in the FEIS, therefore there was no requirement for new mitigation to be identified for the proposal.

11. At the close of hearing the Examiner provided the Appellant the opportunity to identify in written closing statement issues that it believed were not encompassed by the traffic impact issues that were dismissed, because the Code did not provide express mitigation for such impacts in accordance with RCW 43.21C.500.(1)(b)(ii). The Appellant identified the following six issues: (1) the Project will cause conflicts with the new streetcar on Stewart Street causing significant adverse traffic impacts; (2) the Project will cause congestion and safety problems at the intersection of the alley and Stewart Street which will have significant adverse impacts to pedestrians, bicyclists, and drivers on Stewart Street; (3) the Project will cause conflicts between trucks attempting to access the Project loading bay and residents attempting to access the parking garage which will cause significant adverse impacts in the alley; (4) The lack of curbside parking and loading/unloading opportunities in the near vicinity of the Project will cause significant adverse traffic impacts; (5) The existing obstructions in the alley, including but not limited to solid waste and recycling containers, ducts, electrical boxes, will obstruct vehicle access and will, in turn, cause significant adverse impacts in the alley; and (6) The cumulative impacts of the Altitude

Project, the Escala, and the proposed 5th and Virginia project will cause congestion problems in the alley that will have significant adverse impacts to residents, hotel guests, emergency vehicles, solid waste and recycling vehicles, delivery vehicles, and other users of the alley.

First, these alleged impacts are all transportation impacts pursuant to RCW 43.21C.500.[3] In addition, the Applicant and City provided citations to Code provisions of general applicability that expressly mitigate each of the six impacts identified by the Appellant as remaining issues. City and Applicant's Joint List of Mitigating Ordinances at 2-17. Therefore, these issues are subject to the appeal exemption of RCW 43.21C.500 and should be dismissed.

12. Because Appellant's Notice of Appeal issues related to transportation have been dismissed pursuant to RCW 43.21C.500, the Hearing Examiner declines to rule on the sufficiency of the evidence submitted by Appellant to demonstrate significant impacts related to transportation impacts.

13. Appellant did not meet its burden to show that the Interpretation was in error. SMC 23.54.035.C.2.c provides that loading berth length may be reduced to 25 feet "[w]here the Director finds, after consulting with the property user, that site design and use of the property will not result in vehicles extending beyond the property line." The Applicant provided analysis to the Department, demonstrating that most delivery vehicles will fit within the two 25-foot berths and that longer delivery vehicles will fit within the 35-foot berth. Ms. King testified that the Department reviewed and agreed with this analysis. The Appellant provided evidence that some larger trucks would not fit in the loading berths, but trucks longer than 26 feet are not allowed to service the Project under a condition contained in the Decision. Applicant and City demonstrated that the Project's loading berths will accommodate trucks up to 26 feet in length without vehicles extending over the property line.

14. The design review process strives to incorporate public comment, while also offering the oversight of experienced design professionals. The public has had the opportunity to provide their comments, and those comments are reflected in the record and in the Board's recommendations. The Appellants have not shown that the Director's Decision accepting the recommendations of the Board, including departures from the development standards, was clearly erroneous.

15. Appellant alleged that the Project is not consistent with Downtown and Belltown Design Guideline C6. The Board specifically identified Downtown Guideline C6 as a Priority Guideline in its review, and the record reflects conformance of the proposal with Guideline C6.

[3] RCW 43.21C.500.(2) provides "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."

16. On review of the entire record, the Director's design review decision was not shown to be clearly erroneous, and it should therefore be affirmed.

17. The adequacy of the scope of the environmental analysis and scoping process was raised in Notice of Appeal Issue III.2.1.f, but this issue was not addressed at hearing, or by the Appellant's closing arguments, and is dismissed.

Decision

The Determination of Significance is **AFFIRMED**, and the appeal of the Determination of Significance is **DENIED**. The appeal of the Director's Decision approving design review is **DENIED**.

Entered this 5th day of May, 2020.

s/Ryan Vancil
Ryan Vancil
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **ESCALA OWNERS ASSOCIATION**. Case Number: **MUP-19-031 (DD, DR, SU, W) & S-19-002** in the manner indicated.

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Dated: May 11, 2020

/s/ Angela Oberhansly
Angela Oberhansly
Administrative Specialist

Appendix B:

Key Statutes

Included:

RCW 43.21C.034
RCW 43.21C.501

WAC 197-11-600

REVISED CODE OF WASHINGTON

TITLE 43 – STATE GOVERNMENT-EXECUTIVE

CHAPTER 43.21C – STATE ENVIRONMENTAL POLICY

RCW 43.21C.034 – Use of existing documents.

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.501 – Certain project actions evaluated under this chapter by a city or town planning under RCW 36.70A.040 – When exempt from appeal under this chapter.

(1) Project actions described in this section that pertain to residential, multifamily, or mixed-use development evaluated under this chapter by a city or town planning under RCW 36.70A.040 are exempt from appeals under this chapter on the basis of the evaluation of or impacts to the following elements of the environment, provided that the appropriate requirements

for a particular element of the environment, as set forth in subsections (2) and (3) of this section, are met.

(2)(a) Transportation. 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 is:

(i)(A) Consistent with a locally adopted transportation plan; or

(B) Consistent with the transportation element of a comprehensive plan; and

(ii)(A) A project for which traffic or parking impact fees are imposed pursuant to RCW 82.02.050 through 82.02.090; or

(B) A project for which traffic or parking impacts are mitigated by an ordinance, or ordinances, of general application adopted by the city or town.

(b) The exemption under this subsection (2) does not apply if the department of transportation has found that the project will present significant adverse impacts to the state-owned transportation system.

. . .

(4) For purposes of this section: . . .

(b) "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.

WASHINGTON ADMINISTRATIVE CODE

TITLE 197 – ECOLOGY, DEPARTMENT OF (ENVIRONMENTAL POLICY, COUNCIL ON)

CHAPTER 197-11 – SEPA RULES

WAC 197-11-600 – When to use existing environmental documents.

(1) This section contains criteria for determining whether an environmental document must be used unchanged and describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA.

(2) An agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents.

. . .

(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).

CERTIFICATE OF SERVICE

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

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Dated this 23rd day of September 2022, at

Seattle, Washington.

s/Sarah Willis
Paralegal
McCullough Hill Leary, PS

MCCULLOUGH HILL LEARY, PS

September 23, 2022 - 12:05 PM

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