

REC'D HEARING EXAMINER
2019 OCT 24 PM 1:14

BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by

ESCALA OWNERS ASSOCIATION

of Decisions Re Land Use Application
for 1903 5th Avenue, Project 3018037

NOTICE OF APPEAL

I. APPELLANT INFORMATION

1. Appellant:

Name: Escala Owners Association, c/o John Sosnowy
Address: 1920-4th Avenue, #2308, Seattle, WA 98101
Phone: (206) 409-4681
Email: john@sosnowy.com

In what format do you wish to receive documents from the Office of Hearing Examiner?

Check One: ☐ U.S. Mail ☐ Fax ☒ Email Attachment

2. Authorized Representative:

Name: Claudia M. Newman, Bricklin & Newman, LLP
Address: 1424 Fourth Avenue, Suite 500, Seattle, WA 98101
Phone: (206) 264-8600
Fax: (206) 264-9300
Email: newman@bnd-law.com and cahill@bnd-law.com

In what format do you wish to receive documents from the Office of Hearing Examiner?

Check One: _____ U.S. Mail _____ Fax X Email Attachment

II. DECISION BEING APPEALED

1. Escala is appealing the Analysis and Decision of the Director of the Seattle Department of Construction and Inspections for Project Number 3018037 dated October 10, 2019. A copy of that decision is attached to this appeal. Escala is also appealing the Director's code interpretation that is required to be issued pursuant to SMC 23.88.020 in response to the request for code interpretation in the attached (and incorporated) letter from Claudia Newman to the Director of SDCI (Oct. 24, 2019).
2. **Property address of decision being appealed:** 1903 5th Ave., Seattle, Washington, 98101.
3. **Elements of decision being appealed. Check one or more as appropriate:**

<u> X </u> Adequacy of conditions	<u> </u> Variance (Departures)
<u> X </u> Design Review and Departure	<u> X </u> Adequacy of EIS
<u> </u> Conditional Use	<u> X </u> Interpretation (See SMC 23.88.020)
<u> X </u> EIS not required	<u> </u> Short Plat
<u> </u> Major Institution Master Plan	<u> </u> Rezone
<u> X </u> Other (specify: <u>See objections to the Decision below</u>)	

III. APPEAL INFORMATION

1. What is your interest in this decision? (State how you are affected by it)

Seattle Downtown Hotel & Residences LLC has proposed to build a 54-story building with a hotel, 233 apartment units, and retail at 5th Avenue and Stewart Street (the "Altitude Proposal") in downtown Seattle. Escala, a 30-story residential tower, is located at the corner of 4th Avenue and Virginia and will share an alley with the proposed development. Escala is home to 408 residents who are all members of the Escala Owners Association. Members of the Escala Owners Association will be significantly and adversely impacted by the Altitude Proposal.

The Altitude Proposal will cause significant adverse traffic and transportation impacts that will directly harm the residents of Escala. The project will have significant adverse traffic circulation, loading, and access impacts as well as vehicular and pedestrian safety issues associated with the alley that runs from Virginia to Stewart between 4th and 5th Avenues. Vehicle traffic and truck loading circulation through the alley is highly constricted given the narrow width of the alley and frequent daily need for service access. Today's traffic taxes the alley already - The alley is too narrow to handle current traffic and servicing demands. This proposal will cause a significant increase in use of the alley and will create significant safety and congestion issues for drivers and pedestrians alike. Escala residents who drive in and near the alley, walk in and near the alley, rely on trash

1 service and other services that occur in the alley will be significantly and adversely affected by the
2 proposal's impacts to the alley.

3 This is just one example of the impacts on the residents of Escala – there are more that will be
4 summarized at the hearing. Overall, a decision in favor of the Escala on the issues raised in this
5 appeal would substantially eliminate or redress the injuries caused to Escala by this proposal.

6 **2. What are your objections to the decision? (List and describe what you believe to be the
7 errors, omissions, or other problems with this decision.)**

8 The Decision by the Director of SDCI was made in error and should be reversed for the following
9 reasons:

- 10 1. The decision violates the State Environmental Policy Act (SEPA), ch. 43.21A, and state
11 and local regulations implementing that law.
 - 12 a. The project will have probable significant adverse impacts related to traffic and
13 transportation, public facilities (the alley), and safety. The project will have
14 significant adverse traffic circulation, loading, and access impacts as well as
15 vehicular and pedestrian safety issues associated with the alley that runs from
16 Virginia to Stewart between 4th and 5th Avenues. Vehicle traffic and truck loading
17 circulation through the alley is highly constricted given the narrow width of the alley
18 and frequent daily need for service access. Today's traffic taxes the public facility
19 (the alley) already – It is too narrow to handle current traffic and servicing demands.
20 The design of the loading berths is deficient and seriously problematic. There is also
21 an inadequate number of loading berths being proposed for the project. The
22 requirement for extensive backing of trucks poses significant safety risks and alley
23 congestion issues. There is not enough space in the alley for additional garbage
24 collection. This proposal will cause a significant increase in use of the alley and will
25 create significant safety and congestion issues for drivers and pedestrians alike. The
26 proposal will cause congestion and safety impacts to the public streets and rights-of-
way in the area. Escala residents who drive in and near the alley, walk in and near
the alley, rely on trash service and other services that occur in the alley will be
significantly and adversely affected by the proposal's impacts to the alley. These
impacts were not adequately disclosed, analyzed, or mitigated in the Addendum or
in the FEIS. The level of analysis and information on these subjects was inadequate
and fell below meeting the burden required by SEPA. Fundamental information
existed regarding impacts that SDCI failed to disclose and failed to include in its
analysis.
 - b. SDCI failed to adequately analyze probable significant adverse impacts that the
Proposal may have related to construction and environmental and human health.
These impacts include, but are not limited to, impacts from contamination caused as
a result of construction dewatering, impacts caused by vapors from contaminants,
and/or contamination of this and other properties in the area. The responsible official

1 erred when she relied on a 16-year-old Phase I Environmental Site Assessment
2 (ESA) and a 14-year old Phase II ESA without requiring or conducting an analysis
3 of changes in the vicinity since the old ESAs were prepared. SDCI should have
4 required both a new Phase I and Phase II ESA. Without such information, mitigation
5 of current impacts regarding the contamination of soil and groundwater at the subject
6 site and subsequent impacts from construction to the environment and human
7 receptors cannot possibly be adequately addressed. Current conditions and impacts
8 were not adequately disclosed, analyzed, or mitigated in the Addendum or in the
9 FEIS. The level of analysis and information collected on this issue was inadequate
10 and fell below meeting the burden required by SEPA.

- 11
- 12 c. The responsible official erred when she did not require a reasonable assessment of
13 the present and planned condition and capacity of the impacted alley as authorized
14 in SMC 25.05.675.O.1.
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- 16 d. The FEIS, Addendum, and SEPA decision did not adequately identify mitigation
17 measures that could be implemented or might be required for this proposal. The
18 Addendum fails to identify obvious and feasible mitigation that could be applied to
19 this project as explicitly stated in SMC 25.05.675.O and R.2 such as applying
20 conditions to lessen the proposals demand for services and impacts on the alley
21 and/or requiring improvements to the alley. The responsible official erred when she
22 failed to identify mitigation for and when she concluded that no further mitigation is
23 warranted for impacts to environmental health per SMC 25.05.675.F because she
24 failed to adequately analyze the impacts to environmental health in the first place.
- 25
- 26 e. The Addendum's statement that the substantive SEPA policies in SMC 25.05.675
 limit the scope of procedural disclosure and analysis of environmental impacts is
 incorrect. The scope of procedural disclosure and analysis of impacts that is required
 under SEPA is broader than and goes beyond substantive limitations in SMC
 25.05.675.
- f. The scope of impacts that were addressed by the Addendum and FEIS was
 incomplete. SDCI failed to follow the proper scoping process for a proposal that
 receives a determination of significance.
- g. The FEIS and Addendum do not contain all of the information for the Altitude
 Proposal that is required by WAC 197-11-440. There is no "Summary" for the
 proposal as described and required by WAC 197-11-440(4) and there is no
 discussion of the existing environment for many of the elements of the environment
 as is required by WAC 197-11-440(6).
- h. The Design Review process violated SEPA regulatory and case law requirements
 that disclosure and analysis of environmental impacts must occur before a decision
 maker commits to a particular course of action. SEPA review must inform decision
 makers and the public of environmental impacts and mitigation measures that would

1 avoid or minimize those impacts of the proposal *before* decisions are made. In direct
2 violation of law, the Design Review Board's decisions were not informed by SEPA.
3 The Design Review Board improperly made decisions that locked in the design
4 during the Design Review process before SEPA review was completed. The Board's
5 Recommendation unlawfully built momentum in favor of the facility without the
6 benefit of environmental review in violation of SEPA. The Design Board's action
7 also improperly limited the choice of alternatives before SEPA review was
8 conducted. As it stands, the Addendum misrepresents and downplays the impacts in
9 an attempt to justify approval of the design approved by the Design Review Board
10 before SEPA review was completed. To the extent that the Seattle code requires this,
11 we challenge the legality of those provisions as applied in this case.

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- i. By relying on an Addendum instead of preparing an EIS for the proposal, SDCI violated the process that is required by SEPA for environmental review of the Altitude Proposal. SDCI issued a Determination of Significance for the Altitude Proposal. Based on that, SDCI was required to follow the specific process set forth in SEPA and its accompanying regulations for environmental review of a project that receives a DS. A project that has significant impacts must follow the rules for proper scoping, the Draft EIS, comments on the DEIS, and then issuance of the final EIS for the proposal. The Addendum was not an EIS, did not contain the proper content for an EIS, and did not follow the proper process for an EIS. SDCI instead relied on a Draft and Final EIS that were issued 15 years ago for the Downtown Height and Density Changes, which were area wide programmatic rezone proposals for downtown Seattle. The Downtown Height and Density Changes is not the same thing as the Altitude Proposal. It was error for SDCI to take the position that that this old EIS for a completely different underlying government action could be relied on as the EIS for the Altitude Proposal. At the very least, SDCI violated (among other rules and regulations) with this approach: RCW 43.21C.031; WAC 197-11-310; WAC 197-11-360; WAC 197-11-400; WAC 197-11-408; WAC 197-11-440; WAC 197-11-460; WAC 197-11-500 through 570; WAC 197-11-600; WAC 197-11-736; WAC 197-11-980; WAC 197-11-535. SDCI created its own makeshift process for review of this proposal - preparing an "Addendum" to a 12 year old programmatic EIS - without even purporting to meet the requirements of SEPA for environmental review of this site specific project. SDCI's conclusion that the project produces no probable, significant, adverse environmental impacts that were not already studied in the 2005 EIS is incorrect and made in error. SEPA rules concerning Addenda, WAC 197-11-600 and WAC 197-11-625, do not support this process.
 - j. SDCI cannot rely the 2003 DEIS and 2005 FEIS for environmental review of the Altitude Proposal because they do not adequately address environmental considerations for the Altitude Proposal set forth in SEPA as is explicitly required by RCW 43.21.030 and .034.
 - k. SDCI cannot rely the 2003 DEIS and the 2005 FEIS for environmental review of the Altitude Proposal because they are not accurate and are not reasonably up to date as

1 is required by SMC 25.05.600. The information in the old review is 15 years old. It
2 is outdated and no longer accurate.

- 3 1. Even if SDCI could rely on the 2003 DEIS and 2005 FEIS for environmental review
4 of this proposal, SDCI was still required to prepare a supplemental EIS for the
5 Altitude Proposal pursuant to WAC 197-11-405, WAC 197-11-600, and WAC 197-
6 11-620. There are substantial changes to the proposal (in fact it's not even the same
7 proposal) and there is new information about environmental impacts. The
8 Addendum that was issued was not an SEIS, did not contain the proper content for
9 an SEIS, and did not follow the proper process for an SEIS.
- 10 m. SDCI failed to conduct an alternatives analysis for the Altitude Proposal as is
11 required by RCW 43.21C.030; WAC 197-11-070(1)(b); WAC 197-11-400; WAC
12 197-11-402; WAC 197-11-440(5); and WAC 197-11-792(2)(b). The environmental
13 documents do not contain an adequate analysis of alternatives and their impacts as
14 is required by law. SDCI did not evaluate a "no-action" alternative to the proposal.
15 These are fundamental errors that render the Addendum inadequate on its face.
- 16 2. The design review decisions and the process leading up to those decisions violated state and
17 local laws.
- 18 a. The Altitude Proposal is inconsistent with the Downtown and Belltown Design
19 Guidelines addressing the alley design, specifically those guidelines listed in C.6.
20 SDCI and the Design Review Board misapplied and misconstrued these Design
21 Guidelines.
- 22 b. The Design Review Board decisions were made in error because they were not
23 informed by environmental review as is required by SEPA. As a matter of law,
24 design review decisions should not have been made until after the SEPA process was
25 completed. To the extent that SDCI argues that the Seattle code required the process
26 that was followed in this case, this appeal challenges the relevant code provisions as
they were applied.
- c. The Design Review Board violated SMC 23.41.014 because the members of the
Board did not review the written public comments that were submitted regarding
design review issues.
- d. SDCI erred when it concluded that the decision and recommendation of the Design
Review Board was consistent with the Downtown and Belltown Design Review
Guidelines.
- e. SDCI erred when it approved the Design Review Board recommendation because
the recommendation conflicted with conditions and mitigation that should have been
applied by SDCI pursuant to SEPA and because the recommendation itself violated
SEPA.

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2 3. The Director's construction and application of SMC 23.54.035 to the Altitude Proposal was
3 made in error for the detailed reasons that are outlined in the attached (and hereby
4 incorporated) request for code interpretation, letter from Claudia Newman to SDCI (October
5 24, 2019). Escala is hereby appealing the Director's interpretation of SMC 23.54.035 as
6 applied to the Altitude Proposal.

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8 **3. Relief Requested.**

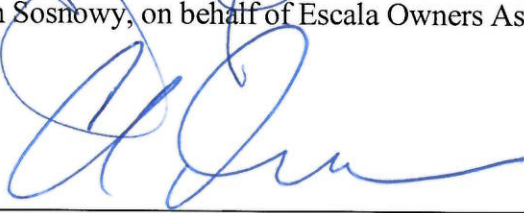
9 Appellant requests that the Hearing Examiner reverse the Director's decision and remand with
10 instructions to prepare an Environmental Impact Statement for the Altitude Proposal as required by
11 law. Appellant also requests that the remand include specific instructions requiring that SDCI
12 mitigate the adverse impacts to Appellant pursuant to the city's substantive SEPA authority as is
13 authorized by law. Appellant requests that the Hearing Examiner reverse the decision of SDCI with
14 respect to the design review and remand for further analysis of the consistency of the Altitude
15 Proposal with the design guidelines to occur only after SDCI has prepared a proper Environmental
16 Impact Statement for the Altitude Proposal. Appellant requests that the order direct the Board to
17 require changes to the proposal to make it consistent with the Design Guidelines.

18 Appellant requests that the Hearing Examiner reverse the Director's interpretation of SMC
19 23.54.035 in whole and issue a ruling that confirms that Appellant's interpretation and application
20 of that code provision is the correct interpretation.

21 Appellant requests any and all additional relief that is necessary to address and alleviate the errors
22 raised by the objections to the Decisions that are presented in Appellant's appeal.

23 Filed on behalf of ESCALA OWNERS ASSOCIATION this 24th day of October, 2019.

24
25 By: 
26 John Sosnowy, on behalf of Escala Owners Assoc.

And by: 
Claudia M. Newman
BRICKLIN & NEWMAN, LLP
Representative of Escala Owners Assoc.