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	NO. MUP-19-031 (DD, DR, S, SU,W) ESCALA OWNERS ASSOCIATON'S RESPONSE TO CITY AND APPLICANT'S JOINT MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

There are no credible grounds for dismissal of Appellants claims that are challenged in the City and Applicant's Joint Motion for Partial Dismissal. For the reasons presented in this response, Appellant Escala Owners Association requests that the Hearing Examiner deny the motion to dismiss.

II. STATEMENT OF FACTS

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.[1] Escala is home to 408 residents who

[1] To a large extent, factual statements that are made in this response brief are from the Notice of Appeal, including the decision on appeal, which is an attachment to that Notice of Appeal. However, this response also contains factual statements without citation that are consistent with the allegations in the Notice of Appeal and that are based on what the

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

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 impacts to the alley that it shares with Escala, which runs from Virginia to Stewart between 4th and 5th Avenues. The proposal will cause traffic congestion, circulation, loading, and access impacts as well as vehicular and pedestrian safety issues. 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. The Altitude proposal will cause a significant increase in use of the alley and will create significant safety and congestion issues for drivers and pedestrians alike.

The Seattle Department of Construction and Inspections (SDCI) issued a "Determination of Significance" pursuant to SMC 25.05.360 for the Altitude Proposal. For its environmental review of the Proposal, SDCI prepared an Addendum (Sept. 14, 2017) to a programmatic FEIS that was published in 2005. The 2005 FEIS that SDCI relied on for review of the Altitude Proposal was prepared for the purpose of examining five alternative zoning proposals for consideration by the Seattle City Council. These so-called "Downtown Seattle Height and Density Changes" consisted generally of an area-wide programmatic rezone proposal for portions of the Denny Triangle, Commercial Core, and Belltown neighborhoods within Downtown Seattle. The alternatives presented were different combinations of increases in allowable maximum heights and densities throughout the Downtown area. The Draft EIS for Downtown Height and Density Changes was issued in November,

evidence at the hearing is intended to show. This is allowed in a response to a motion to dismiss because, as is explained in the standard of review below, any conceivable set of facts consistent with the allegations in the complaint can be used to withstand a motion to dismiss for failure to state a claim.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

2003 and the Final EIS for Downtown Height and Density Changes was issued in January, 2005. The project proponent for the proposed legislation was the City of Seattle.

The Altitude Proposal went through a Design Review process before the Seattle Design Review Board, which resulted in specific recommendations to SDCI.

On October 10, 2019, SDCI issued a decision adopting the Downtown Height and Density Draft and Final Environmental Impact Statements (2003 and 2005), as supplemented by the EIS Addendum dated September 14, 2017. SDCI also accepted the Design Review Board's recommendations and approved the proposed design subject to conditions set forth in the decision.

The appeal that is currently before the Hearing Examiner followed.

III. ARGUMENT

A. Standard of Review

The City and Applicant's (hereinafter referred to as "Respondents") Joint Motion for Partial Dismissal requests that the Hearing Examiner dismiss certain issues raised in Escala's Notice of Appeal pursuant to Hearing Examiner Rules of Practice and Procedure (HER) 3.02. That rule states that an appeal to the City of Seattle Hearing Examiner "may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay." HER 3.02(a).

This language reflects the language in Washington State Superior Court Civil Rule (CR) 12(b)(6), which states that a defendant may file a motion to dismiss based on a failure to state a claim upon which relief can be granted. The Hearing Examiner rules state that the Examiner may look to the Superior Court Civil Rules for guidance on the interpretation of its rules. HER 1.03(c). Defendants face a steep burden when moving to dismiss for failure to state a claim under the civil rules. "Dismissal

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

under CR 12 should be granted sparingly and with care." *Swinomish Indian Tribal Cmty. v. Skagit Cty.*, 138 Wn. App. 771, 776, 158 P.3d 1179, 1181 (2007). Under CR 12(b)(6), the factual allegations in the notice of appeal must be accepted as true. *Eugster v. Wash. State Bar Assoc.*, 198 Wn. App. 758, 763, 397 P.3d 131 (2017). Any conceivable set of facts consistent with the allegations in the complaint can be used to withstand a CR 12(b)(6) motion. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190, 1191 (1978).

In a 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim. *Id. citing Brown v. MacPherson's*, 86 Wn.2d 293, 545 P.2d 13 (1975); *Grimsby v. Samson*, 85 Wn.2d 52, 530 P.2d 291 (1975); *Hofto v. Blumer*, 74 Wn.2d 321, 444 P.2d 657 (1968); *Barnum v. State*, 72 Wn.2d 928, 435 P.2d 678 (1967). Therefore, any hypothetical situation conceivably raised by the appeal defeats a motion to dismiss if it is legally sufficient to support the claim. *Id.* at 674-75.

Rule 1.03(c) states that when questions of practice or procedure arise that are not addressed by the Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process.

B. The Hearing Examiner Does Not Have Legal Authority to Dismiss Claims in an Appeal on the Grounds that They Are Insufficiently Specific.

Respondents' Motion requests dismissal of the objections in paragraphs 2.1.e, 2.1g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m in the Notice of Appeal on the grounds that they are "insufficiently specific." Joint Motion at 2. The Hearing Examiner rules indicate that an appeal to the Examiner must contain, among other things, a "brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed." HER 3.01.d. However, the rules do not grant the

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Hearing Examiner with authority to dismiss an appeal on the grounds that an appellant failed to articulate "specific objections" to the decision being appealed. *See* HE Rule 3.01; 3.02.

An appeal may be dismissed without a hearing only if "the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay." HER 3.02(a). An argument that certain objections stated in the Notice of Appeal are "not sufficiently specific" is not an assertion that the Notice of Appeal fails to state a claim and/or that it is without merit, frivolous, or brought merely to secure delay. There is no language anywhere in the Hearing Examiner Rules that would allow the Examiner to dismiss an appeal because the objections that are stated are not "specific" enough.

The remedy set forth in the rules for a situation where the objections to the decision are not specific enough is clarification. Specifically, the rules state:

> **CLARIFICATION.** On the motion of a party, or at the Hearing Examiner's own initiative, the Hearing Examiner may require that the appellant provide clarification, additional information, or other submittal that the Hearing Examiner deems necessary to demonstrate the basis for the Hearing Examiner's jurisdiction, or to make the appeal complete and understandable. A request for clarification must be made in a timely manner so that other parties have a reasonable opportunity to respond before hearing.

HER 3.04.

There is no limit to how many times an Appellant can be asked to clarify their issues long as long as the requests for clarification happens early enough in the proceeding prior to the hearing. There is no prohibition against allowing Appellants to provide additional clarification (beyond a first attempt) if the Applicant or City indicate that the initial clarification did not go far enough and/or if they express a need for more detail or additional clarification before the hearing. The goal of a clear

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

appeal is for everyone to know what issues are being presented, not to bar appellants from presenting valid legal claims.

The Hearing Examiner's rules on this makes sense as a matter of policy. Dismissal is a draconian remedy that undermines principals of due process and fairness. The requirement for "[a] brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed" is itself vague enough to lend itself to varied subjective interpretations about what is required. What level of "specificity" is required exactly? A requirement for specificity in an appeal (especially when what "specificity" means is not entirely clear) should not be employed as a tool for barring appellants from presenting valid legal claims. Requiring that issues be fully clear before the hearing is held is a reasonable remedy that adequately redresses any harm caused by any vagueness in a fair manner for everyone.

It's worth noting that the appeal form that the Hearing Examiner's office provides to appellants doesn't even contain the word "specific." That form states: "What are your objections to the issue being appealed? (List and describe what you believe to be the errors, omissions, or other problems and issues involved.)" Declaration of Claudia M. Newman (Dec. 4, 2019), Ex. 2. The Examiner's appeal form doesn't even follow the language that is in the rule. The idea that an appeal issue could be dismissed for failure to follow the rules when the form itself doesn't even use that same language is patently unfair.

Allowing dismissal (instead of clarification) as a remedy because an objection issue was not "specific" enough would be terrible policy in a forum that is supposed to be accessible to members of the community who do not have or cannot hire an attorney. Appellants who find themselves filing an appeal to the Hearing Examiner days after a land use decision has been issued are, no doubt, overwhelmed by the confounding labyrinth of land use law. The idea that a credible legal issue could

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

be dismissed entirely just because that person did not provide some (undefined) level of specificity in an appeal would be draconian, unfair, and unnecessary. Presumably, that is why the Hearing Examiner rules do not grant authority for such a dismissal.

To the extent that Examiner has dismissed any appeal in the past solely because the objections in the Notice of Appeal were not specific enough, does not warrant continuing to do so in the future considering that it's not allowed by the Hearing Examiner's rules.

As is demonstrated in the following section, the objections presented in Escala's Notice of Appeal and later clarified in the Clarification of Issues were specific enough to understand and know what claims are being presented at the hearing. To the extent that there remains any uncertainty about what Escala's objections are, this response to the motion to dismiss is intended to provide additional clarification and, therefore, should be adequate to answer any remaining questions that Respondents have asserted in their motion about the objections that are raised in Escala's Notice of Appeal.

C. Paragraphs 2.1.e, 2.1g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m Present Specific Objections to the Decision.

Contrary to Respondents contentions otherwise, the statements in paragraphs 2.1.e, 2.1g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m in Escala's Notice of Appeal do provide specific objections to the decision being appealed. Even if the Examiner had authority to dismiss specific objections on the grounds that they were not specific enough, it would be inappropriate to exercise that authority in this case because the Notice of Appeal statements of objections complied with the hearing examiner rule for content in an appeal.

As noted above, the Hearing Examiner rules state that an appeal to the Examiner must be in writing and must contain, among other things, "[a] brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision or action being appealed." Rule 3.01(d).

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Similar to a Complaint that is filed in state or federal court, not every numbered paragraph in Escala's Notice of Appeal constitutes a single legal claim in and of itself. Therefore, it's important to recognize that each paragraph does not necessarily stand alone as a single claim.

The paragraphs that are at issue in the Joint Motion are:

> **Paragraph 2.1** The decision violates the State Environmental Policy Act (SEPA), ch. 43.21A, and state and local regulations implementing that law [because]:
> …
>
> **Paragraph 2.1.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).
>
> …
>
> **Paragraph 2.1.j** SDCI cannot rely on 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.
> …
>
> **Paragraph 2.1.l** Even if SDCI could rely on the 2003 DEIS and 2005 FEIS for environmental review of this proposal, SDCI was still required to prepare a supplemental EIS for the Altitude Proposal pursuant to WAC 197-11-405, WAC 197-11-600, and WAC 197-11-620. There are substantial changes to the proposal (in fact it's not even the same proposal) and there is new information about environmental impacts. The Addendum that was issued was not an SEIS, did not contain the proper content for an SEIS, and did not follow the proper process for an SEIS.
>
> **Paragraph 2.1.m** SDCI failed to conduct an alternatives analysis for the Altitude Proposal as is 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 environmental documents do not contain an adequate analysis of alternatives and their impacts as is required by law. SDCI did not evaluate a "no-action" alternative to the

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> proposal. These are fundamental errors that render the Addendum inadequate on its face.

See Joint Motion at 2; *See* Notice of Appeal at 3-6 (Oct. 24, 2019).

At the prehearing conference, the applicant's request for clarification was specific and narrow: The applicant asked, specifically, whether statements made in 2.1(e), (g),(j), (k),(l), and (m) in the Notice of Appeal were intended to encompass elements of the environment beyond those that are identified in Sections 2.1.(a) and (b). Newman Dec, ¶ 4. In response to this specific request for clarification on the SEPA claims stated above, appellant submitted a written clarification that stated:

> The issues stated in Section 2.1(e), (g),(j), (k),(l), and (m) in the Notice of Appeal (Oct. 24, 2019) are intended to encompass elements of the environment beyond those that are identified in Sections 2.1.(a) and (b). SDCI issued a Determination of Significance (DS) for the land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk, and scale, light, glare, and shadows), wind, historic and cultural resources, transportation and parking and construction elements of the environment for the Proposal. The analysis, disclosure, and process associated with the review of those specifically identified elements of the environment following the issuance of the DS violated SEPA.
>
> The issue stated in Section 2.1(f) in the Notice of Appeal (regarding scoping) is intended to encompass only those elements of the environment that are identified in Sections 2.1(a)-(d).

Appellants Clarification of Issues (Nov. 12, 2019).

Just to be clear, the issues stated in the paragraphs that are addressed in the motion are also meant to encompass the elements of the environment that are identified in paragraph 2.1(a). The word "beyond" in the clarification of issues was intended to be inclusive, not exclusive. Furthermore, the clarification was not used to "amend" the appeal as is asserted by Respondents in their motion. The Notice of Appeal refers to the Determination of Significance, the Determination of Significance identifies the elements of the environment, and the clarification makes it clear that the legal issues

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

presented are relying on the conclusion in the Determination of Significance that the Altitude Proposal will have significant adverse impacts associated with each of the elements of the environment listed therein. It's not entirely clear what the supposed "new claims" are that Respondents believes Appellants have added to their appeal.

Paragraph 2.1.g asserts that the FEIS and Addendum do not contain all of the information for the Altitude Proposal that is required by WAC 197-11-440. WAC 197-11-440 requires that the EIS provide a "summary" of the proposal. That provision states that a "summary" includes a statement about the proposal's objectives, specifying the purpose and need to which the proposal is responding, the major conclusions, significant areas of controversy and uncertainty, if any, and the issues to be resolved, including the environmental choices to be made among alternative courses of adverse impacts that can't be mitigated. The specific objection is that this information was not provided in the 2003 DEIS, the 2005 FEIS, or the Addendum for the Altitude Proposal. No environmental documents for the Proposal contained this information despite that it's required by law.

Paragraph 2.1.g of the Notice of Appeal also states that 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). Appellants clarification of issues established that, in addition to that described in paragraph 2.1.a, this objection applies to land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk, and scale, light, glare, and shadows), wind, historic and cultural resources, transportation and parking and construction elements of the environment. WAC 197-11-440(6) requires that an EIS must include a section that describes the "existing environment that will be affected by the proposal." The specific objection (which is stated in the appeal) is that neither the FEIS nor the Addendum for the Altitude Proposal contains a description of the "existing environment that will be affected by the

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

proposal" any of the elements of the environment that are affected by the proposal. No environmental documents for the Proposal contained this information despite that it's required by law.

Paragraph 2.1.j asserts that SDCI cannot rely on the 2003 DEIS and 2005 FEIS for environmental review of the Altitude Proposal because those documents did not adequately address environmental considerations for the Altitude Proposal as is explicitly required by RCW § 43.21.030 and .034. RCW § 43.21C.030 states that, for major actions significantly affecting the quality of the environment, SDCI is legally obligated to prepare a detailed statement on (1) the environmental impact of that action, (2) the adverse environmental effects which cannot be avoided should the proposal be implemented, and (3) alternatives to the proposed action. This detailed statement is referred to as an Environmental Impact Statement (EIS). In this case, as was asserted in appellants Clarification of Issues, SDCI issued a Determination of Significance for several specific elements of the environment. That means that SDCI concluded that the Altitude Proposal is a major action significantly affecting the quality of the environment under RCW 43.21C.030. This means that, SDCI was required to prepare an EIS for the Altitude Proposal.

As is explained in paragraph 2.1.i, SDCI is relying on the 2005 FEIS for the Downtown Height and Density Changes for the Altitude Proposal. RCW § 43.21C.034 allows SDCI to use the 2005 FEIS as the EIS for the Altitude Proposal only if the 2005 FEIS adequately addresses environmental considerations set forth in RCW § 43.21C.030 for the Altitude Proposal. 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. RCW § 43.21C.034. 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

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

adequate. *Id*. If necessary, the lead agency may require additional documentation to ensure that all environmental impacts have been adequately addressed. *Id.*

Paragraph 2.1.j does not stand alone. That statement provides a legal basis for objecting to the Decision and specific assertions that are associated with this objection are also provided in paragraphs 2.1.a, 2.1.d, 2.1.i, 2.1.k, 2.1.l, and 2.1.m. Overall, the legal claim is that because SDCI issued a DS, it has a legal obligation to meet the requirements of RCW 43.21C.030 and other SEPA laws and regulations set forth in the Notice of Appeal. For the reasons stated in other paragraphs in the Notice of Appeal, SDCI cannot rely on the old DEIS and FEIS to meet those obligations.

Paragraph 2.1.l states that even if SDCI could rely on the 2003 DEIS and 2005 FEIS for environmental review of this proposal, SDCI was still required to prepare a supplemental EIS for the Altitude Proposal pursuant to WAC 197-11-405, WAC 197-11-600, and WAC 197-11-620. The specific objection is that the Altitude Proposal is a site specific proposal that is being proposed on a small individual piece of property by a developer, not a citywide zoning proposal being proposed by the City of Seattle. Fifteen years have passed by and we now have new information about land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk, and scale, light, glare, and shadows), wind, historic and cultural resources, transportation and parking and construction impacts. This paragraph, especially when combined with paragraphs 2.1.a, 2.1.k, and 2.1.m, presents specific objections. The law requires that an SEIS be prepared for the Altitude Proposal and the Addendum that was issued was not an SEIS, did not contain the proper content for an SEIS, and did not follow the proper process for an SEIS.

Paragraph 2.1.m asserts that SDCI failed to conduct an alternatives analysis for the Altitude Proposal as is 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 specific objection is that SDCI issued

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

a Determination of Significance for the Altitude Proposal. That means that SDCI concluded that the Altitude Proposal is a major action significantly affecting the quality of the environment under RCW 43.21C.030. RCW § 43.21C.030 states that, for major actions significantly affecting the quality of the environment, SDCI must conduct an alternatives analysis for the Altitude Proposal. Neither the 2005 FEIS, nor the Addendum contain an adequate analysis of alternatives and their impacts to any of the elements of the environment. SDCI did not evaluate a "no-action" alternative to the Altitude Proposal.

In the end, it's disingenuous for the City and the Applicant to assert that the objections are not specific enough for them to understand. This is not the first time that Escala has raised these issues in front of the Hearing Examiner. The issues presented in the Notice of Appeal in this case are similar to the issues presented in the Notice of Appeal that was filed with the Hearing Examiner in *Escala Owners Association*, HE File No. MUP 17-035. Those issues were fully briefed via a Motion for Summary Judgment and then again in the Closing briefs. SDCI was involved in that appeal and fully briefed these issues. While the applicant is different, the applicant in this appeal is relying on decisions that were made by the Examiner in that case and is represented by the same law firm as the applicant in *Escala Owners Association*, HE File No. MUP 17-035.

D. The Examiner Has Jurisdiction Over Claims that Are Asserted in Paragraphs 2.1.a, 2.1.c, 2.1.d, 2.1.e, 2.1.f, 2.1.g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m.

Respondents argue that claims 2.1.a and 2.1.c should be dismissed in their entirety and that portions of claims 2.1.d, 2.1.e, 2.1.f, 2.1.g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m relating to transportation must be dismissed.

Respondents' argument is based on a recently enacted provision in SEPA, which states:

> (1) A project action pertaining to residential, multi-family, 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

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> elements of the environment, so long as the project does not present significant adverse impact 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; water borne, rail, and air traffic; parking; movement or circulation of people or goods; and traffic hazards.

RCW § 43.21C.500. There is no credible basis for dismissal of these claims based on this provision as is demonstrated below.

1. RCW § 43.21C.500 does not exempt SEPA appeal on the basis of an evaluation of impacts to public facilities.

Respondents argue that claims 2.1.a and 2.1.c should be dismissed in their entirety and that portions of claims 2.1.d, 2.1.e, 2.1.f, 2.1.g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m should be dismissed on the grounds that RCW 43.21C.500 bars certain SEPA appeals concerning traffic and transportation impacts. Paragraph 2.1.a in the Notice of Appeal asserts that the project will have probable significant impacts related to both "public facilities (the alley)" and to "traffic and transportation." Notice of Appeal at 3. Paragraph 2.1.c refers to and quotes specifically from SMC § 25.05.675.O, which only addresses impacts to "public facilities", not traffic and transportation impacts. The claims in

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

paragraphs 2.1.d, 2.1.e, 2.1.f, 2.1.g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m are supported by the specific objections about both the public facilities and transportation impacts that are asserted in 2.1.a.

Escala's SEPA claim concerning "public facility" impacts is not subject to dismissal per RCW § 43.21C.500. RCW 43.21C.500 states that certain project actions are exempt from SEPA appeals on the basis of the evaluation of or impacts to "transportation elements of the environment." That provision does not bar SEPA appeals regarding impacts to "public facilities."

The City code contains separate policies and separate provisions on analysis and mitigation for each of these elements of the environment under SEPA. *See* SMC § 25.05.675 ("specific environmental policies"). The category of "public facilities," is in one section, with its own policies and mitigation authorizations, and the category of "traffic and transportation" is in a different section with its own policies and mitigation authorizations. *Cf.* SMC § 25.05.675.O *with* SMC § 25.05.675.R.

The City's SEPA "specific environmental policies" for public services and facilities are:

> **O. Public Services and Facilities**.
>
> 1. Policy Background. A single development, though otherwise consistent with zoning regulations, may create excessive demands upon existing public services and facilities. "Public services and facilities" in this context includes facilities such as sewers, storm drains, solid waste disposal facilities, parks, schools, and streets and services such as transit, solid waste collection, public health services, and police and fire protection, provided by either a public agency or private entity.
>
> 2. Policies.
>
> a. It is the City's policy to minimize or prevent adverse impacts to existing public services and facilities.
>
> b. The decisionmaker may require, as part of the environmental review of a project, a reasonable assessment of the present and planned condition and capacity of public services and facilities to serve the area affected by the proposal.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> c. Based upon such analyses, a project which would result in adverse impacts on existing public services and facilities may be conditioned or denied to lessen its demand for services and facilities, or required to improve or add services and/or facilities for the public, whether or not the project meets the criteria of the Overview Policy set forth in SMC 25.05.665.

SMC § 25.05.675.O. This section is clearly born out of the element of the environment as identified in WAC 197-11-444, public services and utilities. It does not spring from the traffic element of the environment in WAC 197-11-444. The fact that this particular public facility is an alley does not make it any less of a public facility.

Traffic and transportation impacts are addressed separately, in SMC § 25.05.675.R, with completely different SEPA policies and mitigation authority, stating:

> **R. Traffic and Transportation**.
>
> 1. Policy Background.
>
> a. Excessive traffic can adversely affect the stability, safety and character of Seattle's communities.
>
> b. Substantial traffic volumes associated with major projects may adversely impact surrounding areas.
>
> c. Individual projects may create adverse impacts on transportation facilities which service such projects. Such impacts may result in a need for turn channelization, right-of-way dedication, street widening or other improvements including traffic signalization.
>
> d. Seattle's land use policies call for decreasing reliance on the single occupant automobile and increased use of alternative transportation modes.
>
> e. Regional traffic and transportation impacts arising as a result of downtown development have been addressed in substantial part by the Land Use Code.
>
> f. The University District is an area of the City which is subject to particularly severe traffic congestion problems, as highlighted in the

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

1983 City-University Agreement, and therefore deserves special attention in the environmental review of project proposals.

2. Policies.

a. It is the City's policy to minimize or prevent adverse traffic impacts which would undermine the stability, safety and/or character of a neighborhood or surrounding areas.

b. In determining the necessary traffic and transportation impact mitigation, the decisionmaker shall examine the expected peak traffic and circulation pattern of the proposed project weighed against such factors as the availability of public transit; existing vehicular and pedestrian traffic conditions; accident history; the trend in local area development; parking characteristics of the immediate area; the use of the street as determined by the Seattle Department of Transportation's Seattle Comprehensive Transportation Plan; and the availability of goods, services and recreation within reasonable walking distance.

c. Mitigation of traffic and transportation impacts shall be permitted whether or not the project meets the criteria of the Overview Policy set forth in SMC Section 25.05.665.

d. Mitigation measures which may be applied to residential projects in downtown are limited to the following:

i. Signage;
ii. Provision of information on transit and ride-sharing programs; and
iii. Bicycle parking; and
iv. Transportation management plans.

e. Mitigating measures which may be applied to nonresidential projects in downtown are limited to the following:

i. Provision of transit incentives including transit pass subsidies;
ii. Signage;
iii. Improvements to pedestrian and vehicular traffic operations, signalization, turn channelization, right-of-way dedication, street widening, or other improvements proportionate to the impact of the project; and
iv.Transportation management plans.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> f. i. Mitigating measures which may be applied to projects outside of downtown may include, but are not limited to:
>
> (A) Changes in access;
> (B) Changes in the location, number and size of curb cuts and driveways;
> (C) Provision of transit incentives including transit pass subsidies;
> (D) Bicycle parking;
> (E) Signage;
> (F) Improvements to pedestrian and vehicular traffic operations including signalization, turn channelization, right-of-way dedication, street widening, or other improvements proportionate to the impacts of the project; and
> (G) Transportation management plans.
>
> …

SMC § 25.05.675.R.

As was asserted in the Notice of Appeal, Escala will demonstrate at the hearing that the Altitude project will create excessive demands upon the alley, which is a public facility that runs from Virginia to Stewart between 4th and 5th Avenues. Escala is seeking relief under SEPA that would minimize or prevent the adverse impacts to the public facility. Escala is seeking proper SEPA review that would result in conditions under SEPA being required for the project that would lessen its demand for the alley or require the developer to improve the alley for the public. These issues are all straight from the language of SMC 25.05.675.O regarding public facilities and, because they address public facilities, these claims are not barred by RCW § 43.21.500.

Because RCW § 43.21C.500 does not bar SEPA appeals of SDCI's review of impacts to public facilities, the Examiner cannot and should not dismiss Escala's SEPA claims regarding the impacts to the alley as a public facility.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

2. There is a conceivable set of facts in which the Altitude project is not consistent with the City's transportation plan or with the transportation element of the comprehensive plan

Escala's SEPA claims related to "traffic and transportation" impacts are not subject to dismissal by RCW § 43.21C.500 because there is a conceivable set of facts in which the Altitude Project is not consistent with transportation element of the City's Comprehensive Plan.

RCW § 43.21C.500 states that certain project actions are exempt from SEPA appeals on the basis of the evaluation of or impacts to transportation elements of the environment, so long as, among other things, the project is consistent with a locally adopted transportation plan; or consistent with the transportation element of a comprehensive plan. The Transportation element of the Seattle's Comprehensive Plan states that it is meant to guide transportation investments to "equitably serve the city's current residents and businesses and to accommodate Seattle's future growth." Newman Dec., Ex. 1. In the introduction to the Transportation section, the plan states:

> Hundreds of thousands of city and regional residents and businesses depend on the city's transportation system to access jobs, services, and community facilities, and to deliver freight and goods. Thousands more people will depend on it in the next twenty years as the city and region continue to grow. In Seattle's future, a robust transportation system should
>
> • contribute to a safer city by working to eliminate serious injuries and fatalities on city streets;
>
> • create an interconnected city where people have reliable, easy-to-use travel options;
>
> • develop a more vibrant city by creating streets and sidewalks that generate economic and social activity, adding to the city's overall health, prosperity, and happiness; and Citywide Planning Transportation Seattle 2035
>
> • contribute to a more affordable city by providing high-quality and affordable transportation options that allow people to spend money on other things.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> Seattle's transportation system in 2035 will look very different than it does now.

Id.

Several goals and policies in the Plan are directly relevant to the adverse traffic and transportation impacts that will be caused by the Altitude Proposal. An overarching goal of the Plan is Goal TG 2, which states that the City should: "Allocate space on Seattle's streets to safely and efficiently connect and move people and goods to their destinations while creating inviting spaces within the rights-of-way." Newman Dec, Ex. 2 at 76. Policy T 2.14 requires that the City: "Maintain, preserve, and enhance the City's alleys as a valuable network for public spaces and access, loading and unloading for freight, and utility operations." *Id.* at 78. Policy T 2.5 states that the City must: "Prioritize mobility needs in the street travelway based on safety concerns and then on the recommended networks and facilities identified in the respective modal plans." *Id*. at 76. Policy T 4.6 states that the City must: "Improve mobility and access for freight in order to reduce truck idling, improve air quality, and minimize the impacts of truck parking and movement in residential areas." *Id*. at 86.

Another overarching goal in the Plan is Goal TG 5, which states that the City should aim to "Improve mobility and access for the movement of goods and services to enhance and promote economic opportunity throughout the city." *Id*. at 88. Policy T 5.2 states that the City must: "Develop a truck freight network in the Freight Master Plan that connects the city's manufacturing/industrial centers, enhances freight mobility and operational efficiencies, and promotes the city's economic health." *Id.* at 88. Policy T 5.3 states that the City must: "Ensure that freight corridors are designed, maintained, and operated to provide efficient movement of truck traffic." *Id.* at 88. Regarding safety

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

impacts, Policy T 6.4 states that the City must: "Minimize right-of-way conflicts to safely accommodate all travelers." *Id*. at 89.

As a reminder, in considering a motion to dismiss for failure to state a claim, the factual allegations in the notice of appeal must be accepted as true. *Eugster v. Wash. State Bar Assoc.*, 198 Wn. App. 758, 763, 397 P.3d 131 (2017). Any conceivable set of facts consistent with the allegations in the appeal can be used to withstand the motion to dismiss. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190, 1191 (1978). Any hypothetical situation conceivably raised by the appeal defeats a motion to dismiss if it is legally sufficient to support the claim.

There are conceivable facts which Escala could prove, consistent with the Notice of Appeal, that would demonstrate that the Altitude Project is not consistent with the goals and policies from the transportation element of the City's Comprehensive Plan that are quoted above. In the appeal, Escala has asserted that 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. Notice of Appeal at 3. Escala intends to prove that 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. *Id*. Escala will show that the design of the loading berths is deficient and seriously problematic and there is an inadequate number of loading berths being proposed for the project. *Id*. The requirement for extensive backing of trucks poses significant safety risks and alley congestion issues. Escala will demonstrate that the proposal will cause congestion and safety impacts to the public streets and rights-of-way in the area.

If Escala demonstrates that the Altitude Proposal will cause these problems and impacts, Escala has shown that the Altitude Proposal is inconsistent with the goals and policies quoted above. Creating massive congestion and safety issues in a public alley in downtown Seattle without requiring

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

proper mitigation to address the issue is inconsistent with the policy that requires that the City maintain, preserve, and enhance the City's alleys as a valuable network for public spaces and access, loading and unloading for freight, and utility operations. The introduction of significant vehicular and pedestrian safety issues is inconsistent with the policy requirement that the City "minimize right-of-way conflicts to safely accommodate all travelers." Facts at the hearing will demonstrate that the approval of the Altitude Proposal will directly undermine the City's goal of allocating space on Seattle's streets to safely and efficiently connect and move people and goods to their destinations while creating inviting spaces within the rights-of-way. Evidence will show that this project will do exactly the opposite of that.

Evidence will demonstrate that trucks will be forced to sit in the alley, cars will be blocked while running in the alley, cars will line up at the access points in the alley, and mobility and access for freight will be hindered and diminished by the Altitude Proposal. Escala anticipates that the evidence will demonstrate that the Project will meaningfully increase traffic on City streets and transit routes. That is inconsistent with the Policy that requires that the city: "Improve mobility and access for freight in order to reduce truck idling, improve air quality, and minimize the impacts of truck parking and movement in residential areas."

In sum, Escala's claim that the project will cause probable significant adverse "traffic and transportation" impacts that have not been adequately addressed by SDCI is not subject to dismissal per RCW § 43.21C.500 because there is a conceivable set of facts in which the Altitude Project is not consistent with transportation element of the City's Comprehensive Plan. Escala has stated a claim that it should be allowed to pursue at the hearing.

In addition, there are conceivable facts which Escala could prove, consistent with the Notice of Appeal, that would demonstrate that the Altitude Project is not consistent with the City of Seattle's

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Freight Master Plan, which was adopted by the Seattle City Council in 2016. This plan states the City's policy concerning freight movement in somewhat more specific terms than the Comprehensive Plan. Newman Dec., Ex. 3.

The following 6 goals, which reflect the City's current needs and desired outcome of freight infrastructure investments in Seattle, are described in detail in Chapter 3, Policy Framework:

- Economy – Provide a freight network that supports a growing economy for Seattle and the region.
- Safety – Improve safety and the predictable movement of goods and people.
- Mobility – Reliably connect manufacturing/ industrial centers and business districts with the local, state, and international freight networks.
- State of Good Repair – Maintain and improve the freight transportation network to ensure safe and efficient operations.
- Equity – Benefit residents and businesses of Seattle through equity in freight investments and improve the health of communities impacted by goods movement.
- Environment – Improve freight operations in Seattle and the region by making goods movement more efficient and reducing its environmental footprint.

Newman Dec., Ex. 3 (FMP at 46-47).

Although intended to guide public investments in freight infrastructure, the goals give the City reason to expect that private development would not hinder its ability to meet its freight goals. Safety, economy, mobility and environment stand out as markers for reviewing the Altitude Project. The Freight Management Plan presents specific strategies and actions to meet the goals, including: Safety: Strategy 1.11, Action 1.11.1 – Design pedestrian facility treatments to provide predictable movement of people and to minimize conflicts with goods movement and deliveries. Newman Dec., Ex. 3 at 82. There is a conceivable set of facts where Escala can prove that the design of the Altitude will conflict

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

with this action item. Evidence is expected to show that no attention is being given to where the alley meets the sidewalk and the resulting conflicts between truck movements and pedestrians.

With respect to Economy, Strategy 2.1 to Develop an urban goods delivery system, the plan includes Action item 2.1.7 – Evaluate and recommend on- and off-street tactics to enable bicycle, non-truck and small truck deliveries in dense areas. The evidence at the hearing will show that no tactics are being employed or considered for the Altitude Proposal to increase delivery capacity for the Altitude block or surrounding blocks. Action 2.1.13 calls for exploration of the best off-street loading practices, including loading dock development and use standards. Evidence will show that the Altitude is not exploring or using best practices for these purposes. In fact, the Altitude is proposed to rely on a dysfunctional loading berth geometry and a reduction in required dimensions. Their proposal certainly doesn't mirror potential improvements in design standards. Mobility Strategy 3.1 is to Design and enhance a freight network for the City and Action 3.1.3 is to improve roadway geometry to support goods movement using "design for" and "accommodate" approaches for freight vehicles, depending on the street function, location (street type), and truck volumes. Newman Dec., Ex. 3, at 85. Alleys are a recognized type of street in the Right-of-Way Improvement Manual. So far, the Altitude Proposal's loading geometry neither designs for or accommodates truck movements, and certainly does not enhance the movement of freight. The lack of geometric guidelines or standards for alleys represents a huge oversight in the otherwise very good Right-of-Way Improvements Manual and the Freight Master Plan. The policy here provides a basis for improving design based on function, location and volume. With respect to the Environment goal, the broad goal of making goods movement more efficient is certainly not true of the Altitude Proposal's loading design. Newman Dec., Ex. 3 at 88. It will only slow deliveries, block the alley and cause delay on the street, all of which will increase fuel

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

consumption and vehicle miles of travel from having to drive around the block when alleys are blocked.

These are just a few examples. Overall, because there are conceivable facts which Escala could prove, consistent with the Notice of Appeal, that would demonstrate that the Altitude Project is not consistent with the City of Seattle's Freight Master Plan, which was adopted by the Seattle City Council in 2016, their traffic and transportation SEPA claims should not be dismissed.

3. There is a conceivable set of facts in which the traffic or parking impacts are not expressly mitigated by the Seattle code and no impact fees have been imposed.

Escala's claim that the project will cause probable significant adverse "traffic and transportation" impacts that have not been adequately addressed by SDCI is not subject to dismissal per RCW § 43.21C.500 because there is a conceivable set of facts in which the traffic and parking impacts are not expressly mitigated by the Seattle Code.

Under RCW § 43.21C.500, certain project actions are exempt from SEPA appeals on the basis of the evaluation of or impacts to transportation elements of the environment, so long as (1) traffic or parking impact fees are imposed pursuant to RCW § 82.02.050 through § 82.02.090; or (2) the traffic or parking impacts are expressly mitigated by an ordinance, or ordinances, of general application adopted by the city or town. Because no traffic or parking impact fees have been imposed pursuant to RCW § 82.02.050 through § 82.02.090, there's no dispute that this factor in RCW § 43.21C.500 has been met.

There are conceivable facts which Escala could prove, consistent with the Notice of Appeal, that would demonstrate that the traffic and parking impacts are not expressly mitigated by provisions in the Seattle Code. Escala has asserted that the project will have significant adverse traffic circulation, loading, and access impacts as well as vehicular and pedestrian safety issues associated with the alley

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

that runs from Virginia to Stewart between 4th and 5th Avenues. Notice of Appeal at 3. The facts at the hearing will show that the City has approved a deficient and dysfunctional design for purposes of accommodating truck deliveries and access to residential parking off of the alley for the Altitude Proposal. The deficient design will cause significant safety risks and alley congestion issues. The proposal will not only cause congestion and safety impacts to the alley itself, but also to the public streets and rights-of-way in the area.

There are no provisions in the Seattle code that expressly mitigate these impacts. Evidence at the hearing will show that, only just recently, extensive research has been undertaken by the Urban Freight Lab (UFL) at the University of Washington, working in support of the Seattle Department of Transportation (SDOT), in an attempt to understand and document the significant impacts associated with the growth in demand and the current use and operational capacity of the alley system in downtown Seattle, among other areas. The research has focused on issues concerning alley congestion, especially when fixed alley space limitations have resulted in conflicts, congestion, and safety issues.

This effort is still in the research stage and the City Council has not yet adopted code provisions to address these issues. The UFL report includes recommendations that could ultimately be adopted. The evidence at the hearing will show that, among other things, that report recommends that the City of Seattle revise the alley design standards for future development so that the impacted areas provide loading bays with entrances that angle in the correct direction for alley flow, sufficient space for trucks to fully extend equipment, smooth enough pavement for hand trucks in load/unload area, space for trash/recycle containers to be stored out of travel lanes (on pick up days); sufficient height for garbage trucks to complete overhead lift.

This will demonstrate that the unique impacts that towers have on downtown Seattle's alleys is an issue that the City has not yet addressed in its code. While steps are being taken towards

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

researching the issue, no legislation has been adopted. Right now, the only way to address these impacts is through SEPA review. The Seattle code does not expressly mitigate the impacts that the Altitude Proposal will have on the alley.

Respondents claim that the Seattle City Code contains provisions that generically mitigate traffic impacts to alleys. Joint Motion at 15. They point to SMC § 23.49.022 and § 23.53.030, which requires a dedication of property to widen substandard alleys. *Id*. This provision does not apply to the Altitude project at all and, therefore, does not expressly mitigate the impacts that the Altitude Proposal will have on the alley.

Respondents also point to SMC § 11.72.020 and § 11.72.025, which restrict the standing or parking of a vehicle in an alley. *Id*. SMC § 11.72.020 states that "No person shall stand or park a vehicle except a commercial vehicle, a vehicle displaying a valid commercial loading permit, or authorized emergency vehicle in an alley." SMC § 11.72.025 states that "No person shall stop, stand or park a vehicle within an alley in such a position as to block the driveway entrance to any abutting property." The first provision doesn't apply to commercial vehicles, vehicles with loading permits, or authorized emergency vehicles. The evidence will show that it is precisely these types of vehicles that will largely be responsible for the problems. Regarding both provisions, the evidence will show that the enforcement of this provision is extremely lax and cars and trucks stand and park in alleys throughout the city despite this limit. This is not expressly mitigating the developer's faulty design which is going to cause these problems in the first place. The developer's defective design of the Altitude Proposal is going to force other people to violate these laws – there will be no other option but to stand still in the alley because of the congestion. These provisions do not expressly mitigate the congestion, safety, and/or the majority of other problems and impacts that have been asserted by Escala in the appeal.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Respondents correctly did not mention SMC 23.45.035 and that is presumably because the City of Seattle has waived the requirements of that provision for the Altitude Proposal. Considering that the Altitude is not being required to abide by SMC 23.45.035, it cannot be credibly argued that that provision expressly mitigates the adverse traffic and transportation impacts of the proposal.

Respondents, oddly, reference the SEPA provisions in the City of Seattle code indicating that they "expressly provide substantive SEPA authority to minimize or prevent adverse traffic impacts." Joint Motion at 16. The language in RCW § 43.21C.500, which bars SEPA appeal if traffic or parking impacts are expressly mitigated by an ordinance, or ordinances, of general application adopted by the city or town, is not referring to SEPA authority to condition a project. It's referring to ordinances such as stormwater, traffic, critical areas codes, and the like. Nonetheless, that is the very heart of Escala's claim. The evidence will show that the impacts of the Altitude Proposal were not adequately mitigated by SDCI pursuant to the SEPA substantive authority that has been granted to them.

In the end, there are conceivable facts which Escala could prove, consistent with the Notice of Appeal, that would demonstrate that the traffic impacts that will be caused by the Altitude Proposal are not expressly mitigated by any provisions in the Seattle Code. This claim should not be dismissed and Escala should be allowed to proceed to the hearing to present evidence on this issue.

E. The Examiner Has Jurisdiction Over the Design Review Claims

Respondents contend that the Examiner lacks jurisdiction over the claims that are asserted in paragraphs 2.1.h, 2.2.b, 2.2.c, and 2.2.e. This is incorrect.

The City of Seattle Hearing Examiner has jurisdiction as follows:

> The Hearing Examiner shall entertain issues cited in the appeal that relate to compliance with the procedures for Type II decisions as required in this Chapter 23.76, compliance with substantive criteria, determinations of nonsignificance (DNSs), adequacy of an EIS upon which the decision was made, or failure to properly approve, condition,

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> or deny a permit based on disclosed adverse environmental impacts, and any request for interpretation included in the appeal or consolidated appeal pursuant to Section 23.88.020.C.3.

SMC 23.76.022.C.6. Thus, according to this provision, the Examiner has jurisdiction issues that relate to the adequacy of an EIS and issues that relate to compliance with the procedures for Type II decisions as required in Chapter 23.76.

The claim asserted in paragraph 2.1.h, which is one of the claims that Respondents seek to dismiss for lack of jurisdiction, is in the first section (Section 2.1) and is specifically challenging the adequacy of the EIS and Addendum on the grounds that the City improperly locked in a decision on the project before SEPA review was completed. That paragraph asserts:

> 1. The decision violates the State Environmental Policy Act (SEPA), ch. 43.21A, and state and local regulations implementing that law.
> …
> 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 avoid or minimize those impacts of the proposal *before* decisions are made. In direct violation of law, the Design Review Board's decisions were not informed by SEPA. The Design Review Board improperly made decisions that locked in the design during the Design Review process before SEPA review was completed. The Board's Recommendation unlawfully built momentum in favor of the facility without the benefit of environmental review in violation of SEPA. The Design Board's action also improperly limited the choice of alternatives before SEPA review was conducted. As it stands, the Addendum misrepresents and downplays the impacts in an attempt to justify approval of the design approved by the Design Review Board before SEPA review was completed. To the extent that the Seattle code requires this, we challenge the legality of those provisions as applied in this case.

Notice of Appeal at 4-5.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Section 2.1 of the Notice of Appeal contains all of the objections that challenge the adequacy of the EIS and Addendum. The claim in paragraph 2.1.h is challenging SDCI's SEPA decision based on well-established SEPA case law. SEPA regulations and decades of case law instruct that SEPA's requirements are to be met early in the process before momentum builds in favor of one alternative or another. WAC 197-11-055(2); *Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 803-04, 309 P.3d 734, 742-43 (2013); *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 663 (1993). The disclosure and analysis of environmental impacts must occur before commitments to a particular course of action are made. WAC 197-11-055(2)(c); WAC 197-11-448(1); *City of Des Moines v. Puget Sound Regional Council*, 108 Wn. App. 836, 849 (1999). SEPA regulations require that the "lead agency shall prepare its threshold determination and environmental impact statement, if required, *at the earliest possible point in the planning and decision-making process*, when the principle features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2) (emphasis supplied). Both the threshold determination and Environmental Impact Statement ("EIS") must be developed early. "The [EIS] shall be prepared early enough so it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." WAC 197-11-406. The City cannot take any action that would limit the choice of alternatives before SEPA review has occurred. WAC 197-11-070(1)(b). Actions to develop plans or designs or work that is necessary to develop an application for a proposal is allowed, but not if those actions limit the choice of alternatives. WAC 197-11-070(4).

Paragraph 2.1.h, which is in the SEPA section of the Appeal, is a SEPA issue that is focused on the adequacy of an EIS. The Examiner has jurisdiction over the question of whether SDCI's SEPA decision on appeal violates SEPA and state and local regulations implementing that law. Our claim is that the EIS and Addendum violate SEPA requirements as summarized above.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Paragraphs 2.2.b and 2.2.e challenge the Design Review decision that was made by the Director. The claims asserted in paragraphs 2.2.b and 2.2.e state:

> 2. The design review decisions and the process leading up to those decisions violated state and local laws.
> …
>
> b. The Design Review Board decisions were made in error because they were not informed by environmental review as is required by SEPA. As a matter of law, design review decisions should not have been made until after the SEPA process was completed. To the extent that SDCI argues that the Seattle code required the process that was followed in this case, this appeal challenges the relevant code provisions as they were applied.
>
> 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.

Notice of Appeal at 6.

As the code says, the Examiner has jurisdiction over issues that "related to compliance with the procedures for Type II decisions as required in this Chapter 23.76." *Id*. The Examiner also has jurisdiction over compliance with substantive criteria in the code. *Id*. The Design Review decision in this case is a Type II decision that follows the Master Use Permit process required in SMC 23.76. SMC 23.76.006(C)(2)(e).

The criteria for the Director's decision on Design Review is in Chapter 23.76:

> Master Use Permit Review Criteria. The Director shall grant, deny, or conditionally grant approval of a Type II decision based on the applicant's compliance with the applicable SEPA policies pursuant to Section 25.05.660, and with the applicable substantive requirements of the Seattle Municipal Code pursuant to 23.76.026. If an EIS is required, the application shall be subject to only those SEPA policies in effect when the draft EIS is issued. The Director may also impose conditions in order to mitigate adverse environmental impacts associated with the construction process.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

SMC § 23.76.020.

According to this provision, the Director shall grant, deny, or conditionally approve Design Review based on the applicant's compliance with SEPA and with the applicable substantive requirements of the code. Paragraphs 2.2.b and 2.2.e should be read together to assert a single claim that 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. The assertions in paragraph 2.2.b are not intended to present a legal claim specific to the Board's decision, but is describing the facts and objections that support the claim that the Director erred when he approved design review because it was not compliant with SEPA. The Examiner has jurisdiction over the question of whether this Type II decision should have been approved by SDCI.

F. The Issues Presented in the Notice of Appeal States Claims for which the Hearing Examiner Has Jurisdiction to Grant Relief.

Respondents argue that the claims asserted in paragraphs 2.1.c, 2.1.f, 2.1.g, 2.1.h, 2.2.b, 2.1.i, 2.1.k, and 2.1.b should be dismissed on the grounds that appellants have failed to state a claim for which the Hearing Examiner has jurisdiction to grant relief. Their arguments on this basis should be rejected. Each relevant paragraph is addressed in turn below.

Paragraph 2.1.c

Respondents argue that the claim asserted paragraph 2.1.c must be dismissed because it relies on a permissive code provision and does not assert a violation of a legal requirement and is duplicative. SMC § 25.05.675(O)(2)(b) states: "The decisionmaker may require, as part of the environmental review of a project, a reasonable assessment of the present and planned condition and capacity of

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

public services and facilities to serve the area affected by the proposal." Respondents argue that this claim must be dismissed because the cited provision uses the word "may," not "shall."

The fact that SMC 25.05.675.O.2.b contains the word "may" instead of "shall" is not a basis to dismiss for failure to state a claim. The Hearing Examiner has jurisdiction over the questions of whether an EIS is adequate and whether SDCI has failed to properly approve, condition, or deny the Altitude Proposal based on disclosed adverse environmental impacts. After considering all of the evidence presented at the hearing about impacts to the alley, the issue presented will be whether SDCI should have exercised its authority to require that the Addendum include a reasonable assessment of the present and planned condition and capacity of public services and facilities to serve the area affected by the proposal.

SMC 25.05.675 uses the word "may" over and over again to describe what mitigation "may" be applied to address impacts. *See, e.g.,* SMC 25.05.675(A)(2)(d) (mitigation measures "may" include…), B(2)(e) (Mitigating measures … "may" include), C(2)(b) (the decisionmaker "may" condition or deny projects). Frankly, every single section contains the word "may" somewhere. Over and over again, this provision, SMC 25.05.675, sets forth the parameters of SDCI's authority under SEPA. Because the Hearing Examiner has jurisdiction over whether an EIS is adequate and whether SDCI has failed to properly approve, condition, or deny the Altitude Proposal based on disclosed adverse environmental impacts, Appellants have a right to present a claim that shows that, while the code says "may," the facts and evidence demonstrate that SDCI should have exercised its authority to require that certain analysis of specific impacts be included in an EIS using the tools provided to it in that provision.

The question here is whether SDCI has properly disclosed, addressed, assessed and mitigated the alley impacts as required by SEPA. SDCI has the express legal authority to require this assessment

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

and the question is - is the EIS inadequate because, among other things, SDCI failed to exercise this authority? Because Escala has a right to present evidence that will prove that this was a necessary assessment to property assess significant adverse impacts to the alley, there is no grounds for dismissal of this claim without hearing the evidence on this issue.

Paragraph 2.1.f.

Respondents argue that the claim asserted in paragraph 2.1.f must be dismissed because scoping is not required for an addendum. But, the Notice of Appeal does not make any such assertion or claim. Escala is not arguing that scoping is required for an Addendum (as is obvious from reading paragraph 2.1.f).

Paragraph 2.1.f in the Notice of Appeal states:

> 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.

Notice of Appeal at 4.

In this case, the evidence that will be presented at the hearing (and consistent with the Notice of Appeal) will show that SDCI issued a SEPA Determination of Significance for the Altitude Proposal pursuant to WAC 197-11-360 and SMC 25.05.360. The DS constituted a decision that the Altitude Proposal is a major action significantly affecting the environment pursuant to RCW 43.21C.030 and, therefore, SDCI was required to prepare an EIS for the Altitude Proposal.

Scoping under SMC § 25.05.408 is required for every proposal that receives a Determination of Significance. The Seattle code states:

> **25.05.360 - Determination of significance (DS)/initiation of scoping.**
>
> A. If the responsible official determines that a proposal may have a probable significant adverse environmental impact, the responsible

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

> official shall prepare and issue a determination of significance (DS) substantially in the form provided in Section 25.05.980. …
>
> …
> C. The responsible official shall put the DS in the lead agency's file and shall commence scoping (Section 25.05.408) by circulating copies of the DS to the applicant, agencies with jurisdiction and expertise, if any, affected tribes, and to the public. Notice shall be given under Section 25.05.510. The lead agency is not required to scope if the agency is adopting another environmental document for the EIS or is preparing a supplemental EIS.

SMC § 25.05.360.

Therefore, scoping is required for the Altitude Project. Under SMC 25.05.408, SDCI is required to invite agency, affected tribes, and public comment on the scope of issues that should be addressed in the EIS, including identifying reasonable alternatives and probable significant adverse environmental impacts. SDCI is required to revise the scope of an EIS if substantial changes are made later in the proposal, or if significant new circumstances or information arise that bear on the proposal and its significant impacts. SMC 25.05.408(E).

Recognizing that it had to prepare an EIS for the Altitude Proposal, SDCI adopted existing environmental documents, specifically the City of Seattle's January, 2005 FEIS for the Downtown Height and Density Changes as the EIS for the Altitude Proposal. SDCI determined that the proposal's impacts for the Altitude Proposal were adequately analyzed in the 2005 FEIS. SDCI concluded that the 2005 FEIS process met SDCI's SEPA responsibilities for a project that received a DS, including the legal obligation to conduct scoping pursuant to SMC § 25.05.408 for the Altitude project. Therefore, the question of whether the 2005 FEIS scoping process was adequate for the Altitude project is certainly an issue that is rightfully presented in this appeal.

The claims on appeal are whether the scope of impacts that were addressed by the Addendum and FEIS was incomplete and whether SDCI followed the proper scoping process for the Altitude

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Proposal. As a reminder, when considering a motion to dismiss for failure to assert a claim, the factual allegations in the notice of appeal must be accepted as true. Any conceivable set of facts consistent with the allegations in the complaint can be used to withstand the motion. Any hypothetical situation conceivably raised by the appeal defeats a motion to dismiss if it is legally sufficient to support the claim.

The Examiner must, therefore accept as true that the scope of impacts that were addressed by the Addendum was incomplete. The Examiner must accept as true that the Altitude project will have all of the 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 that have been pleaded and that will be presented in detail at the hearing. The Examiner must accept, as true, that those impacts are significant.

The Examiner must presume as true that SDCI did not consider these alley impacts to be within the scope of the Addendum or the 2005 FEIS. Neither the 205 FEIS, nor the Addendum, adequately assessed impacts to the alley. The Examiner must presume that Escala never had an opportunity to submit written scoping comments to request that these alley impacts be considering in the 2005 FEIS before the 2005 FEIS was prepared and there was no scoping process required for the Addendum. The Examiner must presume, as true, that the Downtown Height and Density Changes was a different project from the Altitude Proposal. The evidence will show that there have been substantial changes to the proposal (in fact it's not even the same proposal) and there is new information about environmental impacts specifically associated with the alley. Escala will demonstrate that the Downtown Height and Density Changes zoning did not have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography with the Altitude project. We will demonstrate that the information and analysis in the

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

2005 FEIS is not relevant or adequate to a review of impacts to the alley caused by the Altitude Proposal. The information in the 2005 review is 15 years old. That FEIS does not contain accurate information and is not reasonably up to date. In other words, Escala will present facts to prove that it was improper for the City to adopt the 2005 FEIS (and in turn the scoping for that EIS) for the Altitude Proposal. This claim should not be dismissed.

Paragraph 2.1.g

Respondents argue that the claim asserted in paragraph 2.1.g must be dismissed because an Addendum need not contain the same information as an EIS. This suffers from similar misconceptions as their argument regarding scoping. Escala is not arguing that, as a matter of law, an Addendum requires all of the information that is required in WAC 197-11-440. Escala's claim is that the EIS for the Altitude must contain the information that is required in WAC 197-11-440 and the 2005 FEIS did not contain that information. Nor did the Addendum. In short, no environment documents contain the information that is required (specified in paragraph 2.1.g) in WAC 197-11-400(4) and (6) for the Altitude Proposal.

Paragraph 2.1.g states:

> 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).

As explained above, the evidence that will be presented at the hearing (and consistent with the Notice of Appeal) will show that SDCI issued a SEPA Determination of Significance for the Altitude Proposal pursuant to WAC 197-11-360 and SMC 25.05.360. The DS constituted a decision that the

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Altitude Proposal is a major action significantly affecting the environment pursuant to RCW 43.21C.030 and, therefore, SDCI was required to prepare an EIS for the Altitude Proposal.

Also as explained above, SDCI adopted the 2005 FEIS for the Downtown Height and Density Changes as the EIS for the Altitude Proposal. SDCI concluded that the 2005 FEIS process met SDCI's SEPA responsibilities for a project that received a DS, including the legal obligation to provide a summary of the proposal as described and required by WAC 197-11-440(4) and the legal obligation to describe the existing environment for the Altitude Proposal as is required by WAC 197-11-440(6).

Because any hypothetical situation conceivably raised by the appeal must be assumed to be true by the Examiner, this claim cannot be dismissed at this time. The evidence will show that neither the 2005 FEIS, nor the Addendum contain the information that is required by WAC 197-11-440(4), specifically neither specified the purpose and need to which the Altitude Proposal is responding, the major conclusions concerning the environmental review of the Altitude Proposal, significant areas of controversy and uncertainty for the Altitude Proposal, or the issues to be resolved, including the environmental choices to be made among alternative courses of adverse impacts that can't be mitigated for the Altitude Proposal. The evidence will also show that there is no discussion of the existing environment for the Altitude Proposal for the elements of the environment that were listed in the DS as is required by WAC 197-11-440(6). This claim cannot be dismissed.

Paragraphs 2.1.h and 2.2.b

Respondents argue that the claims asserted in paragraphs 2.1.h and 2.2.b must be dismissed because under the City Code the Board must issue a recommendation before SEPA is complete. Joint Motion at 22. Respondents argue that the Seattle City code "mandates" a requirement that the Design Review Board issue its recommendation before SEPA is complete. Their legal support for this

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

assertion is a vague citation to the entire chapters of 23.41 and 23.76 – no specific code provisions and no specific language in the code that "mandates" this requirement. Joint Motion at 22-23.

The Seattle code does not dictate the timing of issuance of a recommendation by the Design Review Board review, nor does it preclude providing a copy of the EIS and/or Addendum along with public comments on environmental review to the Board members so that they are informed by the SEPA review before making decisions. The Seattle code section that describes the design review process, SMC 23.41.014, has no such limitations. Nor do the provisions on the SEPA process. Respondents have provided absolutely no credible legal argument to suggest otherwise and have provided no specific cites to the code that would suggest such a thing. To the extent that Respondents attempt to sandbag appellants by introducing new cites to the code to support this argument, the Examiner should disregard it as unfairly barring appellants from having a meaningful opportunity to respond.

The claim asserted in paragraph 2.1.h is that "SEPA review must inform decision makers and the public of environmental impacts and mitigation measures that would avoid or minimize those impacts of the proposal before decisions are made." The objection being made is that the Design Review Board's decisions were not informed by SEPA review and that they improperly made decisions that locked in the design during the Design Review process before SEPA review was completed.

The statement in the appeal that says that we challenge the code to the extent that it requires it, says "*to the extent*" on purpose. Escala does not believe that the code requires it, but with land use law as it is, included that statement to preserve the issue as necessary. This is not an "admission." And considering that the Respondents failed to point to any specific language in the code to show that it does mandate this process, that settles the issue once and for all.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Paragraph 2.1.i

Respondents argue that the claim asserted in paragraph 2.1.i must be dismissed because SEPA allows the use of existing environmental documents. The Notice of Appeal does not contain any assertion that SDCI is not allowed to use environmental documents.

SEPA allows a lead agency to use existing environmental documents, but only under certain conditions. The claim that is being presented by Escala is that those conditions have not been met in this case. That's a factual issue – not a failure to state a claim. Whether those conditions have been met depend on the facts of the case.

When an agency decides to use an existing EIS in lieu of drafting a new one, specific requirements must be met. The statute that authorizes re-use of an existing EIS expressly states that an existing EIS may be used only if it "adequately address[es] the environmental considerations set forth is RCW 43.21C.030." RCW 43.21C.034.

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

RCW 43.21C.034. This language sets clear limitations on the use of existing documents.

In turn, WAC 197-11-600(4)(e) states that a proposal must be "substantially similar" to one covered in an existing EIS if that existing EIS is to be adopted with additional information provided in an addendum.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Furthermore, even if SDCI could rely on and adopt the 2005 FEIS for some of the environmental review of the Altitude Proposal, SDCI was still required to prepare a supplemental EIS for the Altitude Proposal pursuant to WAC 197-11-405, WAC 197-11-600, and WAC 197-11-620.

Again, when considering a motion to dismiss for failure to assert a claim, the factual allegations in the notice of appeal must be accepted as true. Any conceivable set of facts consistent with the allegations in the complaint can be used to withstand the motion. Any hypothetical situation conceivably raised by the appeal defeats a motion to dismiss if it is legally sufficient to support the claim.

The issue presented, therefore, is whether the criteria in RCW 43.21C.034 have been met. According to RCW 43.21C.034, SDCI can adopt the 2005 FEIS only if it adequately addresses the environmental considerations of the Altitude project set forth in RCW 43.21C.030. The Notice of Appeal asserts that the 2005 FEIS does not adequately asses those environmental considerations. In addition, SDCI cannot rely on existing environmental documents if the two projects do not have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography. The Examiner must, presume that the evidence will show that the 2005 zoning proposal and the Altitude Proposal are a complete mismatch for purposes of comparing environmental consequences. They do not have similar elements in timing, in alternatives, or in geography. The Altitude Proposal is a site-specific project on a single parcel currently proposed by a private developer that was approved in 2019. The rezone proposal (Downtown Height and Density Changes) that was analyzed in the 2005 FEIS was a programmatic legislative action that was proposed in 2003 by the City of Seattle and that covered a very large, broad area of the City of Seattle. at were issued 15 years ago for the, which were area wide programmatic rezone proposals for downtown Seattle. The Downtown Height and Density Changes is not the same thing as the Altitude

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Proposal. The 2005 FEIS does not assess alternative proposals for developing the Altitude Proposal parcel.

SDCI must also show that the information and analysis used in the 2005 FEIS is relevant and adequate. It is not. The information in the 2005 FEIS is not relevant to the Altitude Proposal's specific impacts and it is inadequate to review those impacts. Likewise, the analysis of impacts is fundamentally different at the programmatic level. SEPA allows programmatic EISs to be far more general than a site-specific EIS. WAC 197-11-442 ("The lead agency shall have more flexibility in preparing EISs on nonproject proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals"). The requirements for environmental analyses vary based on whether the planning action at issue is a project action or a nonproject action. *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, No. 75375-4-I, 2018 WL 1250190, at *6 (Wash. Ct. App. Mar. 12, 2018). "A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area." *Id. quoting* WAC 197-11-704(2)(a). "Non-project actions involve decisions on policies, plans, or programs," including "[t]he adoption or amendment of comprehensive land use plans or zoning ordinances." *Id. quoting* WAC 197-11-704(2)(b)(ii); *See also* WAC 197-11-774.

Respondents' argument that the claim asserted in paragraph 2.1.i must be dismissed because SEPA allows the use of existing environmental documents should be rejected. Appellants have stated a claim that SDCI has not met the requirements that are necessary to use existing environmental documents in this case.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Paragraph 2.1.k and 2.1.b

Respondents argue that the claims asserted in 2.1.k and 2.1.b must be dismissed because appellant's claims that prior environmental documents are not reasonably up to date fail. Joint Motion at 25.

Paragraph 2.1k in the Notice of Appeal states:

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

Notice of Appeal at 5-6.

Relying on *Escala Owners Association*, HE File No. MUP-17-035, Order on Motion for Summary Judgment (Feb. 15, 2018) at 2, Respondents argue that Claim 2.1.k must be dismissed because the Examiner asserted in that case that "there is no limit on the age of a document that can be adopted" identified in SEPA rules. That statement is not controlling in this case and simply does not provide any basis for dismissing the issue presented in 2.i.k for failure to state a claim. The Hearing Examiner made that statement in the *Escala* case in the context of a motion for summary judgement that had been filed by the Appellant, Escala. Escala had asked the Examiner to conclude that, as a matter of law, SDCI could not rely on the 2005 FEIS. The Examiner did not resolve the legal issue, but instead concluded that there remained a dispute of fact over whether the information in the 2005 FEIS was inaccurate or outdated with respect to the environmental review of the 5th and Virginia Proposal. That is a completely different issue that what we have here.

In this case, Respondents have filed a motion to dismiss for failure to state a claim, not a motion for summary judgment. A motion to dismiss must be denied unless no state of facts which appellant could prove, consistent with the appeal, would entitle the plaintiff to relief on the claim. There are

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

(and will be) facts that Escala can prove, consistent with the assertions in paragraph 2.1.k in the Notice of Appeal, to show that the information in the 2005 FEIS is inaccurate and outdated specifically with respect to the environmental review of the Altitude Proposal. Respondents request for dismissal of this claim should be rejected.

Paragraph 2.1.m

Respondents argue that the claim asserted in paragraph 2.1.m must be dismissed because an Addendum is not required to contain an alternatives analysis. That is not our claim. The Notice of Appeal does not assert that an Addendum, as a matter of law, is required to contain an alternatives analysis. Escala's claim is that the EIS for the Altitude must contain an alternatives analysis for the Altitude Proposal. That analysis was not in the 2005 FEIS or the Addendum. In short, no environment documents contain an alternatives analysis for the Altitude Proposal.

Paragraph 2.1.m in the Notice of Appeal states:

> SDCI failed to conduct an alternatives analysis for the Altitude Proposal as is 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 environmental documents do not contain an adequate analysis of alternatives and their impacts as is required by law. SDCI did not evaluate a "no-action" alternative to the proposal. These are fundamental errors that render the Addendum inadequate on its face.

Notice of Appeal at 6.

In this case, the evidence that will be presented at the hearing (and consistent with the Notice of Appeal) will show that SDCI issued a SEPA Determination of Significance for the Altitude Proposal pursuant to WAC 197-11-360 and SMC 25.05.360. The DS constituted a decision that the Altitude Proposal is a major action significantly affecting the environment pursuant to RCW 43.21C.030 and, therefore, SDCI was required to prepare an EIS for the Altitude Proposal.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

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) require that SDCI prepare an alternatives analysis for a major action significantly affecting the environment. You cannot issue a Determination of Significance for a proposal and then not conduct an alternatives analysis for that proposal.

As mentioned above, SDCI adopted the 2005 FEIS for the Downtown Height and Density Changes as the EIS for the Altitude Proposal. SDCI concluded that the 2005 FEIS process met SDCI's SEPA legal responsibilities, including the legal obligation to conduct an alternatives analysis of the Altitude Proposal.

For purposes of the motion to dismiss, the Examiner must presume that the statements and concurring conceptual facts are true: Neither the 2005 FEIS, nor the Addendum, contained an alternatives analysis of the Altitude Proposal. Nowhere, in any environmental documents for the Altitude Proposal, has SDCI presented an alternatives analysis for that proposal. Respondents' motion to dismiss this claim should be rejected.

IV. CONCLUSION

For the reasons stated above, Appellant requests that the Examiner deny Respondents' Joint Motion for Partial Dismissal. It should be noted that Appellants do not intend to pursue the claims asserted in **Paragraphs 2.1.b, 2.1.e, or 2.2.c.** We did not address those claims in this response because they are being voluntarily dismissed by Escala.

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300

Dated this 5th day of December, 2019.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

Claudia M. Newman, WSBA No. 24928
Attorneys for Escala Owners Association

Bricklin & Newman, LLP
Attorneys at Law
1424 Fourth Avenue, Suite 500
Seattle WA 98101
Tel. (206) 264-8600
Fax. (206) 264-9300