BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of ESCALA OWNERS ASSOCIATION from a decision issued by the Director, Seattle Department of Construction and Inspections	Hearing Examiner File: MUP-19-031 (DD, DR, S, SU, W) Department Reference: 3018037-LU CITY AND APPLICANT'S REPLY IN SUPPORT OF THEIR JOINT MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

Since filing its Notice of Appeal ("Notice"), Appellant Escala Owners Association ("Appellant") has attempted to expand the Notice's scope to incorporate a raft of arguments about Respondent City of Seattle's ("City") review of the 54-story mixed-use building ("Project") at issue in this case. In its so-called Clarification ("Clarification"), Appellant asserted that its claims were "intended to encompass" nearly every element of the environment analyzed in the City's review process. The arguments in Appellant's Response to the Joint Motion for Partial Dismissal ("Motion") filed by Respondents Seattle Downtown Hotel &

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Residences, LLC ("Applicant") and the City ("Response") purport to "provide additional clarification" of its claims, *see* Response, p. 7, but they do nothing of the kind. Instead, Appellant's broad assertions only muddy the waters further.

For the reasons explained in the Motion – none of which Appellant has successfully disputed – numerous claims in the Notice must be dismissed.

II. AUTHORITY

A. Standard of Review

Appellant's assertion that its claims survive the Motion if there is "any conceivable set of facts consistent with the allegations in the [Notice]" or "any hypothetical situation conceivably raised by the appeal" that might be sufficient to obtain relief is misleading and non-responsive to issues raised the Motion. *See* Response, p. 4. Respondents do not dispute that Appellant is entitled, at this stage of the proceedings, to have its factual allegations taken as true. But that does not relieve Appellant from its obligation, explained in the Motion and below, to make specific factual allegations. SMC 23.76.022.C.3.a ("Specific objections to the Director's decision and the relief sought shall be stated in the written appeal."); Hearing Examiner Rule of Practice and Procedure ("HER") 3.01(d)(3) (requiring appellants to state "specific objections"). For example, Appellant cites *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190, 1191 (1978), for its "any conceivable set of facts" argument, but that case considered whether a court could evaluate "specific allegations" that were "made initially upon . . . appeal" rather than in a complaint before the trial court. It does not support Appellant's suggestion that it is not required to state its objections with specificity or that it may raise exaggerated hypotheticals in its briefing that are unmoored from any actual allegations in the Notice. *See* Response, pp. 21-28 (extensive allegations of "conceivable facts" going far beyond allegations in notice of appeal).

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Nor is Appellant entitled to deference for allegations that are contradicted by uncontested facts. For example, Appellant makes extensive, unsupported factual allegations beginning at page 21 of the Response to support its argument that the Project is inconsistent with the Comprehensive Plan. Yet, Appellant fails to grapple with controlling law and uncontested facts demonstrating the Project is consistent. *See* Section II.E.2 *infra*.

In sum, Appellant's reliance on "conceivable facts" does not save its claims from dismissal.

B. Withdrawn or abandoned SEPA claims.

Appellant states that its numbered paragraphs do not "necessarily" represent discrete legal claims, but it declines to indicate which paragraphs are intended as claims in themselves. *See* Response, p. 8. Respondents will therefore continue to address each paragraph as a separate claim; any paragraphs that are dismissed as a result of the Motion may not be asserted either as independent claims or as legal bases for a claim in conjunction with other paragraphs.

Claims 2.1.b and 2.1.e, which Appellant has withdrawn, must be dismissed. *See* Response, p. 45. Claim 2.1.b relates to SEPA review of hazardous contamination. Having withdrawn this issue, Appellant cannot now claim deficiencies in the SEPA review relating to hazardous contamination under a different numbered claim that generally raises issues relating to environmental health (*e.g.*, Claim 2.1.d, last sentence, or any other claim that Appellant "clarified" would encompass the environmental health element of the environment).

In addition, the Motion requested that "the Examiner determine the Appellant did not raise claims regarding impacts of loss of light on human health, since this claim was never expressly stated, either in the Notice of Appeal or the 'Clarification.'" Motion, p. 11. Appellant did not address this request in the Response and has now abandoned or waived its opportunity to

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do so. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006) (a party abandons an issue by failing to brief it). The Examiner should determine that no claim regarding the impacts of loss of light on human health may be asserted at hearing.

Appellant's remaining SEPA claims are 2.1.a, 2.1.c, 2.1.d, 2.1.f, 2.1.g, 2.1.h, 2.1.i, 2.1.j, 2.1.k, 2.1.l, and 2.1.m. Each of these claims must be dismissed for one or more of three reasons, as explained in the Motion: first, claims concerning transportation impacts are exempt from appeal (section V.C of the Motion); second, claims concerning other elements of the environment were untimely added and/or are insufficiently specific (section V.B); and, third, claims asserting procedural error based on adoption of existing documents are without merit because they improperly assume the Project required preparation of a new and self-contained EIS (section V.F).

Appellant's arguments in the Response have highlighted the centrality of the third argument to its claims. Although the Response fails to provide any detail regarding the alleged inadequacies in review that Appellant has asserted, it does clarify the legal basis for many of the claims in the Notice. In sum, Appellant believes that the City's adoption of the 2003 Draft Environmental Impact Statement ("DEIS") and 2005 Final Environmental Impact Statement ("FEIS") for the Seattle Downtown Height and Density Changes was improper because those documents did not specifically address the Project, and the City's determination that the Project would have significant adverse effects on certain elements of the environment necessitated the preparation of a new EIS. *See* Response, pp. 10-13, 34-38, 40-45. Appellant states that this supposed procedural flaw (which, as will be explained below, was nothing of the kind) is the "legal basis" for the "[o]verall" claim asserted by claims 2.1.a, 2.1.d, 2.1.i, 2.1.j, 2.1.k, 2.1.l, and 2.1.m. Response, p. 12. The Response likewise makes clear that this assertion underlies claims

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2.1.f and 2.1.g, because they too depend on the mistaken premise that a new and complete EIS was required for the Project. Response, pp. 34-38.

Because this mistaken assertion is the basis for essentially all of Appellant' SEPA claims, it is discussed first below.

C. Appellant's claims that an EIS should have been prepared must be dismissed.

1. RCW 43.21C.034 allows the adoption of existing documents that do not specifically discuss a project.

The Response makes abundantly clear that nearly all aspects of Appellant's claims depend on Appellant's misreading of RCW 43.21C.034. Response, pp. 10-13, 34-38, 40-45. That provision, entitled "Use of existing documents," provides:

> 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.

According to Appellant, based on the City's determination that the Project is a "major action significantly affecting the quality of the environment," it was "required to prepare an EIS" for the Project. Response, p. 11. Appellant further argues that RCW 43.21C.034 authorized the City to adopt the FEIS "only if [the FEIS] adequately addresses *the environmental considerations of the [Project]*." Response, p. 41 (emphasis added). In other words, Appellant reads the first sentence of RCW 43.21C.034 as a requirement for existing environmental documents to include information specific to any project for which they are adopted. This is the basis for Appellant's assertion that the FEIS was not validly adopted: because it does not describe the Project.

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Appellant's claims both invent a requirement that does not appear in RCW 43.21C.034 and ignore numerous words that do. The intent of RCW 43.21C.034 is clear from its plain language: agencies may avoid duplicative review of impacts that are adequately addressed by preexisting documents so long as any new, project-specific impacts are fully analyzed before a project is ultimately approved. *HomeStreet, Inc. v. Dep't. of Revenue*, 166 Wn.2d 444, 451-452, 210 P.3d 297 (2009) ("Where statutory language is plain and unambiguous, courts will . . . glean the legislative intent from the words of the statute itself[.]"). That is why the statute allows the use of existing documents "in whole or in part"; why it requires agencies to determine that the portions of "information and analysis *to be used*" is "relevant and adequate" for the impacts to which it applies (and does not require the entire adopted document to be relevant or adequate in itself); and why, most importantly, agencies retain the ability to "require additional documentation to ensure that all environmental impacts have been adequately addressed." RCW 43.21C.034 (emphasis added). There is both a clear goal – to ensure that all impacts are fully analyzed – and numerous options for flexibility, including point-by-point analysis of preexisting documents and the additional of supplemental information. Appellant's contention that the City is "required to prepare [a new] EIS" any time it determines a project will have significant impacts is inconsistent both with the statute and with WAC 197-11-600(4)(c), which allows agencies to adopt existing documents and prepare an addendum "that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document."

The City's review of the Project complied fully with this statutory scheme. The City

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determined that the DEIS and FEIS adequately addressed environmental considerations[1] regarding "impacts that could result from redevelopment following a change in zoning to allow additional height and density in the Downtown zones," including "the direct, indirect and cumulative impacts of the Preferred Alternative and other alternatives." Analysis and Decision of the Director of the Seattle Department of Construction and Inspections, October 10, 2019 ("Decision"), p. 27. The City also determined that because the Project "lies within the geographic area analyzed in that EIS," the Project's "[p]otential impacts . . . are within the range of significant impacts that were evaluated in that EIS." *Id.* In other words, the FEIS and DEIS analyzed the environmental impacts of adding buildings at the Project's levels of height and density to the Project's neighborhood. In recognition of the programmatic nature of the DEIS and FEIS, however, the City recognized the need to "add more project-specific information and identify and analyze new potential environmental impacts from the proposed [P]roject." *Id.* It therefore prepared the Addendum, which concludes, based on a Project-specific analysis of 10 elements of the environment, that the Project "produces no significant, adverse environmental impacts that were not already studied in the EIS." *Id.*

Appellant's claims, by contrast, deliberately read the flexibility out of RCW 43.21C.034. According to Appellant, because the height and density changes analyzed in the DEIS and FEIS are "not the same thing as the [Project]" and "does not assess alternative proposals for developing the [individual] parcel" on which the Project will be constructed, "[t]he information in the 2005 FEIS is not relevant to the [Project's] specific impacts and it is inadequate to review

[1] The considerations listed in RCW 43.21C.030(c)(i) – (v) are "the environmental impact of the proposed action; any adverse environmental effects which cannot be avoided should the proposal be implemented; alternatives to the proposed action; the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

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those impacts." Response, pp. 41-42. Thus, Appellant argues, preparation of a full, self-contained EIS was required specifically for the Project.

Appellant advances an argument that would essentially nullify agencies' ability to rely on existing documents. Under Appellant's reading of RCW 43.21C.034, *no* environmental analysis of a nonproject action could be adopted as the basis for analysis of a project action, even if supplemented with all necessary project-specific information. Appellant provides no statutory or other legal support for its assertion that nonproject analyses may never be adopted in support of particular projects. Moreover, its cramped interpretation is inconsistent with the statutory scheme: if an adopted document had to fully address the impacts of a specific project, there would be no reason to allow adoption to authorize an agency to identify the "information and analysis to be used" in evaluating the new project, or to allow for "additional documentation." *See* RCW 43.21C.034.

Appellant's novel approach to RCW 43.21C.034 not only invents a "requirement" for project-specific analysis but ignores the plain language of the statute that expressly allows the flexible approach utilized by the City. Appellant emphasizes form to the exclusion of substance: rather than asking whether the Project's impacts were fully analyzed before the City issued a permit, it focuses only on whether the Project's impacts were fully analyzed *in the DEIS and FEIS*. But that question is not relevant, both because full analysis of the Project in the adopted documents was not required by RCW 43.21C.034 and because specific analysis of the Project is contained in the Addendum. If Appellant's argument were correct, no project could ever adopt existing documents or any portion of them – an outcome that would be flatly inconsistent with SEPA's text. All of Appellant's claims that depend on this mistaken description of the procedural requirements of SEPA review are without merit on their face and must be dismissed

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as described below.

2. Claims 2.1.i, 2.1.j, and 2.1.k must be dismissed.

Claim 2.1.i must be dismissed because it is a purely legal assertion, based on Appellant's misreading of RCW 43.21C.034, that the adoption of existing documents concerning a nonproject action is impermissible. The statements in the Response purport to dispute Respondents' argument in section V.F.5 of the Motion, but they do not succeed. *See* Response, pp. 40-42. Appellant insists that the claim presents a "factual issue," *see* Response, p. 40, but this is belied both by the text of the claim and by the Response itself, neither of which asserts any actual issue of fact regarding the environmental impacts of the Project. Neither the claim nor the Response makes any allegation that an environmental impact was not addressed prior to permitting of the Project; they assert only that the Project was not analyzed in the DEIS and FEIS. Nor does Appellant assert any inadequacy in the Addendum's discussion of any element of the environment; it alleges only that a "project that has significant impacts" must "follow the rules" for preparation of a new EIS, but the Addendum "did not contain the proper content *for an EIS*." Notice, p. 5 (emphasis added). This is a purely legal claim: it asserts that the City's SEPA review process was invalid not because relevant factual information was lacking, but because the Project was analyzed in an adopted document and an addendum. For the reasons explained in the section above, that argument fails as a matter of law. SEPA allows required analysis to be provided through the adoption of an existing EIS and the preparation of an addendum. WAC 197-11-600(3).

The same is true of claim 2.1.j, which merely reiterates the argument that the FEIS and DEIS "do not adequately address environmental considerations for the [Project]" as required by RCW 43.21C.034. In the Motion, Respondents did not seek dismissal of claim 2.1.j on the basis

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that the claim is without merit on its face, as it did for claim 2.1.i. However, the Response has made clear that claim 2.1.j "does not stand alone" but is instead part of the same "[o]verall legal claim regarding alleged noncompliance with RCW 43.21C.034." Appellant's discussion of claim 2.1.j expressly states that – just as for claim 2.1.i – its asserted error is not that any particular element of the environment was inadequately analyzed in the DEIS and FEIS, but instead that those documents were not validly adopted because they do not "adequately address[] environmental considerations set forth in RCW 43.21C.030 *for the [Project]*." Response, p. 11 (emphasis added). These statements leave no room for argument: claim 2.1.j lacks merit on its face and must be dismissed for the same reason as claim 2.1.i.

Appellant's erroneous reading of the required basis for adopting existing documents also requires dismissal of claim 2.1.k. This claim concerns a City Code provision that implements RCW 43.21C.034 by authorizing an agency to "use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts, provided that the information in the existing document(s) is accurate and reasonably up-to-date." SMC 25.05.600.B. Appellant stated in the Notice that the information in the FEIS is "outdated" not because of any particular impact that is insufficiently addressed, but because it is "15 years old." Again, had Appellant actually asserted an inadequacy in the City's analysis – for example, had it claimed that the Project will exceed the heights analyzed in the FEIS's discussion of heights allowed under the zoning changes it discussed – there could be an issue of fact that would survive a motion to dismiss. But Appellant has made no such claim.[2] Instead, it

[2] Indeed, Appellant's inclusion of claim 2.1.k on the list of issues that, according to the Clarification, apply to practically every element of the environment analyzed in the Addendum undermines any assertion that Appellant is specifically criticizing the City's treatment of any factual environmental issue, rather than the inherent nature of the FEIS as a whole.

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asserts that the entire FEIS is simply too old to be adopted for the Project, regardless of the inclusion of supplemental information. This is not an assertion of a factual issue but an argument that the FEIS's age makes its adoption legally invalid. And as Respondents explained in the Motion, the Examiner has already rejected this argument, ruling that "there is no limit on the age of a document that can be adopted identified in either WAC 197-11-630 or SMC 25.05." *Escala Owners Association*, HE File No. MUP-17-035, Order on Motion for Summary Judgment (February 15, 2018), at 2. Nor is there any such limit in RCW 43.21C.034.

Claims 2.1.i, 2.1.j, and 2.1.k must be dismissed.

3. Claims 2.1.f, 2.1.g, and 2.1.m must be dismissed.

In sections V.F.2, V.F.3, and V.F.7 of the Motion, Respondents demonstrated that claims 2.1.f, 2.1.g, and 2.1.m must be dismissed because they make the purely legal arguments that the City's environmental documents were required to include components that are required only for an EIS, not an Addendum. The Response, again, only proves the correctness of Respondents' arguments. Appellant does not contest that these elements are not required for an Addendum.[3] *See* Response, pp. 10, 34-38, 44-45. Instead, Appellant's contentions are merely a reiteration of its RCW 43.21C.034 argument: the adoption of the DEIS and FEIS was invalid, and preparation of a full EIS containing all EIS-specific elements was required. These claims fail for the same reasons described above.

Appellant's discussion of claim 2.1.f purports to frame its assertion that the alleged requirement to prepare a new, project-specific EIS carried with it a requirement to engage in an EIS-specific scoping process, but ends up merely reasserting that "it was improper for the City to

[3] Nor, indeed, could Appellant challenge the supposed failure of the Addendum to include these elements, because the Examiner lacks jurisdiction over challenges to the content of Addendum. SMC 23.76.006.C.1 (Examiner has jurisdiction to review only the adequacy of an EIS).

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adopt the 2005 FEIS." Response, p. 37. This assertion is incorrect. Because no new EIS was required, no scoping was required.

Likewise, Appellant asserts that claim 2.1.g survives because the "summary" and "existing environment" requirements of WAC 197-11-440(4) and (6) must be met either with project-specific information in an adopted existing document or with separately designated sections in an Addendum. Response, pp. 10, 37-38. But Appellant cites no provision of law establishing such a requirement; instead, as explained in the Motion, WAC 197-11-440 governs only the content of an EIS. No parallel requirement appears in WAC 197-11-600.

In its discussion of claim 2.1.m, Appellant once more concedes that its arguments do not concern the content of the Addendum itself but only reiterate the assertion that the City "was required to prepare an EIS for [the Project]." Response, p. 44. This assertion is incorrect. Moreover, as was explained in the Motion, the legal provisions cited by Appellant do not apply to Addenda.

Claims 2.1.f, 2.1.g, and 2.1.m must be dismissed.

D. Claims not asserted in the Notice of Appeal must be dismissed.

The Notice clearly raised two overall issues under SEPA: the legality of adopting the DEIS and FEIS, and the sufficiency of the City's analysis and mitigation of transportation impacts. Although neither of these claims can survive, for the reasons discussed in the Motion and in this reply, Respondents do not dispute that they were presented by the Notice.

Nowhere in the Notice, however, do the terms "land use," "energy/greenhouse gas emissions," "aesthetics," "height, bulk, and scale," "light, glare, and shadows," "wind," "historic and cultural resources," or "parking" appear. The term "construction" appears only in claim 2.1.b, which Appellant has now withdrawn. Nonetheless, after the deadline to amend its appeal

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had come and gone, Appellant filed the Clarification, asserting that claims 2.1.e (now withdrawn), 2.1.g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m were "intended to encompass" the assertion that "[t]he analysis, disclosure, and process associated with review" of all of these issues "violated SEPA." Clarification, pp. 1-2.[4]

For the reasons explained in section V.B of the Motion, Appellant's post-deadline amendment attempt violates HER 3.05. In addition, even if the claims in the Clarification had been validly added to the Notice, they are insufficiently specific to comply with HER 3.01(d)(3).

1. It is too late to amend the appeal.

For the reasons explained in section V.B.1 of the Motion, Appellant's so-called "clarification" was in fact an impermissible attempt at amendment after the deadline for doing so had passed. *See* HER 3.05 ("For good cause shown, the Hearing Examiner may allow an appeal to be amended no later than 10 days after the date on which it was filed."). In the Response, Appellant does not reference HER 3.05, does not attempt to establish "good cause" for the Notice's failure to even mention the elements of the environment listed in the Clarification, and does not attempt to distinguish the Clarification from untimely amendment attempts previously rejected in Hearing Examiner proceedings. *See, e.g., Moehring*, HE File No. MUP-18-001, Order on Motion to Dismiss (March 15, 2018), at 3 ("[B]road catch-all language that does not identify a specific issue . . . cannot be relied upon to shoehorn in new (more specific) issues.").

Instead, the only line in the Response that even acknowledges this argument is

[4] Appellant mischaracterizes the events of the prehearing conference. Contrary to Appellant's assertion, at page 9 of the Response, that Applicant's counsel "asked, specifically, whether" Appellant's claims "were intended to encompass elements of the environment beyond those" identified in the Notice, Applicant's counsel in fact requested that Appellant clarify that its claims were *limited* to those identified in the Notice. This was not an invitation to amend the Notice but an effort to ensure that Appellant could not do at hearing what it has sought to do in the Clarification and Response: take advantage of generalized assertions to introduce previously unidentified allegations.

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Appellant's assertion at pages 9-10 that the Clarification was not an impermissible amendment because 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 presented are relying on the conclusion in the Determination of Significance that the [Project] will have significant adverse impacts associated with each of the elements of the environment listed therein." In other words, any notice of appeal that "refers to" an environmental document should be understood to challenge any and every aspect of the evaluation of any element of the environment discussed in that document. This absurd and circular argument would require the Examiner to ignore not only HER 3.05 but also HER 3.01(d)(3) (requiring appellants to state "specific objections"), SMC 23.76.022.C.3.a ("Specific objections to the Director's decision and the relief sought shall be stated in the written appeal."), and the longstanding practice of the Office of the Hearing Examiner. *Moehring*, *supra*, at 3 ("[A]ny issue not raised in the Notice of Appeal, may not be raised later in the hearing process.").[5]

Appellant's argument is unavailing. The Notice's references to a "Determination of Significance" and generalized assertions of inadequate environmental analysis are not assertions that "[t]he analysis, disclosure, and process associated with the review of" any "specifically identified elements of the environment," as Appellant claims. *See* Clarification, pp. 1-2. Its late attempt to amend the Notice must be rejected: claims 2.1.g, 2.1.j, 2.1.k, 2.1.l, and 2.1.m may not be considered to include any elements of the environment not clearly identified in the Notice.

[5] Appellant also claims Respondents should understand its claims because they are "similar" to claims made in another case. Response, p. 13. But the two appeals involve different projects and a comparison of the notices of appeal in each case show that Appellant's issues are not identical. The HER require that the notice of appeal in each case state specific objections. Respondents should not be compelled to guess what Appellant might mean based on its unsuccessful claims in a different appeal.

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2. Vague claims must be dismissed.

For the reasons explained in section V.B.2 and 3 of the Motion, claims 2.1.j, 2.1.k, 2.1.l, and 2.1.m must be dismissed for failure to comply with HER 3.01(d)(3) and SMC 23.76.022.C.3.a, which require the inclusion of specific objections in appeal statements.

Appellant begins its response not by pointing to specific assertions of errors in analysis (as it could not, since there are none) but by challenging the Hearing Examiner's authority to enforce its own rules. Not only that, Appellant misleadingly quotes the rule that forms the basis for its argument, stating: "An appeal may 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.'" Response, p. 5 (quoting HER 3.02(a)). Appellant's selective quotation from HER 3.02(a) is an apparent attempt to obscure the fact that the Rule does not contain the word "only." Nor do HER 3.02 and other Rules support Appellant's added language: indeed, the Rules expressly allow dismissal without hearing when the challenged action is withdrawn by the City (HER 3.02(c)); when Appellant withdraws a claim (HER 3.06(c)); and when "the appellant fails to appear or is unprepared to proceed." (HER 3.14). Thus, HER 3.02(b), which allows "[a]ny party" to "request dismissal of all or part of an appeal by motion pursuant to HER 2.16," is not limited to motions brought under HER 3.02(a), as Appellant implies. Appellant's contention that dismissal for insufficient specificity is "not allowed by the Hearing Examiner's rules," Response, p. 7, is unavailing. Moreover, Appellant fails to respond to Respondents' citation, at page 10 of the Motion, of SMC 23.76.022.C.3.a, which requires: "Specific objections to the Director's decision and the relief sought *shall* be stated in the written appeal." (emphasis added). Even if HER 3.02(a) provided the only basis for dismissal, it would be warranted here. Since specific

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objections are required in a notice of appeal, arguments that raise new claims are outside the jurisdiction of the Examiner and subject to dismissal under HER 3.02(a).

Appellant next contends that the "draconian remedy" of dismissal for failure to state a specific claim is "terrible policy" because appeals are supposed to be accessible to *pro se* litigants. Response, p. 6. While this principle might reasonably guide the Examiner's discretion in analysis of particular cases, Appellant is represented by a very experienced land use attorney – and not only that, as the Response itself notes, "[t]his is not the first time that [Appellant] has raised these issues in front of the Hearing Examiner." Response, p. 13. Nonetheless, despite filing the Notice, the Clarification, and now a 45-page response that it suggests is also "intended to provide additional clarification" of its claims, Appellant has not indicated that any claim's assertion of inadequate environmental analysis is based on any specific "error." Consistent with the Examiner's long practice, dismissal of these claims on this basis is fully justified.

As Respondents explained at page 12 of the Motion, the following assertions lack sufficient specificity to provide the basis for a claim to be proven at hearing: the DEIS and FEIS "do not adequately address environmental considerations" (claim 2.1.j) and "are not accurate[,] not reasonably up to date[,] and no longer accurate" (claim 2.1.k); an SEIS was required due to "new information" (claim 2.1.l); and the Project's "environmental documents do not contain an adequate analysis of alternatives and their impacts" (claim 2.1.m). In its Response, as in the Clarification, Appellant again offers no specific assertions regarding any particular environmental impact – only reiterations of its claims that analysis was inadequate on the whole. Its claims thus remain mere conclusory and circular assertions that the Project's environmental documents are insufficient, inaccurate, inadequate, and out of date. Appellant may not rely on this language to make later assertions of specific environmental impacts. *See Cromwell,* HE File

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No. MUP-17-027, Order on Owner's and Applicant's Motion to Dismiss, (Oct. 10, 2017), at 2 (dismissing claim that "simply states the Appellants' opinion that the DNS for the proposal is inadequate" and that "does not state any facts in support of the opinion or identify any aspect of the ECA that was not evaluated by the Department").

For example, claim 2.1.l asserts that an SEIS was required because "there is new information about environmental impacts."[6] As Respondents asserted in the Motion, this is not a specific statement of error because it does not provide any indication of what new information exists, let alone why it would require the preparation of a separate document. Appellant's invocation in the Response of a laundry list of all the elements of the environment discussed in the Addendum does nothing to clarify the basis for this claim. *See* Response, p. 12 ("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."). To the contrary, the Response only makes the claim more confusing. It is nothing more than an assertion that one or more aspects of environmental analysis of the Project was generally inadequate – the type of claim that has been repeatedly dismissed in Hearing Examiner appeals. *See e.g., Safe and Affordable Seattle*, HE File No. MUP-18-019, Order on Motion to Dismiss (Oct. 5, 2018), at 1 (dismissing allegation that checklist contained "intentional and substantial misstatements of facts" for "fail[ure] to state specific objections concerning the errors it alleges); *Moehring, supra*, at 3 ("[M]ere generalized statements should be dismissed.).

[6] Claim 2.1.l's reference to "substantial changes to the proposal (in fact it's not even the same proposal)" appears to again refer to the DEIS and FEIS analyzing a nonproject zoning change rather than the Project. To the extent this is the meaning, this language is sufficiently specific but incorrect as a matter of law. To the extent it asserts other, unspecified "substantial changes" to the nature of the action proposed, it is insufficiently specific for the reasons described in this section.

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Appellant cannot rely on this language, or any language like it, to provide a basis for the assertion at hearing of specific impacts not alleged anywhere in the Notice, the Clarification or the Response. Appellant should not be permitted to rely on these claims to (as purely hypothetical examples) introduce expert testimony alleging that the Project threatens the historic integrity of a particular nearby building, that the FEIS inadequately analyzed shadow impacts on an adjacent facility, or that an alternative Project design would have better mitigated wind impacts. It would be unfair, inefficient, and inconsistent with the purposes of SEPA to require project applicants and municipalities to devote extensive resources to preparing to rebut every possible argument that could conceivably be asserted under the simple allegation that every aspect of environmental analysis was insufficient. Instead, appellants must state "[s]pecific objections" to the City's decision in the notice of appeal. SMC 23.76.022.C.3.a. They may state as many objections as they like, but they must do so with specificity.

Appellant has not met this requirement. Claims 2.1.j, 2.1.k, 2.1.l, and 2.1.m must therefore be dismissed to the extent they seek to assert heretofore unidentified impacts.

E. The Examiner lacks jurisdiction over transportation claims.

In the Motion, Respondents explained why the Examiner lacks jurisdiction over Appellant's transportation-related claims under RCW 43.21C.500. Appellant disputes this argument on three grounds, none of which can succeed.

1. Appellant's "public facilities" claims are transportation claims.

As Respondents explained in the Motion, RCW 43.21C.500 is jurisdictional. It establishes unequivocally that projects are "exempt from appeals under this chapter on the basis of the evaluation of or impacts to transportation elements of the environment" as long as certain additional criteria are met. RCW 43.21C.500(1). "Impacts to transportation elements" are

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defined as including "impacts to transportation systems; vehicular traffic; . . . parking; movement or circulation of people or goods; and traffic hazards." RCW 43.21C.500(2). There can be no dispute that Appellant's claim fit this description. In Appellant's own words, its "appeal . . . has asserted that the [P]roject will have significant adverse traffic circulation, loading, and access impacts as well as vehicular and pedestrian safety issues associated with the alley." Response, p. 21; *see also id.*, p. 22 ("Escala's claim that the [P]roject will cause probable significant adverse 'traffic and transportation' impacts that have not been adequately addressed by SDCI is not subject to dismissal."). Indeed, the Response does not attempt to assert that the claims do not fit this description.

Instead, Appellant attempts to sidestep the exemption by asserting that its claims may be described by a term other than "transportation." Specifically, Appellant asserts that the City Code provides authority for substantive SEPA mitigation of impacts to alleys under either of two policies – SMC 25.05.675.O, which concerns "public facilities," and SMC 25.05.675.R, concerning "traffic and transportation." Appellant argues that because the Notice uses the term "public facilities" and cites SMC 25.05.675.O, the alley-related claims regarding traffic and circulation may somehow escape RCW 43.21C.500's exemption. Response, pp. 14-18.

This argument cannot withstand scrutiny. As Respondents explained in the Motion, nothing in RCW 43.21C.500 remotely indicates that transportation-related claims are exempt from appeal simply because they can also be designated under some other term. Much less does it suggest that such a designation in a city code can override a statutory jurisdictional bar – particularly a city code that recognizes the controlling effect of state law. *See* SMC 25.05.680. The Response provides no explanation, let alone legal support, for why this could be so.

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Appellant's only nod to state law is its suggestion that SMC 25.05.675.O is "clearly born out of" WAC 197-11-444(2)(d), entitled "Public services and utilities," and does not "spring from" WAC 197-11-444(2)(c), "Transportation." Response, p. 16. This assertion is irrelevant: an administrative regulation does not override a statutory jurisdictional bar any more than does a municipal ordinance. But even if the question of which WAC provision inspired the drafters of the City Code were at issue, Appellant's argument would not help its case because it ignores the differences between WAC 197-11-444(2)(d) and SMC 25.05.675.O. WAC 197-11-444(2)(d) has nothing to do with transportation: as indicated by its title, it concerns "public services" such as "police," "schools," and "maintenance," and "utilities," such as "water/stormwater" and "sewer/solid waste." The scope of SMC 25.05.675.O, by contrast, is broader: its nonexclusive definition of "public services and facilities" includes "streets" and "transit." SMC 25.05.675.O.1. This further undermines Appellant's suggestion that claims of impacts to "public facilities" as defined by the City Code are necessarily a separate category from impacts to transportation.

Finally, Appellant's argument would lead to absurd results and would render RCW 43.21C.500 meaningless. All impacts to "transportation systems; vehicular traffic; . . . parking; movement or circulation of people or goods; and traffic hazards," RCW 43.21C.500(2), are also impacts to "streets," "transit," or similar transportation facilities and services. Reading the City Code to allow the appeal of indisputably transportation-based impacts whenever a notice of appeal invokes purportedly magic words such as "impacts to the alley as a public facility" would eviscerate the statutory exemption.

Appellant's use of the term "public facilities" does not save its claims.

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2. Generalized comprehensive plan policies do not demonstrate inconsistency.

Appellant next asserts that the Project does not meet the RCW 43.21C.500(1)(a)(ii) requirement of consistency with the transportation element of the City's Comprehensive Plan ("Comprehensive Plan" or "Plan").[7] Response, pp. 19-25. Appellant does not dispute any of the bases that Respondents offered in the Motion to establish compliance with this criterion – in particular, the Project's consistency with development regulations that are themselves consistent with the Plan and the lack of any indication that the Project will violate Level of Service ("LOS") standards. *See* Motion, pp. 14-15. Nor does Appellant assert that the Project fails to comply with any specific, quantifiable requirement or restriction in the Plan. Instead, Appellant argues the following: because the Project will have "adverse traffic and transportation impacts," it will be inconsistent with broadly worded Plan policies like "preserve and enhance the City's alleys" and "provide efficient movement of truck traffic." Response, pp. 20-21. Appellant then claims these alleged impacts concern issues of fact, because Respondents cannot establish that there is no "hypothetical situation conceivably raised by the appeal" that would prove them. Response, p. 21. Thus, Appellant asserts, RCW 43.21C.500's jurisdictional bar does not apply.

Appellant's argument misconstrues the nature of a comprehensive plan. Appellant maintains that it can demonstrate that the Project is inconsistent with the Plan because it will have "significant adverse traffic circulation, loading, and access impacts." Response, p. 21. But Appellant provides no legal support for its assertion that a project's alleged impact on an isolated area such as the single-block stretch of alley at issue here renders the project as a whole inconsistent with the Plan. Indeed, this assertion is contrary to the purpose of a comprehensive

[7] *Available at* https://www.seattle.gov/Documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/CouncilAdopted2019.pdf

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plan, which is "not a document designed for making specific land use decisions." *Lakeside Indus. v. Thurston Cty.*, 119 Wn. App. 886, 894, 83 P.3d 433, 437 (2004). Instead, it is a "general policy guide," *Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 44, 873 P.2d 498, 507-08 (1994) (quotations omitted), consisting of "broad policy benchmarks – not specific measures designed to implement such policies." *Sammamish Cmty. Council v. Bellevue*, 108 Wn. App. 46, 56, 29 P.3d 728, 733 (2001). The Examiner should reject Appellant's attempt to restyle its claims under SEPA – a law requiring project-specific analysis of development projects and their impacts on their surroundings – as claims under the Comprehensive Plan, which looks at general policy goals. Even if Appellant's factual allegations regarding the alley were correct, which they are not, congestion in a single alley does not render an entire project inconsistent with the entire transportation element of the Plan. *See Chinn v. City of Spokane*, 173 Wn. App. 89, 102, 293 P.3d 401, 407 (2013) (when a comprehensive plan "employs precatory language," such as "encourage" and "should," and does not "prohibit" development according to established standards, development is not "in conflict with the [plan's] aspirational goals" simply because it does not serve all of them).

Even when individual projects are reviewed for consistency with a comprehensive plan, "a proposed land use decision must only generally conform, rather than strictly conform, to the comprehensive plan." *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007). Courts disfavor the use of broad, subjective policy goals in comprehensive plans to disallow a project that complies with zoning regulations. *See Lakeside*, 119 Wn. App. at 897-98 ("[T]he Board may not invoke the plan's general purpose statements to overrule the specific authority granted by the zoning code . . . ."). As a result, so long as a project is an allowed use for its zone and land use designation and does not violate any bright-line prohibitions or requirements, courts

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do not rely on comprehensive plan language to create additional hurdles in the development process. *See, e.g.*, *Weyerhaeuser*, 124 Wn.2d at 44 ("[T]he extremely broad nature of the comprehensive plan [supports] the conclusion that [a project] is not so incompatible . . . as to be proscribed by the comprehensive plan."); *Barrie v. Kitsap Cty.*, 93 Wn.2d 843, 850, 613 P.2d 1148, 1153 (1980) ("In the instant case, even though the Ross shopping center does not completely conform with the plan, it is well within the statutory parameters outlined above. There has not been willful and unreasonable action but instead reasoned action following careful consideration of the issue.").

The City's Plan itself underscores these descriptions: it states that its goals should be read as "aspirations, not guarantees or mandates." Plan, p. 17. The Plan's policies are statements of "general policy" that "help[] to guide the creation of or changes to specific rules or strategies." *Id.* They involve "a range of actions over time, so one cannot simply ask whether a specific action or project would fulfill a particular Plan policy." *Id.* The policies and goals cited by Appellant contain broad, general language that could not form the basis for finding the Project inconsistent with the Plan even if Appellant's factual allegations could support such a determination. Indeed, based on the Plan's own interpretive guidance, accepting Appellant's contention that mere traffic impacts render the Project inconsistent with the Plan would *itself* be inconsistent with the Plan.

More broadly, RCW 43.21C.500(1)(a)(ii) cannot logically be interpreted to allow for a determination of inconsistency on the basis of broad, non-mandatory, and subjective policies like the ones cited in the Response. The obvious intent of RCW 43.21C.500 is to exempt residential projects from appeals rehashing disputes over traffic issues that have been systematically addressed by local growth-management policies. This represents a continuation of the ongoing,

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post-GMA legislative effort to "avoid duplicative environmental analysis and substantive mitigation of development projects by assigning SEPA a secondary role to (1) more comprehensive environmental analysis in plans and their programmatic environmental impact statements and (2) systematic mitigation of adverse environmental impacts through local development regulations and other local, state, and federal environmental laws.'" *Moss v. City of Bellingham*, 109 Wn. App. 6, 15, 31 P.3d 703, 708 (2001) (quoting Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, App. E, at 505 (1995)); *see also Save Madison Valley*, HE File No. MUP 18-020 & S-18-011, Findings and Decision (Feb. 26, 2019), at 35 ("The legislative intent behind RCW 43.21C.240 was to narrow SEPA review to 'gaps' that may exist in applicable law. . . . The Code follow[s] the state mandate to avoid duplicative review.").

If generalized policy assertions like Appellant's were sufficient to defeat RCW 43.21C.500's jurisdictional bar, it would effectively nullify the statute. Because nearly all comprehensive plans contain broad goals and policies like the ones Appellant cites, no project could be immune from criticism on this basis, meaning that requiring a hearing to test every such claim would do the opposite of exempting projects from appeal. Project proponents seeking to invoke the exemption would have to engage in extensive litigation over general and subjective questions such as whether a project "enhance[s]" city alleys and "creat[es] inviting spaces within the rights-of-way." *See* Response, p. 20. Not only would this completely defeat the purpose of the RCW 43.21C.500 exemption, it would require hearing examiners to decide appeals on the basis not of legal or factual issues but on whether, for example, an action complies with City policy to "enhance and promote economic opportunity." *See* Response, p. 20. Weighing these types of policy statements – which often conflict with one another – is a quintessentially

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legislative function, not one that belongs in a project permit appeal. *See Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 173 Wn. App. 310, 333, 293 P.3d 1248, 1259-60 (2013) ("The weighing of competing goals and policies is a fundamental planning responsibility of the local government."); *Aagard v. City of Bothell*, Central Puget Sound Growth Management Hearings Board Case No. 94-3-0011, Final Decision and Order, p. 14 n.7 (Feb. 21, 1995) ("This is why the GMA leaves discretion to local legislative bodies to balance objective factors with subjective factors."). Accepting Appellant's invitation to create more legal process over subjective policy questions – especially under the authority of a statute that expressly seeks to *reduce* litigation – would simply make no sense.

Instead, as Respondents explained in the Motion, the inquiry under RCW 43.21C.500(1)(a)(ii) should focus on specific and identifiable standards for determining consistency. As Appellant has not disputed, the Project represents a type of development specifically anticipated and encouraged by the Plan. Many of its users and residents will rely on modes of transportation the Plan seeks to increase. It will not impact state transportation systems and will not lead to the violation of any of the City's adopted Level of Service standards. It has been approved by the City after extensive review and with specific conditions to address transportation impacts. The Project is fully consistent with the Comprehensive Plan.[8]

[8] Appellant's discussion of the City's Freight Master Plan, *see* Response, pp. 22-25, is irrelevant. The Freight Master Plan is one of many documents adopted by the City to implement various aspects of the Plan; it is not itself part of the Plan. Plan, p. 20. To the extent Appellant's argument on this point is intended as an assertion that the Project does not meet the RCW 43.21C.500(1)(a)(i) criterion of "[c]onsisten[cy] with a locally adopted transportation plan," it would be unavailing for at least two reasons even if Appellant's assertions about the Freight Master Plan were correct (which they are not). First, a project is not required to be consistent with both a locally adopted transportation plan *and* a comprehensive plan; either is sufficient under RCW 43.21C.500(1)(a). Second, even projects seeking to establish compliance under this criterion need only demonstrate that they are consistent with "*a* locally adopted transportation plan," not with *every* locally adopted transportation plan. RCW 43.21C.500(1)(a)(i) (emphasis added). Thus, even if Appellant had demonstrated inconsistency with one such plan, that would not defeat an exemption from appeal.

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3. The Project's transportation impacts are expressly mitigated.

In Section V.C.3 of the Motion, Respondents established that the Project is "[a] project for which traffic . . . impacts are expressly mitigated by an ordinance, or ordinances, of general application adopted by the [City]," as required by RCW 43.21C.500(1)(b)(ii). Specifically, the Project's traffic impacts will be mitigated as necessary by SMC 23.52.006 (installation of improvements or strategy to resolve concurrency LOS noncompliance); SMC 23.49.022 and 23.53.030 (requiring alleys below minimum standards to be widened); and SMC 11.72.020 and 11.72.025 (which restrict standing or parking in an alley).

In the Response, Appellant first misconstrues the nature of the RCW 43.21C.500(1)(b)(ii) requirement, asserting that if it has made any allegation of any impact that would not be mitigated by the City Code, the Project is not exempt from appeal. This reading is not supported by the language of the provision, which does not state that a project may be appealed on the basis of transportation impacts if those impacts are insufficiently mitigated. It does not require every potential impact to be addressed by a city ordinance, or require a project's impacts be "fully" or "adequately" mitigated by applicable ordinances. It requires only that one or more impacts that a project may have "are expressly mitigated by *an* ordinance." RCW 43.21C.500(1)(b)(ii) (emphasis added). Appellant's interpretation is an illogical reading of the statute that would essentially nullify its effect in the same way as allowing appeals based on general comprehensive policies. In light of the obvious purposes of RCW 43.21C.500 and of SEPA more broadly, subsection (1)(b)(ii) can only be read to require that a project be of a type that is subject to mitigation under a citywide ordinance such as the ordinances cited in the Motion.

The Response simply ignores the argument in the Motion that SMC 23.52.006 both fits the definition in RCW 43.21C.500(1)(b)(ii) and applies to the Project – thereby conceding its

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correctness. In addition, unable to dispute that SMC 11.72.020 and 025 apply to the Project, Appellant resorts to claiming that the ordinances are not properly enforced and that "cars and trucks stand and park in alleys throughout the city despite this limit." Response, p. 27. The "limit" is, of course, the express mitigation required by RCW 43.21C.500(1)(b)(ii); Appellant's use of the term concedes the correctness of Respondents' argument on this point as well. Appellant's assertion that it should be entitled to appeal anyway would, once again, effectively prevent the RCW 43.21C.500 exemption from ever applying, because any Appellant could assert that an ordinance of general application is inadequately enforced.

Appellant's unavailing arguments reveal that its claims raise precisely the type of dispute that RCW 43.21C.500 was intended to foreclose: residential projects that have been analyzed and conditioned under city policies being appealed by opponents who do not believe those policies will adequately protect them from traffic or parking impacts. Appellant was free to raise these arguments during the City's review of the Project – as it did repeatedly and at great length. Appellant is also free to argue to policymakers that the City's laws should be changed to, in its view, more effectively address traffic and parking impacts on alleys downtown. But SEPA has been amended specifically to prohibit Appellant from seeking another bite at the apple on this basis during appeal of a permit decision, and Appellant cannot avoid this jurisdictional bar. The State legislature decided to prohibit appeals in this situation. This is a policy decision enacted into state law that cannot be revisited at the administrative level. All of Appellant's claims relating to transportation issues must be dismissed.

F. Design Review claims

In sections V.E and V.F.4 of the Motion, Respondents explained that claims 2.1.h, 2.2.b, 2.2.c, and 2.2.e must be dismissed because the Examiner lacks jurisdiction over procedures

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governing the Design Review process, because the City Code establishes that review of Design Review Board Decisions and SEPA determinations occur at the same time, and because the Design Review Board is a not a decision-maker whose actions are required to be informed by SEPA. Motion, pp. 20-21, 22-23.

In its Response, Appellant states that Claims 2.2.b and 2.2.e should be "read together to assert a single claim that SDCI erred . . ." and that Claim 2.2.b was "not intended to present a legal claim specific to the Board's decision." Response, p. 32. In its Response, Appellant has abandoned its SEPA claims challenging the Design Review Board ("Board") recommendation. Instead, Appellant primarily asserts that the City Department of Construction and Inspections ("SDCI") violated SEPA by failing to issue a SEPA determination before the Design Review Board issued its recommendation. Response, pp. 28-32, 38-39. Appellant claims this constitutes an action that would "[l]imit the choice of reasonable alternatives" in violation of WAC 197-11-070(1)(b). *Id*., p. 30. But Appellant ignores the fact that the City Code requires the City to issue its design review and SEPA decision together in a single document. While Appellant asserts Respondents did not identify the Code section with this requirement, this argument is disingenuous, as the requirement is fundamental to the structure of SDCI decision making on Master Use Permits ("MUPs") under SMC 23.76. SMC 23.76.002 explains that the purposes of Chapter 23.76 is to "provide for an integrated and consolidated land use permit process, integrate the environmental review process with the procedures for review of land use decisions, and provide for the consolidation of appeals for all land use decisions." Accordingly, under SMC 23.76.004, Type I and II decisions are "made by the Director and are consolidated in Master Use Permits." The decisions at issue here (design review and adequacy of an EIS) are Type II decisions appealable to the Examiner. SMC 23.76.006.C. As required by Chapter 23.76, here

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SDCI properly issued a consolidated MUP decision including both design review and SEPA in the decision at issue in this appeal. To separate those decisions would have violated the requirement for consolidation that underlies the MUP process as provided in Chapter 23.76.

In addition, Appellant failed to respond to the statements in the Motion – and as was previously decided in an appeal brought by this Appellant – that the Board "does not have decision making authority" but instead "is a recommending body, and the Director retains final decision making authority with regard to design review and to SEPA." *Escala Owners*, supra, at 20. WAC 197-11-070(1)(b) provides that "no action concerning the proposal shall be taken *by a governmental agency* that would . . . limit the choice of reasonable alternatives." (emphasis added). "Agency" is defined by WAC 197-11-714 as a body or board authorized to "take the actions stated in WAC 197-11-704," which are "limited to agency decisions to . . . [l]icense, fund, or undertake" a project action. WAC 197-11-704. Even though the Design Review Board is a "board," it does not have the authority to "license, fund, or undertake" any action – it only issues a recommendation to the City, which defers any final decision until it can be fully informed by SEPA. *See* SMC 23.41.008.F.2 ("The Director shall consider the recommendations of the Design Review Board when deciding whether to approve an application for a Master Use Permit."). There is no basis for Appellant's claims under 2.1.h or 2.2.b. The Response also makes clear that claim 2.2.e simply reiterates these claims. Response, p. 31. Claim 2.2.e must therefore be dismissed as well.

In addition, Appellant has withdrawn claim 2.2.c. Response, p. 45. This claim must also be dismissed.

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G. Claim 2.1.c

As explained in Section V.F.1 of the motion, in addition to requiring dismissal under RCW 43.21C.500, claim 2.1.c should be dismissed on the alternative basis that it does not assert a violation of a legal requirement – it only alleges that the City did not take an action that the Code places within its sole discretion. Appellant cites no legal authority for a finding of noncompliance with a non-mandatory requirement. Response, pp. 32-34. Claim 2.1.c must be dismissed on this basis.

III. CONCLUSION

For the reasons stated in the Motion and in this Reply, all of the claims identified in the Conclusion of the Motion must be dismissed.

DATED this 11th day of December, 2019.

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s/Courtney A. Kaylor, WSBA #27519
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