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 ASSOCIATION'S POST-HEARING BRIEF

I. INTRODUCTION

SDCI's code interpretation of SMC 23.54.035.C.2 should be reversed because SDCI incorrectly concluded that the Altitude Project will not result in vehicles extending beyond the property line if the loading berths are reduced to 25 feet in length. SDCI's evaluation was demonstrated to be a rote recitation of information provided to the agency by the applicant. That information was incomplete in many regards and incorrect in others. SDCI did not carefully examine the information, but instead echoed whatever conclusions the applicant supplied without critically assessing its accuracy or completeness.

SDCI also violated the process that is required for environmental review of the Altitude Project under the State Environmental Policy Act (SEPA), ch. 43.21C RCW and accompanying rules. SDCI committed legal error when it relied on the 2005 FEIS because the 2005 FEIS does not contain the requisite assessment information for the Altitude Proposal and does not, therefore, meet SEPA

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requirements for an adequate EIS. In addition, SDCI was not authorized by law to rely on the 2005 FEIS because the conditions for authorizing use of an existing EIS set forth in RCW 43.21C.034 and SMC 25.05.600(B) have not been met. SDCI's attempt to use an Addendum in lieu of an EIS has no possible justification or basis in law.

II. STANDARD OF REVIEW

All issues presented on appeal before the City of Seattle Hearing Examiner "shall be considered de novo." SMC 23.76.022.C.6. SDCI decisions that are made on a "Type II Master Use Permit shall be given substantial weight, except for determinations on variances, conditional uses, and special exceptions." SMC 23.76.022.C.7. Based on this provision, substantial weight is not given to the SDCI code interpretation because it is a Type I determination on a special exception to the loading berth standards in the code. *Id*.

The adequacy of an EIS is a question of law subject to *de novo* review. *Weyerhaeuser v. Pierce Cty*., 124 Wn.2d 26, 37–38, 873 P.2d 498, 504 (1994). EIS adequacy involves the legal sufficiency of the data in the EIS. *Id*. Adequacy is assessed under the "rule of reason," which requires a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision. *Id*. The court will give the agency determination substantial weight. *Id. citing* RCW 43.21C.090. To the extent that deference is due to a decision, the Court's "deference is not unlimited, nor does it approximate a rubber stamp." *Whatcom County v. Hirst*, 186 Wn.2d 648, 666, 381 P.3d 1 (2016). Instead, deference remains bounded by the goals and requirements of the law at issue. *Id*. at 667. *See also Quadrant Corp. v. State Growth Mgmt Hearings Bd.*, 154 Wn.2d. 224, 238, 110 P.3d 1132 (2005).

Here, SDCI determined an EIS drafted in 2003 and finalized in 2005 (the 2005 FEIS) "adequately address[ed] the environmental considerations set forth is RCW 43.21C.030 [*e.g.*

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alternatives, impacts, unavoidable impacts]." RCW 43.21C.034. Whether the 2005 FEIS adequately addressed those considerations should be considered using the *de novo* standard of review typically used for reviewing the adequacy of an EIS. Whether an EIS is being used for the proposal for which it was originally prepared or a later one, the issue remains the same: Does it adequately address the environmental considerations required by RCW 43.21C.030? That is an issue of law, reviewed *de novo. Id.*

III. ARGUMENT

Code Interpretation

SDCI erred in its interpretation and application of SMC 23.54.035.C.2 to the Altitude Proposal. The truck sizes, types and numbers of deliveries, truck maneuvering, inadequacy of the loading space, the narrowness of the alley, and inadequacy of the dock management plan altogether result in a situation where it is likely that vehicles that are using the loading berth or meant to use the loading berth will extend beyond the property line or park in the alley.

SMC 23.54.035 sets forth the standards for loading berths and requisite quantity of loading spaces for the proposal. The length of loading berths are determined by the extent that the proposal will have low, medium, or high demand uses. The Code states:

> b. Low- and Medium-demand Uses. Each loading berth for low- and medium-demand uses, except those uses identified in subsection C2d, shall be a minimum of thirty-five (35) feet in length unless reduced by determination of the Director as provided at subsection C2c.
>
> c. Exceptions to Loading Berth Length. Where the Director finds, after consultation with the property user, that site design and use of the property will not result in vehicles extending beyond the property line, loading berth lengths may be reduced to not less than the following:
>
> . . .

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(ii) Low- and Medium-demand Uses. Twenty-five (25) feet.

SMC 23.54.035.C.2.

The Master Use Plan Set for the Altitude Proposal reports a total of 202,434 square feet of low-demand uses and a total of 8,723 square feet of medium-demand uses for the Altitude Proposal. Ex. 17 at G001. Altogether, the total square footage for these uses require that they include a minimum of three 35 foot long loading berths in their design. SMC 23.54.035.A and C.2. SDCI may reduce the length of the loading berths to 25 feet only if the site design and use of the property "will not result" in vehicles extending beyond the property line. *Id*.

In SDCI Interpretation No. 19-004 (Jan. 7, 2020), SDCI concluded that the Altitude Project will not result in vehicles extending beyond the property line if two of the loading berths are reduced from 35 feet in length to 25 feet in length. Ex. 79. The evidence presented at the hearing demonstrated that SDCI's decision was not based on a credible assessment of the facts or law.

The plain language of SMC 23.54.035.C.2 leaves no doubt as to how that provision must be interpreted. The use of the phrase "will not result" is absolute. This means that, if there is any possibility that trucks might extend beyond the property line, the exception cannot be granted. If the evidence demonstrates that there is a chance that trucks might extend into the alley, the SDCI decision must be reversed.

The policy behind the absolute nature of this requirement makes sense: Once a building is constructed and operating with loading berths that are too short to accommodate the demand, there's no going back. Therefore, the applicant must prove beforehand, with certainty, that the trucks will not protrude into the alley. If trucks ultimately do extend into the alley after the building is in operation, it's too late.

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Rather than require certainty here, SDCI took leap of faith approach. SDCI did not adequately address serious questions about whether the trucks will extend beyond the property line in the 25 foot loading berths.

It was undisputed that only a certain type of very small trucks will actually fit in the 25 foot loading berths while still allowing enough room to maneuver behind the truck. Frank Rose, a former downtown truck driver, truck deliveries router, and current truck salesman and designer at Western Peterbilt, was the only authoritative voice on truck design, truck sizes, truck types, loading berth access and use, and the driver's perspective and behavior who testified at the hearing. *Rose Testimony* (Hearing Day 2, 9:01:26-11:08:24). He established that a truck that had a 20 to 22 foot box with a conventional cab would be 30 to 32 feet long, without a lift gate or a ramp. *Id*. A truck that had a 20 to 22 foot box with a cab over front (cab sits over the engine) would be 28 to 30 feet long, without a lift gate or a ramp. *Id*. If there is no lift gate or ramp, there is a step plate behind the box that is about an additional foot for the driver to step up onto it on every on every front. *Id*. He established that, at a minimum, the average lift gate on box trucks are from 5½ feet to 8 feet long and the average length of a ramp is 14 feet long. *Id*. He explained that the driver would need 5 ½ to 8 feet of room to maneuver in the back in addition to room for the truck and lift gates/ramps themselves. *Id*. Mr. Rose testified that most deliveries require a lift aid or ramp. *Id*.

By the time Mr. Rose finished testifying, it was plainly evident that trucks with a 20-22 foot box would not fit in the 25 foot loading bay, even without a lift ramp or gate. John Sosnowy then demonstrated that a truck with a 15 foot box and ramp would not fit in the 25 foot loading berth. *Sosnowy Testimony* (Hearing Day 2, 11:08:42-2:06:27); Ex. 62. It ultimately became evident from the testimony and evidence presented that the only trucks that can fit in the 25 foot loading berths, while still allowing for adequate room for the driver to maneuver in the back, are trucks that (1) do

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not have a typical lift gate, (2) do not have a side or back ramp, and (3) are short enough to allow adequate space for maneuvering. That a very small universe of trucks.

The SDCI land use planner who prepared the code interpretation, Lindsay King, generally agreed with Mr. Rose and Mr. Sosnowy in her testimony. *King Testimony* (Hearing Day 4, 10:45:59-11:41:35). The SDCI Code interpretation backs up Mr. Sosnowy's testimony as well where it concludes that trucks with as small as a 10 foot box with a ramp will not fit in the 25 foot loading bay. Ex. 79 at 10, fn 7. Ms. King erred, however, when she concluded that a 25 foot long truck with a 30" lift gate will not protrude into the alley when parked in the 25 foot berths. *See* Ex. 79 at 11. She failed to correctly calculate the length of the parking bays. Despite months of review, it was evident that she never took a hard look at the drawings. She never asked the questions (or got the answers) that were posed by the Examiner and appellant's counsel at the hearing. How, exactly, did SDCI determine that the drawings of the bays included in the Code Interpretation would allow a 25' truck to unload without protruding into the alley? The drawing ("25'0" Truck into Bay 1") shows a truck with a 30" lift gate that has been perfectly parked would have just 1'8" of clearance. Not a single witness for any party indicated that work space of one foot, eight inches would be adequate maneuvering space for unloading. Frank Ross testified that a driver would need five feet to unload. Nor did SDCI question how the truck could stay out of the alley if it had a lift gate longer than 30" – despite evidence from witnesses for all of the parties that many lift gates would be longer than 30 inches.

Indicating that her review was done at a "very high level," Ms. King relied entirely on the numbers of truck deliveries that were provided by the Applicant's paid consultant. *Id*. She did not conduct an independent investigation, but instead simply reviewed the existing project file documents that were already on file with SDCI. *Id*. She relied on a vague notion that there are "a

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number of deliveries" that occur in the downtown core that utilize much smaller vehicles such as the parcel post to Amazon deliveries, the sprinter vans, the worker trucks was generally a leap of faith that SDCI accepted. Ms. King did not conduct any research or assessment to validate this assumption, nor did she provide actual data or meaningful information to support it.

The data submitted on Escala deliveries to residents provided serious and credible doubts about Ms. King's assumptions and analysis. Ex. 58 (photos of ranges of vehicle types delivering to Escala); Ex. 61 (Escala loading berth logs); Ex. Ex. 59 (Escala Loading Experience); Ex. 27 (Escala loading logs); *Tilghman Testimony* (Hearing Day 3). Deliveries to the residential units fell into many different categories including package deliveries, furniture deliveries, delivery of equipment, pet turf, delivery of services, and more. *Id*. FedEx used large box trucks for delivery to the Escala. *Id*. Service trucks, such as those providing carpet replacement services, California closets, and pet turf, did not fit in the 25 foot berth. *Id*. This was all to a building that doesn't have a restaurant, bar, or hotel. *Id*.

The evidence at the hearing demonstrated that moving trucks and vans are a major issue that demand attention on this subject. *Tilghman Testimony* (Hearing Day 3), *Sosnowy Testimony* (Hearing Day 2); *Erickson Testimony* (Hearing Day 1); Ex. 58. The numbers of moving trucks and potential size of moving trucks are not given serious critical consideration in the Code Interpretation analysis despite that the great majority of them obviously won't fit into the 25 foot loading berths (especially with the need to maneuver from the back of the truck). The length of time that they will park in the 35 foot loading berth (over three hours) will pose significant problems on the demand for that single berth for other oversized trucks.

The Code interpretation's conclusion that truck access to the loading berths will not be a problem ignores the evidence that demonstrated major issues associated with access to the berths:

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including obstructions in the alley, turning radius issues, lack of skilled drivers, difficulty associated with the blindside back in, too tight of a space in the berth, and the presence of residential vehicles in the alley attempting to access the parking garage. *See* Ex. 79 at 14; *Tilghman Testimony; Rose Testimony.* SDCI failed to seek any independent verification of the applicant's claim that most or all truck drivers would be able and willing to navigate the various impediments and back their trucks into the loading bays. Certainly, it is possible to do so on a computer screen with a computer program driving the truck. But even then, just barely. But what about in the real world? How likely is it that most drivers would risk damaging their truck or items in the alley or the walls of the loading bay by trying that difficult maneuver? That is a question that SDCI apparently never asked. But Escala did and learned from truck drivers and the trainer of truck drivers that many drivers would not attempt that difficult maneuver. Mr. Rose's testimony confirmed this. Instead, they would park in the alley – the most likely scenario, but one which SDCI blindly ignored.

SDCI accepted the applicant's claims that a dock management plan would solve various issues, without ever seeking any assessment of the likely effectiveness of the plan from independent sources. Ex. 79 at 15; *King Testimony*. SDCI could not say how the Altitude or the residents would be able to assert control over the size of trucks that the United States Postal Service, Amazon, FedEx, Furniture Stores, Service vehicles, or any other companies will use to deliver to the residential units. (When a person orders something on Amazon, how do they control the size of the delivery truck?). SDCI could not say where oversized moving trucks will park the 35 foot loading berth is full. In light of the presence of the new Center City streetcar and the lack of available curbside parking on that block, it appears that SDCI is expecting that people will carry their couches, beds, and furniture from several blocks away when they are moving in or out of their apartments? What happens if the 35 foot loading bay is taken and a truck that is too big for the 25

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foot berth arrives for a delivery? What if a moving truck is parked in the 35 foot loading berth for more than three hours? How will the ambiguity of the word "vendors" in the dock management plan affect SDCI's ability to enforce of this provision in the future? They claim that it applies to every vendor (including Amazon and others over whom they have no control), but that's not clear. How can we trust that a dock manager will be able to stop drivers from parking in the alley when the evidence demonstrated that this was extremely difficult to impossible to do when the Escala tried to do it for their loading berth? The plan indicates that trucks will not be allowed to stage in the alley - where will those trucks park? The list of questions goes on and on.

No investigation was made of the success (or lack thereof) of similar dock management plans. No dock managers at other downtown buildings were interviewed. Staff just took it as an article of faith that if the applicant said a dock management plan would work that it would. Investigation done.

SDCI's evaluation was basically no more than a rote recitation of information provided to the agency by the applicant. SDCI did not carefully examine the data provided, but rather echoed whatever conclusions the applicant supplied without critically assessing its credibility, accuracy, or completeness. SDCI's failure to provide critical scrutiny of the applicant's information led the department to decisions that are not well grounded in facts, but instead are built on a series of wishful thinking and speculation. The department's incomplete assessment of the most important issues does not warrant any deference.

The Examiner sits in the seat as an original decisionmaker on this issue – reviewing it *de novo* with no deference or weight due to SDCI's code interpretation. SMC 23.76.022.C.7. Based on the evidence presented, the Examiner should find that many of SDCI's assumptions were not only untested and based on incomplete information, but were also quite likely untrue. The

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Examiner should vacate the SDCI decisions, determine that the project as designed violates the code requirement that precludes designs that may result in causing trucks to extend into or park in the alley.

Design Review

Design review is meant to offer a flexible tool that will allow new development to respond better to the distinctive character of its surroundings. Ex. 68 at 5. The purpose is to encourage better design and site planning to enhance the character of the City and ensure that new development sensitively fits into neighborhoods. *Id.*

The City design guidelines provide the basis for City design review decisions. SMC 23.41.010. Neighborhood design guidelines apply in the areas that are shown on the maps in the applicable guidelines. SMC 23.41.010. The project site for the Altitude Proposal is within the Belltown Urban Village as identified in the City of Seattle Comprehensive Plan and as identified in the maps in the Belltown Urban Village Guidelines. Ex. 89; Ex. 91. The project site is also within the area that is covered by the Downtown Design Guidelines. *See* Design Review Guidelines for Downtown Development at 53.

The Downtown Design Guidelines and Belltown Urban Village Design Guidelines both assign certain goals for the development of alleys. In the Downtown Guidelines, the goal expressed is to increase pedestrian safety, comfort, and interest, development portions of the alley façade in response to the unique conditions of the site or project. *Id*. at 32. The Downtown Guidelines indicate that the design should enhance the facades and surfaces in and adjacent to the alley to create parking access that is visible, safe, and welcoming for drivers and pedestrians. The Board must consider:

> (d) Locating the alley parking garage entry and/or exit near the entrance the alley; . . .

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> (f) Chamfering the building corners to enhance pedestrian visibility and safety where alley is regularly used by vehicles accessing parking and loading.

Ex. 68 at 33.

The Belltown Design Guidelines state: "When designing a building next to an alley, new developments should address all of its functions, including access to parking, service and loading areas, and as pedestrian routes." Ex. 69 at 18.

With respect to the pedestrian environment, the Belltown Design Guidelines state:

> (e) Pedestrian circulation is an integral part of the site layout. Where possible, and feasible, provide elements, such as landscaping and special paving, that help define a pedestrian friendly environment in the alley.
>
> (f) Create a comfortably scaled and thoughtfully detailed urban environment in the alley through the use of well-design architectural forms and details, particularly at street level. The photos indicate that well designed alley facades contain the same features as the other sides of the building, including windows.

Id. at 19. The Belltown Design Guidelines emphasize the need for pedestrian friendly alleys in the neighborhood. *Id*.

SDCI erred when it approved the Design Review decision because the Altitude Proposal is inconsistent with these design guidelines. SDCI should have required that the design include chamfering the building corners to enhance pedestrian visibility and safety at the Stewart/alley intersection as is called for in the Downtown Design Guidelines. Ex. 68 at 33. According to the Transportation Impact Analysis for the 5th and Virginia Proposal, which is another tower development that has been approved by SDCI on the same block, the level of service at the intersection of the alley and Stewart Street will be at an LOS F even without the Altitude Proposal. Ex. 18 at 29; *See also* Ex. 25 (App J at 27) ("Intersections at both ends of the alley, at Stewart Street and Virginia Street, are

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expected to operate at LOS F during the peak hours with the proposed action). According to the Applicant's consultant's traffic analysis, the Altitude will then introduce, on top of that, over 1000 vehicle trips and about 25 truck deliveries per day into that same intersection. Ex. 25 (App. J at 20, 27). That's a significant amount of trucks and cars trying to navigate accessing the alley entrance which shares a sidewalk that pedestrians will be using regularly. *Tilghman Testimony* (Hearing Day 3). Currently, the building creates a blind spot at that corner with no chamfering or other modifications that would address this problem. *Id*. The lack of any response to this risk in the design poses a significant pedestrian safety and visibility issue that should have been addressed in the design as called for by the design guidelines. *Id*.

The design does not locate the alley parking garage entry and/or exit near the entrance the alley. Ex. 3; *Tilghman Testimony* (Hearing Day 3). The parking garage entry is at the northernmost end of the project site boundary on the alley, while the entrance of the alley is at the southernmost end of the project site. *Id*. The garage entry is as far away from the alley entrance as it can possibly be. *Id.*

The Belltown Urban Village Design Guidelines state: "When designing a building next to an alley, new developments should address all of its functions, including access to parking, service and loading areas, and as pedestrian routes." Ex. 69 at 18. Pedestrian circulation is supposed to be an integral part of the site layout. *Id*. Where possible, and feasible, the design is meant to provide elements, such as landscaping and special paving, that help define a pedestrian friendly environment in the alley. *Id*. The design of the Altitude Proposal at the alley is about as unfriendly to pedestrians as it can possibly be. The design is focused on servicing an enormous number of new cars and trucks (and it even fails at that). SDCI paid no attention whatsoever to making sure that this alley functions as a pedestrian route. SDCI did not require that the proposal create a comfortably scaled and thoughtfully detailed urban environment in the alley through the use of well-design architectural forms

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and details, particularly at street level. Frankly, this demonstrates how inappropriate the size and scale of this building is for this site within the Belltown Urban Village.

For these reasons, the SDCI decision to approve design review for the Altitude Proposal should be reversed.

The State Environmental Policy Act

The overriding and central premise of the State Environmental Policy Act (SEPA), ch. 43.21C RCW, is that, for any major action significantly affecting the quality of the environment, the lead agency must prepare an environmental impact statement (EIS) that assesses the environmental impacts of the proposed action and alternatives to the proposed action. RCW 43.21C.030. In this case, SDCI has failed to abide by this fundamental legal requirement for the Altitude Proposal for the reasons explained below.

A. SDCI issued a Determination of Significance for the Altitude Proposal.

The first step of the SEPA process is for the agency to decide whether a specific proposal is "a major action significantly affecting the quality of the environment" as described in RCW 43.21C.030. That decision is referred to as the "threshold determination." RCW 43.21C.033; WAC 197-11-310; SMC 25.05.310. All threshold determinations must be documented in one of two ways: either a determination of non-significance (a DNS or MDNS) or a determination of significance (DS). WAC 197-11-310; SMC 25.05.310.D. *See also, Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). If the responsible official determines that the proposal will have no probable significant adverse environmental impacts, the lead agency shall prepare and issue a DNS per WAC 197-11-340 or a mitigated DNS per WAC 197-11-350. *Id.* If the responsible official determines that a proposal may have a probable significant adverse environmental impact, the responsible official

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shall prepare and issue a DS. WAC 197-11-360. The threshold determination, positive or negative, is final and binding on all agencies. WAC 197-11-390.

SDCI issued a Determination of Significance for the Altitude Proposal on September 14, 2017. Ex. 40. In that document, SDCI stated:

> Pursuant to SMC 25.05.360, the Director of the Seattle Department of Construction and Inspections (SDCI) has determined that the referenced proposal is likely to have probable significant adverse environmental impacts under the State Environmental Policy Act (SEPA) on the land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale; light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment.
>
> SDCI has identified and adopts the City of Seattle's Final Environmental Impact Statement (FEIS) (Downtown Height and Density Changes), dated January 2005 FEIS. This FEIS meets SDCI's SEPA responsibilities and needs for the current proposal and will accompany the proposal to the decision-maker.
>
> The Addendum has been prepared by the applicant to add specific information on the land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale, light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment from the proposal and discusses changes in the analysis in the referenced FEIS. Pursuant to SMC 25.05.625-630, this addendum does not substantially change analysis of the significant impacts and alternatives in the FEIS.

Ex. 40.

This document was issued to the public pursuant to WAC 197-11-360. It identified the elements of the environment for which an EIS must be prepared and constituted a binding decision that the Altitude Proposal is a major action significantly affecting the environment per RCW 43.21C.030. *See* WAC 197-11-390. SDCI then issued a second identical notice (with no changes to the September document) on October 9, 2017. Ex. 41.

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On August 5, 2020, two years after the Addendum was issued and shortly before the MUP Decision was made, SDCI issued a revised notice of Availability of Addendum, which stated that this public notice "corrects" information in the previous public notice. Ex. 42. The new revised notice changed the words "is likely to" to "could," as follows:

> Pursuant to SMC 25.05.360, the Director of the Seattle Department of Construction and Inspections (SDCI) has determined that the referenced proposal (~~is likely to~~) could have probable significant adverse environmental impacts under the State Environmental Policy Act (SEPA) on the land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale; light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment.

Ex. 42.

A Determination of Significance (DS) is "the written decision by the responsible official of the lead agency that a proposal is likely to have a significant adverse environmental impact, and therefore an EIS is required (WAC 197-11-310 and 197-11-360)." WAC 197-11-736. With this DS, SDCI concluded the proposal would have significant impacts related to land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale; light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment which must be analyzed in an EIS. WAC 197.11.330(b). It was also a final, binding decision that an alternatives analysis is required for the Altitude Proposal.

B. When a DS Is Issued for a Proposal, the Lead Agency Must Prepare an EIS that Contains the Information and Analysis Identified in SMC 25.05.440.

Once a DS is issued for a proposal, the lead agency must prepare an EIS for that proposal that contains everything identified in SMC 25.05.440 (also WAC 197-11-440). *See* RCW 43.21C.030; RCW 43.21C.031. Among other things, the EIS must include a "summary" of the proposal as follows:

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> The summary shall briefly state 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 action and the effectiveness of mitigation measures. The summary need not mention every subject discussed in the EIS, but shall include a summary of the proposal, impacts, alternatives, mitigation measures, and significant adverse impacts that cannot be mitigated. The summary shall state when the EIS is part of a phased review, if known, or the lead agency is relying on prior or future environmental review (which should be generally identified). The lead agency shall make the summary significantly broad to be useful to the other agencies with jurisdiction.

SMC 25.05.440(C).

The EIS must also identify and assess the impacts of reasonable alternatives to the proposal, including a no-action alternative. RCW 43.21C.030 (expressly requires an alternatives analysis). *See also* WAC 197-11-400; WAC 197-11-402; WAC 197-11-440(5), WAC 197-11-792(2)(b). The rules state:

> (a) This section of the EIS describes and presents the proposal (or preferred alternative, if one or more exists) and alternative courses of action.
>
> (b) Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.
>
> > (i) The word 'reasonable' is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.
> >
> > (ii) The 'no-action' alternative shall be evaluated and compared to other alternatives.
> >
> > (iii) Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts either directly, or indirectly through requirement of mitigation measures.
>
> (c) This section of the EIS shall:

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> (i) Describe the objective(s), proponent(s), and principal features of reasonable alternatives. Include the proposed action, including mitigation measures that are part of the proposal.
>
> (ii) Describe the location of the alternatives including the proposed action, so that a lay person can understand it. Include a map, street address, if any, and legal description (unless long or in metes and bounds).
>
> (iii) Identify any phases of the proposal, their timing, and previous or future environmental analysis on this or related proposals, if known.
>
> (iv) Tailor the level of detail of descriptions to the significance of environmental impacts. The lead agency should retain any detailed engineering drawings and technical data, that have been submitted, in agency files and make them available on request.
>
> (v) Devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action. The amount of space devoted to each alternative may vary. One alternative (including the proposed action) may be used as a benchmark for comparing alternatives. The EIS may indicate the main reasons for eliminating alternatives from detailed study.
>
> (vi) Present a comparison of the environmental impacts of the reasonable alternatives, and include the no action alternative. Although graphics may be helpful, a matrix or chart is not required. A range of alternatives or a few representative alternatives, rather than every possible reasonable variation, may be discussed.
>
> (vii) Discuss the benefits and disadvantages of reserving for some future time the implementation of the proposal, as compared with possible approval at this time. The agency perspective should be that each generation is, in effect, a trustee of the environment for succeeding generations. Particular attention should be given to the possibility of foreclosing future options by implementing the proposal.

SMC 25.05.440(D); WAC 197-11-440(5).

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An EIS must also include a description of the "affected environment" for each element of the environment that is at issue. SMC 25.05.440; WAC 197-11-440(6). "[B]ecause the 'Affected Environment' chapter of the EIS sets the 'baseline' for the environmental analysis that is the heart of the EIS, it is important that the baseline be accurate and complete." *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1163 (N.D. Cal. 2006).

Finally, the EIS must analyze significant impacts of alternatives including the proposed action and discuss reasonable mitigation measures that would significantly mitigate these impacts. SMC 25.05.440.E.1. This section must succinctly describe the principal features of the environment that would be affected, or created, by the alternatives including the proposal under consideration. *Id*. It must summarize significant adverse impacts that cannot or will not be mitigated. *Id*. The EIS must also include a detailed statement about any adverse environmental effects which cannot be avoided should the proposal be implemented. RCW 43.21C.030. It must clearly indicate those mitigation measures, if any, that could be implemented or might be required, as well as those, if any, that agencies or applicants are committed to implement. *Id.*

All of this is required by the broad requirement for an EIS in RCW 43.21C.030 and the rules that implement that provision, specifically SMC 25.05.440 (and WAC 197-11-440). Because the 2005 FEIS does not meet the requirements of RCW 43.21C.030, SMC 25.05.440, and WAC 197-11-440, it cannot be relied on for the Altitude Proposal SEPA review.

C. The 2005 FEIS Cannot Be Relied on by SDCI for the Purpose of Meeting Its SEPA Responsibilities for the Altitude Proposal.

SDCI adopted the City of Seattle's dated January, 2005 Final Environmental Impact Statement (Downtown Height and Density Changes) (the "2005 FEIS") for the purpose of meeting SDCI's SEPA responsibilities and needs for an EIS for the Altitude Proposal. Ex. 40. The source of authority for

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reliance on existing environmental documents to meet SEPA obligations is RCW 43.21C.034. That provision authorizes adoption of an existing EIS only under limited circumstances. It states:

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

RCW 43.21C.034 (emphasis supplied).

The Seattle Code states that an existing EIS can be adopted for use on a new proposal only if the information in the existing document is accurate and reasonably up-to-date. SMC 25.05.600(B).

SDCI committed legal error when it relied on the 2005 FEIS for two reasons: First, the 2005 FEIS does not contain the requisite information identified in SMC 25.05.440 (also WAC 197-11-440) for the Altitude Proposal and, therefore, the 2005 FEIS does not meet SEPA requirements for an adequate EIS for the Altitude Proposal. Second, SDCI is not authorized by law to rely on the 2005 FEIS because the other conditions described above for authorizing use of an existing EIS set forth in RCW 43.21C.034 and SMC 25.05.600(B) have not been met. Each are addressed in more detail below.

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1. 2005 FEIS does not contain the information and analysis required by SMC 25.05.440 and WAC 197-11-440 for the Altitude Proposal

a. The 2005 EIS does not contain a fact sheet or summary of the Altitude Proposal.

On the most fundamental level, the fact sheet and summary in the 2005 FEIS do not even mention the Altitude Proposal or identify the proponent of the Altitude Proposal. *See* Ex. 67. The legal requirements for a fact sheet are set forth in WAC 197-11-440(2). None of the information required by that regulation specific to the Altitude Proposal is provided in the 2005 FEIS. The 2005 FEIS does not contain the summary of the Altitude Proposal that is required by SMC 25.05.440(C). The 2005 FEIS does not even contemplate that the Altitude Project site would be developed at all. Ex. 66, Appendix C at C1-C4; Ex. 66, Appendix F (Map B) (states that it is unlikely that this site will be developed).

The 2005 FEIS is a programmatic EIS for an area-wide rezone. The project summary in that FEIS is a description of the Mayor's recommendation for changes to downtown zoning in the Denny Triangle, Commercial Core, and Belltown neighborhoods that was developed over fifteen years ago. Ex. 67 at 1-1 – 1-8. The 2005 FEIS does not contain a statement of the Altitude Proposal objectives, specifying the purpose and need to which the Altitude Proposal is responding. *Id*. There is no summary of major conclusions or significant areas of controversy and uncertainty and the issues to be resolved for the Altitude Proposal, including the environmental choices to be made among alternative courses of action and the effectiveness of mitigation measures for the Altitude Proposal. *Id*. There is no summary of the proposal, impacts, alternatives, mitigation measures, and significant adverse impacts that cannot be mitigated. *Id.* SMC 25.05.440(C) requires that this information about the proposal be included in the EIS for the Altitude Proposal. The adoption of the 2005 FEIS as a substitute for an EIS

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specific to the Altitude Proposal, when the 2005 FEIS omits all of that information, is a violation of SEPA.

b. The 2005 FEIS does not contain an analysis of reasonable alternatives for the Altitude Proposal.

The EIS must identify and assess the impacts of reasonable alternatives to the proposal, including a no-action alternative. RCW 43.21C.030. *See also* WAC 197-11-400; WAC 197-11-402; WAC 197-11-440(5), WAC 197-11-792(2)(b).

The Altitude Proposal is a site-specific land use application. The objective of the proposal is presumably to construct and operate a high-rise tower containing hotel rooms, apartments, retail and restaurants at the corner of Fifth and Stewart in Downtown, Seattle. The "preferred alternative" is a 500-foot tower with 3,000 square feet of retail, 209 hotel rooms, 236 apartments, and 10,580 square feet of restaurant space. Ex. 25 at ii. Reasonable alternatives to the Altitude Proposal are actions that could feasibly obtain or approximate the site-specific objective of a building and operating a mixed-use building at the corner of Altitude, but at a lower environmental cost or decreased level of environmental degradation. WAC 197-11-440(5)(b). Reasonable alternatives would include, for example, different building designs, different configurations, fewer hotel rooms, apartments and/or restaurant/retail space, different setbacks, and/or different approaches to utilizing the alley. In other words, reasonable alternatives would be alternative proposals for a mixed-use building on this site, not for a non-project area wide rezone of downtown Seattle. The no-action alternative would consider the impacts of not building on this specific site with the zoning and development regulations that were in effect when the project vested (not the 2003 zoning which was the no-action considered in the 2005 FEIS), with other development proposals that are in the

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pipeline now (many new proposals that were not in the pipeline in 2003), along with updated and relevant data and information for the neighborhood.

The 2005 FEIS does not contain a reasonable alternatives analysis for the Altitude Proposal. That document is a programmatic EIS for an area-wide rezone. The alternatives that were analyzed in the 2005 FEIS constituted different alternatives for zoning legislation that was planned to rezone portions of the Denny Triangle, Commercial Core, and Belltown neighborhoods. *Id*. at iii (Fact Sheet for FEIS). It does not include any description of the Preferred Alternative (the Altitude Proposal itself), nor any discussion of reasonable alternatives to the Altitude Proposal. Ex. 67 at 2-1 – 2-27. Three of the alternatives (Alternatives 1, 2, and 3) in the 2005 FEIS consisted of different combinations of increases in allowable maximum heights and densities (volumes) of buildings in several downtown zones. The "no action" alternative (Alternative 4) assessed what was likely to occur over time under the land use code that was in effect in 2003. Ex. 67 at 2-21 – 2-23. The no-action alternative assessed a situation with zoning that does not even apply to the project site today. The 2003 development regulations and zoning that were in effect when the 2003 DEIS and 2005 FEIS were prepared has been replaced with the new zoning legislation that was adopted by the City Council following the preparation of the 2005 FEIS and again more recently with the adoption of new MHA zoning downtown. Therefore, the "no-action" alternative that was analyzed in that old FEIS is outdated, inapplicable, and irrelevant to any "no-action" alternative to the Altitude Proposal today.

The omission of this information in the 2005 EIS is in violation of SEPA. This is a significant legal error that invalidates the SEPA review for the Altitude Proposal.

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c. The 2005 FEIS does not contain a detailed analysis of the "affected environment" for the Altitude proposal.

An EIS must include a description of the "affected environment" for each element of the environment that is at issue. SMC 25.05.440; WAC 197-11-440(6). The 2005 FEIS does not contain a "detailed analysis" of the "affected environment" for each of the elements of the environment listed in the DS as is required by law for the Altitude Proposal.

The DS concluded the proposal would have significant impacts related to land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale; light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment. Ex.'s 40, 41, and 42. The 2005 FEIS does not describe the affected environment for any of those elements of the environment in a manner that is reasonable to assess the Altitude Proposal. The 2005 FEIS does not describe the existing project site, the existing cultural resource information; existing alley characteristics, design, and use; existing street, transit, pedestrian, and other transportation or traffic information; existing parking information; or existing and proposed development in the area that is relevant to this project site for purposes of assessing land use, aesthetic, construction or other impacts. *See* Ex. 67.

The description of the existing environment in the 2005 FEIS is a description of what existed in 2003. In addition, the description is too broad – it does not describe the specific features of the project site itself that would be affected by the Altitude Proposal in 2003, let alone as it exists today. Because it was a programmatic EIS for an area-wide rezone, the 2005 FEIS's description of the existing environment contains only a general description of traffic, land use, aesthetics, and other issues within the large study area.

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The adoption of the 2005 EIS as providing a "detailed" analysis of the environment impacted by the Altitude Proposal is a plain violation of SEPA. This is a significant legal error that invalidates the SEPA review for the Altitude Proposal.

d. The 2005 FEIS does not contain an analysis of probable significant environmental impacts associated with the alley caused by the Altitude Proposal.

The EIS must analyze probable, significant impacts of the proposed action and discuss reasonable mitigation measures that would significantly mitigate these impacts. SMC 25.05.440.E.1. As was asserted in Escala's Notice of Appeal and as was demonstrated at the hearing, the Altitude Proposal will have probable, significant adverse impacts to the alley that runs between Stewart and Virginia Streets and 4th and 5th Avenue.

Following the Hearing Examiner's oral ruling on subject matter jurisdiction pursuant to RCW 43.21C.500, the Hearing Examiner indicated that there may be SEPA issues that remained subject to the Examiner's jurisdiction notwithstanding the Examiner's ruling on the interpretation of RCW 43.21C.500(1)(b)(ii). This brief presents argument only on those alley impacts that Appellant believes have survived the Examiner's jurisdictional ruling. Escala has preserved argument on the other issues for appeal. The few issues that remain are addressed here.

The Altitude Project will cause conflicts with the new Seattle Streetcar on Stewart Street causing significant adverse traffic impacts on Stewart and in the alley. Tilghman Testimony, Ex. 72, Ex. 65. The Center City Connector is a new street car section that will link the South Lake Union Streetcar to the First Hill Street Car. *Tilghman Testimony*. The new route will run down Stewart Street immediately adjacent to the Altitude Project site. *Id.*; Ex. 72. The new Streetcar will be on a double track and will, therefore, take up the entire southern half of Stewart Street. *Id*. With the Altitude, trucks that are attempting to turn into the alley will be forced to enter into the streetcar lane for the Center

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City Connector, thereby causing significant impacts as a result of potential conflicts with the streetcar. *Id*. Ex. 65.

The Altitude Project will also cause congestion and safety problems at the intersection of the alley and Stewart Street which, in turn, will have significant adverse impacts to pedestrians, bicyclists, and drivers on Stewart Street. As described above with respect to design review, the Transportation Impact Analysis for the 5th and Virginia Proposal reports that the level of service at the intersection of the alley and Stewart Street will be at an LOS F even without the Altitude Proposal. Ex. 18 at 29; *See also* Ex. 25 (App J at 27) ("Intersections at both ends of the alley, at Stewart Street and Virginia Street, are expected to operate at LOS F during the peak hours with the proposed action). According to the Applicant's consultant's traffic analysis, the Altitude will then introduce, on top of that, over 1000 vehicle trips and about 25 truck deliveries per day into that same intersection. Ex. 25 (App. J at 20, 27). That's a significant amount of trucks and cars trying to navigate accessing the alley entrance which shares a sidewalk that pedestrians will be using regularly. *Tilghman Testimony* (Hearing Day 3). This poses a significant pedestrian and cyclist safety and visibility issues that should have been assessed and addressed in the SEPA review.

The Altitude Project will cause conflicts between trucks attempting to access the Altitude loading bay and residents attempting to access the Altitude residential parking garage which will, in turn, cause significant adverse impacts in the alley. *Tilghman Testimony*. When trucks pull fully into the alley off of Stewart to prepare to back in to the loading berth, they will block the resident's garage access. Ex. 71. In addition, residential cars that enter the alley from Stewart will block the trucks from being able to back into the loading berth. *Id*. Trucks will be stuck in the alley and residential drivers will not be able to access the parking garage.

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The lack of curbside parking and loading/unloading opportunities in the near vicinity of the Altitude Project will cause significant adverse traffic impacts. As Mr. Tilghman explained, there is basically no curbside parking available on 4th Avenue, which has become a bus layover area for busses coming out of the tunnel. *Tilghman Testimony*; Ex. 75. And there will be no curbside parking on either side of Stewart Street as a result of the Center City Streetcar. *Id.*; *See also* Exs. 72 and 73. The segment of the south side of Virginia from the alley to 5th Avenue is another metro layover zone and therefore, no parking is available there. *Id*. Fifth Avenue has very limited curbside parking available. *Id*.

SDCI has approved the Altitude Proposal with the condition that residents shall use small trucks, but SDCI could not say how the Altitude or the residents would be able to assert control over the size of trucks that the United States Postal Service, Amazon, FedEx, Furniture Stores, Service vehicles, or any other companies will use to deliver to the residential units. To the extent that these or any other trucks (moving trucks, other oversized trucks) are turned away by the dock manager because the 35 foot loading berth is full and the 25 foot berths are too short, where will those trucks park? Also, are residents expected to carry their couches, beds, and furniture from a truck that is parked several blocks away? If a moving truck is using the 35 foot berth to solve this problem, where will the other large trucks park while that moving truck sits there for three or more hours? How can we trust that a dock manager will be able to stop drivers from parking in the alley when the evidence demonstrated how difficult that was for the Escala when they attempted to do that? Where will the trucks that need to stage go to park? What happens if the 35 foot loading bay is taken and a truck that is too big for the 25 foot berth arrives for a delivery? The list of questions goes on

The existing obstructions in the alley, including but not limited to solid waste and recycling containers, ducts, electrical boxes, will obstruct vehicle access and will, in turn, cause significant adverse impacts in the alley. *Tilghman Testimony*, Ex. 64, Ex. 71. The evidence demonstrated that

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there will be significant challenges in this very tight space regarding truck maneuvering into the loading berth. The turning radius is very tight, the alley is very narrow, not all drivers will be skilled and/or licensed drivers, and there will be considerable difficulty and risk associated with the blindside back in. *Tilghman Testimony; Rose Testimony.* Adding to this already difficult situation is the necessity of drivers having to navigate the various impediments as they attempt to circulate through the alley and take on the risks associated with backing their trucks into the loading bays. These impediments will add to the likelihood that the drivers will simply park in the alley rather than attempt to enter the loading berth.

The cumulative impacts of the Altitude Project, the Escala, and the proposed 5th and Virginia project will cause congestion problems in the alley that will have significant adverse impacts to residents, hotel guests, emergency vehicles, solid waste and recycling vehicles, delivery vehicles, and other users of the alley. When you add all of the traffic together in that alley for the Escala, the 5th and Virginia Proposal, and the Altitude Proposal – the residential vehicles, delivery trucks, moving trucks, service trucks, solid waste/recycling/compost, utility trucks, and more – the congestion and safety impacts to the alley are going to be significant. Any suggestion that all of these together will have less than a moderate impact on the alley is wishful thinking.

The 2005 FEIS didn't even mention the issue of alley congestion and safety impacts at all anywhere in the entire EIS. *Tilghman Testimony*. The 2005 FEIS certainly did not identify mitigation measures that could be implemented or might be required to mitigate the alley impacts of the Altitude Proposal. *Id.* The FEIS did not summarize significant adverse impacts to the alley that cannot or will not be avoided. *Id.*

The mitigation discussed in the 2005 FEIS is relevant to mitigation that applies to legislative action — policy choices, programs, or other broad action that the City Council could take — a very

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different realm of mitigation possibilities that are not relevant to this site-specific project. Mitigation for a site-specific project would include ideas such as setbacks in the alley, design modifications, additional requirements in the dock management plan, and the like. None of these ideas or anything like them were discussed in the 2005 FEIS.

2. The 2005 FEIS is no longer accurate or up to date.

The Seattle Code states that an existing EIS can be adopted for use on a new proposal only if the information in the existing document is accurate and reasonably up-to-date. SMC 25.05.600(B). In this case, the information in the 2005 FEIS is not accurate or reasonably up-to-date.

The 2005 FEIS was based on assumptions about the amount of growth of commercial buildings and residential units, the pattern of this growth, and population changes that were developed in 2003. Ex. 66 at 1-2–1-4. Assumptions about growth in downtown Seattle that were made 17 years ago cannot credibly be considered reasonably up-to-date. Not only is the actual evidence of what growth occurred and how that growth occurred available (and more accurate and up-to-date than guessing), but the Hearing Examiner can take judicial notice that 2003 was seven years before Amazon moved its headquarters to South Lake Union, which is also in the northern downtown and in close proximity to the Belltown Urban Village Neighborhood.

Appendix C to the 2003 DEIS summarizes the anticipated downtown residential/mixed use and projects that were in the pipeline at that time. That list does not include the Altitude Project, much less the project site. Ex. 66, Appendix C at C1-C4. Appendix F to the 2003 DEIS contains a Height and Density Study Report that provides information for the EIS's assessment of impacts. The authors of that report conducted a Capacity Analysis and made predictions about the anticipated commercial and residential development in the future. Ex. 66, Appendix F. That report was prepared in 2001. *Id*. Predictions that were made in 2001 about what residential and commercial development may occur in

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the next 17 years are not up-to-date in 2020. It's important to note that the Altitude Project site itself was identified as "not likely" to be developed by this study. Ex. 66, Appendix F (Map B). The 5th and Virginia Project site, which has recently been approved for development of a massive tower of roughly the same size as the Altitude Proposal on the same block, was also deemed "not likely" to be developed in the 2005 FEIS. *Id.* The 2005 FEIS assumptions are clearly not accurate or up-to-date.

On April 10, 2017, The City of Seattle City Council adopted a new Mandatory Housing Affordability (MHA) framework ordinance for development in downtown, Seattle in which the Council adopted new zoning that allowed for increased heights and higher density downtown, thus increasing the commercial and residential development capacity in downtown Seattle. *See* Ordinance 125291. The 2005 FEIS assumptions about the existing environment and the impacts of the proposed zoning at that time are no longer accurate or up to date in light of the new zoning.

Considering the amount of new development that has occurred in the area and the changes that have occurred overall, the information and assessment of impacts related to land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale; light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment is no longer accurate and is out of date.

With respect to alley impacts specifically, (to the limited degree that is described above), the Seattle Code did not require that access for new developments be off of the alley when the 2005 FEIS was prepared. That requirement was introduced into the Seattle code for the first time in September, 2006, when Ordinance 122235 was adopted. *See* Ex. 43. That ordinance added language to the code in 2006 for the first time that stated: "When a lot abuts an alley, alley access shall be required, unless the Director determines otherwise under subsection H1c." *Id.* at 17. The 2005 FEIS is not up-to-date

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on its analysis of traffic impacts because this crucial change requiring access via alleys occurred after that document was prepared.

3. The prior rezone proposal and the new Altitude Proposal do not have similar elements that provide a basis for comparing their environmental consequences.

SDCI can rely on the 2005 FEIS only if the proposal that was analyzed in the 2005 FEIS has similar elements to the Altitude Proposal that provide a basis for comparing their environmental consequences. RCW 43.21C.034. This would include elements such as timing, types of impacts, alternatives, or geography. *Id*. A lead agency can rely on existing environmental documents only if the information and analysis in those documents remain "valid" and are relevant and adequate to meet SEPA's requirements. RCW 43.21C.034. 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.

The 2005 zoning proposal and the Altitude Proposal are a not even in the same universe for purposes of comparing environmental consequences. They are not similar in timing, they are not similar in types of impacts, they are not similar in alternatives, and they are not similar in geography. The Altitude Proposal is a site-specific project on a single parcel proposed by a private developer that was approved by SDCI in October, 2020. The previous rezone proposal in the 2005 FEIS was a non-project, programmatic rezone of a very area in Downtown Seattle that was proposed in 2003 by the City of Seattle.

Re-using the 2005 FEIS as a complete substitute for an EIS for the current project is wrong for multiple reasons. As explained in more detail above, the alternatives considered in the old EIS do not constitute alternatives to what is being proposed today. Yet, the EIS in this case does not include alternative proposals for developing the Altitude parcel. Likewise, the analysis of impacts is

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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); s*ee also* WAC 197-11-774.

Consistent with the allowance for greater generality, the 2005 EIS analyzes impacts without any of the detail provided in a site-specific EIS. For example, its discussion of shadow impacts sweeps broadly, summarizing that bigger buildings allowed by the proposed rezone will mean less light in some public spaces. Ex. 67. But however appropriately for an area-wide, programmatic EIS, there is no assessment of the light impacts on individual buildings, including the Escala. *Id.*

The preface of the 2005 EIS reminds the reader that it is a programmatic document; that the analysis is general; and that more detailed analysis will be forthcoming at the project-specific stage:

> **SEPA NON-PROJECT REVIEW**
>
> *** * ***
>
> The State's SEPA rules and handbook provide for flexibility in the content and formatting of environmental review for non-project proposals, because details about the proposal are typically limited. . . . The level of analysis should be consistent with the specificity of the proposal and available information.

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> Broad analyses of non-project proposals can facilitate "phased review" by addressing bigger-picture concerns and allowing review of future proposals to focus on a smaller range of more specific concerns. This means that future proposals in the study area could incorporate or refer to portions of this EIS to fulfill their SEPA requirements. . . .

Ex. 67 (2005 FEIS) at ii.

Thus, when a commenter raised the issue that the 2003 Draft EIS failed to adequately address the impacts associated with alley vacations, the 2005 FEIS responded: "The precise location of alley vacations is not predicted in this EIS. Impacts of alley vacations are evaluated on a case-by-case basis." *Id.* at 5-11 (response #28). The same could have been said about any number of other project-specific impacts, including congestion created by overloading alleys. The programmatic 2005 EIS made no effort to discuss these project-specific impacts. While "portions" of the 2005 EIS could be adopted to fulfill some review for a later site-specific project, "phased review" should be used to assure the necessary level of more detailed analysis at the project stage. Phased review is a convenience to move the ball forward from the programmatic stage to the project stage, not an excuse for omitting necessary detail to fully inform the decision maker at significant points along the way.

D. Even if SDCI Could Rely on and Adopt the 2005 FEIS, SDCI Was Still Required to Prepare a Supplemental EIS for the Altitude Proposal

Even if SDCI could rely on and adopt the 2005 FEIS for its SEPA review 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. Those provisions stated that a supplemental EIS "shall" be prepared to an existing FEIS if (1) there are substantial changes to a proposal so that the proposal is likely to have significant adverse impacts; or (4) there is new information indicating, or on, a proposal's probable significant adverse environmental impacts.

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In addition, there is a considerable amount of new information indicating, or on, the proposal's probable significant adverse environmental impacts that were identified in the DS as was described above in detail in Section C2 of this brief. The amount of new development that has occurred in the area, the outdated nature of the information from 2003 in the 2005 EIS, and the unexpected changes that have occurred since then overall result in new information that is relevant to the assessment of impacts related to land use, environmental health, energy/greenhouse gas emissions, aesthetics (height, bulk and scale; light, glare and shadows, views), wind, historic and cultural resources, transportation and parking and construction elements of the environment.

With respect to the probable significant adverse alley impacts (to the limited degree that is described above), as mentioned above, the Seattle Code did not require that access for new developments be off of the alley when the 2005 FEIS was prepared. That requirement was introduced into the Seattle code for the first time in September, 2006, when Ordinance 122235 was adopted. *See* Ex. 43. That ordinance added language to the code that stated: "When a lot abuts an alley, alley access shall be required, unless the Director determines otherwise under subsection H1c." *Id.* at 17. The 2005 FEIS is not up-to-date on its analysis of traffic impacts because this crucial change occurred after that document was prepared.

In 2018, the Seattle City Council adopted a Statement of Legislative Intent requesting that SDOT, SDCI, and other departments identify and report on tools to reduce alley congestion in the Downtown Core. Ex. 10; Ex. 11. This was basically announcing a recognition that the alley access requirement has caused new significant adverse safety and congestion problems in the alleys downtown (exactly those significant impacts that are the subject of the Escala's appeal). An enormous amount of research and work has now gone into assessing these impacts, ultimately producing a wealth of new information that is directly relevant to and informative about the probable significant adverse

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impacts of the Altitude Proposal. *See* Ex.11, Ex. 21, Ex. 22, Ex. 53, Ex. 54, Ex. 55, Ex. 56, Ex. 57, and Ex. 58. These studies provide a considerable amount of new information indicating, or on, the Altitude Proposal's probable significant adverse impacts to the alley.

E. The Addendum Can Not Be Relied on as a Substitute for an EIS

An addendum cannot be used as a substitute for an EIS. *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty*., 122 Wn.2d 619, 631, 860 P.2d 390, 398 (1993), *as amended on denial of reconsideration* (Jan. 28, 1994), *amended*, 866 P.2d 1256 (1994). Procedurally, the steps in creating an addendum are different (and less demanding) than those involved in preparing an EIS. Whereas an EIS must first be scoped, no scoping is required for an addendum. *Compare* WAC 197-11-408 *with* WAC 197-11-625. Whereas an EIS is first published as a draft and circulated to other agencies with expertise and the public for comment, no such scrutiny is required for an addendum. *Compare* WAC 197-11-455 *with* WAC 197-11-625. Whereas a final EIS must be prepared and must include a response to the comments on the draft EIS, no such final analysis is required and no such transparency is required for an addendum. *Compare* WAC 197-11-460 and 560 with WAC 197-11-625.

Substantively, the two documents are distinct, too. An EIS must include all of the information summarized in SMC 25.05.440 (and WAC 197-11-440) (a detailed discussion of alternatives, summary of existing environment, analysis of impacts, and more). In contrast, an addendum is reserved for supplemental material that does not substantially change the prior analysis. WAC 197-11-660(4)(c); SMC 25.05.600.D.3.

Because the 2005 FEIS does not include a detailed analysis for the Altitude Proposal as required by SEPA, the necessary predicate for the addendum is absent. *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty*., 122 Wn.2d at 632. The issue in this case is, therefore, whether the

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analysis of significant impacts and alternatives in the existing environmental document — the 2005 FEIS — is adequate under SEPA. *Id*.

F. Even if the Addendum Could be Relied on as a Substitute for an EIS, It Is Not Adequate Because It Does Not Contain the Information and Analysis required by SMC 25.05.440.

Even if the Addendum could be relied on as a substitute for an EIS or SEIS for the Altitude Proposal, it is not adequate because it does not contain the information and analysis required by SMC 25.05.440.

1. The Addendum does not contain the required summary of the Altitude Proposal.

The Addendum does not contain a statement of the Altitude proposal's objectives, specifying the purpose and need to which the Altitude Proposal is responding. Ex. 25 at 1. There is no summary of major conclusions or significant areas of controversy and uncertainty and the issues to be resolved for the Altitude Proposal, including the environmental choices to be made among alternative courses of action and the effectiveness of mitigation measures for the Altitude Proposal. *Id*. There is no summary of the proposal, impacts, alternatives, mitigation measures, and significant adverse impacts that cannot be mitigated in this section of the Addendum. *Id.*

2. The Addendum does not contain an analysis of reasonable alternatives for the Altitude Proposal.

The Addendum not identify, describe, or assess reasonable alternatives to the Altitude Proposal. Pursuant to SMC 25.05.440(D), reasonable alternatives must include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation. The "Proposed Action" is identified as Alternative 1, Option A in the Addendum. That Option is a 500-foot tower with 209 hotels rooms, 236 residential units, approximately 3,000 sq. ft. of ground floor retail and 10,580 sq. ft. of restaurant space. There is no

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description of access to the proposal, the alley, or the location of and number of parking spots. The Alternatives to the Proposed Action that are identified - Alternative 1, Option B and Alternative 2, Options A and B all have increased density and/or increased height and more intensive land use than that Proposed Action.

The alternative provided in the Addendum is directly contrary to the explicit requirement in SMC 25.05.440(D); WAC 197-11-440(5)(b). The alternatives to the Proposed Action are more intensive, taller, and for a higher use than what is proposed. They will not have a "lower environmental cost or decreased level of environmental degradation than the Proposed Action. There is no description of the 'no-action' alternative for the Altitude Proposal in the Addendum. There is no analysis of the affected environment or impacts of the no-action alternative in the Addendum (with the exception of traffic impacts).

3. **The Addendum does not contain a detailed analysis of the "affected environment" for the Altitude proposal**

With the exception of the traffic and transportation impact study in Appendix J, the Addendum does not contain a detailed analysis of the affected environment for the Altitude Proposal for the other elements of the environment set forth in the DS that passes the rule of reason.

4. The Addendum does not contain an adequate analysis of probable significant environmental impacts associated with the alley that will be caused by the Altitude Proposal.

As mentioned above, this development project will have severe impacts to the alley that runs from Virginia to Lenora Street, between 4th and 5th Avenues. As mentioned above, our argument on this issue is limited by the Hearing Examiner's ruling on jurisdiction on this issue and this brief presents argument only on those impacts that Appellant believes have survived the Examiner's

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jurisdictional ruling. The few that are remaining and that were described in detail above with respect to the 2005 FEIS, were also not addressed adequately in the Addendum.

IV. CONCLUSION

For the reasons stated above, Escala Owners Association requests that the Examiner reverse and vacate the SDCI code interpretation and determine that the project as designed violates the code requirement that precludes designs that may result in causing trucks to extend into or park in the alley. Escala also requests that the Examiner reverse SDCI's decisions on design review and SEPA and remand with instructions to issue new decisions that are consistent with the guidelines and with the requirements of SEPA.

Dated this 14th day of February, 2020.

Respectfully submitted,

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