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 JOINT POST-HEARING BRIEF

I. INTRODUCTION

This is an appeal of the Master Use Permit ("MUP") granted for Respondent Downtown Hotel & Residences, LLC's ("Applicant") application to construct a 54-story mixed-use building ("Project") in the City of Seattle ("City"). The MUP includes two components: (1) design review approval under the Seattle Municipal Code ("SMC" or "Code") Chapter 23.41; and (2) the City's State Environmental Policy Act ("SEPA") decision, including both procedural compliance with SEPA and imposition of conditions pursuant to the City's substantive SEPA authority. Appellant Escala Owners Association ("Appellant") challenged both of these components through its appeal of the October 10, 2019 Analysis and Decision ("Decision") of

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the Director ("Director") of the Seattle Department of Construction and Inspections ("SDCI"). Appellant also appealed Land Use Code Interpretation 19-004 ("Code Interpretation"), which was issued by the Director on January 7, 2020.

All of Appellant's claims fail. Appellant's SEPA challenges fail as a matter of law, and Appellant introduced no affirmative evidence to demonstrate that the Project as conditioned will be inconsistent with the Code or with the Design Review Guidelines. The Examiner should deny the appeal in its entirety.

II. STATEMENT OF FACTS

A. The Project

The Project is a proposed 54-story mixed use building with hotel, 233 apartment units, retail, and parking for 140 vehicles. Ex. 20, p. 1. The Project's address is 1903 5th Avenue, and it will be located on a parcel (the "Project Site") at the southeast corner of a block bounded by Virginia Street, 5th Avenue, Stewart Street and 4th Avenue. *Id.*, p. 2. The Project Site is zoned Downtown Office Core 2 ("DOC-2"), and it is currently developed with a commercial surface parking lot. *Id*.

Most of Appellant's claims concern the alley that runs between Stewart and Virginia Streets. As shown in the diagram below (taken from page 19 of Ex. 78), the alley provides the rear frontage for five projects: the Project (at the upper right); the Escala (the building in which Appellant's members live; at lower left); the Centennial Building (at lower right, across from the Project); a commercial building/parking garage (in the upper middle, to the left/northwest of the Project); and the future 5th and Virginia development (at upper left):

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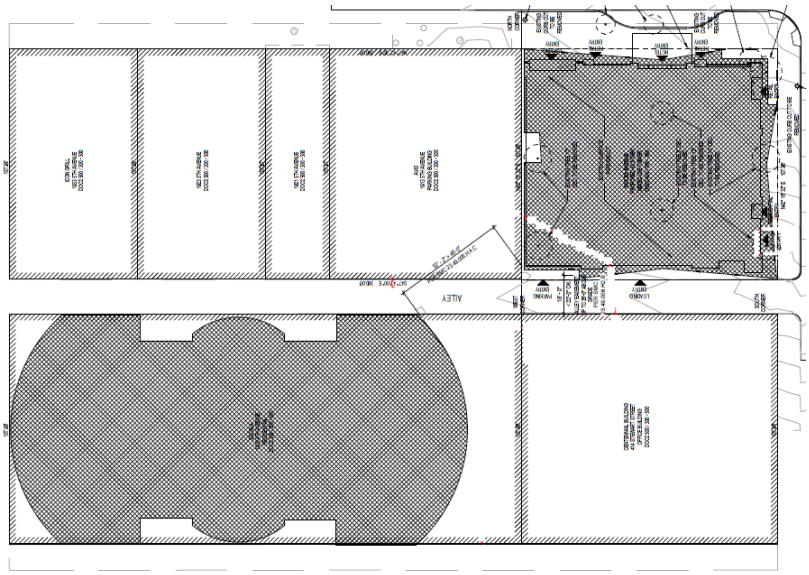
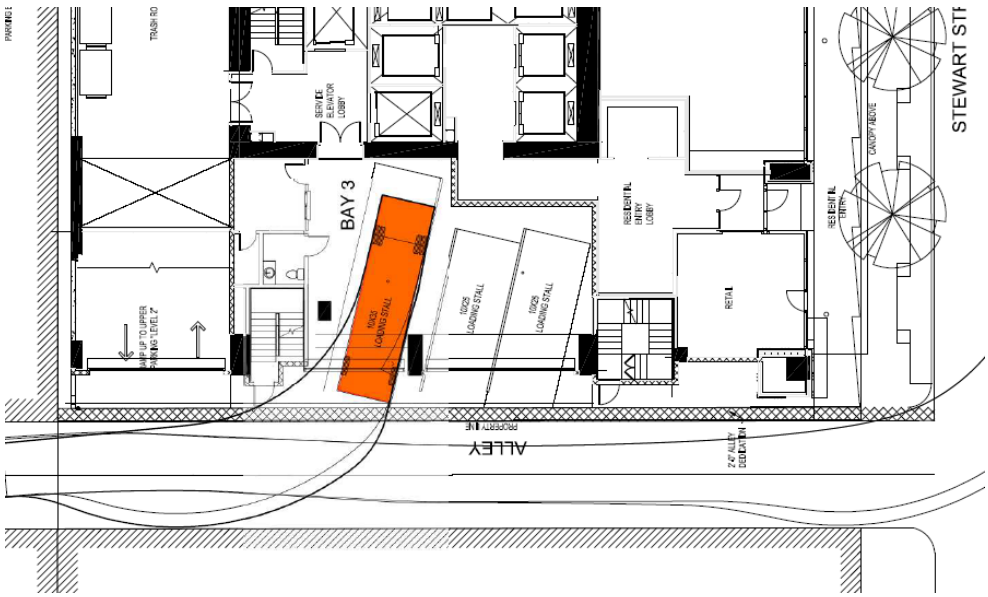


As shown in the diagram below, from Ex. 65, p. 5, the Project will include three loading bays and the entrance to a residential parking garage along its alley frontage:



B. Design Review

City review of the Project has spanned more than five years and reflects significant attention to the potential alley impacts asserted by Appellant. The Downtown Design Review Board ("Board") held three Early Design Guidance ("EDG") meetings for the Project: on

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December 16, 2014, on September 29, 2015, and on December 15, 2015. Ex. 44, 45, 46. Alley-related issues – including loading, design, and pedestrian safety – were raised in public comments by Appellant's members and were discussed by the Board at these meetings. *See* Ex. 20, pp. 4, 17, 19-20. Crystal Torres, a member of the City's planning staff who worked on design review for the Project, described how the "the project continued to evolve in response to guidance from the Board," and particularly that "from EDG 1 to EDG 3 you can see in the ground floor plan the changes that were made to accommodate the Board guidance." *Torres*, Day 3, Part 4, 1:03:00-1:04:00. These issues were also discussed at the Board's design review recommendation meeting on August 16, 2016. Ex. 47, p. 6; Ex. 20, p. 22. The Board noted that it was "[e]ncouraged by the responsiveness of the design team to the Board's directives over the course of three Early Design Guidance meetings." Ex. 48, p. 7. At the conclusion of the August 16, 2016 meeting, the Board voted to recommend approval of the Project with conditions. Ex. 48, p. 7.

City staff worked with the Applicant to ensure compliance with these conditions. *See* Ex. 20, pp. 25-26. Ultimately, the Director indicated "agree[ment] with the Design Review Board's conclusion that the proposed project and conditions imposed result in a design that best meets the intent of the Design Review Guidelines and accepts the recommendations noted by the Board." Ex. 20, p. 25.

C. Procedural SEPA Compliance

The City also analyzed the Project in compliance with the procedural requirements of SEPA. The City determined that because of the Project's nature and its Belltown location, many of its impacts had already been evaluated in the Draft Environmental Impact Statement ("DEIS") and Final Environmental Impact Statement ("FEIS") for the Seattle Downtown Height and

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Density Changes. Ex. 20, p. 27. The DEIS (which was published in 2003) and FEIS (published in 2005) evaluated zoning changes within the City's downtown, including the direct, indirect, and cumulative impacts of allowing additional height and density. *Id.* The FEIS analyzed development of up to 600 feet in the area in which the Project is located. Ex. 67, p. 1-2. The DEIS shows the Project site as a location of potential future development. Ex. 66, p. 3-44. The City determined that the Project's potential significant impacts were within the range of impacts analyzed in the FEIS, and it therefore decided to use the FEIS to evaluate the Project as provided by SMC 25.05.600. Ex. 20, p. 27.

In addition, the City completed a comprehensive analysis of the specific potential impacts of the Project. *Id.* The City described this analysis in a document entitled "Addendum to the Final Environmental Impact Statement for the Downtown Height and Density Changes EIS prepared for the 1903 5th Ave. Development, Master Use Permit No. 3018037" ("Addendum"), which was published September 14, 2017. Ex. 25. On the same day, the City issued a Notice of Revised Application, Adoption of Final Environmental Impact Statement and Availability of Addendum ("Addendum Notice"). Ex. 40. The Addendum Notice 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. This FEIS meets SDCI's SEPA responsibilities and needs for the current proposals and will accompany the proposal to the decision-maker. The Addendum has been prepared by the Applicant to add specific information on [all of the abovementioned] elements of the environment from the proposal and discusses changes in the analysis in the referenced FEIS. Pursuant to SMC 25.05.625-630, this addendum does not substantially change analysis of the significant impacts and alternatives in the FEIS.

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Id. The City published updated versions of the Addendum Notice on October 9, 2017, and August 5, 2019. Ex. 42. In its August 5, 2019 revision, the City replaced the words "likely to" with "could," indicating that it had "determined that the referenced proposal *could* have probable significant adverse impacts . . . ." *Id.* (emphasis added). All three notices solicited public comment on the FEIS and the Addendum.

In the Addendum, the City described its determination that the FEIS "analyzed the impacts of increasing building height to 600 feet on the [Project] site and surrounding area" and that the Project is "within the range of actions and impacts evaluated in the [FEIS]." Ex. 5, p. 6. More specifically, in a Project-specific Land Use Analysis that was attached and incorporated into the Addendum as its Appendix B, the City noted:

> [The FEIS] did not identify a specific potential future project for the [Project Site]; however, it did evaluate the impacts of allowing commercial office buildings and high-rise residential buildings to be increased in height from the previously-allowed height of 300 feet to a height limit of 600 feet in the [DOC-2 zone]. It was determined that such an increase in density was consistent with the City's Comprehensive Plan and neighborhood plans and was not a significant unavoidable adverse impact. Mitigation strategies identified in the [FEIS] included rezones of some areas to promote residential uses, employing measures to encourage retention of existing and new buildings for human service agencies, and increasing priority for using incentives in commercial development that contribute most directly to landmark preservation.
>
> . . .
>
> Redevelopment of the [Project Site] would substantially intensify on-site development. In order to accommodate the proposed development, all existing surface parking on-site would be removed. The increase in on-site population associated with the proposed hotel, residential, commercial, and retail uses would result in increased activity levels on-site and within the surrounding neighborhood. The general nature of increased site activity would include increases in pedestrian and vehicular traffic due to the dense nature of proposed redevelopment, as well as increases in the number of visitors to the commercial and retail facilities, as well as employees on-site. The overall site activity and increases associated with this proposal would be compatible with the surrounding dense, urban environment.

Ex. 5, Appx. B, pp. 1-2.

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The City also considered other information in the FEIS and Addendum (including the numerous, project-specific technical analyses and reports attached to the Addendum) to determine the scope of potential short- and long-term impacts. *See* Ex. 5, pp. 6-34. In addition, the City considered the mitigation for these impacts that was proposed by the Applicant, as well as additional mitigation required by City laws and policies. This analysis is documented in the Decision. Ex. 20, pp. 28-37. The City did not identify new probable significant adverse impacts that were not previously identified. The City concluded that no mitigation was warranted for the less-than-significant impacts the Project would have relating to greenhouse gas emissions, land use, public views, and shadows on designed public open spaces; that no mitigation beyond that already required and/or proposed would be necessary for impacts relating to construction, environmental health, height, bulk, scale, light, glare, and historic resources; and that the City has no authority to mitigate for parking impacts (which were unlikely to be significant).

D. Analysis of Transportation Impacts

The City closely reviewed the Project's potential transportation impacts throughout its multi-year consideration of the Project, paying particular attention to the alley. Marni Heffron, a licensed transportation engineer with 25 years of experience evaluating freight issues in the City, analyzed the Project's transportation effects and documented them in the August 13, 2017 Transportation Technical Report ("Technical Report"). Ex. 5, Appx. J. Ms. Heffron acknowledged public comments suggesting that "the alley is often blocked for long periods of time for truck deliveries, and the narrow width (16-feet between existing buildings) prevents a vehicle from passing a parked truck." Ex. 5, Appx. J, p. 12. She testified that due to these comments, her analysis included a "more rigorous alley-operations and loading analysis than we

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would typically do," including "specific studies" of truck use in the alley to "evaluate blockages." *Id.*; *Heffron*, Day 3, Part 3, 10:00-11:00.

First, Ms. Heffron analyzed existing alley operations by conducting 11 hours of video surveillance on Tuesday, May 17, 2016, between 7:00 A.M. and 6:00 P.M. Ex. 5, Appx. J, p. 12. As described in the Technical Report:

> During this period, the alley was blocked to traffic 16 times, and the average blockage time was about 17 minutes. However, on that day there was a moving truck that blocked the alley at Escala for over three hours. If this one disruption was removed from the calculations, then the average blockage time would have been under six minutes. . . . Alley use was also determined from the video surveillance. It determined that existing alley traffic is comparatively low with 20 or fewer vehicles during peak hours.

Ex. 5, Appx. J, pp. 12-13. The Technical Report noted that when trucks parked in the alley, other vehicles would have to use an alternate route, and that the alley's intersections with Virginia and Stewart Streets were predicted to operate at LOS F and E respectively. *Id.* Ms. Heffron testified during the hearing that it was important to note that blockages in the alley behind the Project are not "unusual," and that it "is not the case" that the alley is "the worst alley in town." *Heffron*, Day 3, Part 3, 26:30-27:30. She pointed out that the City's "Alley Infrastructure Inventory and Occupancy Study 2018" indicates that the "vast majority of alleys in the Center City area are just one-lane wide," that 90% are 19 feet wide or less, and that more than 36% are 15 feet wide or less. *Id.*; Ex. 22, pp. 13-14. Moreover, the Stewart-Virginia alley was one of six alleys for which delay times were specifically analyzed in the City's study, and the result was that this alley had the second-highest percentage of time free from blockages. *Id.*; Ex. 22, p. 41.

Second, Ms. Heffron determined the impacts that the Project could have on the alley and analyzed how to design and manage the Project to minimize those impacts. The Technical Report notes that the Project will dedicate 2 feet along its alley frontage, creating an 18-foot

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alley along its perimeter. Ex. 5, Appx. J, p. 27. It describes the Project's planned incorporation of three truck loading bays (one 35-foot bay and two 25-foot bays), which will be "angled to accommodate trucks that enter from Stewart Street, back into the loading dock, and then exit to Virginia Street, which would eliminate excess truck travel into the downtown street grid." *Id.* In addition, the Technical Report utilized the Institute of Transportation Engineers' Trip Generation Manual and Trip Generation Handbook to determine trip generation and estimated delivery and loading impacts for the hotel, retail, and residential components of the Project. *Id.*, pp. 17, 27.

After reviewing this information, John Shaw, a senior transportation planner with the City, twice requested additional information regarding alley logistics and operations for the Project. In response to comments from Mr. Shaw, Ms. Heffron provided a memorandum on May 8, 2019 that included a much more detailed analysis of expected deliveries to the Project, including trash and recycling; food delivery; flowers and herbs; liquor; linen; mail; and packages. Ex. 26, pp. 1-3. The expected deliveries totaled 35 to 40 per week, and the largest truck is expected to be a 26-foot long linen truck. *Id.* Ms. Heffron's May 8, 2019 memorandum also included diagrams demonstrating that the expected trucks would be able to maneuver into the loading bays, and it recommended mitigation in the form of "No Stopping or Standing" signs and residential move-in/move-out restrictions and scheduling. *Id.*, pp. 3-9.

Subsequently, Mr. Shaw issued a Transportation Correction Notice requesting additional information about truck turning movements, rear unloading, access to loading bays, and the loading dock management plan. Ex. 28, p. 1. In response, Ms. Heffron provided a memorandum dated September 10, 2019, which indicated that Bays 1 and 2 were designed to have lengths of 27'-11.5" and 28'-5", respectively. *Id.*, p. 3. Ms. Heffron determined that:

> Bay 3 would accommodate [a 26-foot] truck plus a truck lift, and still provide circulation behind the truck to access the freight elevator core. As noted in the May 8, 2019

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> memorandum, this 26-foot size truck is mainly used by the hotel's linen delivery service, which is expected to make deliveries in the late-night hours. The large bay would be available for other freight deliveries or resident move-in/move-out activities during daytime hours. The vast majority of the freight is expected to be made in smaller trucks, which could be accommodated in Bays 1 or 2.

Id. The memo also included updated truck turning diagrams demonstrating that Bays 1 and 2 "could accommodate a 25-foot truck with a 30-inch rear gate lift and still leave some ground space behind for maneuvering hand trucks," although "[m]ost trucks, including a standard U-Haul-type moving truck would be shorter than 25-feet." *Id.*, p. 5. In addition, the memo noted that neighbors had raised concerns "that other buildings may store waste receptacles in the alley that could affect truck maneuvering," and that to address this issue the Project would "designate a 'Dock Master' who can be available on-call to assist trucks with maneuvering into the building's loading dock, and/or reposition the waste receptacles, if needed, to provide a truck maneuvering path." *Id.* The Dock Master also featured in a detailed draft Dock Management Plan. *Id.*, pp. 10-11.

In the Decision, the City analyzed all of the material provided by Ms. Heffron and her colleagues and concluded that "[t]raffic operations with the proposed project would be consistent with those in the Downtown EIS." Ex. 20, p. 36. The Decision also noted the City's detailed analysis of the alley and its conclusion that the three proposed truck loading bays were 'anticipated to accommodate the expected loading demand and truck lengths without blocking the alley." *Id.* The City "determined that a dock management plan is warranted" to "provide protocols on the scheduling and timing of deliveries to minimize alley impacts of trucks waiting to access loading berths" and otherwise "mitigate potential traffic impacts from alley blockages." *Id.*, p. 37. The Decision both discussed the elements of the management plan, at pages 36 and 37, and provided specific requirements as a condition of Project approval, at pages 38 and 39.

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E. Appeal and Code Interpretation

The City issued the Decision on October 10, 2019. Appellant filed its Notice of Appeal on October 24, 2019. Pursuant to SMC 23.88.020.C.3.c, Appellant filed a Request for Land Use Code Interpretation ("Code Interpretation Request") along with its Notice of Appeal. In the Code Interpretation Request, Appellant asserted that the City was incorrect in determining that the Project qualified for an exception to loading-berth length as provided by SMC 23.54.035.C.2. Ex. 80, pp. 1-2. Appellant also asserted that the Project would not contain the required number of booths for its planned uses. Ex. 80, pp. 2-3. On January 7, 2020, the City issued the Code Interpretation, concluding that the Project was consistent with both provisions cited in the Code Interpretation request. Ex. 79, p. 16. In this appeal, Appellant has pursued only one of the two issues discussed in its Code Interpretation Request: its assertion that the Project was improperly granted an exception under SMC 23.54.035.C.2.c. That provision reads:

> C . Standards for Loading Berths.
> . . .
> 2. Length.
> . . .
> 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 consulting 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:
> . . .
> (ii) Low- and Medium-demand Uses. Twenty-five (25) feet.

In the Code Interpretation Request, Appellant argued that the truck sizes, available maneuvering space, and (allegedly) inadequate dock management plan would "altogether result in a situation where vehicles that are using the loading berth or meant to use the loading berth will extend

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beyond the property line." Ex. 80, p. 2. Thus, according to Appellant, all three berths should have been required to be 35 feet in length. *Id.*

SDCI Land Use Planner Supervisor Lindsay King prepared the Code Interpretation for the City. Ms. King reviewed the Decision; records of Project plans; the May 8, 2019 and September 9, 2019 memos prepared by Ms. Heffron; and three comment letters from Appellant's witnesses. Ex. 79, p. 2. In particular, she relied on the anticipated numbers of deliveries for the hotel, retail, and residential uses in the Project, as calculated by Ms. Heffron. *Id.*, p. 9-11. Ms. King concluded that deliveries in trucks that would not fit in the smaller loading berths would not be so frequent as to require more than one 35-foot berth. *Id.*, p. 11. She also analyzed the issue of maneuvering room behind delivery vehicles and concluded that a 25-foot truck could fit in the 25-foot berth while using a 30-inch lift gate, but that a larger lift gate or a ramp would require that truck to use the 35-foot berth. *Id.* However, according to Ms. Heffron's analysis, "[m]ost vehicles anticipated to use the 25-foot loading berth are vans and trucks that would have an overall length dimension of less than 25 feet and would not include a lift gate." *Id.*

In addition, Ms. King determined from the turning-movement diagrams in Ms. Heffron's September 9, 2019 memo that "a 26-foot box truck can maneuver into the 35-foot loading berth"; that "a 25-foot truck can maneuver into the 25-foot loading berth"; and that "[a]ll three loading berths can be occupied simultaneously." *Id.*, p. 14. This analysis specifically accounted for "the alley dimensions, considering adjacent building locations and the proposed building design." *Id.* Finally, Ms. King analyzed the conditions that would be imposed by the dock management plan, as well as the criticisms raised by Appellant's three comment letters. *Id.*, pp. 15-16. She concluded that the conditions were sufficient to maintain compliance and that Appellant's witnesses "question[ing of] the logistics of implementing the dock management plan" were

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"irrelevant to this interpretation and instead go to compliance with MUP conditions, which is an enforcement issue after the project is built." *Id.*, p. 16.

F. Appeal Hearing

Applicant and the City filed a Joint Motion for Partial Dismissal on November 25, 2019, and Appellant filed a Response on December 5, 2019. On January 10, 2020, the Examiner issued an Order granting Respondents' motion in part. The Examiner dismissed claims 2.1.b, 2.1.c, and 2.1.e (which were voluntarily withdrawn by Appellant) as well as claims 2.1.h, 2.2.b, and 2.2.e (which concerned procedural issues relating to the design review process). Respondents also sought to dismiss Appellant's claims relating to transportation impacts on the alley pursuant to RCW 43.21C.500. The Examiner determined that this claim implicated factual issues that needed to be addressed after the parties had the chance to present evidence during the hearing.

The Examiner held a four-day hearing on January 28, 29, 30, and 31, 2020. At the close of the first day, the Examiner concluded that RCW 43.21C.500 exempts the Project from SEPA appeals on the basis of transportation impacts as defined in RCW 43.21C.500(2). The Examiner determined that the requirement for a project to be "consistent with" the transportation element of a comprehensive plan requires a general inquiry that is "something less than" an analysis of consistency with individual policies, which is not "the level that the statute is trying to achieve." *Examiner*, Day 1, Part 4, 35:00-37:00. The Examiner likewise concluded that the Project "is a project for which traffic and parking impacts are expressly mitigated by ordinance of general application adopted by the City." *Id.*, 41:00-42:00. However, he determined that Appellant should have the opportunity to address whether any of its asserted impacts would survive dismissal under this standard. At the close of the hearing, the Examiner instructed Appellant to

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provide a list of claims that it believed had survived the RCW 43.21C.500 dismissal and instructed Applicant to respond with a list of generally applicable ordinances that it believed mitigated those impacts. The parties did so. Section C.1.d of the SEPA argument in Appellant's closing brief ("Brief") is devoted to asserting these impacts in greater detail. *See* Brief, pp. 24-28.

The parties agree the following claims remain to be resolved: Claims 2.1.f, 2.1.g, 2.1.i, 2.1.j (to the extent the claims challenge the adequacy of the DEIS and FEIS on their face), 2.1.k, 2.1.l, 2.1.m, 2.2.a, 2.2.d, and 2.3. Portions of claims 2.1.a and 2.1.d may also remain to the extent the Examiner determines they are not subject to dismissal under his ruling on RCW 43.21C.500.

III. ARGUMENT

A. Standard of Review

"[T]he Appellant bears the burden of proving that the Director's Decision was clearly erroneous." *Appeal of Escala Owners Association*, HE File No. MUP-17-035, Amended Findings and Decision (June 12, 2018) ("*Escala Owners*"), p. 14 (citing *Brown v. Tacoma*, 30 Wn. App. 762, 637 P.2d 1005 (1981)). "This is a deferential standard of review, under which the Directors decision may be reversed only if the Hearing Examiner, on review of the entire record, and in light of the public policy expressed in the underlying law, is left with the definite and firm conviction that a mistake has been made." *Id.* (citing *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001)).

Appeals of the City's SEPA determinations "shall be considered de novo and limited to the issues cited in the notice of appeal." SMC 25.05.680.B.5. "The determination appealed from shall be accorded substantial weight and the burden of establishing the contrary shall be upon the

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appealing party." *Id.* "To be adequate, the EIS must present decisionmakers with a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the agency's decision. Adequacy is judged by the 'rule of reason,' a 'broad, flexible cost-effectiveness standard,' and is determined on a case by case basis[.]" *Escala Owners*, *supra*, p. 15 (citing *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass*, 90 Wn. App. 225, 229, 951 P.2d 812 (1998)). To the extent Appellant claims there is a significant adverse impact that was not analyzed, "[t]o meet its burden of proof under SEPA, the Appellant must present actual evidence of probable significant adverse impacts from the proposal." *Id. (*citing *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002)). "This burden is not met when an appellant only argues that they have a concern about a potential impact, or an opinion that more study or review is necessary." *Id.*

Appeals of land use interpretations "shall be considered de novo, and the decision of the Hearing Examiner shall be made upon the same basis as was required of the Director." SMC 23.88.020.G.5. "The interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant." *Id.* Under the plain language of the City Code, the Appellant's claim that the Code Interpretation is not entitled to substantial weight is incorrect. *See* Brief, pp. 2, 9.

B. The Examiner Should Affirm the Code Interpretation.

Appellant challenges the Code Interpretation by arguing that "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" due to anticipated traffic and the alley's dimensions. Brief, p. 3. Appellant's claim fails. First, Appellant misstates the applicable legal standards – including the standard of review, the nature of the City's inquiry, and the requirements for the City's analysis.

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Second, Appellant has introduced no evidence to counter the careful, technical assessments conducted by Ms. Heffron and Ms. King. Instead, it has provided only a "list of questions [that] goes on and on," *see* Brief, p. 9, which is insufficient to meet its burden of proof.

1. Appellant incorrectly describes the applicable legal standards.

First, Appellant asserts that the standard of review is provided by SMC 23.76.022.C.7, which states that the Director's decisions on a "Type II Master Use Permit shall be given substantial weight, except for determinations on variances, conditional uses, and special exceptions, which shall be given no deference." According to Appellant, "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." This is wrong for several reasons, beginning with the fact that SMC 23.54.035.C.2.c provides an "Exception," not a "Special Exception." But more importantly, as noted above, SMC 23.88.020 expressly provides that when a land use interpretation is consolidated with an appeal of other issues relating to a Type II Master Use Permit decision, "[t]he interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant." SMC 23.88.020.G.5. Appellant's assertion that the Code Interpretation is not entitled to deference is unavailing.

Second, Appellant's arguments misleadingly portray the subject matter of the question before the Examiner. Appellant asserts the Code Interpretation was made in error because "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." Brief, p. 3. Neither SMC 23.54.035.C.2.c nor the Code Interpretation, however, concerned whether vehicles that are "*meant* to use the loading berth will . . . *park* in the alley." *See id.* Instead, they examined only whether "site design and

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use of the property will not result in vehicles extending beyond the property line." *See* SMC 23.54.035.C.2.c. The wording of this provision is meaningful, as is the fact that it is part of a subsection entitled "length." This language indicates that the relevant inquiry concerns the number and, particularly, dimensions of trucks expected to visit the property, and whether those trucks will fit within the allotted space. By contrast, SMC 23.54.035.C.2.c has nothing to do with whether the drivers of the trucks will choose to use the loading berths. A truck that is parked in the alley is not a truck "extending beyond the property line" – it is a truck that has not entered the property in the first place. Appellant's discussion of this issue is merely an attempt to restate its dismissed SEPA transportation claims regarding general congestion in the alley. This cannot provide the basis for a claim under a specific, unrelated provision of the zoning code.

Third, Appellant asserts that this section means "if there is <u>any possibility</u> that tricks <u>might</u> extend beyond the property line," the exception cannot be granted. Brief, p. 4 (emphasis added). But this is not what the Code says. Instead, under the plain language of this section, SDCI need only determine that "site design and use of the property will not result in vehicles extending beyond the property line." *See* SMC 23.54.035.C.2.c. Appellant's argument is an attempt to avoid its burden of proof. SDCI's determination is entitled to substantial weight and Appellant has the burden of proving SDCI erred. 23.88.020.G.5. The mere assertion that something "might" happen is insufficient to meet that burden.

Fourth, Appellant repeatedly asserts that SDCI based the Code Interpretation on what Appellant calls an "incomplete assessment." *See* Brief, p. 9. Appellant criticizes Ms. King for allegedly "echo[ing] whatever conclusions the applicant supplied without critically assessing its accuracy or completeness"; for not conducting an "independent investigation"; and for not

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interviewing "dock managers at other downtown buildings" or seeking "assessment of the likely effectiveness of the [dock management] plan from independent sources." Brief, pp. 1, 7-9. Appellant's attempt to create additional procedural requirements has no basis in law.[1] Neither SMC 23.54.035.C.2.c, nor SMC 23.88.020, nor anything else in the Code requires a land use interpretation to involve the actions Appellant describes. To the contrary, the Code directs the City to determine the Project's qualification for the exception based on only one expressly identified source of information: "consulting with the property user." SMC 23.54.035.C.2.c. This renders Appellant's suggestion that Ms. Heffron was an inappropriate source of information particularly unconvincing. Further, in addition to Ms. Heffron, Ms. King also relied on the City's transportation planner, Mr. Shaw, who independently reviewed the analysis provided by Ms. Heffron. Appellant's invented procedural requirements are simply another attempt to obscure the burden of proof, which falls not on SDCI to prove the adequacy of its analysis but rather squarely on Appellant to show that the standard will not be met. SMC 23.88.020.G.5.

2. Vehicles will not overhang the property line.

The majority of Appellant's arguments regarding the Code Interpretation are assertions that truck drivers will not comply with the dock management and instead park in the alley. But as stated in the Code Interpretation, that question "go[es] to compliance with MUP conditions, which is an enforcement issue after the project is built and is not part of a request for interpretation." Ex. 79, p. 16. Appellant's assertions are not only unsupported by the record, they are irrelevant to the question of whether trucks will extend beyond the property line when

[1] Appellant's assertion that Ms. King did not conduct an independent investigation is also incorrect. In response to a question from Appellant's counsel regarding whether she had "done any analysis of how many trucks would have a lift gate of more than 30 inches," Ms. King stated that she "called U-Haul" for more information on a number of questions, including whether "a moving truck [would] fit in a 25 foot loading dock." *King*, Day 4, Part 3, 38:00-39:00.

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parked in the loading berths.

Appellant makes only three assertions that are arguably relevant to the Code Interpretation: (1) that the demand for residential moving trucks will overwhelm the availability of the 35-foot berth; (2) that the size of truck depicted on Applicant's diagrams (a 25-foot truck with a 30-inch lift gate) could not use a 25-foot berth; and (3) that the majority of trucks serving the project will not fit in a 25-foot berth. None of these assertions are supported by evidence. First, with regard to moving trucks, the Code Interpretation concluded that "move-in/move-out could occur in either the 25-foot or 35-foot berth based on the size of the truck anticipated." Ex. 79, p. 11. Additionally, the requirements to schedule use of the loading dock for residential move-in and move-out activity, and to use a truck no longer than 26 feet (or else to secure an on-street truck loading permit), are part of the dock management plan and thus conditions of project approval. Ex. 20, p. 39. Appellant has provided no specific evidence that these conditions will be insufficient, only unsupported conjectures that the "great majority" of moving trucks "obviously won't fit into the 25 foot loading berths" and that reservation of the 35-foot berth will "pose significant problems on the demand for that single berth." Brief, p. 7. But Appellant's assertions of "serious and credible doubts," *see id.*, are insufficient to meet its burden of proving error in the Director's determination.

Second, Appellant questions Ms. King's determination that a 25-foot truck with a 30-inch lift gate could use a 25-foot loading berth, arguing that this would provide inadequate unloading space. Brief, p. 6. But even if Appellant were correct that these dimensions could pose a challenge to a driver, that would not invalidate the Code Interpretation. As Ms. King testified, a space behind a truck of less than two feet "would still accommodate the width of a hand truck" and thus "demonstrate[d] that maneuvering could occur." *King*, Day 4, Part 3, 32:00-33:30.

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Appellant has not actually challenged this conclusion; it simply argues that this provides inadequate unloading room. *See* Brief, p. 6. But Appellant's argument ignores the context of this determination: Ms. King was not suggesting that trucks of this size would routinely use the 25-foot berths, but instead seeking to "demonstrate what the minimum would be required in a worst-case scenario." *Id.* Such a scenario will be rare, because "the majority of vehicles [] represented in the interpretation are not going to have a 30 inch load gate behind a truck in the space," which would provide closer to four feet of maneuvering room in most cases. *Id.* In addition, "the majority of trucks [serving the Project] are going to be less than 25 feet in length." *Id.*[2]

Third, Appellant suggests that vehicles that can fit in the 25-foot berths and that do not have a ramp or a lift gate comprise "a very small universe of trucks." Brief, p. 6. This statement is not supported by the evidence. Appellant's witness Franklyn Rose, whom Appellant calls "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," *id.*, repeatedly contradicted Appellant's claims. Mr. Rose discussed his extensive experience driving "standard" 20-22 foot trucks for Sysco and testified that it would be possible to back those trucks into the 25-foot berths for the Project. *Rose*, Day 2, Part 1, 1:25-1:30. He stated that although it could be difficult to fit a 26-foot truck into the berth, it would likewise be possible. *Id.* Similarly, when

[2] During the hearing, a measurement on the diagrams in Ms. Heffron's September 9, 2019 Transportation Correction Response was the subject of questioning by Appellant's counsel and by the Examiner. As shown in Exhibit 28, page 4 (page 2 of the Heffron memo), the diagram in Figure 1 indicates that the distance between the rear corner of Bay 2 and the wall is 3'4". The graphic at page 7 of Exhibit 28 (entitled "25'-0" Truck Into Bay 2") indicates a distance of 4'1.5" in a similar area. Appellant's counsel suggested that this was an irreconcilable discrepancy that undermined the basis for the City's conclusions. But as Ms. King explained (and as closer inspection of the diagrams reveals), because the "Figure 1" diagram indicates the distance to the wall from the rear corner of the *bay*, whereas the "Truck Into Bay 2" diagram indicates the distance from the rear corner of a *truck* that is not taking up the full width of the bay. *King*, Day 3, Part 3, 52:00-54:00. There is no discrepancy.

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asked if the 25-foot trucks depicted in the turning-movement diagrams in Ms. Heffron's memo (Ex. 28) would fit in the 25-foot berths, Mr. Rose testified: "I'll be honest . . . they will fit once they get in there. They can fit in there." *Id.*, 19:00-20:00. Additionally, although Appellant's arguments imply that trucks requiring lift gates will either refuse to use the berths or simply extend into the alley, Mr. Rose testified instead that drivers who find there is not enough room for a ramp or liftgate would unload the truck from the inside. *Id.*, 43:00-44:00. Mr. Rose did not state that a driver in this situation would park in a manner that extended into the alley, even if other trucks were in adjacent berths; instead, he suggested that the driver would "run [deliveries] in between the two trucks . . . into the alley, and around and access the elevator." *Id.*, 50:00-51:00. Moreover, Mr. Rose also noted that not all deliveries require a liftgate or ramp, and he agreed that smaller vehicles servicing the Project (such as vans, cargo vans, and service vans) would have "no issues" fitting into the 25-foot berths. *Rose*, Day 2, Part 2, 2:00-7:00. Appellant's use of the phrase "universe of *trucks*" notwithstanding, *see* Brief, p. 6, its own exhibits indicate that many deliveries will not use trucks and that many delivery trucks do not rely on ramps or liftgates. *See* Ex. 22, p. 49; Ex. 58, p. 1.

Appellant's Code Interpretation appeal is not only based on irrelevant and conjectural assertions; its premise was repeatedly contradicted by Appellant's own witness. The Examiner should affirm the Code Interpretation.

C. The Examiner Should Affirm the Design Review Recommendation.

Appellant next argues that the Director erred in accepting the recommendation of the Downtown Design Review Board. The Code requires projects in the DOC-2 zone that exceed 50,000 sf to undergo full design review, including preparation of and compliance with a community outreach plan. SMC 23.41.004, Table B; SMC 23.41.014.B. Full design review

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includes EDG, during which the Board "shall identify the applicable guidelines of highest priority to the Board, referred to as the 'guideline priorities,'" and shall "summarize and consider any community consensus regarding design resulting from community outreach, or as expressed at the meeting or in written comments received." SMC 23.41.014.D.1. Subsequently, during the Design Review Board recommendation meeting, "the Board shall review the summary of public comments on the project's design, the project's consistency with the guideline priorities, and the Director's review of the project's design and consistency with the guideline priorities, and make a recommendation" to the Director regarding "whether to approve or conditionally approve the proposed project based on compliance with the guideline priorities, and whether to approve, condition, or deny any requested departures from development standards." SMC 23.41.008.F.1; 23.41.014.F.1. "The Director shall consider the recommendations of the Design Review Board when deciding whether to approve an application for a Master Use Permit." SMC 23.41.008.F.2. Here, the Director properly considered and accepted the Board's recommendation.

On appeal, Appellant asserts only that the Project is inconsistent with four provisions from the guidelines: Downtown Design Guidelines C(6)(d) and (f); and Belltown Design Guidelines C(6)(e) and (f). Appellant is incorrect.

1. The Project complies with the Downtown Design Guidelines.

In relevant Part, Downtown Design Guideline C(6) provides:

> ***alley parking access*** 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. Consider
>
> d. locating the alley parking garage entry and/ or exit near the entrance to the alley;
>
> e. installing highly visible signage indicating parking rates and availability on the building facade adjacent to the alley; and

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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, p. 3. Appellant argues that the City erred in approving the Project because the Project does not "locate the alley parking garage entry and/or exit near the entrance to the alley" and because the Project does not include chamfering at the Stewart Street corner despite anticipated heavy traffic. Brief, pp. 11-12.

Appellant's assertions that the Project should not have been approved depend on reading C6(d) and (f) as if they were mandatory zoning regulations. But that is not what the Downtown Design Guidelines themselves indicate – as demonstrated particularly by their use of the term "considerations" to refer to these provisions. Ex. 68, p. 32. Project applicants are not directed to "locate the alley parking garage entry" in a particular place or to "chamfer the building corners," but rather to "*consider* locating" and "*consider* chamfering." *See* Ex. 68, p. 33. More broadly, the Downtown Design Guidelines indicate that in contrast to "prescriptive" standards such as "zoning," "design review provides the opportunity to consider the distinctive characteristics of each development site and its immediate surroundings in a discretionary manner." Ex. 68, p. 6. And as both Project Architect Ted Caloger and Ms. Torres testified, the considerations are not mandatory. *Caloger*, Day 3, Part 4, 30:00-35:00; *Torres*, Day 3, Part 4, 1:04:00-1:05:00.

At the first EDG meeting, the Board identified Downtown Design Guideline C6 as a priority and asked the Applicant to consider loading, pedestrian, and façade issues relating to the alley. Ex. 44, p. 12. Mr. Caloger testified that in response to this and similar guidance, and in accordance with the overall goal of C6 to "[e]nhance the facades and surfaces in and adjacent to the alley to create parking access that is visible, safe, and welcoming," *see* Ex. 68, p. 33, the design team ensured that the Project would employ the same materials on the street- and alley-facing frontages as on the tower, including metal column covers and decorative art panels.

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Caloger, Day 3, Part 4, 30:00-35:00; Ex. 87 pp. 32-34. Mr. Caloger also testified that the Project will provide building-mounted lighting along its entire perimeter, including throughout the alley, to enhance safety. *Id.* He stated that the Project will be set back 7 feet from the property line along Stewart Street, resulting in an 18-foot-wide sidewalk that will "enhance the safety of pedestrians as they approach the alley" because they will "be able to look into it." *Id.*

Mr. Caloger also testified that he looked at the "considerations" listed under Downtown Design Guideline C6 and that he considered incorporating each one, but he determined that including some elements was not necessary. *Caloger*, Day 3, Part 4, 35:00-41:00. He indicated that he considered extending retail fenestration into the alley, as provided by C6(a) as well as chamfering, but that he determined that the extra-wide sidewalk would provide the same or better enhancement of visibility. *Id.* He testified that he considered chamfering but that he determined that "providing the additional 7 feet of sidewalk width serves the same purpose." *Id.* He also testified that he considered locating the parking garage entry closer to the entrance to the alley, and he stated that he believed that given the width of the sidewalk and the length of the entire block, the garage entry was located close to the alley entrance. *Id.*

The careful consideration of these issues by both the Board and the Project's design team is reflected in the materials that the Applicant prepared for its design review meetings and in the Board's comments. *See, e.g.*, Ex. 45, pp. 11-12 ("Consider implications of neighbors' ongoing uses of the alley and provisions for utilization of the alley as a pedestrian corridor. As earlier noted, consider and design for a highly visible alley façade."); Ex. 85, p. 16. Appellant has provided no evidence to challenge Mr. Caloger's testimony that the Project's design complied with guidelines C6(d) and (f) by "consider[ing]" the applicable requirements; much less has Appellant provided any analysis to challenge the substantive bases for Mr. Caloger's

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determinations that chamfering was unnecessary in light of the visibility provided by the sidewalk widening and that the garage entryway is, in fact, located close to the alley entrance. The Appellant has not shown that the City's decision to approve the Project in light of these criteria was clearly erroneous.

2. The Project is consistent with the Belltown Design Guidelines.

Appellant also challenges the Project's compliance with Belltown Design Guidelines C6(e) and (f). Belltown Design Guideline C6, like its Downtown Design Guideline counterpart, includes a number of "considerations," including two addressed specifically to the "Pedestrian environment":

> 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-designed architectural forms and details, particularly at street level.

Ex. 69, p. 19.

Appellant's claims regarding the Belltown Design Guidelines fail because the Belltown Design Guidelines do not apply to the Project. The Belltown Design Guidelines describe the Belltown neighborhood as being "bounded by Denny Way to the north, Elliott Avenue to the west, Sixth Avenue to the east, and Virginia Street to the south (historically and decades ago, the southern border was Stewart Street)." Ex. 69, p. VII. Because the Project is south of Virginia Street, it was within the borders of the Belltown neighborhood, for purposes of applying the Belltown Design Guidelines, "historically and decades ago." *See id.* However, it is not within those borders for purposes of the City's Decision, and Appellant's claims assuming otherwise must be denied.

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Even if the Belltown Design Guidelines did apply, however, Appellant's claims could not succeed. Like the Downtown Design Guidelines, Belltown Design Guideline C6 provides non-mandatory "considerations" rather than prescriptive zoning standards. Mr. Caloger testified that he included several elements specifically designed to increase safety and enhance the pedestrian experience in the alley, including lighting, sidewalk widening, and façade elements. *Caloger*, Day 3, Part 4, 30:00-41:00. Appellant's arguments that "the alley is about as unfriendly to pedestrians as it can possibly be" are bare assertions. *See* Brief, p. 12. And again, Appellant has provided no evidence to indicate that it was "possible and feasible" – let alone required – for the Project to include additional pedestrian amenities. Indeed, Appellant's suggestion that the alley should "function[] as a pedestrian route" directly conflicts with its other claims on appeal, nearly all of which are directed towards facilitating the flow of vehicular traffic through the alley. *See id.*

The fact that Appellant's challenge to the results of the multi-year design review process (which included three EDG meetings, a successful recommendation meeting, multiple rounds of Board and public comments, and the identification and consideration of numerous priority guidelines) comes down to a few non-mandatory, alley-related considerations speaks for itself. The record "reflects conformance of the proposal with the Design Review Guidelines" and "it was not error for the Director to conclude that the proposal was consistent with these guidelines." *See Escala Owners, supra*, p. 20. Appellant has not shown that the Director's decision was inconsistent with any applicable guidelines or otherwise clearly erroneous.

D. The City Complied With All SEPA Requirements.

Appellant's Notice of Appeal contained two types of SEPA claims. First, Appellant asserted that the Project "will have significant adverse traffic circulation, loading, and access

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impacts as well as vehicular and pedestrian safety issues associated with the alley." Notice of Appeal, p. 3. Appellant withdrew or stated that it would not pursue any claims asserting significant adverse impacts from the Project other than those concerning the alley. Second, Appellant asserted that issuing the DS irrevocably committed the City to preparing a full, Project-specific EIS, and thus that adoption of the FEIS and preparation of the Addendum was insufficient to meet the City's obligations.

For the reasons explained below, these claims fail as well. First, none of the claims Appellant has described as "surviving" claims can, in fact, survive the Examiner's jurisdictional ruling under RCW 43.21C.500. Second, Appellant's conception of SEPA's requirements is unsupported by the law for the reasons articulated by the Examiner's ruling in *Escala Owners*, *supra*. Third, even if Appellant's transportation claims had not been dismissed under RCW 43.21C.500, they would not have established significant adverse impacts requiring a supplemental environmental impact statement ("SEIS"). And fourth, Appellant's assertions that the Addendum is inadequate to meet SEPA requirements is unsupported by the record.

In claim 2.1.f and portions of claim 2.1.i, Appellant's Notice of Appeal asserted that the City's SEPA process was improper because it did not include "proper scoping" and because it allegedly violated the requirements of WAC 197-11-500 through 570, which concern notice and comment. The Brief mentions scoping and comment only once: at page 34, as part of a description of how preparation of an addendum differs from preparation of a full EIS. These claims, like Appellant's other procedural claims, must be dismissed because they incorrectly describe SEPA's requirements. To the extent that these claims were intended as separate assertions of inadequacy in the SEPA process for the Project, they should be dismissed as abandoned because they are not the subject of any substantive discussion in the Brief.

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1. Appellant's alley-related claims must be dismissed under RCW 43.21C.500.

The Examiner correctly dismissed most of Appellant's alley-related claims during the hearing pursuant to RCW 43.21C.500, because the claims all concern transportation impacts; all of the impacts are mitigated by ordinances of general applicability; and the Project is consistent with the Comprehensive Plan. For the same reasons, the Examiner should dismiss the additional alley-related claims identified in section C.1.d of Appellant's SEPA argument.

Pursuant to the Examiner's instructions after ruling on the Joint Motion for Partial Dismissal and at the close of the hearing, Appellant has identified six issues that it claims have survived:

1. 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.

2. The Altitude Project will 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.

3. 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.

4. The lack of curbside parking and loading/unloading opportunities in the near vicinity of the Altitude Project will cause significant adverse traffic impacts.

5. The existing obstructions in the alley, including but not limited to solid waste and recycling containers, ducts, electrical boxes, will obstruct vehicle access and will, in turn, cause significant adverse impacts in the alley.

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

Escala Owners Association's Statement of Remaining SEPA Issues, February 4, 2020.

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a. Traffic, parking, and safety claims must be dismissed.

As an initial matter, the Examiner can dismiss all of these claims without any additional analysis under the plain language of his prior ruling that the Project "is a project for which traffic and parking impacts are expressly mitigated by ordinances of general application" adopted by the City. *Examiner*, Day 1, Part 4, 41:00-42:00. This ruling required the dismissal of all alley-related traffic and parking impacts from this appeal. All of Appellant's reasserted claims concern alley-related traffic and parking impacts, and they therefore cannot survive.

Numerous statements by the Examiner during the hearing established that traffic and parking impacts are definitively barred from this appeal. The Examiner unambiguously described "traffic impacts" as "foreclosed with my jurisdictional determination." *Id.*, 44:30-45:00; *see also id.*, 39:00-40:00 ("[I]t is instructive that on a general policy level, the City through its SEPA code and its traffic ordinance have indicated that their codes are there for the purpose of mitigation. And so, with that I would rule with the City on that issue."). Similarly, the Examiner stated: "I don't think that my original ruling completely foreclosed every issue that could be potentially raised by the Appellants that may be transportation-related[, but] I did indicate that there was a parking ordinance, so parking issues are gone." *Examiner*, Day 4, Part 3, 1:33:00-1:34:00. More broadly, the Examiner indicated that Appellant's task was to "identify what issues you believe fall outside the umbrella of transportation elements that may remain." *Examiner*, Day 1, Part 4, 45:30-46:00. Describing the issues that remained for briefing, the Examiner stated that "[for] issues concerning alleys, we have Code to address [them]" but expressed "concern that may be an impact raised by appellants that is not encompassed within the alley description or general alley/transportation description or parking." *Id.*, 40:00-42:00. For example, "if something is a traffic hazard related to pedestrian, that's also movement and

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circulation of people and traffic hazards – that's a transportation element over which I don't believe I have jurisdiction." *Examiner*, Day 4, Part 3, 1:21:50-1:22:10.

All six of Appellant's claims are based on the assertion that the Project will result in increased truck traffic in the alley and are therefore claims of significant impacts to "vehicular traffic." *See* WAC 197-11-444(2)(c)(ii); RCW 43.21C.500(2). No claim concerns any issues that are *not* fundamentally based on Appellant's traffic allegation.[3] In addition, claims 1, 2 and 6 concern traffic hazards, and claims 3, 4 and 5 concern parking. *See* WAC 197-11-444(2)(c); RCW 43.21C.500(2). In other words, every claim concerns at least two of the aspects of the transportation element of the environment the Examiner specifically identified as exempt from appeal. No additional analysis is needed to dismiss these claims.

b. City ordinances mitigate all transportation impacts.

Even if the Examiner looks to additional mitigating ordinances, it is abundantly clear that all of Appellant's asserted impacts are expressly mitigated by myriad ordinances of general application adopted by the City. *See* RCW 43.21C.500(1)(b)(ii). Respondents provided lists of applicable ordinances in the document admitted as Exhibit 5 as well as in their February 6, 2020 filing of City and Applicant's Joint List of Mitigating Ordinances. All of the ordinances listed in those documents apply as stated and are incorporated herein by reference. However, Respondents call the Examiner's attention particularly to the following provisions:

[3] In Claim 5, Appellant asserts that "existing obstructions in the alley" will cause significant adverse impacts. For the reasons stated at page 11 of City and Applicant's Joint List of Mitigating Ordinances, in addition to the fact that this is a transportation issue subject to dismissal under the Examiner's ruling, Appellant should not be permitted to raise this issue. It is not a proper claim (SEPA relates only to impacts arising from the project under review, not to existing conditions), and Appellant did not identify the issue in its Notice of Appeal. Likewise, in Claim 6, Appellant suggests that "congestion problems in the alley will impact "emergency vehicles," "solid waste and recycling vehicles," and "utility trucks," and that this will result in "cumulative impacts" Brief, p. 27; Escala Statement of Remaining Issues, p. 3. Appellant should not be permitted to rely on these references as an assertion of an impact to a non-transportation element of the environment such as public services and utilities. *See* WAC 197-11-444(2)(d). Appellant's Notice of Appeal made clear that all impacts were asserted as transportation impacts in the context of the alley. Appellant cannot re-characterize or assert issues for the first time in its closing brief.

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- In a report prepared in response to a request from the City Council, the Seattle Department of Transportation identified several ordinances that "address alley traffic operations and access control," including many of the ordinances that Respondents have cited in this appeal. Ex. 11, pp. 5-6. All of these ordinances expressly mitigate for the impacts asserted in all six claims relating to vehicular traffic.

- SMC 11.62.080 and 11.62.100 prohibit trucks over 30 feet in length from operating in the downtown traffic-control zone (which includes the Project) between 7 am and 7 pm and provide further restrictions on all trucks over 24 feet between 4pm and 6pm. These ordinances likewise mitigate for the impacts asserted in all six claims relating to vehicular traffic.

- SMC 11.74.010 prohibits stopping, standing or parking a commercial vehicle in an alley for longer than 30 minutes. SMC 11.72.020 and 11.72.025 prohibit stopping, standing, or parking any non-commercial vehicle in an alley or any vehicle in an alley driveway. SMC 11.72.330 prohibits stopping, standing, or parking at any place or time when official signs prohibit it. Each of these ordinances expressly mitigates for the impacts asserted in claims 4 and 5 relating to drivers who will allegedly park in the alley.

- SMC 11.52.020 ("The driver of every vehicle shall, consistent with the requirements of this section, drive at an appropriate reduced speed when approaching and crossing an intersection . . . when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or roadway conditions."); SMC 11.58.230 ("Except as directed otherwise by official traffic-control devices, the driver of a vehicle emerging from any alley, driveway, private property, or building shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alley or driveway, or onto a public path, and shall yield the right-of-way to any pedestrian or bicyclist as may be necessary to avoid collision, and upon entering the roadway of a street shall yield the right-of-way to all vehicles approaching on the roadway."); and many similar ordinances cited in Respondents' list expressly mitigate for the traffic-hazard and safety-related impacts asserted in claims 1, 2, and 6 regarding conflicts between trucks and pedestrians, bicyclists, or other vehicles.

- SMC 11.65.020, 11.65.040, and 11.65.080 provide that streetcars have the right of way and prohibit obstruction of streetcar movement. These ordinances mitigate for the streetcar-related impacts alleged in claim 1.

- SMC 11.72.215 ("No person shall stop, stand, or park a vehicle in a load and unload zone, for any purpose or length of time other than for the expeditious pickup and loading or unloading and delivery of persons or property, and then in no case shall the stop for such purposes exceed thirty (30) minutes."); SMC 11.74.120 ("Standing in morning peak-hour restricted areas in downtown traffic-control zone"); and other parking and loading ordinances cited in Respondents' list mitigate for the parking and loading impacts alleged in claim 4.

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- SMC 11.60.060 ("No person shall operate any vehicle unladen or with load exceeding a height of fourteen (14) feet above the level surface upon which the vehicle stands . . . "); SMC 15.46.010 ("Whenever it furthers the safety or convenience of the public, the Director of Transportation, and, as to park drives and boulevards, the Superintendent of Parks and Recreation, may remove obstructions, hazards or nuisances from public places . . . ") and similar ordinances mitigate for the alley-obstruction impacts alleged in claim 5.

- SMC 11.58.270.A ("Operation of vehicles on approach of authorized emergency vehicles"); SMC 11.68.180 ("Barricading hazardous area"); and other ordinances providing for emergency right-of-way and access mitigate for any service-related impacts alleged in claim 6.

All of Appellant's claims regarding Project impacts concern transportation impacts in the alley. Because all of these impacts are expressly mitigated by City ordinances, and because the Examiner has already found the Project consistent with the other criteria in RCW 43.21C.500, Appellant's remaining alley claims must be dismissed as well.

2. Appellant's claim the City could not use the FEIS fails as a matter of law.

Appellant devotes much of its Brief to an argument the Examiner has already roundly rejected in a prior appeal involving a development on the same block: that the City violated the requirements of SEPA because it analyzed the Project in the Addendum rather than preparing a new EIS. As it did in *Escala Owners*, *supra,* Appellant challenges the fundamental legitimacy of analyzing a project action by means of adopting a nonproject EIS and providing project-specific information in an Addendum. But as with its arguments in the prior appeal, Appellant's procedural claims ignore express SEPA provisions allowing for the adoption of existing environmental documents and the incorporation of relevant prior analysis. As the Examiner has already ruled, Appellant's claim "that the City is procedurally barred by SEPA from adopting the FEIS and using the Addendum" must fail because "the City is permitted to take these actions to

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fulfill its SEPA procedural requirements." *Escala Owners*, *supra*, p. 15 (citing SMC 25.05 Sub-chapter IV; WAC 197-11-625; WAC 197-11-630).

Appellant generally asserts four reasons for the supposed illegitimacy of the City's action, none of which turns on facts specific to the Project: (1) SEPA requires the City, every time it issues a DS, to prepare a new EIS for the proposal at issue (Brief, pp. 13-15); (2) a proposal for which a DS was issued must be analyzed in a new EIS document containing every element described in SMC 25.05.440 (which mirrors WAC 197-11-440) (Brief, pp. 15-18); (3) the FEIS cannot provide a basis for analyzing the Project because it analyzes a nonproject zoning action rather than specifically addressing the Project (Brief, pp. 18-28, 30-32, 34-35); and (4) the FEIS cannot provide a basis for analyzing the Project because it is too old (Brief, pp. 28-30). These reasons are simply variations on a single claim: that the City's issuance of the DS irrevocably committed it, as a matter of law, to issuance of a full, Project-specific EIS. Significantly, other than claims relating to the alley, Appellant does not assert *any* criticisms of the substance of the discussions included in the Addendum or argue that any specific impact has not been adequately analyzed. Indeed, Appellant barely mentions that the City prepared an Addendum at all – let alone acknowledging that this document consisted of more than 30 pages of original text specifically analyzing the Project, and that it referred to and incorporated nearly 300 pages of additional Project-specific information. The Examiner specifically rejected each of Appellant's arguments in the prior *Escala Owners* case relating to a development on the same block and should do so again.

a. The DS did not require the City to issue a project-specific EIS.

In section A of its SEPA argument, Appellant relies on WAC 197-11-736 (defining a DS as the decision "that a proposal is likely to have a significant adverse environmental impact, and

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therefore an EIS is required") and WAC 197-11-390 (which states that a threshold determination is "final and binding on all agencies"). Citing these provisions, Appellant asserts that the City's issuance of the DS constituted a "binding decision that the Altitude Proposal is a major action significantly affecting the environment per RCW 43.21C.030" and that "must be analyzed in an EIS." Brief, pp. 14-15. Appellant misinterprets each of the provisions on which it relies.

First, Appellant's suggestion that the City's actions were inconsistent with WAC 197-11-736 (a DS is a decision that "an EIS is required") fails to recognize that the City has provided the required EIS. The City did so by adopting the FEIS, which discussed all potential significant adverse impacts related to the Project. Specifically, as described in the Land Use Analysis that the City prepared for the Project, the FEIS "evaluate[d] the impacts of allowing commercial office buildings and high-rise residential buildings to be increased in height [to] 600 feet in the [DOC-2] zone" and "determined that such an increase in density . . . was not a significant unavoidable adverse impact." Ex. 25, Appx. B, p. 1. Project-specific impacts, while they will include "increased activity levels on-site and within the surrounding neighborhood" and "increases in pedestrian and vehicular traffic due to the dense nature of proposed redevelopment" (Ex. 25, Appx. B, p. 2) are not significant because the "overall site activity and increases associated with this proposal would be compatible with the surrounding dense, urban environment." *Id.* Appellant attempts to read WAC 197-11-736 as requiring a *new, project-specific* EIS every time a project receives a DS, but nothing in the provisions it cites supports this argument. Instead, Appellant's reading misses a key distinction that was highlighted by the Examiner's previous decision: the City determined "that the proposal could have probable significant adverse environmental impacts *as detailed in the FEIS*, but that the proposal would have no *new* probable significant adverse environmental impacts *beyond* those addressed in the

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FEIS." *See Escala Owners*, *supra*, p. 16 (emphasis added). The City's analysis provides ample support for this conclusion and fully complies with the requirements of SEPA.

Second, similarly, Appellant's argument regarding RCW 43.21C.030 fails to recognize that the need for an EIS is determined not by the nature of a *project* but by that project's *impacts*. RCW 43.21C.030 requires proposals for "major actions significantly affecting the quality of the environment" to be accompanied by "a detailed statement." RCW 43.21C.031 makes clear that this "detailed statement" is an EIS. However, RCW 43.21C.031 also provides important guidelines regarding the scope of RCW 43.21C.030's requirement. SEPA does not require every project that could significantly affect the environment to be fully described in its own EIS. Instead, an EIS is required "to analyze only those probable adverse environmental impacts *which are significant*." RCW 43.21C.031 (emphasis added); *accord* SMC 25.05.402.A. "Discussion of insignificant impacts is not required." SMC 25.05.402.C. In accordance with these provisions, the City issued the DS and adopted the FEIS in recognition of the potential for significant impacts contemplated by the prior zoning change. However, this did not include a determination that the Project itself would have any new, previously undiscussed significant impacts – and again, Appellant has put forth no evidence to suggest otherwise.

Third, Appellant interprets the word "binding" in WAC 197-11-390 as an irreversible decision that a project will have new significant adverse impacts. This interpretation is contradicted by the text of WAC 197-11-390(3), which expressly provides that a threshold determination is only final "unless subsequently changed, reversed, or withdrawn." Appellant also appears to imply that the City erred by issuing a revised Notice of Availability of Addendum that changed the description of the Project from "likely to have [significant impacts]" to "could

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have [significant impacts]," again despite the fact that such changes are specifically contemplated by WAC 197-11-390. But as the Examiner previously observed:

> Appellant's argument assumes that because a DS was issued that the Department found that the proposal would have new probable significant adverse environmental impacts that were not identified in the FEIS, and that these were listed in the notice. This goes explicitly against the Director's determination in the Decision . . . . The notice merely lists potential significant impacts that could occur. It is not a definitive listing of probable significant adverse environmental impacts that the Director attributes to the proposal.

Escala Owners, *supra,* Conclusion No. 7, p. 16.

Upon determining that the Project could have probable significant adverse impacts, the City properly issued a DS. Upon determining that all such impacts were adequately discussed in the FEIS, the City adopted the FEIS and prepared the Addendum. SEPA did not require the City to do more.

b. SEPA authorizes the use of the Addendum and does not require an Addendum to have the same contents as an EIS.

In sections B, C.1, and F of its Brief, Appellant argues that even if an agency adopts existing environmental documents, it must nonetheless analyze the proposal at issue in "an EIS *for that proposal* that contains everything identified in SMC 25.05.440." Brief, p. 15 (emphasis added). Like Appellant's first argument, this proposition portrays SEPA as a statute that requires the preparation of particular types of documents, rather than a statute that requires analysis of relevant impacts. But contrary to Appellant's view, the purpose of SEPA is to ensure that "environmental amenities and values will be given appropriate consideration in decision making." RCW 43.21C.030(b). SEPA rules and regulations are designed to require environmental documents to contain sufficient information to facilitate this consideration, not to ensure that each proposal is the subject of a new document entitled "Environmental Impact Statement" that contains a particular number of subject headings.

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Accordingly, as the Examiner has recognized, "[c]ourts have consistently upheld SEPA's rules allowing for reuse of existing environmental documents [t]o avoid wasteful duplication of environmental analysis and to reduce delay." *Escala Owners*, *supra,* Conclusion No. 5, p. 15 (internal quotations omitted). Existing documents may be used regardless of whether the proposal under consideration is the same as or different from those analyzed in the existing document, WAC 197-11-600(2), as long as the proposals have "similar elements" and "the information and analysis to be used is relevant and adequate." RCW 43.21C.034. At the discretion of the lead agency, use of existing environmental documents may take multiple forms, including adoption, incorporation by reference, addendum or a supplemental environmental impact statement. WAC 197-11-600(4). In particular, "[a]n addendum is the appropriate vehicle for adding analyses or information about a proposal that 'do[] not substantially change the analysis of significant impacts and alternatives in the existing environmental document.'" *Thornton Creek Legal Fund v. Seattle*, 113 Wn. App. 34, 51, 52 P.3d 522, 530 (2002) (quoting SMC 25.05.600(D)(3)). This is the procedure that the City utilized.

Somewhat oddly, Appellant devotes substantial space in its Brief to arguing the undisputed proposition that the FEIS does not include specific analysis of the Project. *See* Brief, pp. 20-24. Appellant explains in detail why the FEIS "does not contain a statement of the Altitude Proposal objectives," "does not contain a reasonable alternatives analysis for the Altitude Proposal," and "does not describe the existing [P]roject [S]ite," *id.*, despite the fact that Respondents have never asserted anything to the contrary. Appellant's strawman argument springs from its continued insistence that "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

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Proposal." Brief, p 19 (emphasis added). Again, this confuses SEPA's requirement for an EIS to discuss significant adverse *impacts* (which here are adequately discussed in the FEIS) with Appellant's own invented "requirement" for each *project* to be the subject of its own EIS.

Moreover, Appellant essentially contends that only a full EIS for a project may be adopted as an existing environmental document for that project. This is an absurd argument that leads to even more absurd results, because it contradicts express allowances for agencies to adopt existing documents "to meet all or part of the agency's responsibilities under SEPA to prepare an EIS or other environmental document." SMC 25.05.708. As the Examiner previously ruled, this argument has no basis in SEPA:

> Generally, there is no procedural error under SEPA simply because an Addendum does not include the items of concern to Appellant where the adopted FEIS the Addendum is supplementing has adequately addressed these issues. The Appellant cites no authority showing that where an EIS is adopted and an Addendum has been issued, that a new alternatives analysis, [or] discussion of WAC 197-11-440 components . . . are required under SEPA. Finally, the City specifically provides for the use of an Addendum to satisfy SEPA requirements [in] SMC 25.05.600.D.3.

Escala Owners, *supra*, pp. 15-16.

Similarly, Appellant asserts in sections E and F of its SEPA argument that the Addendum is "not adequate because it does not contain the information and analysis required by SMC 25.05.440." *See* Brief, pp. 35-36. In other words, according to Appellant, the City may adopt an existing environmental document and supplement it with an addendum as long as both the adopted document *and* the addendum contain all the information that SMC 25.05.440 would require for a full, project-specific EIS. Again, this makes no sense – Appellant is essentially claiming that the City's decision to rely on an *existing* EIS somehow required it to prepare a *new* EIS. Appellant complains that the FEIS (which included the elements required by SMC 25.05.440) did not specifically analyze the Project and that the Addendum (which specifically

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analyzed the Project) did not include the elements required by SMC 25.05.440. But Appellant cites no law applying SMC 25.05.440's requirements to an addendum. Nor, again, does it explain how any required information was actually missing from the City's SEPA analysis, which ensured that probable significant adverse impacts were analyzed in the FEIS and that additional relevant information was provided in the Addendum.

Indeed, Appellant suggests only one actual issue that was not considered in the SEPA analysis: a "no-action alternative [that] would consider the impacts of not building on this specific site." *See* Brief, p. 21. But the no-action alternative was examined in the FEIS adopted by the City. Ex. 67, p. iii (FEIS examines five alternatives, including "no action" alternative). Again, the Examiner has already considered and rejected this claim in the prior *Escala Owners* case, which presented the same factual scenario as is present in this case:

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

Escala Owners, *supra,* p. 16. In addition, the analysis that Appellant seeks was provided in the Land Use Analysis attached to the Addendum. The Land Use Analysis noted that development of the Project Site would mean that "all existing surface parking on-site would be removed" and on-site activity and traffic would "substantially intensify." Ex. 5, Appx. B, p. 2. These impacts were deemed to be consistent with applicable plans as well as with current "development trends that are occurring (and planned) throughout the Belltown area." *Id.*

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c. The FEIS contains relevant and accurate information and may be used regardless of its nonproject nature.

In section C.3 of its SEPA argument, Appellant argues that adoption of the FEIS was not permitted because the 2006 zoning change and the Project do not "have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography," as required by RCW 43.21C.034. Brief, p. 30. Once again, this is not an argument that the Project will have any significant impacts that have not been analyzed. Indeed, it is not an argument specific to the Project in any way. Instead, it is simply an argument that analysis of a programmatic or nonproject action cannot be adopted to meet City SEPA responsibilities for a Project action. *See, e.g.*, Brief at 30-31 ("[T]he analysis of impacts is fundamentally different at the programmatic level."). Yet, as previously discussed, this proposition is not supported by the law. This argument also misses the fact that the FEIS analyzed the impacts of development at (or greater than) the scale of the Project in the downtown area in which the Project is located. Ex. 67, p. 1-2. This analysis is relevant to the Project. And yet again, the Examiner has already rejected Appellant's arguments regarding the programmatic nature of the FEIS in the prior *Escala Owners* case:

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

Escala Owners, *supra,* p. 17.

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d. The FEIS may be used notwithstanding its age.

In section C.2, Appellant asserts that the information in the FEIS is not "accurate or reasonably up-to-date" as required by SMC 25.05.600.B. Yet, as the Examiner recognized in the prior *Escala Owner's* case, "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. . . . there is no specific point in time identified by these regulations wherein the ability to adopt a document expires." *Appeal of Escala Owners Association*, HE File No. MUP-17-035, Order on Motion for Summary Judgment (February 15, 2018), p. 2.

Appellant argues that the FEIS did not specifically anticipate development on the Project Site; that it did not anticipate Amazon locating its headquarters in the neighborhood; that increases in height and density from Mandatory Housing Affordability as well as "the amount of new development that has occurred in the area" have invalidated the prior density analysis; and that the FEIS did not contemplate a Code requirement for projects to provide access from alleys. Brief, pp. 28-29. Appellant ignores the fact that the DEIS did identify the Project Site as a potential site for future development. Ex. 66, p. 3-44. The FEIS also analyzed development of up to 600 feet in height in the area of the Project – well over the Project's height, even with the MHA height allowance. Ex. 67, p. 1-2. The occurrences Appellant references are all consistent with a general increase in neighborhood density, and Appellant introduced no evidence to support its assertions that any of these issues affect or change the analysis in the FEIS.

As noted above, the City recognized that the Project would "intensify on-site development," including "increased activity levels" and "increases in pedestrian and vehicular traffic due to the dense nature of proposed redevelopment," but it determined that the "overall site activity and increases associated with this proposal would be compatible with the

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surrounding dense, urban environment." Ex. 25, Appx. B, p. 2. Moreover, the City specifically considered the Project in light of contemporary conditions, including MHA, and concluded that it would be consistent with "development and uses that exist, are under construction, or are in the permitting process throughout the Belltown area." Ex. 25, p. 8; *see also* Ex. 25, Appx. B, p. 5. Appellant has introduced no evidence contravening this point either. The Examiner's previous ruling regarding the programmatic nature of the FEIS, quoted in the section above, applies equally to the issue of the FEIS's age. *Escala Owners*, *supra,* p. 17 ("The FEIS specifically anticipated projects of the type represented by the proposal. . . . The Department did not find that there would be any new probable significant environmental impacts at the project level [and] Appellant has not demonstrated [otherwise].").

Overall, Appellant's procedural SEPA claims read a few provisions in isolation and argue that they supposedly trump well-established and practical procedures that allow agencies to fulfill SEPA's goals – full analysis of significant environmental impacts – while minimizing duplication and paperwork. Appellant's procedural claims have no basis in the law, and its critique of the City's analysis of the Project has repeatedly failed to allege any unanalyzed or unmitigated significant impact. Appellant's claims fail.

3. A Supplemental EIS is not required.

Appellant argues in the alternative that, even if the FEIS could be used to evaluate the environmental impacts of the Project, an SEIS was required rather than an Addendum. Brief, pp. 32-34. Appellant is wrong. As Appellant acknowledges, an SEIS is required only if there are substantial changes or new information indicating new significant adverse impacts. "A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing

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environmental documents." WAC 197-11-600(3)(b)(2). Here, Appellant has failed to meet its burden of proof to establish that there are new significant adverse impacts. Appellant has not even attempted to meet this burden except with regard to alley-related impacts. As to those impacts, since they are transportation impacts, the Examiner lacks jurisdiction to consider them under RCW 43.21C.500.

Even if the Examiner had jurisdiction over these claims, Appellant failed to provide affirmative evidence of any new significant adverse impacts. In light of the Examiner's jurisdictional ruling, Respondents will not address every aspect of Appellant's claims. However, for several broad reasons, it is plain that these claims could not succeed in any event.

First, Appellant suggests that there is "new information indicating [the] proposal's probable significant adverse environmental impacts," *see* SMC 25.05.600.D.4.b, because the zoning code now requires downtown buildings to provide access off of an alley and a 2018 Statement of Legislative Intent adopted by the City Council requests information on how to reduce alley congestion. Brief, p. 33. Appellant describes this as "basically announcing a recognition that the alley access requirement has caused new significant adverse safety and congestion problems in the alleys downtown." *Id.* Even if this were an accurate description of the Statement of Legislative Intent (which it is not), it would not be relevant to Appellant's burden, which is to show probable significant adverse impacts resulting from the Project, not to establish that the Council has "basically" recognized a policy question. Moreover, neither the Statement of Legislative Intent (Ex. 10) nor the report prepared by SDOT in response (Ex. 11) describe alley congestion as a "significant" impact or mention safety. And additionally, the mitigation strategies recommended by the Statement of Legislative Intent include "education, enforcement and design of the built environment," which are consistent with the mitigation

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planned for the Project. Similarly, none of the various reports and studies that Appellant introduced at the hearing, including those listed at page 34 of the Brief, demonstrate that alley congestion is considered a significant adverse impact under City policy or that the Project will have significant adverse impacts. Indeed, the fact that the City Code still requires access be taken from the alley, except in limited circumstances, belies Appellants' claims.

Second, none of Appellant's evidence establishes that the Project would have significant adverse transportation impacts – even if it did not include the additional mitigation that the City has required. Appellant's assertions essentially amount to claims that (1) trucks will park in or inexpertly maneuver through the alley, causing congestion, and (2) increased truck activity will lead to safety hazards at the alley entrances. On the first point, Appellant introduced no evidence that called into question Ms. Heffron's conclusion that all of the uses in the Project will generate "an average of 5 to 7 deliveries per day." Ex. 26, pp. 1-2.[4] Nor did Appellant present any evidence that this additional traffic would have a significant adverse impact on the environment even if some of these trucks were to park in the alley rather than one of the loading berths. Appellant's own analysis of existing conditions, performed during the busiest month of the year, shows significant periods of time during which no vehicles entered the alley. Ex. 61, p. 2. The log prepared by Appellant also shows that even when one or more vehicles remains in the alley for a substantial amount of time, other vehicles are able to come and go. The graphic below, taken from the December 2, 2019 data on page 1 of Ex. 61, shows as many as four vehicles using

[4] Appellant states that the Transportation Technical Report indicated that the Project would introduce "about 25 truck deliveries per day" into the alley's intersection with Stewart Street. Brief, p. 12. This inaccurately describes the report, which states that "residential uses *could* generate an estimated 10 truck deliveries," that the retail and restaurant uses "*could* generate 5 to 10 truck deliveries," and "the hotel *could* generate 1 to 5 deliveries." Ex. 5, Appx. J, p. 27. This is not a statement that 25 daily deliveries are expected. More importantly, these numbers were updated in the 2019 memo prepared by Ms. Heffron on the basis of "new information related to truck trip generation at local hotels and mixed/hotel residential projects." Ex. 26, p. 2. This information provided the basis for the memo's calculation of 5-7 expected deliveries per day.

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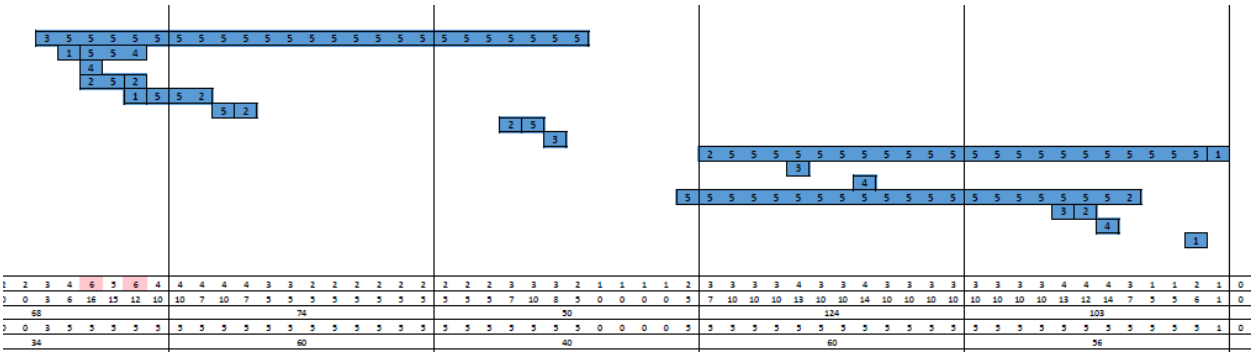
the alley at the same time:



The description of each vehicle represented in this graph, which appears to the left of the graph at page 1 of Ex. 61, indicates that one of the vehicles parked in the alley for nearly two hours was a 25-foot "refuse truck for construction," but that multiple other deliveries were able to take place despite this condition. In addition, as Appellant's witnesses admitted, many aspects of the Escala experience will not apply to the Project. For example, residents of the Project will not independently arrange for contractors and construction workers to visit their units, and the Project will include a centralized mail room that will greatly minimize the duration of mail and package deliveries. Given all of these factors, there is simply no evidence to indicate that 5-7 deliveries to the Project per day would lead to congestion that causes "a more than moderate adverse impact on environmental quality." *See* WAC 197-11-794; *see also Shaw*, Day 4, Part 1, 4:45-5:30 ("Alleys in a broad transportation sense . . . are seen primarily as a focus for access to property. They can serve limited mobility functions, but that's not generally their primary purpose in any transportation system.").

Appellant's claims of safety impacts amounted to nothing more than conjecture. Mr. Shaw testified generally that "[i]f traffic on a block face or a block is consolidated and focused traveling down an alley, that obviously provides fewer potential points of conflict, and it also gives pedestrians, drivers, and bicyclists more of an indication that this spot, where a sidewalk or

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the travel crosses or intersects with an alley, is a spot where they should pay attention and be aware that there might be vehicles traveling." *Id.*, 6:00-7:10. He also testified specifically that the widened sidewalk for the Project will provide a "better visual angle" and "more room to be able to walk away from the building." *Id.*, 19:30-20:00. Therefore, he concluded that trucks backing out of the alley would not pose "a significant safety risk" because "given the consolidation of access points, . . . pedestrians in a downtown environment will be expecting traffic in an alley. . . . Pedestrians are aware that this is a spot they should be careful and cautious and look and listen. Trucks are fairly large vehicles; when they back up they have audible alarms," and therefore "any additional safety risks from trucks backing up would be fairly low." *Id.*, 18:00-19:00. Appellant's evidence to the contrary consisted of largely unsupported assertions that there would be a significant increase in the number of trucks backing out of the alley (which Mr. Shaw contradicted, *id.*, 19:00-19:30) and hypothetical statements by Ross Tilghman, such as, "[I]magine you're walking along the sidewalk towards the alley . . . they could suddenly find themselves in the same place at the same time with unhappy consequences." *Tilghman*, Day 2, Part 4, 1:02:45-1:03:15. This is not evidence of a significant adverse impact to safety.

Third, even if some of these impacts could be significant (which Appellant did not prove), Appellant failed to provide any evidence that they would not be sufficiently mitigated by the conditions of approval. Appellant's central assertion, repeated throughout its briefing, is that truck drivers will ignore instructions from the Project's Dock Master regarding standing or parking in the alley. Appellant fails to acknowledge, however, that this assertion was twice contradicted directly by its own witness. Mr. Rose testified that if a dock master told a driver he needed to park in a loading berth, the driver would do so. *Rose*, Day 2, Part 2, 2:30-3:00.

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Similarly, when asked if signs would stop drivers from parking, Mr. Rose testified that they might not do so "unless there's . . . somebody standing there saying no you can't park there," which the dock management plan will include. *Rose*, Day 2, Part 1, 51:00-52:00. This alone invalidates Appellant's argument that planned mitigation will not work. Moreover, even if Mr. Rose had testified to the contrary, such a statement would be legally irrelevant. The City's substantive SEPA policies specifically provide that transportation impacts may be mitigated by "signage" and by "transportation management plans." SMC 25.05.675.R.2.d and e. As repeatedly explained by the City's witnesses, the City both assumes that projects will comply with legally imposed conditions and, where necessary, works with or brings enforcement actions against projects that do not comply. *Shaw*, Day 4, Part 1, 16:00-19:00; Ex. 79, p. 16; *see also Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 236, 802 P.2d 1360, 1370 (1991) ("[O]ne is normally allowed to proceed on the basis that others will obey the law."). Assertions that the Project or its vendors will disobey conditions of approval, even if they were supported by evidence (as Appellant's assertions are not), do not establish probable significant adverse impacts.

In addition to Mr. Rose's testimony, Appellant has also failed to dispute any of the testimony by Marco Filice, an experienced general manager who described his experience coordinating deliveries and working with vendors at two of Appellant's other hotels and his preparations to begin managing a third hotel in South Lake Union. Mr. Filice testified that establishing a relationship with a vendor would include both discussions of plans and a "very thorough site walk" to "show them the layout of the hotel . . . the path of travel that their truck drivers will need to follow, as well as all the obstacles in their way to get to where they need to be in our loading docks." *Filice*, Day 3, part 3, 1:15:00-1:16:00. Mr. Filice stressed that because

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"sequencing of vendors is important" to hotel operations, delivery schedules are "written in the contract, so that we don't have any anomalies or miscues." *Id.*, 1:16:00-1:18:00. He stated that vendors consider hotels to be "their customer" and thus that the vendors "want to appease us" and "adhere to the contract." *Id.*, 1:19:00-1:20:00. If a truck driver brought a truck onto the property that did not fit the available space, "we've had to send them away . . . and they come back the next day with the product in the appropriately sized truck." *Id.*, 1:19:30-1:20:00. Mr. Filice also discussed the truck sizes predicted by Ms. Heffron and stated that in light of his past experience – as well as his outreach to vendors in Seattle in preparation for his upcoming work – he believed that all deliveries could be conducted in trucks of 26 feet or smaller. *Id.*, 1:20:00-1:25:00. He testified further that he believed these trucks would be able to serve the loading berths for the Project as depicted in the plans, and that he believed compliance with the dock management plan would be workable. *Filice*, Day 3, Part 4, 7:30-10:00. Appellant introduced no evidence contradicting any of Mr. Filice's statements and has not disputed them in its Brief.

Finally, as discussed above regarding Appellant's Code Interpretation claim, Appellant introduced no evidence to support its argument that lease conditions, scheduling, and dock management would be in any way insufficient to ensure that residential moving trucks do not block the alley or prevent other deliveries from accessing the berths. Appellant's assertions regarding mitigation for the Project amount, again, to mere statements of "doubts" and "questions" that do not come close to meeting its burden.

For these reasons, even if the Examiner were to consider Appellant's transportation claims, they would not establish significant adverse impacts requiring the preparation of an SEIS.

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4. The Addendum is adequate.

Finally, Appellant argues in the alternative that, even if the FEIS could be used to evaluate the environmental impacts of the Project, the Addendum was not adequate. Brief, pp. 35-37. However, this argument simply repeats Appellant's previous assertions: that the Addendum is inadequate because it does not contain the contents specified by SMC 25.05.440, and that the Addendum does not account for significant adverse transportation impacts related to the alley. These arguments fail for the reasons discussed previously.

First, Appellant argues that the Addendum cannot "be relied on as a substitute for an EIS or SEIS" and that it "does not contain the information and analysis required by SMC 25.05.440." But the Addendum is not a "substitute" for an EIS or SEIS; it is a document that "adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document." SMC 25.05.600.D.3. Requirements for an addendum are provided in SMC 25.05.625, and Appellant nowhere disputes the City's compliance with this provision. By contrast, SMC 25.05.440 governs what "[a]n EIS shall contain" and does not apply to addenda.

Second, other than transportation impacts, Appellant does not dispute any of the analysis actually included in the Addendum. And as discussed earlier, Appellant's assertions regarding transportation impacts consist only of questions and conjectural statements. These statements neither contradict the substantive analysis in the Transportation Technical Report and related documents nor provide evidence of any additional adverse impacts. The Examiner must reject the argument that the Addendum is not adequate.

IV. CONCLUSION

For these reasons, Respondents Applicant and City jointly request that the Hearing

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Examiner deny all of Appellant's claims.

DATED this 28th day of February 2020.

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