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8 BEFORE THE HEARING EXAMINER
9 FOR THE CITY OF SEATTLE

10 In the Matter of the Appeal of
11 ESCALA OWNERS ASSOCIATION
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13 from a decision issued by the Director, Seattle
14 Department of Construction and Inspections
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Hearing Examiner File:
MUP-19-031 (DD, DR, S, SU, W)

Department Reference:
3018037-LU

CITY AND APPLICANT’S JOINT
PROPOSED FINDINGS AND
CONCLUSIONS

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19 At the close of the hearing in this matter, the Applicant Seattle Downtown Hotel &
20 Residence LLC (“Applicant”) asked whether it would be appropriate to submit proposed findings
21 and conclusions. The Examiner indicated that proposed findings and conclusions are permitted
22 by the Hearing Examiner Rules of Practice and Procedure (“Rules”). Pursuant to this discussion
23 and Rule 2.11(g), the City of Seattle and Applicant jointly submit the attached Proposed Findings
24 and Conclusions for the Examiner’s consideration.
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1 DATED this 28th day of February 2020.

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Introduction

The Director (“Director”) of the Department of Construction and Inspections (“Department”) issued a State Environmental Policy Act (“SEPA”) Determination of Significance (“DS”) and design review approval for construction of a 54-story structure (“Decision”). The DS was followed by the adoption of a Final Environmental Impact Statement (FEIS) and issuance of an associated Addendum. The Appellant, the Escala Owners Association (“Appellant”), exercised its right to appeal the Decision and the FEIS. The Appellant also sought a Code Interpretation (“Interpretation”) relating to the loading berths and appealed the Interpretation.

The appeal hearing was held on January 28, 29, 30, and 31, 2020, before the Hearing Examiner. The Appellant was represented by Claudia M. Newman and David A. Bricklin, attorneys-at-law; the Applicant, Seattle Downtown Hotel & Residence LLC (“Applicant”), was represented by Courtney A. Kaylor, and David P. Carpmann, attorneys-at-law; and the Director was represented by Elizabeth E. Anderson, attorney-at-law. The Appellant submitted a written closing argument on February 14, 2020, the Applicant and Director submitted a written response argument and proposed findings and conclusions on February 28, 2020, the Appellant submitted a written reply argument on March 6, 2020, and the record closed on that date.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (“SMC” or “Code”) unless otherwise indicated. After considering the evidence in the record, the Hearing Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Site and Vicinity

1. The subject site is addressed as 1903 5th Avenue, and is located on the northwest corner of the intersection of Stewart Street and 5th Avenue. The site is approximately 12,960 square feet in size. and is currently utilized as a commercial surface parking lot. Exhibit 20.
2. The site is currently occupied by a commercial surface parking lot striped to accommodate 56 vehicles. *Id.*
3. The site is zoned Downtown Office Core 2 with a maximum height dependent on the proposed use. *Id.*
4. The site lies across the street from the twin 400-foot towers of the Westin Hotel which is located on the east side of 5th Avenue. The site lies north/northwest of the five-story Times Square Building, a Registered Historic Landmark (1916), and directly across the alley from the three-story Centennial Building (1925). The nearly square lot constitutes the southern terminus of a block occupied by a series of two and three story commercial buildings, aligned along 5th Avenue. The elevated Seattle Monorail runs along 5th Avenue, in the center of the street right-of-way. In addition, the site lies directly diagonally across 5th Avenue from McGraw Square, a Seattle Landmark, and diagonally across the alley from

the Escala condominiums. Westlake Center Tower, Westlake Center Park, and the light-rail underground tunnel and station lie approximately a block south, as does the Mayflower Hotel. *Id.*

5. Pedestrian access is from the adjacent streets, Stewart Street and 5th Avenue. Vehicle access to is from the adjacent streets, and the adjacent through-block improved alley. *Id.*

Proposal

6. The proposal is a 54-story building with hotel, 233 apartment units and retail. Parking for 140 vehicles is proposed. Parking for the hotel is proposed to be located below grade, with access from 5th Avenue. Parking for the apartment units is proposed to be located above grade, with access from the alley that fronts the property on the west side. The alley runs from Stewart Street to the south to Virginia Street to the north. *Id.*

Design Review

7. The Downtown Design Review Board (“Board” or “DRB”) held an Early Design Guidance (“EDG”) meeting on the proposal on December 16, 2014, at which it heard the Applicant's analysis of the site and proposal as well as comments from the public. The Applicant requested several departures, including reduced sidewalk with on Stewart, reduced percentage of approved street-level uses, and reduced depth for two loading berths off the alley and a van-size stall near the residential elevators and other departures. The written and oral public comments included concerns that the program appeared too ambitious for the lot size, reducing sidewalk widths takes the project away from a safe, comfortable and inviting ground plane, reducing the number of loading berths is unrealistic and would further burden an alley overburdened with service and loading demands, the departure requests in no way improved the design, and other issues. Exhibits 20, 44.
8. The Board’s discussion at the December 16, 2014, EDG meeting focused on specific issues including concerns about the intention to reduce the amount of retail space at the ground level, the intention to reduce the required sidewalk widths around the proposal, whether reducing the loading capacity serving the structure would not adversely affect the functioning of the proposed building or create impacts on neighboring structures, and other issues. The Board stressed the importance of working with the neighboring Escala condominium residents to attempt to resolve their concerns regarding impacts of the proposed new structure at this location. *Id.*
9. The Board held a second EDG meeting on September 29, 2015. The Applicant presented a revised design and no longer requested departures. Additional public comments were received. The majority of those offering comments were residents of the Escala. Several comments were directed at issues outside the jurisdiction or purview of the Board. Design issues communicated to the Board included the overall massing of the proposal, scale as a component of adjacency consideration, and other issues. The Board’s deliberations at the September 29, 2015 EDG meeting acknowledged elements of the refined design, including more generous sidewalks along both 5th Avenue and Stewart Street and relocation of the hotel lobby to an upper floor allowing an increase in ground level retail. During

deliberations the Board expressed several concerns relating to massing and design, but none relating to ground level retail or the alley. Exhibits 20, 45.

10. The Board held a third EDG meeting on December 15, 2015. The Board took public comment, which expressed similar concerns to those raised in the two previous EDG meetings. Other public comments conveyed the notion that the project had adequately responded to community input and the Board's guidance and recommendations and should be moved along to a MUP application. The Board thought the design had made significant improvements and recommended the proposal be allowed to proceed to MUP application. The Board stated further design development should address several concerns relating to design and stated that additional information will need to be presented to the Board regarding a streetscape plan that presents design solutions to pedestrian safety concerns and provides mitigation for the disruption of the parking entry and curb cut on 5th Avenue. Exhibits 20, 46.
11. The Board held a Recommendation meeting on August 16, 2016. The Board again took public comment. Residents of the Escala presented an organized and collective comment regarding their concerns. Several of the public comments, while stressing that significant issues remained, acknowledged progress toward resolving some of the perceived problems, and several of the commenters expressed gratitude for the applicant team's willingness to establish dialogue with concerned neighbors and extended other compliments. The main concerns remaining included that the building is too big for the site, the building needs full-sized loading berths and ground floor retail space should be sacrificed in favor of loading berth space, and the alley is functionally inadequate to accommodate service needs. Other public comments conveyed the notion that the project had adequately responded to community input and the Board's guidance and recommendations and should be moved along to approval. The Board noted items that had been resolved and others that were still in need of refinement and resolution. The majority of Board members present voted to recommend approval dependent on the remaining issues being addressed by the Applicant and approved by the Department's Land Use Planner. The Board regarded the adequacy of the Code-compliant loading berths and the safe and effective functioning of the alley as matters not within their official purview and desired that the Land Use Planner should convey their concerns to functionaries within the City who would have the competence and responsibility to address them. Exhibits 20, 48.

Director's Review and Decision

12. The Director reviewed the Board's recommendations and determined that they did not conflict with applicable regulatory requirements and law, were within the Board's authority, and were consistent with the design review guidelines. The Director therefore issued design review approval for the proposal with the Board's recommended conditions. Exhibit 20.
13. Following a public comment period, the Director reviewed the environmental impacts of the proposal and issued a determination of significance ("DS") pursuant to SEPA. *Id.*

14. The site of the proposal is within the geographic area analyzed in the Final Environmental Impact Statement that was published for the Seattle Downtown Height and Density Changes in January 2005 (FEIS). The FEIS evaluated the probable significant environmental impacts that could result from the development following a change in zoning to allow additional height and density in the Downtown area. The Director determined that the subject proposal would have potential significant impacts that were within the range of significant impacts that were evaluated in the FEIS. As a result, the Department adopted the FEIS. In addition, an 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”) was prepared to review more project-specific information. The Department’s analysis determined that the project would produce no probable, significant, adverse environmental impacts that were not already reviewed in the FEIS. The Addendum addressed the following areas of environmental impact: Land Use; Environmental Health; Energy/Greenhouse Gas Emissions; Aesthetics (Height, Bulk and Scale; Light/Glare/Shadows; Viewshed); Wind; Transportation, Circulation and Parking; and Construction. Exhibits 20, 25, 66, 67.
15. Notices of the DS were issued on September 14, 2017, October 9, 2017, and August 5, 2019. Exhibits 40, 41 and 42. The first two notices state that the Department has determined that the referenced proposal “is likely to” have probable significant adverse environmental impacts. Exhibits 40, 41. The August 5, 2019, notice indicates that the Director of the Department:

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

Exhibit 42.

16. Concerning land use, the Director’s analysis states:

The FEIS included a discussion of land use impacts that were anticipated as a result of height and density changes in the various EIS alternatives but concluded that the change was consistent with the Comprehensive Plan and

neighborhood plans and was not a significant unavoidable adverse impact. The height, density, and intensity of use authorized by the zoning designations were contemplated in the EIS. The FEIS described potential mitigation including rezones of some areas to promote residential uses, tools to encourage retention and expansion of human service agencies and using incentives to encourage landmark preservation.

The Addendum noted that the proposed development is consistent with development expected at this site in the Belltown Neighborhood and the Downtown Urban Center. The Addendum did not identify mitigation for this item.

Pursuant to the SEPA Land Use Policy, SMC 25.05.675.J, no significant adverse land use impacts are anticipated from the proposal and no mitigation is necessary.

Exhibit 20.

17. The Director's analysis reviewed the FEIS and Addendum transportation analyses, and in relevant part, stated the following:

SMC 25.05.675.R provides policies to minimize transportation impacts. The FEIS analysis considered the direct, indirect and cumulative impacts of the EIS alternatives as they relate to the overall transportation system and parking demand. The subject site is within the area analyzed in the FEIS and the proposed development is within the range of actions and impacts evaluated in the FEIS.

The Addendum and the Transportation Technical report prepared by the Heffron Transportation Inc., estimated that the project would generate a total of 2,290 new daily vehicle trips. Of these, 74 would occur during the morning peak hour, and 130 would occur during the afternoon peak hour. The study evaluated traffic operations at nearby intersections and roadway segments and on the alley adjacent to the site to determine the likely level of impact of the additional project traffic. Future-year conditions assume traffic from other developments in the vicinity of the project.

The transportation impact analysis determined that the project's likely transportation impacts were consistent with the analysis in the FEIS. Specifically, traffic operations during the afternoon peak hour were evaluated at thirteen nearby intersections, including Stewart Street and Virginia between 7th Avenue and 3rd Avenue and Olive Way between 5th and 7th Avenues and alley intersections at Stewart Street and Virginia Street. The Addendum noted with or without the proposed project none of the study area intersections would operate worse than LOS D during the PM peak hour.

Alley intersection with Virginia Street is estimated to operate LOS F with or without the project. Alley intersection with Stewart Street is estimated to operate LOS E without the project and LOS F with the proposed project. These operations include increased vehicle and pedestrian traffic associated with the proposed project, traffic from the proposed 5th and Virginia hotel that would share the alley, and a 1% per year increase in existing traffic volumes to provide a cumulative analysis accounting for traffic growth from other projects in the vicinity of the site. The Transportation Technical Report noted that poor operations are common for unsignalized intersections in the downtown core, and vehicles may have to wait on the alley for pedestrians and main street traffic to clear.

The driveway on 5th Avenue is expected to operate at LOS D.

The Downtown EIS concluded that, *future development through the year 2020 would generate additional traffic volumes and increase congestion in portions of Downtown, most notably in the Denny Triangle area. Much of this impact would occur with or without zoning changes.* Key corridors where congestion was anticipated in the Downtown EIS included Stewart Street, Denny Way, Olive Way, and Howell Street. Traffic operations with the proposed project would be consistent with those in the Downtown EIS. The project is not expected to noticeably increase delay at any of the intersections, and all future levels of service are forecast to operate at a Level of Service (LOS) D or better.

Residential project access is proposed from the alley on the west side of the site. The width of the alley varies between approximately 16' and 18'. With the development of the proposed project and a nearby project at 1933 5th Avenue, portions of the alley will be widened additional 2'.

Loading and unloading activity in the alley currently block traffic. Observations over an 11-hour weekday documented a range of delays with an average of 17 minutes. This average was increased from 6 minutes to 17 minutes as a result of one 3-hour block by a moving truck.

Delivery and loading for both the proposed project and the future development at 1933 5th Avenue would occur from access via the alley and could result in increased loading activity in the alley or potential short-term blockages. The project proposes three truck loading bays (one 35-foot long bay and two 25-foot long bays) anticipated to accommodate the expected loading demand and truck lengths without blocking the alley. In the occasional circumstance where a larger vehicle (such as a residential moving van) needs to access the site, they would be directed to obtain a street use permit from SOOT so that the truck could be parked on the adjacent streets during move-in or move-out.

The Addendum and the Transportation Technical Report, as well as, the Transportation memo dated May 8th, 2019 prepared by Heffron Transportation Inc., listed mitigation including "no stopping or standing" signage to be posted along the building adjacent to the alley, working with residents prior to move-in/move-out to ensure trucks fit in the building's loading dock, and working with others fronting the alley to establish more and/or longer commercial loading zones along 4th Avenue, 5th Avenue, Stewart Street and Virginia Street to accommodate the local truck loading needs. In addition, the Addendum recommended building management inform residents about move-in/move-out restrictions and permit requirements, and schedule use of the loading bays at times with multiple residents may be moving on the same day.

To mitigate potential impacts from increased delivery activity on the alley, a dock management plan will be required. The objective of the management plan will be to coordinate deliveries among the residential and the commercial tenants. The management plan will provide protocols on the scheduling and timing of deliveries to minimize alley impacts of trucks waiting to access loading berths. If dock management plans are developed for other projects taking access from the segment of the alley bounded by 4th Avenue, 5th Avenue, Virginia Street, and Stewart Street, these plans shall be taken into consideration by the dock management plan prepared for this project, with goals of avoiding delivery schedule conflicts and minimizing waiting times for trucks accessing loading berths from the alley.

The SDCI Transportation Planner reviewed the information in the TIA and determined that a dock management plan is warranted to mitigate potential traffic impacts from alley blockages, consistent with per SMC 25.05.675.R. SDCI has analyzed and determined that the required dock management plan will mitigate potential traffic impacts from alley blockages.

Exhibit 20.

18. The Department's Senior Transportation Planner John Shaw testified the City has not adopted any traffic level of service standards for alleys, and vehicular mobility is not considered a primary function of alley access. Instead, alleys are intended to primarily serve the functions of access for parking, freight loading, and utility services (including waste and recycling services).
19. The Applicant analyzed transportation impacts of the proposal on the alley adjacent to the proposal. The Applicant's analysis included a review of current alley operations; existing alley conditions; peak hour level of service for existing alley operations and for future level of service with the proposal; loading dock use; and AutoTurn analysis of access to the alley and the proposal's loading dock. Exhibit 25 (Appendix J); Exhibits 26, 28.

20. Mr. Shaw testified that he reviewed the traffic study and agreed with its conclusions. In addition, the Director's determination identified a dock management plan as a condition on the proposal to minimize potential impacts of the proposal. Exhibit 20.
21. Following review of the FEIS and the Addendum and its supporting information, the Department determined that the proposal would have no new probable significant negative impacts to the environment, including but not limited to impacts related to transportation. Exhibit 20.

Appeal

22. The Appellant filed a timely appeal of the Director's Decision, and the DS. Concurrently, Appellant made a request for Interpretation and appealed the resulting Interpretation. Appellant's notice of appeal raised a list of 19 issues numbered III.2.1.a-m, III.2.2a-e and III.2.3 in the Notice of Appeal. Applicant and City requested clarification of issues and Appellant provided a clarification narrowing some issues.
23. The Department issued the Interpretation requested by Appellant. The Interpretation determined that the Department properly concluded that the Project requires three loading berths and that the length of two of the Project's loading berths could be reduced to 25 feet because "site design and use of the property will not result in vehicles extending beyond the property line." SMC 23.54.035.C.2.c. Exhibit 79. At hearing, Appellant clarified it is challenging only the decision on loading berth length, not number of berths.
24. City and Applicant filed a motion to dismiss, resulting in the withdrawal or dismissal of 7 issues and partial withdrawal or dismissal of 2 issues. These issues are Notice of Appeal Issues III.2.1.b, III.2.1.c, III.2.1.d (environmental health claim withdrawn), III.2.1.e, III.2.1.h, III.2.1.j (motion granted to the extent the issue must be supported by argument beyond the contents of the documents) III.2.2b, III.2.2c, and III.2.2.e.
25. The motion sought dismissal of SEPA transportation issues under RCW 43.21C.500. The Examiner held an open record hearing on this issue at the beginning of the hearing in this matter. After hearing testimony and argument, the Examiner determined the requirements of RCW 43.21C.500 were met and the Examiner lacks jurisdiction over SEPA transportation issues. Nevertheless, the Examiner stated the parties could present evidence on these issues so that, if the Examiner's decision is reversed on appeal and remanded to the Examiner, a factual record for making a decision on these issues will exist and an additional open record hearing will not be required.
26. The following appeal issues were addressed at the hearing. Consistent with the Examiner's decision to allow the parties to make a factual record, these include appeal issues dismissed under RCW 43.21C.500.
 - a. The Project will have probable significant adverse impacts related to traffic and transportation, public facilities (the alley) and safety. The Project will have significant

- adverse traffic circulation, loading, and access impacts as well as vehicular and pedestrian safety issues associated with alley. (Notice of Appeal Issue III.2.1.a).
- b. Mitigation measures were not identified as stated in SMC 25.05.675.O and R.2 for impacts to the alley under SMC 25.05.675.F. (Notice of Appeal Issue III.2.1.d (part)).
 - c. The scope is incomplete and the scoping process was not followed. (Notice of Appeal Issue III.2.1.f).
 - d. The FEIS and Addendum do not contain all of the information required by WAC 197-11-440. There is no summary or discussion of existing environment for many elements of environment. (Notice of Appeal Issue III.2.1.g).
 - e. A new EIS was required instead of the Addendum because the Project received a DS. (Notice of Appeal Issue III.2.1.i).
 - f. The Department cannot rely on the DEIS and FEIS because they do not adequately address environmental considerations for the Project as required by RCW 43.21C.030 and RCW 43.21C.034. (Notice of Appeal Issue III.2.1.j).
 - g. The Department cannot rely on the DEIS and FEIS because they are not accurate or reasonably up to date as required by RCW 25.05.600. (Notice of Appeal Issue III.2.1.k).
 - h. A supplemental EIS is required under WAC 197-11-405, -600 and WAC 197-11-620 because there are substantial changes and new information. (Notice of Appeal Issue III.2.1.l).
 - i. The Department failed to conduct an alternatives analysis as required by RCW 43.21C.030, WAC 197-11-070(1)(b), WAC 197-11-400, WAC 197-11-402, WAC 197-11-440(5) and WAC 197-11-792(2)(b). The alternatives are not adequate and there is no “no action alternative.” (Notice of Appeal Issue III.2.1.m).
 - j. The Project is inconsistent with the Downtown and Belltown Design Guidelines on alley design, specifically Guideline C.6 (Develop the alley facade). (Notice of Appeal Issue III.2.2.a).
 - k. SCDI erred when it concluded the Design Review Board decision is consistent with the Downtown and Belltown design review guidelines, specifically Guideline C.6. (Notice of Appeal Issue III.2.2.d).
 - l. The Code Interpretation regarding the loading docks was incorrect under SMC 23.54.035 for the reasons stated in request for Code Interpretation. (Notice of Appeal Issue III.2.3).

27. At the close of hearing the Examiner clarified that he lacks jurisdiction over SEPA transportation issues that allege impacts mitigated by ordinances of general application. In written closing arguments, the City and Applicant identified ordinances that they believe mitigate transportation issues alleged by Appellant. Appellant identified issues it believes survive the motion to dismiss.
28. While the adequacy of the scope of the environmental analysis and scoping process was raised in Notice of Appeal Issue III.2.1.f, this issue was not addressed by the Appellant's closing arguments.
29. At the hearing the Appellant presented testimony concerning transportation impacts in the alley relating to the Project by Ross Tilghman, Frank Rose, Ken Erickson, Megan Kruse and John Sosnowy. Mr. Tilghman presented comments on the FEIS and Addendum and his opinions regarding loading and transportation impacts to the alley, the Interpretation and consistency with Design Guideline C6. Mr. Rose is a former truck driver and presented testimony relating to deliveries and the loading berths. Mr. Erickson is the owner of a security company and presented testimony regarding the Escala condominium's loading operations. Ms. Kruse is a communications consultant and presented testimony regarding exhibits she prepared. Mr. Sosnowy is an Escala resident and presented testimony regarding a range of topics including the Escala condominium's loading operations.
30. The Applicant presented responsive testimony by Marni Heffron, Marco Felice and Ted Caloger. Ms. Heffron testified regarding her analysis of transportation impacts of the Project, including impacts in the alley, and her conclusion that these impacts were not significant, Project loading and the Interpretation. Mr. Felice is a hotel general manager and testified about hotel loading operations. Mr. Caloger is an architect and testified regarding the Project's consistency with Design Guideline C6.
31. The City presented testimony by the Department's Senior Transportation Planner John Shaw, Seattle Department of Transportation ("SDOT") Transportation Planner Trevor Partap, the Department's Senior Planner Lindsay King, and the Department's Senior Planner Crystal Torres. Mr. Shaw testified regarding his review of the transportation analysis for the Project and Project conditions. Ms. King testified regarding the bases for the Interpretation. Mr. Partap testified regarding alley and loading operations. Ms. Torres testified regarding the Project's consistency with Design Guideline C6.

Applicable Law

32. SMC 23.76.022.C.6 provides that appeals of Type II MUP decisions are to be considered *de novo*, and that the Hearing Examiner "shall entertain issues cited in the appeal *that relate to compliance with procedures for Type II decisions as required in this Chapter 23.76*, compliance with substantive criteria," (emphasis added) and various determinations under SEPA.
33. In an appeal of an FEIS the decision of the governmental agency shall be accorded substantial weight. RCW 43.21C.090.

34. The requirement that only reasonable alternatives be discussed in an EIS is intended to limit the number of alternatives considered, as well as the detailed analysis required for each alternative. WAC 197-11-440(5)(b)(i). The discussion of alternatives in an EIS need not be exhaustive if the impact statement presents sufficient information for a reasoned choice of alternatives. *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn. App. 439, 446, 832 P.2d 503 (1992).
35. SMC Chapter 25.05 details the City's environmental policies and procedures, and SMC Chapter 25.05 Subchapter IV identifies requirements for an Environmental Impact Statement.
36. SEPA provides that a threshold determination shall be prepared "at the earliest possible point in the planning and decision making process, when the principal features of a proposal and its environmental impacts can be reasonably identified. SMC 25.05.055.B. "A proposal exists ... when an agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated." SMC 25.05.055.B.1 (emphasis added). "The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts." SMC 25.05.055.B.1.a.
37. SMC 25.05.330.A.2 directs that, in making a threshold determination under SEPA, the responsible official shall determine "if the proposal is likely to have a probable significant adverse environmental impact ..." "Probable" means "likely or reasonably likely to occur..." SMC 25.05.782. "Significant" means "a reasonable likelihood of *more than a moderate adverse impact* on environmental quality." SMC 25.05.794 (emphasis added). "If the responsible official determines that a proposal **may** have a probable significant adverse environmental impact, the responsible official shall prepare and issue a determination of significance (DS) substantially in the form provided in Section 25.05.980." SMC 25.05.360.A (emphasis added).
38. SMC 25.05.335 directs the lead agency to "make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal," and where "the agency concludes that there is insufficient information to make its threshold determination" calls for the lead agency to take additional steps that may include seeking additional information from the applicant, or making its own further study.
39. SMC 25.05.402 calls for the following in EIS preparation:

EISs need analyze only the reasonable alternatives and probable adverse environmental impacts that are significant. Beneficial environmental impacts or other impacts may be discussed.

The level of detail shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or referenced.

Description of the existing environment and the nature of environmental impacts shall be limited to the affected environment and shall be no longer than is necessary to understand the environmental consequences of the alternatives, including the proposal.

SMC 25.05.402 A, B and D.

40. SMC 25.05.440.D.3.f requires an EIS to “Present a comparison of the environmental impacts of the reasonable alternatives, and include the no action alternative. Although graphics may be helpful, a matrix or chart is not required. A range of alternatives or a few representative alternatives, rather than every possible reasonable variation, may be discussed.”

41. SMC 25.05.448 provides:

SEPA contemplates that the general welfare, social, economic, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives and in making final decisions. However, the environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision or to contain the balancing judgments that must ultimately be made by the decisionmakers. Rather, an environmental impact statement analyzes environmental impacts and must be used by agency decisionmakers, along with other relevant considerations or documents, in making final decisions on a proposal. The EIS provides a basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA, because it provides information on the environmental costs and impacts. SEPA does not require that an EIS be an agency’s only decisionmaking document.

42. Concerning mitigation measures identified in an EIS, SMC 25.05.660.B provides:

EISs are not required to analyze in detail the environmental impacts of mitigation measures, unless the mitigation measures:

1. Represent substantial changes in the proposal so that the proposal is likely to have significant adverse environmental impacts, or involve significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; and
2. Will not be analyzed in a subsequent environmental document prior to their implementation.

43. SMC 25.05.360.D provides “If at any time after the issuance of a DS a proposal is changed so, in the judgment of the lead agency, there are no probable significant adverse environmental impacts, the DS shall be withdrawn and a DNS issued instead.”

44. SMC 23.88.020 grants the Director the authority to issue an Interpretation, which is a “decision by the Director as to the meaning, application, or intent of any development regulation in this Title 23 . . . as it relates to a specific property[.]”
45. SMC 23.54.035.C.2.c provides that “[w]here 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 . . . Low- and Medium-demand Uses. Twenty-five (25) feet.”
46. The purpose of Design Review is to “[e]ncourage better design and site planning to help ensure that new development enhances the character of the city and sensitively fits into neighborhoods while allowing diversity and creativity.” SMC 23.41.002.A.
47. The Citywide Guidelines and Council-approved neighborhood design guidelines “provide the basis for Design Review Board recommendations and City design review decisions.” SMC 23.41.010.A.
48. SMC 23.41.014 describes the design review process. “The purpose of the early design guidance public meeting is to identify concerns about the site and the proposed project, receive comments from the public, review the design guidelines applicable to the site, identify guideline priorities, and explore conceptual design or siting alternatives.” SMC 23.41.014.C.2. “The Board shall identify the applicable guidelines of highest priority to the Board, referred to as the “guideline priorities”. The Board 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. “During a regularly scheduled evening meeting of the Design Review Board, 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[.]” SMC 23.41.014.F.1.
49. The Director must consider the Board’s recommendation. SMC 23.41.008.F.2. If four or more members of the Board agree to a recommendation, the Director “shall issue a decision that makes compliance with the recommendation of the Design Review Board a condition of permit approval,” unless the Director concludes that the recommendation inconsistently applies the design review guidelines, exceeds the Boards authority, conflicts with SEPA conditions or other applicable requirements, or conflicts with state or federal law. SMC 23.41.008.F.3.

Conclusions

1. For the Decision, the Appellant bears the burden of proving that the Directors Decision was “clearly erroneous.” *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. *Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001). The Interpretation is subject to the same standard of review. SMC 23.88.020 (in an Interpretation appeal, “interpretation of the Director shall be given substantial weight, and the burden of establishing the contrary shall be upon the appellant.”)

2. The Examiner has jurisdiction over the EIS appeal pursuant to Chapter 23.76 SMC. Appeals are considered de novo, and the Examiner must give substantial weight to the Director’s decisions. SMC 25.05.680.B.3. The Appellant bears the burden of proving that the FEIS is legally insufficient within the standards set by SEPA. In reviewing the adequacy of the FEIS the Examiner does “not rule on the wisdom of the proposed development but rather on whether the FEIS [gives] the City . . . sufficient information to make a reasoned decision.” *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass*, 90 Wn. App. at 362. In this case, it is not the Examiner’s role to determine whether impacts should be allowed, but only to determine if the City’s environmental review of those impacts is adequate under the standards of SEPA in the context of the legal issues raised by the Appellant.
3. “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, considering ‘all of the policy and factual considerations reasonably related to SEPA’s terse directives.’” *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. State, Dept. of Transp.*, 90 Wn. App. 225, 229, 951 P.2d 812 (1998) (citations omitted). “In determining whether a particular discussion of environmental factors in an EIS is adequate under the rule of reason, the reviewing court must determine whether the environmental effects of the proposed action are sufficiently disclosed, discussed, and substantiated by supportive opinion and data.” *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 644, 860 P.2d 390 (1993).
4. To meet its burden of proof under SEPA, the Appellant must present actual evidence of probable significant adverse impacts from the proposal. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002); *Moss, supra*, 109 Wn. App. 23. As noted above, “significance” is defined as “a reasonable likelihood of more than a moderate adverse impact on environmental quality.” WAC 19711794. 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.
5. To the degree Appellant has argued that the City is procedurally barred by SEPA from adopting the FEIS and using the Addendum, the appeal is denied, because the City is permitted to take these actions to fulfill its SEPA procedural requirements. *See e.g.* SMC 25.05 Sub-chapter IV; WAC 197-11-625; and WAC 197-11-630. Courts have consistently upheld SEPAs rules allowing for reuse of existing environmental documents “[t]o avoid wasteful duplication of environmental analysis and to reduce delay.” *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 50, 52 P.3d 522 (2002).

Adoption of an existing EIS is explicitly authorized when “a proposal is substantially similar to one covered in an existing EIS.” If an agency adopts existing documents, it must independently assess the sufficiency of the document, identify the document and state why it is being adopted, make the adopted document readily available, and circulate the statement of adoption.

Id. at 51. (citations omitted). *See also* Amended Findings and Decision of the Hearing Examiner in the matter of appeal of Escala Owners Association of a decision and the adequacy of the FEIS and addendum issued by the Director, MUP-17-035 (DR, W).

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, discussion of WAC 197-11-440 components, scoping process, or comment period are required under SEPA. Finally, the City specifically provides for the use of an Addendum to satisfy SEPA requirements stating “Existing documents may be used for a proposal by employing one (1) or more of the following methods . . . [a]n addendum, that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document.” SMC 25.05.600.D.3. In addition, for these reasons and the conclusions regarding impacts below, the Appellants argument that the City was required to develop a new EIS or a Supplemental Environmental Impact Statement instead of an Addendum should be denied.

6. 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. Exhibit 67. 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). In addition, the Addendum analyzed two alternative development scenarios, each with two sub-alternatives. Exhibit 25. Appellant has not demonstrated this was not adequate to meet SEPAs alternative analysis requirement.
7. The Appellant argues that the notices of the DS issued September 14, 2017, and October 9, 2017, indicate that the proposal is likely to have certain probable adverse environmental impacts, and quotes the impacts that the City has identified for the DS. See Exhibits 40, 41. The Appellant characterizes these notices as “final, binding” notwithstanding the revised August 5, 2019, notice. *See* Exhibit 42. Appellant’s Post-Hearing Brief, p. 15. The Appellant relies upon this to support its claim that the City has decided any such impacts listed in the notice would occur, and as a result the Appellant can then avoid its burden of proof and need not demonstrate the probability or significance of any such impacts. *Id.* However, the final notice for the DS only identifies certain probable significant negative environmental impacts that could occur. Exhibit 42. 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, and the record of the hearing where there is no evidence of any probable significant adverse environmental impacts except those originally addressed in the FEIS. The notice merely lists potential significant impacts that could occur. It is not a definitive listing of new probable significant adverse environmental impacts that the Director attributes to the proposal.

8. At no time did the Department determine that there would be no probable significant adverse environmental impacts for purposes of WAC 197-11-340. Instead the Department 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 FEIS.
9. 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 area. 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 and development at heights greater than the proposal in the area in which the proposal is located. Exhibit 67 (Figure 1). 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.
10. The Appellant argues that the proposal's SEPA analysis is inadequate, because it fails to identify mitigation for the types of significant impacts that are listed in the notice for the DS. However, Appellant has not demonstrated that there will be any new probable significant environmental impacts that were not identified, analyzed and mitigated for in the FEIS, therefore there was no requirement for new mitigation to be identified for the proposal.
11. The Appellant argues that the FEIS transportation analysis is inadequate for the current proposal, because it does not adequately describe principal features of the alley, did not summarize significant adverse impacts to the alley resulting from the proposal, and did not identify mitigation measures to address those significant adverse impacts that can be mitigated. The Appellant's assertion is not correct. The Appellant must establish that the FEIS failed to adequately consider probable significant adverse impacts related to traffic impacts from the alley. Even where all of the parties agree that the FEIS did not analyze any such impacts, it is still the Appellant's burden to demonstrate that such impacts are likely to arise from the proposal, and that the impact would be significant. It is not error for the City to not have considered probable significant impacts that are not significant.

SMC 25.05.402.A (“EIS’s need analyze only . . . probable adverse environmental impacts that are significant.”)

12. RCW 43.21C.500 provides, in pertinent part, that a mixed use project is exempt from SEPA appeal on the basis of evaluation of or impacts to transportation elements of the environment, so long as the project does not present significant adverse impacts to the state-owned transportation system and the project is (1) consistent with the transportation element of a comprehensive plan and (2) “[a] project for which traffic or parking impacts are expressly mitigated by an ordinance, or ordinances, of general application adopted by the city or town.” The Examiner provided an oral ruling at hearing that the Project meets these standards. No party claims the Project will result in significant adverse impacts to the state-owned transportation system. Evidence at hearing, including the testimony of Mr. Shaw, establishes the Project is generally consistent with the Transportation Element of the Comprehensive Plan. The evidence, including testimony by Ms. Heffron, also establishes that traffic or parking impacts are mitigated by ordinances of general application. The Examiner lacks subject matter jurisdiction over SEPA transportation issues under RCW 43.21C.500.
13. At the close of hearing the Examiner provided the Appellant the opportunity to identify in written closing statement issues that it believes fall outside the scope of RCW 43.21C.500 and remain for decision. The Appellant identified six issues: (1) the Project will cause conflicts with the new streetcar on Stewart Street causing significant adverse traffic impacts; (2) the Project will cause congestion and safety problems at the intersection of the alley and Stewart Street which will have significant adverse impacts to pedestrians, bicyclists, and drivers on Stewart Street; (3) the Project will cause conflicts between trucks attempting to access the Project loading bay and residents attempting to access the parking garage which will cause significant adverse impacts in the alley; (4) The lack of curbside parking and loading/unloading opportunities in the near vicinity of the 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; and (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.
14. These alleged impacts are all transportation impacts. The Applicant and City provided citations to Code provisions of general applicability that mitigate each of the six impacts identified by the Appellant as remaining issues. The Examiner lacks subject matter jurisdiction over these issues.
15. Even if the Examiner had jurisdiction, the Appellant has not demonstrated that the Department did not adequately analyze these transportation impacts. The Applicant completed adequate analysis of project operations in the context of the alley. Applicant identified existing alley conditions and provided analysis of loading and alley operations with the Project. Exhibit 25 (Appendix J); Exhibits 26, 28. Applicant sought and the

Department approved access for the hotel off of 5th Avenue, reducing vehicular traffic in the alley. Exhibit 4. The Department independently reviewed Applicant's analysis and the Department imposed a condition requiring a dock management plan in the Decision. Exhibit 20. The City's SEPA analysis was adequate for purposes of determining if there would be any probable significant impacts, and this analysis and the conclusion that there would be no new transportation impacts other than those analyzed in the FEIS satisfies the rule of reason.

16. Further, the Appellant has not demonstrated that the proposal is likely to have probable significant transportation impacts that were not disclosed in the original FEIS. The Applicant's traffic analysis included the evaluation of traffic operations at nearby intersections and roadway segments and on the alley. Exhibit 25 (Appendix J). The appeal was limited to alley operations and related nearby traffic operations. The Project's likely transportation impacts were consistent with the analysis in the FEIS, and new significant adverse transportation impacts were not shown.
17. On the first issue identified by Appellant, Appellant submitted contradictory evidence into the record regarding the location of the planned Stewart Street streetcar (whether on the north or south side of the street). Exhibit 48, p. 13 (showing the streetcar on the south side of Stewart Street). Regardless of the location, Appellant did not meet its burden to show that Project traffic will interfere with the streetcar resulting in significant adverse impacts, particularly in light of SMC 11.65.040, which provides that streetcars have the right-of-way, and SMC 11.65.080 which provides that "no person shall obstruct, hinder, interfere or delay in any way the movement of a streetcar."
18. Regarding the second issue, Appellant did not meet its burden to show the Project will result in congestion and safety problems at the intersection of the alley and Stewart Street resulting in a significant adverse impact. While the traffic study shows this intersection will operate at LOS F, it also states that poor operations are common for unsignalized intersections in the downtown core. Exhibit 25 (Appendix J). Mr. Shaw testified that vehicular mobility is not considered a primary function of alleys and the City has not adopted transportation levels of service for alley intersections. The Project includes widening of the sidewalk at Stewart, widening of the alley, on site loading berths, and the hotel garage is accessed from 5th Avenue, reducing traffic in the alley. Exhibit 87, pp. 32-34, 55. Appellants failed to show significant adverse impacts.
19. Appellant also did not meet its burden of proof on the third issue. Ms. Heffron testified that the Project would generate an average of 5 to 7 deliveries a day. These deliveries would be accommodated in the loading berths. Exhibits 26, 28. Appellant did not provide affirmative evidence of conflicts between deliveries and residents accessing the parking garage.
20. Similarly, Appellant did not meet its burden of proof on the fourth issue. The shortage of curbside parking/loading in the area is an existing condition. Project loading will be accommodated in its loading berths. The Appellant did not demonstrate that the loss of the commercial surface parking lot presently occupying the Project site would result in

significant adverse impacts, as the City Code allows the City to establish loading zones and issue street parking permits for service vehicles. SMC 11.16.280, 11.26.020.

21. Further, Appellant did not meet its burden on the fifth issue. Alley obstructions are an existing condition not caused by the Project. Delivery vehicles are currently able to use the alley notwithstanding these obstructions. The Applicant and City provided AutoTurn diagrams showing Project delivery vehicles will be able to access the alley and loading berths. Exhibits 26, 28. Mr. Rose confirmed a delivery truck could enter the loading berth.
22. Finally, Appellant did not meet its burden on the sixth issue. The traffic analysis prepared by the Applicant and reviewed by SDCI considered the cumulative impacts of all three projects and concluded the Project would not result in new significant adverse transportation impacts. Exhibit 25 (Appendix J).
23. The Appellant has not demonstrated that additional mitigation measures are required to mitigate transportation impacts, including alley impacts. Appellant did not demonstrate that any new significant adverse impacts would warranting mitigation. The City's SEPA Ordinance limits the mitigation that may be imposed on projects downtown to mitigate transportation impacts. For residential projects, mitigation is limited to signage, provision of information on transit and ride-sharing programs, bicycle parking and transportation management plans. SMC 25.05.675.R.2d. For nonresidential projects, mitigation is limited to provision of transit incentives including transit pass subsidies; signage; improvements to pedestrian and vehicular operations, signalization, turn channelization, right-of-way dedication, street widening, or other improvements proportionate to the project; and transportation management plans. The Department required a dock management plan. Exhibit 20. Appellant has not established that additional mitigation allowed by SMC 25.05.675 is warranted.
24. Appellant did not meet its burden to show that the Interpretation was in error. SMC 23.54.035.C.2.c provides that loading berth length may be reduced to 25 feet "[w]here 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." The Applicant provided analysis to the Department demonstrating that most delivery vehicles will fit within the two 25-foot berths and that longer delivery vehicles will fit within the 35-foot berth. Exhibits 26, 28. Ms. King testified that the Department reviewed and agreed with this analysis. The Appellant provided evidence that some larger trucks would not fit in the loading berths, but trucks longer than 26 feet are not allowed to service the Project under a condition contained in the Decision. Exhibit 20. Applicant and City demonstrated that the Project's loading berths will accommodate trucks up to 26 feet in length without vehicles extending over the property line.
25. The design review process strives to incorporate public comment, while also offering the oversight of experienced design professionals. The public has had the opportunity to provide their comments, and those comments are reflected in the record and in the Board's recommendations. The Appellant has not shown that the Director's Decision accepting the recommendations of the Board was clearly erroneous.

26. Appellant alleges that the Project is not consistent with portions of Guideline C6 of the Downtown and Belltown Design Guidelines. However, the Board specifically identified Downtown Guideline C6 as a Priority Guideline in its review, and the record reflects conformance of the proposal with the Guideline. Mr. Caloger testified that the Guideline's considerations are not mandatory and that the Applicant considered and responded to them. The project places the parking entry at the logical location considering the slope of the Project site, widens the sidewalk on Stewart, widens the alley, uses the same materials in the alley as on the street-facing facades, and provides lighting in the alley for pedestrians. Exhibit 87, pp. 32-34, 55. These features address Guideline C6. The Belltown Design Guidelines state they do not apply to the Project site but, even if they did, the Project is consistent with their Guideline C6 for the same reasons.
27. On review of the entire record, the Directors design review decision was not shown to be clearly erroneous, and it should therefore be affirmed.
50. The adequacy of the scope of the environmental analysis and scoping process (Notice of Appeal Issue III.2.1.f) was not addressed by the Appellant's closing arguments. Without supporting legal argument from the Appellant for these issues the Appellant has not met its burden of proof to demonstrate error on the part of the City under the applicable standard of review either the rule of reason or clearly erroneous standard as related to the respective issue. The Hearing Examiner therefore finds against the Appellant on these issues.