

than is necessary to understand the environmental consequences of the alternatives, including the proposal.

SMC 25.05.402 A, B and D.

38. The SEPA policy on height, bulk and scale explains that the City's adopted land use regulations are intended to provide "for a smooth transition between industrial, commercial, and residential areas," and to preserve neighborhood character and reinforce natural topography by controlling development's height, bulk and scale. The policy acknowledges that "zoning designations cannot always provide a reasonable transition in height bulk and scale between development in adjacent zones," SMC 25.05.675.G.1, and affords limited authority for requiring mitigation of height, bulk and scale impacts. SMC 25.05.675.G.2. However, the policy concludes by stating that a project approved through the design review process is presumed to comply with the SEPA policy on height, bulk and scale, and that the presumption may be rebutted "only by clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated." SMC 25.05.675.G.2.c.
39. SMC 25.05.440.D.2.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."
40. 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.
41. 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.
42. 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."
43. 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.
44. 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.
45. SMC 23.41.014 describes the design review process. "Based on the concerns expressed at the early design guidance public meeting or in writing to the Design Review Board, the applicable guidelines of highest priority to the neighborhood, referred to as the 'guideline priorities,' shall be identified. The Board shall incorporate any community consensus regarding design expressed at the meeting into its guideline priorities, to the extent the consensus is consistent with the design guidelines and reasonable in light of the facts of the proposed development." SMC 23.41.014.C.1.
46. The Director must consider the Board's recommendation. 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 Board's authority, conflicts with SEPA conditions or other applicable requirements, or conflicts with state or federal law. SMC 23.41.014.F.3.

Conclusions

1. For the Decision, the Appellant bears the burden of proving that the Director's 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 Director's 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).
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, the Appellants hold reasonable concerns regarding the proposal, and its impacts on their residences. However, it is not the Examiner’s role to determine that such impacts should not 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 v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001). As noted above, “significance” is defined as “a reasonable likelihood of more than a moderate adverse impact on environmental quality.” WAC 197-11-794. 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 SEPA’s 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).

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 Appellant’s argument that the City was required to develop 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. 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. Dep’t 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 SEPA’s alternative analysis requirement.
7. The Appellant argues that the notice of the DS issued December 15, 2016 indicates that the proposal would have certain probable adverse environmental impacts, and lists the impacts that the City has identified for the DS. See Exhibit 89. 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. Appellant’s Closing Argument at 7. However, Appellant fails to cite to the final notice for the DS which only identifies certain probable significant negative environmental impacts that *could* occur. Exhibit 89. 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 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 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.
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 that cannot be avoided, and did not identify mitigation measures to address those significant adverse impacts that can be mitigated. The Appellant further argued that "[i]t was not our burden to prove that the proposal would have significant adverse traffic impacts." Appellant's Closing Argument at 20. 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. The Appellant has not demonstrated that the Department did not adequately analyze transportation impacts. The Applicant completed adequate analysis of project operations in the context of the alley. Much of the Appellant's expert's transportation analysis was based on the Applicant's analysis that was used to support the City's SEPA analysis. 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.

13. 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. The project's likely transportation impacts were consistent with the analysis in the FEIS, and new significant adverse transportation impacts were not shown.
14. The Appellant argues that the Department erred in refusing to exercise its SEPA substantive authority to mitigate the height, bulk and scale impacts. The Department's substantive authority to mitigate the height, bulk and scale impacts is discretionary, and the record demonstrates that the Department fully considered the proposal's height, bulk and scale impacts through its review of the application materials, FEIS, Addendum and Design Review process. The Appellant did not provide clear and convincing evidence that height, bulk and scale impacts documented through environmental review have not been adequately mitigated. The FEIS analyzed the impacts of increasing building height to 600 feet on the site of the proposal and surrounding areas. The Addendum provides additional site-specific information or analysis that does not substantially change the analysis of significant impacts and alternatives in the FEIS. The proposal's SEPA analysis for height, bulk, and scale impacts satisfies the rule of reason.
15. Appellant alleges that the FEIS analysis is inadequate, because the analysis of the proposal's height, bulk, and scale impacts is incomplete. Appellant incorrectly argues that it did not have the burden of showing that the proposal was likely to have significant adverse height, bulk, and scale impacts. Appellant failed to meet its burden of demonstrating that the project would result in height, bulk, or scale impacts, that such impacts had not been adequately mitigated by the Design Review Process, or that evidence of such impacts was not in the record before the Director.
16. In issuing the DS, the Director made a threshold determination which was required to be "based upon information reasonably sufficient to evaluate the environmental impact of a proposal." SMC 25.05.335. At the time of the threshold determination, the Department lacked sufficient information to evaluate the proposal's health impacts as they relate to loss of light within the Escala residential units. As noted, the report from Mr. Loveland raised issues concerning health impacts due to loss of light to Escala, as did his testimony, both of which were presented at an EDG meeting. While his report did not measure the potential health impacts of loss of light that might result from the proposal, his finding did show that at the fifth floor of Escala facing the alley between Escala and the proposal, residential units would see daylight reductions in the range of 75% or more, and that some units would experience adequate daylight conditions for only 12% of daytime hours, and that in winter months there would be less. The Applicant's light analysis also showed reduction of light in Escala units. Therefore, the Department was alerted to this as an issue at a phase of review in advance of the threshold determination. The record reflects that Design Review process was included in the Director's review and consideration as part of the threshold

determination. However, no analysis or request for additional information was executed relating to negative health impacts resulting from loss of light. Even the Applicant's witness, Mr. Meek, agreed that loss of light can have negative health impacts. But there is nothing in the documents reviewed by the responsible official, or in this record, that evaluates the health impacts from loss of light as a result of the proposal. There is also no evidence that the Director (or those acting on his behalf) had such a level of expertise that their opinion concerning such impacts could substitute for such an analysis. The reference to the shadow and view impact analysis in the SEPA analysis is not sufficient, as these consider different impacts.² Therefore, the Director did not have adequate information necessary to make a determination that there were no probable adverse significant health impacts arising from loss of light caused by the proposal. Without this information the Director could not have concluded that the proposal presented no new probable adverse significant impacts, and the Director's threshold determination was not based on reasonably sufficient information. The FEIS did not address this impact. This is clear error, and the Hearing Examiner is left with a firm and definite conviction that a mistake was made.

17. Appellant alleged that the EIS analysis is inadequate, because the analysis of the proposal's probable significant negative impacts concerning level of light within residences at Escala is inadequate. Mr. Loveland did not present any definitive evidence concerning level of health impacts resulting from low light in the residences, and therefore the Appellant did not demonstrate that the loss of light as described by Mr. Loveland would be a probable significant adverse impact on the residents. Mr. Loveland's analysis was not directed at determining or demonstrating adverse health impacts from loss of light, nor was it definitive in determining the actual loss of light from the proposal.
18. Appellant alleged that the EIS analysis is inadequate, because the analysis of the proposal's land use impacts is incomplete. Appellant failed to meet its burden of demonstrating that the project would result in significant land use impacts, that such impacts had not been adequately mitigated, or that evidence of such impacts was not in the record before the Director. Appellant presented no expert testimony to support its argument that the proposal would result in significant negative land use impacts. 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, and concluded that the change was consistent with the Comprehensive Plan and neighborhood plans and was not a significant unavoidable adverse impact. The FEIS and Addendum analysis satisfies the rule of reason as to land use impacts.
19. The condition in the Addendum calling for a dock management plan lacks specificity to adequately minimize potential impacts of the proposal, and should be revised. If revised, this condition effectively mitigates potential impacts to users of the alley by users of the loading dock.

² A viewer may be located within a shadow or have a view removed, and still view visible light (e.g. a viewer sitting in the shade on a sunny day may see ample light, as may a viewer receiving light from a skylight in a room with no view). The absence of light is therefore distinguishable from potential loss of direct solar access, and potential loss of views.

20. 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 Appellants have not shown that the Director's Decision accepting the recommendations of the Board, including departures from the development standards, was clearly erroneous.
21. In Notice of Appeal Issue 2e the Appellant asserts that procedural prerequisites for the design review process set forth in Chapter 23.41 SMC were not met. Consequently, according to the Appellant, the Board acted outside its authority in making its recommendation on the proposal. The Appellant questions compliance with the mandatory Board review of written public comments, SMC 23.41.014.E.1.c. However, procedural requirements under Chapter 21.41 are not within the Hearing Examiner's jurisdiction in an appeal of a design review decision. *See* SMC 23.76.022.C.6 (quoted in ¶ 30). Therefore, Notice of Appeal Issue 2e should be dismissed.
22. The Appellant alleges that the proposal does not meet the Design Review Guidelines, specifically A-1, A-2, B-1, B-2, and B-3. However, the Board specifically identified Guidelines A-1, A-2, B-1, B-2, and B-3 as Priority Guidelines for the proposal in its review, and the record reflects conformance of the proposal with the Design Review Guidelines. Exhibit 83 at 6. Similarly, the record demonstrates that the DRB adequately reviewed the proposal in the context of the Downtown and Belltown Design Review Guidelines, and it was not error for the Director to conclude that the proposal was consistent with these guidelines. The Appellant has not shown that the Director's Decision accepting the recommendations of the Board was clearly erroneous.
23. Appellant has failed to support its contention that the DRB holds decision making authority on a proposal such that its failure to consider SEPA impacts as part of its analysis is a violation of SEPA. Contrary to the Appellant's assertions, the DRB does not have decision making authority. Instead, it is a recommending body, and the Director retains final decision making authority with regard to design review and to SEPA. Appellant has failed to demonstrate that the design review process through the DRB violates SEPA, because it does not include a SEPA impacts analysis.
24. On review of the entire record, the Director's design review decision was not shown to be clearly erroneous, and it should therefore be affirmed.
25. The Appellant raised other issues in its appeal that were not addressed in its closing statement (*e.g.* Notice of Appeal Issues 1d, 1f, 1g, 1h, 1n, and 2e). Unless otherwise addressed above (*e.g.* Notice of Appeal Issue 2e), these issues have been preserved for purposes of appeal by reference in the closing argument to the record. *See* Appellant's Closing Argument at 36. However, 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.

Decision

The Determination of Significance is (1) **REMANDED** for the purpose of evaluating the proposal's impacts as they relate to loss of light within the Escala residential units, and (2) the following terms shall be incorporated into the dock management plan required in the second SEPA condition of the Director's Decision:

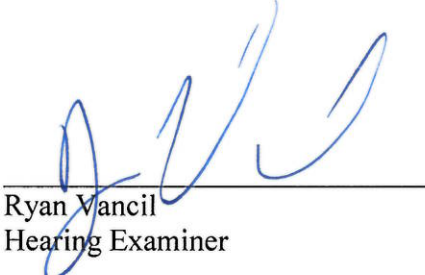
- Applicant shall hire and maintain a "dock master" to manage dock operations;
- The Project's dock master shall be the designated point of contact for ensuring the Project's continuing compliance with the adopted dock management plan;
- Dock master shall ensure that trucks parked in the Project's loading dock do not block the alley and are contained within the loading dock facility;
- Applicant shall provide a portable 5' x 8' dock lift for loading operations within the loading dock. The dock master shall coordinate the use of the dock lift as necessary;
- Project shall participate in the City's Clean-scapes turn-key garbage and recycling access program to allow service collectors to access garbage within the Project, preventing storage of garbage in the alley;
- Applicant shall install video cameras on the Project facing north and south in the alley that are connected to monitors in the Project's loading dock and parking garage access to provide real-time information to drivers exiting the site, regarding potential alley blockages;
- Applicant's dock master shall use best efforts to coordinate with the building official and/or staff for other buildings on the alley regarding alley operations;
- In addition to the signage incorporated by reference in the dock management plan, Applicant shall post signage on the Project's alley façade identifying the City of Seattle regulations regarding time limits for loading and unloading in an alley;
- Dock master (or designee) shall be responsible to keeping the Project's loading dock and exterior alley façade appropriately maintained and safely lit; and
- Dock master shall meet quarterly with the Project's residential and commercial management staff for all tenants to discuss the operations of the dock management plan and identify any issues for improvement or coordination. Additional meetings shall be scheduled as needed for events that may relate to the alley operations, such as road or alley closures, regularly scheduled maintenance, etc.

The Determination of Significance is otherwise **AFFIRMED**, and the remainder of the appeal of the Determination of Significance is **DENIED**.

The appeal of the Director's Decision approving design review is **DENIED**.

The Hearing Examiner does not retain jurisdiction.

Entered this ^{12th} day of June, 2018.



Ryan Mencil
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion for Reconsideration & Amended Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **Escala Owners Association**. Hearing Examiner File: **MUP-17-035 (DR, W)** in the manner indicated.

| Party | Method of Service |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Appellant Legal Counsel Claudia Newman newman@bnd-law.com Peggy Cahill cahill@bnd-law.com | <input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger |
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Dated: June 12, 2018



Alayna Johnson
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