

**FINDINGS AND DECISION  
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE**

In the Matter of the Appeal of

**ESCALA OWNERS ASSOCIATION**

of a decision, and adequacy of the FEIS  
and Addendum issued by the Director,  
Department of Construction and Inspections

Hearing Examiner Files:  
**MUP-19-031 (DD, DR, S, SU, W)**

Department Reference:  
3018037-LU

**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 forty eight-story structure (“Decision”). The DS was followed by the adoption of a Final Environmental Impact Statement (“FEIS”) and issuing an associated Addendum. The Appellant exercised its right to appeal the Decision and the FEIS.

The appeal hearing was held on January 28, 29, 20, 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. Carpman, attorneys-at-law; and the Director was represented by Elizabeth E. Anderson, attorney-at-law. The Hearing Examiner subsequently visited the site. Final written closing arguments were submitted 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 and reviewing the site, 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.
2. The site is currently occupied by a commercial surface parking lot.
3. The site is zoned Downtown Office Core 2 with a maximum height dependent on the proposed use.

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

#### 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.

#### 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 width 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.
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.

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. 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 altered design, including wider sidewalks along 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.
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. The Board thought the design had made 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 asked for some additional information to be presented.
11. The Board held a Recommendation meeting on August 16, 2016. The Board took public comment at the meeting. Public comments 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 that the alley is functionally inadequate to accommodate service needs and support for the project. 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.

#### 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.
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.
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 and Density Changes EIS prepared for the 5th and Virginia 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; and Viewshed); Historic Resources; Wind; Transportation, Circulation and Parking; and Construction.

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. 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 decisionmaker. 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.

16. Concerning land use, the Director's SEPA 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 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.

17. With regard to aesthetic height, bulk and scale impacts the Director's analysis states:

The height, bulk and scale of the proposed development have been addressed during the Design Review process for the project proposed on the site. Per the Overview policies in SMC 25.05.665.D, the existing City Codes, and regulations to mitigate impacts to height, bulk and scale are presumed to be sufficient. Further, the project size does not present unusual circumstances such as substantially different site size or shape, or topography anticipated by applicable codes or zoning; the development proposal does not present unusual features, or unforeseen design; and the project is not located at the edge of a less intensive zone, which could result in substantial problems of transition in scale. The project is located in an area of downtown Seattle that was intentionally zoned to allow and encourage greater density and additional high-rise residential and commercial towers. Additional mitigation is not warranted under SMC 25.05.675.G.

18. In reviewing potential aesthetic light and glare impacts the Director's analysis states:

The FEIS did not specifically address light and glare-related impacts or mitigation.

The Addendum described project-specific impacts related to light and glare. The building material reflectivity and angled facades are anticipated to have minimal glare impacts. The Addendum identified potential mitigation, including compliance with Design Review Guidelines, not using excessively-reflective surfaces, street trees to disrupt glare, pedestrian scale lighting with cut-off fixtures, and the presence of nearby buildings that will shade the proposed structure and disrupt glare. Headlights from vehicles entering and exiting the garage are also anticipated to have minimal impacts, and the Addendum did not identify mitigation for this item.

Pursuant to the SEPA Light and Glare Policy, SMC 25.05.675.K, no significant adverse impacts are anticipated from the proposal and no mitigation is necessary.

As part of the analysis for light and glare the City considered analyses that measured the loss of light associated with the proposal. Nothing in the record demonstrates that this analysis included data concerning health impacts associated with loss of light levels identified in the analyses, or that the reviewing staff had such a level of expertise that their opinion concerning such impacts could substitute for such an analysis.

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

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.

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 SDOT 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.

20. The City has not adopted any traffic level of service standards for alleys, and vehicular mobility is not considered a 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).
21. The Applicant analyzed transportation impacts of the proposal on the alley adjacent to the proposal. The Applicant's analysis included a review of the following: 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 proposal's loading dock.
22. The Department's Senior Transportation Planner testified that he reviewed the traffic study, and agreed with its conclusions.
23. Following review of the FEIS, the SEPA checklist, 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.

#### Appeal

24. The Appellant filed a timely appeal of the Director's Decision and the DS. Appellant also requested an interpretation ("Interpretation") and appealed the resulting Interpretation. Appellant's Notice of Appeal identified 19 issues numbered III.2.1.a-m, III.2.2a-e and III.2.3.



25. The Interpretation indicated that the Department properly determined 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. Appellant challenged the decision on loading berth length.
26. As a result of a prehearing motion to dismiss 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.2.2.b, III.2.2.c, and III.2.2.e were withdrawn or dismissed.
27. The motion to dismiss argued that Appellant's claims related to transportation impacts should be dismissed, because such issues are exempted from SEPA appeals pursuant to RCW 43.21C.500.
28. Appellant's Notice of Appeal SEPA issues related to transportation impacts were dismissed pursuant to RCW 43.21C.500.

RCW 43.21C.500 states:

(1) A project action pertaining to residential, multifamily, or mixed use development evaluated under this chapter by a city or town planning under RCW 36.70A.040 is exempt from appeals under this chapter on the basis of the 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 as determined by the department of transportation and the project is:

- (a)(i) Consistent with a locally adopted transportation plan; or
- (ii) Consistent with the transportation element of a comprehensive plan; and
- (b)(i) A project for which traffic or parking impact fees are imposed pursuant to RCW 82.02.050 through 82.02.090; or
- (ii) 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.

(2) For purposes of this section, "impacts to transportation elements of the environment" include impacts to transportation systems; vehicular traffic; waterborne, rail, and air traffic; parking; movement or circulation of people or goods; and traffic hazards.

RCW 43.21C.500 was adopted in 2019, and there are no published decisions concerning its interpretation or application.

In an order on the City's and Applicant's prehearing motion, the Examiner found that the Project falls within the scope of the projects described in RCW 43.21C.500(1), because it is a mixed-use project, and no evidence indicates that there has been a department of

transportation determination that the project will have significant adverse impacts to the state-owned transportation system.

The parties raised competing claims as to whether the Project was, or was not, consistent with the criteria in RCW 43.21C.500(1)(a) and (b), and as this is a fact intensive determination, the Examiner bifurcated the scheduled hearing and provided that the hearing would initiate with an opportunity for the parties to present evidence and argument as to whether the Project was or was not consistent with the criteria in RCW 43.21C.500(1)(a) and (b), and that if the Project was found to meet the criteria of RCW 43.21C.500(1)(a) and (b), then issues raised by the Appellant concerning transportation impacts would be dismissed.

At hearing, the City and Applicant demonstrated that the project is consistent with the transportation element of the City's comprehensive plan, thus satisfying RCW 43.21C.500(1)(a).

The parties presented conflicting argument and evidence concerning whether the project meets the criteria of RCW 43.21C.500(1)(b)(ii). Central to these arguments was whether the City had adopted ordinances that addressed the potential traffic impacts related to the proposal alleged by the Appellant. The City presented as part of its argument a list of various ordinances concerning Appellant's issues. The Examiner rejected the City and Applicant's argument that *any* Code that merely concerned or even named the type of impact identified by Appellant would be adequate to show compliance with RCW 43.21C.500(1)(b)(ii), because the statute requires that such ordinances "expressly" mitigate such impacts and a mere reference to or naming of an impacts fails to show such mitigation. The Examiner also rejected the Appellant's argument at the other extreme that such ordinances needed to expressly mitigate the impacts of the specific project at issue (e.g. the specific project at issue would have to be identified by the ordinance), because the statute indicates the ordinances should be of "general application."

The City's list of ordinances included ordinances of general application adopted by the City that expressly mitigated traffic or parking impacts alleged by the Appellants including, but not limited to:

- a. Failure to meet applicable concurrency LOS standards;
- b. traffic impacts to alleys;
- c. stopping, standing, or parking of a vehicle in an alley; and,
- d. generally adverse traffic impacts.

Thus, in accordance with RCW 43.21C.500(1)(b)(ii), these traffic impact issues are exempt from appeal under SEPA, and the Examiner orally dismissed them at the hearing. The Appellant argued that some of the traffic impacts it intended to address at hearing were not encompassed by the issues that were dismissed, and that the Code did not provide express

mitigation for such impacts, and the Examiner left these to be addressed later in the hearing.<sup>1</sup>

29. The following appeal issues were addressed at the hearing:<sup>2</sup>

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 in accordance with 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 FEIS and Addendum 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 19711-440. 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 and are outdated, thus contravening 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 Guideline C.6 concerning alley design. (Notice of Appeal Issue III.2.2.a).

k. SDCI erred when it concluded the Design Review Board decision is consistent with the Downtown and Belltown Design Guideline C.6. (Notice of Appeal Issue III.2.2.d).

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<sup>1</sup> These issues were addressed as part of closing briefing by the parties, and are addressed below in the conclusions section.

<sup>2</sup> 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.

1. The Code Interpretation regarding the loading docks was incorrect under SMC 23.54.035 for the reasons stated in the request for Code Interpretation. (Notice of Appeal Issue III.2.3).

30. 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.
31. The Applicant presented 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, 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.
32. 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.
33. Ms. Torres testified regarding the Project's consistency with Design Guideline C6. 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. These features address Guideline C6.

#### Applicable Law

34. SMC 23.76.022 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.
35. In an appeal of an FEIS "the decision of the governmental agency shall be accorded substantial weight." RCW 43.21C.090.

36. “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).
37. 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.
38. 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.
39. SMC 25.05.330 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).
40. 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.
41. 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.

42. 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.
43. 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."
44. 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.
45. 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.
46. 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."
47. 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.
48. 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.
49. 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.
50. 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 notices of the DS issued September 14, 2017, and October 9, 2017, indicate that the proposal would have certain probable adverse environmental impacts, and lists the impacts that the City has identified for the DS. The Appellant argues 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. However, Appellant fails to cite to the final revised notice for the DS issued on August 5, 2019, which only identifies certain probable significant negative environmental impacts that *could* occur. 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 projectspecific 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. At the close of hearing the Examiner provided the Appellant the opportunity to identify in written closing statement issues that it believed were not encompassed by the traffic impact issues that were dismissed, because the Code did not provide express mitigation for such impacts in accordance with RCW 43.21C.500.(1)(b)(ii). The Appellant identified the following 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.

First, these alleged impacts are all transportation impacts pursuant to RCW 43.21C.500.<sup>3</sup> In addition, the Applicant and City provided citations to Code provisions of general applicability that expressly mitigate each of the six impacts identified by the Appellant as remaining issues. City and Applicant's Joint List of Mitigating Ordinances at 2-17. Therefore, these issues are subject to the appeal exemption of RCW 43.21C.500 and should be dismissed.

12. Because Appellant's Notice of Appeal issues related to transportation have been dismissed pursuant to RCW 43.21C.500, the Hearing Examiner declines to rule on the sufficiency of the evidence submitted by Appellant to demonstrate significant impacts related to transportation impacts.
13. 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. 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. 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.
14. 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.
15. Appellant alleged that the Project is not consistent with Downtown and Belltown Design Guideline C6. The Board specifically identified Downtown Guideline C6 as a Priority Guideline in its review, and the record reflects conformance of the proposal with Guideline C6.

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<sup>3</sup> RCW 43.21C.500.(2) provides "For purposes of this section, 'impacts to transportation elements of the environment' include impacts to transportation systems; vehicular traffic; waterborne, rail, and air traffic; parking; movement or circulation of people or goods; and traffic hazards."

16. 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.
17. The adequacy of the scope of the environmental analysis and scoping process was raised in Notice of Appeal Issue III.2.1.f, but this issue was not addressed at hearing, or by the Appellant's closing arguments, and is dismissed.

### Decision

The Determination of Significance is **AFFIRMED**, and the appeal of the Determination of Significance is **DENIED**. The appeal of the Director's Decision approving design review is **DENIED**.

Entered this 5<sup>th</sup> day of May, 2020.

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s/Ryan Vancil

Ryan Vancil  
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.

**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 **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **ESCALA OWNERS ASSOCIATION**. Case Number: **MUP-19-031 (DD, DR, SU, W) & S-19-002** in the manner indicated.

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Dated: May 11, 2020

/s/ Angela Oberhansly  
 Angela Oberhansly  
 Administrative Specialist