BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by ESCALA OWNERS ASSOCIATION Of Decisions Re Land Use Application for 1933 5th Avenue, Project 3019699	Hearing Examiner File: MUP-20-012 (W) RESPONDENTS CITY OF SEATTLE AND APPLICANT'S JOINT MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION AND RELIEF REQUESTED

This is an appeal of a Revised Master Use Permit ("Revised MUP") for a 48-story building in the City of Seattle's ("City's") Belltown neighborhood ("Project") and is the second Hearing Examiner appeal filed by Escala Owners Association ("Appellant") on this Project. In Appellant's first appeal challenging the Seattle Department of Construction and Inspections ("SDCI") Master Use Permit ("MUP") decision for the Project, the Hearing Examiner upheld the MUP Decision related to the Project's design review approval and the legal adequacy of the SDCI's review of the Project's potential environmental impacts related to transportation, alley operations, height, bulk and scale, and land use compatibility elements ("Examiner Decision").

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However, the Hearing Examiner remanded the Project to SDCI to evaluate the impacts related to loss of light within the Escala residential units.

As a result of the remand, SDCI analyzed the impacts of the loss of light within the Escala and issued a second EIS Addendum ("Second EIS Addendum") documenting its analysis. Appellants now appeal the Revised MUP decision, which adopts the Final Environmental Impact Statement ("FEIS") for the Seattle Downtown Height and Density Changes (January 2005) for the Project, as supplemented by two EIS Addenda for the Project ("New Appeal").

In their appeal, however, Appellant challenges more than SDCI's new SEPA determination and analysis regarding the impacts of loss of light and raises, for a second time, several claims regarding the use of EIS addenda that were rejected in the Prior Appeal. Specifically, Appellant's new claims ("New Claims") allege:

> 1(a). The City is relying on an EIS prepared 15 years ago – before this project was proposed and before the Escala existed – as providing the required analysis of this proposal's impacts on Escala's residents. The City's reliance on that EIS is bizarre and, in the words of more conventional legal standards, arbitrary and capricious.
>
> 1(b). The City also relied on two addenda it has published. But addenda are no substitute for an EIS. SEPA's obligation to prepare an EIS is not excused by issuing an addendum.
>
> 1(c). The addenda that were not the functional or substantive substitute for an EIS. The procedures for preparing an addendum are different from those for preparing an EIS. The content is different, too. The addenda are not adequate substitutes for the required EIS.
>
> 1(e). The addendum's statement that the substantive SEPA policies in SMC 25.05.675 limit the scope of procedural disclosure and analysis of environmental impacts is incorrect. The scope of procedural disclosure and analysis of impacts that is required under SEPA is broader than and goes beyond substantive limitations in SMC 25.05.675.

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New Appeal, pp, 3-4. These claims were all raised and rejected in Appellant's first appeal and cannot be retried here.

In addition, Appellant also attempts to challenge a condition imposed under the Hearing Examiner's SEPA authority regarding the dock management plan that was incorporated into the Revised MUP ("New Claim 2"). The Hearing Examiner does not have jurisdiction to reconsider the imposition of the dock management plan condition or its future enforcement and this claim must be dismissed.

For these reasons, Respondents City of Seattle and Jodi Patterson O'Hare ("Applicant") (collectively, "Respondents") respectfully request that the Hearing Examiner dismiss New Claims 1a, 1b, 1c, 1e, and 2 of this Appeal.

II. STATEMENT OF FACTS

The Project includes one 48-story structure containing 432 apartment units, 155 hotel rooms, retail and restaurant space, and below-grade parking for 239 vehicles. The City issued a SEPA determination of significance and notice of adoption of the FEIS for the Seattle Downtown Height and Density Changes (January 2005), as supplemented by the FEIS Addendum dated July 3, 2017 ("EIS Addendum") for the Project.

On October 26, 2017, the City issued a MUP for the Project. The MUP included three components: (1) design review approval under the Seattle Municipal Code ("SMC" or "Code") Chapter 23.41; (2) the City's procedural compliance with SEPA, including the adoption of the Downtown FEIS for the Project and determination of EIS adequacy; and (3) imposition of conditions pursuant to the City's substantive SEPA authority.

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On November 9, 2017, the Appellant appealed the MUP ("Prior Appeal"). After a four-day hearing, the Hearing Examiner issued his Findings and Decision on the matter and upheld SDCI's MUP Decision related to the Project's design review approval and the legal adequacy of the City's review of the Project's potential environmental impacts related to transportation, alley operations, height, bulk and scale, and land use compatibility elements. Declaration of Katie Kendall ("Kendall Decl."), Exh. A (Hearing Examiner Decision on Prior Appeal). The Hearing Examiner also dismissed Appellant's procedural SEPA claims regarding the adoption of the FEIS and use of the EIS Addendum.

However, the Hearing Examiner found that SDCI erred procedurally by failing to evaluate the impacts related to loss of light prior to the issuance of its environmental determination for the Project. The Hearing Examiner remanded the MUP Decision to SDCI for the "purpose of evaluating the [Project's] impacts as they relate to the loss of light within Escala residential units." Examiner Decision, p. 21. The Examiner's Decision also required several terms to be included in the Project's Dock Management Plan, including a requirement that the "[d]ock Master shall ensure that trucks parking in the Project's loading dock do not block the alley and are contained within the loading dock facility." *Id.,* p. 21. In all other respects, the Hearing Examiner upheld the MUP Decision and denied Appellant's appeal.

Applicant and the City of Seattle filed a joint motion for reconsideration on the remanded issue related to loss of light. As a result of this motion, the Hearing Examiner clarified his

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decision in an Amended Decision dated June 12, 2018. *See* Kendall Decl., Exh. A. Appellant did not seek reconsideration or clarification of the Hearing Examiner's decision.[1]

On remand, SDCI prepared the Second EIS Addendum on November 18, 2019. The Second EIS Addendum provides analysis and information about the Project's impacts as it relates to loss of light within private structures such as Escala's residential units. On April 23, 2020, SDCI issued its Revised MUP decision that approved the Project and documented its procedural compliance with SEPA, including the adoption of the Downtown FEIS for the Project as supplemented by the EIS Addendum and Second EIS Addendum and determination of EIS adequacy. SDCI concludes in its Revised MUP Decision that the Second EIS Addendum does not substantively change the analysis of significant impacts or alternatives in the EIS and does not change SDCI's determination that the Project will not result in probable significant impacts.

Appellant has now appealed the Revised MUP Decision to the Hearing Examiner and raises claims regarding the City's analysis in the Second EIS Addendum.[2] Appellant also raises several issues regarding the adoption of the FEIS, as supplemented by the EIS Addendum and Second EIS Addendum.

The Applicant and the City move to dismiss several claims raised by Appellant because the Hearing Examiner lacks jurisdiction to hear them.

[1] Both the Applicant and Escala appealed aspects of the Examiner's Decision under the Land Use Petition Act ("LUPA"). The cases were then consolidated. Escala moved to dismiss the consolidated LUPA appeal because, in their view, there was no final land use decision to appeal under LUPA due to the Examiner's remand. The Court dismissed the consolidated LUPA appeal.

[2] Escala also filed a new LUPA appeal in King County Superior Court.

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III. STATEMENT OF ISSUES

The issues raised in this motion are (1) whether the Hearing Examiner should dismiss New Claims 1(a), 1(b), 1(c), and 1(e) of the Appeal because the Examiner lacks jurisdiction to hear the same claims that were adjudicated in the Prior Appeal on the same Project; and (2) whether the Hearing Examiner should dismiss New Claim 2 of the Appeal because the Examiner lacks jurisdiction to review a dock management plan condition imposed by the Hearing Examiner in the Prior Appeal.

IV. EVIDENCE RELIED UPON

This motion relies on the papers and pleadings in this matter and the Kendall Declaration submitted concurrently with this motion.

V. AUTHORITY

A. The Hearing Examiner may dismiss an appeal over which the Examiner lacks jurisdiction or that is without merit on its face, frivolous or brought merely to delay.

"An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is without merit on its face, frivolous, or brought merely to secure delay." Hearing Examiner Rules of Practice and Procedure ("HER"), Rule 3.02. "Any party may request dismissal of all or part of an appeal by motion." *Id*.

B. The Hearing Examiner must dismiss issues over which the Hearing Examiner lacks jurisdiction.

The Hearing Examiner should dismiss issues over which the Examiner lacks jurisdiction. Here, New Claims 1(a), 1(b), 1(c), and 1(e) are barred by res judicata because the claims are identical to those claims raised before the Hearing Examiner in the Prior Appeal. New Claim 2

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should similarly be rejected because it is an improper challenge to a SEPA condition imposed by the Hearing Examiner in the Prior Appeal.

a. Appellant's procedural SEPA claims are precluded by res judicata.

The Hearing Examiner must dismiss New Claims 1(a), 1(b), 1(c) and 1(e) of the New Appeal because these procedural SEPA claims were previously litigated in the Prior Appeal.

The doctrine of res judicata, or claim preclusion, prevents the same parties from relitigating a claim that was raised or could have been raised in an earlier action. *Roberson v. Perez,* 156 Wn.2d 33, 41 n. 7, 123 P.3d 844 (2005). The doctrine is intended to prevent piecemeal litigation and to ensure the finality of judgments. *Spokane Research & Defense Fund v. City of Spokane,* 155 Wn.2d 89, 99, 117 P.3d 117 (2005). Res judicata applies if a subsequent action is identical to an earlier action in (1) identity of persons and parties, (2) the subject matter, (3) the cause of action, and (4) the quality of the persons for or against whom the claim is made. *Id.* Res judicata applies to quasi-judicial decisions. *Clallam County v. W. Wash. Growth Mgmt. Hearings Bd.,* 130 Wn. App. 127, 121 P.3d 764 (2005).

Squarely before the Hearing Examiner in the Prior Appeal were the following claims[1]: (1) The FEIS does not satisfy SEPA requirements for analyzing the Project (Prior Claims 1g, 1i, 1l, 1m, 1o); (2) the Addendum cannot substitute for an EIS or an SEIS (Prior Claim 1l); (3) SDCI did not follow the proper process under SEPA when it adopted the 2005 FEIS and issued an EIS addendum (Prior Claim 1g, 1i, and 1l); (4) SDCI incorrectly stated in its EIS Addendum that the substantive SEPA policies in SMC 25.05.675 limit the scope of procedural disclosure

[1] Escala raised a number of additional procedural SEPA claims regarding SDCI's use of the 2005 Downtown FEIS and site-specific addendum in its appeal that are not repeated in this appeal. See Kendall Decl., Exh. C. To the extent Escala seeks to raise any of these additional claims in this appeal, they are barred from doing so on res judicata, or alternatively collateral estoppel, grounds.

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and analysis of environmental impacts (Prior Claim 1f); and (5) SDCI cannot adopt the 2005 FEIS because it is 15 years old (Prior Claim 1n). See Kendall Decl., Exh. C (Escala Notice of Appeal).

With the exception of the Hearing Examiner's remand to SDCI for the consideration of the impacts of loss of light on the Escala, the Hearing Examiner upheld the adoption of the 2005 FEIS and the EIS Addenda and denied all remaining issues in Appellant's appeal. Kendall Decl., Exh. A, Decision at p. 22. Despite the rejection of the remaining claims in Appellant's Prior Appeal, it once again argues that: (1) the FEIS is too old (New Claim 1(a)); (2) SDCI's adoption of the Downtown FEIS, as supplemented by the EIS Addendum and Second EIS Addendum for the Project, is not an adequate substitute for an EIS (New Claims 1(b) and 1(c)); and (3) SDCI incorrectly stated in its EIS Addendum that the substantive SEPA policies in SMC 25.05.675 limit the scope of procedural disclosure and analysis of environmental impacts (New Claim1(e)).

Res judicata applies here. The subject matter (the Project) is the same. The parties are the same. Finally, several claims in the New Appeal are the same claims raised before the Hearing Examiner in the Prior Appeal; here, Appellant seeks to invalidate the Revised MUP based on an identical challenge to SDCI's use of the Downtown FEIS and EIS Addenda. Specifically, the following new claims are the same as the claims raised in the Prior Appeal: (1) New Claim 1a is the same as Prior Claim 1n; (2) New Claims 1b and 1c are summaries of the same claims raised in Prior Claims 1g, 1i, 1l, 1m, 1o; and (3) New Claim 1e is a verbatim recitation of Prior Claim 1f. Accordingly, the doctrine of res judicata precludes Appellant from litigating these issues again in this forum. *Spokane Research & Defense Fund,* 155 Wn.2d at 99.

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Alternatively, the Examiner can conclude that collateral estoppel bars New Claims 1(a), 1(b), 1(c), and 1(e). Collateral estoppel applies when an issue decided in an earlier case is identical to an issue presented in a later case, the earlier case ended in a judgment on the merits, the party against whom collateral estoppel would apply was a party to, or in privity with a party to the earlier case, and application of collateral estoppel does not result in injustice to the party against whom it is applied. *Christiansen v. Grant County Hospital Dist. No.1*, 152 Wash. 2d 299, 307, 96 P.3d 957 (2004). Here, the issues decided previously are identical to ones presented in this case. The prior case resulted in a judgment on the merits regarding the challenged issues. The parties are the same, and the application of collateral estoppel does not result in an injustice to Appellant. Indeed, these same issues are on appeal in the pending LUPA proceeding.

Accordingly, the Hearing Examiner must dismiss these claims.

b. The Hearing Examiner does not have jurisdiction in this appeal over the implementation of conditions imposed by the Examiner Decision related to the Dock Management Plan.

In the Prior Appeal, the Hearing Examiner imposed a condition under its SEPA Authority that required the Applicant to incorporate specific terms into its Dock Management Plan, including a requirement that the "[d]ock Master shall ensure that trucks parking in the Project's loading dock do not block the alley and are contained within the loading dock facility." Examiner Decision, p. 21. Appellant never asked the Examiner to reconsider this condition. In its Revised MUP decision, SDCI incorporated this Dock Management Plan condition.

Appellant claims in its New Appeal that it is not possible for the Applicant to meet this condition and seeks to require the applicant to **prove** that it is possible to meet this condition. The Hearing Examiner does not have jurisdiction over this claim for several reasons.

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First, Appellant is barred from retroactively challenging a Hearing Examiner condition in a subsequent Hearing Examiner appeal. Appellant did not seek to reconsider the Hearing Examiner's imposition of the dock management condition and cannot seek to relitigate that issue in this forum now. Second, this claim is not ripe. There is currently no alleged violation of any code provision or MUP condition, so there is nothing for the Examiner to adjudicate. Third, even if there was an enforcement matter to adjudicate, the Hearing Examiner does not have jurisdiction over enforcement matters. *See* SMC 23.76.022.C.6.

Alternatively, even if the Hearing Examiner determines the issue is ripe and was appealed to the correct forum, the dock management condition was imposed under the Examiner's SEPA authority and is now exempt from further appeal under Chapter 43.21C RCW and SMC 25.05.680. SMC 25.05.680 expressly exempts mixed-use projects from appeal under SEPA "on the basis of the evaluation of or impacts to transportation elements of the environment." *See also* RCW 43.21C.500(1). The conditions related to the dock management plan are exempt from appeal on this basis. Indeed, in a recent appeal involving the Escala Owners Association and different project located at 1903 5th Avenue—involving the same block and alley at issue here—the Hearing Examiner found that transportation claims related to the alley met the criteria for exemption under RCW 43.21C.500 and were exempt from appeal. *In the Matter of the Appeal of Escala Owners Association,* MUP 19-031, Findings and Decision of the Hearing Examiner, pp. 9-12, 18-19 (May 5, 2020) (Exhibit B in Kendall Decl.). The same conditions apply here and the claim challenging the Hearing Examiner's condition on the dock management plan should be dismissed.

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VI. CONCLUSION

The Respondents respectfully request that the Hearing Examiner dismiss Appellant's New Claims 1(a), 1(b), 1(c), 1(e), and 2 and grant Respondent's Joint Motion for Partial Dismissal.

DATED this 22nd day of June, 2020.

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