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8 BEFORE THE HEARING EXAMINER
9 FOR THE CITY OF SEATTLE

10 In Re: Appeal by

11 ESCALA OWNERS ASSOCIATION

12
13 Of Decisions Re Land Use Application
14 for 1933 5th Avenue, Project 3019699

Hearing Examiner File: MUP-20-012 (W)

RESPONDENTS CITY OF SEATTLE AND
APPLICANT'S JOINT STATEMENT OF
JURISDICTION

15
16 **I. INTRODUCTION**

17 This is an appeal of a Revised Master Use Permit ("Revised MUP") for a 48-story
18 building in Seattle's Belltown neighborhood ("Project") and is the second Hearing Examiner
19 appeal filed by Escala Owners Association ("Appellant") on this Project. The Hearing Examiner
20 requested that the parties provide a statement regarding their view of the Hearing Examiner's
21 jurisdiction over the appeal. Under the Seattle Municipal Code, the Hearing Examiner has
22 jurisdiction to hear and decide Appellant's New Claim 1(d) of its appeal. No other law precludes
23 the Hearing Examiner from hearing this challenge to the City's new procedural environmental
24 determination.
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28 RESPONDENTS' JOINT STATEMENT
OF JURISDICTION - 1

McCULLOUGH HILL LEARY, PS

701 Fifth Avenue, Suite 6600
Seattle, WA 98104
206.812.3388
206.812.3389 fax

1 Respondents City of Seattle (“City”) and Jodi Patterson O’Hare (“Applicant”)
2 (collectively, “Respondents”) respectfully request that the Hearing Examiner issue an Order
3 determining that she has jurisdiction over New Claim 1(d) of this Appeal.
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5 II. STATEMENT OF FACTS

6 The relevant facts for the purpose of a jurisdictional determination are below. Additional
7 facts regarding the project and the approval process are available in Respondent’s Joint Motion
8 for Partial Dismissal, filed concurrently with this statement on jurisdiction.

9 The Project includes one 48-story structure containing 432 apartment units, 155 hotel
10 rooms, retail and restaurant space, and below-grade parking for 239 vehicles. The City issued a
11 SEPA determination of significance and notice of adoption of the 2005 FEIS for the Seattle
12 Downtown Height and Density Changes (“Downtown FEIS”), as supplemented by the FEIS
13 Addendum dated July 3, 2017 (“EIS Addendum”) for the Project.
14

15 On October 26, 2017, the City issued a MUP for the Project, which included (1) design
16 review approval under SMC Chapter 23.41; (2) the City’s procedural compliance with SEPA,
17 including the adoption of the Downtown FEIS for the Project and determination of EIS
18 adequacy; and (3) imposition of conditions pursuant to the City’s substantive SEPA authority.
19

20 On November 9, 2017, the Appellant appealed the MUP (“Prior Appeal”). After a four-
21 day hearing, the Hearing Examiner issued its Findings and Decision on the matter and upheld the
22 MUP Decision related to the Project’s design review approval and the legal adequacy of the
23 City’s review of the Project’s potential environmental impacts related to transportation, alley
24 operations, height, bulk and scale, and land use compatibility elements. Declaration of Katie
25 Kendall (“Kendall Decl.”), Exh. A. However, the Hearing Examiner found that the City erred
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1 procedurally by failing to evaluate the impacts related to loss of light within the Escala
2 residential units prior to the issuance of its environmental determination for the Project. The
3 Hearing Examiner remanded the MUP to the Seattle Department of Construction and Inspections
4 (“SDCI”) for “purpose of evaluating the [Project’s] impacts as they relate to the loss of light
5 within Escala residential units.” Exh. A, p. 21.
6

7 Both the Applicant and Escala appealed aspects of the Examiner’s Decision under the
8 Land Use Petition Act (“LUPA”). The cases were then consolidated. Escala moved to dismiss
9 the consolidated LUPA appeal because, in their view, there was no final land use decision to
10 appeal due to the Examiner’s remand. The Court dismissed the consolidated LUPA appeal.
11

12 On remand, SDCI prepared the Second EIS Addendum on November 18, 2019. The
13 Second EIS Addendum adds analysis and information about the Project’s impacts as it relates to
14 loss of light within private structures such as Escala’s residential units. On April 23, 2020, SDCI
15 issued its Revised MUP decision that approved the Project and documented its procedural
16 compliance with SEPA, including adopting the Downtown FEIS for the Project as supplemented
17 by the EIS Addendum and Second EIS Addendum, and making its determination of EIS
18 adequacy.
19

20 Appellant has now appealed the Revised MUP Decision to the Hearing Examiner and
21 raises claims regarding the City’s analysis in the Second EIS Addendum and its environmental
22 determination in the Revised MUP. Escala also filed a new LUPA appeal in King County
23 Superior Court raising the same claims that are before the Examiner in this matter. The parties in
24 the LUPA proceeding have asked the Court to stay the LUPA matter pending resolution of the
25 appeal before the Hearing Examiner. This request is pending before the Court.
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1 **III. STATEMENT OF ISSUES**

2 The question before the Hearing Examiner is whether she has jurisdiction to hear the
3 appeal of SDCI's Revised MUP decision.

4 **IV. AUTHORITY**

5 **A. The Code provides the Hearing Examiner with jurisdiction to hear and decide**
6 **portions of the Appeal.**

7 "The Hearing Examiner has jurisdiction to hear and decide appeals and other contested
8 cases, make decisions on preliminary subdivisions, and make recommendations to the City
9 Council only as authorized by law." Hearing Examiner Rules of Practice and Procedure
10 ("HER"), Rule 2.03.
11

12 In this case, Appellant has appealed the City's new environmental determination, which
13 adopted the Downtown FEIS, as supplemented by the EIS Addendum and the Second
14 Addendum, and determined that the FEIS was adequate. SMC 23.76.022.C.6 requires the
15 Hearing Examiner to entertain appeals regarding the City's determination of "adequacy of an
16 EIS upon which the decision was made". Accordingly, the Hearing Examiner has jurisdiction
17 over Appellant's New Claim 1(d), which challenges the City's determination of EIS adequacy.¹
18

19 **B. SEPA does not deprive the Hearing Examiner of jurisdiction in this matter.**

20 Under the City's Code, the Hearing Examiner has jurisdiction over New Claim 1(d).
21 Nothing in SEPA requires the Hearing Examiner to denounce that jurisdiction.
22

23 SEPA provides in RCW 43.21C.075(3)(a) that a City that chooses to implement an
24 administrative SEPA appeal process, "[s]hall allow no more than one agency appeal proceeding
25

26 ¹ Appellant's appeal includes a number of claims upon which the Examiner does not have jurisdiction. Respondents
27 have accordingly filed a separate joint motion to dismiss New Claims 1(a), 1(b), 1(c), 1(e), and 2.

1 on each procedural determination (the adequacy of a determination of
2 significance/nonsignificance or of a final environmental impact statement).”

3 The question before the Examiner is whether the Revised MUP Decision is the same
4 procedural determination under SEPA. It is not—rather, it is an entirely new procedural
5 determination and RCW 43.21C.075(3)(a) does not apply.
6

7 Here, the Hearing Examiner in 2018 remanded the City’s SEPA determination because it
8 did not consider sufficient information on impacts due to loss of light and the MUP decision was
9 remanded to SDCI to review new analyses of impacts due to loss of light. Kendall Decl., Exh.

10 A. In other words, SDCI was required to conduct new analysis that informs a new SEPA
11 determination. Indeed, the Superior Court dismissed the previous LUPA appeal—at the request
12 of Appellants--because there was no final land use decision to review until SDCI made a new
13 SEPA determination that evaluated the proposal’s impacts as they relate to loss of light within
14 the Escala residential units.
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16 As a result of the remand, SDCI prepared a Second EIS Addendum that evaluates the
17 Project’s impacts related to loss of light within the Escala. Upon review of this extensive
18 analysis, SDCI issued a revised MUP decision that approved the project and made a new SEPA
19 determination that adopted the Downtown EIS and the two EIS addenda for the Project, and
20 determined that the EIS, as supplemented by the addenda, was adequate. Kendall Decl., Exh. D
21 (Revised MUP decision). Accordingly, the state law limitation to hold no more than one agency
22 appeal hearing does not apply here and the Hearing Examiner has jurisdiction to hear and decide
23 New Claim 1(d) of the Appeal, as granted by the City Code.
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V. CONCLUSION

The Respondents respectfully request that the Hearing Examiner issue an Order determining that the Examiner has jurisdiction over New Claim 1(d) of the Appellant's Appeal.

DATED this 22nd day of June, 2020.

s/John C. McCullough, WSBA #12740
s/Ian S. Morrison, WSBA #45384
s/Katie J. Kendall, WSBA #48164
Attorneys for Jodi Patterson O'Hare, Applicant
McCULLOUGH HILL LEARY, PS
701 Fifth Avenue, Suite 6600
Seattle, WA 98104
Tel: 206-812-3388
Fax: 206-812-3398
Email: jack@mhseattle.com
Email: imorrison@mhseattle.com
Email: kkendall@mhseattle.com

s/ Elizabeth E. Anderson, WSBA #34036
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7095
Ph: (206) 684-8200
Fax: (206) 684-8284
Email: liza.anderson@seattle.gov
Attorneys for Respondent
Seattle Department of Construction and Inspections