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	MUP-20-012 APPELLANT'S RESPONSE TO JOINT MOTION TO DISMISS

I. INTRODUCTION

The respondents have jointly moved to dismiss four of the issues raised in the Notice of Appeal on grounds that they are identical to issues decided in the prior appeal regarding this same project. But the City has made new environmental determinations based on new facts. It is those new decisions that are the subject of this appeal. Because the issues raised are not identical – but rather are based on the new factual record – the new claims are not identical to those previously resolved and should not be dismissed.

The respondents also moved to dismiss an issue regarding the dock management plan. That same issue has been raised in a parallel LUPA case pending (but stayed) in Superior Court. We raised the dock management plan issue in this proceeding in an abundance of caution. Given that the respondents now agree that the Examiner lacks jurisdiction to hear that claim, we do not oppose its dismissal here and will pursue it in the Superior Court action once the stay is lifted.

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II. STATEMENT OF FACTS

As the motion to dismiss acknowledges, in the prior proceeding, 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." Motion at 4. Because of that decision, SDCI was required to reevaluate the project's impacts related to the loss of light. Upon completing that reevaluation, SDCI made a new environmental determination. As the respondents acknowledge, "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." Motion at 5 (emphasis supplied).

Then, based upon the new environmental "analysis and information," SDCI made a new, revised decision. "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*." Motion at 5 (emphasis supplied).

The Notice of Appeal in this proceeding challenges the new decisions made by SDCI, based on the new "analysis and information" that followed the prior remand. Specifically, the Notice of Appeal challenges the Revised MUP decision that determined that a new environmental impact statement is not required based on all the analysis SDCI did prior to issuing the new Revised MUP decision.

The new Revised MUP decision is based not just on the Second Addendum but also is based on adoption of the Downtown FEIS and the first Addendum – as the respondents acknowledge in the quote above. That is, these are new decisions and they are based on an amalgamation of analysis and evidence – some old and some new. Because new decisions have been made and because the new

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decisions are based on a revised evidentiary record, review of this new decision is not barred by the doctrines of res judicata or collateral estoppel.

Moreover, to the extent the Examiner addressed an issue like the one presented in this appeal, he decided it in our favor, not the respondents' favor. That is, the closest issue in the prior appeal to the issue now presented was whether the old EIS and the first addendum provided adequate SEPA review. The Examiner ruled in our favor on that issue. If issue preclusion were to be applied, it would favor us, not the respondents.

III. ARGUMENT

Res judicata bars relitigation of the identical claim decided in an earlier action. It is distinguished from collateral estoppel which precludes relitigation discrete issues (not entire claims):

> Under [res judicata] a plaintiff is not allowed to recast his claim under a different theory and sue again. Where a plaintiff's second claim clearly is a new, distinct claim, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion. In an instance of claim preclusion, all issues which might have been raised and determined are precluded. In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded.

Stevedoring Servs. Of Am., Inc. v. Eggert, 129 Wn.2d 17, 40, 914 P.2d 737, 749 (1996) (quoting *Shoemaker v. Bremerton,* 109 Wn.2d 504, 507, 745 P.2d 858 (1987)). *See also Clallam Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 130 Wn. App. 127, 132 (2005) ("[i]ssue preclusion [collateral estoppel] bars relitigation of an issue in a subsequent proceeding involving the same parties, even if a different cause of action is asserted"). As shown below, neither doctrine applies here.

A. The Claims Are Not Barred by Application of *Res Judicata*

Res judicata applies only if the prior action and the current action are "identical" in four respects: "(1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the

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persons for or against whom the claim is made." *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117, 1123 (2005).

The subject matter is not identical just because both matters involve a similar subject. Where a new decision has been made or where new evidence will be relevant, the subject matters are different:

> In *Harsin* the plaintiff initially sued for a breach of a covenant against encumbrances and recovered nominal damages. A more substantial breach occurred and plaintiff sued on the same covenant. *Harsin v. Oman, supra* at 283, 123 P. 1. Defendants argued the second action was barred by res judicata. Holding for the plaintiff, we declared:
>
> > While it is admitted, there can be but one recovery upon the same cause of action. This does not mean the subject-matter of a cause of action can be litigated but once. It may be litigated as often as an independent cause of action arises which, because of its subsequent creation, could not have been litigated in the former suit, as the right did not then exist. It follows from the very nature of things that a cause of action which did not exist at the time of a former judgment could not have been the subject-matter of the action sustaining that judgment.

Mellor v. Chamberlin, 100 Wn.2d 643, 646–47 (1983) (quoting *Hasim v. Oman,* 68 Wash. 281, 283–84 (1912)).

"The critical question for a res judicata analysis is whether the same persons and parties have already previously litigated *the identical claims* presented in the Guild's grievance." *Yakima Cty. v. Yakima Cty. Law Enf't Officers Guild*, 157 Wn. App. 304, 329 (2010) (emphasis supplied). In that case, a claimant pursued three, sequential wrongful termination claims arising from an unfit for duty to finding. Despite adverse rulings in the first two proceedings, the court held that a subsequent challenge was not barred by res judicata:

> Certainly, the factual "genesis" of all three of Ms. Bartleson's actions was an unfitness for duty finding that led to her termination. But the precise contract claims raised in the Guild's grievance were not raised

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> or resolved by Ms. Bartleson's prior proceedings. The contractual and statutory rights are distinctly separate in nature.

Yakima Cty. v. Yakima Cty. Law Enf't Officers Guild, 157 Wn. App. 304, 331 (2010). *See also, Weaver v. City of Everett,* 4 Wn. App2d 303, 329 (2018), *aff'd,* 194 Wn.2d 464 (2019) ("although there are some commonalities between Weaver's applications, it is evident that the facts underlying his applications are not identical").

Here, the subject matters of the two appeals are not identical. The subject matter now is the correctness of new environmental and MUP decisions based on the additional "analysis and information" that SDCI obtained after the first appeal. Those are new decisions and, therefore, cannot possibly be the same subject matter or give rise to claim preclusion.

The additional analysis and information SDCI considered could not – and was not – reviewed in a vacuum. SDCI had to determine whether the 2005 EIS adequately addressed the lighting issues, given the information in the old EIS together with the information SDCI obtained and summarized in the first and, now, second addenda. In the decision now under review, SDCI was explicit that it was adopting the old EIS based on the first and second addenda:

> SCDI adopts the Seattle Downtown eight and Density Changes [EIS] (January 2005) for the proposed project, as supplemented by the FEIS Addenda dated July 3, 2017 and November 18, 2019.

Revised MUP (April 23, 2020) at 44. (Underlining in the original; underlining identifies changes from the original MUP.)

Thus, the subject matters of the earlier appeal and this appeal are undeniably different. The first appeal was a challenge to the original MUP and SEPA determinations which were based on SDCI's review of the old EIS and the first addendum only. The current appeal is a challenge to the revised MUP and SEPA determinations which were based on SDCI's review of the old EIS, the first

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addendum, and the second addendum. These are different decisions, based on different evidence. The subject matters are different for *res judicata* purposes. In the words of the *Hasim* court, "a cause of action that did not exist at the time of the former [appeal] could not have been the subject-matter of the action sustaining that judgment."

Neither case cited by the respondents aids their position. While each case is useful in setting forth the general rules applicable to a claim preclusion analysis, in neither case did the court determine that *res judicata* applied under the facts presented in those case. *See Spokane Research & Def. Fund v. City of Spokane*, *supra; Clallam County v. WWGMHB,* 130 Wn. App. 127 (2005). The respondents have failed to provide any authority for dismissing these issues based on *res judicata* on facts like those present here.[1]

B. The Claims Are Not Barred by Application of Collateral Estoppel

The respondents briefly argue that collateral estoppel applies. Motion at 9. The motion barely provides any analysis. The elements of a collateral estoppel defense are stated, followed by a few conclusory statements that the elements exist here. *Id.* An argument is waived when not addressed with adequate briefing. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma,* 90 Wn. App. 533, 538 (1998). The Examiner should not even consider this faintly addressed claim.

In any event, the collateral estoppel defense fails for reasons like those that spell the demise of the *res judicata* defense. Collateral estoppel requires that the issue decided in the prior litigation be

[1] Indeed, the respondents' invocation of *res judicata*, not the law of the case doctrine, is a further implicit acknowledgement that this appeal is a new proceeding challenging a new decision. If this appeal were simply another step in the processing of the prior appeal, the law of the case doctrine would be the appropriate doctrine to consider. *See Lodis v. Corbis Holding, Inc.,* 192 Wn. App. 30, 55 (2015) ("the essential difference between the doctrines is that the law of the case doctrine applies to successive proceedings in the same case, whereas res judicata is applicable to successive proceedings in different cases").

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"identical" to the claim in the present appeal. *Christiansen v. Grant County Hosp. Dist.,* 152 Wn. 2d 299, 307 (2004).[2] As discussed above, that test cannot be satisfied here. The prior appeal involved a determination of whether the old EIS supplemented by the first addendum provided adequate environmental review of the lighting impact issues. The current appeal presents the issue of whether the old EIS supplemented by the first and second addenda and the SDCI'S new "analysis and information" provides adequate environmental review (and an adequate basis for the Revised MUP). The issues are decidedly different.

Moreover, the issue in the current appeal was not decided adversely to the appellant in the first appeal. In the first appeal, the Examiner agreed with Escala that the old EIS supplemented with the first addendum was not adequate for SEPA purposes and would not provide an adequate basis for the original MUP. So, not only was the issue different, but the related issue that was decided in the first case was decided adverse to the respondents. If collateral estoppel were to apply, it would preclude the respondents from arguing that the old EIS is sufficient, not the reverse.

C. The Examiner Does Not Have Jurisdiction Over the Dock Management Issue

Escala agrees with the respondents that the Hearing Examiner does not have jurisdiction in this appeal over the implementation of conditions imposed by the Hearing Examiner Decision related to the Dock Management Plan because the Hearing Examiner required that condition, not SDCI. We agree that the proper way to challenge that condition is to challenge the Hearing Examiner's previous decision in Superior Court.

Escala raised this issue in its Superior Court appeal of the Hearing Examiner's first decision Therefore, this issue will ultimately be litigated in Superior Court. Escala raised the issue in this

[2] The respondents cite this case to support application of collateral estoppel to the facts of this case, but in *Christiansen,* the court did not address whether the issues were "identical." The plaintiff conceded that issue. *Id.* at 308.

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hearing examiner appeal in case the respondents took the position that we were required to raise the issue in this forum. Now that they have argued that we cannot raise the issue in this forum, but must instead raise it in Superior Court, we do not object to its dismissal.

Escala disagrees with the respondents' claim that this issue is exempt from further appeal under Chapter 43.21C RCW and SMC 25.05.680, but that is moot for purposes of ruling on their motion. That issue may be addressed in the Superior Court appeal.

IV. CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied, except as to the dock management plan.

Dated this 2nd day of July, 2020.

Respectfully submitted,

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