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 REPLY ON MOTION FOR PARTIAL DISMISSAL

Respondents City of Seattle and Jodi Patterson O'Hare (for the Applicant) (collectively, "Respondents") moved to dismiss five claims from Appellant Escala Owners Association's ("Appellant's") new appeal challenging Seattle Department of Construction and Inspections ("SDCI")'s revised Master Use Permit ("Revised MUP") for the project located at 1933 5th Avenue. Appellant agrees in its response that the Hearing Examiner does not have jurisdiction to hear a claim related to the dock management plan (New Claim 2). Appellant, however, attempts to salvage four of the claims in its appeal—New Claims 1(a), 1(b), 1(c), and 1(e)—by asserting they can reargue all claims related to the City's State Environmental Policy Act ("SEPA") decision once again because the City issued a revised SEPA decision. This argument ignores the

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standards of res judicata and collateral estoppel and would defeat the finality and conservation of judicial resources concerns that underlie these doctrines.

Appellant is barred by the doctrine of res judicata—or is alternatively collaterally estopped—from raising New Claims 1(a), 1(b), 1(c), and 1(e) in this appeal because each claim and issue raises challenges that were reviewed and resolved in the prior appeal. The Revised MUP Decision was limited to a single issue for SDCI to analyze: the potential impacts associated with the loss of light within the Escala residential units. All other facts and analysis in the Revised MUP Decision remained unchanged from the prior decision upheld by the Examiner. The mere existence of a Revised MUP Decision does not provide Appellant carte blanche to relitigate every SEPA claim that the Examiner previously rejected once again in this appeal.

I. ARGUMENT

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

Appellant argues in its response that New Claims 1(a), 1(b), 1(c), and 1(e) are new causes of actions because these claims are based on "different decisions, based on different evidence" than Appellant's identical challenge to the use of an EIS Addendum in SDCI's first MUP decision. Response, p. 6. This oversimplification of the res judicata doctrine must fail.

Appellant's response incorrectly assumes that its procedural SEPA claims—which were rejected in the prior proceeding—are again fair game even though the underlying facts required to argue that claim have not changed and the claims were not the basis of the limited remand by the Hearing Examiner. But the doctrine of res judicata does not put the question of whether a claim raises the same cause of action on the same subject matter in such stark terms. The question here is not whether *any* underlying facts have changed from the prior proceeding; rather

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the question is whether the operative facts *for that claim* have changed so that the application of res judicata is not appropriate. Here, the operative facts and decisions related to the new claims at issue in this motion are identical to those facts and decisions that formed the bases of the same claims in the prior proceeding, and res judicata applies. Indeed,

> Washington law does not necessarily define the term "cause of action" for purposes of res judicata. In other contexts, the Washington courts have referred to a "cause of action" as the act that occasioned the injury, *McFarling v. Evaneski*, 141 Wn. App. 400, 405, 171 P.3d 497 (2007), and a legal right of the plaintiff invaded by the defendant. *Cowley v. Northern Pacific Railway Co.*, 68 Wash. 558, 563, 123 P. 998 (1912). *Black's Law Dictionary* defines the term as "a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; claim." Black's Law Dictionary 266 (10th ed. 2014).
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> The res judicata doctrine either redefines or undefines the term "cause of action" as found in other settings. Washington utilizes no specific test for determining identity of causes of action. *Rains v. State*, 100 Wn.2d at 663-64 (1983). Consideration of four factors provides an analytical tool for determining whether two causes of action are identical for purposes of res judicata: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action, (2) whether substantially the same evidence is presented in the two actions, (3) whether the two suits involve infringement of the same right, and (4) whether the two suits arise out of the same transactional nucleus of facts. *Berschauer Phillips Construction Co. v. Mutual of Enumclaw Insurance Co.*, 175 Wn. App. at 230 (2013). All four elements need not be present to bar the second legal action. *See Rains v. State*, 100 Wn.2d at 664.

Eugster v. Wash. State Bar Ass'n, 198 Wn. App. 758, 788-789 (2017) ("Eugster VI").

In *Eugster VI,* which is the sixth proceeding involving the attorney and the state bar association, the Court found that the attorney's claims for deprivation of civil rights were barred by res judicata because he could have raised the claims in at least one of the earlier proceedings. The Court determined that the subject matter and the cause of action of the first appeal and the

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sixth appeal included the WSBA disciplinary process and were identical, despite the fact that the complaints resulting in disciplinary proceedings against the attorney involved separate clients with separate complaints. *Eugster VI,* 198 Wn. App. at 785.

Here, consideration of the four factors outlined in *Eugster VI* make clear New Claims 1(a), 1(b), 1(c), and 1(e) relate to the SDCI's use of the EIS Addendum process, which is the same cause of action and subject matter that was previously litigated in the prior proceeding.

First, the current appeal yet again challenges the City's ability to use an EIS Addendum. In rejecting this series of arguments from the Appellant in the prior proceeding, the Hearing Examiner's decision established SDCI's right to use the EIS Addendum process. Specifically, the Hearing Examiner found that "[t]o the degree Appellants 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." Declaration of Katie Kendall, Exhibit A, June 12, 2018 Hearing Examiner Amended Findings and Decision for the first Hearing Examiner appeal of the MUP for the Project, Conclusion 5, p. 15; *see also* Exh. A, Conclusions 6-9, pp. 15-17. A contrary decision in this matter would impair the City's right to utilize the addenda process established in the prior proceeding.

Second, the claims involve the same alleged infringrement of the same right; specifically, both appeals allege the same procedural violations under SEPA by use of the Downtown FEIS, as supplemented by the EIS Addenda. Appellant has failed to point to any new evidence resulting from the limited remand that could possibly be relevant to the resolution of New Claims 1(a), 1(b), 1(c), and 1(e).

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The final factor to determine whether the cause of action is identical for res judicata purposes requires consideration of whether claims arise out of the same nucleus of facts. Here, the operative facts related to resolution of New Claims 1(a), 1(b), 1(c), and 1(e) are exactly the same as those from the prior proceeding. The existence of new facts related to the the City's Revised MUP decision were related to the limited remand and have no bearing on the resoultion of the claims at issue in this motion. Indeed, the Revised MUP Deicsion makes clear that:

> SCDI is issuing a revised MUP Decision on Project No. 3019699-LU that includes new information and impact analysis in response to the Examiner's remand. All new text is underlined. SDCI elected to use the MUP Decision for Project No. 3019699-LU dated October 26, 2017 as the "base" document to ensure all previous conditions imposed by SDCI are carried forward while adding new information and impact analysis in response to the Examiner's remand, as noted by underlined text.

Kendall Decl., Exh. D, p. 1.

This revised MUP Decision based on a limited Hearing Examiner remand does not provide an opening to reargue Appellant's procedural SEPA concerns about the use of the Downtown EIS and the EIS Addendum process. Appellant failed to explain otherwise.

Appellant's argument that the subject matter of the claims at issue in this motion have changed because SDCI made a new SEPA decision similarly fails. Like the courts' analysis of an identical cause of action for res judicata purposes, "Washington courts have not articulated any precise test to determine when the subject matter of multiple claims is the same. . . Our Supreme Court has held that in determining the identity of subject matter, '[t]he critical factors seem to be the nature of the claim or cause of action and the nature of the parties.'" *Marshall v. Thurston Cty.*, 165 Wn. App. 346, 353, 267 P.3d 491 (2011) (internal citations omitted). There, the nature of the claims at issue in this motion—SDCI's use of the Downtown EIS and the EIS

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Addendum process—is identical to the claims set forth in the prior proceeding. Nothing in SDCI's Revised MUP decision changes the nature of these claims.

Appellant's reliance on *Harsin v. Oman*, 68 Wash. 281, 123 P. 1 (1912), and *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983) is unavailing. First, as explained by the Court in *Marshall,* both *Harsin* and *Mellor* address covenants of title, where the courts have applied res judicata less strictly. *Mellor*, 100 Wn.2d at 646 ("[W]e maintain our view that res judicata principles are less strictly adhered to in the case of covenants of title."). Second, courts do not universally hold that causes of action based on facts that did not exist at the time of the original suit preclude the application res judicata. Indeed, in distinguishing *Harsin* and *Mellor*, the Court in *Marshall* held that Plaintiff's 2009 claim for damages from flooding was one and the same with the 2003 claim for damages from flooding "because it was based on the same, single, purportedly wrongful act." 165 Wn. App. 346, 356-57, 267 P.3d 491 (2011); *see also Eugster VI, supra*. Here, New Claims 1(a), 1(b), 1(c), and 1(e) are based on SDCI's *use* of the Downtown EIS and its use of an EIS Addendum to supplement the EIS. The existence of a Second EIS Addendum and a Revised MUP Decision that addresses the Hearing Examiner's limited remand of the SEPA analysis does not change the underlying subject matter of the claims.

Appellant has provided no compelling argument that the cause of action or the subject matter of the claims at issue in the motion are not identical. Accordingly, New Claims 1(a), 1(b), 1(c), and 1(e) are barred under res judicata.

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B. Appellant is collaterally estopped from again arguing procedural SEPA claims before the Hearing Examiner.

Collateral estoppel also bars New Claims 1(a), 1(b), 1(c), and 1(e).[1] Appellant argues in its response that it can reargue the same issues in this proceeding because the underlying basis of the appeal is the Revised MUP, and not the original MUP decision. This line of reasoning ignores the purpose of collateral estoppel.

To the extend claims raised in this appeal relate to different causes of action or subject matter under a res judicata analysis—which they do not--the application of collateral estoppel require identical "subject matter" or "cause of action." Instead, it precludes an appellant from rearguing the identical issue argued in a prior proceeding. Indeed, in an opinion cited by the Appellant, the Court explains that "'[c]ollateral estoppel, or issue preclusion, is the applicable preclusive principle when "the subsequent suit involves a different claim but the same issue."' *Weaver v. City of Everett*, 4 Wn. App. 2d 303, 314, 421 P.3d 1013 (2018) (internal citations omitted). Tellingly, Appellant cited *Weaver* for the proposition that res judicata was not appropriate because the facts were not identical. However, a close reading of this decision demonstrates the distinction between the two doctrines; in *Weaver,* the Court held that even though the facts were not identical for the purpose of application of res judicata, the City had "established the first three elements of collateral estoppel" existed, including the fact that the appellant raised the identical issue in each appeal.[2]

[1] Appellants seek to bar the Examiner's consideration of Respondents' collateral estoppel alternative argument because Respondents did not write a thesis on each element. This argument should be disregarded. The facts and the argument in the motion outline the identical nature of the claims and issues and each criterion was appropriately addressed.

[2] The Court found the claim was not barred by collateral estoppel because the application would work an injustice again the Plaintiff. Appellant has not argued the application of collateral estoppel would work an injustice.

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Here, there is no question that New Claims 1(a), 1(b), 1(c) and 1(e) raise the exact same issues regarding the City's use of the Downtown EIS and EIS Addenda that were argued in the prior Examiner proceeding. As explained in our motion, the issues raised in New Claim 1(a) is the same as Prior Claim 1(n); (2) New Claims 1(b) and 1(c) are summaries of the same claims raised in Prior Claims 1(g), 1(i), 1(l), 1(m), 1(o); and (3) New Claim 1(e) is a verbatim recitation of Prior Claim 1(f). Appellant simply cannot (and did not try to) distinguish the specific issues they bring forward now with the issues raised and rejected in the prior proceeding

Appellant also argue that, because the Examiner remanded the City's SEPA analysis for the limited purpose addressing the impacts of loss of light on the Escala residential units, all issues related to the use of an EIS Addendum were also decided in Appellant's favor. This is not true. As noted above, the Hearing Examiner specifically rejected Appellant's procedural SEPA claims arguing it was improper for the City to use the EIS Addendum process. *See* Kendall Decl., Exh. A, p. 15, Conclusion 5 ("In addition, for these reasons and the conclusions regarding impacts below, the Appellant's arguments that the City was required to development a Supplemental Environmental Impact Statement instead of an Addendum should be denied."); *see also* Exh. A, Conclusions 6-9 and 25.

Appellant's attempt to avoid collateral estoppel have no merit and the Hearing Examiner must dismiss these claims.

II. 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.

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