BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of Appeal of

ESCALA OWNERS ASSOCIATION

of a Decision by the Director of the Seattle Department of Construction and Inspections

Hearing Examiner File
MUP-20-012(W)

Department Reference
3019699-LU

ORDER ON JURISDICTION AND MOTION TO DISMISS

1. Background. Escala Owners Association appealed Seattle Department Construction and Inspection's approval of a 48-story building in Seattle's Belltown neighborhood. This is the second Escala appeal to the Examiner involving this project. On its first appeal, the Examiner largely upheld the City's decision, but remanded under the State Environmental Policy Act, Ch. 43.21C RCW, for further review of shading impacts on the adjacent Escala residences. The City completed this review and issued a revised decision, which Escala appealed. Given questions on whether certain appeal issues challenge previously litigated language, the parties agreed to address Examiner jurisdiction up front. This order addresses these pleadings:

- Respondent City of Seattle and Applicant's Joint Statement of Jurisdiction
- Appellant's Jurisdictional Statement (with Appendix A, MUP issued October 26, 2017)
- Respondents City of Seattle and Applicant's Joint Motion for Partial Dismissal
- Declaration in Support of Joint Motion, with Exhibits A-D
  A. Examiner's Amended Decision (June 12, 2018)
  B. Examiner's Decision (May 5, 2020)
  C. Escala's Appeal (November 9, 2017)
  D. Revised City MUP Decision (April 23, 2020)
- Appellant's Response to Joint Motion to Dismiss
- Respondents City of Seattle and Applicant's Joint Reply on Motion for Partial Dismissal

2. Jurisdictional Statements (RCW 43.21C.075(3)). The Examiner agrees with the parties that SEPA's prohibition on appealing the same decision twice does not apply. The City issued two separate procedural SEPA determinations. The first was earlier appealed. The second is now under appeal. Following Examiner remand, the City prepared a 2nd EIS Addendum. The City then issued a Revised MUP Decision. Based on the supplemental SEPA review, this new decision revises the earlier Downtown EIS adoption. Given the two distinct decisions, SEPA's prohibition against more than one administrative appeal "on each procedural determination,"[1] does not apply.

[1] RCW 43.21C.075(3).

3. City and Applicant's Motion to Dismiss.

3.1 Issues 1(a-c) and (e). There is no dispute that Escala can appeal the City's new procedural determination. But, Escala cannot use the new appeal to re-litigate the original issues from the first appeal. The Land Use Petition Act, Ch. 36.70C RCW, and case law interpreting it prohibit this.[2] However, if the appeal's new issues stem solely from the revisions to implement the remand decision regarding shading, then these issues are properly before the Examiner.

Under LUPA and City Code,[3] which both impose appeal time limits, as long as Issues (1)(a)-(c) and (e) are used to address only the revised decision language, and are not used to re-litigate the original decision, the Examiner has jurisdiction. All arguments must come within the scope of the remand issue and the City's response to that remand. Because Issues (1)(a)-(c) and (e), if viewed in isolation from surrounding paragraphs, were drafted without referring to the new decision, they can only remain before the Examiner if not treated as stand-alone issues. In other words, they can only be decided within the context of the Issue Preamble and Issue 1(d), which both specifically focus on the remand issue. As long as Issues (1)(a)-(c) and (e) are treated as subsets of the Preamble and Issue 1(d), the Examiner has jurisdiction.

LUPA and the City Code provide the basic legal framework. Their time limits for filing appeals prohibit re-litigation of earlier decisions. This limits Examiner jurisdiction to only the revised portions of the earlier decision. Given this legal structure, there is no need to decide the motion under res judicata and collateral estoppel theories. As this ruling does not follow either side's line of analysis, if further clarification is needed, the parties may request a second pre-hearing conference call, or stipulate on the scope of review of Issues (1)(a)-(c) and (e).

3.2 Issue 2 (Loading Dock Condition). The parties agree the Examiner lacks jurisdiction over Issue 2, also appealed to superior court. The Examiner agrees. The Revised MUP includes a new condition on loading dock management. Although new, the condition directly implements the first Hearing Examiner's decision requiring it; the second appeal challenges condition feasibility. To raise this challenge, the original Examiner decision would need to be appealed to superior court as the Examiner presiding over the present appeal cannot effectively revise an earlier Examiner decision.[4] Per party agreement, and Examiner concurrence, this issue is dismissed.

Issue 2 is dismissed. The Examiner has jurisdiction over the remaining issues, but with the clarification above on Issue 1(a)-(c) and (e).

Entered July 13, 2020.

Susan Drummond
Hearing Examiner Pro Tempore

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[2] *Chelan County v. Nykreim*, 146 Wn.2d 904 (2002) (final land use decisions must be timely appealed to superior court).
[3] SMC 23.76.022(C).
[4] *See* FN's 1 and 2 above.

Attachment 1
Appeal Issues

1. The revised MUP decision was issued in violation of the State Environmental Policy Act (SEPA), ch. 43.21A, and state and local regulations implementing that law. SEPA requires preparation of an environmental impact statement for project's that – like this one – will have significant adverse environmental impacts. The City issued the revised MUP decision without first completing an EIS that analyzed the project's environmental health impacts. The revised MUP cannot stand in the absence of the required EIS.

a. The City is relying on an EIS prepared fifteen 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.

b. The City also relies 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.

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.

d. The addenda's analyses of the health impacts are misleading and incomplete. Among other things, the addenda ignore the connection between a loss of light and depression; they seek to minimize impacts by focusing on light conditions when a resident is facing the window, instead of facing the middle of the room; they minimize impacts by suggesting actions the residents could or should take to mitigate the impacts (SEPA's mitigation obligations fall on the applicant, not the neighbors); the mitigation measures suggested for the residents are not reasonable; and the addenda trivialize the impacts by suggesting that the lack of impact on other downtown residents somehow makes the impact to Escala's residents less significant.

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.

2. The hearing examiner's earlier decision provided a list of terms that were required to be incorporated into the dock management plan for the project. Included on that list was a requirement that the dock master "shall ensure that trucks parked in the Project's loading dock do not block the alley and are contained within the loading dock facility." The Director's April 23, 2020 Decision incorporates this requirement, but neither the Applicant, nor SDCI provided evidence to demonstrate that it's possible for this project to meet this condition. Because the developer cannot make the changes that will be necessary to meet this condition after it's built (i.e. increased setback), SDCI and the applicant must prove that it will be possible for the landowner to meet this condition before the MUP permit is approved.

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 **Order on Jurisdiction and Motion to Dismiss** to each person listed below, or on the attached mailing list, in the matters of **ESCALA OWNERS ASSOCIATION**, Hearing Examiner Files: **MUP-20-012 (W)** in the manner indicated.

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Dated: July 13, 2020

___/s/ Galen Edlund-Cho_____
Galen Edlund-Cho
Legal Assistant