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BEFORE THE HEARING EXAMINER  
FOR THE CITY OF SEATTLE

In Re: Appeal by  
  
ESCALA OWNERS ASSOCIATION  
  
of Decisions Re Land Use Application  
for 1933 5<sup>th</sup> Avenue, Project 3019699

NO. MUP-17-035  
  
ESCALA OWNERS ASSOCIATION’S  
MOTION FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

For any proposal that has received a Determination of Significance per the State Environmental Policy Act, ch. 43.21C RCW, the City of Seattle Department of Construction and Inspections (SDCI) must prepare a Draft Environmental Impact Statement (EIS) that describes the proposal, alternative courses of action, and the existing environment affected by the proposal. The Draft must be followed by a public notice and comment period, which must then be followed by the publication of a Final EIS in which SDCI provides responses to the public comments on the Draft EIS.

SDCI issued a Determination of Significance for the 5th and Virginia Proposal that has been proposed by Douglaston Development, but did not prepare a Draft EIS or a Final EIS for that proposal. Instead, for its environmental review of the 5th and Virginia Proposal, SDCI prepared an “Addendum”

1 to an old programmatic FEIS that was published over twelve years ago for an area-wide downtown  
2 Seattle rezone.

3 As a result of this process:

- 4 • SDCI did not present, describe, or analyze the impacts of alternatives  
5 to the 5<sup>th</sup> and Virginia Proposal. The review did not include any  
6 description and/or analysis of a no-action alternative or other  
7 reasonable alternatives to the proposal.
- 8 • SDCI did not provide certain information required by WAC 197-11-  
9 440 for the 5th and Virginia Proposal.
- 10 • SDCI did not initiate a scoping process and scoping comment period  
11 as required by WAC 197-11-408 for the 5th and Virginia Proposal.
- 12 • SDCI violated the SEPA requirements for public input, comment, and  
13 agency response to comments on the 5th and Virginia Proposal.

14 The rationale provided by SDCI is that it is using its authority to rely on “existing documents”  
15 for environmental review of the 5<sup>th</sup> and Virginia Proposal. But there are legal limits to relying on  
16 existing documents for SEPA review. The prior proposal must have similar elements that provide a  
17 basis for comparing their environmental consequences such as timing, types of impacts, alternatives,  
18 or geography to the current proposal that is being reviewed. RCW 43.21C.034. The lead agency must  
19 independently review the content of the existing documents and determine that the information and  
20 analysis to be used is relevant and adequate. *Id.*

21 Here, the Downtown Height and Density Changes are not similar in timing, not similar in  
22 alternatives, not similar in geography, not similar in impacts on specific properties, and not similar in  
23

1 environmental consequences to the 5<sup>th</sup> and Virginia Proposal. The information and analysis in the  
2 2005 FEIS is not relevant or adequate for environmental review of the 5<sup>th</sup> and Virginia Proposal. As  
3 a result, it was improper for SDCI to rely on the old FEIS for its environmental review of the 5<sup>th</sup> and  
4 Virginia Proposal.

5  
6 Even if SDCI was legally allowed to rely on the old 2005 EIS for its review of the current  
7 proposal, an SEIS is required when there are substantial changes to a proposal and/or when there is  
8 significant new information about the impacts of a proposal. Here, both of those criteria are easily met  
9 and, therefore, SDCI should have, at the very least, prepared an SEIS to the old 2005 FEIS.

10 Based on this, as a matter of law, the process for environmental review of the 5th and Virginia  
11 Proposal violated SEPA and summary judgment is appropriate.

## 12 II. STATEMENT OF FACTS

13  
14 The 5th and Virginia Proposal is a land use application filed by Douglaston Development to  
15 construct a 48-story building with retail, hotel rooms, and apartments at the corner of 5<sup>th</sup> Avenue and  
16 Virginia Street in Downtown, Seattle. Declaration of Claudia M. Newman (Jan. 5, 2018), Ex. B at i.<sup>1</sup>

17 Escala is directly adjacent to and west of the project site. Newman Dec, Ex. D. It is home to  
18 408 residents who enjoy living downtown in the Belltown neighborhood. *Id.* The significance of the  
19 environmental impacts of the 5th and Virginia Proposal to the Escala residents is disputed, but suffice  
20 it to say that the Escala Owners believe that the evidence at the hearing will show that the proposal  
21 will have devastating impacts to them. This motion is not brought on that disputed issue, but rather for  
22 the purpose of presenting the narrow legal issues as described below that are rooted in undisputed facts  
23 and appropriate for summary judgment.

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<sup>1</sup> The SEPA Determination of Significance described the project as a 47 story building, but the Updated Addendum described the project as a 48 story building. *Cf.* Ex. A and Ex. B at i.

1           **A.       SDCI's Environmental Review of the 5<sup>th</sup> and Virginia Proposal**

2           On December 15, 2016, SDCI issued a "Determination of Significance" for the 5<sup>th</sup> and  
3 Virginia Proposal. Newman Dec., Ex. A. SDCI did not, however, follow that up with the preparation  
4 of a Draft EIS or a Final EIS for the project. Instead, for its environmental review of the 5<sup>th</sup> and Virginia  
5 Proposal, SDCI prepared an "Addendum" to an old programmatic FEIS that was published over  
6 twelve years ago. *See* Newman Dec., Ex. B (Addendum to the FEIS for Downtown Height and Density  
7 Changes for the 5<sup>th</sup> and Virginia Proposal (Dec. 15, 2016)).

8           The Notice and Availability of the Addendum was announced in the same December 15, 2016  
9 document that gave notice of the Determination of Significance (DS). Newman Dec., Ex. A. SDCI  
10 did not issue notice or initiate a comment period for scoping comments as is required by WAC 197-  
11 11-980. With this notice of the DS and the availability of the Addendum combined, the City  
12 announced a 14-day comment period with a deadline of December 29, 2016 (four days after Christmas  
13 and two days prior to New Year's Eve). *Id.* After a request from Escala's counsel to extend the  
14 deadline per SMC 23.76.012.D, SDCI extended the comment period to January 12, 2017. Newman  
15 Dec., Ex. F. Escala's counsel submitted a comment letter that, among other things, pointed out the  
16 fundamental legal errors associated with adopting this Addendum in lieu of preparing an EIS for the  
17 Proposal. Newman Dec., Ex. D.

18           Six months later, SDCI issued an "Updated" Addendum to the 2005 FEIS. Newman Dec.,  
19 Ex.'s E and F. SDCI announced a 14-day comment period for the updated Addendum with a deadline  
20 of July 17, 2017. *Id.*, Ex. E. Escala's counsel submitted yet another comment letter that pointed out,  
21 among other things, that SDCI was still violating basic SEPA requirements with this process.  
22 Newman Dec., Ex. G.

1 On October 26, 2107, SDCI issued a decision determining that the “Downtown Height and  
2 Density Final Environmental Impact Statement (FEIS) with Addendum adequately describes and  
3 assesses the adverse impacts of the proposed project and the project has been conditioned to mitigate  
4 the impacts.” Newman Dec., Ex. I. The appeal that is currently before the Hearing Examiner  
5 followed.  
6

7 **B. The 2005 Downtown Seattle Height and Density Changes and the 5<sup>th</sup> and Virginia**  
8 **Proposal**

9 The old FEIS that SDCI relied on for review of the 5<sup>th</sup> and Virginia Proposal was prepared for  
10 the purpose of examining five alternative zoning proposals for consideration by the Seattle City  
11 Council. *See* Newman Dec., Ex. C. These so-called “Downtown Seattle Height and Density Changes”  
12 consisted generally of an area- wide programmatic rezone proposal for portions of the Denny Triangle,  
13 Commercial Core, and Belltown neighborhoods within Downtown Seattle. *Id* at iii. The alternatives  
14 presented were different combinations of increases in allowable maximum heights and densities  
15 throughout the Downtown area.  
16

17 The Draft EIS for Downtown Height and Density Changes was issued in November, 2003 and  
18 the Final EIS for Downtown Height and Density Changes was issued in January, 2005. *Id*. The project  
19 proponent for the proposed legislation was the City of Seattle. *Id*.

20 The 5th and Virginia Proposal is a completely different project from the Downtown Height  
21 and Density Changes proposal. It is a specific project on a single parcel that a private developer has  
22 proposed fourteen years after the 2003 Draft EIS was issued and twelve years after the 2005 Final EIS  
23 was issued. The 5<sup>th</sup> and Virginia Proposal is a site-specific project action - the other was a non-project  
24 programmatic action being proposed by the City of Seattle. The 5th and Virginia Proposal is  
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completely unrelated to the old rezone legislation other than the mere fact that the new zoning regulations that were adopted in that legislation presumably apply to this site.

The 2003 Draft EIS and the 2005 Final EIS do not analyze the affected environment and environmental impacts specific to the 5th and Virginia project, they do not analyze alternatives to the 5th and Virginia project and they do not consider mitigation for the direct, adverse impacts caused by the 5th and Virginia project. They do not consider the specific impacts of the 5th and Virginia project – such as height, bulk and scale impacts (including light, air and privacy impacts); the traffic and transportation impacts (including impacts to the public facility alley); shadow impacts to Escala residents; environmental health impacts; land use impacts; construction impacts; and other impacts. They were not proceeded by scoping of issues specifically relevant to the 5th and Virginia project.

The residents of Escala did not receive a copy of the 2003 Draft EIS when it was issued because the Escala had not even been built at that time. Newman Dec, Ex. J. (Escala was built in 2009).

### III. ARGUMENT

### A. Standard of Review for Summary Judgment

Summary judgment is appropriate if the evidence provided demonstrates that there is no genuine issues of material fact remain, entitling the moving party to judgment as a matter of law. CR 56(c); *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law on all, or specified, issues. *See Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

1           **B.     The SEPA Rules Set Forth a Specific, Unambiguous Process That Must Be**  
2           **Followed for Review of a Proposal That Has Received a Determination of**  
3           **Significance.**

4           For context and background, this section provides a brief summary of the general requirements  
5           for review under SEPA of a proposal that has received a Determination of Significance.

6           A Determination of Significance (DS) is “the written decision by the responsible official of  
7           the lead agency that a proposal is likely to have a significant adverse environmental impact, and  
8           therefore an EIS is required (WAC 197-11-310 and 197-11-360).” WAC 197-11-736. When a  
9           Determination of Significance (DS) is issued for a proposal, the lead agency must prepare a draft and  
10          a final EIS for that proposal. RCW 43.21C.031.

11                       "Proposal" means a proposed action. A proposal includes both actions  
12                       and regulatory decisions of agencies as well as any actions proposed  
13                       by applicants. A proposal exists at that stage in the development of an  
14                       action when an agency is presented with an application, or has a goal  
15                       and is actively preparing to make a decision on one or more alternative  
16                       means of accomplishing that goal, and the environmental effects can  
17                       be meaningfully evaluated. (See WAC 197-11-055 and 197-11-  
18                       060(3).) A proposal may therefore be a particular or preferred course  
19                       of action or several alternatives. For this reason, these rules use the  
20                       phrase "alternatives including the proposed action." The term  
21                       "proposal" may therefore include "other reasonable courses of action,"  
22                       if there is no preferred alternative and if it is appropriate to do so in the  
23                       particular context.

24           WAC 197-11-784.

25           The responsible official must begin by preparing and issuing a determination of significance  
26           (DS) substantially in the form provided in WAC 197-11-980. Issuances of that form, which is titled:  
27           “Determination of Significance and Request for Comments on Scope of EIS,” initiates the public  
28           comment period for scoping. The responsible official must circulate copies of that form to the  
29           applicant, agencies with jurisdiction and expertise, if any, affected tribes, and to the public. WAC 197-  
30           11-360; WAC 197-11-510.

1 After that, the lead agency must prepare a draft and a final environmental impact statement for  
2 that proposal. RCW 43.21C.031. The EIS must contain everything that is identified in WAC 197-11-  
3 440. Among other things, an EIS must include a summary, a description of the proposal and  
4 alternatives; a description of the affected environment, and a disclosure and analysis of the significant  
5 impacts and mitigation measures. WAC 197-11-440.  
6

7 Public input is a major component of SEPA. Review, comment, and responsiveness to  
8 comments on a draft EIS are the focal point of the act's commenting process because the DEIS is  
9 developed as a result of scoping and serves as the basis for the final statement. WAC 197-11-500.  
10 Thus, after preparing the DEIS, the lead agency is required to invite and consider comments on the  
11 DEIS as set forth in WAC 197-11-500 through 570. The lead agency must inform the public and other  
12 agencies that an environmental document is being prepared or is available and that public hearing(s),  
13 if any, will be held. WAC 197-11-510. At a minimum, the draft EIS must be sent to the following:  
14

- 15 (a) The department of ecology (2 copies).
- 16 (b) Each federal agency with jurisdiction over the proposal.
- 17 (c) Each agency with jurisdiction over or environmental expertise on  
18 the proposal.
- 19 (d) Each city/county in which adverse environmental impacts  
20 identified in the EIS may occur, if the proposal were implemented.
- 21 (e) Each local agency or political subdivision whose public services  
22 would be changed as a result of implementation of the proposal.
- 23 (f) The applicable local, area-wide, or regional agency, if any, that has  
24 been designated under federal law to conduct intergovernmental  
25 review and coordinate federal activities with state or local planning.
- 26 (g) Any person requesting a copy of the EIS from the lead agency (fee  
may be charged for DEIS, see WAC 197-11-504).
- (h) Any affected tribe.



1 WAC 197-11-455. Having a draft EIS allows the lead agency to consult with members of the public,  
2 affected tribes, and agencies with jurisdiction and with expertise prior to issuing the final EIS. WAC  
3 197-11-405. *See also* RCW 43.21C.030.  
4

5 A public hearing on the environmental impact of a proposal must be held when fifty or more  
6 persons residing within the jurisdiction of the lead agency, or who would be adversely affected by the  
7 environmental impact of the proposal, make written request to the lead agency within thirty days of  
8 issuance of the draft EIS. WAC 197-11-535  
9

10 After public and agency comments have been received and reviewed, the lead agency must  
11 prepare a final EIS (FEIS) to revise the DEIS as appropriate and respond to comments per WAC 197-  
12 11-560. *Id.* The FEIS must respond to opposing views on significant adverse environmental impacts  
13 and reasonable alternatives which the lead agency determines were not adequately discussed in the  
14 DEIS. The lead agency must then issue the FEIS as specified by WAC 197-11-460.  
15

16 It's obvious that the authors of SEPA did not intend for an Addendum to substitute as an EIS.  
17 Addendums are meant to modify an existing EIS. WAC 197-11-625. Agencies aren't required to  
18 prepare a draft addendum. WAC 197-11-625. No comment period is required for an addendum - the  
19 addendum must simply be circulated to the recipients of the original Draft EIS. *Id.*

20 Applied here, this means that an Addendum could be used to simply modify the 2005 FEIS.  
21 The Addendum would have to be circulated to the recipients of the original Downtown Height &  
22 Density Changes FEIS only with no comment period. That means that the Addendum was technically  
23 required to be sent to the list of interested persons for the zoning amendments that were adopted a  
24 decade ago.  
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1           **C.       SDCI Did Not Follow the Process That Is Required by SEPA for Environmental**  
2                   **Review of the 5<sup>th</sup> and Virginia Proposal.**

3           Within the context of the legal requirements above, we turn now to look at the environmental  
4 review process that SDCI followed for the 5<sup>th</sup> and Virginia Proposal. While it is clear that an EIS is  
5 legally required for this proposal (in light of the DS), SDCI did not prepare a Draft EIS or Final EIS  
6 for the proposal. Instead, SDCI relied on the 2005 Final EIS for Downtown Height and Density  
7 Changes as if it was the EIS for the 5<sup>th</sup> and Virginia Proposal. SDCI issued an “Addendum” to that  
8 2005 FEIS which contained some “additional, more site-specific environmental analysis and  
9 mitigation” relative to a few selected environmental parameters. Newman Dec., Ex. F at 6.  
10

11           On a most basic level, the obvious problem is that the 2005 Downtown Seattle Height and  
12 Density Changes is not the “proposal” that is being proposed by Douglaston Development. The  
13 “proposal” is the 5<sup>th</sup> and Virginia Proposal. *See* WAC 197-11-784 *citing* WAC 197-11-055 and 197-  
14 11-060(3). Thus, the “proposal” that, as a matter of law, requires all of the content and process that  
15 comes along with the Draft and Final EIS requirements is the proposal to construct a 48-story building  
16 with retail, hotel rooms, and apartments at the corner of 5<sup>th</sup> Avenue and Virginia Street.  
17

18           As you look at the 2005 FEIS, the December 15, 2016 Addendum, and the July 3, 2017  
19 Updated Addendum, it is clear that SDCI failed to abide by the most basic SEPA requirements for  
20 review of the 5<sup>th</sup> and Virginia Proposal. Because there is no dispute of the material facts and because  
21 the facts show that SDCI clearly violated SEPA, summary judgment on these issues is appropriate.

22                   **1.       SDCI did not present, describe, or analyze the impacts of any alternatives**  
23                   **to the 5<sup>th</sup> and Virginia Proposal.**

24           One of the most basic requirements in SEPA is the consideration of alternatives in an EIS. *See*  
25 RCW 43.21C.030; WAC 197-11-400; WAC 197-11-402; WAC 197-11-440(5). For every major  
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1 action significantly affecting the environment, agencies must present, discuss, and evaluate the  
2 impacts of alternatives, including no-action. *Id.* See also WAC 197-11-792(2)(b).

3 SDCI did not conduct an alternatives analysis for the 5<sup>th</sup> and Virginia Proposal. Neither the  
4 December 15, 2016 Addendum nor the July 3, 2017 Updated Addendum discuss any alternatives,  
5 present any alternatives, or analyze any impacts of alternatives to the proposal. See Newman Dec.,  
6 Ex.'s B and F. Neither evaluate the environmental impacts of a no-action alternative, much less  
7 describe what a no-action alternative would even look like. *Id.*

9 So, the next question is whether the 2005 FEIS discusses, presents, or evaluate alternatives to  
10 the 5<sup>th</sup> and Virginia Proposal. The answer to that is a clear no – it does not. This is not surprising  
11 considering that the 5<sup>th</sup> and Virginia Proposal was proposed by Douglaston Development over a  
12 decade after the 2005 FEIS was published. The alternative proposals that were analyzed in the 2005  
13 FEIS consisted of different combinations of regulatory increases in allowable maximum heights and  
14 densities of buildings in the Downtown Office Core 1 and 2 and Downtown Mixed Commercial  
15 Zones. Newman Dec., Ex. C at iii. In other words, the 2005 FEIS analyzed different legislation  
16 proposals to rezone large swaths of Downtown Seattle. The 2005 FEIS did not analyze alternatives to  
17 the specific building proposal on the specific site at the corner of 5<sup>th</sup> and Virginia.

19 Any attempt to argue that the analysis of the alternative area-wide rezone proposals that were  
20 being considered by the City Council can be construed as a reasonable alternatives analysis for the 5<sup>th</sup>  
21 and Virginia Proposal fails. Reasonable alternatives to the 5<sup>th</sup> and Virginia Proposal would consist of  
22 alternative building proposals for this site-specific project – such as alternative proposed setbacks  
23 along the alley or alternative proposed uses such as fewer hotel rooms, fewer apartments, less retail.  
24 The EIS could consider an alternative with fewer units overall or alternative designs of the building,  
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1 parking lots, units layout, retail layout, and more. That is completely different from alternatives to an  
2 area-wide rezone.

3 Consider an Escala resident who considers himself to be significantly impacted by this  
4 development. With proper SEPA review, that person is, rightly so, anticipating an opportunity to see  
5 alternative building designs for the project site in the EIS, to see what the impacts would be of those  
6 alternatives, and to provide input via public comments on whether those alternatives are reasonable  
7 and/or whether the analysis of impacts of those alternatives is adequate. That person may be seeking  
8 discussion of an alternative building design that has an increased setback between the Escala and the  
9 proposal or discussion of an alternative building design that minimizes the privacy impacts.  
10

11 With SDCI's current approach, this Escala owner has been shut out from that opportunity.  
12 There was no such alternatives analysis in the Addendum. The only other option would have been for  
13 him to comment on the alternatives analysis that was in the 2003 Draft EIS of the different area wide  
14 rezone proposals. But that makes no sense. Any comments that would have been submitted back in  
15 2003 asking that the City, at that time, consider alternative building designs/proposals on this particular  
16 site at 5<sup>th</sup> and Virginia would have been rejected immediately on the grounds that he was asking for  
17 too much detail not appropriate for programmatic SEPA review.  
18

19 Furthermore, the EIS must not only present different alternatives, but must evaluate the  
20 environmental impacts of those different alternatives. A proper impact analysis associated with the 5<sup>th</sup>  
21 and Virginia Development alternative building designs would be focused on evaluating specific alley  
22 impacts of each alternative, specific traffic impacts of the different proposals, specific impacts to the  
23 Escala residents' access to daylight and privacy, noise impacts, construction impacts, and all of the  
24 other impacts that were discussed in the Addendum and comments on the Addendum. Considering  
25 that SDCI thought it was necessary to conduct an additional evaluation of specific impacts of the  
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1 proposal itself with an Addendum beyond what was in the 2005 FEIS, it goes without saying that  
2 SDCI should have also conducted an additional evaluation of impacts of alternatives to the 5<sup>th</sup> and  
3 Virginia Project as well.

4 If SDCI had done this properly, members of the public, agencies with jurisdiction, and other  
5 interested parties would have had an opportunity (as is required by SEPA) to comment on the choice  
6 of alternatives as well as the adequacy of the analysis of impacts of alternatives during the comment  
7 period following issuance of a Draft EIS on the 5<sup>th</sup> and Virginia Proposal. If SDCI had done this  
8 properly, the decision makers would have had the information from the EIS and from all of the input  
9 from the public and other agencies about alternatives and their impacts before making a decision to  
10 approve the proposal. In fact, that information may have affected that decision.

11  
12 **2. The environmental documents did not include certain information**  
13 **required by WAC 197-11-440 for the 5<sup>th</sup> and Virginia Proposal**

14 The Addendum doesn't contain information about the 5<sup>th</sup> and Virginia Proposal as is required  
15 in WAC 197-11-440. The Addendum does not contain a "Summary" as that requirement is described  
16 in WAC 197-11-440(4). Newman Dec., Ex.'s B and F. The Addendum does not state the proposal's  
17 objectives, does not specify the purpose and need to which the proposal is responding, does not  
18 summarize the major conclusions, and does not summarize significant areas of controversy and  
19 uncertainty and the issues to be resolved, including the environmental choices to be made among  
20 alternative courses of action and the effectiveness of mitigation measures. There is no summary of the  
21 proposal, impacts, alternatives, mitigation measures, and significant adverse impacts that cannot be  
22 mitigated.

23  
24 The Addendum does not describe the existing environment that will be affected by the  
25 proposal as is required by WAC 197-11-440(6). *See* Newman Dec., Ex.'s B and F. Of course, the  
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1 2005 FEIS description of existing conditions was for the entire area not the specific project and is  
2 twelve years old and, therefore, isn't applicable anyway. The 2005 EIS certainly does not contain the  
3 information and analysis for this proposal that is required by this rule. The comment letters and  
4 responses were not circulated with the FEIS as is required by WC 197-11-400(7).  
5

6 **3. SDCI did not initiate a scoping process and scoping comment period as**  
7 **required by WAC 197-11-408 for the 5<sup>th</sup> and Virginia Proposal.**

8 When done properly, the determination of significance (DS) must be issued in the form  
9 provided in WAC 197-11-980. That form initiates the public comment period for scoping. In that  
10 form, the lead agency announces to the public which topics will be discussed in the EIS for the  
11 proposal and invites agencies, affected tribes, and members of the public to comment on the scope of  
12 the EIS, including alternatives, mitigation measures, and probable significant impacts. *Id.*

13 SDCI did not issue this form and did not initiate a public comment period for scoping for the  
14 5<sup>th</sup> and Virginia Proposal. SDCI instead announced that the Addendum had been prepared and was  
15 available in the same December 15, 2016 document that gave notice of the Determination of  
16 Significance (DS). Newman Dec., Ex. A.  
17

18 As a matter of law, this violated SEPA. The public and outside agencies were provided no  
19 opportunity for scoping comments on the 5<sup>th</sup> and Virginia Proposal. It's also important to recognize  
20 that there were real consequences to skipping this step that prejudiced the public's ability to have  
21 meaningful involvement. As is evident from the comment letters that were submitted by Escala on the  
22 Addendum, SDCI failed entirely to consider major topics of concern in the Addendum. Newman Dec.,  
23 Ex.'s D and G. If there had been a scoping comment period, the public would have had the opportunity  
24 to outline and list all of the issues that they believed should be included before the environmental  
25 review began. In addition, if there had been a scoping comment period, members of the public would  
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1 have had an opportunity to present ideas for specific alternative designs of the building. Because there  
2 was no opportunity to comment on the scope of environmental review for the 5<sup>th</sup> and Virginia  
3 Proposal, SDCI violated SEPA requirements.

4  
5 **4. SDCI violated the SEPA requirements for public input and comment on**  
6 **the 5<sup>th</sup> and Virginia Proposal**

7 There was no opportunity provided to comment on a Draft EIS for the 5<sup>th</sup> and Virginia  
8 Proposal as required by SEPA. Furthermore, SDCI did not circulate and respond to SEPA comments  
9 that were submitted by the public on the 5<sup>th</sup> and Virginia Proposal as is required to be done in a Final  
10 EIS.

11 After preparing a Draft EIS, lead agencies are required to circulate the Draft EIS to various  
12 agencies and the public. RCW 43.21C.030(2)(d); WAC 197-11-455. Any person or agency shall have  
13 a minimum of 30 days from the date of issue in which to review and comment on the Draft EIS. *Id.*  
14 Extensions of up to fifteen days may be granted, which would allow a total of 45 days for comments  
15 on the Draft. *Id.*

16 Having a Draft EIS allows the lead agency to consult with members of the public, affected  
17 tribes, and agencies with jurisdiction and with expertise prior to issuing the Final EIS. WAC 197-11-  
18 405. *See also* RCW 43.21C.030. Government agencies and interested citizens must be given an  
19 opportunity to review and comment on the analysis of the affected environment, the disclosure and  
20 analysis of environmental impacts, the analysis of alternatives, the analysis of mitigation, and all other  
21 information that is required to be in the Draft EIS. They must be given an opportunity to comment on  
22 these issues *specific to the 5<sup>th</sup> and Virginia proposal* (not the 2005 rezone) prior to the issuance of a  
23 Final EIS on the proposal.  
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1 The Final EIS must be circulated to, among others, anyone who commented on the Draft EIS.  
2 WAC 197-11-460. The lead agency must consider comments that were submitted on the Draft EIS  
3 and respond by modifying alternatives (including the proposed action), developing new alternatives,  
4 supplementing or improving the analysis, making factual corrections, or explaining why the comments  
5 do not warrant further agency response. WAC 197-11-560. All substantive comments must be  
6 appended to the Final EIS or summarized. *Id.*

8 When the Addendum was issued, the City announced a 14-day comment period with a  
9 deadline of December 29, 2016. After a request from Escala's counsel to extend the deadline per SMC  
10 23.76.012.D, SDCI informed Escala's counsel that it would extend the comment period to January 12,  
11 2017. Newman Dec., Ex. H. As far as we can tell, SDCI did not publicly announce the extension of  
12 the comment deadline to January 12. Therefore, the publicly announced comment period for the  
13 Addendum was a 14-day comment period. The comment period that was relayed to Escala was a 28-  
14 day comment period. Either way, SDCI violated the SEPA requirement for a minimum 30-day  
15 comment period for commenting on SEPA review of the 5<sup>th</sup> and Virginia Proposal.

17 In addition, the public was not given the opportunity to require a public hearing on the  
18 environmental impacts of the 5<sup>th</sup> and Virginia Proposal pursuant to WAC 197-11-535.

19 The Addendum was not a draft detailed statement as required by SEPA – it was a final  
20 document. SDCI did “update” the Addendum, but that was not characterized as a “draft” and “final”  
21 and the “update” did not summarize or refer to any of the public comments at all. And then, SDCI  
22 had yet another comment period after the “updated” Addendum was issued – which, again, is not  
23 contemplated in the SEPA regulations. All of those public comments that SDCI received, including  
24 Escala's comments on the adequacy of the updated Addendum were submitted after SDCI prepared  
25 the final Addendum.  
26



1 Because the rules don't contemplate the odd approach that SDCI took for this project, SDCI  
2 created its own ad-hoc distribution and commenting process. This cobbled together approach doesn't  
3 appear in the SEPA regulations.

4 SDCI violated the requirement that it must revise a DEIS as appropriate and respond to  
5 comments on impacts, alternatives, and mitigation specific to the 5<sup>th</sup> and Virginia Project per  
6 WAC 197-11-560 in a final EIS. *Id.* There must be a FEIS for this project that responds to opposing  
7 views on significant adverse environmental impacts and reasonable alternatives for this project which  
8 the lead agency determines were not adequately discussed in a DEIS for this project. An addendum  
9 can be used to add analysis or information to an existing environmental document, but the City cannot  
10 ignore the requirements and public process that is required for a proposal that has probable significant  
11 impacts. *See* WAC 197-11-600; WAC 197-11-625.

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14 **D. SEPA Rules Place Limitations on the Use of Existing Documents for SEPA**  
15 **Review of a Proposal**

16 To justify preparing an "addendum" instead of an EIS, SDCI relied on the SEPA rules that  
17 allow the use of "existing documents" for its SEPA review. But SEPA rules place limitations on the  
18 use of existing documents for SEPA review of a proposal.

19 For context, the overriding requirement in RCW 43.21C.030 is that SDCI must prepare a  
20 detailed statement (EIS) on the environmental impact of the 5<sup>th</sup> and Virginia Proposal, any adverse  
21 environmental effects which cannot be avoided should the 5<sup>th</sup> and Virginia Proposal be implemented;  
22 and alternatives to the 5<sup>th</sup> and Virginia proposal. That is the task that must be done.

23 The rules do allow that the lead agency use existing documents to carry out this task. SEPA  
24 states:

25  
26 Lead agencies are authorized to use in whole or in part existing  
environmental documents for new project or nonproject actions, if the

documents adequately address environmental considerations set forth in RCW 43.21C.030. The prior proposal or action and the new proposal or action need not be identical, but must have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography. The lead agency shall independently review the content of the existing documents and determine that the information and analysis to be used is relevant and adequate. If necessary, the lead agency may require additional documentation to ensure that all environmental impacts have been adequately addressed.

RCW 43.21C.034.

But there are express limitations in this provision. As the quote states above, the prior proposal must have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography. The lead agency shall independently review the content of the existing documents and determine that the information and analysis to be used is relevant and adequate.

Furthermore, WAC 197-11-600, which describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA, states that for EISs, preparation of a supplemental EIS is required if there are:

(i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or

(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.

WAC 197-11-600. *See also* WAC 197-11-405. An SEIS must be prepared in the same way as a draft and final EIS except that scoping is optional. WAC 197-11-620.

1 And finally, the Seattle Municipal Code states that the City can use an existing document only  
2 provided that the information in that document is “accurate and reasonably up-to-date.” SMC  
3 25.05.600.

4 **E. SDCI Violated the Limitations on Using Existing Documents for SEPA Review**  
5 **of the 5<sup>th</sup> and Virginia Proposal.**

6 It’s plainly evident to any rational observer that the timing, the types of impacts, the  
7 alternatives, and even the geography of the 2005 rezone and the 5<sup>th</sup> and Virginia Proposal are not  
8 similar. The Downtown Height and Density Changes are not similar in timing, not similar in  
9 alternatives, not similar in geography, not similar in impacts on specific properties, and not similar in  
10 environmental consequences. It is also quite evident that the information and analysis in the 2005 FEIS  
11 is not relevant or adequate for environmental review of the 5<sup>th</sup> and Virginia Proposal. As a result, it is  
12 improper under RCW 43.21C.034 for SDCI to rely on the old FEIS for its environmental review of  
13 the 5<sup>th</sup> and Virginia Proposal.  
14

15 Even if SDCI could legally rely on the “existing” 2005 FEIS for its review of the 5<sup>th</sup> and  
16 Virginia Proposal, SDCI was required to prepare, at the very least, a Supplemental EIS for the  
17 Proposal. There can be no dispute that there are substantial changes to the “proposal” considering that  
18 the 5<sup>th</sup> and Virginia Proposal is not even the same proposal as the old rezone. It’s a different proposal,  
19 with different people impacted, with a different proponent, raising different issues, different types of  
20 impacts, calling for different mitigation, and different alternatives.  
21

22 In addition, there is significant new information since the 2003 and 2005 EIS was prepared  
23 indicating, or on, the probable significant adverse environmental impacts of the 5<sup>th</sup> and Virginia  
24 Proposal. The information in the 2005 FEIS is twelve years old. Just to give you some perspective of  
25  
26

1 how long ago that was – can take judicial notice that it was two years before the first Apple iPhone  
2 was released and two years before Amazon moved its corporate headquarters to South Lake Union.

3       There has been an enormous amount of growth and changes in the character of downtown  
4 since then – there are exponentially more residents, traffic, residential vs commercial construction  
5 downtown than was anticipated in the 2005 FEIS. Newman Dec., Ex. D. The bike lanes, streetcars,  
6 trolleys, and light rail that exist today did not exist when that EIS was prepared. *Id.* The newspapers  
7 report that more residential units will be built this decade than the previous 50 years combined.  
8 Newman Dec., Ex. K. There is significant new information on the anticipated development of  
9 additional towers in the area that was not contemplated on the same block in the 2005 FEIS. The  
10 Addendum admits that many changes have occurred since the publication of the 2005 EIS. Newman  
11 Dec., Ex. F, Appendix B.

12  
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14       The 2005 review of the rezone and development regulations for downtown never contemplated  
15 this level of development would occur, on a single block without any FAR restrictions, tower spacing,  
16 or setback requirements to protect against overcrowding of residential towers. The 2005 FEIS  
17 identifies what sites the authors of the EIS assumed would be developed under the proposed rezone as  
18 a basis for its analysis and conclusions about impacts and mitigation. Newman Dec., Ex. C at 4-17, 4-  
19 19. Figures 16 and 18 on pages 4-17 and 4-19 show that the EIS analysis anticipated that only one  
20 tower would be built on the block between 4<sup>th</sup> and 5<sup>th</sup> and between Stewart and Virginia. *Id.* This is  
21 also presented (numerically) in Appendix D – the Preferred Alternative Project List for Potential  
22 Development. *Id.*, Appendix D.

23  
24       The assumptions in that EIS are outdated and completely inaccurate. We know now that not  
25 only is there a project for development at 5<sup>th</sup> and Virginia, there is also a current proposal for a massive  
26 tower at 5<sup>th</sup> and Stewart. Newman Dec., Ex. L. The information in the 2003 DEIS and 2005 FEIS is

1 not accurate and is not reasonably up-to-date. Based on all of this, SDCI must, at the very least, prepare  
2 an SEIS for the 5<sup>th</sup> and Virginia Proposal.

#### 3 4 **IV. CONCLUSION**

5 SDCI created its own makeshift process for review of the 5<sup>th</sup> and Virginia proposal - preparing  
6 an “Addendum” to a 12 year old programmatic EIS that was prepared for an entirely different proposal  
7 – without even purporting to meet the requirements of SEPA for environmental review of this site-  
8 specific project. SDCI cannot rely on an old EIS for a proposal that is different in timing, has different  
9 alternatives, different in geography, has different impacts, and does not have the same environmental  
10 consequences. The 2005 FEIS is not relevant or adequate for environmental review of the 5<sup>th</sup> and  
11 Virginia Proposal. It was improper under RCW 43.21C.034 for SDCI to rely on the old FEIS for its  
12 environmental review of the 5<sup>th</sup> and Virginia Proposal.

13  
14 SDCI’s approach to environmental review for this proposal violates SEPA in multiple  
15 respects. Escala requests that the Hearing Examiner grant summary judgment in its favor on these  
16 issues and order that SDCI prepare a draft and a final EIS following a scoping process that contains  
17 everything set forth in WAC 197-11-440 and that follows the public process in WAC 197-11-500  
18 through 570. The EIS must provide an adequate and impartial discussion of significant environmental  
19 impacts and shall inform decision makers and the public of reasonable alternatives, including  
20 mitigation measures, which would avoid or minimize adverse impacts or enhance environmental  
21 quality.  
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Dated this 5th day of January, 2018.

Respectfully submitted,

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By:



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