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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 5th Avenue, Project 3019699

NO. MUP-17-035

APPELLANT ESCALA OWNERS
ASSOCIATION’S RESPONSE TO
RESPONDENTS’ JOINT MOTION
FOR PARTIAL DISMISSAL

I. INTRODUCTION

The City of Seattle Hearing Examiner has jurisdiction over the question of whether the Decision on appeal violates the State Environmental Policy Act (SEPA), ch. 43.21A, and state and local regulations implementing that law. More specifically, the Examiner “shall” entertain issues cited in the appeal that relate to adequacy of an EIS upon which the decision was made, or failure to properly approve, condition, or deny a permit based on disclosed adverse environmental impacts. SMC 23.76.022.C.6.

In its appeal, the Escala Owners Association presented a claim that the 5th and Virginia Proposal violates certain code requirements and that, in turn, will cause significant adverse environmental impacts. Escala did not claim that SDCI improperly interpreted the code, nor did it claim that it improperly applied the code provision at issue. The issue presented with respect to the

garage layout/slope claim is a SEPA issue – not a code interpretation issue. Because this issue constitutes a SEPA claim it fits squarely within the Examiner’s jurisdiction.

II. STATEMENT OF FACTS

The 5th and Virginia Project is a 48-story building proposed to be constructed at the corner of 5th and Virginia in Downtown, Seattle. The 5th and Virginia proposal was processed as a Type II application by the Seattle Department of Construction and Inspections (SDCI). Declaration of Claudia M. Newman in Support of Response to Partial Motion to Dismiss (Jan. 11, 2018), Ex. A. SDCI ultimately issued a Decision approving the 5th and Virginia Proposal on October 26, 2017. *Id.*

That Decision was appealed by the Escala Owners Association on November 9, 2017. Newman Dec., Ex. A. The appeal included, among other claims, a SEPA claim that asserted that because the code violates requirements in the code, the proposal may have significant adverse environmental impacts that haven’t been adequately addressed. *Id.* at 4. The claim was focused on the impacts of approving an exemption from code requirements, it did not challenge SDCI’s interpretation of or application of the code.

Respondents filed a Joint Motion for Partial Dismissal of that claim on the grounds that the Escala Owner’s Association failed to file a request for code interpretation on that claim.

III. AUTHORITY

A. The Issue Presented in Escala’s Appeal is a SEPA Issue That Fits Squarely Within the Hearing Examiner’s Jurisdiction.

The issue that was presented in Escala’s appeal that is now the subject of Respondents’ motion to dismiss challenges the adequacy of the SEPA review on the grounds that the responsible official failed to consider the probable significant adverse impacts that would be caused by SDCI’s decision

1 to exempt the proposal from certain code requirements with respect to the garage layout and slope.
2 That is within the Hearing Examiner's jurisdiction.

3 Regarding Hearing Examiner jurisdiction, the Code states:

4 The Hearing Examiner shall entertain issues cited in the appeal that
5 relate to compliance with the procedures for Type I decisions as
6 required in this Chapter 23.76, compliance with substantive criteria,
7 determinations of nonsignificance (DNSs), *adequacy of an EIS upon*
8 *which the decision was made, or failure to properly approve,*
9 *condition, or deny a permit based on disclosed adverse*
10 *environmental impacts*, and any request for interpretation included in
11 the appeal or consolidated appeal pursuant to Section 23.88.020.C.3.

12 SMC 23.76.022.C.6 (emphasis supplied).

13 The legal issue, word for word, as it was presented in Escala's appeal is as follows:

14 The Decision by the Director of SDCI and the Recommendation of the
15 Design Review Board were both made in error and should be reversed
16 for the following reasons:

17 1. The decisions violate the State Environmental Policy
18 Act (SEPA), ch. 43.21A, and state and local regulations implementing
19 that law.

20 ...

21 b. In some respects, the proposal violates code
22 provisions, which in turn, causes significant adverse environmental
23 impacts. For example, the garage layout violates 23.54.030.H. That
24 provision requires compliance with specific stall dimensions and aisle
25 widths if and when the valet operation ceases. As designed, the garage
26 could never meet that code requirement since columns and elevator
core locations make them impossible to meet. In addition, aisle slopes
on some parking levels are greater than the code maximum of 15%.

27 *Id.* at 4.

28 This is a SEPA issue - not a code interpretation issue. It's presented under the heading that
29 says: "The decisions violate ... SEPA..." The first sentence of subsection 1.b under that heading

1 explicitly refers to environmental impacts, stating: “In some respects, the proposal violates code
2 provisions, which in turn, causes significant adverse environmental impacts.” *Id.*

3 This is not a challenge about whether the code has been interpreted or applied correctly. This
4 is a challenge of the failure to disclose, analyze and mitigate impacts that will be caused by the City’s
5 decision to exempt the proposal from the code requirements. Impacts from a decision to exempt a
6 proposal from code requirements must be considered in the analysis of significant impacts under
7 SEPA. *See* WAC 197-11-330.3.e.iii (when determining an impact’s significance, SDCI shall take into
8 account whether a proposal conflicts with local laws).

10 Escala intends to present expert testimony at the upcoming hearing that shows that the
11 applicant is relying on SMC 23.54.030.H, which exempts parking facilities fully operated by
12 attendants from meeting code requirements for stall dimensions and aisle widths. Newman Dec, ¶ 4.
13 But, as Escala will show, that section also requires compliance with normal dimensions *if valet*
14 *operation ceases* at any time. Escala intends to present evidence that shows that, as designed, this
15 garage would never be able to meet code (as set by SMC 23.54.030 sections A – E) should valet
16 parking stop since the columns and elevator core locations make standard aisle dimensions impossible
17 to meet. Escala intends to provide evidence that will show that if the proposal is approved as is and
18 the applicant decides to stop using valet operations after approval simply because it is inconvenient or
19 too expensive, then the project will have probable significant adverse traffic impacts. Based on this,
20 the Escala will request that a SEPA condition be placed on the proposal requiring that valet services
21 be offered in perpetuity since the design cannot be changed after the building has been constructed.
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1 **B. The Examiner Has Jurisdiction to Consider Issues Regarding Compliance with**
2 **Substantive Criteria in the Code When Those Issues Are Raised as Part of an**
3 **Appeal of a Type II Decision.**

4 Even if the issue presented in the appeal was a challenge to the City's interpretation and
5 application of its code, the City of Seattle Hearing Examiner has jurisdiction over issues of compliance
6 with the substantive criteria in the Seattle Code when those issues are presented in an appeal of a Type
7 II decision.

8 Repeating the quote above regarding Hearing Examiner jurisdiction, the Code states:

9 The Hearing Examiner shall entertain issues cited in the appeal that
10 relate to compliance with the procedures for Type I decisions as
11 required in this Chapter 23.76, ***compliance with substantive criteria***,
12 determinations of nonsignificance (DNSs), adequacy of an EIS upon
13 which the decision was made, or failure to properly approve, condition,
14 or deny a permit based on disclosed adverse environmental impacts,
15 and any request for interpretation included in the appeal or
16 consolidated appeal pursuant to Section 23.88.020.C.3.

17 SMC 23.76.022.C.6 (emphasis supplied). This provision makes it clear that the Examiner has
18 jurisdiction over the question of whether a proposal complies with code requirements.

19 This is true even if a code interpretation request is not filed. The code interpretation process is
20 optional, not mandatory. *See* SMC 23.76.022, SMC 23.88.020. There is no statement anywhere in
21 the Seattle Code that states that claims concerning a Type II project's consistency with the Code must
22 be challenged through the Code Interpretation process. A request for a code interpretation is an
23 optional route for members of the public if they, for some reason, choose to file an application seeking
24 a formal interpretation of the code.
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IV. CONCLUSION

Because the claim that the Respondents have focused on in their motion constitutes a SEPA claim that fits squarely within the Examiner’s jurisdiction, Escala requests that the Examiner deny Respondents’ Joint Motion for Partial Dismissal.

Dated this 12th day of January, 2018.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 
Claudia M. Newman, WSBA No. 24928
Attorneys for Escala Owners Association