BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of Appeal of: ESCALA OWNERS ASSOCIATION Of a Master Use Permit Decision issued by the Director, Seattle Department of Construction & Inspections	Hearing Examiner File: MUP-17-035 RESPONDENTS CITY OF SEATTLE AND JODI PATTERSON-O'HARE'S JOINT RESPONSE TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Escala Homeowners Association ("Appellant") appealed the City of Seattle's ("City's") issuance of a master use permit for a 48-story structure at 1933 Fifth Avenue ("Property") proposed by Jodi Patterson-O'Hare ("Applicant") (collectively with City, "Respondents"). The proposal is in the Belltown neighborhood. In 2005, the City adopted a Final Environmental Impact Statement for the Downtown Height and Density Changes ("DHDC FEIS") that evaluated zoning changes within the Downtown, including 600-foot heights for development at the Property. As an adjacent 30-story building, the Appellant opposes the new development.

Consistent with the State Environmental Policy Act ("SEPA"), SEPA Regulations, Seattle Municipal Code ("Code") for SEPA compliance and the City's long-standing process, the

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City conducted its environmental review of the proposal by using existing environmental documents, namely the DHDC FEIS, and utilized a project-specific addendum to add information about the proposal that did not substantially change the analysis of significant impacts and alternatives studied in the DHDC FEIS pursuant to WAC 197-11-600(4). As authorized by SEPA Regulations, the City has utilized this same procedure to evaluate the project-specific level environmental review for at least 12 other major projects in Downtown.

Appellant appealed the City's SEPA determination, including the adequacy of the adopted DHDC FEIS and addendum. Appellant now moves for summary judgment, arguing as a matter of law that the City violated SEPA by failing to prepare an environmental impact statement for the proposal. Appellant's Motion for Summary Judgment, pg. 1-2 ("Motion").

Appellant's arguments are founded on a fundamental misreading of SEPA and packaged in an attempt to shift its burden of proof. Appellant misreads SEPA Regulations regarding a determination of significance ("DS") to argue any DS – even one associated with an EIS addendum – somehow mandates preparation of a full environmental impact statement for the proposal. Building from this false premise, Appellant constructs a litany of reasons why the City's SEPA review process was flawed because the City failed to complete an environmental impact statement, including an alleged lack of scoping, content, public comment and responses.

Appellant's arguments are nonsensical. They devolve to an internally contradictory claim: that the City's decision to rely on an *existing* EIS somehow required it to prepare a *new* EIS. This is contrary to the SEPA regulations. SEPA authorizes the use of existing environmental documents to fulfill the City's SEPA obligations, including combining a DS with a notice of adoption and addendum. RCW 43.21C.034; WAC 197-11-340; WAC 197-11-600; SMC 25.05.600. As a matter of law, SEPA does not require an environmental impact statement

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for the proposal because the City adopted the DHDC FEIS and added analysis of the project-specific issues through the Addendum. Therefore, SEPA does not require scoping here. Nor does SEPA require public comment or the inclusion of all the elements required for an environmental impact statement because the City is legally adopting the DHDC FEIS for its environmental review and provided an Addendum for the project-specific information. Lastly, the City was not required to prepare a supplemental EIS here. In sum, the City complied with all its legal obligations under SEPA when conducting its environmental review of the proposal.

Therefore, Respondents respectfully request that the Hearing Examiner deny the Motion.

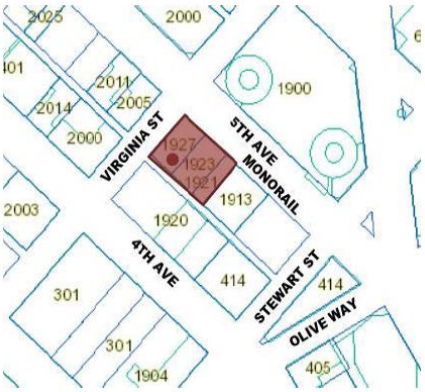
II. STATEMENT OF FACTS

A. The Project.

The Applicant proposes to construct a 48-story structure at 1933 Fifth Avenue in the City's Belltown neighborhood ("Project"). The Project includes 431 apartment units, 155 hotel rooms, retail and restaurant space and below-grade parking for 239 vehicles. Master Use Permit Director's Decision for Project No. 3019699 ("MUP Decision"), pg. 1-2.

The Project is located within the Downtown Office Core-2 ("DOC-2") zone. *Id.*, pg. 2.

Geographically, the Project is located on the northwest corner of the downtown Belltown block bounded by Virginia Street, 5th Avenue and the Monorail, Stewart Street and 4th Avenue:



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Id. (Site and Vicinity Map). Surrounding structures include the 30-story Escala Condominiums to the west and the Westin Hotel twin towers to the east. *Id.*, pg. 2. The MUP Decision noted that the "surrounding mixed-use district has buildings of diverse scale, style and vintage, with recent additions that add higher densities, consistent with adopted downtown zoning and policies." *Id.*

As is authorized by the SEPA Regulations and Code, the City elected to adopt the DHDC FEIS and utilize an Addendum to meet its SEPA responsibilities for the Project. Declaration of Claudia M. Newman in Support of Motion for Summary Judgment ("Newman Declaration"), Ex. A. Respondents discuss the SEPA review procedures for the Project *supra* at Section II.D.

First, Respondents address the City's adoption of the DHDC FEIS and its long-standing practice of using such existing environmental documents to comply with its SEPA obligations.

B. The Downtown Height and Density Changes environmental review process.

As the Appellant noted, the City underwent a comprehensive SEPA procedure for potential Downtown area-wide height and density changes that included production of an environmental impact statement. Motion, pgs. 5-6.

The City first issued a draft environmental impact statement for the height and density changes. Declaration of Ian Morrison ("Morrison Declaration), Ex. A (Downtown Height and Density Changes Draft Environmental Impact Statement ("DHDC DEIS")). The City considered and responded to the public comments in the DHDC FEIS. Newman Declaration, Ex. C, Ch. 5.

The City's SEPA review process culminated with the publication of the DHDC FEIS in January 2005. *Id.* The City's Preferred Alternative in the DHDC FEIS identified the Property as an area for expansion of the Downtown Office Core ("DOC") zoning. *Id.*, Figure 1, pg. 1-2. While the DHDC FEIS was a "non-project" proposal that involved decisions on policies, regulations and plans rather than any site-specific project development, it clearly stated that:

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> Broad analyses of non-project proposals can facilitate "phased review" by addressing bigger-picture concerns and allowing review of future proposals to focus on a smaller range of more specific concerns. **This means that future proposals in the study area could incorporate or refer to portions of this EIS to fulfill their SEPA requirements.** This could increase the efficiency of environmental review and expedite permitting processes.

Newman Declaration, Ex. C, pg. ii (emphasis added).

C. The City's practice of using existing environmental documents for SEPA review.

SEPA authorizes the use of existing environmental documents. RCW 43.21C.034. The SEPA Regulations recognize that the use of existing documents may be used where the proposal is the same or different than those analyzed in the existing document. WAC 197-11-600(2). At the discretion of the lead agency, use of existing environmental documents may take multiple forms, including adoption, incorporation by reference, addendum or a supplemental environmental impact statement. WAC 197-11-600(4).[1] Use of an addendum is appropriate where it "adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document." WAC 197-11-600(4)(c). Notably, the City's SEPA provisions mirror the SEPA Regulations regarding the use of existing environmental documents. *Compare* WAC 197-11-600 *with* SMC 25.05.600.

[1] WAC 197-11-600(4) provides:

> Existing documents may be used for a proposal by employing one or more of the following methods:
> (a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document; or
> (b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.
> (c) An addendum, that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document.
> (d) Preparation of a SEIS if there are:
> (i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or
> (ii) New information indicating a proposal's probable significant adverse environmental impacts.
> (e) If a proposal is substantially similar to one covered in an existing EIS, that EIS may be adopted; additional information may be provided in an addendum or SEIS (see (c) and (d) of this subsection).

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1. The City has adopted the DHDC FEIS and used an Addendum to conduct environmental review for at least 12 other major projects in the Downtown.

Given SEPA's authorization for use of existing environmental documents and the DHDC FEIS expressed goal of having project-specific SEPA review incorporate these environmental documents to fulfill SEPA obligations, it is not surprising that the City has often used the DHDC FEIS through adoption and an addendum for project-specific review of Downtown projects.

Appellant's recitation of the facts omits how frequently the City has adopted the DHDC FEIS and a project-specific addendum to comply with SEPA for project-specific review within the Downtown core. In fact, the City has utilized this process at least 12 times since the City published the DHDC FEIS in 2005. Declaration of Cheryl Waldman ("Waldman Declaration"), ¶¶ 1-2. The City's use of the DHDC FEIS includes such projects as:

- Construction of two 29-story residential towers over a 12-story podium 2326 6th Avenue (Master Use Permit No. 3020315). Notice of Adoption of DHDC FEIS and Addendum issued on May 18, 2017;

- Construction of two 40-story towers and a 10-story podium building with 638 residential units, approximately 175,116 sf. of office and 10,509 sf. of retail at 2301 6th Avenue (Master Use Permit No. 3019371). Notice of Adoption of DHDC FEIS and Addendum on December 5, 2016;

- Construction of two 31-story office buildings with 25,885 sf. of retail at 1201 2nd Avenue (Master Use Permit Nos. 3019177/3019178). Notice of Adoption of DHDC FEIS and Addendum issued on October 13, 2016;

- Construction of a 59-story building with 780,000 sf. of office and 178 residential uses and 12-story development with 180 hotel rooms and retail space at 1301 5th Avenue (Master Use Permit No. 3017644 or Rainier Tower). Notice of Adoption of DHDC FEIS and Addendum issued on July 11, 2016. Once completed, the Rainier Tower development here will include the City's second tallest building;

- Construction of a 38-story building with 380 residential units and 3,500 sf. of retail at 2030 8th Avenue (Master Use Permit No. 3010962). Notice of Adoption of DHDC FEIS and Addendum issued on June 30, 2011;

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- Construction of a 35-story building with 290 residential units and 14,850 sf. of retail at 1430 2nd Avenue (Master Use Permit No. 3009156). Notice of Adoption of DHDC FEIS and Addendum issued on May 26, 2011;

- Construction of a 40-story building with 357 residential units and 2,663 sf. of retail at 2116 4th Avenue (Master Use Permit No. 3009145). Notice of Adoption of DHDC FEIS and Addendum issued on December 16, 2010;

- Construction of a 38-story building with 186 residential units, 139 hotel rooms and 6,073 sf. of retail at 1931 2nd Avenue (Master Use Permit No. 3007606). Notice of Adoption of DHDC FEIS and Addendum issued on September 8, 2008;

- Construction of a 39-story building with 7,733 sf. of retail at 2015 2nd Avenue (Master Use Permit No. 3007605). Notice of Adoption of DHDC FEIS and Addendum issued on June 12, 2008;

- Construction of a 36-story office building over a three-story base structure with 6,176 sf., of retail space at 505 Madison Avenue (Master Use Permit No. 3006834)., Notice of Adoption of DHDC FEIS and Addendum issued on August 4, 2008; and

- Construction of two 32-story residential buildings over an 8-story base at 2301 6th Avenue (Master Use Permit No. 3004231). Notice of Adoption of DHDC FEIS and Addendum issued on May 10, 2007.

Waldman Declaration, ¶ 2.

The City's adoption of the DHDC FEIS and use of a project-specific addendum is plainly a long-established practice for Downtown projects. Of course, this is what the DHDC FEIS contemplated: "future proposals in the study area could **incorporate or refer to portions of this EIS to fulfill their SEPA requirements**. This could increase the efficiency of environmental review and expedite permitting processes." Newman Declaration, Ex. C, pg. ii (emphasis added). The fact is the City has been utilizing the SEPA adoption and addendum process for project-specific environmental review within the Downtown ever since the DHDC FEIS was completed.

Indeed, the City's use of SEPA's adoption and addendum procedures are not solely limited to the DHDC FEIS. The City has historically utilized the same adoption of a programmatic EIS for zoning changes and project-specific addendums for projects within South

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Lake Union and the South Downtown/Pioneer Square neighborhoods. Waldman Declaration, ¶ 3-4.

D. The City's Environmental Review of the Project.

Lastly, Respondents provide a brief overview of the City's SEPA review procedures for the Project. On December 15, 2016, the City issued a "SEPA Determination of Significance, Notice of Adoption of Existing Environmental Documents and Availability of Addendum" for the Project. Newman Declaration, Ex. A ("First Notice of Adoption and Availability of Addendum").[2]

In the First Notice of Adoption and Availability of Addendum, the City concluded that:

> Pursuant to SMC 25.05.360, the Director of the [SDCI] has determined that the referenced proposals are likely to have probable significant adverse environmental impacts under the State Environmental Policy Act…on the land use, environmental health, energy, greenhouse gas emissions, esthetics (including height, bulk, scale, light, glare, shadows and viewshed), wind, historic resources, transportation circulation, parking and construction elements of the environment.
>
> [SDCI] has identified and adopts the City of Seattle's Final Environmental Impact Statement (FEIS) dated January 2005 (Downtown Height and Density Changes) [e.g., the DHDC FEIS]. **SDCI has determined that the proposal's impacts for this current Master Use Permit application have been adequately analyzed in the referenced FEIS. The FEIS was prepared by the City of Seattle. This FEIS meets SDCI's SEPA responsibilities and needs for the current proposals and will accompany the proposals to the decision-maker**.
>
> The Addendum has been prepared by the Applicant to add specific information on the land use, environmental health, energy, greenhouse gas emissions, esthetics (including height, bulk, scale, light, glare, shadows and viewshed), wind, historic resources, transportation circulation, parking and construction impacts from the proposals and discusses changes in the analysis in the referenced FEIS. **Pursuant to SMC 25.05.625-630, this addendum does not substantially change analysis of the significant impacts and alternatives in the FEIS.**

Id., pg. 1.

[2] Appellant misconstrues this document as only a "Determination of Significance." Motion, pg. 4. As discussed in Section III, Appellant's flawed legal arguments appear to spring from this fundamental misconception.

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On the same day, the City released the Addendum for the 5th and Virginia Development. ("First Addendum"). The First Addendum noted that DHDC FEIS analyzed the "impacts of increasing building height to 600 feet on the [Project] site and surrounding area." Newman Declaration, Ex. B, pg. 5. Given that prior programmatic review of height and density, the 613-page First Addendum provides additional site-specific information or analysis that does not substantially change the analysis of significant impacts and alternatives in the DHDC FEIS. *Id.*

The SEPA Regulations do not require a comment period for the adoption of an addendum. WAC 197-11-625. However, the Code contemplates an option for comments within fifteen days of the date of issuance of an addendum. SMC 25.05.625.F ("Any person, affected tribe, or agency may submit comments to the lead agency…") (emphasis added). The City provided a comment period running through December 29, 2016. Newman Declaration, Ex. A.

At the request of Appellant's counsel for an "additional 14 days" to comment on the addendum, the City later extend the comment period to January 12, 2017. *Id.*, Ex. H. Appellants and their counsel submitted numerous (and voluminous) comment letters on the First Addendum.

On March 21, 2017, the City requested that the Applicant complete a second addendum to respond to certain design review, view and shadow impacts and parking and traffic issues. Morrison Declaration, Ex. B (SDCI land use correction). The SEPA issues requested for additional evaluation by the City were primarily raised by the Appellant and its members. *See, e.g.*, Newman Declaration, Ex. D. Nonetheless, the Applicant complied with the City's request.

On July 3, 2017, the City issued a new "SEPA Determination of Significance, Notice of Adoption of Existing Environmental Documents and Availability of Addendum" for the Project. Newman Declaration, Ex. E. The City also made the Second Addendum for the Project available. *Id.; see also* Newman Declaration, Ex. F ("Second Addendum"). The Second Addendum

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supplanted the First Addendum. *Id.*, Preface. However, like in the First Addendum, the Second Addendum provided additional site-specific information or analysis – including the requested view and shadow and traffic and parking analysis – that does not substantially change the analysis of significant impacts and alternatives in the DHDC FEIS. *Id.*, Ex. F, pg. 5.

The City noted that the Second Addendum would also include a 14-day comment period. Newman Declaration, Ex. E. The Appellant's counsel and its members provided public comments on the Second Addendum. *Id.*, Ex. G. The City reviewed the public comments prior to preparing and issuing the MUP Decision for the Project on October 27, 2017. The MUP Decision included a SEPA determination the Project was within the "geographic area" analyzed by the DHDC FEIS and the "potential significant impacts from the project proposed here are within the range of significant impacts that were evaluated" in the DHDC FEIS. MUP Decision, pg. 25. Thus, the City adopted the DHDC FEIS for the Project. *Id.* It also found the Second Addendum added more project-specific information related to the Project's potential impacts. *Id.*

This appeal followed. Respondents now respond jointly to oppose Appellant's Motion.

III. ARGUMENT

A. Summary judgment standard.

"The standard of review of an order of summary judgment is de novo." *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). A summary judgment motion brought under CR 56 can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law." *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 253, 928 P.2d 1127 (1996).

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"The function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists." *Duckworth v. Bonney Lake,* 91 Wn.2d 19, 21, 586 P.2d 860 (1978)(citing *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 424-25, 367 P.2d 985 (1962)).

"Once the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a material issue of fact." *Dombrosky,* 84 Wn. App. 245 at 253 (citing *Seven Gables Corp. v. MGM/UA Entertainment Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

"Once the moving party has shown entitlement to summary judgment, the burden shifts to the nonmoving party to establish an issue of fact. However, if the moving party has failed in its burden to establish entitlement to judgment as a matter of law, summary judgment is denied, even if the nonmovant has not submitted evidence to the contrary." *Hiatt v. Walker Chevrolet Co*., 64 Wn. App. 95, 97-98, 822 P.2d 1235 (1992) (citing *Graves v. P.J. Taggares Co*., 94 Wn.2d 298, 302, 616 P.2d 1223 (1980)).

"The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. […] The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion." *Dombrosky* 84 Wn. App. 245 at 253.

A nonmoving party may be granted summary judgment if the court determines that there are no genuine issues of material fact and the nonmoving party is entitled to summary judgment as a matter of law. *See e.g., Impecoven v. Department of Revenue,* 120 Wn.2d 357, 365, 841 P.2d 752 (1992); *Washington Ass'n. of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 234, 660 P.2d 1124 (1983), citing *Rubenser v. Felice,* 58 Wn.2d 862, 365 P.2d 320 (1961).

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B. The standard of review is deferential to the City's SEPA determination.

To the extent the Motion's argument can be deduced, it appears to be a challenge to the adequacy of the EIS. The Code requires that the Director's decision made on a Type II Master Use Permit shall be given substantial weight, including on adequacy of an EIS. SMC 23.76.022.C.7. Both SEPA and the Code require the Hearing Examiner to give substantial weight to the Director's SEPA determination, including on the adequacy of an EIS . RCW 43.21.090; SMC 23.76.022.C.7. The burden is on the Appellant to overcome the deference that the Director's decision is given. *Brown v. Tacoma,* 30 Wn. App. 762, 764, 637 P.2d 1005 (1981).

The adequacy of an environmental impact statement is a question of law, reviewed de novo. Although review is de novo, the court shall give substantial weight to the agency's determination pursuant to RCW 43.21C.090. Courts examine the legal sufficiency of the data contained in an environmental impact statement under the "rule of reason" standard. In sum, the EIS must present decision makers with a reasonably thorough discussion of the significant aspects of the probable environmental consequences of an agency's decision. *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 498, 306 P.3d 1031 (2013).

C. The Appellant must demonstrate that the Project will have probable significant adverse environmental impacts.

As an initial matter, Appellant's Motion is built on a faulty premise in an attempt to shift its burden. Appellant claims that the City's SEPA review is inappropriate and an EIS must be prepared because the Project allegedly will have significant adverse environmental impacts.

Yet Appellant bears the burden of producing **affirmative evidence** of any such impacts. *See Boehm v. City of Vancouver*, 111 Wn. App. 711, 719-720 (2002); *Moss v. City of Bellingham,* 109 Wn. App. 6, 31 P.3d 703 (2001).

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In *Boehm,* the Court rejected a challenge to a mitigated determination of nonsignificance ("MDNS") for a gas station associated with a retail grocery store. The appellant in that case argued that the project would cause significant adverse impacts. The Court rejected this claim, stating: "[w]hen the Boehms complain of a failure to adequately identify or mitigate adverse impacts, they have produced no evidence that such impacts exist." Thus, *Boehm* held the claimed impacts to be speculative, and rejected the appellant's claim. 11 Wn. App. at 719-720.

Similarly, in *Moss,* the Court upheld the issuance of an MDNS for a 79-acre, 172-lot subdivision. The Court emphasized the specific burden of proof borne by the appellants, stating that "[A]lthough appellants complain generally that the impacts were not adequately analyzed, they have failed to cite to any facts or evidence in the record demonstrating that the project as mitigated will cause significant environmental impacts warranting an EIS." 109 Wn. App. at 23-24.

Boehm and *Moss* stand for the proposition that an appellant must present affirmative evidence demonstrating the existence of a probable significant adverse environmental impact. Mere complaints, or conclusory statements that a project *could* result in significant adverse environmental impacts, are insufficient to satisfy an appellant's burden of proof in a SEPA appeal as a matter of law. As discussed below in more detail, the Motion fails to meet its burden.

D. SEPA authorizes the use of existing environmental documents.

As a matter of law, SEPA authorizes lead agencies to use existing environmental documents to fulfill its SEPA responsibility. RCW 43.21C.034. SEPA does not demand the proposal evaluated under the existing document be identical to the current proposal under review. Instead, the "prior proposal" and the new proposal "need not be identical, but must have similar elements

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that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography." *Id.* Both the SEPA Regulations and Code provide:

> (4) Existing documents may be used for a proposal by employing one or more of the following methods:
>
> (a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document; or
> (b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.
> (c) An addendum, that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document.
> (d) Preparation of a SEIS if there are:
>
> (i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or
> (ii) New information indicating a proposal's probable significant adverse environmental impacts.
>
> (e) If a proposal is substantially similar to one covered in an existing EIS, that EIS may be adopted; additional information may be provided in an addendum or SEIS (see (c) and (d) of this subsection).

WAC 197-11-600; SMC 25.05.600.

Under the SEPA Regulations, the lead agency may use "all or part" of an adopted SEPA document to meet its responsibilities under SEPA. *Id.* In addition, an addendum or SEIS may be prepared. *Id.* An SEIS is required in a case where, either due to substantial changes or new information, a proposal is likely to result in significant adverse environmental impacts; otherwise, the use of an addendum is appropriate. *Id*. Critically, in order to argue for preparation of a SEIS (or new EIS) in a case where an addendum is utilized, the appellant must demonstrate the likelihood of new significant adverse impacts of the proposal.

As described above at Section II.C, the City since 2007 has consistently employed addendums (together with the adoption of the DHDC FEIS) to satisfy procedural SEPA requirements for Downtown projects. In no fewer than 12 representative cases the City has

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issued a "determination of significance, notice of adoption and notice of availability of addendum" in connection with a major Downtown project. Downtown. Waldman Declaration, ¶¶ 1-4. These cases include the City's future second tallest building at Rainier Tower, millions of additional square feet of office buildings all over Downtown and numerous high-rise residential towers totaling literally thousands of units in Belltown, the Denny Triangle and elsewhere Downtown. *Id.* Appellant tries to denigrate the City's process in this case as an "odd approach" to SEPA review; but in truth – a truth ignored by Appellant – the use of addendums to the DHDC FEIS is an established convention in Downtown. *Id.* Further, as will be demonstrated at hearing, the proposal's likely environmental impacts were comprehensively addressed through the adoption of the DHDC FEIS and the preparation of the Second Addendum. The Motion fails to provide any affirmative evidence that the DHDC FEIS is inadequate as it relates to the Project.

Appellant's argument to the contrary are without merit and the Motion must be denied.

E. Appellant's procedural arguments are merely an effort to avoid its burden of proof.

In arguing that the City's use of an addendum for the Project's SEPA review was somehow erroneous, it is Appellant's burden (as noted above) to demonstrate through evidentiary facts the likelihood of significant adverse impacts from the Project, not otherwise disclosed in the adopted EIS. *See* Section III.C, *infra.* Other than a passing argument at the very end of its brief (addressed at Section III.G, *supra*), Appellant completely ignores this burden.

Instead of presenting facts, Appellant attempts a tortured revision of the SEPA Regulations, trying to manufacture some procedural infirmity in the City process. As discussed below, Appellant's efforts fail. The City's process with the Addendum for the Project precisely followed the SEPA Regulations, just as the City had in a dozen of similar Downtown projects in the last decade. Appellant's strained reading of the SEPA Regulations does not alter that truth.

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In the end, these procedural arguments merely represent a tactic, an effort to distract from Appellant's fundamental burden and to prevail without evidence. The Hearing Examiner should reject the invitation; therefore, Respondents request that the Hearing Examiner deny the Motion.

F. The City properly employed the adoption and addendum process to satisfy the procedural SEPA requirements for the Project.

Contrary to the Appellant's allegations, the City's use of the adoption and addendum process was appropriate.

1. The City properly adopted the DHDC FEIS and published the Addendum.

WAC 197-11-630(3)(c) requires that when using the addendum process, the lead agency shall "include the statement of adoption with the addendum and circulate both" as required by law. On December 15, 2016, the City issued its SEPA Determination of Significance, Notice of Adoption of Existing Environmental Documents and Availability of Addendum. Newman Declaration, Ex. A. Six months later, following additional analysis in response to Appellant's comments, the City issued a new SEPA Determination of Significance, Notice of Adoption of Existing Environmental Documents and Availability of Addendum. Newman Declaration, Ex. E.

Appellant's argument – that a determination of significant necessarily requires preparation of an EIS – is based on a parsed reading of this City notice. Motion, pgs. 10-13. Appellant focuses only on the "Determination of Significance" in the title, ignoring the subsequent announcement of a corresponding "Notice of Adoption of Existing Environmental Documents and Availability of Addendum." Newman Declaration, Ex. A. This intentional omission leads Appellant to the faulty conclusion that the City should have undertaken the procedures for a new environmental impact statement in this case, simply because a "determination of significance" is included in this notice. In Appellant's narrow interpretation of the process, the City should have conducted a scoping process, an alternatives analysis and

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addressed all EIS elements in WAC 197-11-440 when conducting the SEPA review for the Project, even though the City relied on the DHDC FEIS for these procedural steps.

The Appellant conveniently ignores that the inclusion of the "determination of significance" is a mandatory part of the SEPA adoption process. Under WAC 197-11-360(2), the SEPA Regulations provide that "if an agency adopts another environmental document in support of a threshold determination (Part Six), the notice of adoption (WAC 197-11-965) and the DS shall **be combined or attached to each other**." (emphasis added). In short, the determination of significance for the Project is required to be included in the adoption notice because the DHDC FEIS is being adopted. But as noted below at Sections III.F.2-5, the inclusion of the determination of significance does not require the lead agency to invoke all the procedural requirements of an EIS. This would be contrary to the Legislature's creation of the adoption process to allow a lead agency to use another environmental document (including an EIS) to satisfy its SEPA obligations. WAC 197-11-600(4)(a). Thus, Appellant's argument regarding a determination of significance, to the extent it can be understood, is nonsensical under SEPA.

Appellant's argument cannot be squared with the Legislature's intent for use of existing documents. RCW 43.21C.034. In essence, Appellant is arguing that the City's decision to rely on an existing EIS somehow required it to prepare a new EIS. This is contrary to the letter and spirit of the SEPA regulations. Washington courts have recognized that the SEPA statute and rules encourage and facilitate reusing existing environmental documents to avoid "wasteful duplication of environmental analysis and to reduce delay," *Thorton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 50, 52 P.3d 522 (2002), *as amended on denial of reconsideration* (2002); *see also* RCW 43.21C.034. Furthermore, Appellant's argument is contrary to the stated intent of the DHDC FEIS which contemplated the use of this document for

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project-specific reviews to "increase efficiency of environmental review and expedite the permitting process." Newman Declaration, Ex. C, pg. ii. Appellant's claim here is without merit.

Accordingly, the Hearing Examiner should deny the Motion.

2. An alternatives analysis is not required in the adoption and addendum process.

Appellant claims that the City was required to present and study alternatives. Motion, pgs. 10-11. Appellant is wrong. WAC 197-11-440(5) requires the lead agency, when preparing a new EIS, to include a discussion of reasonable alternatives, including the no-action alternative. Other than a requirement to include the no-action alternative, the SEPA Regulations do not specify a number of alternatives to be included in an EIS for review, and courts have held an EIS to be adequate when it included *no* alternatives other than the no-action alternative. *Coalition for a Sustainable 520 v. U.S. Dep't of Transportation*, 881 F. Supp. 2d 1242, 1258-60 (2012); *Citizens All. to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 894 P.2d 1300 (1995).

As noted above in Section III.C, a lead agency may rely on an adopted environmental document for all its procedural requirements under SEPA. The provisions in WAC 197-11-440 addressing alternatives are no different than other portions of that regulation: all are elements of an EIS and all may be satisfied by an adopted environmental document. In this case, the City adopted the 2005 DHDC FEIS to satisfy these SEPA procedural requirements.

Indeed, the SEPA Regulations speak directly to the extent to which an addendum may address the alternatives analysis in the adopted environmental document – and Appellant neglects to bring this clear direction to the attention of the Hearing Examiner. WAC 197-11-600(4)(c) provides that an addendum "adds analyses or information about a proposal" but may not "substantially change the analysis of significant impacts and alternatives in the existing environmental document." Thus, the SEPA Regulations preclude the use of an addendum to

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undertake a new alternatives analysis, such as that proposed by Appellant. As the City's notice indicates: "Pursuant to SMC 25.05.625-630, this current Addendum does not substantially change analysis of the significant impacts and alternatives in the FEIS." Newman Declaration, Ex. A; E. Appellant's claim that the City was required to complete an alternative analysis fails.

3. An addendum is not required to include EIS elements per WAC 197-11-440.

Appellant next claims that the Addendum should have included various components of an EIS identified in WAC 197-11-440, such as a summary, a description of the proposal and alternatives; a description of the affected environment, and a disclosure and analysis of the significant impacts and mitigation measures. Motion, pg. 8. Appellant misunderstands SEPA.

When an environmental document is adopted under WAC 197-11-600(4)(a), the lead agency may "use all or part of an existing environmental document to meet its responsibilities under SEPA." In this case, the City adopted the 2005 DHDC FEIS, determining that this document "meets SDCI's SEPA responsibilities and needs for the current proposal." Newman Declaration Ex. E (Second Notice of Adoption and Availability of Addendum). While the City properly used the Addendum for the Project to "add analyses or information about a proposal," WAC 197-11-600(4)(c), there is no legal SEPA authority to require, as Appellant suggests, to treat the Addendum as a new EIS and elaborate on all the provisions of WAC 197-11-440. Indeed, Appellant's suggested approach is contrary to the SEPA regulations, which expressly allow the lead agency to use an existing document to satisfy its responsibilities under SEPA.

4. Scoping is not required when the adoption and addendum process is used.

Appellant next contends that the City should have implemented a scoping process under WAC 197-11-408 for the Addendum. For this proposition, Appellant cites no authority other than the scoping provisions applicable to a new EIS, and Appellant conveniently ignores the

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express direction of the SEPA Regulations in this case. WAC 197-11-360(3) clearly provides that: "The lead agency is **not required to scope** if the agency is adopting another environmental document for the EIS or is preparing a supplemental EIS." (emphasis added).

Here, it is undisputed that the City adopted the DHDC FEIS. Newman Declaration, Ex. E. Therefore, scoping is not required here.

5. A comment period is not required in the adoption and addendum process.

Next, the Appellant complains generally about lack of opportunity to provide comments through the process. Motion, pgs. 15-16. Appellant asserts, without citation to authority, that the comment procedures provided for an environmental impact statement should apply. *Id.*, pgs. 8-9. But Appellant's argument lacks merit because the facts are clear that the Appellant and its members submitted numerous comments, both in response to both the First and Second Addendum and with respect to the Project generally. *See* Newman Declaration, Ex. D and G.

Appellant's argument also fails for the same reasons as its DS-based argument. The SEPA Regulations themselves provide for an extensive array of commenting requirements. *See, e.g.*, WAC 197-11-500 (Commenting provisions); WAC 197-11-340(2)(c) (Commenting opportunities are required for certain DNS); WAC 197-11-408 (EIS scoping process); WAC 197-11-455 (Draft EIS commenting), among other things. Taken together, it is clear that when the SEPA Regulations call for a public comment process, they are quite explicit in doing so.

Notably absent from those SEPA Regulation processes that require a comment period is the addendum. Under WAC 197-11-625, an addendum must be circulated to certain parties, but the regulations do not require public comment. Appellant's failure to cite any SEPA authority for this proposition is therefore not surprising. Appellant's attempt to conflate City's adoption and addendum processes to the EIS process for purposes of the commenting requirements falls flat.

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It is the Code that authorizes public comment periods for an addendum. SMC 25.05.625.F. As required by Code, the City went to great lengths to solicit public comments on the Addendum for the Project. As the Appellant notes, a comment period was provided on the First Addendum and then extended by an additional two weeks at the request of Appellant. Newman Declaration, Ex. H. In July 2017, the City provided another public comment period on the Second Addendum for the Project. Apparently, these opportunities for public comment were effective, since they elicited no fewer than 300 comment letters from Appellant and its members.

The City met its obligations with respect to public comment for the Addendum for the Project. Accordingly, Appellant's comment argument fails, and the Motion should be denied.

G. The City's use of existing documents for Project complied with SEPA Regulations.

Appellant argues that the City's use of existing documents to conduct SEPA review for the Project goes beyond SEPA's authorization for such use and adoption because it alleges that the timing, type of impacts, alternatives and geography of the DHDC FEIS and the Addendum for the Project are different. Motion, pg. 17-21. Appellant's argument is inconsistent with SEPA.

As an initial matter, SEPA does not demand that the proposal evaluated under the existing document be identical to the current proposal under review. RCW 43.21C.034. Instead, the "prior proposal" and the new proposal "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." *Id.* The SEPA Regulations reiterate that authorization, stating "proposals may be the same as, **or different than**, **those analyzed in the existing documents**." WAC 197-11-600(2)(emphasis added); *see also* SMC 25.05.600.B. Appellant's attempt to narrow the eligibility for projects to use existing environmental documents must fail.

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Viewed through the SEPA Regulations, Appellant's argument attempting to contrast the DHDC FEIS with the Project are also all without merit. With regards to geography, the Project is within the boundaries of the study area of the DHDC FEIS. Newman Declaration, Ex. C, Figure 1, pg. 1-2. On timing, the DHDC FEIS evaluated commercial and residential growth over a 20-year planning horizon, meaning growth through 2020. *Id.,* pg. 4-4. The Project falls within the planning horizon evaluated by the DHDC FEIS. On type of impacts and alternatives, the DHDC FEIS evaluated a variety of alternatives for commercial and residential heights and densities within the DOC-2 zone – including the Property – as well as the potential impacts to land use, height, bulk and scale and transportation of the various alternatives. *Id.,* Chps.1-4. There is no merit to Appellant's attempt to assert (without factual basis) some purported dissimilarities here.

As is contemplated by SEPA, the City recognized that project-specific analysis or information was appropriate for the Project, but that such information would not change the analysis of significant impacts and alternatives in the DHDC FEIS. Newman Declaration, Ex. A. Therefore, the City prepared the Addendum for the Project to evaluate those project-specific impacts, including land use, height, bulk and scale and transportation impacts. *Id.,* Ex. C. The City's procedures for the Project are squarely within the SEPA Regulations for use of existing documents. WAC 197-11-600. Accordingly, Appellant's argument to the contrary is meritless.

Appellant's argument also cannot be squared with judicial recognition that SEPA and its rules encourage and facilitate reusing existing environmental documents to avoid "wasteful duplication of environmental analysis and to reduce delay…" *Thorton Creek Legal Defense Fund*, 113 Wn. App. at 50. The City has long used these SEPA adoption and addendum procedures in Downtown (and in other area) to promote efficiency. Waldman Declaration,¶¶ 1-5. Appellant's argument turns SEPA's clear mandate against unnecessary duplication on its head.

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H. Appellant has not met its burden to demonstrate significant adverse impacts from the Project.

As noted above in Section III.C, Appellant's fundamental burden in this case is to adduce material evidence of probable significant adverse impacts of the Project resulting from new information or substantial changes, in order to argue that the use of the addendum process was improper. Appellant utterly fails to do so, its only effort being an article from the Seattle Times noting the extent of growth in Seattle. Newman Declaration, Ex. K. Beyond that, Appellant merely notes that many changes have occurred since the publication of the DHDC FEIS. Despite the lack of factual evidence, Appellant argues that, at a minimum, a supplemental environmental impact statement ("SEIS") was required for the Project. Motion, pgs. 19-21.

None of this litany, however, identifies any specific adverse environmental impact likely to result from the Project. Appellant complains about additional traffic, but presents no transportation analysis to attempt to demonstrate significant adverse impacts. Appellant notes there are many more residents and residential units downtown, and additional towers in the area, but fails to provide evidence why these facts lead to the probability of significant adverse impacts. Appellant asserts that the assumptions in the 2005 Downtown EIS are "outdated and completely inaccurate," but this assertion is bereft of any factual support or explanation – or connection to significant adverse environmental impacts.

It is no mystery how SEPA impacts are characterized and evaluated. Over the past nearly 50 years, lead agencies have carefully developed methodologies, laid out in EIS's and other environmental documents, to assess these impacts. Transportation engineers can characterize traffic impacts. Noise standards are used to evaluate noise impacts. Elaborate water quality and stormwater regulations allow assessment of those impacts. Appellant presents no such facts here.

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Lastly, Appellant argues that the DHDC FEIS "never contemplated" that "this level of development" would occur on the block containing the Project, therefore, a SEIS is warranted. Motion, pg. 20. Appellant misunderstands the scope of a programmatic, non-project EIS.

The City studied the potential impacts of same amount of increased growth across all alternatives; it evaluated the impacts of various different height and density scenarios within that growth assumption. Newman Declaration, Ex. C, pg. 2-8. The DHDC FEIS, therefore, included a Preferred Alternative "Assumed Project on a Site Likely to Be Redeveloped" analysis. Newman Declaration, Ex. C, Appdx. D. The Property block was identified on the Assumed Project list. *Id.*

Appellant's argument, however, fails because the Assumed Project list was a programmatic-level planning evaluation tool, not a prescriptive list of where and how sites must be redeveloped. Like the rest of the DHDC FEIS, the Assumed Project list was to provide substantive analysis of impact implications "at a programmatic level of detail." *Id,* Ex. C., pg. ii.

The Assumed Project list did not prescribe or limit development within Downtown. For example, at least seven of the Downtown projects where the City utilized the adoption and addendum process were not identified on the Assumed Project list. Waldman Declaration, ¶ 1-2.

While the Project's program differs from what was assumed in the DHDC FEIS Assumed Project list, the Addendum for the Project evaluated the project-specific information – including urban design, height, bulk and scale, land use and transportation. Newman Declaration, Ex. F, Section II. Simply put, Appellant's argument here is another unavailing attempt to distract the Hearing Examiner from the fundamental issue – can Appellant demonstrate new significant adverse environmental impacts? As shown in this Response, the Appellant has failed to do so.

Unsupported allegations and reliance on local media stories do not meet this test. Appellant offers nothing in the way of proof or evidence of impacts, just fiction. Appellant's

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conclusory statements and speculative assertions do not meet the SEPA Regulations requirements for the preparation of an SEIS. WAC 197-11-660. Accordingly, to the extent that Appellant's Motion is based on an alternative argument alleging the City's SEPA review was improper for failing to prepare a SEIS, the Hearing Examiner should deny Appellant's Motion.

IV. CONCLUSION

For these reasons, Appellant has failed to meet their burden under SEPA to demonstrate judgment as a matter of law. Therefore, Respondents respectfully request that the Hearing Examiner deny the Motion.

DATED this 12th day of January, 2018.

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