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'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Upon review of the response brief, it is clear that Summary Judgment in favor of Escala on the issues presented is warranted. The arguments presented by Respondents Jodi Patterson O'Hare (the Applicant) and the Seattle Department of Construction and Inspections (SDCI) in their Joint Response to Appellant's Motion for Summary Judgment fail to successfully rebut the claims in the motion. Adopting an existing EIS does not automatically excuse SDCI from its duties and obligations under SEPA for review of the 5th and Virginia Proposal. SDCI has certain obligations and it can rely on existing documents only if and when those existing documents fulfill those obligations. In this case, SDCI cannot rely on the 2005 FEIS because the 2005 FEIS is not adequate in terms of both process and content to be substituted as an EIS for the 5th and Virginia Proposal.

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Because the proponent of the 5th and Virginia Proposal is identified as Douglaston Development in the Addendum for the Proposal, we refer to Respondents collectively throughout this brief as "Douglaston."

II. ARGUMENT

A. Standard of Review

As Douglaston stated in its response brief, the issues presented in Escala's motion constitute a challenge to the adequacy of the EIS for the 5th and Virginia Proposal. The adequacy of an EIS is a question of law subject to de novo review. *Weyerhaeuser v. Pierce Cty*., 124 Wash. 2d 26, 37–38, 873 P.2d 498, 504 (1994). EIS adequacy involves the legal sufficiency of the data in the EIS. *Id*. Adequacy is assessed under the "rule of reason," which requires a reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the agency's decision. *Id*. The court will give the agency determination substantial weight. *Id. citing* RCW 43.21C.090.

B. Escala Is Not Required to Demonstrate that the 5th and Virginia Proposal Will Have Probable Significant Adverse Environmental Impacts for Purposes of its Motion for Summary Judgment.

In its Response Brief, Douglaston argues that Escala must demonstrate that the 5th and Virginia Proposal will have significant adverse environmental impacts to support an argument that an EIS is required for the Proposal. Respondents' Joint Response to Appellant's Motion for Summary Judgment (Jan. 12, 2018) (hereinafter "Joint Response") at 13-14 *citing Boehm v. City of Vancouver*, 111 Wn. App. 711, 714, 47 P.3d 137 (2002); *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001). This argument is flat out incorrect and is completely off the mark. SDCI already determined that the project will have significant adverse environmental impacts and SDCI already determined that an EIS is required for the proposal. Douglaston either (1) misunderstands the issues

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that are presented in Escala's motion for summary judgment or (2) understand the issues and is purposefully trying to create confusion around them.

Before addressing the argument, it's important to provide a little context about how the threshold determination process works. As a starting point, SEPA requires that the City of Seattle prepare an EIS for all major actions having a probable significant adverse environmental impact. RCW 43.21C.030. Upon receiving an application for development, SDCI must begin with a threshold determination. RCW 43.21C.033; WAC 197-11-310. All threshold determinations must be documented in either a determination of non-significance (DNS/MDNS) or a determination of significance (DS). *Moss v. City of Bellingham*, 109 Wn. App. at 14. If the responsible official's threshold determination is that there will be no probable significant adverse environmental impacts from a proposal, the lead agency shall prepare and issue a DNS, WAC 197-11-340, or a mitigated DNS, WAC 197-11-350. *Id*. If the responsible official determines that a proposal may have a probable significant adverse environmental impact, the responsible official shall prepare and issue a determination of significance (DS). WAC 197-11-360. "A DS mandates the preparation of a full EIS." *Moss v. City of Bellingham*, 109 Wn. App. at 14.

Oftentimes, appellants who are seeking the preparation of an EIS will challenge the issuance of a DNS on the grounds that the proposal may have significant adverse environmental impacts. There is a well-established proposition of law regarding these types of claims: In order to prove that a determination of non-significance (DNS) was issued in error, plaintiffs/appellants must provide evidence to show that the project at issue may have probable significant adverse impacts. *See Boehm v. City of Vancouver*, 111 Wn. App at 715-719; Moss *v. City of Bellingham*, 109 Wn. App. at 23-24.

Relying on that proposition of law and relying specifically on *Boehm* and *Moss*, Douglaston argues that Escala must demonstrate that the 5th and Virginia Proposal will have significant adverse

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environmental impacts to prove that an EIS is required for that Proposal. Joint Response at 12-13. But that legal issue is not remotely relevant or applicable to the issues presented in Escala's motion. The City of Seattle did not issue a DNS for the 5th and Virginia Proposal – it issued a Determination of Significance for the Proposal. Newman Declaration, Ex. A. Escala's motion for summary judgment is not challenging a DNS. *Boehm* and *Moss* do not apply.

In fact, Douglaston's reliance on *Boehm* and *Moss* is proven to be off the mark by a separate section of its own response brief. Elsewhere in the response, Douglaston recognizes that Escala's motion is not challenging a DNS – this is a challenge to the adequacy of the EIS. *See* Joint Response at 12. (The standard of review for EIS adequacy is *de novo* review). Therefore, Douglaston contradicts itself – on the one hand it argues that *Boehm* and *Moss* apply here, while, on the other hand, Douglaston implicitly admits that they don't.

As should be obvious, it is nonsensical to suggest that Escala must demonstrate that the 5th and Virginia Proposal will have significant adverse environmental impacts when the Director of SDCI already determined that the 5th and Virginia Proposal will have significant adverse environmental impacts. In its Determination of Significance, SDCI stated:

> 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, aesthetics (including height, bulk, scale, light, glare, shadows and viewshed), wind, historic resources, transportation circulation, parking and construction elements of the environment.

Newman Dec., Ex. A at 1 (emphasis supplied). With this, SDCI concluded, as a matter of fact and law, that the project will have significant adverse environmental impacts and, therefore, an EIS is

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required.[1] With respect to the narrow issues that are presented in Escala's motion for summary judgment, Escala is not required to demonstrate that the 5th and Virginia Proposal will have significant adverse environmental impacts.

C. Escala Will Be Required to Present Concrete Evidence at the Hearing to Show that the Project Will Have Probable Significant Adverse Impacts that Have Not Been Adequately Addressed in the FEIS/Addendum at the Upcoming Hearing.

Escala recognizes that it will be required to provide concrete evidence to demonstrate that certain significant adverse impacts caused by the 5th and Virginia Proposal were not adequately assessed in the 2005 EIS/Addendum at the upcoming hearing. The argument above should not be interpreted to suggest otherwise. But that evidence is not required to prove the narrow issues that are presented in Escala's motion for summary judgment.

Out of all of the issues presented in Escala's Notice of Appeal, Escala's motion for summary judgment presents only a few narrow issues. The majority of the issues in the Notice of Appeal are not appropriate for summary judgment and are, therefore, reserved for the open record hearing so that evidence and testimony can be presented on those issues. For example, Escala's appeal asserts, among many other things, that probable significant adverse impacts related to air quality, traffic and transportation, construction, public facilities (the alley), height/bulk/scale, noise, parking, environmental and human health, land use, privacy, lack of daylight, and safety were not adequately disclosed, analyzed, or mitigated in the Addendum or in the FEIS. *See* Notice of Appeal (Nov. 9, 2018). This is a completely different legal issue than the issue that was addressed in *Boehm* and *Moss*

[1] It is not clear what Douglaston means when it asserts that Escala "misconstrued" the notice document as "only" a determination of significance. *See* Joint Response at 8, footnote 2. In one document, the City provided notice of three different distinct items: (1) notice of the determination of significance, (2) notice of the adoption of the 2005 FEIS, and (3) notice of the availability of the Addendum. *Id*. The mere fact that the City provided notice of the determination of significance at the same time that it provided notice of adoption of the existing environmental document and availability of the addendum does not change the fact that the City issued a determination of significance for the 5th and Virginia proposal.

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– it is about the adequacy of the EIS analysis of specific significant impacts. This issue, amongst many others in the appeal, will be presented at the upcoming hearing if the motion for summary judgment is denied. Obviously, Escala recognizes that it will be required to present concrete evidence at the hearing to support these claims.

The issues that are presented in the motion for summary judgment are narrow legal issues based on undisputed facts. Those issues revolve around the central premise that by relying on the Final Environmental Impact Statement for Downtown Height and Density Changes (January, 2005) (hereinafter the "2005 FEIS") and preparing an Addendum, SDCI violated the process that is required by SEPA for environmental review of the 5th and Virginia Proposal. SDCI must follow the rules for proper scoping, the Draft EIS (or Supplemental EIS), comments on the DEIS, and then issuance of the final EIS for the 5th and Virginia Proposal. To prove that an SEIS is required, Escala must show evidence of substantial changes and/or new information that is relevant to the consideration of and analysis of impacts.

The issue of whether the Project will have probable significant adverse impacts that haven't been adequately addressed in the FEIS/Addendum is not presented in the motion and is not appropriate for summary judgment.

D. SDCI Did Not Follow the Process that is Required by SEPA for Environmental Review of the 5th and Virginia Proposal

Contrary to what Douglaston suggests in its response, adopting an existing EIS does not automatically excuse SDCI from its duties and obligations under SEPA for the 5th and Virginia Proposal. A lead agency has specific legal obligations under SEPA and it may (or may not) be able to adopt existing documents to meet those obligations. The first step is to determine what the City's duties and obligations are under SEPA and then, if it chooses to rely on existing documents, the second

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step is to determine the extent that the existing documents can be relied on to meet those duties and obligations.

The first step is easy. No matter how you slice it – "A DS mandates the preparation of a full EIS." *Moss v. City of Bellingham*, 109 Wn. App. at 14. When a DS is issued, the City must prepare an EIS. Therefore, in this case, because a DS was issued for the 5th and Virginia Proposal, SDCI is required to prepare an EIS ***for the 5th and Virginia Proposal***. SDCI can adopt existing SEPA documents to carry this duty out under SEPA, but SDCI has to follow all of the requirements associated with an EIS for the 5th and Virginia Proposal. The City must conduct a scoping process, an alternatives analysis, and addressed all EIS elements in WAC 197-11-440 ***for the 5th and Virginia Proposal.*** That is the legal obligation of SDCI. That is our starting point.

The next question is whether existing documents can be relied on to carry out that legal obligation and duty. Specifically, here – Douglaston argues that the 2005 FEIS fulfills the duties and obligations for content and process required by SEPA rules for the 5th and Virginia Proposal. But that is not true. The City did go through a scoping process, it did assess alternatives, it did allow for a proper comment period, and it did respond to public comments in the Downtown Height and Density Changes in the 2005 FEIS, but for the reasons explained in Escala's motion for summary judgment that did not fulfill the obligations for scoping, comments, alternatives, and other duties for the 5th and Virginia Proposal.

The Legislature may have sought efficiency by allowing a lead agency to rely on existing documents, but they certainly did not intend for the lead agency to manipulate that process to avoid its SEPA obligations. *See* RCW 43.21C.034; WAC 197-11-600(4)(a). Lead agencies are authorized to use existing environmental documents for a new project ***only*** "if the documents adequately address environmental considerations set forth in RCW 43.21C.030." RCW 43.21C.034. RCW 43.21C.030

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is the broad mandate that requires preparation of an EIS, including scoping, alternatives, and everything else. Therefore, when an existing document does not meet that mandate, it cannot be used. Considering how critical public involvement is in SEPA and in light of the language RCW 43.21C.034, the rules on allowing the use of existing documents cannot possibly be construed to allow members of the public to be completely shut out of an opportunity to have meaningful input on the alternatives analysis process or other meaningful involvement for the 5th and Virginia Proposal.

1. SDCI did not present, describe or analyze the impacts of alternatives to the 5th and Virginia Proposal.

As was explained in detail in Escala's Motion for Summary Judgement, SDCI did not conduct an alternatives analysis for the 5th and Virginia Proposal. *See* Escala Owner Association's Motion for Summary Judgment (Jan. 5, 2018) at 10-13. None of the environmental documents evaluated the environmental impacts of a no-action alternative, much less described what a no-action alternative would even look like. *Id.*

Douglaston implicitly admits that SDCI did not present, discuss, or analyze alternatives, including a no-build alternative, to the 5th and Virginia Proposal. Douglaston instead points out that WAC 197-11-600(4)(c) provides that an addendum "adds analysis or information about a proposal" but may not "substantially change the analysis of significant impacts and alternatives in the existing environmental document." With this, Douglaston argues that the SEPA regulations preclude the use of an addendum to undertake a new alternatives analysis for the 5th and Virginia Proposal. Joint Response at 18. To the extent that is true, that proves Escala's entire point. Because it issued a DS for the 5th and Virginia Proposal, SDCI is legally obligated to conduct an alternatives analysis for the 5th and Virginia Proposal. WAC 197-11-440(5). That is our starting point. If an Addendum cannot be

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used for that purpose, Douglaston is here admitting that an Addendum was not the proper vehicle for SDCI to use to meet its obligation to conduct an alternatives analysis under SEPA.

In its response brief, Douglaston states: "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." Joint Response at 18, *citing Coalition for a Sustainable 520 v. U.S. Department of Transportation*, 881 F.Supp.2d 1243, 1258-60 (2012); *Citizens All to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 894 P.2d 1300 (1995). But that doesn't help Douglaston's position at all because SDCI did not even present, describe, or analyze the impacts of a "no-action" alternative for the 5th and Virginia Proposal. SDCI violated even this basic minimum requirement.

Furthermore, the cases cited do not support Douglaston's implication that SDCI is not legally obligated to consider alternatives other than the proposal and the "no action" alternative. It's worth noting that *Coalition for a Sustainable 520* applied the National Environmental Policy Act (NEPA), not SEPA. But, NEPA cases can indeed be instructive in SEPA cases. In that case, the agency's analysis of alternatives for the 520 bridge was extensive. After a broad range of alternatives were initially considered, the Draft EIS compared four alternatives for the new 520 bridge: a "no-build" option, a four lane option, a six lane option and an eight lane option. *Coalition for a Sustainable 520 v. U.S. Department of Transportation*, 881 F.Supp.2d at 1248. The eight lane option was dropped during the DEIS process, but the DEIS compared the other three alternatives in detail. *Id*. That court spent quite some time emphasizing the importance of the alternatives analysis. *Id*. This included a statement that the agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." Id. at 1256. Ultimately, the court ruled that a final EIS

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that contained just the "no build" option and the "4 lane option," was acceptable because the Department of Transportation had previously "rigorously explored and evaluated all reasonable alternatives." *Id*. at 1257.

In *Citizens All to Protect Our Wetlands v. City of Auburn*, a similar theme emerged. The FEIS considered both on-site and off-site alternatives. The on-site alternatives included the proposal and the no-build option, but the FEIS also examined three off-site alternatives for a proposed racetrack within the City of Auburn: Auburn Downs, the Hendley or Riverbend Site, and the Glacier park site. *Citizens All to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d at 367. In addition, the court's conclusions about the alternatives analysis overall were based on the fact that the City had analyzed other alternatives and had demonstrated with evidence that no reasonable, feasible alternatives existed.

The SEPA Rules indicate that reasonable alternatives are those that could "feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-440(5)(b). SDCI has not presented, described, or analyzed any alternatives to the 5th and Virginia Proposal at all – not even a no-build alternative. The 2005 FEIS does not satisfy the SEPA procedural requirements for an alternatives analysis for the 5th and Virginia Proposal.

2. The environmental documents did not include certain information required by WAC 197-11-440 for the 5th and Virginia Proposal

As was established in Escala's Motion for Summary Judgment, the 2005 FEIS and Addendum doesn't include certain information about the 5th and Virginia Proposal that is required in WAC 197-11-440. *See* Escala Motion at 13-14.

Douglaston implicitly admits that the Addendum is indeed missing the information set forth in Escala's motion but argues instead that when an agency adopts an existing document under WAC

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197-11-600, the agency is automatically allowed to adopt an Addendum and is not required to treat that Addendum as a new EIS and, thus, is not required to include all of the information that is required by WAC 197-11-440 in the Addendum. Joint Response at 19.

But, as was explained above, adopting an existing EIS does not automatically excuse SDCI from its duties and obligations under SEPA for the 5th and Virginia Proposal. A DS was issued for the 5th and Virginia Proposal. Based on that, SDCI has a legal obligation under SEPA to prepare an EIS that contains all of the information required in WAC 197-11-400. SDCI may be allowed to adopt an existing document to meet that obligation, but the existing document must meet that requirement. Here, the 2005 FEIS does not contain all of the information required in WAC 197-11-440 for the 5th and Virginia Proposal. SDCI has not met its legal obligations under SEPA.

3. SDCI did not initiate a scoping process and scoping comment period as required by WAC 197-11-408 for the 5th and Virginia Proposal.

Members of the public and interested agencies had no opportunity to provide input on the scope of issues to be analyzed in an EIS for the 5th and Virginia Project. Douglaston implicitly admits that the only scoping process that occurred was scoping for the Downtown Height and Density Changes, not for the 5th and Virginia Proposal.

Douglaston points out that WAC 197-11-360(3) 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." *See* Joint Response at 20. This is true, but, Douglaston overlooks the fact that Escala is arguing that it was improper for SDCI to adopt the outdated 2005 FEIS in the first place. *See* Motion For Summary Judgment at 17-20. RCW 43.21C.034 and WAC 197-11-360 both place limits on the City's ability to rely on an existing document. Upon review of those provisions, it is clear that

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the limitations set forth have not been met and it is improper for SDCI to rely on the 2005 FEIS for environmental review of the 5th and Virginia Proposal. *Id*.

It's important to keep in mind, WAC 197-11-360(3), which forgoes the scoping process if an existing EIS is adopted, assumes that the other SEPA rules and regulations are being followed. Here, other SEPA rules and regulations are not being followed. Lead agencies are authorized to use in whole or in part existing environmental documents for new project or non-project actions, only if the documents adequately address environmental considerations set forth in RCW 43.21C.030. The 2005 FEIS does not adequately address the requirements of RCW 43.21C.030 for the 5th and Virginia Proposal. An existing EIS may be adopted only for a proposal that has similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography per RCW 43.21C.034. Again, not the case here.

If SDCI is allowed to rely on the 2005 FEIS for its SEPA review of the 5th and Virginia Proposal despite the limitations on doing so in those provisions, SDCI must, at the very least, prepare a Supplemental EIS instead of an Addendum. *See* Motion for Summary Judgment at 17-20. If that is the outcome, Escala agrees that scoping would not be required per WAC 197-11-360(3). However, looking at the practical application of that and how that would effectively preclude members of the public from a meaningful opportunity to provide input on scoping for the 5th and Virginia Proposal, this is further proof that relying on the 2005 FEIS in the first place violates the limitations in RCW 43.21C.034.

4. SDCI violated the SEPA requirements for public input and comment on the 5th and Virginia Proposal

Douglaston implicitly admits that SDCI violated the requirement that the public comment period be a minimum of 30 days with extensions of up to 45 days in WAC 197-11-455, but argues

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that appellant's argument lacks merit because the facts are clear that Escala and its members submitted numerous comments, both in response to both the first and second addendum and with respect to the Project generally. Joint Response at 20. Whether or not people submitted comments during an improperly short comment period is irrelevant. And, even if it is relevant, every day in a comment period matters when members of the public are scrambling to collect copies of and review the documents and doing their best to put together meaningful comments on those documents.

Douglaston states: "Notably absent from those SEPA regulation processes that require a comment period is the addendum. An addendum does not require a public comment period." Joint Response at 20. Once again, Douglaston has made an argument that proves Escala's entire point. Because it issued a DS for the 5th and Virginia Proposal, SDCI is legally obligated to circulate a Draft EIS, allow comments on that Draft, and then respond to those comments in an FEIS for the 5th and Virginia Proposal. WAC 197-11-440(5). Douglaston is here admitting that an Addendum does not require a comment period at all. Therefore, it is clearly not the proper vehicle for SDCI to use to meet its obligation for a public comment period under SEPA for the 5th and Virginia Proposal.

Moreover, because they followed the rules for an Addendum, the public was not given the opportunity to require a public hearing on the environmental impacts of the 5th and Virginia Proposal pursuant to WAC 197-11-535. Because they followed the rules for an Addendum, SDCI did not revise a DEIS as appropriate and respond to comments on impacts, alternatives, and mitigation specific to the 5th and Virginia Project per WAC 197-11-560 in a Final EIS. *Id*.

The City may have followed the comment requirements for an Addendum, but that is not the basis for considering what SDCI was required to do. The City was required to follow requirements for a proposal that received a Determination of Significance and SDCI did not follow those requirements.

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E. SDCI Cannot Rely on the 2005 FEIS for its Environmental Review of the 5th and Virginia Proposal.

State law does not allow SDCI to rely on the 2005 FEIS for its environmental review of the 5th Virginia Proposal for three separate reasons. SEPA states:

> Lead agencies are authorized to use in whole or in part existing environmental documents for new project or non-project 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.

First, SDCI cannot rely on the 2005 FEIS because the 2005 FEIS is not an adequate document in terms of both process and content to be substituted as an EIS for the 5th and Virginia Proposal. The first line of the quoted language above states that lead agencies are authorized to use in whole or in part existing environmental documents for new project or non-project actions only if the documents adequately address environmental considerations set forth in RCW 43.21C.030. RCW 43.21C.030 is the heart of SEPA – this provision contains the requirement that for all major actions significantly affecting the quality of the environment, a lead agency must prepare an environmental impact statement that assesses the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action. This provision triggers all of the SEPA rules related to the process for scoping, preparing a Draft EIS, commenting, and preparing a Final EIS. Based on this provision, SDCI cannot rely on the

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2005 FEIS because the 2005 FEIS is not an adequate document in terms of both process and content to be substituted as an EIS for the 5th and Virginia Proposal.

Second, the 5th and Virginia Proposal does not have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography. Douglaston argues that, with regards to geography, the project is within the boundaries of the study area of the 2005 FEIS. Joint Response at 22. But, the 2005 FEIS study area is enormous: it is the area generally bounded by Denny Way, Interstate 5, Yesler Way, Alaskan Way as well as Lenora Street and 5th Avenue. Newman Dec., Ex. C at pg. 1-2 and pg. 2-6. The 5th and Virginia Proposal, in contrast, is a site-specific proposal on a site that is approximately 16,200 sq. feet. Newman Dec., Ex. A at pg.'s 1-3. The nature and relative arrangement of places and physical features to be considered between these two completely different geographical perspectives are not similar at all. The 5th and Virginia Proposal raises site-specific issues associated with alley impacts, immediate traffic impacts, privacy impacts to the Escala residents, construction impacts, lack of sunlight impacts to the Escala residents, noise impacts, environmental health impacts, and much, much more. *See* Newman Dec., Ex. D. The location and specific size of the 5th and Virginia Proposal does not have similar elements to the study area in the 2005 FEIS.

Douglaston argues that with respect to timing, the 2005 FEIS evaluated commercial and residential growth over a 20-year planning horizon, meaning growth through 2020 and the project falls within that planning horizon. Joint Response at 22. A "planning horizon" is hardly a basis against which to judge whether the 5th and Virginia Proposal has similar elements that provide a basis for comparing their environmental consequences with respect to timing. That is simply a planning tool that allows for guessing what may happen. As is plainly evident from looking at the 2005 FEIS and then looking at the reality on the ground for what has happened over the last 15 years since that 2005

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FEIS was adopted, the City's predictions about the future were vastly incorrect. The City lowballed expectations of growth in an extraordinary fashion. *See* Declaration of John Sosnowy (January 19, 2018).

Douglaston argues that, with respect to types of impacts and alternatives, the 2005 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. Joint Response at 22, citing Newman Dec, Ex. C, Chapters 1-4. While the 2005 FEIS evaluated alternatives, it did so with a very broad brush for the entire area. Looking at Chapters 1-4 of the 2005 FEIS, it is plainly evident that the analysis and conclusions talk in generalities that do not provide a basis for analyzing the types of impacts that need to be assessed with respect to the 5th and Virginia Proposal. Newman Dec., Ex. C, Chapters 1-4.

Douglaston lists eleven examples of projects that the City has utilized an addendum combined with adoption of the 2005 FEIS in the past. Joint Response at 6-7. They claim that this is a "plainly long-established practice for downtown projects" and the City has historically utilized this same adoption of a programmatic EIS for zoning changes and project-specific addendums for projects within South Lake Union and South Downtown and Pioneer Square neighborhoods. *Id*. The fact that SDCI has used this process before has no significance whatsoever on whether it's legal for SDCI to use this process for the 5th and Virginia Proposal. First of all, it appears on the face of it that SDCI's use of this process in the past may very well have constituted consistent and repeated violations of SEPA. Past violations of the law do not excuse the agency from legal requirements. If you are stopped on the freeway for speeding, you cannot tell the officer that he can't give you a ticket because you always go 90 miles per hour on the highway. Second, even if SDCI's use of this process in the past did fulfill their SEPA obligations for those particular projects, that has no bearing on whether it

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fulfilled their SEPA obligations for the 5th and Virginia Proposal. This proposal presents its own facts and its own issues and the Examiner should review the specific facts and issues in this case to consider whether SEPA has been violated. Whether or not the City violated SEPA or did not violate SEPA with other projects is irrelevant to that review.

F. Even if it is Allowed to Rely on the 2005 FEIS, SDCI Must Prepare an SEIS for the 5th and Virginia Proposal.

It is so obvious that there is new information and "substantial changes" to the 2005 FEIS proposal from the 5th and Virginia Proposal that Appellants easily meet that burden contrary to Douglaston's claims otherwise. In fact, it feels comical that anyone could argue otherwise.

It is an understatement to say that there have been "substantial changes" from the proposal that was reviewed in the 2005 FEIS to the 5th and Virginia Proposal – it's a completely different proposal. The 2005 FEIS studied a massive rezone covering a large portion of downtown Seattle. Newman Dec., Ex. C at pg. 1-2 and pg. 2-6. The Douglaston Proposal is a site-specific proposal on a site that is approximately 16,200 sq. feet. Newman Dec., Ex. F at pg.'s 1-3. The 5th and Virginia Proposal is a completely different proposal that raises different impacts, different mitigation, different alternatives – all focused on this particular site. The proposal is for a site-specific building that will have alley impacts, immediate traffic impacts, privacy impacts to the Escala residents, construction impacts, lack of sunlight impacts to the Escala residents, noise impacts, environmental health impacts, and much, much more. Newman Dec., Ex. D.

Contrary to Douglaston's argument otherwise, the evidence shows that there is also new information about the probable significant adverse impacts associated with the proposal. Escala's motion provided ample evidence to show this. The 2005 FEIS did not contemplate the level of development that would occur on the block containing the project. *See* Motion for Summary Judgment

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at 20. In addition, a comparison and analysis of the growth that was projected in the 2005 FEIS versus actual growth in the area that was prepared by a member of Escala, John Sosnowy, demonstrates that there is significant new information about the probable significant adverse impacts in the area. *See* Sosnowy Dec.

Escala certainly does not misunderstand the scope of a programmatic, non-project EIS as is suggested by Douglaston in its response. *See* Joint Response at 24. Indeed, Escala agrees that the 2005 FEIS was only required to conduct a broad review of the potential impacts of increased growth throughout the entire study area. But, Douglaston's contention that "Appellant's argument fails because the assumed project list was a programmatic level planning evaluation tool, not a proscriptive list of where and how sites must be redeveloped" misses the mark completely. In fact, once again, Douglaston's argument proves Escala's entire point. Douglaston admits here that SDCI was not legally required to adequately assess the impacts of the 5th and Virginia Proposal in the 2005 FEIS because it was a non-project, programmatic EIS. Douglaston admits that the assumed project list in the FEIS was meant to "provide substantive analysis of impact implications at a programmatic level of detail." Joint Response at 24. That's precisely the problem. Information that is relevant to the environmental review of the 5th and Virginia Proposal was not assessed in the 2005 FEIS. SDCI must, at the very least, prepare an SEIS for the 5th and Virginia Proposal.

III. CONCLUSION

SDCI erred when it prepared an "Addendum" to a 12 year old programmatic EIS for an entirely different proposal because with that process, SDCI failed to meet the requirements of SEPA for environmental review of the 5th and Virginia Proposal. Escala requests that the Hearing Examiner grant summary judgment in its favor on these issues and order that SDCI prepare a draft and a final EIS following a scoping process that contains everything set forth in WAC 197-11-440 and that

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follows the public process in WAC 197-11-500 through 570. The EIS must provide an adequate and impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, which would avoid or minimize adverse impacts or enhance environmental quality.

Dated this 19th day of January, 2018.

Respectfully submitted,

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