**BEFORE THE HEARING EXAMINER**
**CITY OF SEATTLE**

In the Matter of the Appeal of

**ESCALA OWNERS ASSOCIATION**

from a decision issued by the Director,
Seattle Department of Construction and Inspections

Hearing Examiner File:
**MUP-17-035 (DR, W)**

Department Reference:
3019699

**ORDER ON MOTION FOR SUMMARY JUDGMENT**

This matter concerns the appeal of a State Environmental Policy Act ("SEPA") Final Environmental Impact Statement ("EIS") issued by the Department of Construction and Inspections ("City") in association with a design review approval decision ("Decision"), to Jodi Patterson O'Hare ("Applicant"). The Appellant, Escala Owners Association ("Appellant"), appealed the City's SEPA determination. The Appellant filed a motion for summary judgment ("Motion"). The Applicant filed a response to the Motion, and the Appellant filed a reply to the response. The Hearing Examiner has reviewed the file in this matter including the motion documents. For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated.

Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc.* v. *Air Quality Coalition,* 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure ("HERs") states that for questions of practice and procedure not covered by the HERs, the Examiner "may look to the Superior Court Civil Rules for guidance." Civil Rule 56(c) provides that a motion for summary judgment is properly granted where "the moving party is entitled to a judgment as a matter of law." The Hearing Examiner "must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion." *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832-833, (2004).

> Summary judgments shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. A material fact is one upon which the outcome of the litigation depends. In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue. One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent, at the trial, would have the burden of proof on the issue concerned.

*Hudesman v. Foley*, 73 Wn.2d 880, 886-887, 441 P.2d 532 (2004)(citations omitted).

Appellant moves for summary judgment on the basis that a Draft EIS and a Final EIS were not prepared for the proposal. Appellant raises issues concerning the proposal's SEPA process which relied on an Addendum to a programmatic EIS completed in 2005, and also raises various SEPA procedural errors.

The project proposal is for a 48-story building to be located at 1933 Fifth Avenue ("Project"). The Project location is zoned Downtown Office Core-2. The Escala Condominiums are located to the west of the proposal. As a result of SEPA review for the Project the City issued a Determination of Significance ("DS"). In order to meet its obligations for further environmental review following the DS, the City elected to adopt the Final EIS for the Downtown Height and Density Changes ("FEIS"), that evaluated zoning changes within Downtown Seattle, including the area of the Project, and which was completed in 2005. The City further elected to utilize an Addendum to the FEIS to complete its environmental review for the Project.

SMC 25.05 Sub-chapter IV allows the City to use existing environmental documents to meet the City's SEPA obligations for a project, and mirrors the provisions of WAC 197-11-625 and WAC 197-11-630. These provisions detail the procedural means by which the City utilized the FEIS, and elected to continue with an Addendum.

In the Motion the Appellant complains of the age of the FEIS (*see e.g.* Motion at 2, 4, 19-20, and Appellant's Reply in Support of Motion at 11). However, there is no limit on the age of a document that can be adopted identified in either WAC 197-11-630 or SMC 25.05. While age of a document is within the range of considerations an agency could apply before adopting a document, there is no specific point in time identified by these regulations wherein the ability to adopt a document expires. Appellant indicates that many changes have occurred in the area of the Project from the time of the FEIS, but with about the same level of analysis, the Applicant counters that the FEIS remains relevant. Thus, the Motion fails to demonstrate that there is no genuine issue as to the material fact of whether the age of the FEIS has rendered it inadequate for use in the Project SEPA analysis.

Several additional issues raised by the Appellant appear to argue that the City is procedurally barred by SEPA requirements from adopting the FEIS and issuing the Addendum, because these processes do not fulfill the requirements of an EIS required when a Determination of Significance is made. The Appellant alleges that:

1. The Project SEPA analysis required an alternatives analysis in addition to that which was included in the FEIS;
2. The environmental documents did not include information required by WAC 197-11-440;
3. The scoping process required under WAC 197-11-408 was not met; and
4. Public comment requirements were not met.

To the degree Appellant is arguing that the City is procedurally barred by SEPA from adopting the FEIS and using the Addendum, the Motion fails, because the City is permitted to take these actions to fulfill its SEPA procedural requirements. *See e.g.* SMC 25.05 Sub-chapter IV; WAC 197-11-

625: and WAC 197-11-630. Courts have consistently upheld SEPA's rules allowing for reuse of existing environmental documents "[t]o avoid 'wasteful duplication of environmental analysis and to reduce delay." *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 50, 52 P.3d 522 (2002).

> Adoption of an existing EIS is explicitly authorized when "a proposal is substantially similar to one covered in an existing EIS." If an agency adopts existing documents, it must independently assess the sufficiency of the document, identify the document and state why it is being adopted, make the adopted document readily available, and circulate the statement of adoption.

*Id.* at 51. (citations omitted)

Generally, there is no procedural error under SEPA simply because an Addendum does not include the items of concern to Appellant where the adopted FEIS the Addendum is supplementing has adequately addressed these issues. The Motion cites no authority showing that where an EIS is adopted and an Addendum has been issued, that a new alternatives analysis, discussion of WAC 197-11-440 components, scoping process, or comment period are required under SEPA.

Where the Motion raises the allegations listed as 1-4 above as issues of fact as to whether the FEIS and/or Addendum have satisfied SEPA review requirements, the Motion fails to demonstrate that no question of fact remains as to the adequacy of these documents, and summary judgment cannot be granted on these issues. Appellant's concerns center on the allegation that because the FEIS is an area wide programmatic EIS it is not adequate for purposes of SEPA review for the Project. However, the Applicant counters that the FEIS area included the Project area and impacts within its analysis, and therefore satisfied the SEPA analysis requirements. When the facts are considered in the light most favorable to the nonmoving party it is clear that reasonable minds could reach different conclusions, and so questions of fact remain, and summary judgment is not appropriate. These are issues that will need to be addressed at hearing.

For example, the FEIS included an alternatives analysis. Appellant argues that the FEIS alternative analysis is not adequate, because it does not address alternatives specific to the Project. The Applicant counters that the alternatives analysis of the FEIS is adequate because the area of the Project was included within the area addressed by the FEIS. The adequacy of the alternatives analysis in the FEIS relative to the Project is a question of fact that cannot be decided by summary judgment.

Similarly, the Appellant argues that circumstances have changed since the FEIS, such that the FEIS analysis is no longer adequate. The Applicant argues that the FEIS anticipated the types of changed circumstances alleged by the Appellant, and that the Addendum addresses the specifics

related to the Project. Again, this presents a question of fact where summary judgment is not appropriate.[1]

In multiple points throughout its response, the Applicant highlighted the City's practice of adopting the FEIS for major Downtown projects. However, past action by the City does not serve as precedent to demonstrate that its actions have been in accordance with development regulations, or that such practices should be considered concerning a particular project under review. *See e.g. Buechel v. Department of Ecology*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994) ("The proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property."); *See also Dykstra v. County of Skagit*, 97 Wn.App. 670, 677, 985 P.2d 424 (1999). The determination of adequacy of the SEPA review for this Project must be considered based on its own merit.

The Appellant's motion for summary judgment is **DENIED.**

Entered this 15th day of February, 2018.

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[1] At several points Appellant indicates that the inadequacy of the FEIS to provide the necessary analysis is "plainly evident." (*See e.g.* Motion at 19, and Appellant's Reply at 16). Such argument simply cannot overcome the summary judgment standard where the Applicant has at least made a *prima facie* showing that the FEIS is adequate.

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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion for Summary Judgment** to each person listed below, or on the attached mailing list, in the matter of **Escala Owners Association**. Hearing Examiner File: **MUP-17-035 (DR, W)** in the manner indicated.

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Dated: February 15, 2018

Alayna Johnson
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