BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: ESCALA OWNERS ASSOCIATION Of a Master Use Permit Decision issued by the Director, Seattle Department of Construction & Inspections (MUP No. 3019699)	Hearing Examiner File Nos. MUP-17-035 CITY OF SEATTLE'S AND APPLICANT'S POST-HEARING BRIEF

I. INTRODUCTION

Appellants Escala Owners' Association ("Appellants") have appealed the Director of the City of Seattle ("City") Department of Construction and Inspections ("SDCI's") approval of a hotel and residential building at 1933 5th Avenue in downtown Seattle ("Project" or SDCI Project No. 3019699). The Project required design review and State Environmental Policy Act ("SEPA") review.

The Project was reviewed during four separate Design Review Board ("Board") meetings. As a result of design review, numerous changes to the Project were made, ultimately resulting in a better-designed building. In addition, the Applicant thoughtfully considered the surroundings of the Project site in its design, including both the neighborhood and the

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neighboring Escala Condominiums. In sum, the Project resulted in a design that was thoroughly vetted and satisfies the City's design guidelines. SDCI properly issued design review approval.

SDCI also thoroughly reviewed the Project under SEPA. As part of the SEPA review for the Project, the Applicant ("Applicant") completed several studies, including a shadow analysis, view analysis, traffic analysis and limited Phase I environmental reports, among others, which SDCI reviewed. Ultimately, SDCI issued a Master Use Permit ("MUP") decision consisting of approval of the design recommended for approval by the Board and adoption of the Downtown Height and Density Changes EIS and additional information about the Project in an Addendum.

The Appellants have not met their burden to show that the MUP approving this Project was erroneous. The appeal must be denied and the MUP must be affirmed. Accordingly, the City and Applicant (collectively, "Respondents") respectfully request that the Hearing Examiner deny all Appellants' challenges and uphold the MUP decision for the Project.

II. FACTS

The facts in this matter were established at hearing. The relevant facts are discussed below in relation to each claim.

III. ARGUMENT

A. Appellants failed to meet their burden to show that SDCI's design review decision was erroneous.

1. The Hearing Examiner must give substantial weight to SDCI's design review decision.

The design review process exists, in part, to "[e]ncourage better design and site planning to help ensure that new development enhances the character of the city and sensitively fits into neighborhoods." SMC 23.41.002. The Board is the entity charged with reviewing the design of

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projects under the Seattle Municipal Code ("City Code" or "SMC") and the City's adopted Design Review Guidelines. SMC 23.41.008.A. When (as here), if four or more members of the Board are in agreement in their recommendation to SDCI, then SDCI must issue a decision requiring compliance with the Board recommendation, with limited exceptions. SMC 23.41.014.F.3. In fact, the Board here was unanimous in recommending approval of the Project. *See* Ex. 83. In recognition of this process, the City Code requires the Hearing Examiner to give substantial weight to SDCI's design review decision. SMC 23.76.022.C.7.

2. **The Project is consistent with the Design Review Guidelines.**

Appellants claim that the Project does not meet the Design Review Guidelines, with specific attention to Guidelines A-1, A-2, B-1, B-2 and B-3. Appellants are incorrect. The evidence at hearing showed that the Project meets both the Downtown and Belltown Design Review Guidelines. *See* Testimony of Erik Mott ("Mott Testimony"); Testimony of Blaine Weber ("Weber Testimony"); Testimony of Shelley Bolser ("Bolser Testimony"); *see also* Ex. 91 (Bolser testimony notes). Appellants failed to meet their burden to demonstrate that SDCI's conclusion on design review was erroneous. The "B" Guidelines are discussed first as they generated the most testimony at hearing.

a. Guideline B-1: Respond to the Neighborhood Context.

Appellants generally complained that the Project is too large for the neighborhood. Testimony of John Sosnowy ("Sosnowy Testimony"). However, Appellants failed to present affirmative evidence supporting their allegations that the Project did not meet Guideline B-1. Instead, the evidence in the record shows that the Project meets both the Downtown and the Belltown Guideline B-1.

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The Project architect, Mr. Mott testified regarding the extensive design review process conducted for the Project. The Board reviewed this Project in four meetings, an unusually large number. The Board considered the surrounding neighborhood's context, reviewing several "neighborhood context" diagrams during the EDG process. Ex. 65, pgs. 5-16; Ex. 66, pgs. 4-6. Although some buildings in the neighborhood are smaller, the Project is similar in scale and height to many buildings in the immediate surrounding neighborhood. The Project employs several techniques to minimize its apparent height, bulk and scale, as discussed under Guideline B-2 below. Mott Testimony; Weber Testimony; Ex. 83 (MUP Decision).

With regard to Guideline B-1, the Board agreed that the Project responds to the neighborhood context, noting for example:

- The Project achieves material softening and opacity on the west façade, in response to Escala (Ex. 23, pg. 15).
- The west façade elements and podium structure are properly scaled (Ex. 23, pg. 13).
- The west façade elements are suitably differentiated (Ex. 23, pg. 12).

The Appellants failed to submit any affirmative evidence overcoming the presumption that Guideline B-1 has been addressed. The Examiner must reject this issue.

b. Guideline B-2: Create a Transition in Bulk and Scale.

Downtown Guideline B-2 relates to the creation of a transition in bulk and scale. The Appellants contended that further reduction in the actual height, bulk and scale should have been required to comply with this Guideline. The Appellants are mistaken.

Guideline B-2 identifies seven different techniques for mitigation of height, bulk and scale impacts, including (1) use of architectural style, detail, colors or materials, (2) architectural massing of building components, (3) responding to topographic conditions, (4) articulating the

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building's facades, (5) increasing setbacks; (6) reducing the bulk of upper floors, and (7) limiting the length of or otherwise modifying facades. At hearing, Mr. Mott and Mr. Weber testified that the Project uses most of these methods, often in direct response to DRB suggestions. As they testified, the Project includes several features that reduce the actual and apparent height, bulk and scale of the building, including the following:

- Eliminating the cantilevered upper floors at the top of the tower;
- Reducing the project massing to less than 80% of the allowable envelope;
- Reshaping the western mass to be curved and further setback from Escala;
- Setting back the northwest and southwest building corners further to reduce adjacent mass and enhance light and air in the alley area;
- Reducing the width of the western façade by 30%; and
- Reducing the height of the podium structure from 125 feet to 35 feet

In sum, the evidence in the record shows that the Project, as designed and with conditions, fully mitigates any height, bulk, or scale impacts. The Examiner should reject the claim of inconsistency with Guideline B-2.

c. Guideline B-3: Reinforce the Positive Urban Form.

Appellants asserted that the Project is inconsistent with Guideline B-3, relating to reinforcing the positive urban form. However, Appellants provided no testimony relating to this Guideline, other than their general testimony regarding height, bulk and scale. With regard to this Guideline, the Board stated that the positive interlocking of the eastern and western forms of the Project supported the Guideline, as well as the treatment of the street level areas. *See* Ex. 23, pg. 17. Appellants failed to present affirmative evidence showing that the Project does not meet this guideline and therefore abandoned this claim. The Examiner must reject the claim of inconsistency with Guideline B-3.

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d. Guideline A-1: Respond to the Physical Environment and Larger Context

The Project meets Guideline A-1, to respond to the physical environment. This Guideline specifically addresses developing areas such as the Project area, stating:

> "Some areas downtown are transitional environments, where existing development patterns are likely to change. In these areas, respond to the urban form goals of current planning efforts, being cognizant that new development will establish the context to which future development will respond."

Exhibit 11, p. 10.

As an initial matter, the DRB meeting summaries do not identify Guideline B-2 as a priority guideline. Ex. 88**.** As Ms. Bolser testified, the Board asked the Applicant to address the relationship between the Project and Escala under the broader Guideline A-1, and to improve the design of the building top. *See, e.g.*, Ex. 23; Ex. 88. In addition, the Board relied on this Guideline to direct the Applicant to modify the massing of the west façade of the Project. *Id.* In response, the Applicant substantially revised the Project design over the course of four DRB meetings, and ultimately the Board voted unanimously to recommend approval of the Project.

The Project is presumed to meet this guideline. The Appellants have failed to produce evidence sufficient to rebut this presumption.

e. Guideline A-2: Enhance the Skyline

The Project meets Guideline A-2, to enhance the skyline of the Downtown. The Board provided early direction to the Applicant to modify the building top to respond to this Guideline. In response, the Applicant substantially modified the building top, including the manner in which the western and eastern masses of the Project are resolved at the building top. The Board voted unanimously to recommend approval of the Project design, including with respect to this

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Guideline. Appellants have presented no evidence to demonstrate that the design of the Project, as approved in the MUP Decision, is not consistent with this Guideline. The Hearing Examiner should dismiss this design review claim as to Guideline A-2.

f. Other Guidelines

Appellants presented no evidence to demonstrate that the Project is not consistent with any other Guidelines.

3. **Appellants failed to meet their burden to show that SDCI's design review decision was erroneous.**

Much of the Appellants' presentations discussed Appellants' opinion of the design of the Project. However, Appellants failed to show that the design review decision was made in error.

Appellants offered no expert witnesses regarding building design or the design review process. Appellant offered the lay testimony of Mr. Sosnowy regarding his personal, lay opinion of the Project's design and its impacts. However, the personal aesthetic opinion of a neighbor does not overcome the substantial weight given to SDCI's design review decision.

In sum, Appellants failed to meet their burden to show the SDCI design review decision was in error, taking in to account the substantial weight the Code requires the decision be afforded by the Hearing Examiner. SMC 23.41.012.F.2.c.

B. Appellants failed to meet their burden to challenge the Addendum under SEPA.

1. **Appellants' Determination of Significance claim is inapposite for this matter.**

At closing, Appellants renewed its various arguments about alleged procedural deficiencies in the SEPA process conducted for the Project, such as claims that scoping should have been conducted or that an alternatives analysis should have been undertaken in the Addendum. These claims have been fully briefed by the parties and all legal issues arising here

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were resolved in the Order on Summary Judgment in this case. Respondents hereby adopt and incorporate by reference in this brief all prior arguments made in the Joint Response in Opposition to Motion for Summary Judgment, filed in January 12, 2018 on file herein. As to such legal procedural issues, the Order on Appellant's Motion for Summary Judgment properly disposes of them. Factual issues relating to these claims are otherwise addressed throughout this brief. In sum, Appellant presented no new arguments that would alter the conclusion reached by the Hearing Examiner in the above-referenced Order on Appellants' Summary Judgment Motion.

Appellants did, at closing, attempt to conjure up an argument based on certain language in the December 15, 2016 Determination of Significance and Notice of Availability of Addendum (Ex. 89) (the "December 2016 DS"). Appellant noted that the language of the December 2016 DS indicated the existence of significant adverse impacts from the Project, and argued, in effect, that this language constituted a sort of "confession of judgment" by the City on this impact issue – apparently absolving Appellant of its burden to demonstrate any such impacts.[1]

But as Respondents noted at closing, the operative language of the SEPA Regulations, WAC 197-11-(340) is more specific, holding that the issuance of a DS merely indicates the *potential* for such significant impacts from a proposal. In its July 3, 2017 Determination of Significance and Notice of Availability of Addendum (Ex. 89, "July 2017 DS"), the City corrected this language, stating instead that the Project "(may)" have significant adverse impacts. Indeed, the 2005 FEIS found such significant impacts in the area of transportation (Ex. 35), and

[1] This was most evident in Appellants' examination of Ms. Bolser when Appellants used the December 2016 DS in an effort to induce her to testify as to the existence of significant daylighting impacts on Escala from the Project. Ms. Bolser made clear, as the record reflects, that no such impacts have been demonstrated.

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the July 2017 Addendum for the Project demonstrated that the likely impacts of the Project are consistent with this finding. Critically, the July 2017 Addendum also found that the Project would not result in *new* significant impacts, which is the operative test the Examiner must apply in this case.

b. Appellants' SEPA timing arguments are unavailing.

Appellants contend that the City's SEPA determination occurred too late in the process, arguing that it was not available for review by the DRB in its design review meetings on the Project. This is wrong.

SEPA does encourage applicants and agencies to undertake SEPA review early in the permitting process (see, e.g., WAC 197-11-155). Such was the case here, as the Applicant's SEPA studies were underway early in the process. Testimony of Terry McCann ("McCann Testimony"); Testimony of Michael Swenson ("Swenson Testimony"). The procedural requirement of the SEPA Regulations as to timing of an agency SEPA determination is clear under WAC 197-11-170(1):

> (1) Until the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would:
> (a) Have an adverse environmental impact; or
> (b) Limit the choice of reasonable alternatives.

"Action" is defined in WAC 197-11-704 as:

> A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:
> (i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.

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In this case, the "action" taken by the City was the issuance of the MUP Decision on October 26, 2017. The MUP Decision included the Director's determination on design review and substantive SEPA compliance. Only the Director is authorized under the Code to render these decisions. SMC 23.76.004, Table A. Recommendations of the DRB are merely that – recommendations – and do not constitute "actions" under SEPA.

Appellants contend that the DRB has effective decisionmaking authority on design review where, as here, four or more members of the DRB vote in support of a project or condition. In those cases, the Director is bound by Code to implement the recommendation of the DRB. SMC 23.41.014.F. But Appellants fail to bring to the Examiner's attention the limitations of that Code section, which specifically preserve to the Director the authority to address all SEPA considerations in the MUP decision, regardless of the recommendation of the DRB. SMC 23.41.014.F. Additionally, Appellants fail to note that the Code's authorization of the role of the design review process expressly does not include environmental review. SMC 23.41.008.A.

Finally, Appellants may argue that RCW 43.21C.030 calls for each agency to include its SEPA work with "every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment." Here, Appellants argue, the December 2016 Addendum was not a part of the DRB recommendation on the Project. But in fact, the December 2016 Addendum was issued by SDCI prior to the final December 20, 2016 meeting of the DRB on the Project. And as required by SEPA, both this Addendum and the recommendation of the DRB were available to the Director to be included as part of his final decision-making on the Project.

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Appellants complain that SEPA considerations were excluded by the City from the DRB process. But nothing in SEPA or its regulations requires that each subordinate actor within an agency create a SEPA record. The obligation to account for SEPA in agency decision-making applies to the agency as a whole and it applies to decisions – not to each intermediate step in the agency process. Indeed, WAC 197-11-655 indicates that environmental documents shall be used in the review process "as determined by agency practice and procedure," so long as the SEPA documents for a proposal are considered by the agency decision-maker in rendering a final decision on the proposal. Ms. Bolser's testimony characterized the SDCI "practice and procedure" in the design review process and confirmed that the December 2016 Addendum, the July 2017 Addendum and the EIS on which both were based were reviewed and considered prior to the final SDCI decision on the Project MUP.

Finally – when the applicable regulations fail to provide an argument – Appellants resort to a claim of "snowballing". Under this theory, Appellants imagine that no SEPA review was conducted prior to the DRB recommendation – an "alternative fact," since we know that the Project Addendum was issued prior to the last DRB meeting – and then contends that the DRB recommendation created so much decisional "momentum" as to swamp the subsequent SDCI decision-making process. This argument suffers from an absolute lack of any evidentiary support in the record – it is no more than a bald accusation by Appellants. As we have seen, the Code specifically directs SDCI to attend to SEPA issues as it evaluates any DRB recommendation, and then to defer to SEPA. There is no basis in the record upon which to assume that SDCI would disregard its corresponding obligations here.

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2. **SEPA standard of review for this matter is two-fold. Appellants must show that the EIS and Addendum failed the rule of reason and that the SEPA determination was clearly erroneous as to the use of the Project Addendum.**

The Hearing Examiner must apply two separate tests to review of the Project Addendum.

Under either standard, SEPA and the City Code require the Hearing Examiner to give substantial weight to the Director's SEPA determination. RCW 43.21C.090; SMC 23.76.022.C.7; *King County v. Central Puget Sound Growth Mgm't Hrgs. Bd.*, 91 Wn. App. 1, 30, 951 P.2d 1151 (1998). The burden is on Appellants to overcome the deference that the City's decision must be given. *Brown v. Tacoma,* 30 Wn. App. 762, 764, 637 P.2d 1005 (1981).

First, the adequacy of the EIS (including the addendum) must be reviewed under the rule of reason. 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 and addendum 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); *In re Matter of Appeal of Unite Here Local 8,* Hearing Examiner File No. MUP-15-032, Order on Applicant's and Department's Motion to Dismiss (June 2, 2016), pg. 9 (reviewing the adequacy of the Addendum to Downtown Height and Density Changes EIS under rule of reason standard).

Under the rule of reason standard, the decision-maker must be presented with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the decision in the EIS. *Cascade Bicycle Club,* 175 Wn. App. at 508-09. The

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focus is to "determine whether the environmental effects of the proposed action are disclosed, discussed and substantiated by opinion and data." *Solid Waste Alternative Proponents v. Okanogan County,* 66 Wn. App. 439, 442, 832 P.2d 503 (1992) ("*SWAP*"). The Hearing Examiner does not "rule on the wisdom of the proposed development but rather on whether the [EIS and Addendum gives] the City…sufficient information to make a reasoned decision." *In re Matter of Appeal of Ballard Coalition*, Hearing Examiner File No. W-17-004, Findings and Decision (Jan. 31, 2018), pg. 15.

However, SDCI made a separate decision to use an addendum in this case, rather than a supplemental EIS ("SEIS"). Under SEPA Regulations, the lead agency may use "all or part" of an adopted SEPA document to meet its responsibilities under SEPA. WAC 197-11-600; SMC 25.05.600. 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.

While the rule of reason must be applied to review the adequacy of the discussion of impacts in the EIS and Addendum, a separate test must be applied to SDCI's decision to issue an

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addendum, rather than a SEIS. Here, the Appellant must demonstrate the likelihood of new significant adverse impacts of the proposal, not previously reviewed in the adopted EIS.[2]

In a similar context regarding the review of the propriety of issuance of a DNS for a project (which indicates no new significant impacts), courts have interpreted this mandate to require the application of the clearly erroneous standard when reviewing an agency's decision to issue a DNS. *Murden Cove Preservation Ass'n. v. Kitsap County,* 41 Wn. App. 515, 523, 704 P.2d 1242 (1985); *Cougar Mountain Ass'n. v. King County* 111 Wn.2d 742, 747-749, 764 P.2d 264 (1988); *Indian Trail Property Owner's Ass'n. v. City of Spokane,* 76 Wn. App. 430, 431, 886 P.2d 209 (1994). Under the clearly erroneous standard, reviewing bodies do not substitute their judgments for those of the agency and may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain, supra,* 111 Wn.2d at 747; *Polygon Corp. v. Seattle,* 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *Ass'n of Rural Residents v. Kitsap County,* 141 Wn.2d 185, 4 P.3d 115 (2000); *Moss v. Bellingham,* 109 Wn. App. 6, 13, 31 P.3d 703 (2001). An appellant does not meet its burden to show a decision is clearly erroneous if the evidence shows only that reasonable minds might differ with the decision. *See e.g., In the Matter of the Appeals of CUCAC and Friends of UW Open Space, et al.,* Hearing Examiner File Nos. S-96-002 and S-96-003, Findings and Decision, (July 15, 1996),

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[2] At the close of hearing, the Hearing Examiner asked the parties to address the precedential value of the Department of Ecology ("Ecology") SEPA Handbook ("SEPA Handbook"). By its own admission, Ecology states the SEPA Handbook is guidance only and does not have the weight of the statute or SEPA Rules. The SEPA Handbook reads:

> The SEPA Handbook is intended to be used in conjunction with the [SEPA] (Chapter 43.21C RCW) and the SEPA Rules (Chapter 197-11- WAC). Should a conflict be found at any time between the guidance in this handbook and either the rules or the RCW, it should be understood that this handbook in intended as guidance only, and does not have legal standing of the RCW or Rule.

SEPA Handbook, pg. ii (Attached as Appendix B to Respondent's Post-Hearing Brief).

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p. 13; *see also In the Matter of the Appeal of Andrew Kirsh and Meredith Getches,* Hearing Examiner File No. MUP-08-003, Findings and Decision (May 23, 2008).

To prove that a decision was clearly erroneous, the Appellants must produce affirmative evidence showing that new significant adverse impacts will occur as a result of the project. Specifically, where Appellants claim of a failure to adequately identify or mitigate adverse impacts, the Appellants must produce evidence that such significant adverse impacts will actually exist for a decision to be overturned. *Boehm v. City of Vancouver,* 111 Wn. App. 711, 719-720 (2002); *Moss v. City of Bellingham, supra,* 109 Wn. App. at 31. Mere complaints, or claims without the production of affirmative evidence proving that the decision was clearly erroneous, are insufficient to satisfy an Appellants' burden of proof as a matter of law.

3. **Appellants failed to meet their burden with regard to height, bulk and scale impacts.**

Appellants failed to meet their burden of proof with regard to height, bulk and scale impacts.

SEPA states that an agency may condition a project only if the condition is based on policies identified by the agency and incorporated into regulations, plans or codes that are formally designated by the agency as possible bases for the exercise of its authority under SEPA. RCW 43.21C.060; WAC 197-11-660(1); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 803, 801 P.2d 985 (1990); *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 752, 765 P.2d 264 (1988); *see also* SMC 25.05.660.A.

The City has adopted substantive SEPA policies to form the basis of its exercise of its SEPA authority. One of these policies, the SEPA Overview Policy, provides, "[m]any environmental concerns have been incorporated in the City's codes and development regulations.

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Where City regulations have been adopted to address an environmental impact, it shall be presumed that such regulations are adequate to achieve sufficient mitigation," with limited exceptions. SMC 25.05.665.D.

The City's SEPA policy for height, bulk and scale provides that citywide and neighborhood design guidelines are intended to fully mitigate height, bulk, and scale impacts. Any project approved through the design review process is presumed to comply with the City's height, bulk, and scale SEPA policies. SMC 25.05.675.G.2.c. This presumption may only be rebutted with clear and convincing evidence that height, bulk, and scale impacts have not been adequately mitigated. *Id.* "Clear and convincing" evidence is not defined by the Code. Courts have interpreted it to mean that "a highly probable standard instead of more likely than not is necessary." *In re Det. Of Brooks,* 145 Wn.2d 725, 36 P.3d 1034 (2001). The clear and convincing standard is higher than the "less stringent 'preponderance of the evidence' burden." *Herron v. Tribune Pub'g Co.,* 108 Wn.2d 162, 169-70, 736 P.2d 249 (1987).

Here, as discussed above, the Project underwent a lengthy and thorough design review process. *See, e.g.,* Ex. 5; Ex. 8; Ex. 15; Ex. 17; Ex. 23; Ex. 63; Ex. 65. The Board carefully considered the Project's height, bulk and scale and determined that it complied with the City's Design Guidelines. *See* Ex. 23. This determination was supported by extensive evidence in the materials presented to the Board. Ex. 65; Ex. 66. The Project height is consistent with other existing or proposed development in all directions. Mott Testimony; Weber Testimony; Ex. 83. The Project includes measures to reduce its actual and apparent height, bulk and scale, including a substantial reduction in building mass and setbacks and façade curvature on the west facade. Mott Testimony; Weber Testimony.

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At hearing, Appellants failed to produce affirmative evidence demonstrating that the Addendum were clearly erroneous as to potential height, bulk and scale impacts. Instead, Appellants provided only lay testimony regarding an individual neighbor's opinions that the Project is too large. This evidence is not clear and convincing and does not satisfy Appellants' burden.

The Hearing Examiner must reject Appellants' claim.

4. **Appellants failed to meet their burden with regard to shadow impacts.**

Appellants failed to meet their burden of proof with regard to shadow impacts.

a. The Downtown Height and Density Changes EIS and Project Addendum evaluation of shadow impacts meets the rule of reason.

To the extent Appellants are challenging the adequacy of the Downtown Height and Density Change EIS and the Project's Addendum on shadows, Appellants' adequacy claim fails.

The Hearing Examiner must evaluate challenges to the adequacy of the Downtown Height and Density Change EIS and the Project's two Addendum under the "rule of reason." The decision-maker must be presented with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the decision. *Cascade Bicycle Club, supra,* 175 Wn. App. at 508-09. The focus of review is to "determine whether the environmental effects of the proposed action are disclosed, discussed and substantiated by opinion and data." *SWAP, supra*, 66 Wn. App. at 442. The Hearing Examiner does not "rule on the wisdom of the proposed development but rather on whether the [EIS and Addendum gives] the City…sufficient information to make a reasoned decision." *In re Ballard Coalition, supra,* at pg. 15.

At hearing, Appellants argument focused solely on shadows on the Escala. Sosnowy Testimony. The City does not have adopted SEPA shadow policies regarding shadows on private

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property. SMC 25.05.675.Q.1.d. Nevertheless, in response to Escala comments, the July Addendum included the following disclosure:

> …The following general discussion is provided in response to [Escala's] request. The discussion does not evaluate the shadow impact to every unit in every building that may be affected by construction of the proposed project.
>
> Private properties near the 5th and Virginia Development could be impacted by shadows cast from the 5th and Virginia Development, depending on the season and time of day. However, the existing urban development patterns within the vicinity of the 5th and Virginia Development, including the existing condominium development directly across the alley to the west of the proposed project, already cast significant shadows on private property within the project vicinity.

Ex. 23, Appx. G, pg. G-6 (emphasis added).

The July Addendum also clearly disclosed that: "Various units in existing buildings in the vicinity of the [Project] may experience increased shadowing as a result of the project, and occupants of the units may consider those impacts to be significant." *Id.*, pg. G-7.

Of course, the City's SEPA review is not inadequate for failure to disclose impacts to individuals because it is "intended to disclose impacts to the environment as a whole." *In re Ballard Coalition*, Hearing Examiner File No. W-17-004, *supra,* at pg. 18. The City's inclusion of the potential impacts to private properties of shadowing – an impact that it lacks authority to mitigate under SEPA – disclosed this information in direct response to Escala's many comments. Appellants' may (and do) disagree with the wisdom on the Project's siting due to potential shadowing impacts, but it cannot claim that the City did not provide sufficient information disclosing the potential impacts to private property to make a reasoned decision. *Id.*, pg. 15.

The record demonstrates that Appellants provided no affirmative evidence that the potential impacts of shadow of the Project on private property were not disclosed, discussed and

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substantiated by data. The July Addendum belies any such claim. The Hearing Examiner must reject Appellants' claim that the Project's SEPA review relative to shadow impacts is inadequate.

b. Appellants failed to demonstrate the Project's probable significant adverse impacts relative to shadows.

The City's SEPA Policy on shadows provides that, in downtown, the City may only impose mitigation for shadow impacts on five designated parks. SMC 25.05.675.Q.2. The closest park to the Project is Steinbrueck Park. *Id.*; *see also* Ex. 28, p. 29.

Appellant claims that the Project will result in the loss of daylight to certain residential units on the east façade of Escala, and that this loss of daylight will result in significant adverse environmental impacts that warrant the preparation of a SEIS. The evidence at hearing does not support this conclusion.

Ms. Bolser testified that although the Seattle SEPA Ordinance does not include a specific policy on "daylighting," the City did consider this set of potential impacts under the "shadow" policies of the SEPA Ordinance. Her testimony was that there was no evidence in the record to support a conclusion that there would be significant adverse environmental impacts from the Project associated with the potential loss of daylight to certain units in the Escala.

In response, Appellants presented the testimony of Mr. Joel Loveland and introduced two reports prepared by Mr. Loveland regarding this issue. Mr. Loveland testified that certain units on the eastern façade of Escala would experience some reduction of daylight as a result of the development of the Project. This conclusion was based on a report prepared by Mr. Loveland. Ex. 43; Ex. 44. For the purposes of these reports, Mr. Loveland did not select an analytic tool that would be best suited to characterizing the daylight environment in the selected Escala units, even though he testified that such tools were available. Instead, he selected the "Daylight

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Autonomy" ("DA") model for his work, specifically because that model was used by the Project designers in a DRB presentation. Even though other, more accurate modeling techniques were available, he disregarded those for the DA model.

Ironically, Mr. Loveland testified that the DA model which he used for his reports is not well-suited to address or characterize the daylighting issues of interest for his testimony. Initially, Mr. Loveland testified that he was "not sure what else he would have used" in place of the DA model. Later, he testified with certainty that other, better models existed for this work – models that he did not use. In any case, it is clear that Mr. Loveland, in his own mind, used the wrong model for his daylighting analysis.

The use of the wrong model did not prevent Mr. Loveland from leaping to conclusions in his testimony. He indicated that some eastern units at Escala would suffer losses of daylight under his DA model analysis when the Project is built. He indicated that for health purposes, critical light was "200 to 250 lux" of "circadian light" in the early morning. Although Mr. Loveland was careful in all his written materials, including his two reports and his testimony notes to reach no specific conclusion as to the possible health effects of the loss of daylight on certain Escala units from the Project, he had a momentary burst of exuberance in his oral testimony when he suggested that significant health impacts could result. But subsequently, under questioning from the Hearing Examiner, Mr. Loveland conceded that additional work would need to be done to determine whether such impacts might occur.

Applicant presented Professor Christopher Meek on this issue. As it happens, Professor Meek and Mr. Loveland had overlapping careers at the same office at the University of Washington. They both testified that they knew and respected each other's work. But Professor

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Meek testified that the DA model is not useful for understanding potential health effects of loss of daylight for many reasons. Fundamentally, the DA model is designed to assess the adequacy of interior daylight to support desk-top tasks in a work environment. As both Mr. Loveland and Professor Meek agree, the DA model is not intended to evaluate daylight adequacy in residential settings relating to health issues. The DA model is just about having enough light in an office environment to complete tasks at the level of a desk; it is not about the quality of light in a home.

Professor Meek identified several specific shortcomings in the DA model as it related to the assessment of health effects. These reasons include:

- The DA model does not evaluate "circadian" light, the specific kind of light Mr. Loveland said was critical to assess;
- The DA model excludes all light prior to 8 a.m., which Mr. Loveland asserted is the most critical daylight for health;
- The DA model focuses only on daylight on working surfaces at table height, whereas the literature on daylight for health focuses on light at eye level; and
- The DA model used by Mr. Loveland (which was the model he simply adopted from the Project architects) used an "illuminance threshold" of 300 lux. This means that the model completely ignores all daylight in the environment less than 300 lux. Mr. Loveland's testimony was that morning light in the 200 to 250 lux range would be important to support positive health. As Professor Meek testified, the DA model would ignore all this favorable daylight.

From Professor Meek's testimony, it was clear that the DA model used by Mr. Loveland was completely inappropriate for assessment of potential health impacts in this case. Nothing in Mr. Loveland's testimony contradicted that position. Both Professor Meek and Mr. Loveland said that other available models would be better suited to characterizing the daylight in the affected Escala units and both agreed that no such analysis had been conducted in this case. To be clear, neither witness indicated that there was a model or test that was recognized for these purposes,

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so there exists no accepted way to characterize interior residential daylighting for purposes of assessing health impacts.

This point was brought home by Professor Meek. He indicated that DA is not a metric for assessing potential health impacts from loss of daylighting. Mr. Loveland did not disagree with this point. When asked specifically by the Hearing Examiner, Professor Meek responded that DA cannot disclose health impacts from the loss of daylight.

In his rebuttal testimony, Mr. Loveland did not quarrel with any of the issues or limitations raised by Professor Meek. Indeed, Mr. Loveland's sole contribution to the issue was this: after noting that merely walking to work or spending time in the sunlight would address the concerns he had raised, he admitted that he had made no effort to assess whether the occupants of the relevant Escala units included these measures in their daily regimen or periodically left their apartments during the daytime hours. Importantly, Mr. Loveland did not challenge any of the limitations of the DA model identified by Professor Meek. Those limitations – which are ultimately shortcomings in Mr. Loveland's reports – remain unresponded to in the record.

On this record, there is no basis on which to conclude the likelihood of any significant adverse health impact resulting from the Project. Both experts agree the DA model is not suited to this task of analysis. Mr. Loveland's expressed concern for certain levels and kinds of morning light is specifically ignored in the DA model. Neither expert can characterize the link between daylight levels and health effects. Under direct examination, Mr. Loveland did note that the absence of exposure to daylight is not positive for health.

At the close of hearing, the Examiner sought some direction from the parties on the law relating to the recognition of "emerging" scientific analysis. Washington has adopted the

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minority rule, the *Frye* test (*Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923)) for admissibility of novel scientific evidence. *State v. Copeland*, 130 Wn.2d 244, 255, 260, 922 P.2d 1304, 1312 (1996) (specifically declining to adopt *Daubert*); *State v. Canaday*, 90 Wn.2d 808, 585 P.2d 1185 (1978)).

In *Copeland*, the Washington State Supreme Court explains that novel scientific evidence should only be admitted if the scientific community has accepted the reliability of its underlying principles:

> The rationale of the *Frye* standard, which requires general acceptance in the relevant scientific community, is that expert testimony should be presented to the trier of fact only when the scientific community has accepted the reliability of the underlying principles. In other words, scientists in the field must make the initial determination whether an experimental principle is reliable and accurate." *Canaday*, at 813. The *Frye* standard recognizes that 'judges do not have the expertise required to decide whether a challenged scientific theory is correct,' and therefore courts 'defer this judgment to scientists.' *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). The court does not itself assess the reliability of the evidence. Id. at 886 n.2. "If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted."

Copeland, 130 Wn.2d at 255.

In *Gentry*, the Court describes two prongs to the *Frye* test:

> In Washington, there are two prongs to the *Frye* test: (1) whether the scientific theory upon which the evidence is based is generally accepted in the relevant scientific community, and (2) whether the technique used to implement that theory is also generally accepted by that scientific community. If there is a significant dispute between qualified experts as to the validity of the scientific evidence, either as to the theory or the implementing technique, it may not be admitted. A third prong, which asks whether a generally accepted technique was performed correctly on a given occasion, is included in some states as part of the *Frye* test, but in Washington, prong three inquiries go to weight, not to admissibility.
>
> There is no question that the underlying scientific theory of DNA typing is accepted in the scientific community for identification purposes in the forensic setting. <u>However, in order to be admissible, *Frye* requires that both an accepted theory and a valid technique to implement that theory be generally accepted in the scientific community.</u>

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State v. Gentry, 125 Wn.2d 570, 585-86, 888 P.2d 1105, 1117 (1995) (emphasis added).

In this case, there is not really a significant dispute between qualified experts as to the validity of scientific evidence. The evidence in the record is based on the DA analysis in the reports prepared by Mr. Loveland. Here, both Mr. Loveland and Professor Meek agree that the DA metric is not designed to assess the health impacts associated with loss of daylight. Mr. Loveland testified that he used the DA metric because it was used by the Project architects and because he was not sure what other metric he would use.[3] Neither rationale represents a scientific basis to use the DA metric to assess health effects. Professor Meek was clear in his testimony that the DA metric should not be used to assess health effects.

The Hearing Examiner should reject this claim.

5. **Appellants failed to meet their burden with regard to land use impacts.**

Appellants failed to meet their burden of proof regarding land use impacts of the Project. Notably, Appellants presented no expert witnesses regarding land use impacts. Instead, Appellant provided only lay testimony regarding (erroneous) computations of the "actual" residential development versus what was contemplated in the Downtown Height and Density Changes EIS and the Project's two Addendum. Appellants did not meet their burden of proof. Accordingly, the Hearing Examiner should reject Appellant's land use claims out of hand.

[3] Appellant in closing may attempt to launch a procedural sideshow defense, arguing that since Mr. Loveland's "evidence" was not objected to at hearing, it must be admitted and given weight. This is wrong on several fronts: (i) as noted, Mr. Loveland really provided no "evidence" of health impacts; (ii) whether weight is accorded evidence is in the discretion of the Examiner, and based on this record no weight should be accorded his testimony; (iii) the Examiner is not bound by the rules of evidence; and (iv) Professor Meek's testimony thoroughly discredited Mr. Loveland's effort even to characterize the daylight environment in the Escala units, let alone derive health effect conclusions from such flawed analysis.

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a. The Downtown Height and Density Changes EIS and Project Addendum evaluation of land use impacts meets the rule of reason.

To the extent Appellants are raising a challenge to the adequacy of the Downtown Height and Density Change EIS and the Project's two Addenda, Appellants' adequacy claim fails.

Regarding land use conditions, the Applicant's December Addendum included an analysis of the existing and potential future land use development within the vicinity of the Project, including identifying the Escala and potential future development sites. Ex. 28, Figure 1 and Appendix B; *see also* McCann Testimony. The Applicants' expert, Mr. McCann, has over forty years preparing environmental analysis, including analysis of land use impacts under the Downtown Height and Density Changes FEIS. Ex. 68. The December Addendum disclosed:

> Many land uses in the Belltown Neighborhood had undergone changes since publication of the Downtown EIS. Over the past several years, many new developments have been proposed and several are under construction in the vicinity of the project site. The 5th and Virginia Development would be consistent with the development trends that are occurring (and planned) throughout the neighborhood, as well as development envisioned and analyzed for this neighborhood in the Downtown EIS.

Ex. 28, Appendix B, pg. B-1.

This analysis was consistent with the City's practice for evaluation of land use impacts. McCann Testimony. At hearing, the City's designee of the SEPA official testified that the Project was within the scope of the height and density changes contemplated in the Downtown Height and Density Changes EIS for DOC-2 zones (such as the Project site). Bolser Testimony. The Project is less tall and dense than the 600-foot Preferred Alternative heights and densities analyzed. *Id.* The land use impacts of the Project are subsumed in the analysis of the Preferred Alternative, which was thoroughly discussed in the Downtown Height and Density Changes EIS. Ex. 35, Ch. 4.

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Appellants provided no affirmative evidence that the land use impacts of the Project were not disclosed, discussed and substantiated by data. Appellants' silence on this issue is fatal. The Hearing Examiner must reject Appellants' claim that the Project's SEPA review is inadequate.

b. Appellants failed to demonstrate the Project's probable significant adverse impacts relative to land use.

To the extent Appellants are challenging the City's decision not to complete an SEIS for the Project based on alleged significant adverse land use impacts, Appellants' argument fails. Appellants lay opinions regarding purported land use impacts fails to meet its burden to produce affirmative evidence of probable significant adverse impacts of the Project. Appellants do not provide any evidence, much less clear and convincing evidence.

Appellants' argument is wholly based on the testimony of its lay witness, Mr. Sosnowy. At hearing, Mr. Sosnowy opined that the pace of residential growth in City is new information indicating the Project's significant adverse impacts to land use due to the projected residential growth versus what he purported to be the "actual" development in Belltown. Sosnowy Testimony; *see also* Ex. 34. Upon cross-examination, Mr. Sosnowy conceded that his analysis:

- Relied on the Draft EIS for Downtown Height and Density Changes;
- Failed to account for or address the Preferred Alternative's height and density;
- Failed to distinguish between residential and hotel uses – which leads to "double-counting" of hundreds of hotel units towards his analysis of residential uses; and
- Failed to account for expired and cancelled permits – which leads to "double-counting" of hundreds of hotel and residential units that are not authorized to be built.

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Mr. Sosnowy admitted that he was unfamiliar with land use planning before taking up his opposition of the Project. *Id.* Respectfully, his "analysis" reveals this unfamiliarity with land use planning because flawed inputs result in flawed outputs. His "analysis" here proves nothing. Mr. Sosnowy's testimony was devoid of any evidence that the pace of growth indicated probable significant adverse impacts relative to land use. Miscounting Belltown residential units does not rise to the level of a significant adverse land use impact. Thus, Appellants' argument here fails.

Appellants next argument is that because the Downtown Height and Density Changes EIS is "too old," it necessarily requires an SEIS to evaluate the impacts of land use conditions. This is incorrect. A new SEIS is not required if the probable significant adverse environmental impacts – i.e., land use – are covered by the range of alternatives and impacts analyzed in existing environmental documents. *Glasser v. City of Seattle,* 139 Wn. App. 728, 738, 162 P.3d 1134 (2007). Appellants' burden in this matter remains to demonstrate by affirmative evidence that there is new information regarding the Project's significant adverse impacts to land use. WAC 197-11-600(4)(d). As became clear at hearing, Appellants cannot meet their burden.

The City's SEPA policies relative to land use are "ensure that the proposed uses in development projects are reasonably compatible with surrounding uses and are consistent with any applicable, adopted City land use regulations and the goals in policies set forth in the Land Use Element [and] Growth Strategy Element…of the Seattle Comprehensive Plan for the area in which the project is located." SMC 25.05.675.J.2.a. At hearing, Ms. Bolser testified that the Project's uses – residential, hotel, retail and restaurant – are all permitted in the DOC-2 zone. Bolser Testimony. Ms. Bolser also identified that the Project's proposed uses – as well as the heights and densities proposed for the Project – all fall within the envelope contemplated for the

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DOC-2 zone studied in the Downtown Height and Density Changes EIS, including the Preferred Alternative. *Id.* Accordingly, the City's analysis of the Project vis-à-vis the Downtown Height and Density Changes EIS for land use was legal and no SEIS was required. *Glasser,* 139 Wn. App. at 738. Appellants failed to provide any evidence that the Project's development of permitted uses – consistent with the adopted DOC-2 land use regulations – were outside the scope of the land use contemplated or would result in probable significant adverse impacts relative to land use. Appellants have failed to meet their burden to demonstrate significant adverse impacts relative to land use. The Hearing Examiner must reject Appellants' argument.

Appellants may point to Appendix D of the Downtown Height and Density Changes DEIS regarding "Projected Development – Assumed Projects on Sites Likely to be Redeveloped" to argue that the City did not contemplate development of the Project site. This is wrong. As the City testified, as a programmatic EIS, the Downtown Height and Density Changes EIS studied increases in height and density across the Downtown area. Bolser Testimony; Testimony of John Shaw ("Shaw Testimony"). The programmatic environmental review was not prescriptive regarding what sites were to be redeveloped in the future. *Id.* The lack of inclusion of a parcel in Appendix D does not mean that the impacts to land use or transportation of development of that site consistent with the proposed land use changes did not occur. *Id.* Notably, the Downtown Height and Density FEIS refutes Appellants argument where it notes that "Assumed Pattern of Growth" would be:

> **Infill and growth outward from the core**. This analysis [FEIS] assumes future development will seek to infill remaining sites in the Downtown Office Core (DOC 1 and DOC 2) zones and also grow outward from the office/retail core. Thus, redevelopable properties in or near the existing core are likely to be the most attractive for the next round of development within Downtown.

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Ex. 36, pg. 4-4 (emphasis in original).

As demonstrated at hearing, the Project is precisely the type of site in the DOC-2 zone near the office core that was contemplated to be redeveloped. Mott Testimony. Appellants' argument that Appendix D to the Downtown Height and Density DEIS is prescriptive about how a site can or would be developed in the growth forecasts cannot be squared with the City's own programmatic EIS assumptions about growth and developments patterns. To suggest that Appendix D is anything more than an illustrative to identify projects that were in the development pipeline or appeared to be likely candidates for redevelopment is nonsense. *Id.*

In sum, Appellants have failed to meet their burden to demonstrate new information relative to the Project's probable significant adverse impacts of land use. Appellants failed to provide any evidence – much less clear and convincing evidence – of significant adverse impacts. Accordingly, the Hearing Examiner should reject Appellants' land use related claims.

6. **Appellants failed to meet their burden with regard to transportation impacts.**

Appellants failed to meet their burden of proof regarding transportation impacts of the Project. Appellants argue that the City's environmental analysis was inadequate or, in the alternative, that the use of the Downtown Height and Density Changes EIS and Addendum for the Project was invalid because of "new" key information indicating significant adverse impacts.

Yet, Appellants' expert did not complete his own level of service analysis. He simply disagreed with how the City and Applicant's traffic engineers undertook their analysis and then raised questions of what potential studies or analysis could have been done to further analyze the Project's potential impacts. Appellants failed to show how the Project's transportation analysis

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did not include a thorough discussion of the Project's potential impacts or identify any new significant transportation impacts. Under both challenges, Appellants failed to meet their burden.

a. The Downtown Height and Density Changes EIS and Addendum evaluation of transportation impacts meets the rule of reason.

Appellants first argue that the City's environmental review of the Project's transportation impacts was inadequate. The evidence at hearing does not support the Appellants' assertions.

At hearing, the City's transportation planner, Mr. Shaw, testified regarding his review of the Applicant's transportation analysis. First, he reviewed the Downtown Height and Density Changes EIS to determine whether the Project was within the scope of the evaluation. Next, he consulted with the Applicant's transportation engineer, Mr. Swenson, to identify the scope of the Project's Transportation Impact Analysis ("TIA"). Testimony of John Shaw ("Shaw Testimony"); Testimony of Mike Swenson ("Swenson Testimony"); *see also* Ex. 69 (Douglaston Addendum proposal to SDCI). Per Mr. Shaw's direction, the Project's TIA included evaluation of traffic operations, parking and alley operations. *Id.*; *see also* Ex. 28, Appx. K, pg. 1.

As part of this consultation, Mr. Shaw identified the "pipeline" projects[4] that should be included in the TIA's cumulative impacts analysis in the future with and with-out project forecasts. The "pipeline" project list for this TIA included eight development projects within the vicinity of the Project site, including a mixed-use development at 1903 5th Avenue ("Fifth and Stewart Project") on the south end of the same block. *Id.;* Ex. 28, Appx. K, pg. 6. Mr. Shaw also noted that the TIA pipeline analysis factored in an additional 1.5 percent (1.5%) annual growth rate to "account for growth" within the Project's vicinity in addition to the pipeline projects. *Id.*

[4] As Mr. Shaw testified at hearing, "pipeline" projects are the known development projects within the vicinity of the proposed project that would increase the background traffic at the identified study intersections. Shaw Testimony.

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Mr. Shaw testified that a 1.5 percent annual growth rate is "high" and would reflect a fairly high level of other new development within the vicinity of the TIA study intersections.

Based on the City's direction and scope, the Applicant analyzed each TIA element. As shown at hearing, the Applicant's TIA included an industry standard, reasonably thorough discussion of the Project's probable impacts to traffic operations (intersection and corridor level of service), parking and alley operations.

1. The Downtown Height and Density Changes EIS and Addendum evaluation of traffic operations meets the rule of reason.

Tellingly, Appellants make no argument that the City's analysis in the Downtown Height and Density Change EIS and the Project's two Addendum is inadequate relative to traffic operations on the City's street network. Appellants' silence on this issue speaks volumes.

As Mr. Shaw testified, the City evaluates traffic operations by calculating the intersection level of service ("LOS"). Shaw Testimony. Mr. Shaw explained that the Downtown Height and Density Changes Draft EIS studied the future LOS operations for several Downtown intersections within the vicinity of the Project. *Id.* These studied intersections included:

- Stewart Street and 4th Avenue;
- Stewart Street and 5th Avenue;
- Olive Way and 5th Avenue;
- Olive Way and 6th Avenue; and
- Olive Way and 7th Avenue.

Ex. 36, pg. 3-178 (Table 55).

In evaluating the Project's potential traffic operations impacts at these intersections, Mr. Shaw compared the identified intersections in the Downtown Height and Density Changes Draft EIS against the July Addendum, which also evaluated this subset of intersections (among others).

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Notably, the July Addendum found that the level of service grade in the with-Project condition remained at the same LOS identified in Downtown Height and Density Changes Draft EIS for four of these intersections. Shaw Testimony; *compare* Ex. 36, pg. 3-178 (Table 55) *with* Ex. 28, Appx. K, pg. 28 (Table 10).

Tellingly, Mr. Shaw identified one intersection – Stewart Street and 4th Avenue – where there was a slight degradation in level of service from LOS A to LOS B in the with-Project scenario. *Id.* However, as Mr. Shaw testified, LOS B is the "second best" operating condition in the City and would be expected to be good performance. *Id.* Based on his evaluation of the Project's Addendum and the Downtown Height and Density EIS, Mr. Shaw concluded that the Project was not likely to have significant adverse impacts relative to traffic operations. *Id.*

In rebuttal, Appellants' witness Mr. Tilghman said nothing regarding traffic operations. He did not conduct his own traffic operations analysis. Tilghman Testimony. He did not contend that the Applicant's traffic operations methodology was inconsistent with industry standards. *Id.* He did not even quibble with the slight degradation in the Stewart Street and 4th Avenue LOS. *Id.*

Appellants failed to provide any evidence that the City's environmental analysis relative to traffic operations was inadequate under the rule of reason. To the contrary, the evidence demonstrated that the Applicant's TIA was a textbook example of a thorough discussion of the Project's impacts relative to traffic operations. The Appellants have failed to meet their burden.

2. The Downtown Height and Density Changes EIS and Addendum evaluation of alley operations meets the rule of reason.

Because Appellants cannot identify any traffic operations impact in the street network, they turn their focus to the scope of analysis around "their" alley. Appellants make two main

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arguments. First, Appellants argue that the discussion of the alley operations was "cursory and incomplete." Ex. 47, pgs. 2-3. Second, Appellants claim that the discussion relative to the freight loading operations is insufficient. Tilghman Testimony. Again, however, Appellants' adequacy claims are meritless. The impacts of the Project on the adjacent alley operations were thoroughly disclosed, discussed and substantiated by supporting data and opinion over the course of two Addendum. *SWAP*, 66 Wn. App. at 442. Thus, the Hearing Examiner must reject these claims.

As an initial matter, the parties agree that the City's SEPA policies have not adopted any standards for alley operations.[5] Shaw Testimony; Tilghman Testimony. The City does not have adopted level of service standards for alleys. *Id.* In Downtown, access to parking for residential and commercial uses are directed to be taken from alleys, subject to limited exceptions. SMC 23.49.019.H.1. As Mr. Shaw testified, Downtown alleys are intended to function primarily for parking access, access for freight loading and access utility services such as waste and recycling pick-up. Shaw Testimony; Testimony of Jeff Schramm ("Schramm Testimony"). Notably, the City does not consider vehicular mobility within an alley to be a primary function of an alley. *Id.*

At hearing, Appellants claimed that the City's evaluation of alley operations was inadequate because it failed to map all of the projections from existing buildings, identify the location of garbage containers that were rolled into the alley for collection or catalogue all the potential conflicts between vehicles and identify how they could be navigated in real time. *See* Tilghman Testimony. The evidence at hearing establishes that this contention is without merit.

The Applicant's transportation engineer Mr. Swenson testified that the Applicant undertook a variety of studies regarding the alley operations. Specifically, the analysis included:

[5] Under the Code, a vehicle is permitted to load and unload in an alley for up to 30 minutes. SMC 11.74.010.

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- Observation of alley operations over the course of two days;
- Evaluation of the existing alley conditions, including identifying alley widths;
- Description of the calculation of peak hour level of service for existing alley operations;
- Calculation of peak hour level of service for future with and without project alley operations;
- Calculation of future with and without-Project alley queuing operations;
- Evaluation of service access and delivery operations; and
- AutoTurn analysis of access to Project's loading docks for a variety of trucks.

Swenson Testimony; *see also* Ex. 28, Appx. K, pgs. 11-12; 29-30; and 32-33.

With regard to alley widths, Mr. Tilghman estimated the width of the alley between the Escala and the Project at approximately 20 feet in the future with-Project condition. Ex. 49, Proposed Condition. Mr. Tilghman also estimated the location and width of the Escala's garbage containers and posited how with garbage containers, the "effective" width of the alley may be reduced to approximately 15 feet, 10 inches. *Id*, Scenario 2A. Upon cross-examination, Mr. Tilghman conceded that the garbage containers he observed in the alley were mobile and moved in and out of the respective building staff as is required by the Code. Tilghman Testimony.

Notably, Mr. Tilghman's testimony did not contradict the July Addendum, which stated:

> The width of the alley varies between approximately 16 and 22-feet. It is also impacted by moveable [garbage] containers within the alley that result in areas as narrow as 14-feet. The existing width can impact operation of the alley since it constrains passing; however, this is typical of alley operations in Seattle particularly in the urban downtown context.

Ex. 28, Appx. K, pg. 12 (emphasis added).

The Applicant disclosed and discussed the alley's width and the impediments within the alley that may impact operations in the future with-Project condition; moreover, this analysis is substantiated by data. *Id.* This is precisely what SEPA requires. *SWAP*, 66 Wn. App. at 442.

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To the extent Appellants argue that the Addendum must disclose every building projection (which Mr. Tilghman conceded do not extend past the garbage containers) or location of each garbage container, SEPA does not require such minutiae to evaluate probable impacts. *In re Ballard Coalition*, Hearing Examiner File No. W-17-004, *supra*, at pg. 17 (Concluding that "analysis of every driveway and truck type that uses those driveways along [Burke Gilman Trail] is not necessary to disclose impacts associated with driveway crossings…"). Appellants may not like the Project, but the Hearing Examiner does not review the "wisdom" of the City's decision, but whether the City's review gives it "sufficient information to make a reasoned decision." *Id.*

The July Addendum disclosed the maximum alley protrusions and probable impacts – constrained passing at these pinch points. Ex. 28, Appx. K, pg. 12; *see also* Swenson Testimony. Appellants' flyspecking at hearing fail to demonstrate how it was inconsistent with industry standards, nor how it failed to disclose, discuss and substantiate the probable impacts with data. Appellants have failed to meet their burden. The Hearing Examiner should uphold the review.

On alley blockages, again, Appellants' argument ignores the July Addendum discussion. Notably, nothing in their testimony contradicted the July Addendum's discussion on blockages:

> As described in the existing conditions, blockages occur within the alley due to loading. Several of the existing blockages observed were related to the existing Icon Grill restaurant, which would be removed with the proposed project. The delivery/loading for both the proposed project and future 1903 5th Avenue development would be accessed via the alley and could result in increased loading activity in the alley or potential short-term blockages. The proposed loading bays for both projects would accommodate the expected demand and truck lengths without blocking the alley reducing the long-term alley blockages. Blockages related to the Escala would continue if loading operations for that property are managed similar to current conditions. During periods of alley blockage caused by Escala project, traffic entering and exiting the proposed project parking garage would utilize the alley to travel south to Stewart Street.

Ex. 28, Appx. K, pg. 30 (emphasis added).

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At hearing, Appellants concede – as they must – that none of their residential access is off the alley. Tilghman Testimony. Future alley operations will not impact Escala's residential access. Schramm Testimony. Indeed, Appellants offered no additional studies to quantify the purported significant impacts of alley blockages. Appellants simply recreated Applicant's study.

In doing so, their own observations validated Transpo Group's conclusions of the alley blockages – namely that the longest blockages were related to the Escala's move-in/move-out. Tilghman Testimony; Ex. 47, pg. 1-3 of October Memorandum. At hearing, Escala's representatives testified that they do not generally use their two Code-compliant 25-foot loading docks for residential move-in and move-out. Sosnowy Testimony; Tilghman Testimony. In fact, Escala owners readily admitted that they routinely exceed the Code time-limits on occupying an alley. *Id.* But despite its testimony on its "self-generated" blockages related to its moving trucks, Appellants' own observations ultimately concluded that the average truck blockage was roughly 8-12 minutes and that smaller vehicles could "generally pass" around trucks "apart from [Escala's] moving van." *Id.*, pgs. 3-4. Appellants' arguments about blockages is unavailing because its residents (who access the garage off Virginia Street) will not experience it, and, to the extent that their residential move-in/out trucks cause blockages, they could use their own dock.

Appellants have failed to demonstrate how this Project – as managed with a dock management plan for its delivery trucks discussed below – will have a direct causal relationship with significant alley impacts arising from Escala's blockages. *Cascade Bicycle Club, supra,* 175 Wn. App. at 509. Appellants appear to dislike that the Project may require evolution in the way that Escala manages their own loading functions, but the Hearing Examiner does not review the

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"wisdom" of the City's decision. The test is does the City's review gives it "sufficient information to make a reasoned decision." *In re Ballard Coalition, supra,* at pg. 15. It does.

Along those lines, Mr. Tilghman asserted that the Addendum failed to adequately discuss the alley blockages in the context of the increased in average daily traffic ("ADT"). Tilghman Testimony; Ex.47, pg. 3. Mr. Tilghman is incorrect. The July Addendum discloses the future with-Project ADT on the alley of "approximately 1,200 vehicles just south of Virginia Street and north of Stewart Street."28, Appx. K, pg. 30. This calculation factors in the 5th and Stewart Project traffic. Swenson Testimony. Moreover, due to the high 1.5% growth rate in the TIA, this analysis factors in other potential development in the vicinity. *Id*.; Shaw Testimony. In short, the Addendum clearly disclosed the cumulative ADT that would result in the future with the Project.

Upon questioning, Mr. Tilghman conceded that his calculation of ADT did not account for trips that accessed the Project from Virginia Street into the alley, or conversely, accessed the 5th and Stewart Project from Stewart Street. In other words, Mr. Tilghman's analysis presumed a disproportionally high number of trips in the alley as "through trips" traveling the whole alley. As Mr. Shaw opined, Mr. Tilghman's ADT counts and analogy to a neighborhood commercial street were flawed. The primary function of an alley is for service and access – not vehicular mobility. Appellants may not like the wisdom of directing new vehicles onto the alley that they have historically treated as "theirs" to block for hours without complaint but the Hearing Examiner does not review the "wisdom" of the City's decision. The test is does the City's review gives it "sufficient information to make a reasoned decision." *In re Ballard Coalition,* at pg. 15. Again, the fact is uncontroverted that it does with regards to alley transportation related impacts.

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Again, the evidence shows that the Applicant disclosed, discussed and substantiated by data the alley's blockages and identified the with-Project condition. *SWAP*, 66 Wn. App. at 442. The City reviewed this analysis – consistent with the primary function of an alley for access to services and loading – and determined it to be a reasonably thorough evaluation of the probable impacts. Shaw Testimony. Appellants failed to present any affirmative evidence demonstrating the inadequacy of the environmental review.[6] Thus, Appellants failed to meet their burden here.

With regard to freight loading, Appellants claim that trucks will not be able to access the Project's loading berths because are they are insufficient to accommodate loading under their assumption that trucks in the "real-world" will have to nose into the alley. Appellants also claim that commercial SU-30 trucks cannot access the alley from Stewart Street. Both claims fail.

The Project will have three loading berths in its internal loading dock off the alley. Ex. 28, Figure 1. The northernmost and middle berths are 35 feet long and angled at roughly 67.5 degrees. *Id.*; Mott Testimony. The Project's southernmost berth is 25 feet long and perpendicular to the alley. *Id.; see also* Testimony of Matthew Jones ("Jones Testimony"). In the future, vehicles using the Project's loading berths are anticipated to enter the alley from Stewart Street and back into the Project's loading dock. Ex. 28, Appx. F to Appx. K; Jones Testimony.

In designing the Project's loading berths, the Applicant's civil engineering firm Magnusson Klemencic Associates ("MKA") completed an AutoTurn analysis[7] to evaluate

[6] Appellants' contention appears to be that the City's review is inadequate because it did not do more to evaluate the impacts on Escala residents specifically. *See* Sosnowy Testimony. However, an EIS is not inadequate for failure to disclose impacts to individuals but is "intended to disclose impacts to the environment as a whole." *In re Ballard Coalition*, Hearing Examiner File No. W-17-004, *supra,* at pg. 18. To the extent this is their argument, it too fails.

[7] As Mr. Tilghman conceded, AutoTurn is the industry standard for simulating and evaluating truck movements. Jones Testimony; Tilghman Testimony. This is because AutoTurn analysis allows for consideration of multiple movements of the truck's wheels and changes in speed which result in a more accurate evaluation of real-world

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whether various-sized trucks could access the berths. *Id.* MKA's evaluation included turning movements for an SU-30 commercial vehicle into the northernmost and middle loading berth and a 20-foot U-Haul van into the southernmost berth. *Id.* One of the Project's civil engineers, Mr. Jones, testified that MKA selected these models based on consultation with the Applicant regarding the largest type of vehicles that were anticipated to use the Project's loading berths. MKA's analysis demonstrated that an SU-30 truck could access (both ingress and egress) the northernmost and middle berth if either is occupied.[8] Ex. 28, Appx. F to Appx. K. Likewise, the AutoTurn analysis demonstrated that a 20-foot U-Haul could enter and exit the southernmost berth while the middle berth was occupied. Critically, Mr. Jones testified that his experience with AutoTurn compared to real world operations, the AutoTurn analysis was a more conservative estimate of the feasibility of movement than actual driver expertise. Jones Testimony. In practice, Mr. Jones found that truck drivers out-perform the AutoTurn movement analysis. *Id.*

At hearing, Mr. Tilghman conceded that he undertook no additional turning movement studies of the Project's loading berths. Tilghman Testimony; *see also* Ex. 50. That makes sense because Mr. Tilghman is not a registered professional engineer. Ex. 46. In fact, his resume lacks any reference to designing loading berths. *Id.* Despite the limitations of his expertise, Mr. Tilghman conducted an "analysis" where he assumed that each truck would require an additional 11 feet of loading clearance area and superimposed that additional area onto MKA's analysis. *Id.*

conditions when compared with a static model such as the American Association of State Highway Transportation Officials ("AASHTO") turning templates. *Id.* AASHTO templates fail to account for these dynamic conditions. *Id.*

[8] At hearing, Mr. Jones testified that the slight changes in the location of SU-30 truck within the berth in the AutoTurn analysis was due to "resetting" the truck for an in-bound versus out-bound movement to make the paths of each movement clearer. Mr. Jones testified that this "resetting" of the trucks in the model did not alter the analysis.

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Based on that assumption, he asserted that the trucks could not access the loading dock due to conflicts with garbage containers and other vehicles that his "study" had shifted into the alley. *Id.*

At hearing, Mr. Tilghman's "analysis" of loading berth conflicts was shown to be flawed.

First, Appellants claimed that the Project's loading bays would be insufficient to accommodate "real world" conditions of accommodating commercial trucks with lift gates or residential moving vehicles with ramps inside the dock. Tilghman Testimony; *see also* Ex. 49, Scenario 3. Mr. Tilghman's assumption that the Project's trucks needed an additional 11 feet of clearance behind the truck was thoroughly rebutted because it fails to account for the City-required dock management plan condition in the Project's Master Use Permit ("MUP") decision. Ex. 83, pg. 35. As Mr. Shaw testified, the City imposed a condition to require a dock management plan for the Project to "manage deliveries at the alley[9]." *Id.* The July Addendum identified the dock management plan as a condition to coordinate deliveries and minimize potential impacts of Project's loading activity on the alley. Ex. 28, pg. 23; Ex. 82.

The Applicant's consultants identified elements of the Project's draft dock management plan conditions and described how they would mitigate any potential impacts. Among the conditions the Applicant has proposed was the use of a 5-foot by 8-foot mobile dock lift that fits behind all the loading berths and allows for off-loading horizontally to access both the residential and commercial freight elevators. Jones Testimony. Notably, the dock-lift would allow all vehicles to off-load inside the loading dock without nosing into alley. *Id.* Moreover, the

[9] The MUP conditions approval of a Project building permit on SDCI and SDOT review and approval of the dock management plan. Ex. 83, pg. 35. As Mr. Shaw testified, once approved by the City, the dock management plan is a condition of compliance with the MUP for the Project. The Applicant would not be able to change the dock management plan conditions or operations without the prior expressed approval of the City. Shaw Testimony. Failure to comply with the dock management plan would subject the Applicant to a potential enforcement action.

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Applicant committed to hiring a dock master as a condition of the dock management plan to coordinate loading maneuvers within the loading dock. *Id.* A dock master will be able to actively manage the sequencing of on- and off-loading in the instances where one vehicle needs to use an attached lift-gate and another use the dock-lift to ensure coordinated operations fully within the loading dock. *Id.* On rebuttal, Appellants conceded that this loading operation was "possible," and, therefore, there would be no impact of trucks nosing into alley. Tilghman Testimony.

Additionally, the dock management plan would impose conditions on residential move-in and move-out operations to trucks that fit within the loading berths height and wide and discourage oversized trucks in the dock.[10] *See* Ex. 81; Ex. 82. In sum, the Appellants' failed to demonstrate that the City's environmental review of the loading dock did not disclose, discuss and substantiate the impacts of the Project's loading access for both commercial and residential uses. Moreover, the Appellants have not made any argument as to why the dock management plan conditions would not mitigate any probable impacts of the Project's loading activities.[11]

Second, Mr. Tilghman conceded that all the garbage containers in the alley were mobile and required to be moved-in and out of the adjacent buildings. Tilghman Testimony (citing SMC 21.36.080.B). Mr. Tilghman also conceded that Escala had staff to manage the movement of it garbage containers that may block access to the Project's loading berths. *Id.* Thus, Mr. Tilghman necessarily conceded that he did not disagree with MKA's turning analysis if one removed Escala's offending garbage containers. *Id.* Again, Mr. Swenson testified that the Project's dock management plan will include a condition that it shall participate in the City's Clear Alley

[10] For oversized trucks, the draft dock management plan contemplates the Applicant's residential manager providing information regarding the City of Seattle street use permit requirements to unload curbside near the Project. Ex. 82.
[11] Per the Hearing Examiner's request at the conclusion of the hearing, the Applicant has attached a comprehensive list of proposed conditions for the Project's dock management plan as Appendix A to this Post-Hearing Brief.

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program so that the Project's garbage containers will not be in the alley and garbage collectors would have access to the Project's garbage inside the building. Swenson Testimony. In sum, Appellants' are complaining about the impacts of their own garbage containers that they apparently wish to leave in the alley. As the Hearing Examiner recently held, SEPA adequacy does not require a detailed evaluation of the impacts on an individual building. *In re Ballard Coalition, supra,* at pg. 18. Mr. Tilghman's argument that the City's analysis was inadequate for failure to evaluate turning movement conflicts with Escala's garbage containers is unavailing.

Finally, Mr. Tilghman argued that the City's environmental analysis was inadequate for failure to disclose that larger commercial vehicles could not access the alley from Stewart Street. Tilghman Testimony; *see also* Ex. 49, Scenario 3. Mr. Tilghman's argument here is without merit.

First, Mr. Tilghman only raised this issue at hearing. The fact is that his comments during the City's SEPA process were conspicuously bereft of this "concern." Perhaps that is because his own observations disproved this claim. At hearing, Mr. Tilghman acknowledged that the current configuration of the 5th & Stewart Street site included a light pole at the southwest corner of the parcel adjacent to alley entrance which constrained truck movements. Tilghman Testimony. This current site constraint means that SU-30 trucks have to avoid that corner – which is approximately the same place as the corner of future 5th & Stewart Project. *Id.* Yet, Mr. Tilghman observed SU-30 trucks currently accessing the alley, which belies his contention that the SU-30 trucks cannot access the alley. His own observations refute the merits of this claim.

Secondly, Mr. Tilghman's "analysis" was limited to applying an AASHTO static turning template to estimate the potential feasibility of the turning movement. Ex. 49, Scenario 4A. He did not complete an AutoTurn analysis. Upon cross-examination, Mr. Tilghman conceded that

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AutoTurn is the industry standard for turning movements; indeed, its use is more appropriate than his static turning template. Tilghman Testimony. The Applicant's civil engineer completed AutoTurn analyses for both the current and future condition (including the completion of the Streetcar on Stewart Street). Jones Testimony; Exs. 78-79. Both AutoTurn analysis show that the turning movement can be achieved by an SU-30 truck from Stewart Street. *Id.* More importantly, the City indicated that it would consider the path of truck travel required under the future with-Streetcar condition to be legal and would be accommodated under future conditions. *Id.* In sum, Appellants' argument that the City's environmental review is inadequate for failure to thoroughly discuss its purported access concerns to the alley is without merit. *In re Ballard Coalition, supra,* at pg. 17 (An EIS is not inadequate due to the failure to study every driveway or access point). The Hearing Examiner should uphold the adequacy of the City's review here.

a. Appellants failed to demonstrate that the Project was likely to have significant adverse transportation impacts.

Recognizing that the City's environmental review of the Project meets the "rule of reason," Appellants also challenge the City's decision not to complete a SEIS for the Project based on alleged significant adverse transportation impacts. This argument also fails for one key reason. Appellants fail to meet their burden to produce affirmative evidence of probable significant adverse transportation impacts of the Project. Appellants only speculate about how additional studies should have been done; they provide no evidence of new significant impacts.

Appellants' new information argument can be grouped into two categories of information. First, Appellants argue that new transportation projects or development growth that have occurred after the Downtown Height and Density Changes EIS process – such as the Mercer Corridor, Alaskan Way Viaduct replacement, Seattle Streetcar or the growth in South

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Lake Union – constitutes new information that may "influence" transportation. Ex. 47, pg. 2. Appellants also argue that changes in delivery patterns and service needs such as the emergence of Amazon deliveries is new information. Tellingly, Appellants fail to provide any affirmative evidence how this this laundry list of mega-projects indicates new significant transportation impacts stemming from the Project. They only raise questions. That is insufficient. Under SEPA, the Appellants have not met their burden of proof when factoring in the substantial weight the Hearing Examiner must accord to the City's determination of the Addendum and MUP decision.

Appellants' new transportation and development projects argument fails for one fundamental reason – they did not identify any probable significant adverse transportation impacts of the Project as required by WAC 197-11-600(4)(d)(ii).

As Mr. Shaw testified, he reviewed the Project's trip generation and impacts to traffic operations and trip generation at five intersections also studied in the Downtown Height and Density Changes DEIS. *See* Section 6.a.1, *supra.* Based on that analysis, Mr. Shaw concluded that the with-Project traffic conditions forecasted in the Project's TIA all operated at the same level of service (apart from the minor degradation and 4th Avenue and Stewart Street to LOS B) as under the Downtown Height and Density Changes DEIS. If there were to be traffic impacts relative to the infrastructure and development projects – such as South Lake Union growth or the Mercer Corridor project – Mr. Shaw expected it to be reflected in the Project's TIA for those intersections. The undisputed fact is that there was no degradation at any of these intersections.

Due to this lack of any new degradation of the level of service standards, Mr. Shaw reasonably concluded that there were no new significant adverse impacts to transportation from

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traffic from either South Lake Union and the Mercer Corridor or the waterfront. As Mr. Tilghman was not present for Mr. Shaw's testimony, he offered no evidence to the contrary.

With regard to the Center City Streetcar, Mr. Shaw also acknowledged that the Project's TIA did account for the new Stewart Street lane configuration upon operation of the streetcar. Shaw Testimony; Swenson Testimony. In fact, Mr. Shaw and Mr. Swenson both observed that they anticipated that the Center City Streetcar could have a net positive impact on transportation operations within the vicinity of the Project to the extent that it reduced the number of vehicular trips. *Id.* Appellants offer no evidence of significant adverse impacts due to the future streetcar.

Lastly, Appellants argue that the change in service demands and delivery patterns is new information regarding probable significant adverse impacts of the Project. Appellants argument proves too little. First, the Project's TIA evaluated the current operations of the alley – including current patterns of delivery vehicles. Ex. 28, Appx. K, pgs. 11-12. This real-world information regarding the current operations of delivery vehicles to this block is already in the TIA analysis.

Second, the Project would include a mail and parcel delivery area accessible off 5th Avenue southeast corner to accommodate direct access for mail and parcel deliveries such as Amazon and UPS. Mott Testimony; Ex. 64, Sheet A11-01. The Applicant is pursuing a City Department of Transportation commercial load zone on 5th Avenue to accommodate delivery parking. Swenson Testimony. The Applicant's draft dock management plan conditioned that mail and parcel deliveries would be directed to that 5th Avenue access location, which will reduce the Project's delivery demands on the alley. Mott Testimony; Swenson Testimony. Appellants failed to provide any affirmative evidence of the probable significant adverse impacts of delivery operations or demonstrate how the delivery condition would not mitigate any impact.

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Lastly, Appellants point to the City's in-progress "Final 50 Feet" study about urban goods deliveries as "new" information. Tilghman Testimony; Ex. 53. However, Appellants' fail make any connection between this draft study and significant adverse transportation impacts of the Project. Moreover, as Mr. Shaw noted, this study is still in draft form and has no final recommendations. Shaw Testimony. Mr. Shaw serves on an inter-departmental panel working with the Final 50 Feet study group around alley operations. Based on his knowledge of the in-progress study, he did not identify any new information in the Final 50 Feet study that indicated the probable significant adverse impacts of this Project on transportation or alley operations.

In summary, the City did evaluate the adoption of the Downtown Height and Density Changes EIS and Addendum here. None of Appellants' scattershot references to new projects or studies demonstrated any indication of new significant adverse impacts relative to transportation. WAC 197-11-600(4)(d)(ii). As Mr. Shaw testified, the traffic operation impacts were within the scope of what was studied in the Downtown Height and Density Changes EIS. The Addendum added information about the Project but did not change the analysis of significant impacts in those adopted documents. Accordingly, no supplemental EIS was required because Appellant failed to demonstrate new probable significant adverse impacts. *Glasser,* 139 Wn. App. at 738.

For these reasons, Applicant requests that the Hearing Examiner reject Appellants' argument that a supplement EIS is required evaluation of the Project's environmental impact.

7. **The Appellants waived their claims of significant impacts in the areas of parking, environmental health or construction-related impacts.**

The Appellants failed to present any evidence regarding significant impacts in the areas of parking, environmental health or construction-related impacts. These issues should be considered waived. *Boehm v. City of Vancouver, supra,* 111 Wn. App. at 722; *see also King*

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County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) ("In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a light reference to the issue in the record."); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d (1997). No evidence was presented at the hearing regarding these issues and, therefore, they are waived.

IV. RELIEF REQUESTED

Appellants failed to meet their burden of proof with regard to any appeal issue. The Hearing Examiner should reject this appeal and uphold the design review approval and City's adoption of the Downtown Height and Density Changes EIS and Addendum for the Project.

DATED this 20th day of March, 2018.

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