BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by ESCALA OWNERS ASSOCIATION of Decisions Re Land Use Application for 1933 5th Avenue, Project 3019699	NO. MUP-17-035 APPELLANT'S CLOSING ARGUMENT

I. INTRODUCTION

The city's SEPA responsible official determined that construction of a 48-story building at 1933 5th Avenue, cheek-to-jowl with the Escala, would have significant adverse environmental impacts. The responsible official then determined that an environmental impact statement (EIS) drafted in 2003 and finalized in 2005 could be used in lieu of drafting a new EIS. SEPA authorizes using a prior EIS, but only if the old EIS remains adequate, notwithstanding the passage of time, in light of the "environmental considerations set forth in RCW 43.21C.030." RCW 43.21C.034. The "environmental considerations" set forth in RCW 43.21C.030 include the familiar elements of an EIS: alternatives, impacts, mitigation, and unavoidable impacts.

Much of the testimony focused on whether the 2005 EIS adequately addressed the impacts of the proposal on the Escala in terms of light, air, bulk and alley impacts. We discuss those issues below.

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But the most obvious manner in which the 2005 EIS fails the test is with regard to alternatives. For a private project that does not require a rezone, an EIS must include alternatives that could feasibly attain or approximate the proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation. WAC 197-11-440(5). The 2005 EIS includes none. Whereas an EIS prepared for this project would have analyzed alternative building designs that would have met the owner's objectives (while imposing less impact on the Escala and the alley), the 2005 EIS contained no such alternatives. The alternatives in the 2005 EIS addressed different area-wide rezoning options for a large area of downtown and Belltown. The 2005 EIS provides the hearing examiner and SDCI staff with no ability to assess the impacts of various alternatives.

The alternatives analysis is "the heart" of the EIS. *See* 40 C.F.R. 1502.14; *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 68–69, 510 P.2d 1140, 1146–47 (1973). Here, neither the Design Review Board nor SDCI had the benefit of SEPA's detailed review of alternatives when making their recommendations and decisions. For this reason alone, the decision to adopt the 2005 EIS without a supplemental EIS was in error.

In addition, the Design Review Process for the 5th and Virginia Proposal violated SEPA regulatory and case law requirements that disclosure and analysis of environmental impacts must occur before a decision maker commits to a particular course of action. Not only was the Design Review Board intentionally cut off from and kept in the dark on all SEPA information, but it made decisions that set the momentum rolling very much in favor of one specific design, essentially locking that design in before SEPA review was completed.

In the end, improper SEPA review and improper design review not only violated the law and undermined the SEPA process, but it also sabotaged any potential for real, meaningful consideration

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of reasonable mitigation measures that would be necessary and appropriate to address the severe adverse impacts of the proposal.

II. ARGUMENT

A. Standard of Review

The adequacy of an EIS is a question of law subject to de novo review. *Weyerhaeuser v. Pierce Cty*., 124 Wn.2d 26, 37–38, 873 P.2d 498, 504 (1994). EIS adequacy involves the legal sufficiency of the data in the EIS. *Id*. Adequacy is assessed under the "rule of reason," which requires a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision. *Id*. The court will give the agency determination substantial weight. *Id. citing* RCW 43.21C.090.

Here, the city determined an EIS drafted in 2003 and finalized in 2005 (the 2005 EIS) "adequately address[ed] the environmental considerations set forth is RCW 43.21C.030 [*e.g.* alternatives, impacts, unavoidable impacts]." RCW 43.21C.034. Whether the 2005 EIS adequately addressed those considerations should be considered using the *de novo* standard of review typically used for reviewing the adequacy of an EIS. Whether an EIS is being used for the proposal for which it was originally prepared or a later one, the issue remains the same: Does it adequately address the environmental considerations required by RCW 43.21C.030? That is an issue of law, reviewed *de novo. Id.*

B. When a Determination of Significance is Made and a Prior EIS is Adopted to Address SEPA's Requirements for Detailed Environmental Review, a New EIS or Supplemental EIS Must be Prepared to Address Any Issues Not Adequately Addressed by the Prior EIS

The overriding and central premise of the State Environmental Policy Act (SEPA), ch. 43.21C RCW, is that, for any major action significantly affecting the quality of the environment, the lead

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agency must prepare a detailed statement on, among other things: (1) the environmental impacts of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, and (3) alternatives to the proposed action. RCW 43.21C.030.

The first step in the SEPA process is the "threshold determination." RCW 43.21C.033; WAC 197-11-310; SMC 25.05.310. This is a determination of whether a proposal is a major action significantly affecting the environment pursuant to RCW 43.21C.030. WAC 197-11-330 specifies the process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact. *See* WAC 197-11-794. The threshold determination is the formal determination about whether an EIS must be prepared. WAC 197-11-330. When the responsible official makes a threshold determination, it is final and binding on all agencies, subject to the provisions of this section and WAC 197-11-340, 197-11-360, and Part Six of the SEPA rules. WAC 197-11-390.

All threshold determinations must be documented in one of two ways: either a determination of non-significance (a DNS or Mitigated DNS) or a determination of significance (DS). WAC 197-11-310; SMC 25.05.310.D. *See also, Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). In making this determination, the responsible official must review the proposal and determine whether it is likely to have a probable significant adverse impact. WAC 197.11.330(b). The threshold determination must be made based on information reasonably sufficient to evaluate the environmental impacts of a proposal. WAC 197-11-335.

If the responsible official determines that the proposal will have no probable significant adverse environmental impacts, the lead agency shall prepare and issue a DNS per WAC 197-11-340 or a mitigated DNS per WAC 197-11-350. *Id*. The responsible official must give notice of the DNS to the public as prescribed by WAC 197-11-510, must send the DNS to agencies with jurisdiction, the

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department of ecology, and affected tribes and other affected agencies, and must allow for a 14-day comment period on the DNS. WAC 197-11-340.

If the responsible official determines that a proposal "may" have a probable significant adverse environmental impact, the responsible official shall prepare and issue a DS. WAC 197-11-360. When a DS is issued for a proposal, that means that the proposal is a "major action significantly affecting the quality of the environment" and the requirements of RCW 43.21C.030 are triggered. RCW 43.21C.030; *See also Moss v. City of Bellingham*, 109 Wn. App. at 14. The responsible official must place the DS in the lead agency's file and must provide notice of the DS to the public as prescribed by WAC 197-11-510. *Id*. The agency must prepare an EIS to evaluate the proposal's environmental impacts, any adverse environmental effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action. RCW 43.21C.030.

This, in a nutshell, describes SDCI's SEPA responsibilities for the 5th and Virginia Proposal. SDCI must prepare (or adopt) an EIS that complies with RCW 43.21C.030 and the regulations that implement that provision. *See* ch. 197-11 WAC. An EIS is particularly important because it documents the extent to which SDCI "has complied with other procedural and substantive provisions of SEPA; it reflects the administrative record; and it is the basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA between the benefits to be gained by the proposed 'major action' and its impact upon the environment." *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, supra*, 9 Wn. App. at 68. The mandatory elements include an analysis of impacts and measures to mitigate those impacts, a description of unavoidable impacts, and the alternatives analysis — the heart of the EIS requirement. *Id*.

Reasonable alternatives are actions that "could feasibly obtain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." WAC

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197-11-440(5)(b). SDCI must devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action, presenting a comparison of the environmental impacts of the reasonable alternatives, including the "no action" alternative. *Id.* SDCI must discuss the benefits and disadvantages of reserving for some future time the implementation of the proposal, as compared with immediate at this time. *Id.* When a proposal is for a private project on a specific site, the lead agency shall be required to evaluate the no action alternative plus other reasonable alternatives for achieving the proposal's objective on the same site. *Id.*

When an agency decides to use an existing EIS in lieu of drafting a new one, the foregoing requirements still apply. The statute that authorizes re-use of an existing EIS expressly states that an existing EIS may be used only if it "adequately address[es] the environmental considerations set forth is RCW 43.21C.030." RCW 43.21C.034.

> Lead agencies are authorized to use in whole or in part existing environmental documents for new project or nonproject actions, if the documents adequately address environmental considerations set forth in RCW 43.21C.030. The prior proposal or action and the new proposal or action need not be identical, but must have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography. The lead agency shall independently review the content of the existing documents and determine that the information and analysis to be used is relevant and adequate. If necessary, the lead agency may require additional documentation to ensure that all environmental impacts have been adequately addressed.

RCW 43.21C.034. This language sets clear limitations on the use of existing documents.

SEPA authorizes phased review, where more generalized analysis on a planning level document is followed by more detail on a project-level document, but phased review is not a gambit for first reviewing broad issues at a general level and then failing to prepare a follow-up EIS on the

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site-specific issues. The second phase of phased review is supposed to be an EIS that focuses on the narrow issues that were not analyzed or not analyzed in detail in the earlier programmatic EIS:

> (2) A nonproject proposal may be approved based on an EIS assessing its broad impacts. When a project is then proposed that is consistent with the approved nonproject action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the nonproject EIS. The scope shall be limited accordingly. Procedures for use of existing documents shall be used as appropriate, see Part Six.
>
> (3) When preparing a project EIS under the preceding subsection, the lead agency shall review the nonproject EIS to ensure that the analysis is valid when applied to the current proposal, knowledge, and technology. If it is not valid, the analysis shall be reanalyzed in the project EIS.

WAC 197-11-443.

Thus, reliance on an earlier, nonproject EIS is not authorization for skipping an EIS for a subsequent site-specific project — especially when, as here, the agency has determined the project has probable significant adverse impacts and issued a DS accordingly. The project-specific EIS need not re-analyze issues that were analyzed in the programmatic EIS (if that analysis remains "valid"), but the project-specific EIS must analyze in detail ("shall focus on") the "impacts **and** alternatives . . . specific to the subsequent project and not analyzed in the nonproject EIS" (emphasis supplied).

C. SDCI's Determination of Significance for the 5th and Virginia Proposal Constituted a Final and Binding Decision that the Proposal is a Major Action Significantly Affecting the Environment Pursuant to RCW 43.21C.030.

In this case, SDCI issued a SEPA Determination of Significance, Notice of Adoption of Existing Environmental Documents, and Availability of Addendum for the Fifth and Virginia proposal on December 15, 2016 and then again on July 3, 2017. Ex. 89.

In the July 3, 2017 document, SDCI stated:

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> Pursuant to SMC 25.05.360, the Director of the Seattle Department of Construction and Inspections (SDCI) has determined that the [5th and Virginia] proposal could have probable significant adverse environmental impacts under the State Environmental Policy Act (SEPA) on the **land use, environmental health; energy/greenhouse gas emissions; aesthetics (height, bulk and scale; light, glare and shadows; views); wind; historic and cultural resources; transportation and parking; and construction** elements of the environment.
>
> SDCI has identified and adopts the City of Seattle's Final Environmental Impact Statement (FEIS) dated January 2005 (Downtown Height and Density Changes). Seattle DCI has determined that the proposal's impacts for this current Master Use Permit application have been adequately analyzed in the referenced FEIS. The FEIS was prepared by the City of Seattle. That document meets SDCI's SEPA responsibilities and needs for the current proposal and will accompany the proposal to the decision-maker.
>
> The current Addendum has been prepared by the applicant to add specific information on **land use, environmental health; energy/greenhouse gas emissions; aesthetics (height, bulk and scale; light, glare and shadows; views); wind; historic and cultural resources; transportation and parking; and construction** impacts from the proposals and discusses changes in the analysis in the referenced FEIS. Pursuant to SMC 25.05.625-630, this Addendum does not substantially change analysis of the significant impacts and alternatives in the FEIS.

Ex. 89 (emphasis supplied).

This document constitutes a formal Determination of Significance issued by SDCI for the 5th and Virginia Proposal that was issued to the public pursuant to WAC 197-11-360. It identified the elements of the environment for which an EIS must be prepared. These elements included land use impacts; height, bulk, and scale impacts; transportation impacts and other elements of the environment. The DS constituted a final and binding decision that the 5th and Virginia Proposal is a major action significantly affecting the environment pursuant to RCW 43.21C.030.

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At the end of the hearing, Douglaston argued that SDCI is legally allowed to issue a formal determination of significance for the 5th and Virginia Proposal that states the proposal could have significant impacts and then, after that, informally and internally change its position and decide that the proposal will not actually have significant adverse impacts with respect to the elements of the environment listed in the DS. Douglaston argued that SDCI had several options after the DS was issued. They argued that SDCI could have decided the project had no significant adverse impacts and could issue a DNS. Or, they argued, SDCI had the option of concluding internally, after issuing the DS, that the proposal will have significant impacts in some areas, but not significant impacts in other areas. According to Douglaston, if the City concluded internally (after issuing a DS) that the 5th and Virginia Proposal would not have any significant impacts other than those that were already considered in the 2003/2005 EIS, then there was no need for a new EIS. This was presumably based on Shelley Bolser's testimony that SDCI routinely issues a DS for larger projects and then, after the DS is issued, may change its mind and — with no documentation — decide the project has no significant impacts after all.[1] *Bolser Testimony*.

This entire concept is completely at odds with SEPA rules and regulations. The Determination of Significance is the final threshold decision for the 5th and Virginia Proposal. In making this determination, the responsible official is required to review all of the information and make a formal, final, binding determination that a proposal could have significant impacts. SDCI did that here and concluded the proposal would have significant impacts related to land use; height, bulk, and scale; transportation and other elements that must be analyzed in an EIS. WAC 197.11.330(b). It was also a final, binding decision that an alternatives analysis is required for the 5th and Virginia Proposal.

[1] Shelley Bolser defined these larger projects for which a DS is routinely issued as more than 220+ units (or a number roughly similar to that). Directly contrary to that statement, Project No. 3026266 at 5th & Lenora, which is 44 stories and 458 apartments recently received a DNS. Ex. 32.

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During the hearing, the Examiner and the parties spent a brief time focusing on the word "could" as contrasted with "is likely to" have significant impacts in the July 3, 2017 Determination of Significance. *See* Ex 89. A Determination of Significance is a legal document that is issued pursuant to specific, detailed regulations to notify the public that the project is a major action significantly affecting the environment. WAC 197-11-360; WAC 197-11-390. Use of the word "could" or "is likely to" does not change the legal significance of the DS. SEPA regulations do not allow for, or contemplate, a situation where a lead agency would issue a Determination of Significance with the word "could" to leave the option open for making a second internal, informal, threshold decision without public notice that a proposal does not have significant impacts and does not, therefore, require compliance with RCW 43.21C.030.

The responsible official is legally required to consult with agencies and the public "to identify the significant impacts that will be assessed and limit the scope of an environmental impact statement." RCW 43.21.031(2). Here, SDCI did that with the DS. If the responsible official determined that the proposal will not have probable significant adverse environmental impacts, SDCI was required to prepare and issue a DNS per WAC 197-11-340 or a mitigated DNS per WAC 197-11-350. *Id*. SDCI issued a DS, not a DNS for the 5th and Virginia Proposal. If at any time ***after*** the issuance of a DS a proposal is changed so, in the judgment of the lead agency, there are no probable significant adverse environmental impacts, the DS must be withdrawn and a DNS issued instead. WAC 197-11-360. In this situation, the DNS must be sent to all who commented on the DS. *Id.* SDCI did not withdraw the DS and did not issue a DNS for the 5th and Virginia Proposal at any time after the DS was issued.

The Determination of Significance issued by SDCI for the 5th and Virginia Proposal (Ex. 89) constituted a final and binding decision that the 5th and Virginia Proposal is a major action significantly affecting the environment pursuant to RCW 43.21C.030. As a matter of law, SDCI concluded that the

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5th and Virginia proposal could have probable significant adverse environmental impacts under SEPA on land use, environmental health, energy, greenhouse gas emissions, aesthetics (including height, bulk, scale, light, glare, shadows, and viewshed), wind, historic and cultural resources, transportation circulation, parking and construction. Ex. 89. As a matter of law, this triggered the overriding and central premise of the State Environmental Policy Act that is set forth in RCW 43.21C.030 — preparation (or adoption) of an adequate EIS.

D. There are Legal Limits to Relying on the Programmatic 2005 FEIS for the Current Proposal

As discussed and quoted above, RCW 43.21C.034 authorizes re-use of an existing EIS only under limited circumstances. SDCI can rely on the 2005 FEIS only if the proposal that was analyzed in the 2005 FEIS has similar elements to the 5th and Virginia Proposal that provide a basis for comparing their environmental consequences. RCW 43.21C.034. This would include elements such as timing, types of impacts, alternatives, or geography. *Id*. A lead agency can rely on existing environmental documents only if the information and analysis in those documents remain "valid" and are relevant and adequate to meet SEPA's requirements. RCW 43.21C.034. In turn, WAC 197-11-600(4)(e) states that a proposal must be "substantially similar" to one covered in an existing EIS if that existing EIS is to be adopted with additional information provided in an addendum.

The 2005 zoning proposal and the 5th and Virginia Proposal are a complete mismatch for purposes of comparing environmental consequences. The 5th and Virginia Proposal is a site-specific project on a single parcel proposed by a private developer in 2017. The rezone proposal in the 2005 FEIS was a programmatic legislative action that was proposed in 2003 by the City of Seattle. The only connection between the two is that the 5th and Virginia Proposal is located within the area analyzed in the 2005 EIS.

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Re-using the 2005 EIS as a complete substitute for an EIS for the current project is wrong for multiple reasons. First and foremost, alternatives are always alternatives to what is being proposed. In 2003, the proposal was a rezone and the alternatives in the EIS were alternatives to that specific, nonproject action. Now, the proposal is a site-specific project and SEPA requires an analysis of alternatives to that specific action. The two are fundamentally different, but the rule remains the same. Alternatives to the project must be considered. Yet, the EIS in this case does not include alternative proposals for developing the 5th and Virginia parcel.

Likewise, the analysis of impacts is fundamentally different at the programmatic level. SEPA allows programmatic EISs to be far more general than a site-specific EIS. WAC 197-11-442 ("The lead agency shall have more flexibility in preparing EISs on nonproject proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals."). The requirements for environmental analyses vary based on whether the planning action at issue is a project action or a nonproject action. *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, No. 75375-4-I, 2018 WL 1250190, at *6 (Wash. Ct. App. Mar. 12, 2018). "A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area." *Id. quoting* WAC 197-11-704(2)(a). "Non-project actions involve decisions on policies, plans, or programs," including "[t]he adoption or amendment of comprehensive land use plans or zoning ordinances." *Id. quoting* WAC 197-11-704(2)(b)(ii); *See also* WAC 197-11-774.

Consistent with the allowance for greater generality, the 2005 EIS analyzes impacts without any of the detail provided in a site-specific EIS. For example, its discussion of shadow impacts sweeps broadly, summarizing that bigger buildings allowed by the proposed rezone will mean less light in

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some public spaces. Ex. 35. But however appropriately for an area-wide, programmatic EIS, there is no assessment of the light impacts on individual buildings, including the Escala. *Id.*

The preface of the 2005 EIS reminds the reader that it is a programmatic document; that the analysis is general; and that more detailed analysis will be forthcoming at the project-specific stage:

> **SEPA NON-PROJECT REVIEW**
>
> * * *
>
> The State's SEPA rules and handbook provide for flexibility in the content and formatting of environmental review for non-project proposals, because details about the proposal are typically limited. . . . The level of analysis should be consistent with the specificity of the proposal and available information.
>
> Broad analyses of non-project proposals can facilitate "phased review" by addressing bigger-picture concerns and allowing review of future proposals to focus on a smaller range of more specific concerns. This means that future proposals in the study area could incorporate or refer to portions of this EIS to fulfill their SEPA requirements. . . .

Ex. 35 (2005 FEIS) at ii.

Thus, when a commenter raised the issue that the 2003 Draft EIS failed to adequately address the impacts associated with alley vacations, the 2005 FEIS responded: "The precise location of alley vacations is not predicted in this EIS. Impacts of alley vacations are evaluated on a case-by-case basis." *Id.* at 5-11 (response #28). The same could have been said about any number of other project-specific impacts, including congestion created by overloading alleys and deprivation of light in residential towers. The programmatic 2005 EIS made no effort to discuss these project-specific impacts. While "portions" of the 2005 EIS could be adopted to fulfill some review for a later site-specific project, "phased review" should be used to assure the necessary level of more detailed analysis at the project stage. Phased review is a convenience to move the ball forward from the programmatic stage to the

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project stage, not an excuse for omitting necessary detail to fully inform the decision maker at significant points along the way.

In addition, as explained in greater detail in the next section, the 2005 FEIS documents do not adequately address environmental considerations set forth in RCW 43.21C.030 as is required by RCW 43.21C.034. While the 2005 FEIS may have addressed some issues, the 2005 EIS could not be adopted to address alternatives or these site-specific issues for the simple reason that the 2005 EIS contained no discussion of alternatives to the current proposal nor any discussion of its impacts on Escala or the alley.

Even if SDCI could rely on and adopt the 2005 FEIS for some of the environmental review of the 5th and Virginia Proposal, SDCI was still required to prepare a supplemental EIS for the 5th and Virginia Proposal pursuant to WAC 197-11-405, WAC 197-11-600, and WAC 197-11-620 because (1) an alternatives analysis specific to this proposal was required; (2) environmental impacts addressed at a generalized programmatic level had to be analyzed in detail for this site specific proposal; (3) substantial changes have been made since 2003 (as described throughout this brief and in the testimony and evidence presented) necessitating updated information and analysis; and (4) there is new information about environmental impacts requiring additional analysis.

E. The 2005 FEIS (Downtown Height and Density Changes) Does Not Meet SEPA Requirements for the 5th and Virginia Proposal.

Upon recognizing that the 5th and Virginia Proposal required preparation of an EIS, SDCI decided that the 2005 FEIS addressed all the issues that must be addressed in an EIS and that its coverage of those issues remained valid more than a decade later. This is false for many reasons discussed below.

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1. The 2005 FEIS does not contain a detailed analysis of alternatives to the 5th and Virginia Proposal

The 2005 FEIS for the Downtown Seattle Height and Density Changes does not contain any analysis of alternatives for the 5th and Virginia Proposal. Ex. 35 at iii. It is a programmatic EIS for an area-wide rezone. The alternatives that were analyzed in the 2005 FEIS constituted different alternatives for zoning legislation that was planned to rezone portions of the Denny Triangle, Commercial Core, and Belltown neighborhoods. *Id*. at iii (Fact Sheet for FEIS). SDCI's Shelley Bolser admitted in her testimony that alternative designs in the EIS were not alternative designs for this project; they were alternative zoning proposals for a large area including much of downtown and the Denny Regrade. *Bolser Testimony* (Day 4, Part 3, 07:23-8:09).

The Final EIS examined five alternatives that covered a range of possible legislative actions for that entire area. Three of the alternatives (Alternatives 1, 2, and 3) consisted of different combinations of increases in allowable maximum heights and densities (volumes) of buildings in several downtown zones.

Alternative 1, which was referred to as the High End Height and Density Increase, would have increased height and density provisions in portions of downtown zoned Office Core 1 and 2 and Downtown Mixed Commercial. Ex. 35 at iii, 2-8 – 2-15. The proposed density changes were proposed to increase allowable densities by three or four times the property area of a given site. *Id*. This alternative included specific proposals for maximum heights in the different zones. *Id*. Alternatives 2 and 3 consisted of height and density increases in fewer areas for lesser amounts of change. *Id*. at 2-16 – 2-28. Alternative 2 would have limited changes to the downtown office core zones. *Id*. Alternative 3, referred to as the Residential Emphasis Alternative, would have increased height and density in

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most of the office core zones, but would reorient zoning in some areas to better encourage housing production. *Id*. at 2-18 - 2-20.

The "Preferred Alternative" was a new alternative included in the Final EIS to represent the Mayor's recommendation for changes to the downtown zoning. Ex. 35. The Preferred Alternative, which is presumably what was ultimately adopted, was intended to increase densities in the DOC1 and most of the DOC2 Office Core to levels comparable to Alternative 1 and would increase densities in fewer of the DMC zones. It would also increase maximum heights in several of these zones to a higher level than defined in Alternative 1, with the highest height limits oriented to developments including housing. *Id*. at iii.

A "no action" alternative (Alternative 4) was included to assess what was likely to occur over time under the land use code that was in effect in 2003. Ex. 35 at 2-21 – 2-23. In other words, the no-action alternative assessed a situation with zoning that does not exist today. The 2003 development regulations and zoning that were in effect when the 2003 DEIS and 2005 FEIS were prepared were replaced with the new zoning legislation that was adopted by the City Council in 2006. Therefore, the "no-action" alternative that was analyzed in that old FEIS is outdated, inapplicable, and irrelevant to any "no-action" alternative to the 5th and Virginia Proposal today.

In contrast to all this, the 5th and Virginia Proposal is a site-specific land use application. The objective of the proposal is to construct and operate a high-rise tower containing hotel rooms, apartments, retail and restaurants at the corner of 5th and Virginia in Downtown, Seattle. The "preferred alternative" is a 48-story building with 1,000 square feet of retail on the first two levels, and 155 hotel rooms and 431 apartments located above. Ex. 89. Parking for 239 vehicles will be located below grade. *Id.* No other alternatives to this proposal were described, discussed, or analyzed anywhere in any of the environmental documents. Most certainly, no alternatives to the current

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proposal were included in the 2005 FEIS which SDCI adopted as the exclusive source of detailed environmental review.

The 5th and Virginia Proposal is restricted in a way that the zoning legislation was not — it must be built within confines of what is allowed by the zoning and development regulations that were in effect on the day it vested. Reasonable alternatives to the 5th and Virginia Proposal are actions that could feasibly obtain or approximate the site-specific objective of a building and operating a mixed-use building at the corner of 5th and Virginia, but at a lower environmental cost or decreased level of environmental degradation. WAC 197-11-440(5)(b). Reasonable alternatives would include, for example, different building designs, different configurations, fewer hotel rooms, apartments and/or restaurant/retail space, different setbacks, and/or different approaches to utilizing the alley. In other words, reasonable alternatives would be alternative proposals for a mixed-use building on this site, not for a larger rezone. The no-action alternative would consider the impacts of not building on the site with the zoning and development regulations that were in effect when the project vested (not 2003 zoning), with other development proposals that are in the pipeline now (many new proposals that were not in the pipeline in 2003), along with updated and relevant growth data for the neighborhood.

Not one witness suggested that the 2005 FEIS contains a detailed analysis of alternatives to the 5th and Virginia Proposal. There is no evidence anywhere in the record to support an argument that it did. This is a major error that on its own, with no further need for analysis of the other issues, invalidates the SEPA review for the 5th and Virginia Proposal.

2. The 2005 FEIS does not contain a detailed analysis of the existing environment, the environmental impacts, or mitigation for the 5th and Virginia proposal

The errors in SEPA review do not, however, end with the failure of SDCI to conduct a detail alternatives analysis for the 5th and Virginia Proposal. As stated above, a Determination of

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Significance means that the proposal is a "major action significantly affecting the environment" pursuant to RCW 43.21C.030. It means the agency must prepare a "detailed statement" on, among other things, the significant environmental impacts of a proposal. Therefore, SDCI was legally obligated to prepare an EIS that contained an analysis of the significant environmental impacts of the 5th and Virginia Proposal.

This requirement goes beyond simply describing the impacts. The EIS must (1) describe the existing environment that will be affected by the proposal, (2) analyze significant impacts of alternatives including the proposed action, and (3) discuss reasonable mitigation measures that would significantly mitigate these impacts for the proposal. WAC 197-11-440. The EIS must also include a detailed statement about any adverse environmental effects which cannot be avoided should the proposal be implemented. RCW 43.21C.030. It must clearly indicate those mitigation measures, if any, that could be implemented or might be required, as well as those, if any, that agencies or applicants are committed to implement. *Id.*

Significant impacts on both the natural and built environments must be analyzed, if relevant (WAC 197-11-444). This involves impacts upon and the quality of the physical surroundings. Discussion of significant impacts must include the cost of and effects on public services, such as utilities, roads, fire, and police protection, that may result from a proposal. *Id*.

The 2005 FEIS does not contain an adequate analysis of impacts as required by law for the 5th and Virginia Proposal. Because it was a programmatic EIS for an area-wide rezone, the 2005 FEIS's description of the existing environment contains only a general description of traffic, land use, aesthetics, and other issues within the large study area. It documents those general conditions as of 2003 (when the EIS was drafted). It does not describe the specific features of the environment that would be affected by the 5th and Virginia Proposal in 2003, let alone as it exists today. The DS states

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the 5th and Virginia project will significantly impact land use; transportation; height, bulk, and scale, historic or cultural resources; environmental health; and other elements of the environment. The 2005 EIS does not address any of those impacts specific to the current proposal. The 2005 EIS does not mention the 5th and Virginia Proposal or Escala. It does not discuss air and light impacts on Escala. The 2005 EIS does not discuss the alley or how it would be impacted by the new project. It does not mention other new and proposed development in the area that exists today and were not contemplated to exist in 2005. *See* Ex. 35; *Sosnowy Testimony*. In fact, Escala had not even been built when the 2005 FEIS was prepared. *Id*.

The FEIS does not identify any mitigation measures that could be implemented or might be required for the 5th and Virginia Proposal with respect to land use, environmental health, energy, greenhouse gas emissions, aesthetics (including height, bulk, scale, light, glare, shadows, and viewshed), wind, historic and cultural resources, transportation circulation, parking and construction as is required by WAC 197-11- 440. It does not indicate the intended environmental benefits of mitigation measures. *Id*. The mitigation discussed in the 2005 FEIS is relevant to mitigation that applies to legislative action — policy choices, programs, or other broad action that the City Council could take — a very different realm of mitigation possibilities that are not relevant to this site-specific project. Mitigation for a site-specific project would include ideas such as setbacks, design modifications, choice of materials, a dock management plan, and the like. None of these ideas or anything like them were discussed in the 2005 FEIS.

The foregoing assessment of the shortcomings of the 2005 FEIS should be sufficient for determining that SDCI erred in relying exclusively on the 2005 programmatic EIS and failing to prepare an EIS or SEIS for the 5th and Virginia Proposal. But we provide below a subject-by-subject analysis to elaborate on and prove the same conclusion.

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a. The 2005 FEIS Fact Sheet and Summary are inadequate for the current proposal

On the most fundamental level, the fact sheet and summary in the 2005 FEIS do not even mention the 5th and Virginia Proposal or identify the proponent of the 5th and Virginia Proposal. *See* Ex. 35; *McCann Testimony* (Day 3, Part 1, 1:01:07–1:04:10). Going through all of the legal requirements for a fact sheet, none of the information provided in the 2005 FEIS applies to the 5th and Virginia Proposal as is required by WAC 197-11-440(2). *Id*. The 2005 FEIS does not even contemplate that the 5th and Virginia project site would be developed at all. Ex. 35, Appendix D (Preferred Alternative Project List); *See also McCann Testimony* (Day 3, Part 2, 1:00– 52:37).

b. The 2005 EIS transportation analysis is inadequate for the current proposal.

There was no dispute that the 2005 FEIS contains no discussion of issues concerning circulation and congestion in the alley caused by the 5th and Virginia Proposal. Every witness who testified on the subject agreed to this basic truth. The 2005 FEIS did not describe the principal features of the alley as it exists today (*i.e.,* the existing environment). *See* Ex. 35. The 2005 EIS did not identify mitigation measures that could be implemented or might be required to mitigate the alley impacts. *Id.* The EIS did not summarize significant adverse impacts to the alley that cannot or will not be avoided. *Id*.

It was not our burden to prove that the proposal would have significant adverse traffic impacts. SDCI acknowledged that in the DS. Nonetheless, the TIA Traffic report, the testimony of Ross Tilghman, and additional overwhelming documentary evidence in the record demonstrated that the 5th and Virginia Proposal will have significant adverse impacts on the alley. Even without the Tilghman testimony and exhibits, the Transportation Impact Analysis for the 5th and Virginia Proposal, which was prepared by Douglaston's consultant, Transpo Group, proves that the impacts on the alley will be

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significant. *See* Ex. 28, Appendix K. The project impact analysis includes an analysis of the traffic volume at the intersections of the alley and Virginia, and the alley and Stewart, and concludes "the project would have the greatest impact at the alley intersections along Virginia and Stewart Streets . . . because these are the primary access points to the site." *Id*. at 28. Transpo predicts that, with the proposed project, the average daily traffic (ADT) in the alley is estimated to be approximately 1,200 vehicles just south of Virginia Street and north of Stewart Street. *Id*. at 30. That is a significant number of trips per day by any standard. After stating that "the City generally recognizes LOS E or worse as poor operations at signalized intersections and LOS F as poor operations at unsignalized intersections," Transpo concluded that, with the project, both alley intersections would operate at LOS F during both the AM and PM peak hour. *Id*. "Significant" as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality. WAC 197-11-794. LOS F at both intersections every day during the AM peak hour and the PM peak hour is "more than a moderate" impact.

Mr. Tilghman's testimony and the written evidence submitted proved that the Transpo report had seriously downplayed and misled on just how severe the alley problem will be. The 5th and Virginia Proposal, especially when combined with the other high-density development at 5th and Stewart and other high-density development in the area, will cause very significant adverse impacts associated with alley blockage, pedestrian vehicular safety, and traffic operations above and beyond those identified in the Transpo Report. *See Tilghman Testimony*; *See, e.g.*, Exs. 11, 14, 21, 47-60. Mr. Tilghman also demonstrated that Transpo's Traffic Impact Analysis Report shows that 75 to 83 percent of the 5th and Virginia traffic enters from Stewart, much more than "some" traffic as testified by Douglaston's consultant, and he explained that alleys become like streets when 2000 vehicles traverse the alley per day. *Tilghman Testimony* (Day 4, Part 1, 1:10:10–1:12:56) (Day 2, Part 3, 36:00–

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38:40) The City is requiring that all of the vehicles for 711 apartments and 430 hotel rooms access their parking via this narrow alley in addition to the normal alley garbage, delivery, and daily servicing functions. *Id*. It's going to be a mess.

Neither Douglaston nor SDCI presented any testimony or documentary evidence that effectively rebutted the DS's conclusive statement and the appellant's testimony that the 5th and Virginia Proposal will have more than a moderate impact on alley circulation and congestion. The central thrust of their response to Mr. Tilghman's testimony was that their "Draft" Dock Management Plan would hopefully mitigate these significant impacts. But then SDCI's John Shaw admitted he had not conducted any analysis of whether Dock Management had actually worked anywhere downtown and he had no examples in the downtown area to point to for proof it would be successful. (Day 4, Part 1, 1:04:112–1:05:15). Instead he provided one example of a development in West Seattle, but admitted that this development was only a couple of stories tall and had a wider alley. *Id.* Mr. Shaw admitted his analysis of impacts did not include any look at Escala's loading berths, nor did he inquire about Escala's delivery scheduling system. *Id*. (Day 4, Part 1, 1:13:05–1:14:11).

The very existence of the Dock Management Plan is an acknowledgement that the impacts are significant enough to warrant a mitigation plan to address them. We were left with serious questions about whether or not the mitigation proposed in the Dock Management Plan is reasonable and/or would adequately address the significant impacts, but there was no dispute that the alley impacts themselves (which are significant) and the proposed mitigation for those impacts (the Dock Management Plan) were not discussed in the 2005 FEIS at all. That is what the law requires and that is what SDCI failed to do.

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c. The 2005 EIS land use analysis is out-of-date and no longer accurate.

As noted above, an existing EIS can be adopted for use on a new proposal only if the information in the existing document is accurate and reasonably up-to-date. RCW 43.21C.034; SMC 25.05.600(B). An SEIS is required when substantial changes have been made and when there is new information about environmental impacts requiring additional analysis. Here, the land use analysis in the 2005 FEIS is out-of-date and no longer valid. SDCI should have prepared a new land use analysis in a new EIS using current information.

Land use impacts for the different alternatives to the rezone proposal were primarily addressed at pages 3-30 through 3-60 of the 2003 Draft EIS. *See* Ex. 36 at 3-30 – 3-60. The Draft EIS describes the existing conditions for the study area as it existed in November, 2003. *Id*. at pages 3-30 to 3-45. The study area in the Draft EIS encompassed three zoning categories and three urban villages. *Id*. at page 3-30. The EIS provided very general summaries of the range of land uses on downtown Seattle parcels in the different sub-areas based on the King County Assessor's data surveys of the study area undertaken in 2001 and knowledge of recent construction in the area. *Id*. at 3-30.

The Final EIS describes the land use pattern and recent development activity that existed in November, 2003 — listing downtown office projects such as One Convention Place, the Millennium Tower, 1700 Seventh Avenue, and the IDX Tower. *Id.* at 3-36 - 3-37. It describes hotels, motels, residential housing, and retail as it existed in 2003. *Id*. at 3-35 – 3.40. Table 24, on page 3-47 of the Draft EIS, summarizes findings about development capacity that was anticipated to be accommodated on potential redevelopment sites in downtown Seattle. For Alternative 1, the development capacity of residential units for the Commercial Core and DOC2 and DMC combined was assumed to be 1,260 residential units. For Alternative 2, it was 1,340 residential units. For Alternative 3, the total assumed

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was 1,340 residential units. And for Alternative 4, the total was 1,185 residential units. The EIS concluded there was not likely to be a change in the total amount of space that developers were likely to produce over a given period without a change in the demand for new space. *Id*.

To provide a better understanding of how the four alternatives would impact the area, the City of Seattle developed a potential 20-year development projection for each alternative between 2000 and 2020. They included 16 projects either completed since 2000 or under construction as of January, 2002. They also included 17 projects that have undergone substantial permit review. *Id*. at 3-48. Table 25 on page 3-49 summarizes the results of the 20-year development model upon which the impacts analysis was based. *Id*. at 3-49. The impacts on office development hotels and motels, housing, human services, and vacant and underutilized sites for each alternative were rooted in this 20-year development model. Furthermore, the analysis of impacts was at a 30,000-foot level — very broad and big description of office development, number of hotels and motels, how much residential growth may occur, impacts on human services, and impacts on vacant and underutilized sites. *Id.* at 3-49 – 3-58.

The baseline conditions for residential use that were assumed in the 2005 FEIS are no longer valid. *See* Ex. 34; Ex. 36 at 3-49 (Table 25); Ex. 38; *Sosnowy Testimony*. Even with slight subtraction for hotel rooms, the DOC 2 zone already has close to double (1.74 times) more residential unit numbers than were forecast in the 2005 FEIS. *Id*. The DMC zone has 4.85 times the forecast in the 2005 FEIS for the time period of 2000-2020. *Id*.

The mitigation strategies for land use impacts, which are described on pages 3-58 to 3-60, are not applicable and are not reasonable mitigation for the 5th and Virginia Proposal. They include ideas such as transfer of development credits and multi-family tax exemption programs, Downtown Seattle Housing Bonus Program, the City's transfer of development rights program, and other broad-based

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relief that could be considered for a legislative rezone. The significant unavoidable adverse impacts related to land use concluded that the increased density of residential and commercial development generally throughout downtown was consistent with the City's Comprehensive Plan and Neighborhood Plans and was not interpreted to be a significant unavoidable adverse impact.

SEPA regulations require that EISs incorporate a summary of existing land use plans and zoning regulations applicable to the proposal and address the proposal's consistency or inconsistency with them. WAC 197-11-440(6). This means that the 2005 EIS was required to summarize existing, applicable comprehensive plans, neighborhood plans, and zoning regulations, and to discuss the project's consistency (or lack thereof) with those plans. The 2003 Draft EIS describes the rezone proposal's relationships to the existing plans and policies of that era. Ex. 36 (Draft EIS) at 3-61 to 3-69. This section analyzes the relationship of the proposed rezone to the Growth Management Act requirements, the Puget Sound Regional Council Framework Goals and Policies, the City of Seattle Comprehensive Plan, and other downtown neighborhood goals and policies. *Id*. That analysis is wholly and utterly unrelated to and irrelevant to an analysis of the 5th and Virginia Proposal's consistency with current zoning and development regulations, the current Comprehensive Plan, the current Belltown neighborhood plan, and other current policies. Not only are the plans and policies that were analyzed in the 2003 DEIS no longer in effect, but the 5th and Virginia Proposal is a site-specific project that demands a completely different analysis altogether. There is no plausible argument that the land use plan analysis in the 2005 EIS is an adequate stand-in for a land use plan and development regulations analysis required by law for today's 5th and Virginia Proposal.

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d. The 2005 FEIS discussion of height, bulk and scale, including light impacts, is inadequate for the current proposal.

The 2005 FEIS does not contain an adequate analysis of the significant height, bulk, and scale impacts of the 5th and Virginia Proposal, including daylight impacts. Every witness who testified on the subject, including those testifying in support of Douglaston, confirmed that the 2005 FEIS did not analyze the massive reduction in daylight that would be suffered by Escala residents because of the 5th and Virginia Proposal. *See e.g*. *McCann Testimony* (Day 3, Part 1, 26:57:00; 54:00–58:88). Nor did the 2005 EIS provide any discussion of the serious health consequences associated with a major deprivation of access to daylight. Indeed, these human health effects have only been recognized in recent years, subsequent to preparation of the 2005 EIS. "When preparing a project EIS under the preceding subsection [allowing phased review], the lead agency shall review the nonproject EIS to ensure that the analysis is valid when applied to the current proposal, knowledge, and technology. If it is not valid, the analysis shall be reanalyzed in the project EIS." WAC 197-11-443 (3). The 2005 EIS fails this test. SDCI violated SEPA by failing to "reanalyze [the issue] in the project EIS."

The impacts caused by lack of daylight to the Escala residents will be significant (*i.e.,* "more than moderate"). Once again, it was not our burden to prove that the Proposal would have significant adverse height, bulk, and scale impacts because SDCI acknowledged that in the DS. Nonetheless, the testimony of Joel Loveland and the documentary evidence in the record prepared by him demonstrated that the 5th and Virginia Proposal will have significant adverse height, bulk, and scale impacts related to lack of daylight on the residents of the Escala. *See* Ex. 43, Ex. 44, Ex. 45; *Loveland Testimony*.

Professor Loveland's own modeling and analysis revealed that there will be devastating impacts to natural daylight to alley side residents. *Id*. For example, at the fifth floor (where there is only alley views) residents will see their daylight reduced by more than 75%. *Id*. This means during

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daylight hours these alley-side units will rarely be able to turn off their electric lights. *Id*. And worse, some units (identified as "B" in the report) will commonly experience adequate daylight conditions for only 12 percent of daytime hours. *Id*. For winter months, there would be only negligible daylight reaching these residents. The residents will be living in a cave in the dark. *Id*.

F. The Addendum Can Not Be Relied on as a Substitute for an EIS or SEIS

During the hearing, Douglaston, SDCI, and their witnesses did not appear to claim that the content in the Addendum can be used to satisfy SEPA's requirements for an EIS (or SEIS). But if such a claim were to surface in their closing arguments, it should fail.

An addendum cannot be used as a substitute for an EIS. *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 631, 860 P.2d 390, 398 (1993), *as amended on denial of reconsideration* (Jan. 28, 1994), *amended,* 866 P.2d 1256 (1994). Procedurally, the steps in creating an addendum are different (and less demanding) than those involved in preparing an EIS. Whereas an EIS must first be scoped, no scoping is required for an addendum. *Compare* WAC 197-11-408 *with* WAC 197-11-625. Whereas an EIS is first published as a draft and circulated to other agencies with expertise and the public for comment, no such scrutiny is required for an addendum. *Compare* WAC 197-11-455 *with* WAC 197-11-625. Whereas a final EIS must be prepared and must include a response to the comments on the draft EIS, no such final analysis is required and no such transparency is required for an addendum. *Compare* WAC 197-11-460 and 560 *with* WAC 197-11-625.

Substantively, the two documents are distinct, too. An EIS must include all of the information summarized in WAC 197-11-440 (a detailed discussion of alternatives, summary of existing environment, analysis of impacts, and more). In contrast, an addendum is reserved for supplemental material that does not materially modify the prior analysis. WAC 197-11-660(4)(c); Ex. 76.

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If the 2005 FEIS fails to follow the strictures of SEPA, then the underpinnings of the addendum are gone. *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty*., 122 Wn.2d at 632. The issue in this case is, therefore, whether the analysis of significant impacts and alternatives in the existing environmental document — the 2005 FEIS — is adequate under SEPA. *Id*. The content of the Addendum is not relevant to the issue presented.

G. The Timing Issue: The Design Review Process for the 5th and Virginia Proposal Violated SEPA Regulatory and Case Law Requirements that Disclosure and Analysis of Environmental Impacts Must Occur Before a Decision Maker Commits to a Particular Course of Action.

SEPA is the legislative pronouncement of our State's policy to assure that the environmental impacts of government decisions are taken into account before, not after, government decisions are made. *Lands Council v. Washington St. Parks & Recreation Comm'n*, 176 Wn. App. 787, 807–808, 309 P.3d 734 (2013). *See also Stempel v. Dept. of Water Resources, supra*, 82 Wn.2d at 118. *See also*, *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 707, 601 P.2d 501 (1979) (SEPA requirements constitute a directive to shape the future environment by deliberation, not default).

Environmental documents are not paperweights. They are to be used by agency staff and decision makers as a project moves through the administrative process, so that better recommendations and decisions are made. SEPA regulations and decades of case law instruct that SEPA's requirements are to be met early in the process before momentum builds in favor of one alternative or another. WAC 197-11-055(2); *Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 803-04, 309 P.3d 734, 742-43 (2013); *King County v. Boundary Review Bd*., 122 Wn.2d 648, 663 (1993). The disclosure and analysis of environmental impacts must occur before commitments to a particular course of action are made. WAC 197-11-055(2)(c); WAC 197-11-448(1); *City of Des Moines v. Puget Sound Regional Council*, 108 Wn. App. 836, 849 (1999). SEPA regulations require

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that the "lead agency shall prepare its threshold determination and environmental impact statement, if required, *at the earliest possible point in the planning and decision-making process*, when the principle features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2) (emphasis supplied). Both the threshold determination and Environmental Impact Statement ("EIS") must be developed early. "The [EIS] shall be prepared early enough so it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." WAC 197-11-406. The City cannot take any action that would limit the choice of alternatives before SEPA review has occurred. WAC 197-11-070(1)(b). Actions to develop plans or designs or work that is necessary to develop an application for a proposal is allowed, but not if those actions limit the choice of alternatives. WAC 197-11-070(4).

The Design Review process for the 5th and Virginia Proposal violated SEPA regulatory and case law requirements that disclosure and analysis of environmental impacts must occur as early as possible in the process, so that the analysis of impacts, alternatives and mitigation can be used by staff, advisory panels, and decision makers as the project moves throughout the permitting process. In direct violation of the law, the Design Review Board's decisions were not informed by SEPA. Remarkably, perhaps shockingly, Shelley Bolser testified that SDCI intentionally separated the Board from the SEPA process and made efforts to ensure that the Board was not informed by or even aware of SEPA information, analysis, documents, and review before making its decisions. *Bolser Testimony* (Day 3, Part 3, 10:38 - 14:04). The motivation for these blindfolds is hard to fathom. Precluding the Design Review Board from utilizing environmental analysis in its process is a blatant violation of SEPA's requirements.

According to the Seattle Code, the applicable design guidelines are intended to mitigate the adverse height, bulk, and scale impacts addressed in the SEPA policies. SMC 25.05.675.G. A project

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that is approved pursuant to the design review process is presumed to comply with these height, bulk, and scale policies. *Id*. The code states that the Design Board can condition the 5th and Virginia Proposal via the City's SEPA authority by, among other things, modifying the bulk of the development, repositioning the development on the site, or requiring increased setbacks or other techniques to offset the appearance of incompatible height, bulk, and scale. *Id*.

The Design Review Board has the opportunity and duty to push the design in various directions to obtain greater conformity with applicable design guidelines. But the environmental impacts of different designs may be different. A design that does a little bit better addressing one guideline may, unfortunately, create worse environmental impacts. The Board should be informed when it is pushing one design or another whether there are environmental consequences associated with those choices. SDCI's process leaves the Board blind to the environmental consequences of its efforts and recommendations. SDCI's process violates SEPA.[2]

That the DRB process results in a recommendation, not a final decision, is no excuse for depriving the DRB of the information in SEPA documents. As discussed above, SEPA rules and case law emphasize, repeatedly, that environmental review must be completed as early as possible in the "process," not just before a final decision is made. At each meeting along the way, the Board made final decisions about massing, materials, and height that were locked in as far as the Board was concerned. At the end of the second EDG meeting, the Design Review Board approved "Option 3," which was the applicant's preferred design, with some additional guidance that would affect the massing and building form and design. Exs. 5 and 8. When Escala presented the lack of daylight study

[2] We do not assert that the Design Review Board has any role in preparing SEPA documents nor in assessing their adequacy. The Board is not involved in the process of creating the SEPA documents. But that does not justify SDCI from blocking the Board's access to the information in the SEPA documents.

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that Joel Loveland prepared at the Second Recommendation meeting, the Board rejected it entirely because it had been submitted "too late" and they had already made their final decision on the massing of the building previously. Ex. 29; *Sosnowy Testimony*. As a result, the Board did not consider the Loveland study at all in its decision-making process simply because it was provided to the Board after they had locked in their decision on massing.[3]

In addition, the city's process places great weight on the Design Review Board's recommendations. SDCI must adopt the Board's recommendations absent extenuating circumstances. SMC 23.41.014. To preclude the Board from considering the environmental impacts of its own recommendations is a dreadful failing of the city's permitting process. The Board issued decisions that were not informed by any of the information that was submitted or prepared pursuant to SEPA. The Board did not review the 2005 FEIS, the Addendum, or the SEPA comments that were submitted by the public. The Board did not review alternatives that had been analyzed in detail as required by SEPA (this was not only because they were cut off from the SEPA information, but also because no such alternatives analysis was prepared). The Design Review Board did not even review the written comments that were submitted to the City by members of the public for design review and inconsistency of the proposal with design guidelines. The sole public input that the Board received was the 20-minute oral public comments that were rushed through right before they made their decisions. That and a summary of written comments prepared by SDCI and the Design Packet

[3] When Shelley Bolser was asked if she read all of the comments and documents that were in the project portal, she answered with an unequivocal "yes." *Bolser Testimony* (Day 4, Part 2, 6:49–7:10). But then, while still under oath, in response to the Examiner's questions about whether Joel Loveland's report had been submitted to the City, Ms. Bolser testified that it had not been submitted and that there was no evidence of his study in the portal. *Bolser Testimony* (Day 3, Part 3, 00:27:02-0:27:50). 2). *See also* (Day 4, Part 2, 1:27:08–1:27:50). It is not entirely clear why Ms. Bolser would say something that is so clearly not true, but Escala certainly did provide Joel Loveland's study to the Design Review Board at the second Recommendation meeting and did submit Joel Loveland's study to SDCI before the Addendum was prepared. Ex. 21; *Sosnowy Testimony* (Day 4, Part 3, 1:29:07–1:31:35.); Ex. 27; Ex. 29. Letters and information submitted to the Design Board and SDCI throughout refer to Joel Loveland's study at length. *See* Ex. 21; Ex. 27; Ex. 29, and Ex. 30.

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submitted by the Applicant constituted the entirety of information upon which the Design Board made its decision.

The Board's actions unlawfully built momentum in favor of a specific alternative without the benefit of environmental review and improperly limited the choice of alternatives before SEPA review was conducted. To the extent the Seattle Municipal Code requires this to occur, we challenge the legality of the relevant code provisions as applied in this case as being inconsistent with Washington law.

H. The Design Review Decision Was Made Without Meaningful Public Input and Resulted in Approval of a Project that is Inconsistent with the Design Guidelines.

The Design Review Board decisions were not fully informed because the EDG process did not allow for meaningful public participation. The end result was approval of a project that is inconsistent with the Design Guidelines.

Despite that the Seattle Municipal Code states that the Board "shall" review the record of public comments on the project's design and the project's conformance to the guideline priorities applicable to the proposed project (SMC 23.41.014), the Board never read any of the written comment letters. *Sosnowy Testimony*; Ex. 9. This included comment letters that contained persuasive argument about the inconsistency of the proposal with the design guidelines. *E.*g. Ex. 10. An opportunity for oral public comment was provided at each Board meeting, but the entire public was allowed only 20 minutes total to speak. *Id*. With a crowded room full of people, that left each person with less than two minutes. *Id*. This was barely enough time to make a few basic points, much less provide the Board with critical details or complicated arguments about the Design Guidelines, within the rushed and limited time allocated to speak. *Id*. Members of the public were forced to abandon major points because of the severe time limits. *Id*.

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To make matters worse, the Board members deliberated and made a decision only minutes after the public testimony ended. *Id*. There was no time whatsoever for the Board to truly digest what they had heard from the public. *Id*. There was no time for the Board members to review details in graphs/tables, reports, photographs, or other information that the public presented. *Id*.

Perhaps due to the Design Review Board's flawed process, its recommendations failed to comport with the applicable design guidelines. The Downtown Design Guidelines explain the important role of the guidelines in addressing issues like the one presented here:

> Height limits and upper level setback requirements were established downtown to create large-scale transitions in height, bulk, and scale. **More refined transitions in bulk and scale must also be considered.**

Design Review Guidelines for Downtown Development at 16 (Guideline B2; emphasis supplied).

More specifically, the guidelines specify that reductions in a project's proposed height, bulk and scale may be necessary to conform with the guidelines:

> For projects undergoing design review, the analysis and mitigation of height, bulk and scale impacts will be accomplished through the design review process. Careful siting and design treatment based on the techniques described in this and other design guidelines will help to mitigate some height, bulk and scale impacts; **in other cases, actual reduction in the height, bulk and scale of a project may be necessary to mitigate impacts.**

Id. (emphasis supplied).

Guideline B2 goes on to specify reducing the bulk of upper flows and modifying the length of the façade as means to mitigate adverse impacts and to "achieve an acceptable level of compatibility:"

> In some cases, reductions in the actual bulk and scale of the proposed structure may be necessary in order to mitigate adverse impacts and achieve an acceptable level of compatibility. Some techniques which can be used in these cases include:

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> k. articulating the building's facades vertically or horizontally in intervals that reflect to existing structures or platting pattern;
> . . .
>
> m. reducing the bulk of the building's upper floors; and
>
> n. limiting the length of, or otherwise modifying, facades.

Id. at 17.

Of particular relevance, Downtown Design Guideline A1 addresses the very issue discussed in detail by Professor Loveland and raised repeatedly by Escala residents — the loss of access to daylight:

> Each building site lies within a larger physical context having various and distinct features and characteristics to which the building design should respond. Develop an architectural concept and arrange the building mass in response to one or more of the following, if present:
> ***
>
> d. Access to direct sunlight – seasonally or at particular times of the day.

Id. at 10.

Professor Loveland testified about the significant adverse height, bulk and scale impacts on daylight accessibility that could not be addressed without taking steps like those listed in Guideline B2: Further modifications of the façade and reducing the upper floor's bulk. His testimony was not new. The bulk of his testimony had been presented to the Design Review Board and SDCI staff more than a year earlier. Ms. Bolser's claim otherwise was simply not true, although her claim was revealing in showing their lack of respect for the public's input. *See infra,* note 3. Sadly, it was ignored. And while the applicant had ample opportunity to rebut it, no one ever did. His quantification of the daylight accessibility losses remains unrebutted.

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The Design Review Board members were either nervous about asserting their authority to require meaningful modifications or they were unaware they had the duty to require such changes, if necessary, to address significant impacts. They were sequestered from most of the information about the significant adverse daylight accessibility impacts (both because staff kept most public input from reaching the board members and because the SEPA review (such as it was) was completed after the Board's deliberations). Not surprisingly, then, the DRB's recommendations failed to address the project's significant height, bulk and scale adverse impacts on Escala and failed to make recommendations for the changes necessary to mitigate those impacts. Because the recommendations were not consistent with the guidelines and because the design review process was flawed, the SDCI decision which embodies the Design Review Board's recommendation should be reversed.

I. Improper SEPA Review and Improper Design Review Foreclosed Consideration of Mitigation Necessary to Address the Probable Significant Adverse Impacts of the Proposal

According to the Seattle Municipal Code, the applicable design guidelines are intended to mitigate the adverse height, bulk, and scale impacts addressed in the SEPA policies. SMC 25.05.675.G. A project that is approved pursuant to the design review process is presumed to comply with these height, bulk, and scale policies. *Id*. This presumption may be rebutted only by clear and convincing evidence that height, bulk, and scale impacts documented through environmental review have not been adequately mitigated. *Id*. The code states that the city can condition the 5th and Virginia project via its SEPA authority to mitigate the adverse impacts of substantially incompatible height, bulk, and scale by, among other things, modifying the bulk of the development, repositioning the development on the site; or requiring increased setbacks or other techniques to offset the appearance of incompatible height, bulk, and scale. *Id*.

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In addition, a project which would result in adverse impacts on existing public services and facilities, including alleys, may be conditioned or denied to lessen its demand for services and facilities, or required to improve or add services and/or facilities for the public, whether or not the project meets the criteria of the overview policy set forth in SMC Section 25.05.665. SMC 25.05.675.O.

The improper SEPA review and improper design review process described in detail throughout this brief foreclosed appropriate consideration of reasonable mitigation that would be necessary to address the probable significant adverse impacts of the proposal. If an adequate EIS had been prepared for the 5th and Virginia Proposal, it would have included analysis of alternative designs and/or ideas for reasonable mitigation such as an increase of the building setback to mitigate the daylight impacts to residents of the Escala; an increased setback of the facade at alley level seven feet from the property line (instead of two feet as required by current code) in order to result in a 25-foot wide alley to accommodate two-way truck traffic with dumpsters out in the alley; and increased depths of loading berths by five feet to allow for loading/unloading at the rear without trucks nosing out into the alley. These and other reasonable mitigation concepts would have been and should have been considered in a proper EIS for the 5th and Virginia Proposal.

III. CONCLUSION[4]

Appellant requests that the Hearing Examiner reverse the Director of SDCI's decision on the Master Use Permit for the 5th and Virginia Proposal and require SDCI to prepare a full Environmental

[4] Due to time limitations for preparing this closing argument, some legal arguments and issues that apply to this matter may not have been raised or discussed in this Closing brief. Appellant does not intend to waive those issues. For the purpose of reserving all of the issues presented in the Notice of Appeal, Appellant incorporates herein the arguments and points made in the comment letters that were submitted on behalf of Escala throughout the land use review process that were included as exhibits in the Hearing Examiner appeal record.

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Impact Statement for the 5th and Virginia Proposal with specific instructions requiring that SDCI disclose and address the significant adverse impacts related to height, bulk and scale, and the alley. Appellant also requests that the Examiner reverse the recommendation of the Design Review Board with an order requiring the Board to reconsider its decision after SDCI has prepared a proper and full EIS, review the EIS prior to issuing a new decision, and to thereafter issue a decision that is consistent with the applicable Design Guidelines.

We close with the words of John Sosnowy from his testimony:

> Mr. Examiner, I am confident that you can see through the Applicant's ploy to obfuscate the issues. I've already lost what should have been the best years of my retirement working almost 24/7 to find a way to get a functional, healthy project across our alley that will work for the residents of both buildings. Seattle is so wonderfully unique, but I'm afraid that we are a city in danger of losing its soul. For a so-called progressive city that prides itself on compassion, there has been no concern for human health in this process. Buildings are for people; so good design will not have people living in a cave with no daylight or privacy.
>
> Unfortunately, it appears that for Douglaston, they could care less about livability. For them, this is just another out-of-state investment. For us, this is our life. We will not waver until we have exhausted every possible avenue to get justice.
>
> Please grant the relief that we requested in this appeal.

In addition, substantial evidence submitted in the form of testimony and documents at the hearing beyond that which was explicitly cited and mentioned in this brief supports the legal arguments presented in this brief and in the comment letters. Any omission of citations to specific evidence is not meant to imply otherwise – there is considerable evidence that supports these arguments, but time constraints have limited our ability to cite to every piece of supporting evidence in this brief.

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Dated this 20th day of March, 2018.

Respectfully submitted,

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