BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by ESCALA OWNERS ASSOCIATION of Decisions Re Land Use Application for 1903 5th Avenue, Project 3018037	NO. MUP-19-031 (DD, DR, S, SU,W) ESCALA OWNERS ASSOCIATION'S POST-HEARING REPLY BRIEF

I. Introduction

Respondents have failed to rebut Appellant's arguments on appeal for the reasons that we describe in detail below. Escala Owners Association requests that the Examiner reverse and vacate the SDCI code interpretation and determine that the Altitude Project as designed violates the code requirement that precludes designs that may result in trucks to extending into the alley. Escala also requests that the Examiner reverse SDCI's decisions on design review and SEPA and remand with instructions to issue new decisions that are consistent with the guidelines and with the requirements of SEPA consistent with the arguments that we provided in our briefing.

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II. Code Interpretation

A. An Exception Cannot Be Granted Under SMC 23.54.035.C.2.c. if Vehicles Will Park in the Alley as a Result of Loading Berths Being too Short for Them to Fit.

Respondents argue that the question of whether vehicles will park in the alley is not relevant to the question of whether the exception in SMC 23.54.035.C.2.c was properly granted by SDCI. *See* Resp. Br. at 16-17. They argue that SMC 23.54.035.C.2.c should be interpreted to raise only the question of whether trucks will extend into the alley once they've already parked in the loading berth. That is not a correct interpretation of the plain language and legislative intent of SMC 23.54.035.C.2.c.

The primary goal in statutory interpretation is to ascertain and give effect to the intent of the authors of the code language. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd*., 154 Wn.2d 224, 238–39, 110 P.3d 1132, 1139–40 (2005). To discern legislative intent, the court begins with the provision's plain language and ordinary meaning, but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole. *Id*.

SMC 23.54.035 as a whole is concerned ensuring that loading berths will be designed to accommodate trucks in a manner that will keep them from blocking the alley. Among other things, SMC 23.54.035.C.2 requires that all loading berths be a minimum of 35 feet in length. For certain uses, the length of berths may be reduced to no less than 25 feet where the Director finds that "site design and use of the property will not result in vehicles extending beyond the property line." SMC 23.54.035.C.2. The intent is to keep the alley clear of trucks that are meant to use the loading berths. If a loading berth is too short, the truck driver will not even attempt to enter the loading berth in the first place. Any vehicle that parks in the alley right of way as a result of the loading berth being too short for it to fit into is a truck that is "extending beyond the property line."

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SDCI's Code Interpretation in this case corroborates this reading of the legislative intent. The question presented by SMC 23.54.035.C.2., in SDCI's opinion, was whether trucks would "block the alley." Ex. 79 at 9. SDCI concluded that the three loading berths, as proposed, would accommodate the expected demand "without blocking the alley." Ex. 79 at 9. Clearly, SDCI recognized that the intent of the length requirements was to ensure that the alley would not be blocked.

Respondents make hay over the use of the word "length" in the title of the subsection. Resp. Br. at 17. The word "length" refers to the length of the loading berth, not the dimensions of a truck, and it's not instructive for either argument. Reference to the "length" of the berth is relevant to the question of whether a truck will extend into the alley after it's parked in the berth, but it's also relevant to the question of whether a driver will park in the alley as a result of the "length" of the berth being too short.

B. If the Question of Whether Vehicles Will Park in the Alley Is Not Addressed by SMC 23.54.035.C.2.c, then a SEPA Claim About Impacts of Parking in the Alley Is Not Barred by RCW 43.21C.500.

Respondents claim that Appellant's argument that SMC 23.54.035.C.2 requires proof that vehicles will not park in the alley as a result of a deficiently sized loading berth is "merely an attempt to restate" Appellant dismissed SEPA transportation claims. Indeed, it is exactly the same issue.

That issue, which was raised as part of our SEPA appeal, was that the deficiently designed and sized loading berths will cause trucks to park in the alley, which will cause significant adverse traffic impacts. The SEPA DNS issued by SDCI was based on the express promise that the loading berths are "anticipated to accommodate the expected loading demand and truck lengths without blocking the alley." Ex. 20. Escala's SEPA appeal challenged that conclusion.

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There's nothing improper about "restating" this issue in the context of the code interpretation claim. In fact, Respondents identified SMC 23.54.035 as an ordinance that expressly mitigated these impacts and, as a result, barred the SEPA claim on the same issue. *See* Ex. 5. Respondents relied on this provision to argue that Escala is barred from raising this issue because SMC 23.54.035.C.2.c "expressly mitigates" the impacts of trucks parking in the alley. Now, in response to our appeal of the code interpretation of SMC 23.54.035.C.2.c, Respondents contend that SMC 23.54.035.C.2.c does not expressly mitigate the impacts of trucks parking in the alley and they complain that we are "restating" a SEPA issue.

Respondents can't have it both ways. They can't claim that SMC 23.54.035.C.2.c concerns trucks parked in the alley to bar the SEPA claim, but then argue that SMC 23.54.035.C.2.c does not concern trucks parked in the alley for the code interpretation. If that the code does not concern trucks parking in the alley as a result of deficient loading berth design, then the SEPA claim on this issue should not be barred.

C. An Exception Cannot Be Granted Under SMC 23.54.035.C.2.c. if the Evidence Shows that Vehicles Might Extend Beyond the Property Line.

Appellant's argument about the mandatory nature of this provision is not an attempt to avoid its burden of proof as Respondents suggest. *See* Resp. Br. at 17. It's an exercise in statutory interpretation that informs us about how SDCI was required to interpret and apply SMC 23.54.035.C.2.c.

The plain language of this section states that SDCI can approve an exception to the 35 foot length requirement only if the site design and use of the property "*will not result"* in vehicles extending beyond the property line." See SMC 23.54.035.C.2.c. (emphasis supplied). This language is absolute – there is no ambiguity or wiggle room. SDCI must know with absolute certainty that it *will not*

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happen. This mandatory language means that if there is any possibility that trucks might extend beyond the property line, the exception cannot be approved.

D. The Site Design and Use of the Property Will Result in Vehicles Extending Beyond the Property Line

In our Post-Hearing Brief, we demonstrated that the Code Interpretation was wrong when it concluded that the exception (allowing smaller than ordinary loading bays) would "not result in" trucks extending beyond the property line. Post-Hearing Br. at 3–10.

Respondents argue that as long as the space is mathematically sufficient to accommodate a certain size truck, the possibility that, in the real world (not a computer software program), trucks will extend beyond the property line (or simply park in the alley) is just an enforcement issue. Resp. Br. at 18. This ignores the words of the code. The exception is authorized only if "site design *and use of the property* will not *result* in vehicles extending beyond the property line." SMC 23.54.035.C.2.c (emphasis supplied). Thus, the inquiry is not limited to the geometry and computer simulations. Actual "use" must be considered. The ultimate inquiry is about the "result" that occurs, given the design and use.

The testimony was clear that while a 25-foot truck might just barely fit into these bays, their design and the probable use of them would "result|" in most trucks extending into the alley or simply parking in the alley. The "result" is due to the tight turning movements that busy truckers anxious to avoid damage will avoid; the need to provide adequate working space behind a truck; the common use of lift gates deeper than 30 inches; the evidence of the ineffectiveness of dock management plans, and the lack of affirmative evidence that dock management plans are effective.

Respondents argue that our factual support is based on "conjecture" and that "credible" evidence of "serious . . . doubts" is not sufficient to satisfy our burden of proof. Resp. Br. at 19.

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This is an example of the pot calling the kettle black. On the one hand, our evidence was not speculative, but based on expert analysis (Tilghman), testimony from an expert truck driver – and trainer of truck drivers (Frank Rose), and a survey of the effectiveness of other dock management plans (Sosnowy).

In contrast, SDCI relies on the gross speculation that a dock management plan will cure all problems. Absolutely no evidence was provided to support this critical assumption. Mr. Shaw was asked, point blank, whether he had any evidence from any study or other observations to support his reliance on the dock management plan. He candidly admitted he had none. He said he had no experience and no track record for assessing the effectiveness of dock management plans. Shaw, Day 4, Part 1 [32:41-33:40]. He did not interview any dock managers nor truck drivers nor trainers. He did not run his own test. Amazingly, he did not even consider the results of Escala's test. *Id*. [39:40].[1] He did not evaluate ability of trucks to back up into the bays. *Id.* Instead, he blithely assumed that truck drivers would obey the law and never block the alley or park in it for more than thirty minutes. *Id*., [28:32; 30:00].

Mr. Shaw also had no clue how residents might comply with the plan's provision that e-commerce companies restrict the size of their delivery trucks. *Id*. [47:00]. He can be forgiven, of course; obviously, there is no such method.

It is the Respondents – not the Appellant – whose case is built on gross speculation.

Respondents make much of Mr. Rose's acknowledgment that a highly skilled truck driver could just barely back a truck into the 25-foot bays. But this is another example of the City ignoring

[1] Escala had performed a test of the ability of a dock manager to enforce the terms of a dock management plan like the one envisioned here. The results were sobering. Even uniformed personnel had difficulty obtaining compliance from truck drivers who refused to adhere to the protocols and went about their business as usual – frequently blocking the alley. Erickson, Day 1, Part 5 [7:11-20:21].

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reality. Yes, it is "possible." But, no, it is not likely. Mr. Rose was clear that most drivers --pressed for time; not highly trained; not assisted by a computer; worried about damaging the truck or the building or projecting pipes and dumpsters – will take the easy way out and extend into or fully block the alley. This testimony is corroborated by Mr. Sosnowy's eyewitness accounts and the Escala test run.[2] The overwhelming weight of the evidence supports a finding that the design and use will result in trucks extending into the alley and blocking it.

In sum, the code requires a focus on the "results" that will be obtained from the building design and *use.* Where the design will prompt a use that results in alley blockages and intrusions, the City cannot ignore reality and pretend the "result" will be something else.

The City's head-in-the-sand approach is unforgiveable. Once the building is constructed, the problems cannot be resolved by providing adequate loading bays. The dye is being cast now. It must be done right – with eyes open to the manner in which the alley really will be used and the "results" that really will occur.

III. Design Review

SDCI's Design Review decision was issued in error because SDCI failed to require that the Altitude Proposal achieve compliance with Design Guidelines associated with the alley to achieve the purpose and intent of the code provisions on design review.

The Altitude Proposal went through Early Design Guidance in 2014 and 2015 and the final Design Review recommendation hearing was held on August 16, 2016. *See* Exs. 44, 45, 46, and 47. The Design Review code provisions were amended significantly in 2017, after the Altitude Project

[2] Mr. Sosnowy's observations in other alleys is informative because Mr. Shaw acknowledged that, at minimum, the subject alley is similar to other alleys in the downtown area. Shaw, Day 4, Part 1 [31:50]. Indeed, if anything, observations in other alleys understates the likely conditions here because Mr. Shaw was not aware of any other alley that served three high rises with residential components. *Id.*

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had gone through the Design Review process. *See* Seattle Ordinance No. 125272, Seattle Ordinance No. 125429.

In their response brief, Respondents quote from the new 2017 code provisions without disclosing the fact that much of the language that they quote didn't exist when this project went through design review before the Board. For example, Respondents point out that the current code requires "preparation of and compliance with a community outreach plan." Resp. Br. at 21-22 *citing* SMC 23.41.014.B. With this, the brief falsely implies that the Altitude developers complied with this provision and prepared a community engagement plan. But the code requirement for a community engagement plan didn't exist when the Altitude Proposal went through design review before the Board and the developer did not prepare or comply with any such plan. *See* Ordinance 125429 at 38-39. Similarly, Respondents also quote substantive language from the new versions of SMC 23.41.014.D.1, SMC 23.41.008.F.1; 23.41.014.F.1 that address the requirements for the Design Review Board's process. Those provisions are quite different today than they were during the time that the Design Review Board was actually reviewing the Altitude Proposal. The Hearing Examiner should disregard Respondents description of SMC 23.41.014.D.1, SMC 23.41.008.F.1; 23.41.014.F.1 entirely on the grounds that reference to that code language is misleading and improper because the language and requirements in those provisions were different when the Design Review Board reviewed the Altitude Proposal. [3]

[3] We presume that Respondents included this discussion about the Design Review Board requirements in the code to shore up the SDCI Decision on design review. That description paints a false picture of what actually happened before the Board. That said, in this brief, we will not spend time going through the old versions of the code provisions that applied at the time because the Hearing Examiner previously dismissed all of Escala's appeal issues concerning the Board's process and decision. This brief focuses on the Design Review decision that was made by the Director of SDCI more recently under the newly amended code since that is the only issue remaining.

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Respondents correctly point out that the Director must consider the recommendations of the Design Review Board when deciding whether to approve an application for a Master Use Permit, SMC 23.41.008.F.2, but they conspicuously fail to mention the code language that indicates that: "The Director may condition a proposed project to achieve compliance with design guidelines and to achieve the purpose and intent of this Chapter 23.41. SMC 23.41.014.G.1. Therefore, while the SDCI must adopt the Board's recommendation in certain circumstances, he or she may include additional conditions to achieve compliance with the design guidelines and to achieve the purpose and intent of the Design Review chapter in addition to the conditions that the Board required. The stated purpose of Design Review is to, among other things "encourage better design and site planning to help ensure that new development enhances the character of the city and sensitively fits into neighborhoods, while allowing for diversity and creativity." SMC 23.41.002. Thus, the Seattle Code sets a legal standard that must be met by SDCI when it approves Design Review.

Respondents argue that Design Guidelines are not mandatory, but are instead entirely optional and should simply be "considered" by the Board. Resp. Br. at 23. That argument is belied by the code language in SMC 23.41.014.G.1.

A. SDCI Should Have Attached Conditions to the Altitude Proposal to Achieve Compliance with the Downtown Design Guidelines.

Per Downtown Design Guideline C.6, SDCI should have conditioned the Altitude Proposal to require that the alley parking garage entry and/or exit be located near the entrance to the alley at Stewart and should have required that the design of the building include chamfering at the Stewart Street corner. Ex. 68 at 3.

Respondents point to Mr. Caloger's testimony in which he indicated that the Project will be set back 7 feet from the property line along Stewart Street, resulting in an 18-foot-wide sidewalk that

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will "enhance the safety of pedestrians as they approach the alley" because they will "be able to look into it." Resp. Br. at 23. But not everyone will be walking on the streetside of the sidewalk. It's important to note that the Altitude's design includes placing canopies off of the building on Stewart along the sidewalk to provide weather protection (protection from rain as is required by the code) for pedestrians and those canopies will extend only 8 feet into the sidewalk area. Ex. 87 at 35. This design element will actually attract pedestrians *towards* the building on the sidewalk (to get cover from the rain) and will, therefore, totally undermine the entire goal of creating a line of sight on the outer edges of the sidewalk that SDCI is hanging its entire hat on for safety purposes. It may be that the pedestrians who are walking further away from the building can look into the alley, but not for the ones who walk closer to the building to get out of the rain.

Respondents point out that Mr. Caloger looked at Design Guideline C6 and "determined that including some elements was not necessary" to address the safety and logistics issues associated with having the residents access be closer to the entrance of the alley. Resp. Br. at 24. But Mr. Caloger is the architect for the developer. This was not his decision to make. It is SDCI who has a duty to attach conditions to achieve compliance with design guidelines and to achieve the purpose and intent of this Chapter 23.41. It's not up to the architect whose being paid by the developer to decide whether certain conditions should or should not be applied to the Altitude Project by SDCI.

B. SDCI Should Have Attached Conditions to the Altitude Proposal to Achieve Compliance with the Belltown Design Guidelines.

Despite overwhelming evidence to the contrary, Respondents continue to argue that the Belltown Design Guidelines do not apply to the Project. Resp. Br. at 25. Their argument is based on a single sentence in the text of the Belltown Design Guidelines, in which they describe the Belltown neighborhood as being "bounded by Denny Way to the north, Elliott Avenue to the west, Sixth Avenue

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to the east, and Virginia Street to the south (historically and decades ago, the southern border was Stewart Street)." *Id*. citing Ex. 69, p. VII.

The title of these guidelines is "Design Guidelines for the Belltown Urban Center Village." The title doesn't say: "Belltown neighborhood," (which is the term used in that single sentence relied on by Respondents) – it says "Belltown Urban Center Village." "Urban Center Village" is a term of art in the City's Comprehensive Plan and the Comprehensive Plan defines, as a matter of law, what the legal border is for the Urban Center Village's, including the Belltown Urban Center Village. See Ex. 89 (Seattle 2035 at 251). The map of the Belltown Urban Center Village in the Comp Plan includes the Altitude Project site. This is not some "historic" border from decades ago – it's the current border of that Urban Center Village today.

In addition, the maps of the Belltown Urban Center Village that are in the Design Guidelines all include the Project Site. In fact, Figure 2 on page 15 identifies positive urban forms and architectural attributes along Stewart St. leaving no doubt that Stewart Street is part of the Urban Center Village that is included in the Design Guidelines. *See* Ex. 89, Figure 2. The Belltown Icon and Historical Building Map from the Belltown Design Guidelines shows a border in green dash lines that includes Stewart. The building immediately adjacent to the Project site on Stewart and the building across 4th from that are both identified as Icon and Historic Buildings. These maps all include the buildings along Stewart as being within the scope of the Design Guidelines. Neighborhood design guidelines apply in the areas that are shown on the maps in the applicable guidelines, not what's described in the text. See SMC 23.41.010.

The Altitude developers own Design Review materials show the border of the Belltown neighborhood as including their Project site and they describe the proposal as being in the Belltown

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Urban Center Village. *See* Ex. 85 at 4, 6; Ex. 84 at 2, 13, 33. The Altitude project materials provide an entire analysis about the consistency of their Project with the Belltown Design Guidelines. Ex. 84 at 60-64.

In light of this evidence, Respondents suggestion that the Belltown Design Guidelines do not apply to this Proposal based on a single sentence in the text of the guidelines that describes the "neighborhood" is unavailing.

As we established in our Post-Hearing Brief, SDCI erred when it approved the Design Review decision because the Altitude Proposal is inconsistent with these design guidelines. Respondents yet again rely on Mr. Caloger's testimony about lighting, sidewalk widening, and façade elements to defend SDCI's decision. Resp. Br. at 26. But again, this was not Mr. Caloger's decision to make – it is the responsibility of SDCI to determine whether additional conditions should be required beyond what the Board required in order to make the project consistent with the Design Guidelines and meet the intent of that chapter.

Respondents tout a supposedly extensive and thorough design review process before the Design Review Board as evidence that points to the right decision by SDCI. Setting aside that we were barred from presenting evidence to challenge the Design Board process (which we would have otherwise done), it's plainly evident from the evidence in the record that the Design Review Board did not even consider whether the project was consistent with C(6)(e) or (f) at all. *See* Ex.'s 45, 46, 47, and 48. So, even under the Respondents' claim that these guidelines must, at the very least, be "considered," the Board didn't meet the requirement.

SDCI had a legal obligation to fix this mistake. SDCI was required to consider the issue and consider adding conditions associated with the Guidelines. This is especially true in light of the fact

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that the Board didn't even consider these guidelines at all. But, like the Board SDCI failed to do even the minimum task – SDCI did not consider these Design Guidelines at all in its MUP Decision.

IV. The State Environmental Policy Act

A. When a DS Is Issued for a Proposal, the Lead Agency Must Prepare an EIS that Contains the Information and Analysis Identified in SMC 25.05.440.

In their response brief, Respondents reframed and mischaracterized Appellant's SEPA arguments so that they could fit them into a box of their own creation. Because the actual SEPA arguments are impossible to rebut, they've had to create false flags to make it appear that Appellant's arguments are incorrect.

First, Respondents claim that Appellant "fails to recognize" that SDCI provided the required EIS for the Altitude Proposal. Resp. Br. at 34. This is simply not true. SDCI obviously provided an EIS for the Altitude Proposal – that is not in dispute and that is not the issue. In fact, Appellant's entire argument is centered on the very fact that SDCI provided the 2005 FEIS for the Altitude Proposal. The issue presented by Appellant is whether the 2005 FEIS is adequate – does it meet SDCI's SEPA responsibilities for the Altitude Proposal?

Second, Respondents claim that Appellant is arguing that WAC 197-11-736 requires that SDCI prepare a new, project-specific EIS every time a project receives a DS. Resp. Br. at 34. That is not what we are arguing. SDCI does not have to automatically prepare a new, project-specific EIS every time a project receives a DS – that is not the argument that we are presenting on appeal. SDCI has the authority to adopt an existing EIS for the Altitude Proposal. The real issue is, again, whether the 2005 FEIS is adequate – does it meet SDCI's SEPA responsibilities for the Altitude Proposal? When a DS is issued for a proposal, the lead agency must prepare an EIS that contains the information and analysis identified in SMC 25.05.440 for that proposal. In this particular case, with these particular

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facts, the 2005 FEIS does not meet legal requirements and conditions that must be met in order for it to be adequate for the Altitude Proposal.

Respondents' defense rests largely on their assertion that the Altitude Proposal will not have any significant adverse environmental impacts beyond those that were analyzed in the 2005 FEIS. The idea that Appellant's argument is focused on some phantom "additional" significant adverse impacts beyond those considered in the 2005 FEIS is a red herring. Appellant is not arguing that SDCI was supposed to discuss "insignificant impacts" in the EIS. Respondents claim that SDCI has determined that the Altitude Proposal will have probable significant adverse environmental impacts and that those significant impacts were analyzed in the 2005 FEIS. Our argument is that 2005 FEIS analysis associated with the project impacts that SDCI *does believe are significant* was inadequate.

Respondents contend that the 2005 FEIS adequately evaluated the impacts of the Altitude Proposal because it analyzed the impacts of allowing commercial office buildings and high-rise residential buildings to be increased in height to 600 feet in the DOC-2 zone and determined that such an increase in density was not a significant unavoidable adverse impact. Resp. Br. at 34. This argument lacks credibility and is not entirely relevant to the issues presented. First of all, there's no evidence to support this claim. Respondents do not cite to a single page in the 2005 FEIS itself to support the fact that this analysis actually exists in the 2005 FEIS. Instead, they cite to the Addendum for the Altitude Project. *See* Resp. Br. at 34 *citing* Ex. 25, Appx. B at 1. But the Addendum does not cite to anywhere in the 2005 FEIS to support this claim. Ex. 25. Appx. B at 1. Where is this analysis of impacts of a 600 foot tall commercial or residential building on the Project site located in the 2005 FEIS? Does it really exist?

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In reality, no such analysis exists. Appendix C to the 2003 DEIS summarizes the anticipated downtown residential/mixed use and projects that were in the pipeline at that time. That list does not include the Altitude Project or the project site. Ex. 66, Appendix C at C1-C4. Appendix F to the 2003 DEIS contains a Height and Density Study Report that provides information for the EIS's assessment of impacts. The authors of that report conducted a Capacity Analysis and made predictions about the anticipated commercial and residential development in the future. Ex. 66, Appendix F. The Project site itself was identified as "not likely" to be developed by this study. Ex. 66, Appendix F (Map B). This means that the 2005 FEIS impacts analysis assumed that there would be no development on the Project site at Fifth and Stewart. This means that the 2005 FEIS *did not* analyze the impacts of allowing commercial office buildings and high-rise residential buildings to be increased in height to 600 feet on the Altitude Project site.

Even if this evaluation of impacts of a 600 foot tall building on the site did exist somewhere in the 2005 FEIS, that only part of what's required under SEPA. There's still no summary of the Altitude Proposal itself in the 2005 FEIS as required by SMC 25.05.440(C); no alternatives analysis of the impacts of the Altitude Proposal as required by RCW 43.21C.030, SMC 25.05.440(D), and WAC 197-11-440(5); and no description of the affected environment specific to the Altitude Proposal as required by SMC 25.05.440; WAC 197-11-440(6). *See* Post-Hearing Brief at 15-23. The 2005 FEIS analysis of the impacts that SDCI itself *agrees will be significant* does not meet basic SEPA requirements.

Respondents claim, incorrectly, that Appellant is arguing that a Determination of Significance is an "irreversible" decision. See Resp. Br. at 35. That is not our argument. When the responsible official makes a threshold determination, it is final and binding on all agencies, but it's not irreversible

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(and we never stated or implied as much). *See* SMC 25.05.390. Our point is that SDCI must follow a formal process if it wants to change its mind about the impacts of a project. SMC 25.05.390.B; SMC 25.05.360.D. The code states: "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 ***shall be withdrawn*** and a DNS issued instead. The DNS shall be sent to all who commented on the DS." SMC 25.05.360.D (emphasis supplied). This was required if SDCI decided that the Altitude Proposal will not have significant environmental impacts.

Because SDCI did not withdraw the DS and issue a DNS, the DS for the Altitude Proposal is the final and binding "written decision by the responsible official of the lead agency that a proposal is likely to have a significant adverse environmental impact, and therefore an EIS is required (WAC 197-11-310 and 197-11-360)." WAC 197-11-736. The EIS must contain the information and analysis required by SEPA rules and regulations for the analysis of significant adverse impacts. In this case, the 2005 FEIS did not contain all of the required information.

SDCI committed legal error when it issued the revised Notice of Availability of Addendum that changed the description of the Project from "likely to" have significant impacts to "could have" significant impacts. The revised notice was issued two years after the Addendum was issued and shortly before the MUP Decision was made, to "correct" information in the previous public notice. Ex. 43. This last minute edit of the phrase "is likely to" to "could" was obviously done to "fix" the DS to support SDCI's legal position on appeal. As was pointed out in Respondents' brief, the difference between "is likely to" and "could" in a DS ultimately ended up having legal significance in the last Escala appeal before this same Examiner. *See Appeal of Escala Owners Association*, HE File No. MUP-17-035, Amended Findings and Decision (June 12, 2018). It's quite obvious, therefore, that

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right before the MUP Decision was made, someone at SDCI saw the words "is likely to" in the DS, recognized (from the experience in the last appeal) that the existence of this phrase would undermine SDCI and the Applicant's argument on appeal, and then changed the wording to "could." The purpose of this change is plain: SDCI wanted to be able to argue on appeal that it changed its mind and decided that the Altitude Proposal will not have significant adverse environmental impacts.

To the extent that SDCI changed its mind and decided that the Altitude Proposal will not have significant adverse environmental impacts, then it was required to issue a DNS (not change the words of the DS). As explained above, the code states: "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 shall be withdrawn and a DNS issued instead. The DNS shall be sent to all who commented on the DS." SMC 25.05.360.D. SDCI did not do that. Thus, we have, as a matter of law, a DS for the Altitude Proposal. SDCI cannot cross out the word "likely" and write in the word "could" at the last minute in a DS and then act as if they've issued a DNS.

Respondents argue that SDCI is excused from meeting its duties and obligations set forth in SMC 25.05.440 for the Altitude Proposal because they adopted an already existing EIS. According to Respondents, when an agency adopts an EIS for a specific proposal, that agency doesn't have to meet the duties and obligations of SEPA in SMC 25.05.440 for that specific proposal. They contend that SDCI does not have to prepare an alternatives analysis for the Altitude Project, does not have to provide a summary of the Altitude Project, and does not have to provide a description of the existing environment for the elements of the environment that will have significant adverse impacts caused by that Project. *Id.*

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This interpretation has no basis in law. Respondents have it backwards. The adoption of existing documents does not excuse SDCI from its duties and obligations under SEPA. SDCI has a right to rely on existing documents for purposes of meeting its SEPA obligations for review of the Altitude Proposal pursuant to WAC 197-11-600 and RCW 43.21C.034, but SDCI must still meet their obligations under SEPA. If the existing documents do not do the job adequately, they have more work to do.

Respondents make the baffling argument that they weren't required to provide the information that is required by SMC 25.05.440 because they prepared an Addendum for the Altitude Proposal. They argue that because the rules for an Addendum don't require this information, they didn't have to include it in the Addendum. Again, Respondents have it backward. SDCI issued a DS for the Altitude Proposal. As a result of that, SDCI must either adopt or prepare a document that contains the information required in SMC 25.05.440. They can't prepare an Addendum and then use that as an excuse to avoid their SEPA duties. And, as was argued in detail in our Post-Hearing Brief, 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).

Respondents state: "Appellant is arguing that the City's decision to rely on an existing EIS required it to prepare a new EIS." Resp. Br. at 38. That is not what we are arguing. It was SDCI's decision to issue a DS that required it to prepare an EIS, not its decision to adopt an existing EIS. It is allowed to adopt an old EIS, but that old EIS must meet SDCI's SEPA obligations – *i.e.*, contain all of the information for the Altitude Project that is required under SEPA.

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Respondents' argument is inconsistent with SDIC's own language in the DS for this proposal. In that DS, SDCI stated:

> SDCI has identified and adopts the City of Seattle's Final Environmental Impact Statement (FEIS) (Downtown Height and Density Changes), dated January 2005 FEIS. ***This FEIS meets SDCI's SEPA responsibilities and needs for the current proposal and will accompany the proposal to the decision-maker.***

Ex. 40 (emphasis added).

This is exactly the point that we are making on appeal. The question presented on appeal is whether that statement is true: whether the 2005 FEIS meets SDCI's SEPA responsibilities and needs for the Altitude Proposal. The answer is a clear: no, it does not.

B. The 2005 FEIS Cannot Be Relied on by SDCI for the Purpose of Meeting Its SEPA Responsibilities for the Altitude Proposal.

1. 2005 FEIS does not contain the information and analysis required by SMC 25.05.440 and WAC 197-11-440 for the Altitude Proposal

Respondents concede that the FEIS does not contain a statement of the Altitude Proposal objectives, does not contain an alternatives analysis for the Altitude Proposal, and does not describe the existing project site. Resp. Br. at 37. With that, they admit that SDCI did not meet the requirements in SMC 25.05.440 (also WAC 197-11-440). See RCW 43.21C.030; RCW 43.21C.031. Because the 2005 FEIS does not meet SDCI's SEPA responsibilities and needs for the current proposal, the SEPA review for the Altitude Proposal must be reversed and vacated.

While conceding that there is no alternative's analysis of the Altitude Proposal in the 2005 FEIS at page 37 of their brief, Respondents suggest elsewhere that the no-action alternative that was examined in the 2005 FEIS constituted a proper no-action alternative for the Altitude Proposal. Resp. Br. at 39. They point to the Examiner's decision in the prior *Appeal of Escala Owners Association*,

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HE File No. MUP-17-035 case, which concluded otherwise. Resp. Br. at 39. We request that the Examiner rule otherwise in this matter. The 2005 FEIS assessment of impacts from no-action *at that time*. This means that the 2005 FEIS analyzed the impacts of keeping the 2003 zoning in place and not adopting the zoning proposal that was being considered by the 2005 FEIS. The City ultimately *adopted the new zoning*. SDCI cannot rely on a "no-action" alternative that was based on the assumption that the 2003 zoning would stay in place when the 2003 zoning was replaced by the new zoning that was adopted in 2006. The no-action alternative in the 2005 FEIS assessed impacts that would occur as a result of zoning on the Project site that does not apply to the Project site. To make matters worse, the zoning on the Project site was significantly amended yet again with the adoption of new MHA zoning downtown. A no-action alternative analysis of impacts for the Altitude Project must, at the very least, be based on the actual zoning (setbacks, height limits, design requirements, FAR requirements, transition requirements, and more) of the Project site. Furthermore, the 2005 FEIS no-action assessment relied on assumptions about the amount of growth of commercial buildings and residential units, the pattern of this growth, and population changes that were developed in 2003. Ex. 66 at 1-2–1-4. The actual impacts that will occur as a result of not building the Altitude Building today would require new information and new assumptions about future growth in downtown Seattle. A No-action alternatives analysis for building the Altitude Proposal on the Project site in 2005 would have completely different conclusions about impacts from a no-action assessment today.

Respondents also argue that the Land Use Analysis attached to the Addendum contained an alternatives analysis. *Id. citing* Ex. 25, Appx. B, p. 2. This fails for two reasons. First, as we've stated before, 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*

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reconsideration (Jan. 28, 1994), *amended*, 866 P.2d 1256 (1994). *See* Post-Hearing Br. at 34-35. SDCI cannot do the alternatives analysis using the Addendum process.

Second, the quotes provided by Respondents from the Land Use Analysis that is attached to the Addendum about the fact that surface parking removal and intensifying of the area is "consistent with current development trends" is not an alternatives analysis. In our Post-Hearing Brief, we spent considerable time outlining what is required for a proper alternatives analysis. These statements that are quoted by Respondents from the Land Use Analysis do not come close to meeting those requirements. Ultimately, Respondents have not provided any evidence to show that SDCI prepared an alternatives analysis for the Altitude Proposal as is required by SEPA.

Appellant's Post-Hearing Brief also demonstrated the Altitude Proposal will cause certain probable significant environmental impacts associated with the alley that were not adequately addressed in the 2005 FEIS. That brief presented argument only on those alley impacts that Appellant believes survived the Examiner's jurisdictional ruling on RCW 43.21C.500. In their response brief, Respondents present argument on the Examiner's jurisdiction over these remaining issues. Their arguments are addressed in detail below in section IV.C and that discussion is incorporated herein to support our argument on this issue as well.

2. The Hearing Examiner's prior ruling on RCW 43.21C.500 was not a blanket dismissal of all alley-related impacts.

Respondents mischaracterized the Examiner's prior ruling on RCW 43.21C.500 as a blanket dismissal of all alley-related traffic impacts. *See* Resp. Br. at 29. This precise issue was discussed extensively on the fourth day of the hearing and the result of that discussion was not characterized correctly by Respondents in their brief.

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On the first day of the hearing, the Examiner issued an oral ruling on the jurisdictional issues (referred to as the Examiner's "prior ruling"), in which he concluded that the plain language of RCW 43.21C.500 does not require that the specific impacts that are alleged in the appeal actually be mitigated by the ordinance, but rather that the traffic impacts that are alleged in an appeal be the actual subject matter that is expressed and/or addressed in certain code provisions.[4]

On the last day of the hearing, a conversation about the scope of the prior ruling began when counsel for Escala asked the Examiner whether his prior ruling incorporated all of the alley-related impacts that were presented in section 2.1.a of the Notice of Appeal. Newman, Day 4, Part 3, 1:23:40-1:24:18. The Examiner stated that it was possible that it did, but that he had not already decided that issue - He stated that he had, instead, "left it open for Appellant." Examiner, Day 4, Part 3, 1:24:18-1:25:38. The Examiner stated that, because he hadn't heard "exhaustive argument on every ordinance concerning traffic or parking or traffic" and because he hadn't heard "arguments on every aspect of ordinances concerning transportation elements," he was leaving the question open. *Id.*

Later, counsel for Escala asked yet again whether all alley-related impacts were within the scope of his prior ruling on dismissal. The Examiner stated unequivocably: "We have not decided that. I did not decide that at that time." Examiner, Day 4, Part 3, 01:29:50. The Examiner stated: "I don't think that my original ruling completely foreclosed every issue that could be potentially raised …by the appellants…that may be transportation related because we didn't exhaustively go through the ordinances that would apply to the project. I didn't agree with the respondents that if you find a traffic ordinance and it applies to this project, that the project is that is exempt from every … issue element

[4] Appellant has reserved the right to challenge the Examiner's conclusions regarding RCW 43.21C.500 on appeal and Escala's post-hearing briefing should not be construed in any way as waiving any issues that have been presented and argued previously in this process with respect to this issue.

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that can be raised under transportation." Examiner, Day 4, Part 3, 1:32:36. When asked to identify all of the issues that Appellant believed survived the prior ruling, Escala's counsel indicated that she could identify most of the issues that remained at that time (and she did identify those issues), but requested more time to identify the specific alley-related traffic issues from Section 2.1.a in the Notice of Appeal that Appellant believed had survived the ruling. Newman, Day 4, Part 3, 01:30:11 - 01:30:16. The Examiner granted that request and Appellant submitted the list of alley-related impacts that still remained on February 4, 2020. Escala Owners Association's Statement of Remaining SEPA Issues (Feb. 4, 2020). The subject matter of these impacts are not expressly mitigated by provisions of the code within the parameters of the Examiner's prior interpretation of that phrase.

Ultimately, while the Examiner did conclude that the City demonstrated that the traffic and parking impacts that were presented in the appeal in this matter are expressly mitigated by the City of Seattle Municipal Code, he did not specify precisely which alley-related impacts were mitigated by the code because he hadn't yet heard exhaustive argument on every ordinance concerning the traffic or parking impacts that were being presented. Based on that, it seemed rather clear at the time that the Hearing Examiner's prior ruling was not a blanket dismissal of all alley-related impacts. Of course, the Examiner ultimately knows better than anyone what he intended, but we provide our understanding of the Examiner's ruling simply to explain the basis for inclusion of the six remaining alley-related SEPA impacts in our Post-Hearing Brief.

3. The remaining alley-related impacts that Appellant identified are not expressly mitigated by ordinances of general application adopted by the City.

The six alley-related impacts identified by Escala in Section C.1.d of our Post-Hearing Brief are not expressly mitigated by the Seattle Code and have, therefore, survived the Examiner's prior

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ruling. Respondents provided the Examiner with a laundry list of over 70 code provisions that they contend expressly mitigate the impacts that have been identified by Appellant. *See* Ex. 5; City and Applicant's Joint List of Mitigating Ordinances (Feb. 6, 2020). These lists are a stark example of overreach. If all of these ordinances trigger the exemption, then the legislature had no need to include as a condition that the jurisdiction have ordinances in place to expressly mitigate transportation impacts. Every jurisdiction from Spokane to Forks will have one or more of these types of generic ordinances.

Respondents fail to mention that the Examiner already declared that SMC Ch. 23.52 (Concurrency) and SMC 23.49.009 (street level use requirements) are irrelevant and inapplicable to the appeal issues presented. Examiner, Day 4, Part 3**,** [1:43:08 – 1:44:03].

Respondents did not expressly mention, discuss, or provide any argument in their Response Brief regarding the great majority of the 70 provisions that they included in their laundry list. As a result, they've waived their right to assert that any of those unmentioned provisions expressly mitigate the remaining SEPA impacts.

Respondents do identify and discuss a smaller number of specific ordinances in their Response Brief, specifically discussing each of them. All of the ordinances that Respondents present in their brief are from Title 11 – the traffic code. The traffic code regulates the general public, not developers. *See* SMC 11.10.040. The stated intent of those provisions to place the obligation of complying with its requirements upon the owner or operator of vehicles and on pedestrians, not on a developer designing and siting a new building. *Id*. SDCI does not have legal authority to enforce the provisions of Title 11. SMC 11.16.020 (Title 11 is enforced by the Police Dept.). In fact, even the Police department is not required to enforce these provisions. The requirements in Title 11 do not "impose

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any duty whatsoever upon the City" or "any of its officers or employees" to enforce these provisions. *Id*. The implementation or enforcement of those provisions is completely discretionary and not mandatory. *Id*.

Because the requirements in Title 11 do not apply to the developer and cannot be enforced by SDCI, they cannot be considered mitigation of the project under SEPA. These provisions apply to the general public in a generic sense, not as SEPA mitigation to a site specific project. Respondents are basically arguing that the Altitude can be designed however the developer wants and it's the public's responsibility to mitigate the impacts that are caused as a result of a bad design. Because these provisions do not expressly mitigate the developer's design and plans for the Altitude Proposal, they should not bar Appellant's SEPA claims.

Even if the generic traffic code requirements could be considered mitigation, they don't specifically address the remaining SEPA claims. We address each ordinance below:

- SMC 11.62.080 and 11.62.100 prohibit trucks of certain sizes from operating in the downtown traffic-control zone at certain times of the day. These provisions do not expressly speak to conflicts that will occur with the new Seattle Streetcar on Stewart Street (claim 1). They do not expressly speak to the safety impacts that will be caused by this project to pedestrians, bicyclists, and drivers on Stewart Street (claim 2). They do not address conflicts between trucks attempting to access the Altitude loading bay and residents attempting to access the Altitude residential parking garage (claim 3). These provisions do not speak to the lack of curbside parking and loading/unloading opportunities in the near vicinity of the Altitude Project (claim 4). These provisions do not address existing obstructions in the alley, including but not limited to solid waste and recycling containers, ducts, electrical boxes, that will obstruct vehicle access (claim 5). And finally, a limit on the truck size in downtown Seattle does not speak to the cumulative congestion impacts of the Altitude Project, the Escala, and the proposed 5th and Virginia (claim 6).

- SMC 11.74.010 prohibits stopping, standing or parking a commercial vehicle in an alley for longer than 30 minutes. SMC 11.72.020 and 11.72.025 prohibit stopping, standing, or parking any non-commercial vehicle in an alley or any vehicle in an alley driveway. SMC 11.72.330 prohibits stopping, standing, or parking at any place or time when official signs prohibit it. Respondents claim that these ordinances expressly mitigate the impacts caused by the lack of curbside parking and loading unloading opportunities in the area (claim 4) and the impacts

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caused by the existing obstructions in the alley (claim 5). This is not true. These ordinances do not provide provisions that address curbside parking or loading, nor do they have any provisions that address obstructions in the alley.

- SMC 11.52.020 indicates that drivers shall drive at an appropriate speed when approaching an intersection and other areas and SMC 11.58.230 requires that drivers emerging from any alley shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alley or driveway, or onto a public path, and shall yield the right-of-way to any pedestrian or bicyclist as may be necessary to avoid collision, and upon entering the roadway of a street shall yield the right-of-way to all vehicles approaching on the roadway. Respondents' suggestion that these provisions expressly mitigate the impacts caused by conflicts with the new Seattle Streetcar on Stewart Street is simply not credible. The issues presented by the new Seattle Streetcar (claim 1) are not about speeding cars, they are about conflicts for literal space on the road and congestion issues. Respondents' suggestion that these provisions speak to the cumulative impacts that will be caused by the Altitude, the Escala, and the 5th and Virginia project (claim 6) is also not credible. These provisions do not address the concept of cumulative impacts caused by different projects in this alley.

- SMC 11.65.020, 11.65.040, and 11.65.080 provide that streetcars have the right of way and prohibit obstruction of streetcar movement. Respondents argue that these ordinances expressly mitigate the conflicts that will be caused between the new truck and vehicle traffic entering and exiting the alley and the Seattle Streetcar on Stewart (claim 1). A simple rule defining who has the right of way does not address literal, physical conflicts and congestion that will occur as a result of the streetcar lane being in the path that trucks will need to use when attempting to turn into the alley.

- SMC 11.72.215 prohibits anyone in the general public from stopping, standing, or parking a vehicle in a load and unload zone for any purpose or length of time other than for the expeditious pickup and loading or unloading and delivery of persons or property, and then in no case shall the stop for such purposes exceed thirty (30) minutes. SMC 11.74.120 does not allow the general public to stand in morning peak-hour restricted areas in downtown traffic-control zone. Respondents claim that these provisions expressly mitigate the traffic impacts that will be caused by the lack of curbside parking and loading/unloading opportunities in the near vicinity of the Altitude Project (claim 4). Prohibiting the general public from stopping and standing in loading zones or in certain restricted areas does not address the fact that there is little to no curbside parking and loading/unloading opportunities for trucks in the vicinity of the Proposal.

- SMC 11.60.060 " No person shall operate any vehicle unladen or with load exceeding a height of fourteen (14) feet above the level surface upon which the vehicle stands . . . "); SMC 15.46.010 ("Whenever it furthers the safety or convenience of the public, the Director of Transportation, and, as to park drives and boulevards, the Superintendent of Parks and Recreation, may remove obstructions, hazards or nuisances from public places . . . ").

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Respondent's claim that these ordinances address the problem of existing obstructions in the alley is simply not credible. These ordinances do not address obstructions in the alley.

- SMC 11.58.270.A ("Operation of vehicles on approach of authorized emergency vehicles"); SMC 11.68.180 ("Barricading hazardous area"). Respondents' claim that these ordinances address the cumulative impacts of the Altitude Project, the Escala, and the proposed 5th and Virginia project is not credible at all. There's no mention of cumulative impacts – it's not what these ordinances are addressing.

Because all of the remaining impacts are not expressly mitigated by any City ordinances, Appellant's remaining alley claims should not be dismissed.

4. The 2005 FEIS cannot be adopted by SDCI for the Altitude Proposal because it is no longer accurate or up to date.

Escala demonstrated, in its Post-Hearing Brief, that the 2005 FEIS is no longer accurate and it's not up to date. As was explained, SMC 25.05.600.B bars SDCI from adopting the 2005 FEIS for that reason.

Respondents' reliance on certain statements that were made by the Hearing Examiner with respect to specific time limits for adoption of environmental documents in the prior *Escala Owner's* case is unavailing. *See* Resp. Br. at 41. That decision was issued in a completely different context and legal posture –i.e. in response to a motion for summary judgment. Having not even heard evidence yet, and in response to being asked to rule outright on the issue, the Examiner explained that, while the age of a document is relevant to the question of whether a document should be adopted, there's no bright line rule that says that a document of a certain age cannot be adopted with no questions asked. *Appeal of Escala Owners Association*, HE File No. MUP-17-035, Order on Motion for Summary Judgment (Feb. 15, 2018). He concluded that a dispute of fact remained and he wanted to hear all of the relevant evidence on the subject before ruling on the issue. *Id.*

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Reliance on the Examiner's statements in that Order on Summary Judgment is a futile effort because, in this case, the hearing has been held, the evidence has been presented, and we are presenting closing arguments. Appellant did not argue and has no intention of arguing that the 2005 FEIS cannot be adopted *solely based* on the fact that it's fifteen years old. The age of the 2005 FEIS is certainly relevant to the question of whether it's out of date (just as the Examiner stated it was in the *Escala Owner's* case), but we are not purporting to rely solely on its age alone.

We don't need to rely on the age alone – the evidence shows that the content of that EIS is out-of-date and no longer accurate. We summarized that evidence in detail in our Post-Hearing Brief at 28-30. Respondents reframe Appellant's argument as a claim that "the FEIS did not specifically anticipate development on the Project Site," did not "anticipate Amazon locating its headquarters in the neighborhood," and "the FEIS did not contemplate a Code requirement for projects to provide access from alleys." Resp. Br. at 41. Our argument is that the information in the 2005 FEIS is not accurate and reasonably up-to-date because major changes occurred after that EIS was adopted that affects the accuracy and usefulness of the prior EIS.

The requirement that alley access shall be required for all lots that abut an alley was introduced into the Seattle code for the first time in September, 2006. See Ex. 43 at 17. The 2005 FEIS is not up-to-date on its analysis of traffic impacts because this significant change requiring access via alleys occurred after that document was prepared. In fact, it's informative to note the Escala was built before this new alley access requirement was in place and, therefore, the residents all access the parking lot off of Virginia Street, not the alley. (Sosnowy Testimony, Tilghman Testimony). As is evident from all of the evidence that's been presented at the hearing, the fact that Escala residents will not be using the alley to access their parking lot is a very significant factor in the assessment of alley-related

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impacts. When the analysis of impacts in the 2005 FEIS was prepared, the assumption was that new development would provide access from the main roads, like the Escala, not from the alley. That results in a very different outcome in the assessment of alley-related impacts.

Respondent contends that the DEIS did identify the Project Site as a potential site for future development. Ex. 66, p. 3-44. That graphic refers to the Project site as a "secondary development site," not a "primary development site," and later in the same chapter, the analysis of impacts itself actually relies on the data and conclusions from the Development Capacity Analysis that was prepared by consultants who created a model of Downtown's potential commercial development capacity, development growth, and possible housing growth under each of the four alternatives. Ex. 66 at 3-47. For purposes of the Development Capacity Analysis, the Altitude Project site itself was identified as "not likely" to be developed by this study. Ex. 66, Appendix F (Map B).

5. The prior rezone proposal and the new Altitude Proposal do not have similar elements that provide a basis for comparing their environmental consequences.

RCW 43.21C.034 allows SDCI to adopt an existing EIS for purposes of meeting its SEPA obligations only under certain circumstances. Among other conditions that must be met, the prior proposal "have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography." RCW 43.21C.034. The question of whether the current Proposal will have any significant impacts that have not been analyzed is irrelevant to the question of whether this condition has been met. SDCI has concluded that the Altitude Project will have significant adverse environmental impacts and claims that those impacts were analyzed in the 2005 FEIS. For purposes of those particular impacts, which SDCI *agrees are significant*, they

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were not legally allowed to rely on the 2005 FEIS for that review because this condition has not been met.

Respondents claim that Appellant's argument on this issue is "simply" an argument that analysis of a programmatic or nonproject action cannot be adopted to meet City SEPA responsibilities for a Project action. Resp. Br. at 40. That is not true. The fact that this is a programmatic EIS standing alone, on its own, would not necessarily disqualify it from being adopted for review of a site-specific Project. That said, it's difficult for an agency to meet their SEPA obligations and duties to review a site-specific project that's received a DS via a programmatic EIS. It's conceivable that it can be done, but it's not easy to meet those obligations considering that the analysis of impacts is fundamentally different at the programmatic level from the analysis of impacts for a site specific project. The fact that the 2005 FEIS is programmatic standing alone does not automatically disqualify it, but it's certainly an important factor towards determining whether it's appropriate to rely on the 2005 FEIS to provide a meaningful SEPA analysis of the Altitude Proposal as is required by the rules and regulations.

Respondents claim that the 2005 FEIS analyzed the impacts of development at (or greater than) the scale of the Project in the downtown area in which the Project is located and argue that this analysis is "relevant to the Project." Resp. Br. at 40. This argument should be rejected for two reasons. First, the citation provided by Respondents to the supposed "analysis of impacts" of the Altitude Project in the 2005 FEIS does not contain an analysis of impacts, but rather a description of the preferred alternative. See Resp. Br. at 40 *citing* Ex. 67, p. 1-2. Respondents provide no support for their claim that the 2005 FEIS actually did analyze the impacts of development of the Altitude Proposal on the actual project site itself. Second, the simple assertion that the 2005 FEIS analyzed

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impacts of the Altitude Proposal does not answer the question presented. Yes – it's clear that SDCI has taken the position that the 2005 FEIS analyzed the significant adverse environmental impacts that will be caused by the Altitude Project. Our argument is that, for purposes of the analysis of those particular impacts which SDCI *agrees are significant*, they were not legally allowed to rely on the 2005 FEIS for that review because this condition has not been met. RCW 43.21C.034. The 2005 FEIS analysis of the significant impacts of the Altitude Proposal is inadequate as a matter of law because the prior proposal, which was analyzed in the 2005 FEIS, does not have similar elements that provide a basis for comparing the environmental consequences of the Altitude Proposal, such as timing, types of impacts, alternatives, or geography.

C. Even if SDCI Could Rely on and Adopt the 2005 FEIS, SDCI Was Still Required to Prepare a Supplemental EIS for the Altitude Proposal

Appellant demonstrated in our Post-Hearing Brief that SDCI was required to prepare a supplemental EIS for the Altitude Proposal pursuant to WAC 197-11-405, WAC 197-11-600, and WAC 197-11-620. Those provisions state that a supplemental EIS "shall" be prepared to an existing FEIS if (1) there are substantial changes to a proposal so that the proposal is likely to have significant adverse impacts; or (4) there is new information indicating, or on, a proposal's probable significant adverse environmental impacts.

Respondents claim that Appellant has not attempted to meet their burden with respect to the question of whether there is new information indicating, or on, the proposal's probable significant adverse environmental impacts other than alley-related impacts is incorrect. *See* Resp. Br. at 43. As we explicitly stated in our Post-Hearing Brief, there is a considerable amount of new information indicating, or on, the proposal's probable significant adverse environmental impacts that were

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identified in the DS as was described in detail in Section C2 of our Post-Hearing Brief. *See* Post-Hearing Br. at 33.

Respondents incorrectly state that Appellant has a burden to prove that there are "new significant adverse impacts" related to the elements of the environment that are in the DS in order to demonstrate that an SEIS was required for the Altitude Proposal. That is not true. The provision at issue states that an SEIS shall be prepared to an existing FEIS when there is new information on a proposal's probable significant adverse environmental impacts. In other words, if there is new information about the significant adverse environmental impacts that were analyzed in the 2005 FEIS, an SEIS must be prepared. SDCI was required to prepare an SEIS to analyze those impacts of the Altitude Proposal that it agrees are significant because there's considerable new information about those impacts as demonstrated herein and in our Pre-Hearing Brief.

Regarding the alley-related impacts, as we've made clear before, we disagree with the assertion that the Examiner lacks jurisdiction to consider these issues under RCW 43.21C.500 and stand by our position that the Altitude Proposal will have a broad array of significant adverse alley-related impacts. And, there is new information on those significant impacts that requires preparation of an SEIS.

By failing to provide any meaningful argument to the contrary (other than chiding Appellant for using the word "basically"), Respondents implicitly admit that the change in the zoning code after the 2005 FEIS was adopted, which now requires downtown buildings to provide access off of an alley is "new information" that is relevant to the significant adverse alley-related impacts that will be caused by the Altitude. *See* Resp. Br. at 43. Instead, they incorrectly claims that Appellant's burden is to "show probable significant adverse impacts resulting from the Project." *Id*. That is not our burden.

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Our burden is to show that there is new information on the significant impacts, not that there are new significant impacts. Respondents are demanding that the citizens of Seattle do their job for them. It's not the job of citizens to prepare the analysis that is required in an SEIS. If there's new information about significant impacts, SDCI must conduct the proper SEPA review.

That said, even if Appellant has a burden to prove that the alley-related impacts are significant, we've easily met that burden. With respect to the remaining alley-related impacts that are addressed in our Post-Hearing Briefs, we have provided affirmative evidence of new significant adverse impacts. See Post-Hearing Br. at 24-28. "Significant," as used in SEPA, means a reasonable likelihood of more than a moderate adverse impact on environmental quality. SMC 25.05.794. "Moderate" is not defined in the Seattle code or state SEPA rules, but is defined in the dictionary as "having average or less than average quality," or "limited in scope or effect." *See Merriam-Webster Online Dictionary* (2020). This means that if there is a reasonable likelihood that the alley-related impacts will have more than an average or common impact, those impacts are significant.

Before focusing on Appellant's specific evidence about the alley at issue in this appeal, Respondents begin with a broad argument that the City Council and SDOT don't believe that alley-congestion issues in downtown Seattle are significant. Their support for this claim is that the City Council did not actually not use the word "significant" in the Statement of Legislative Intent (Ex. 10) and because SDOT did not actually use the word "significant" in their response (Ex. 11). The idea that specific wording was required in a legislative statement in order to prove that the Council thought that this was a matter of great importance is absurd. The Seattle City Council believed that alley-congestion issues that are showing up everywhere in downtown Seattle, (i.e. site conditions and vehicle use that limit the abilities of alleys to function for circulation and access to adjoining properties) demanded a

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full assessment. Ex. 10, Ex. 11 at 2. As part of their budget process, the Council allocated significant City time and resources towards this effort. Ex. 11 at 2. SDOT convened a cross-departmental working group in response to the City Council's direction, which held a series of 5 working meetings to assess the issue and issue recommendations. *Id.* SDOT also worked in collaboration with the UW Freight Lab, which has conducted extensive research and analysis on the issue of alley congestion in downtown Seattle. *See* Ex. 21, Ex. 22, Ex. 53, Ex. 54, Ex. 55, Ex. 56, Ex. 57, and Ex. 58. Considering the amount of City resources and time that has been dedicated towards this effort - it's clear that the City Council believes that alley-congestion is likely to cause more than a moderate impact to circulation and access in downtown Seattle.

Respondents suggest that "the fact that the City Code still requires access be taken from the alley, except in limited circumstances" belies Appellant's claims that the impacts are significant. Resp. Br. at 44. There is no evidence in the record either way that informs us on what the City Council's plans are or aren't with respect to legislation on this issue so it's unfair and inappropriate for Respondents to imply anything about what the City Council's thinking is on this topic. City Council may yet change this requirement any day now based on all of the effort that's been put into assessing the issue.

Furthermore, contrary to Respondent's claims otherwise, Appellant's evidence does establish that there is a reasonable likelihood that the Altitude Proposal will have more than a moderate impact on the alley and the surrounding roads due to alley-related issues. *See* Post-Hearing Brief at 24-28. Respondents contend that Appellant introduced no evidence that called into question Ms. Heffron's conclusion that all of the uses in the Project will generate "an average of 5 to 7 deliveries per day." Ex. 26, pp. 1-2. This is absolutely not true. Appellant demonstrated that there is an average of up to

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12 daily deliveries to the Escala consisting of packages, mail, large deliveries to residences, residential moves, maintenance/restocking, and pick-ups (Goodwill, Styroform). Ex. 59. This number excludes construction deliveries. *Id*. Escala is a residential building with 270 units with no hotel rooms and no restaurants. Sosnowy Testimony. The "Proposed Action" for the Altitude Proposal is described in the Addendum as a 500-foot tower with 209 hotels rooms, 236 residential units, approximately 3,000 sq. ft. of ground floor retail and 10,580 sq. ft. of restaurant space. Ex. 25 at 1. When you consider that Escala receives an average of 12 truck deliveries per day just for its 270 residential units, Ms. Heffron's conclusion that the Altitude Project will generate an average of only 5 to 7 deliveries per day is simply not credible.

Another reason that Ms. Heffron's numbers are not credible is that she limited the range of types of deliveries for her assessment, while excluding others that are certain to occur. Ms. Heffron counted only food deliveries, botanical design/herb deliveries, liquor deliveries, linen deliveries, and mail deliveries, and trash/recycling/compost in her assessment of the daily average. *See* Ex. 26 at 2-3. Appellant's evidence demonstrated that the residential component of the building alone will generate more than just "mail deliveries." Residential uses generate large furniture/pet turf deliveries, package deliveries, maintenance/restocking deliveries, moving trucks, carpet/installation deliveries, pick-ups (Goodwill, Styroform), food deliveries, and more. *See* Ex. 59; Ex. 27. It's no leap of faith to conclude that restaurants and hotels will also generate bulk item deliveries, construction deliveries, and maintenance trucks. Ms. Heffron didn't include any of these types of deliveries in her numbers.

Respondents casually tell the Examiner to ignore the daily trip numbers in their own Transportation Technical Report, which is an appendix to the Addendum. *See* Resp. Br. at 44, fn 4 *citing* Ex. 25, App. J, p 27. They tell the Examiner that he can disregard those numbers entirely because

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they use the word "could" in the report. *Id*. There are multiple problem with this. First of all, these reports that are prepared for purposes of analyzing SEPA use the word "could" all the time – it's the way that the consultant communicates the expectations and potential of outcomes for the purpose of assessing environmental impacts. *See eg* Ex. 25, Preface and pp. 12, 19, 20, 21, 25, 26, 29, 33 (repeated use of the word "could"). Second, the Transportation Technical Report numbers appear to include certain types of deliveries that Ms. Hefron did not include in her second analysis, such as bulk item deliveries (*e.g.*, furniture, appliances) and residential move in and move out trucks. Ms. Heffron's reference to "mail deliveries" in Ex. 26 may have only included USPS delivers and not residential parcel deliveries, while it's clear that the summary in Ex. 25 included residential parcel deliveries.

Nonetheless, even if the Altitude generated an average of 5 to 7 deliveries per day, that would still create a likelihood of more than a moderate impact on the alley. It's important to keep in mind that this is an "average," which means that there will be more than 7 truck deliveries on certain days of the week. With a LOS F at the intersection of the alley and Stewart Street even without the Altitude Proposal. Ex. 18 at 29; *see also* Ex. 25 (App J at 27), adding over 7 new deliveries per day to that already highly defective intersection in addition to over 1000 new vehicle trips per day from the Altitude into that same intersection, this will have more than a moderate impact on the alley. Ex. 25 (App. J at 20, 27).

Respondents also argue that Appellant did not present any evidence that the additional traffic would have a significant adverse impact on the environment even if some of these trucks were to park in the alley rather than one of the loading berths. This is, again, absolutely not true. Mr. Tilghman's testimony, Mr. Sosnowy's testimony, Mr. Erickson's testimony, Mr. Rose's Testimony, multiple

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graphics and photographs all demonstrated that trucks parking in the alley will create obstacles and blockages that will create congestion, cause trucks to back out of the alley, and pose safety risks.

Respondents claim that the evidence shows that, under existing conditions, there were "significant periods of time" during which no vehicles entered the alley and argue that this implies that there's really no problem at all in the alley right now. Resp. Br. at 44 citing Ex. 61, p. 2. If no vehicles entered the alley during these "significant periods of time," that could very well imply that the alley was blocked by trucks and other vehicles and they couldn't get through. Furthermore, that's what's happening now. The number of trucks and vehicles in the alley will increase exponentially after the 5th and Virginia Building and the Altitude Building are constructed.

Respondents point out that the log prepared by Appellant shows that even when one or more vehicles remains in the alley for a substantial amount of time, other vehicles are able to come and go, which they claim implies that sometimes cars and vehicles can actually drive through the alley even if trucks or other cars are parking in the alley. Appellant did not and do not contend that every single truck that parks in the alley will block the alley every single time. The fact that some cars were able to pass some trucks that were parked in the alley some of the time in the current environment (with traffic that is nowhere near the level of traffic and congestion that will be occurring with the 5th and Virginia and Altitude Buildings) does not affect or change the fact that blockages will occur in the future often enough to create a likelihood of more than a moderate impact in the alley. Many trucks will have a very difficult time passing through the alley when other trucks are parked in the alley. *Tilghman Testimony*.

Regarding pedestrian and bicycle safety, Appellant's claims of safety impacts are not simply conjecture. As a reminder, the level of service at the intersection of the alley and Stewart Street will

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be at an LOS F even without the Altitude Proposal. Ex. 18 at 29; *see also* Ex. 25 (App J at 27). With the Altitude, we will have over 1000 vehicle trips and an average of 25 truck deliveries per day into that same intersection. Ex. 25 (App. J at 20, 27). That's a significant amount of trucks and cars trying to navigate accessing the alley entrance which shares a sidewalk that pedestrians will be using regularly. *Tilghman Testimony* (Hearing Day 3). This poses a significant pedestrian and cyclist safety and visibility issues that should have been assessed and addressed in the SEPA review.

The evidence demonstrated that the design and siting of the Altitude Proposal combined with the added traffic from the 5th and Virginia Proposal and Escala, will cause trucks to back out of the alley. SDCI gave an entirely dismissive response to this issue - taking no responsibility to actually reflect on and address the seriousness of this issue. Respondents claims that our warnings about potential safety problems is "conjecture." Are we expected to provide proof of a fatal accident before they will look at this issue?

Mr. Shaw testified, in so many words, that he considers it to be the duty of the pedestrians to keep themselves safe from dangerous situations. SDCI expects that pedestrians and bicyclists should be able see that trucks and cars are using this intersection and they are expected to pay close attention and keep themselves safe when they see this. Shaw, Day 4, Part 1 [6:00-7:10].

The only design element that SDCI points to on this issue was the idea that a widened sidewalk for the Project will provide a "better visual angle" for that intersection. *Id.*, [19:30-20:00]. That might be true for the lucky pedestrians who are walking on that further part of the sidewalk, but not for the ones who walk closer to the building. Apparently, those folks made a bad personal choice of choosing the wrong side of the sidewalk to walk on, but they're on their own. As mentioned above, it's worth noting that the design includes placing canopy applications off of the building on Stewart along the

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sidewalk to provide weather protection (protection from rain) for pedestrians that extends only 8 feet into the sidewalk area. Ex. 87 at 35. Keep in mind that while the sidewalk is widened, the canopy is not, therefore on a typical Seattle rainy day, of which there are many, pedestrians will still walk on the portion of the sidewalk closest to the building. This design element will attract pedestrians towards the building on the sidewalk (to get cover from the rain) and will, therefore, undermine the entire goal of creating a line of sight that SDCI is purportedly relying on for safety purposes.

With respect to the fact that the evidence showed that trucks will, no doubt, have to back out of the alley at times when the alley is blocked by other trucks or cars, Mr. Shaw testified that he expects the pedestrians and bicyclists to "be careful and cautious and look and listen." Id, [18:00-18:48]. As a reminder, it is illegal for any person to back any vehicle into or out of an alley *because it presents a safety problem*. SMC 11.58.290. Putting the responsibility on pedestrians to stay safe is not an appropriate assessment and or treatment of this very serious issue. SDCI should have engaged in a meaningful review of safety issues – it should not have been so dismissive of this potentially life-threatening problem.

Contrary to Respondents' contention otherwise, Appellant did provide evidence that the significant adverse impacts of the Altitude Proposal have not been adequately mitigated by the conditions of approval in the MUP Decision. There are no meaningful conditions in the MUP Decision to address the safety issue (which is not surprising because SDCI did not even take that issue seriously in the first place). Ex. 20 at 37-39. There are no meaningful conditions to mitigate the cumulative congestion impacts that are going to occur as a result of the combined traffic that will be generated by the Altitude Project, the Escala, and the proposed 5th and Virginia project. *Id.* The fact that the access points of the alley at both Stewart and Virginia will operate at a LOS F is, in and of itself, a very

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significant issue. And it's not just about what happens at the intersection – when you have an intersection operating at LOS F, you will have major congestion in the alley itself with all of these combined uses generating an enormous amount of traffic. There's no mitigation for this.

In the meantime, residents and hotel guests will be trying to access the parking garage of the 5th and Virginia, residents will be trying to access the parking garage for the Altitude, trucks and vans will be trying to access the loading berths for the Escala, 5th and Virginia, and the Altitude, and trash/recycling/compost trucks will be trying to collect trash. There has been no mitigation applied to address the impacts of all of these uses in the alley occurring at the same time. Even if a dock master tells a driver to move forward, where will that driver go if there's a line of vehicles in front of or behind him? Where will he go if there's a truck blocking the alley for a delivery to the Escala (which will not have a dock master)? What if there's a large 30 foot box moving truck that's serving the Escala that is parked in the alley even for just 30 minutes? These and other issues have not been addressed by mitigation.

Appellant did not address Mr. Marco Filice's testimony because it's not informative, reliable, or relevant for purposes of the issues that have been presented in this appeal. Mr. Filice spoke in very generic terms about a different hotel in a different location, in a different setting. Felice, Day 3, Part 3 [1:13:57-1:24:52], Day 3, Part 4 [17:02-18:41]. His experience was with hotels in California that were in suburban neighborhoods, not in a downtown cramped area, and did not have apartments. *Id.* He established no foundation or reasonable basis upon which to justify relying on his experience at and information about a completely different hotel in a different location that had completely different circumstances to analyze the impacts to the alley at the Altitude Project site. He did not address the unique impacts that will occur at this site as a result of the width and design of the alley, the design of

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the loading bays, the current and proposed uses of the alley, the cumulative impacts from the 5th and Virginia and Escala, the LOS F at the intersections, the Streetcar conflicts, the obstacles in the alley, the unique needs and uses of the Altitude. Mr. Filice's testimony did not address issues that are raised by truck deliveries that will be generated by the residential units in the Altitude. He did not address the issues that will be presented by conflicts between delivery trucks trying to enter the loading bay and residents trying to enter the parking lot. The fact that everything can go smoothly based on good intentions at a different hotel in a different location is irrelevant to this situation. His testimony may have shown that the owners of the Altitude may have good intentions and high hopes of smooth sailing for the Altitude, but it also reveals that they are being very naïve about the situation that they will be facing at this location if they think it's similar to their hotel in California.

For these reasons, Appellant has established that there is a likelihood of more than a moderate impact to the alley caused by the Altitude Proposal requiring the preparation of an SEIS.

D. The Addendum Can Not Be Relied on as a Substitute for an EIS

As we established in our Post-Hearing Brief, an Addendum cannot be relied on as a substitute for an EIS. Post-Hearing Brief at 34-35. Respondents did not suggest that an Addendum can be relied on as a substitute for an EIS, but instead argued that the 2005 FEIS was adequate for purposes of assessing the Altitude Proposal. Therefore, it is undisputed that an addendum cannot be relied on as a substitute for an EIS.

E. Even if the Addendum Could be Relied on as a Substitute for an EIS, It Is Not Adequate Because It Does Not Contain the Information and Analysis Required by SMC 25.05.440.

Because it is undisputed that an addendum cannot be relied on as a substitute for an EIS, we need not assess whether the Addendum meets the requirements in SMC 25.05.440. As was

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demonstrated in our Post-Hearing Brief, the Addendum does not contain the contents specified by SMC 25.05.440. Respondents appear to agree with that assessment, but instead argue it was not required to. As is evident from all of the briefing above, we disagree with that because there is no basis in law for their argument. In the end, with the 2005 FEIS and the Addendum combined, SDCI has failed to meet its duties and obligations under SEPA for all of the reasons we've described above and in our previous brief.

V. CONCLUSION

For the reasons stated above, Escala Owners Association requests that the Examiner reverse and vacate the SDCI code interpretation and determine that the project as designed violates the code requirement that precludes designs that may result in causing trucks to extend into or park in the alley. Escala also requests that the Examiner reverse SDCI's decisions on design review and SEPA and remand with instructions to issue new decisions that are consistent with the guidelines and with the requirements of SEPA.

Dated this 6th day of March, 2020.

Respectfully submitted,

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