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8 BEFORE THE HEARING EXAMINER  
9 FOR THE CITY OF SEATTLE  
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11 In the Matter of Appeal of:

12 ESCALA OWNERS ASSOCIATION

13 Of a Master Use Permit Decision issued by the  
14 Director, Seattle Department of Construction &  
15 Inspections  
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Hearing Examiner File: MUP-17-035

RESPONDENTS CITY OF SEATTLE AND  
JODI PATTERSON-O'HARE'S REPLY IN  
SUPPORT OF JOINT MOTION FOR  
PARTIAL RECONSIDERATION

17 I. INTRODUCTION

18 Respondents' Joint Motion demonstrated that Conclusion 16 identified facts that were in  
19 clear error per the record. The City of Seattle ("City") had reasonably sufficient information  
20 regarding the environmental impacts of the Applicant's proposal as it relates to the "loss of light"  
21 – including Escala's own study of a "with-out" proposal baseline light condition and the Perkins  
22 + Will Daylight Analysis – both prior to issuing the City's threshold determination and at the end  
23 of the *de novo* administrative appeal hearing of the MUP Decision. In its Response, Escala  
24 Owners Association ("Escala") does not rebut the clear error as to a material fact in Conclusion  
25 16. Instead, Escala raises three tangential arguments. As demonstrated below, none has merit.  
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Escala may not, in its Response, re-write Conclusion 16 and its Notice of Appeal to defend against reconsideration. The Examiner, thus, should grant Respondents' Joint Motion.

## II. ARGUMENT

### A. Conclusion 16 is based on a clear mistake of material fact related to loss of light.

In its Response, Escala first points to the "context" of one sentence in Conclusion 16 regarding Mr. Meek's testimony to write the finding that contains its emphasis on "loss of light" to an alternative finding that "there is not evidence that the responsible official considered the health impacts of reduced light" at Escala residences. Response, pg. 3. From this unsupported reading, Escala argues that the Joint Motion fails to address health impacts. But Escala misses the mark. The Joint Motion seeks reconsideration about the mistake in fact about the City's evaluation of the loss of light prior to its threshold determination. Escala's claim is misdirection.

Conclusion 16, in its entirety, states:

In advance of issuing the DS, the Director made a threshold determination which was required to be "based upon information reasonably sufficient to evaluate the environmental impact of the proposal." SMC 25.05.335. **At the time of the threshold determination, the Department lacked sufficient information to evaluate the proposal's impacts as they relate to loss of light within Escala's residential units.** As noted, the report from Mr. Loveland **raised issues related to significant loss of light to Escala**, as did his testimony, both of which were presented at an EDG meeting. Therefore, the Department was alerted to this as an issue at a phase of review in advance of a threshold determination. The record reflects that Design Review process was included in the Director's review and consideration as part of the threshold determination. **However, no analysis or request for additional information was executed related to this potential environmental impact.** Even the Applicant's witness, Mr. Meek, agreed that loss of light can have negative health impacts. **But there is nothing in the documents reviewed by the responsible official, or in this record, that evaluates the loss of light as a result of this proposal.** The reference to the shadow and view impact analysis in the SEPA analysis is not sufficient, as these consider different impacts. [footnote omitted]. Therefore, the Director did not have adequate information necessary to make a determination that there were no probable after significant impacts in this context. Without this information the Director could not have concluded that the proposal presented no new probable adverse significant impacts, and the Director's threshold determination was not

1 based on reasonably sufficient information. The FEIS did not address this impact.  
2 This is clear error.

3 Examiner's Decision, pg. 17 (emphasis added).

4 Reading the plain language of Conclusion 16, Escala's "context" arguments are meritless.

5 First, the import of Conclusion 16 read as a whole is unambiguous. In its second  
6 sentence, Conclusion 16 reads: "At the time of the threshold determination, the Department  
7 lacked sufficient information to evaluate the proposal's **impacts as they relate to loss of light**  
8 **within Escala's residential units.**" *Id.* (emphasis added). Conclusion 16 goes on to reference  
9 "loss of light" three more times. *Id.* Prior to reaching his conclusion, the Examiner restates the  
10 factual error at issue that is clearly erroneous: "But there is nothing in the documents reviewed  
11 by the responsible official, or in this record, **that evaluates the loss of light as a result of this**  
12 **proposal.**" *Id.* (emphasis added). Thus, reading the paragraph as a whole, Conclusion 16 is  
13 clearly erroneous. The record does not support the finding that the City's failed to evaluate the  
14 **loss of light** impacts to Escala's residential units prior to making its threshold determination.  
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17 Second, Escala's argument based on context is internally inconsistent. Escala focuses on  
18 three sentences:

19 **However, no analysis or request for additional information was executed**  
20 **related to this potential environmental impact.** Even the Applicant's witness,  
21 Mr. Meek, agreed that loss of light can have negative health impacts. **But there is**  
22 **nothing in the documents reviewed by the responsible official, or in this**  
23 **record, that evaluates the loss of light as a result of this proposal.**

24 Examiner's Decision, pg. 17 (emphasis added).

25 Escala argues that the last sentence in this series must be read in conjunction with the  
26 preceding sentence to provide "context" that the finding is really about the absence of  
27 information about health impacts. Response, pg. 3. Conclusion 16 says no such thing. Escala  
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1 ignores the plain language of the third sentence which expressly references “loss of light.” Try as  
2 it might, Escala cannot twist the text of Conclusion 16 into something other than what it says.

3 Escala also argues that the Examiner’s second sentence in the paragraph starting “At the  
4 time of the threshold determination...” actually “follows the Examiner’s reference to Mr. Meeks’  
5 acknowledgment” and “was made in reference to health effect issues.” Response, pg. 4.

7 Escala is wrong. The sentence at the crux of Escala’s argument here was the second  
8 sentence in Conclusion 16. Reading sequentially, the Examiner did not refer to Mr. Meek’s  
9 testimony for another four sentences. Thus, the sentence at issue does not “follow” the  
10 Examiner’s reference to Mr. Meeks – it precedes the sentence and is separated by an intervening  
11 discussion. Escala is conjuring a “reference” that is not reflected in the text. As its Response  
12 makes clear, Escala misreads Conclusion 16 in a strained attempt to misdirect the Examiner from  
13 the core issue – the clear factual mistake relating to the scope of the City’s evaluation of loss of  
14 light on Escala’s residential units that occurred prior to the threshold determination.

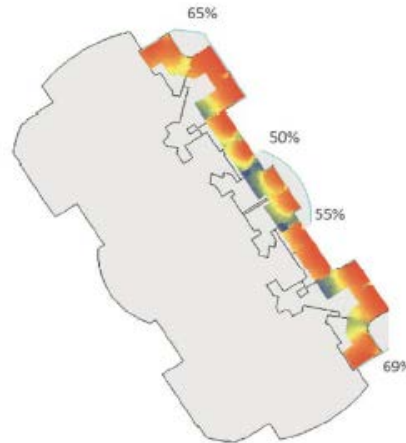
16 Accordingly, Respondents respectfully request that the Examiner grant the Joint Motion.

17 **B. The City had reasonably sufficient information regarding impacts on loss of light.**

19 In its Response, Escala does not dispute that the Perkins + Will Daylight Analysis was in  
20 the record prior to the City’s threshold determination. Instead, it now argues that the Perkins +  
21 Will Daylight Analysis is not sufficient because it did not address the “baseline” amount of  
22 daylight that the proposal would subtract at Escala. Response, pg. 5. But Escala fails to  
23 acknowledge its own study that provided this “baseline” analysis prior to the threshold  
24 determination. The City reviewed both studies before making its threshold determination and  
25 found no significant adverse impacts. Escala’s argument on a lack of a baseline is disingenuous.

1 Contrary to Escala's Response, the City had the baseline daylight analysis prior to  
2 making a threshold determination. In fact, Escala itself provided this precise study to the City:

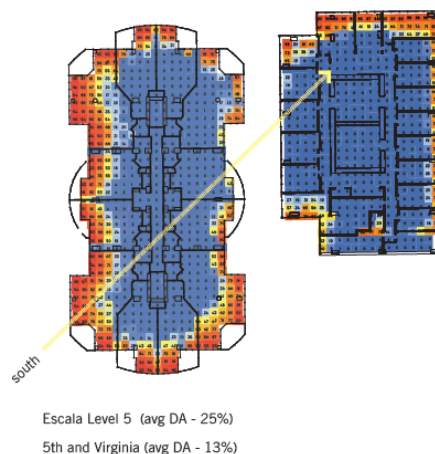
3 **Escala's "Baseline" Study Showing Escala Level 5 Existing Condition**



12 Figure 6: Escala Residences Floor 5  
13 DA Current (Existing) Condition

14 Compare Ex. 21, pg. 12 (Loveland study baseline condition for Escala Level 5) with

15 **Perkins + Will Daylight Analysis Showing Level 5 "With Project" Condition**



26 Ex. 17, pg. 33 (Perkins + Will Daylight Analysis of "with project" condition at same level).

1 Taken together, Escala's daylight baseline study and the Perkins + Will Daylight  
2 Analysis provide a "before and after" analysis of the potential loss of light in relation to the  
3 Escala's residential units. As the City testified, it reviewed all of Escala's comments. Bolser  
4 Testimony (Day 4, Part 2 at 0:06:50). This included the Loveland study baseline condition. *Id.*  
5 Indeed, Escala relied repeatedly on the Loveland study baseline in communications with the  
6 City. Ex. 21, pg. 14 (Escala presentation to Design Review Board alleging a 75% reduction in  
7 daylight for certain units); Ex. 27, pg. 13 (Escala letter to City planner alleging same).

9 Escala does not dispute that the Perkins + Will Daylight Analysis comprehensively  
10 addresses the "with project" condition. Response, pgs. 5-6; *see also* Joint Motion, pg. 4. There is  
11 no dispute that City's planner was present at the relevant Design Review Board presentations and  
12 reviewed this information on daylight issues. Ex. 8 (Noting City Planner attendance at DRB  
13 meetings where information was presented by both Applicant and Escala on daylight issues).  
14 This data was in the record prior to the City's issuance of the threshold determination. Ex. 89.  
15 Yet, after review of this all this information, the City concluded there were no significant adverse  
16 impacts relative to the loss of light within the Escala residential units. Bolser Testimony (Day 4,  
17 Part 2 at 1:28:00). Thus, Escala's protestations about the lack of a baseline in its Response are  
18 unconvincing. Escala may not like the City's determination, but it is inarguably based on data.

21 Respondents seek reconsideration because the Examiner incorrectly found that, as a  
22 matter of fact, the City "lacked sufficient information to evaluate the proposal's impacts as they  
23 relate to loss of light within the Escala residential units" and "...there is nothing in the  
24 documents reviewed by the responsible official, or in this record, that evaluates the impacts to  
25 the loss of light as a result of the proposal." Examiner's Decision, pg. 18; *see also* Joint Motion,  
26 pgs. 3-7. The Examiner's error was based on missing data in the record that the City relied upon  
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1 to conclude no probable significant adverse environmental impacts regarding the loss of light  
2 due to the proposal. Escala's proves this point by highlighting the fact that a baseline study  
3 existed – and was reviewed by the City – prior to the issuance of a threshold determination.

4 **1. Escala failed to respond to Respondents' argument on the record as whole.**

5 In its Joint Motion, Respondents argue the Examiner's Decision cannot be squared with  
6 the record as a whole. Joint Motion, pgs. 6-7. Escala fails to respond to this argument, therefore,  
7 it concedes this point.<sup>1</sup> Accordingly, the Examiner should grant the Joint Motion on this basis.

8 **C. Escala failed to raise specific objection; thus, the Examiner lacks jurisdiction.**

9 Lastly, Escala argues that it properly raised the issue of the sufficiency of the information  
10 related to the loss of light prior to the City's threshold determination. Response, pg. 6.

11 Escala's argument on this point ignores the Seattle Municipal Code ("Code") and  
12 Hearing Examiner's Rules ("Rules") requirements that an appellant raise "specific objections" in  
13 its appeal. SMC 23.76.022.C.3; Rule 3.05. In its Response, Escala fails to identify **with**  
14 **specificity** any appeal statement in the Notice of Appeal that purportedly raised a challenge to  
15 the reasonable sufficiency of the City's information prior to the threshold determination. That is  
16 because none exists. Instead, Escala tries to recast its broad-brush EIS adequacy claims into a  
17 threshold determination claim. Response, pgs. 6-7. Escala's attempt to untimely modify its  
18 appeal to add a new claim that they would like to sustain violates the Code and Rules.

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25 <sup>1</sup> As a *de novo* proceeding, the Examiner looks at the evidence afresh. SMC 23.76.022.C.6. The Examiner must  
26 defer to the City's determination of sufficiency of the information and not substitute his judgment unless left with a  
27 firm and definite conviction that a mistake was made. SMC 23.76.022.C.7; *Cougar Mountain Ass'n v. King County*,  
28 111 Wn.2d 742, 747-749, 764 P.2d 264 (1988). As Ms. Bolser testified after reviewing the entirety of the file –  
including the Perkins + Will Daylight Analysis and Escala's responses – and hearing testimony, she did not  
conclude that Code-compliant development in the densest part of downtown Seattle had a probable significant  
adverse impact relative to the loss of light inside Escala's units. Bolser Testimony (Day 3, Part 2 at 1:38:00). Given  
the Examiner's required deference and the weight of the evidence, this is a separate basis to grant the Joint Motion.

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### III. CONCLUSION

The Respondents, therefore, respectfully request that the Examiner grant the Joint Motion.

DATED this 25<sup>th</sup> day of May, 2018.

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