BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by ESCALA OWNERS ASSOCIATION of Decisions Re Land Use Application for 1933 5th Avenue, Project 3019699	MUP-20-012 ESCALA OWNERS ASSOCIATION'S CLOSING ARGUMENT

I. INTRODUCTION

The city's SEPA responsible official determined that construction of a 48-story building at 1933 5th Avenue, cheek-to-jowl with the Escala, would have significant adverse environmental impacts. SEPA Determination of Significance ((July 3, 2017).[1] The responsible official then determined that an environmental impact statement (EIS) drafted in 2003 and finalized in 2005 could be used in lieu of drafting a new EIS. *Id.* In a prior proceeding, the Hearing Examiner determined that staff had not adequately assessed the project's health impacts resulting from a loss of light in the homes of nearly 200 Escala residents. *In the Matter of the Appeal of the Escala Owners Association,* (MUP-17-035), Amended Findings and Decision (June 12, 2018) at 21 (DS remanded "for the purpose of evaluating the proposal's impacts as they relate to loss of light within the Escala residential units").

[1] The DS was exhibit 89 in the prior hearing and part of appellant's exhibit 2 in this hearing.

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On remand, SDCI stuck to its guns. This appeal has proved it wrong. The evidence of a dramatic loss of light is undisputed. Scientists on both sides concur that the loss of light is associated with severe health risks, including cancer and diabetes. But the respondents argue that because the magnitude of that risk cannot be quantified, a determination of non-significance should be upheld. There are two flaws with that approach.

One, the definition of "significance" takes into account not just the likelihood of an occurrence but its severity. If there were uncertainty about the likelihood of an impact of less consequence, a determination of non-significance might be justified. But here, the impacts are severe (*e.g.,* cancer, diabetes and other extremely serious health issues). Nearly 200 people are exposed to this risk. That the risk cannot currently be quantified should not detract from the significance of the risk. An EIS should be prepared.

The second flaw is that the responsible official totally ignored the SEPA rule that addresses circumstances where information important to a decision is unavailable. In that situation, the rule requires a weighing of a decision to proceed with the severity of the possible adverse effects. If the agency decides to proceed in the face of that uncertainty, it must prepare a worst case analysis:

> If information relevant to adverse impacts is important to the decision and the means to obtain it are speculative or not known;
>
> Then the agency shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty. If the agency proceeds, it shall generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed.

WAC 197-11-080(3)(b).

But there is no evidence that the city "weigh[ed] the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of

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uncertainty." Nor, once it decided to proceed in the face of that uncertainty, did it prepare the required worst case analysis. These twin failings requires a remand so that staff can comply with the rule, prepare an EIS, "weigh the need for the action with the severity of the possible adverse impacts" and, if it still thinks proceeding is a good idea, prepare the mandatory worst case analysis.

II. ARGUMENT

A. Standard of Review

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

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

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

The overriding and central premise of the State Environmental Policy Act (SEPA), ch. 43.21C RCW, is that, for any major action significantly affecting the quality of the environment, the lead agency must prepare a detailed statement on, among other things: (1) the environmental impacts of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, and (3) alternatives to the proposed action. RCW 43.21C.030.

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

If the responsible official determines that a proposal "may" have a probable significant adverse environmental impact, the responsible official shall prepare and issue a DS. WAC 197-11-360. When a DS is issued for a proposal, that means that the proposal is a "major action significantly affecting the quality of the environment" and the requirements of RCW 43.21C.030 are triggered. RCW 43.21C.030; s*ee also Moss v. City of Bellingham*, 109 Wn. App. at 14. The agency must prepare an EIS to evaluate the proposal's environmental impacts, any adverse environmental effects which cannot

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be avoided should the proposal be implemented, and alternatives to the proposed action. RCW 43.21C.030.

An EIS is particularly important because it documents the extent to which SDCI "has complied with other procedural and substantive provisions of SEPA; it reflects the administrative record; and it is the basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA between the benefits to be gained by the proposed 'major action' and its impact upon the environment." *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, supra*, 9 Wn. App. at 68. The mandatory elements include an analysis of impacts and measures to mitigate those impacts, a description of unavoidable impacts, and the alternatives analysis — the heart of the EIS requirement. *Id*.

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

SEPA authorizes phased review, where more generalized analysis on a planning level document is followed by more detail on a project-level document, but phased review is not a gambit for first reviewing broad issues at a general level and then failing to prepare a follow-up EIS on the site-specific issues. The second phase of phased review is supposed to be an EIS that focuses on the narrow issues that were not analyzed or not analyzed in detail in the earlier programmatic EIS:

> (2) A nonproject proposal may be approved based on an EIS assessing its broad impacts. When a project is then proposed that is consistent with the approved nonproject action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the nonproject EIS. The scope shall be limited accordingly. Procedures for use of existing documents shall be used as appropriate, see Part Six.

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> (3) When preparing a project EIS under the preceding subsection, the lead agency shall review the nonproject EIS to ensure that the analysis is valid when applied to the current proposal, knowledge, and technology. If it is not valid, the analysis shall be reanalyzed in the project EIS.

WAC 197-11-443.

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

C. An Addendum Can Not Be Relied on as a Substitute for an EIS or SEIS

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

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

The 2005 FEIS does not address the adverse health effects of a loss of light on the Escala residents. The issue in this case is whether those impacts are significant. If so, an EIS (or supplemental EIS) must be prepared. The most recent addendum provides the City's rationale for concluding that those impacts are not significant. As shown at the hearing and summarized here, the Examiner should conclude that the impacts are significant and require an EIS.

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

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

Ms. Bolser's testimony to the contrary, environmental documents are not paperweights, hidden from view of an agency's review bodies. They are to be used by agency staff, advisory boards and decision makers as a project moves through the administrative process, so that better recommendations and decisions are made. SEPA regulations and decades of case law instruct that SEPA's requirements are to be met early in the process before momentum builds in favor of one

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alternative or another. WAC 197-11-055(2); *Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 803-04, 309 P.3d 734, 742-43 (2013); *King County v. Boundary Review Bd*., 122 Wn.2d 648, 663 (1993). The disclosure and analysis of environmental impacts must occur before commitments to a particular course of action are made. WAC 197-11-055(2)(c); WAC 197-11-448(1); *City of Des Moines v. Puget Sound Regional Council*, 108 Wn. App. 836, 849 (1999). SEPA regulations require that the "lead agency shall prepare its threshold determination and environmental impact statement, if required, *at the earliest possible point in the planning and decision-making process*, when the principle features of a proposal and its environmental impacts can be reasonably identified." WAC 197-11-055(2) (emphasis supplied). Both the threshold determination and Environmental Impact Statement ("EIS") must be developed early. "The [EIS] shall be prepared early enough so it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." WAC 197-11-406.

Ms. Bolser frankly testified that, in essence, the Design Review process for the 5th and Virginia Proposal violated SEPA regulatory and case law requirements. In direct violation of the law, the Design Review Board's decisions were not informed by SEPA. Depriving the Design Review Board of environmental analysis in its process is a blatant violation of SEPA's requirements.

According to the Seattle Code, the applicable design guidelines are intended to mitigate the adverse height, bulk, and scale impacts addressed in the SEPA policies. SMC 25.05.675.G. A project that is approved pursuant to the design review process is presumed to comply with these height, bulk, and scale policies. *Id*. The code states that the Design Board can condition the 5th and Virginia Proposal via the City's SEPA authority by, among other things, modifying the bulk of the development, repositioning the development on the site, or requiring increased setbacks or other techniques to offset the appearance of incompatible height, bulk, and scale. *Id*.

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

That the DRB process results in a recommendation, not a final decision, is no excuse for depriving the DRB of the information in SEPA documents. As discussed above, SEPA rules and case law emphasize, repeatedly, that environmental review must be completed as early as possible in the "process," not just before a final decision is made. The city's process places great weight on the Design Review Board's recommendations. SDCI must adopt the Board's recommendations absent extenuating circumstances. SMC 23.41.014. To preclude the Board from considering the environmental impacts of its own recommendations is a dreadful failing of the city's permitting process. The Board issued decisions that were not informed by any of the information that would be included in an EIS assessing the building's height and bulk impacts on light and health. The Board did not have the opportunity to review height and bulk design alternatives that would have been analyzed in detail in an EIS.

The Board's actions, uninformed by an adequate EIS, unlawfully built momentum in favor of a specific alternative without the benefit of environmental review and improperly limited the choice

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

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of alternatives before SEPA review was conducted. To the extent the Seattle Municipal Code requires this to occur (as Ms. Bolser testified without citation), state law obviously controls.[3]

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

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

Design Review Guidelines for Downtown Development at 10.[4]

The Design Review Board members did not have the benefit of an EIS addressing height and bulk impacts on "direct sunlight" and the consequent health impacts. Not surprisingly, then, the DRB's recommendations failed to address the project's significant height, bulk and scale adverse impacts on Escala and failed to make recommendations for the changes necessary to mitigate those impacts. The MUP decision which embodies the Design Review Board's recommendation, prepared without the benefit of an adequate EIS, should be reversed.

III. SUMMARY OF UNDISPUTED EVIDENCE

Two days of hearing testimony revealed far more areas of concurrence among the parties' experts than disagreement. Several critical foundations for Escala's claims were not disputed and were even acknowledged by the respondents' experts:

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[3] A local ordinance cannot modify state law. This is a bedrock principle of state constitutional law. "Under article XI, section 11 of the Washington State Constitution, a city has the authority to "make and enforce within its limits all such local police, sanitary and other regulations *as are not in conflict with general laws*." *Chan v. City of Seattle*, 164 Wn. App. 549, 559 (2011) (emphasis supplied) (finding local gun control ordinance invalid).

[4] Available at: http://www.seattle.gov/Documents/Departments/SDCI/About/DowntownDesignGuidelines.pdf

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1. The Douglaston tower would reduce light in the Escala units dramatically. No one contested the overall accuracy of Mr. Clark's analysis showing a loss of virtually all natural light in some of the units and significant losses of light in most east-facing units at all times of the year.[5]

2. Because of their east-facing direction, the decrease in natural daylight in the Escala will be particularly severe during the morning and winter months.

3. The reduction in natural daylight would lead to a substantial decrease in the number of days per year in which natural daylight would be sufficient to efficiently stimulate the circadian system.

4. Loss of access to natural daylight is associated with significant adverse health conditions, including cancer, metabolic disorders, mental health issues (especially depression), and diabetes.[6]

5. While electric light, if precisely engineered (as in the space shuttle and specially equipped hospitals) can trigger the circadian system, the proponent is not proposing to mitigate its impacts on Escala by installing any such systems in the Escala.[7]

IV. CRITIQUE OF THE ADDENDUM

The foregoing unchallenged findings should have led SDCI to conclude that the project would have a significant adverse effect. Instead, SDCI published a second addendum that in its "Discussion" section (Addendum at 9-10) advanced various excuses and one relevant rationale for not requiring an EIS. The testimony demonstrated that the numerous excuses and the one relevant rationale lacked merit.

EXCUSE #1: The addendum states there is "no scientific consensus regarding a single, one-dimensional metric" for calculating the physiological effects of light. Addendum at 9.

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[5] Mr. Mott quibbled with some of Mr. Clark's assumptions regarding the room layouts for a couple of units, but Mr. Clark explained on rebuttal that the differences were minor and, in any event, impacted the sight lines that were exhibiting the least impact in the first place. The quibbles did not impact the forecast lost light percentages for sight lines with the greatest impact. In fact, it might have caused those to increase. *See* Clark Rebuttal Testimony. And Mr. Mott's big reveal that Mr. Clark's supposed mis-analysis understanding of the floor 19 layout turned out to be a non-event resulting from the omission of floor 13 in the building's numbering system.

[6] As one notable example, Dr. Brainard's agreed with a Covid science panel's recommendation that house-bound Covid avoiders go outdoors more to protect their own health.

[7] Indeed, the Covid science panel Dr. Brainard referenced recommended house-bound Covid avoiders go outside more—not retrofit their homes with exotic, high-tech lights.

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Response: Simply because there are multiple methods for measuring light does not mean that it cannot be measured with sufficient certainty to estimate the amount of lost light for circadian entrainment (synchronization) purposes. Mr. Clark discussed two different metrics, CS (Circadian Stimulus) and EML (equivalent melanopic lux). The CS computations were done by Mr. Clark. The EML computations were done by Stantec at the applicant's request. They showed basically the same thing: a huge lose in light. Another consultant retained by the applicant (Brainard), prefers a third metric (melanopic EDI), but he agreed that the EML metric Mr. Clark discussed was very good and provides results very similar to the melanopic EDI metric he (Brainard) now favors.

Conclusion: The applicant's whole discussion about the different metrics for measuring light was a smokescreen, trying to confuse a rather simple issue: No matter how measured, the project would dramatically cut light to the Escala. Both metrics discussed by Clark showed roughly the same dramatic decline. And Brainard agreed that one of those metrics, EML, was basically equivalent to the metric recently approved by an international body (the CIE). But the authors of the addendum seemed not to have picked up on that key point, *i.e.,* the smokescreen was effective. Even after listening to Dr. Brainerd acknowledge that the EML metric was plenty good and showed a huge reduction in light, SDCI's witness stuck to her line that uncertainty about the metric required a finding that the impacts were not significant. The Examiner should exercise her de novo review authority[8] and find that department's rationale was based on a misunderstanding of the entire metrics discussion.

EXCUSE #2: The addendum states: "Any analysis relative to the potential impacts on human health of any unique individual would require consideration of the individual's unique exposure to

[8] SMC 25.05.680.B.5. While review is *de novo*, the Examiner must also give "substantial weight" to the staff decision. But "substantial weight" does not mean decisions not based on the facts should be upheld. This is not an issue of giving weight to competing testimony. Brainard agreed with Clark that the EML metric was adequate and no one contested the bulk of Clark's forecast of light reductions.

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light and darkness as well as the other variables that have been shown to elicit changes in circadian timing, such as exercise, diet and temperature, among others." Addendum at 9.

Response: Dr. Horacio de la Iglesia explained that individualized health risk assessments like that are not realistic or standard procedure. He testified that assessments of risks associated to environmental exposures use population scale metrics, not individualized assessments. He used the current Covid risk assessments as examples of population level risk assessments, which are commonly employed, even though every individual's response is unique. None of the respondents' witnesses contended otherwise.

Conclusion: This is another smoke screen. Public health officials routinely rely on population level assessments, without attempting to do the impossible or impractical: calculate risk for each individual. The Examiner should find that this excuse is not based on standard risk assessment protocols and that staff erred in using this as an excuse for not preparing an EIS.

EXCUSE #3: The addendum states: "These Escala residents will continue to have opportunities to access daylight based on their personal circumstances, lifestyles and preferences, including access to light in the approximately two-thirds of daylight that the average Seattleite spends outside their home." Addendum at 9.

Response: As Dr. de la Iglesia testified, Escala residents should have the opportunity to stay healthy right in their own homes. Many are elderly and/or retired. To properly synchronize circadian clocks, it is important that light exposure occur in the early morning. Escala residents should not be forced to leave their own homes in the early morning to get access to healthy amounts of daylight. Mandating that the injured take action to compensate for the adverse impacts caused by the project does not demonstrate that the project's impacts are insignificant. To the contrary, the need to take such action is testament to the project's significant impacts.

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Conclusion: This is another smoke screen. Attempting to shift the focus from the impact suffered by Escala residents to measures they could take to mitigate that harm is irrelevant to the issue of whether the impacts are significant in the first place.

It also is distressing that when it comes to mitigation, instead of the applicant considering means within its own control to limit harm (*i.e.,* using the 2017 code amendments that allow the tower to be skinnier and taller[9]), the applicant seeks to blame the victims for not taking steps to reduce the harm caused by the applicant.

Rationale #1: The addendum provides a single explanation for not preparing an EIS that is germane to the issue before the Examiner (though it, too, is intertwined with an irrelevant excuse). The addendum states: "While any reduction of access to daylight is likely to be perceived as significant by the residents of some east-facing Escala units, a reduction in access to daylight within one façade of one residential building is a less than moderate impact to the environment when viewed in context of the downtown urban environment as a whole."

Response: This statement in the addendum consists of two intertwined explanations. One focuses on the number of people exposed to the harm, that is, the (unstated) number of people residing "in east-facing Escala units." The other adds the element of the larger context, that the building is in the "downtown urban environment." We address each in turn.

We agree that the number of people exposed to an adverse impact is a part of the "significance" equation. Here, the undisputed testimony is that close to 200 people reside in those units. Testimony of Sosnowy. That number is just part of the equation, though. The nature of the harm must also be considered. Exposing a couple hundred people to serious, long-term health risks is more significant

[9] *See* CB119038/Ord. 125374 (amending SMC 23.49.008 (height); 23.49.011 (FAR); and 23.76.004 (review)).

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than exposing a couple hundred people to a matter of mere inconvenience, a slight traffic delay, or a minor aesthetic impact. Exposing a couple hundred people to serious adverse health impacts should be viewed as a significant impact.

The context issue (that the building is in the downtown urban environment) is another smoke screen. Certainly, as a general rule, context matters. Noise levels that are significant in a quiet rural environment might not be viewed as significant in downtown. But health risks are significant whether they occur downtown, in Ravenna, South Park or a remote rural area. Nothing about the city's planning process for the downtown area suggests that adverse health impacts are less significant when they arise there than anywhere else. The city's "context" argument is wrong and, frankly, frightening in its suggestion that the health of downtown residents is less significant than the health of other city residents.

V. THE ROLE OF UNCERTAINTY IN ASSESSING SIGNIFICANCE

In the end, SDCI seemed most absorbed with the uncertainty about the magnitude of the harm that will be suffered due to the loss of light. We acknowledge that scientific studies documenting a specific dose response relationship do not exist. But, as Dr. de la Iglesia analogized, we do not have a specific dose response relationship for the Covid virus, but we know it is dangerous and act accordingly.

Uncertainty is an inherent part of environmental analysis:

> "NEPA requires that an EIS engage in reasonable forecasting. Because speculation is ... implicit in NEPA, [ ] we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.,* 668 F.3d 1067, 1079 (9th Cir.2011) (internal quotation marks and citation omitted).

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Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin., 99 F. Supp. 3d 1033, 1063 (N.D. Cal. 2015).[10]

Uncertainty inherent in environmental assessments is not an excuse to abort the assessment. SDCI reasoned that the uncertainty necessitated *not* analyzing the issue more completely in an EIS. That was the fundamentally wrong decision. The uncertainty provided more support for digging deeper, not turning away.

SEPA rules also address the uncertainty issue. To repeat:

> If information relevant to adverse impacts is important to the decision and the means to obtain it are speculative or not known;
>
> Then the agency shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty. If the agency proceeds, it shall generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed.

WAC 197-11-080(3)(b). This rule is not a license to shy away from hard questions; just the opposite.

The rule sets out an "if/then" protocol. If the conditions in the first paragraph are satisfied, then the steps in the second paragraph shall be taken.

Applying that rule here, there should be no debate that the conditions in the first paragraph are satisfied. Information about the health impacts of lost access to light is "information relevant to adverse impacts," it was "important" and, according to SDCI, the "means to obtain it are speculative or not known." Thus, the three conditions in the preamble are all met. We do not believe the respondents have, will or can claim otherwise.

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[10] "The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370f is substantially similar to SEPA, Washington Courts may look to federal case law for SEPA interpretation." *Pub. Util. Dist. No. 1 of Clark Cty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158, 151 P.3d 1067, 1070 (2007).

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Two responses to that situation are described in the second paragraph. The first response is mandatory: "[T]he agency shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty." One looks in vain in the addendum or MUP for any indication that SDCI "weigh[ed]" the need for the action with the severity of the possible adverse impacts. No weighing was done at all. Rather, SDCI concluded that because important information about the severity of the impacts was unobtainable, it would stop worrying about the issue and issue the permit. This is a blatant failure that occurred only because SDCI failed to prepare the required EIS and proceeded to make its decision in ignorance.

The second response in the second paragraph is not mandatory. It is triggered only if the agency decides to proceed. But here, SDCI decided to proceed, so the response was triggered: "If the agency proceeds, it shall generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed." SDCI did not comply with this mandate either. If it had prepared an EIS, it could and should have included in the EIS the "worst case analysis" triggered by this rule. Even if the impacts were judged insignificant because of the uncertainty (which would have been wrong), the worst case analysis should have been included in the addendum. But SDCI did not prepare a worst case analysis anywhere.

VI. CONCLUSION

The health hazards of living in a dark cave all morning have been illuminated by numerous studies in the last 20 years. This is, by some standards, a relatively new environmental issue. But simply because it is new and not capable of analysis with mathematical precision (contrast it with an LOS calculation or compliance with a height limit) does not mean it is not significant. SDCI has the opportunity here to perform an important service in the advancement of our understanding of the

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health impacts associated with a loss of light. But more than that, SDCI had the legal duty to do so. The department should be ordered to prepare an EIS

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Respectfully submitted,

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