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	Hearing Examiner File: MUP-20-012 (W) APPLICANT'S POST-HEARING BRIEF

I. INTRODUCTION

Appellant Escala Owners Association ("Appellant") bears the burden to demonstrate that Applicant's 48-story building at 1933 Fifth Avenue ("Project") in the City of Seattle ("City") will cause significant adverse health impacts due to the reduction in light experienced by the residents of the Escala Condominium ("Escala") inside their units. Through two days of hearing and hundreds of pages of exhibits, Appellant failed to meet its burden. Instead, Appellant simply asks the Hearing Examiner to take a leap of faith and assume — without proof — that reduced daylight to some units at the Escala must cause a significant adverse health impact. Appellant's argument is not based on any scientific standard for measuring health impacts, ignores the role of other light that Escala residents receive both inside and outside their condos, and fails to cite any

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specific studies of the health impacts to Escala residents. Appellant fails to prove a significant adverse impact to the environment under the State Environmental Policy Act ("SEPA"), RCW 43.21C. Thus, Appellant's appeal fails, and the Hearing Examiner should uphold the decision.

In 2018, Appellant challenged the Seattle Department of Construction and Inspection's ("SDCI's") issuance of a Master Use Permit decision ("MUP Decision") approving the Project. After hearing, the Hearing Examiner upheld the MUP Decision related to the Project's design review approval and the legal adequacy of the SDCI's review of the Project's potential environmental impacts related to transportation, alley operations, height, bulk and scale, and land use elements ("Examiner Decision"). Yet, the Hearing Examiner remanded the Project to SDCI on a limited basis — to evaluate the impacts to health related to loss of light within the Escala residential units. As a result of the remand, SDCI analyzed the impacts to health due to the loss of light on residents living in the Escala's eastern condos. After almost 18 months of additional review, SDCI issued a EIS Addendum ("Lighting Addendum") documenting its analysis.

The Lighting Addendum included three studies by experts in their respective fields.

Dr. George Brainard of the Thomas Jefferson University Light Research Program, who is a renowned expert in the field of lighting and human health, explained that there is: (1) no scientifically adopted metric to evaluate the impacts on health of light; (2) there is no demonstrated difference in the physiological stimulation caused by electric light versus daylight on the human body; and (3) studies prove it takes surprisingly little light (electric or daylight) to entrain the circadian system. At the hearing, the Appellant's only expert on lighting and human health — Dr. de la Iglesia — did not disagree with these foundational scientific conclusions.

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Denise Fong, an architectural lighting designer with Stantec and expert in the field of lighting design, testified regarding the lighting analysis she conducted. Ms. Fong confirmed that while there are commercial applications that assist in designing a building to consider "healthy" electric and natural light concepts, there are not any standard metrics or tools for analyzing the health impacts of light. While Stantec's study showed some reductions in daylight with the introduction of the Project, her study also showed occupants of the units on the Escala's eastern façade will continue to receive daylight year-round. Appellant's experts used a different (and scientifically suspect) metric for quantifying the light reductions but did not conclude otherwise.

Dr. Duane Steffey, an expert in the field of statistics, testified about his study which concludes that Seattleites spend only 4.3 wakeful daylight hours a day, on average, inside their homes and nearly two-thirds their wakeful daylight hours outside the home. This time outside the home (at work, school, or the store) is relevant to the baseline of electric light and daylight received by a Seattleite. Appellant did not provide a valid study that refutes these findings.

After reviewing the expert studies and comments prepared by both the Applicant and the Appellant, SDCI concluded that there is no current scientific consensus for measuring or evaluating the impacts of reduction in light (electric or daylight) on health, much less a proven "dose" of light required for health. Nevertheless, SDCI still considered whether the impact of loss of light on health will be significant based on SEPA's required considerations of context, duration, and intensity. The City found that the reduction of light inside the Escala's eastern units is expected to be less than moderate and is not expected to be significantly adverse.

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At the hearing, Appellant failed to provide any evidence demonstrating that there is a significant adverse health impact due to loss of light at some of the Escala residential units on the eastern façade. Appellant failed to meet its burden. Accordingly, its appeal must be denied.

II. STATEMENT OF FACTS

1. The Project.

The Project is a proposed 48-story mixed-use building with 431 apartment units, 155 hotel rooms, retail and restaurant space, and below-grade parking for 239 vehicles. Ex. 1 ("Revised MUP Decision").[1] The Project's address is 1933 5th Avenue ("Project Site") and will be located on the northeast corner of a block bounded by Virginia Street, 5th Avenue, Stewart Street and 4th Avenue. *Id.,* pg. 2. The Project Site is zoned Downtown Office Core 2 ("DOC-2"), and it is currently developed with three low-rise, vacant commercial structures. The Escala condominium ("Escala") is located across an alley directly to the west of the Project Site. *Id.*

2. Procedural SEPA compliance.

The City has undertaken years of review of the Project and its potential environmental impacts. First, on July 3, 2017, the City issued a SEPA determination of significance ("DS") and notice of adoption of the Final Environmental Impact Statement for the Seattle Downtown Height and Density Changes (January 2005) ("FEIS"), as supplemented by the FEIS Addendum dated July 3, 2017 ("EIS Addendum").

On October 26, 2017, the City issued a MUP Decision for the Project. The MUP Decision included three components: (1) design review approval under the Seattle Municipal Code ("SMC" or "Code") Chapter 23.41; (2) the City's procedural compliance with SEPA,

[1]The Applicant is utilizing the exhibit numbering system provided by the Hearing Examiner in the final admitted Exhibit list provided to the parties on September 17, 2020.

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including the adoption of the Downtown FEIS for the Project and determination of EIS adequacy; and (3) imposition of conditions pursuant to the City's substantive SEPA authority.

On November 9, 2017, the Appellant appealed the MUP Decision ("Prior Appeal"). After a four-day hearing, the Hearing Examiner issued his Findings and Decision on the matter and upheld SDCI's MUP Decision related to the Project's design review approval and the legal adequacy of the City's review of the Project's potential environmental impacts related to transportation, alley operations, height, bulk and scale, and land use compatibility elements in the Examiner's Decision.[2] The Hearing Examiner also dismissed Appellant's procedural SEPA claims regarding the adoption of the FEIS and use of the EIS Addendum. *Id.*, pgs. 15-17.

However, the Hearing Examiner found that SDCI erred procedurally by failing to evaluate the impacts related to loss of light prior to the issuance of its environmental determination for the Project. The Hearing Examiner remanded the MUP Decision to SDCI for the "purpose of evaluating the [Project's] impacts as they relate to the loss of light within Escala residential units." *Id.*, pg. 21. The Prior Examiner's Decision also required new terms to be included in the Project's Dock Management Plan. *Id.,* pg. 21. In all other respects, however, the Hearing Examiner upheld the MUP Decision for the Project and denied Appellant's appeal.

Applicant and the City of Seattle filed a joint motion for reconsideration on the remanded issue of health impacts related to the loss of light. As a result of this motion, the Hearing Examiner clarified his decision in an Amended Decision dated June 12, 2018.[3] The Amended

[2] The Hearing Examiner may take notice of the Examiner's Decision per Hearing Examiner Rule ("HER") 2.18(c).
[3] *See* Footnote 2.

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Decision reiterated and clarified that the remand was limited to an evaluation of potential ***health*** impacts related to the potential loss of light within Escala residential units. *Id.,* pgs. 18-19.

i. Evaluation of health impacts related to loss of light in Escala.

On remand, SDCI prepared the Lighting Addendum dated November 18, 2019. Ex. 37. The Lighting Addendum provides analysis and information about the Project's potential health impacts due to the reduction of light within the private residences located on the eastern façade of the Escala. The Lighting Addendum included three expert studies prepared at the City's request to respond to the Hearing Examiner's remand directive.

First, Dr. George Brainard authored a study detailing the state of the science on how light and darkness influences human health ("Brainard Study"). Ex. 37, Appendix B. Dr. Brainard is Director of the Thomas Jefferson University Light Research Program. Ex. 43. Additionally, Dr. Brainard is the Chair of the Illuminating Engineering Society of North America ("IESNA") Light and Human Health Committee and serves as America's representative to the International Commission on Illumination ("CIE"), where he chairs its Photobiology Committee. *Id.*

Helpfully, Dr. Brainard summarized the biological and behavioral effects of light on humans. The retinal sensory system that supplies input for human circadian, neuroendocrine, and neurobehavioral regulations consists of a set of cells (called the intrinsically photosensitive retinal ganglion cells or "ipRGCs") that are the primary detectors of light for physiological regulations. Ex. 37, Appendix B, pg. 1. These ipRGCs are different than the rod and cone photoreceptors used for vision. *Id.,* pgs. 2-3. Dr. Brainard's analysis of the physiological impact of light is below,

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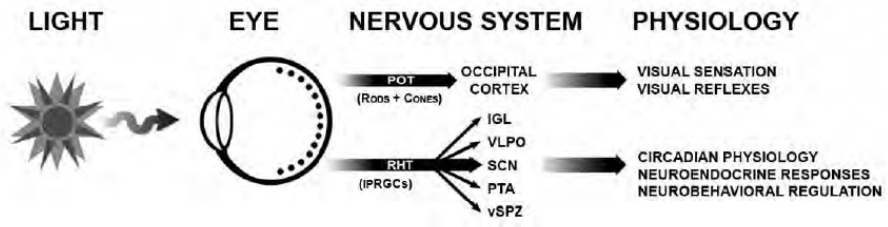

Figure 1. The diagram above provides a simplified schematic of the neuroanatomy responsible for mediating both the sensory capacity of the visual system and the non-visual regulation of circadian, neuroendocrine and neurobehavioural functions.[1] This figure is reprinted with permission by the Commission Internationale de l'Eclairage (71).

Ex. 37, Appendix B, pg. 3.

Dr. Brainard also detailed how light acts as a stimulus to regulate physiology, including the circadian system. As Dr. Brainard explained, the body's circadian system is on an internal 24-hour clock that helps govern sleep. Circadian entrainment is the synchronization of the body's clock through a combination of exposure to light and darkness. Entrainment is a series of chemical, biological, or behavioral changes over that 24-hour cycle, which in turn synchronizes sleep- and arousal-promoting neurons to support sleep (or alertness). Ex. 37, Appendix B, pg. 5. As Dr. Brainard testified, inappropriate levels of light at night can work to disrupt circadian entrainment. This is frequently studied in the context of "shift-work" night-active employment.

The Brainard Study noted that there is not yet a scientifically adopted metric to evaluate the impacts to ***health*** of light and darkness. Ex. 37, Appendix B, pgs. 8-9. Dr. Brainard also explained how there is presently "little peer-reviewed, published data" to support the contention that daylight or natural light is "superior" to electric light in supporting health. *Id.,* pg. 11. On

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this last point, Dr. Brainard noted the distinction between the amount of scientific work studying the impact of electric light on "shift-work" populations versus the lack of studies with daylight.[4]

Second, the Lighting Addendum included an analysis completed by architectural lighting experts at Stantec Consulting. Due to the lack of a scientifically adopted metric to evaluate the health impacts related to loss of light, Stantec applied a modified version of the commercially available WELL Standard to study light levels within the Escala residential units. Ex. 37, Appendix C ("WELL Standard Analysis"). The WELL Standard is a points-based system that establishes criteria for ten concepts (for example, air, water, thermal comfort, and materials) to be evaluated in designing a healthy building, including lighting. One of the ten WELL Standard concepts to be evaluated is lighting. The WELL Standard, however, disclaims that its criteria or studies should not be considered as "medical advice, diagnosis or treatment." *Id.,* pg. 26.

The WELL Standard lighting concept evaluates eight "elements", some of which were not applicable to the considerations presented by the Hearing Examiner's remand (for example, light education was not relevant to remand). Ex. 37, Appendix C, pg. 5. The WELL Standard Analysis prepared by Stantec evaluated four of the eight WELL lighting elements. *Id.* Stantec demonstrated that Escala would qualify for the WELL Standard lighting "point" in both the "without" and "with" Project conditions, with two exceptions.

The first exception related to WELL Standard study of light intensity for ***visual*** illuminance to perform tasks (measured in terms of spatial daylight autonomy or "sDA"). *Id.,* pgs. 11-12; *see also* Fong Testimony, Day Two. At hearing, the Parties agreed that such an

[4] *See also* Dr. Munch's article which concludes: "It seems intuitive that daylight should be preferred wherever possible over artificial light, yet we have little data to support this claim." Ex. 44, Bates 298 (Citing Ex. 51).

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evaluation is irrelevant to the question in the Hearing Examiner's remand because circadian entrainment is governed by the ipRGCs nerves instead of the visual rods and cones system.[5] *Id.*

The second WELL Standard exception, in contrast, was relevant to the question of circadian lighting because it measured the equivalent melanopic lux ("EML") of ***electric*** light within the Escala. As Dr. Brainard explained, EML is one of the emerging metrics that measures the type of light that stimulates human physiology, including the circadian system. Ex. 37, Appendix B, pg. 8. The WELL Standard Analysis showed that (based on the location of fixed lighting at the Escala as set forth in the City's construction permit and reasonable assumptions of typical household lighting within the Escala units) the electric light performance inside these units could not achieve the 120 EML required to earn a WELL Standard point, ***either with or without the Project***. Ex. 37, Appendix C, pgs. 11-12; *see also* Fong Testimony, Day Two.

Stantec also created a study that evaluated the reduction in daylight inside the Escala units associated with the Project for informational purposes ("Stantec Daylight Study"). Ex. 37, Appendix C, pgs. 16; 23-51. Stantec noted that there was no scientific consensus for establishing a "threshold" level for the amount of light (electric, daylight, or a combination of the two) that is sufficient for health. *Id.* Given the absence of any scientific consensus as to a threshold for a dosage of light for health, Stantec elected to set their daylight analysis line at 150 EML level because it is the same as is used in certain WELL Standard lighting concepts for electric light. *Id.*

[5] At the Prior Appeal, Appellant relied on a Professor Loveland to assert claims about health impacts using an sDA model. However, Professor Loveland's reliance on the sDA model was debunked because the sDA model fails to evaluate the effects of light on the ipRGCs. Instead, sDA studies lighting for visual tasks. *See* Fong Testimony, Day Two. The Hearing Examiner previously found that Professor Loveland's testimony failed to show a significant adverse impact. Examiner's Decision, pg. 19. Appellant did not call Professor Loveland or address this issue in its Closing Argument. To extent that Appellant attempts to revive the debunked sDA claims in its reply, it is too late. However, Applicant incorporate its briefing from the Prior Appeal on the sDA modeling in order to reserve rights.

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Using this 150 EML level, Stantec then studied all the rooms on the Escala's eastern façade on Floors 5, 19 and 28[6] for the five hours most relevant for circadian entrainment during the equinox and summer and winter solstice. Stantec's Daylight Study showed that EML levels varied throughout the rooms of the eastern façade, but generally were higher at the northern and southern units and increased as one moved up the tower. Even on the lowest level studied (5th Floor), the majority of rooms experienced daylight in an amount exceeding the 150 EML level in the "with" Project condition. Ex. 37, Appendix C, pgs. 24-33. The same trends carried out on the 19th Floor. For instance, the 19th Floor center unit living room exceeded the 150 EML level for all hours studied on the equinox and for all but one hour studied on the winter solstice, which is the darkest day of the year. *Id.,* pg. 37. The Daylight Study did not reach any health-related conclusions regarding these impact of exposures at the measured EML levels. Instead, Stantec's intention with the Daylight Study was to provide information to aid in the City's response to the Hearing Examiner's remand regarding the levels of daylight experienced with the Project.

Third, Exponent statisticians conducted an analysis of the amount of time people spend awake at home in the Seattle metropolitan region during daytime hours. Ex. 37, Appendix D ("Daylight Activity Study"). Authored by Dr. Duane Steffey, the Daylight Activity Study employed statistical best practices and drew from reputable sources such as the American Time Use Survey and U.S. Census American Community Survey. *Id.*, pg. 4. The Daylight Activity Study concluded Seattleites spend, on average, 4.3 wakeful daylight hours at home per day. *Id.*,

[6] At hearing, Appellant's architectural lighting witnesses attempt to deflect from his failure to model his study on the Escala's actual floor plans as shown on approved City construction plans by alleging that Stantec failed to account for the marketing decision to omit a 13th floor. Clark Testimony, Day One. This is incorrect. Stantec's analysis specifically noted the omission of the Escala's 13th floor. Ex. 37, Appendix C, pg. 7. Stantec's analysis studied the lowest floor where the Escala unit configuration changed. In contrast, Mr. Clark conceded under cross examination that he did not review the City's permits or visit any Escala units on Floor 19 to confirm his plans were accurate.

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pg. 3. This translates to the average Seattle resident spending nearly two-thirds of wakeful daylight hours outside the home, depending on the season. *Id.* For residents in households with a family income of over $150,000, the average wakeful daylight hours spent at home decreased to 3.8 hours per day. *Id.*

The City issued a Notice of Availability of the Lighting Addendum on November 19, 2019. Ex. 78. The City accepted comments on the Lighting Addendum. Appellant and its consultants submitted comments on the Lighting Addendum. Exs. 61-67 ("Escala's Comments"). At hearing, Senior Land Use Planner Shelley Bolser testified that she reviewed the Escala's Comments. Subsequently, Ms. Bolser issued a correction request for more information in response to the Escala's Comments. Ex. 84. The Applicant responded with, among other items, a detailed explanation of the methodology employed by Stantec in its studies. Ex. 70.

On April 23, 2020, the City issued its Revised MUP Decision approving the Project and documenting its procedural compliance with SEPA, including the adoption of the Downtown FEIS for the Project as supplemented by the EIS Addendum and Lighting Addendum and determination of EIS adequacy. Ex. 1. In the Revised MUP Decision, the City analyzed all of the material provided by the Applicant and Appellant and concluded there were no new probable significant adverse impacts related to health due to loss of light within the Escala residential units. That analysis is set out in full in the Revised MUP Decision, which concluded:

> While the studies in the second Addendum measure the reduction of light into residential units of the Escala, there is a lack of scientific consensus to determine how this loss of light may directly impact human health, particularly where there are other variables at play unrelated to any proposed development. Any potential impacts of reduced lighting on human health would be expected to be reduced by the use of electric lighting and by wakeful hours spent outside the home, since wakeful hours spent outside the home expose people to daylight conditions. Consequently, even in light of the public comments and reports prepared by

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> Horacio de la Iglesia and Edward Clark, SDCI concludes that the project's reduction of light into the Escala residential units does not result in probable significant impacts to human health.

Ex. 1, pg. 42 (underline in original).

The City also concluded that it had no authority to mitigate for impacts to human health due to loss of light within the Escala residential units (which were unlikely to be significant). *Id.*

On May 5, 2020, Appellant appealed the Revised MUP Decision. The Hearing Examiner held a virtual hearing on September 14 and 15, 2020.

III. ARGUMENT

A. Standard of review.

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

The adequacy of the FEIS (including the Lighting Addendum) must be reviewed under the rule of reason. The adequacy of an environmental impact statement ("EIS") is a question of law, reviewed de novo. Although review is de novo, the court shall give substantial weight to the agency's determination pursuant to RCW 43.21C.090. Courts examine the legal sufficiency of the data contained in an EIS under the "rule of reason" standard. In sum, the EIS and addendum must present decision makers with a reasonably thorough discussion of the significant aspects of the probable environmental consequences of an agency's decision. *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 498, 306 P.3d 1031 (2013); *In re Matter of*

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

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

SDCI made a separate decision to use an addendum in this case, rather than a supplemental EIS ("SEIS") pursuant to WAC 197-11-600 and SMC 25.05.600. An SEIS is required in a case where, either due to substantial changes or new information, a proposal is likely to result in significant adverse environmental impacts; otherwise, the use of an addendum is appropriate. *Id*. Critically, in order to argue for preparation of a SEIS (or new EIS) in a case where an addendum is utilized, the appellant must demonstrate the likelihood of new significant adverse impacts of a proposal.

In a similar context regarding the review of the propriety of issuance of a DNS for a project (which indicates no new significant impacts), courts have interpreted this mandate to require the application of the "clearly erroneous" standard when reviewing an agency's decision to issue a DNS. *Murden Cove Preservation Ass'n. v. Kitsap County*, 41 Wn. App. 515, 523, 704 P.2d 1242 (1985); *Cougar Mountain Ass'n. v. King County* 111 Wn.2d 742, 747-749, 764 P.2d

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264 (1988); *Indian Trail Property Owner's Ass'n. v. City of Spokane*, 76 Wn. App. 430, 431, 886 P.2d 209 (1994). Under the clearly erroneous standard, reviewing bodies do not substitute their judgments for those of the agency and may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain, supra,* 111 Wn.2d at 747; *Polygon Corp. v. Seattle,* 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *Ass'n of Rural Residents v. Kitsap County,* 141 Wn.2d 185, 4 P.3d 115 (2000); *Moss v. Bellingham,* 109 Wn. App. 6, 13, 31 P.3d 703 (2001). An Appellant does not meet its burden to show a decision is clearly erroneous if the evidence shows only that reasonable minds might differ with the decision. *See e.g., In the Matter of the Appeals of CUCAC and Friends of UW Open Space, et al.,* Hearing Examiner File Nos. S-96-002 and S-96-003, Findings and Decision, (July 15, 1996), pg. 13; *see also In the Matter of the Appeal of Andrew Kirsh and Meredith Getches,* Hearing Examiner File No. MUP-08-003, Findings and Decision (May 23, 2008).

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

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B. Appellant improperly raises a new claim in its Closing Argument; this claim is untimely, not properly before the Hearing Examiner, and must be dismissed.

Appellant raises an entirely new claim questioning, for the first time in this appeal, whether the City violated SEPA because the City's Design Review Board ("Board") did not issue a new recommendation after the issuance of the Lighting Addendum. Because this new claim is not properly before the Hearing Examiner, it must be dismissed.

According to the Hearing Examiner Rules, to be timely, an appeal must be filed by 5:00 p.m. on the last day of the appeal period. HER 3.01(b). The appeal must contain a statement of the Appellant's issues on appeal. HER 3.01(d). Here, Appellant's appeal did not raise a claim related to the SEPA decision and the timing of design review. Indeed, the term "design review" is never mentioned in the Notice of Appeal. Appellant cannot be allowed to continuously revise its appeal, especially in a closing argument after the conclusion of the open record hearing; indeed, the Hearing Examiner Rules give leave to an Appellant to amend its claim only within 10 days of the initial filing for this exact reason. HER 3.05. This claim is untimely under the rules and cannot be considered by the Hearing Examiner. It must be dismissed.

1. Even if the Appellant had timely raised its "SEPA timing" claim, it was rejected by the Hearing Examiner in the Prior Appeal and should be rejected again for the same reasons.

In the Prior Appeal, Appellant claimed that "[t]he Design Review process violates SEPA regulatory and case law requirements that disclosure and analysis of environmental impacts must occur before a decision maker commits a particular action (Notice of Appeal Issue 1k and 2d)." Examiner Decision, pg. 9. In consideration of this claim, in the Prior Appeal, the Hearing Examiner found that:

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> Appellant has failed to support its contention that the DRB holds decision making authority on a proposal such that its failure to consider SEPA impacts as part of its analysis is a violation of SEPA. Contrary to Appellant's assertions, the DRB does not have decisionmaking authority. Instead, it is a recommending body, and the Director retains final decisionmaking authority with regard to design review and to SEPA. Appellant has failed to demonstrate that the design review process through the DRB violates SEPA, because it does not include a SEPA impacts analysis.

Id., pg. 20.

Once again, Appellant has not raised a claim that is distinct from the claim raised and rejected by the Hearing Examiner in the Prior Appeal. Instead, it repeats its allegation that SDCI's Design Review process, which was upheld in the Prior Appeal, violates SEPA. Closing Argument, pg. 8. Appellant's untimely claim should be dismissed.

2. Even if the Appellant had timely raised its "SEPA timing" claim, Appellant's SEPA timing argument is unavailing.

For the reasons set forth above, the Hearing Examiner does not have jurisdiction to consider Appellant's untimely new claim. However, even if the Hearing Examiner entertains this new claim, Appellant's argument that the SEPA process must conclude before the Board makes its recommendation to the SDCI Director fails.

WAC 197-11-170(1) restricts an agency from taking "action" that would have an adverse environmental impact or limit the choice of reasonable alternatives until the responsible SEPA official issues a final environmental impact statement or other threshold determination. On remand, the "action" taken by the City was the issuance of the Revised MUP Decision on April 23, 2020. The Revised MUP Decision includes the Director's determination on design review and substantive SEPA compliance. Only the Director is authorized under the Code to render these decisions. SMC 23.76.004, Table A. Recommendations of the Board are merely that — recommendations — and do not constitute "actions" under SEPA.

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Appellant fails to bring to the Hearing Examiner's attention the limitations of the Code section that specifically preserves to the SDCI Director the authority to address all SEPA considerations in the MUP decision, regardless of the recommendation of the Board. SMC 23.41.014.F. Additionally, a design review board plays no rule in conducting environmental review. SMC 23.41.008.A.

Appellant complains that SEPA considerations were excluded by the City from the Board's process. Even if the Board process and the City's design review determination had not already been upheld and Appellant had not failed to appeal the issue again in this appeal, nothing in SEPA or its regulations requires that each subordinate actor within an agency create a SEPA record. The obligation to account for SEPA in agency decision-making applies to the agency as a whole and it applies to decisions — not to each intermediate step in the agency process. Indeed, WAC 197-11-655 indicates that environmental documents shall be used in the review process "as determined by agency practice and procedure," so long as the SEPA documents for a proposal are considered by the agency decision-maker in rendering a final decision on the proposal. The Revised MUP Decision and the testimony of Ms. Bolser make clear that all SEPA documents were considered prior to SDCI making its decision. Appellant provides no basis in the record that supports the finding that SDCI disregarded its SEPA obligations here.

C. Appellant's claim that the City could not use the FEIS and Addenda fails as a matter of law.

Appellant devotes much of its Closing Argument to explaining its perspective on SEPA, where it once again questions the City's use of an EIS Addendum. The Hearing Examiner has twice roundly rejected the argument the City violated the requirements of SEPA because it analyzed the Project in EIS Addenda rather than preparing a new EIS; the first time, the Hearing

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Examiner rejected this argument in the Prior Appeal and the second time, the Hearing Examiner rejected the same arguments in an appeal from the Escala Owners Association involving a separate development on the same block. *In the Matter of the Appeal of Escala Owners Association,* File No. MUP 19-031, Findings and Decision (May 11, 2020).

As it did in these prior matters, Appellant challenges the fundamental legitimacy of analyzing a project action by means of adopting a nonproject EIS and providing project-specific information in an Addendum. But as with its arguments in these prior appeals, Appellant's procedural claims ignore express SEPA provisions allowing for the adoption of existing environmental documents and the incorporation of relevant prior analysis. As the Hearing Examiner has already ruled, Appellant's claim "that the City is procedurally barred by SEPA from adopting the FEIS and using the Addendum" must fail because "the City is permitted to take these actions to fulfill its SEPA procedural requirements." *See* Examiner Decision, pg. 15 (citing SMC 25.05 Sub-chapter IV; WAC 197-11-625; WAC 197-11-630).

Appellant generally asserts two reasons for the supposed illegitimacy of the City's action, none of which turns on facts specific to the decision on remand: (1) SEPA requires the City, every time it issues a determination of significance, to prepare a new EIS or Supplemental EIS to address any issues not adequately addressed in the prior EIS (Closing Argument, pgs. 4-6); and (2) an EIS Addendum cannot be a substitute for an EIS or SEIS (*Id.*, pgs. 6-7).

The Hearing Examiner specifically rejected each of these assertions in the prior *Escala Owners* appeal relating to this Project and rejected the same arguments in an appeal of a development on the same block. The Hearing Examiner, in her Order on Jurisdiction and Motion to Dismiss dated July 13, 2020, held that "Escala cannot use the new appeal to re-litigate

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the original issues from the first appeal . . . However, if the appeal's new issues stem solely from the revisions to implement the remand decision regarding shading, then these issues are properly before the Examiner." Appellant has failed to show that Appellant's procedural claims in this appeal are new issues resulting from the remand; instead, Appellant's arguments are simply variations on a single claim raised and rejected in the Prior Appeal of this Project and similar projects on the block: that the City's issuance of the DS irrevocably committed it, as a matter of law, to issuance of a full, Project-specific EIS. This is incorrect as a matter of law. Once again, the Hearing Examiner should reject Appellant's resuscitated arguments.

1. Even if the Hearing Examiner entertains Appellant's arguments that were already rejected by the Hearing Examiner in the Prior Appeal, SEPA authorizes the use of existing environmental documents and addenda.

As a matter of law, SEPA authorizes lead agencies to use existing environmental documents to fulfill its SEPA responsibility. RCW 43.21C.034. SEPA does not demand the proposal evaluated under the existing document be identical to the current proposal under review. Instead, the "prior proposal" and the new proposal "need not be identical but must have similar elements that provide a basis for comparing their environmental consequences such as timing, types of impacts, alternatives, or geography." *Id.; see also* WAC 197-11-600 and SMC 25.05.600 (permitting the use of existing documents, including adopting an EIS, and allowing for the use of an addendum to supplement the existing environmental documents).

Under the SEPA Regulations, the lead agency may use "all or part" of an adopted SEPA document to meet its responsibilities under SEPA. *Id.* In addition, an addendum or SEIS may be prepared. WAC 197-11-600; *see also* -620; -625. An SEIS is required in a case where, either due to substantial changes or new information, a proposal is likely to result in significant adverse

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environmental impacts; otherwise, the use of an addendum is appropriate. WAC 197-11-600. Critically, in order to argue for preparation of a SEIS (or new EIS) in a case where an addendum is utilized, the Appellant must demonstrate the likelihood of new significant adverse impacts of the proposal. *Id.* As discussed in Section III.E below, Appellant failed to meet its burden.

2. Even if the Hearing Examiner entertain Appellant's arguments that were already rejected by the Hearing Examiner in the Prior Appeal, the City is not required to issue a project-specific EIS if there are no new probable significant adverse environmental impacts

Appellant argues that City's issuance of a DS for the Project requires the City to prepare a project-specific EIS when the existing EIS adopted by the City is a nonproject EIS (Closing Argument, pg. 6). Even if this argument was not well outside the limited scope of the remand (it is, as discussed above), Appellant's argument misunderstands SEPA.

Appellant conflates various provisions of RCW 36.21C and WAC 197-11 in an attempt to require a ***new, project-specific*** EIS every time a project receives a DS, but nothing in the provisions it cites supports this argument. Appellant's argument also misses two key facts. One, the 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. Ex. 1, pg. 27. Two, the City determined there were no new probable significant adverse environmental impacts ***beyond*** those addressed in the FEIS. Ex. 1. And yet again, the Examiner has already rejected Appellant's arguments regarding the programmatic nature of the FEIS in the Prior Appeal:

> Appellant argues that the FEIS as a programmatic EIS cannot substitute for a project specific EIS. Appellant argues that as a programmatic EIS the FEIS has failed to address required SEPA project level analysis. The FEIS provided environmental analysis for the upzone of the Downtown District. The rezone established the zoning under which the project application was submitted - establishing the provisions that specifically allow for the proposal. The FEIS specifically anticipated projects of the type represented by the proposal. The DS

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> reflects the Department's determination that it is probable that the proposal will have certain negative environmental impacts that were identified in the FEIS. The Department did not find that there would be any new probable significant environmental impacts at the project level. In addition, Appellant has not demonstrated that there would be any probable significant environmental impacts caused on the site specific level, and has therefore failed to meet its burden in demonstrating that the Department's analysis of such impacts was inadequate.

Examiner Decision, pg. 17.

Moreover, contrary to the suggestion of the Appellant, the inclusion of a DS does not require the lead agency to invoke all the procedural requirements of an EIS, as explained by the Hearing Examiner in the Prior Appeal. *Id.* ("The Appellant cites no authority showing where an EIS is adopted and an Addendum has been issued, that a new alternatives analysis, discussion of WAC 197-11-440 components, scoping process, or comment period are required under SEPA."). To hold otherwise would be contrary to the Legislature's creation of the adoption process to allow a lead agency to use another environmental document (including an EIS) to satisfy its SEPA obligations. WAC 197-11-600(4)(a). Thus, Appellant's argument regarding a determination of significance, to the extent it can be understood, is nonsensical under SEPA.

Appellant's argument also cannot be squared with the Legislature's intent for use of existing documents and is contrary to the letter and spirit of the SEPA regulations. RCW 43.21C.034. Washington courts have recognized that the SEPA statute and rules encourage and facilitate reusing existing environmental documents to avoid "wasteful duplication of environmental analysis and to reduce delay," *Thorton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 50, 52 P.3d 522 (2002), *as amended on denial of reconsideration* (2002); *see also* RCW 43.21C.034.

Appellant has failed to demonstrate that the City's process on remand violates SEPA.

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D. The health impact of the loss of light on residents is not an element of the environment under SEPA and is outside of the scope of substantive SEPA protection.

The Hearing Examiner remanded the matter to SDCI to analyze the health impact of the loss of light within the Escala residential units. This remand was based on his finding that SDCI failed to conduct any analysis on the impact of the loss of light after the Escala presented concerns to SDCI regarding this issue. Applicant disagrees with the Hearing Examiner's decision[7] and reserves its arguments on this issue; Applicant does not seek to relitigate the Hearing Examiner's remand in this forum. However, to the extent the Hearing Examiner's Decision is unclear or silent regarding the City's substantive decision-making authority regarding the health impact on the loss of light to Escala residents, the Applicant addresses the relevant requirements below.

To determine whether a project has a probable significant adverse impact, the City's SEPA authority is limited to consideration of elements of the environment as defined expressly listed in SMC 25.05.444 and WAC 197-11-444, including the built environment elements as defined in SMC 25.05.718. Specifically, SEPA notes that its "procedural provisions require the consideration of "environmental" impacts (see definition of "environment" in Section 25.05.740 and of "impacts" in Section 25.05.752), with attention to impacts that are likely, not merely speculative. (See definition of "probable" in Section 25.05.782 and Section 25.05.080 on incomplete or unavailable information.)" SMC 25.05.060.D.1. The specific reference to the

[7] Both the Applicant and Escala appealed aspects of the Hearing Examiner's Decision under the Land Use Petition Act ("LUPA"). The cases were then consolidated. Escala moved to dismiss the consolidated LUPA appeal because, in their view, there was no final land use decision to appeal under LUPA due to the Hearing Examiner's remand. The Court dismissed the consolidated LUPA appeal.

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SEPA definitions makes clear that the consideration of impacts is not open to every conceivable topic — it is instead limited by the definition of "environmental" and "impact" under SEPA.

Under SEPA, "environment" "means, ***and is limited to,*** those elements listed in Section 25.05.444, as required by RCW 43.21C.110(1)(f)." SMC 25.05.740 (emphasis added). And "[e]nvironmental impacts" are effects upon the elements of the environment listed in Section 25.05.444. SMC 25.05.752. In other words, SEPA only confers the City with authority to consider the probability of significant adverse environmental impact under SEPA if that topic is an express element of the environment under SMC 25.05.444.

Notably, the Hearing Examiner did not opine on whether the impact of the loss of light from the Project falls under any element of the environment, and if so, under which element it falls. Instead, the Hearing Examiner found that consideration of health impacts from the Project due to loss of light is different than, and not included in, three elements of the environment: shadows, light and glare, and height, bulk and scale. Prior Examiner's Decision, pgs. 16-18. Since the Hearing Examiner already ruled out three elements of the environment, Appellant now claims — without support or explanation — that the analysis falls under the category of "environmental health," which is explicitly limited to noise; risk of explosion; and releases or potential releases to the environment affecting public health, such as toxic or hazardous materials. SMC 25.05.444.B. None of these subtopics can conceivably be broad enough to encompass the health impacts contemplated from a potential loss of light within a private residential use. Testimony at the hearing makes clear that the human health impact of loss of light on residents does not fall within any of the elements of the environment listed in SMC

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25.05.444, and Appellant has not demonstrated otherwise. See Terry McCann Testimony, Day One; *see also* Ex. 1, pgs. 38-42.

Accordingly, while the Hearing Examiner required analysis of the potential human health impact due to the loss of light and the Applicant and SDCI conducted the required analysis, by the clear and unequivocal language of the Code, the City is limited in its consideration of impacts to those elements of the environment listed in SMC 25.05.444 — and health impacts due to loss of light within the Escala's private residential units are not included within any element.

Nevertheless, in light of the Hearing Examiner's remand, the City did consider the potential impact of the loss of light on the Escala residents and did not find a significant adverse environmental impact. Appellant failed to meet its burden to demonstrate that this impact is a probable significant impact under SEPA requiring an SEIS.

E. Even if the impact of loss of light on residents was under the scope of SEPA protection, Appellant failed to meet their burden.

As Appellant acknowledges, an SEIS is required only if there are substantial changes or new information indicating new significant adverse impacts. "A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents." WAC 197-11-600(3)(b)(2). Contrary to Appellant's assertions, a probable significant adverse environmental impact must be reasonably likely to occur — it cannot merely have a possibility of occurring but be remote or speculative. SMC 25.05.794. Here, Appellant has failed to meet its burden of proof to establish that there are new probable significant adverse impacts.

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1. The Downtown Height and Density Changes EIS and Project Addenda evaluation of impacts from the loss of light meets the "rule of reason."

To the extent Appellant is raising a challenge to the adequacy of the Downtown Height and Density FEIS and the Project's Lighting Addendum, Appellant's adequacy claim fails.

Consistent with the Hearing Examiner's remand directive, the Lighting Addendum included a thorough evaluation of the current state of the science regarding the health-related impacts of light and darkness. Applicant retained one of the leading international scientists, Dr. Brainard, in the field of light and human physiology to author its study. In both the Brainard Study and at hearing, Dr. Brainard detailed the state of the science and the fact that there is not yet a scientifically accepted metric to evaluate the impact of light (or darkness) on human health, much less a dosage of light to ensure health outcomes. Brainard Testimony, Day Two. Dr. Brainard detailed the undisputed gaps in current scientific knowledge that remain, and which make the evaluation of health impacts of natural light infeasible. Ex. 44, Bates 299-302. Appellant's health expert did not refute Dr. Brainard's conclusion on the state of the science.

Due to the lack of scientific consensus as to a "metric" to measure the health impacts of light, Applicant also retained Stantec, a respected architectural lighting designer, to evaluate the lighting conditions at the Escala "with" and "without" the Project applying a modified version of a popular, commercial comprehensive healthy building WELL Standard. However, the WELL Standard, like any commercial methodology, was not designed to measure the impacts of a reduction in daylight within an existing residential condo. So, Stantec employed the basic WELL Standard concept — modified to address the remand question — to attempt to place the reduction of daylight into a conceptual framework. Stantec applied the WELL Standard lighting elements, concluding that both the "with" and "without" Project conditions would typically be

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able to "earn" a WELL point. Only one WELL Standard lighting element directly addressed circadian lighting for health ("WELL L03"). Ex. 37, Appendix C, pg. 11-13. Even then, WELL L03 studied only electric light within the Escala units. In order to earn the WELL L03 point, a project needed to achieve a minimum 120 EML level using electric light. As Ms. Fong testified, the current electric lighting within Escala based on the City's permit plans and reasonable assumptions of what a typical resident would add as personalized lighting, demonstrated that the Escala failed to earn a WELL point in the "without" Project condition. Ex. 42, Bates 237-240. Stantec also showed the "with" Project condition did not change this WELL L03 outcome. *Id.*

Overall, Stantec's WELL Standard Analysis detailed how it applied the WELL methodology and how the results may help inform the City's review of the remand question.

Additionally, Stantec developed a standalone Daylight Study that evaluated the reduction in daylight within the Escala residential units associated with the construction of the Project. The Daylight Study did not any reach health related conclusions. Fong Testimony, Day Two. Instead, the Daylight Study quantified the numerical reduction in light using an EML metric.

Lastly, Applicant hired statisticians to study average Seattle resident's daytime habits. Exponent's Dr. Steffey concluded that the average Seattle resident spent roughly 4.3 wakeful daylight hours within their residences. Ex. 37, Appendix D. At hearing, Dr. Steffey concluded that typical Seattle residents spend nearly two-thirds of their wakeful daylight hours outside the home. As Dr. Steffey testified, this pattern is not anticipated to shift greatly over the long-term.

At hearing, the City's Senior Land Use Planner Bolser testified that she reviewed the Project to ensure it was within the scope of the Downtown Height and Density FEIS. Ms. Bolser concluded it was within the scope of the height and density changes contemplated in the FEIS for

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the DOC-2 zone (which included the Project Site). Bolser Testimony, Day Two. Ms. Bolser testified that she reviewed the Lighting Addendum and all three Applicant studies. Ms. Bolser also reviewed the Appellant's comment letters. Prior to authoring the Revised MUP Decision, Ms. Bolser issued a correction notice requesting the Applicant to respond to the Appellant's expert comments and critiques. Ex. 84. Applicants did. Ex. 70. Ms. Bolser confirmed that she reviewed all these materials before authoring the Revised MUP Decision.

The Lighting Addendum disclosed the scientific uncertainty as to a metric to measure the health impacts of light. Despite that uncertainty, the Lighting Addendum also included multiple studies that discussed the reduction of light using the commercially available WELL Standard and Stantec's own invention of a "daylight" study to isolate and quantify the reduction in daylight. Applicant's experts studied the entirety of the Escala's eastern façade using the lowest floor of each major unit configuration type to provide a "worst-case" analysis of daylight reductions. The Lighting Addendum included information that detailed a typical Seattle resident's patterns during daylight hours to help inform the City's study of background conditions.

Simply put, the Lighting Addendum disclosed and discussed the loss of light using one recognized commercial methodology and a Stantec originated study of daylight alone. Appellant's experts quibbled with what model was being used, but overall, Mr. Clark did not refute to Ms. Fong's analysis. Indeed, he used her study as a key component of his testimony. The reduction in natural light within the Escala's eastern façade units was thoroughly catalogued. Furthermore, the Lighting Addendum disclosed and discussed the best available science to evaluate health impacts (or lack thereof) to residents in Escala's eastern façade. Appellant

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provided no affirmative evidence that the health impacts to Escala residents related to reduction in daylight from the Project were not disclosed, discussed, and substantiated by data and expert opinion. Appellant may not like the Project's design or location, but the Hearing Examiner does not review the "wisdom" of the City's decision. Instead, the Hearing Examiner must evaluate whether the City's review had "sufficient information to make a reasoned decision." *Ballard Coalition, supra,* at pg. 17. The record is clear that the City both obtained and reviewed a volume of information before making its decision. Appellant's SEPA adequacy arguments fail.

2. There is no scientific consensus regarding a threshold for the amount of light necessary to achieve circadian entrainment, let alone the thresholds necessary to determine the potential health impact of a reduction in light on health.

It is undisputed that there is no scientific consensus regarding a particular threshold for how much light is needed as it relates to human health. Closing Argument, pg. 15. Under SEPA, if there are "gaps in relevant information or scientific uncertainty concerning significant impacts, agencies shall make clear that such information is lacking or that substantial uncertainty exists." SMC 25.05.080.B. This is precisely what SDCI did in its Revised MUP decision, noting that "[t]he studies note that there is not yet any empirical basis for understanding the effects of reduced daylight on human health, and the research of impacts of reduced light on human health is inconclusive." Ex. 1, pg. 39.

SEPA goes on to state that agencies may proceed in the absence of information "[i]f information relevant to adverse impacts is important to the decision and the means to obtain it are speculative or not known." SMC 25.05.080.C. As noted above, the human health impacts from the loss of light is not an element of the environment under SMC 25.05.444 and SDCI is accordingly not permitted to utilize the information gathered as part of its any impact

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determination. Accordingly, the uncertainty in the information on this topic is not important to SDCI's decision on probable significant adverse impacts.

Even assuming that the information is important to SDCI's decision, however, SDCI did precisely as SEPA instructs: (1) SDCI "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 uncertainty" (SMC 25.05.080.C); and (2) choosing to proceed, SDCI then "generally indicate[d] in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed." (SMC 25.05.080.C).

Contrary to Appellant's conclusory assertions, SDCI did not utilize the scientific uncertainty as "an excuse to abort assessment" in its Revised MUP Decision. In fact, SDCI did precisely the opposite; Appellant simply disagreed with SDCI's conclusion.

In the Revised MUP Decision, SDCI's discussed its conclusion as follows:

- Scientific uncertainty exists and there is no threshold for determining how much light is necessary to support human health;
- The analysis conducted was a worst-case analysis because it looked only at the units most impacted by the loss of light;
- It considered the information provided by the Appellant's experts and requested Applicant to respond to key issues raised in public comments;
- After review of the studies provided by Appellant's experts, it found that "while the de la Iglesia report, the Clark report, and the public comments assert there are other professional opinions and methods of measuring light in the field of circadian light impacts, after careful evaluation by SDCI, this information does not demonstrate that the analysis used by applicant is faulty or that proposed development will have a probable significant impact to human health." Ex, 1, pg. 40;
- It considered whether the impact of loss of light on human health was significant based on SEPA's required considerations of context, duration, and intensity; and
- It found that "[t[he information provided by the applicant and identified in the Second EIS Addendum indicates the reduction of light inside the Escala residential units is expected to be less than moderate and is not expected to be significantly adverse."

Ex. 1, pgs. 38-42.

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Reasonable minds can, and do, differ on the severity of any human health impact due to the loss of light. It does not make SDCI's decision clearly erroneous simply because SDCI agreed with the analysis conducted by the Applicant's experts rather than Appellant's. *See e.g., In the Matter of the Appeals of CUCAC and Friends of UW Open Space, et al.,* Hearing Examiner File Nos. S-96-002 and S-96-003, Findings and Decision, (July 15, 1996), pg. 13.

Caselaw applying the National Environmental Policy Act ("NEPA") is instructive here. As noted by the 9th Circuit, to the extent that uncertainty exists as to environmental impacts or the efficacy of a type of mitigation is uncertain, an agency must provide a reasonable analysis of the available science: "NEPA does not require that we decide whether an [environmental analysis] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology. . . Our task is simply to ensure that the procedure followed by the Service resulted in a reasoned analysis of the evidence before it, and that the Service made the evidence available to all concerned." *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) (citations omitted); *see also Lands Council v. McNair*, 537 F.3d 981, 1001 (9th Cir. 2008). Here, Appellant has failed to demonstrate that the analysis in the Lighting Addendum and the City's discussion of the impact of the loss of light on Escala residents was not reasonable. And, as discussed below in Section III.E.3, Appellant failed to meet its burden that there is an actual significant adverse environmental impact related to health, particularly considering Dr. Brainard's expert testimony.

3. Appellant failed to provide affirmative evidence of new significant adverse impacts to health due to the loss of daylight within Escala residential units.

Appellant argues that its self-proclaimed "unchallenged findings should have led SDCI to conclude" the Project had a "significant adverse effect." Closing Argument, pg. 11. In essence,

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Appellant set forth a three-part (illogical) sequence the Project would reduce daylight in the Escala units, which 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," and finally, that "[l]oss of access to natural daylight is associated with significant adverse health conditions…" *Id.* The evidence does not support their argument, and as such, their claim fails.[8]

a. Appellant fails to show a scientific metric to evaluate health impacts.

As an initial matter, even if Appellant's contentions were true (which they are not), they fail to meet their burden to establish a probable adverse impact to the ***health*** of the ***Escala residents*** due to a reduction in daylight within their units due to the Project because there is not yet a scientifically accepted metric to evaluate the health effects of electric and natural light on humans. On this point, Appellant offered no evidence to refute Dr. Brainard's conclusion that the leading international and national scientific organizations in the lighting field have not adopted a metric for evaluating the impacts of light on human health. Ex. 37, Appendix B, pg. 11-12; Ex. 44, Bates 297-302. While Dr. Brainard expressed optimism that the melanopic EDI metric may eventually evolve into an adopted standard, he acknowledged that the state of lighting and human health science is emerging and many "gaps" remained, including:

[8] Appellant bears the burden of proving that the Revised MUP Decision was clearly erroneous. *Brown, supra,* 30 Wn. App. 762. Where the parties claim that there was a significant adverse impact that was not analyzed, Appellant must present "actual evidence of probable significant adverse impacts from the proposal" to meet its burden of proof. *Boehm, supra,* at 719. This burden under SEPA is not meet "when an appellant only argues that they have a concern about a potential impact, or an opinion that more study or review is necessary." *Id.*

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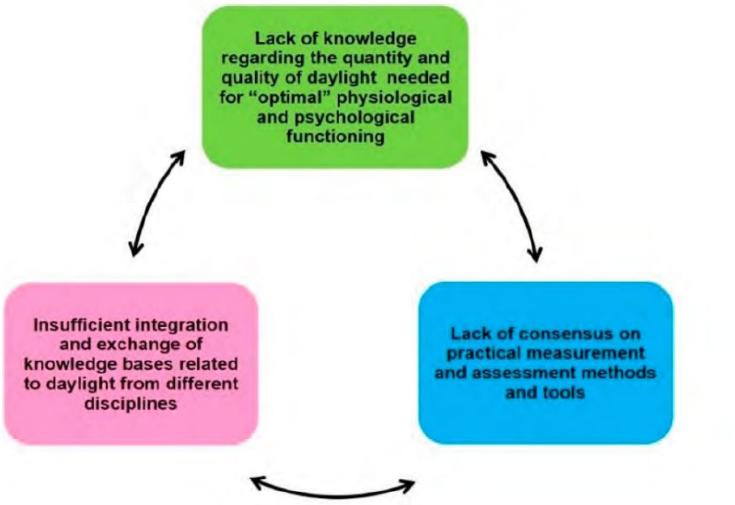

Figure 1. The identified three main groups of gaps of knowledge in daylight research.

Ex. 44, Bates 300; *see also* Bates 301-302 (Citing Dr. Munch's article listing all the current gaps in knowledge related to the impact of natural light in "real-life" conditions and necessary measurement tools and methods). As Dr. Brainard testified, the reason for scientific balloting of metrics and methodologies is to ensure best available science and eliminate the potential for bias. The science around light and human health in the built environment is still emerging. Regardless of whether the reduction in light is measured in CS, EML, or melanopic EDI, there is no metric to reach any health-related conclusions on the impact (or lack thereof) of reduction in natural light on humans, much less draw conclusions where the scope of the study is limited to one façade of the Escala. Appellant must provide affirmative evidence of health impacts related to a loss of light to Escala residents. They failed to do so, and therefore their claims of adverse impacts also must fail. The Hearing Examiner does not need to proceed further with Appellant's attempts to critique the Lighting Addendum. However, Appellant's other arguments also fail.

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b. Appellant's light reduction analysis fails to acknowledge electric light.

Instead of addressing the lack of scientific metric to evaluate the ***health*** impacts of light, Appellant initially claims that the Project will "dramatically" reduce light in the Escala units. Appellant's attempt to constrain discussion of "light" to daylight alone is scientifically erroneous. Throughout the City's review of the Project, Appellant has conflated "light" with daylight as if the sun is the only relevant source of light. It is not. As Dr. Brainard succinctly stated: a photon is a photon for purposes of stimulating the ipRGCs systems that regulates human physiology. Instead, ***there is no distinction between electric light and daylight*** for stimulating these systems. *Id.* On this point, Dr. de la Iglesia agreed.

Moreover, Dr. Brainard testified that "[i]t takes surprisingly little light to entrain the circadian system." Dr. Brainard Testimony, Day Two, Part One 3:42-3:47. Typical household levels of electric lights can sufficiently entrain one's circadian system. *Id.* Contrary to Appellant's argument that this is about "exotic" light in space, Dr. Brainard was talking about table lamps and bathroom lighting. Again, Dr. de la Iglesia did not disagree.[9] Appellant failed to evaluate (or acknowledge) the existence and availability of electric light, which both experts agreed can entrain one's circadian system. Appellant ignores the uncontested ability of electric light to entrain the circadian system, which defeats the validity of any alleged health impact.

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[9] Dr. Brainard cited to a study by Dr. Wright at University of Colorado Boulder who was able to entrain the circadian system with 1.5 lux of lighting, which is the equivalent of turning on a lamp. He also noted other laboratories that were able to achieve similar results with 100 lux of lighting and these are not "exotic" levels of light. Dr. Brainard Testimony, Day Two, Part One 3:42-3:47. Dr. de la Iglesia acknowledged his respect for Dr. Wright but quibbled that it was in an "extreme" condition. Dr. de la Iglesia, however, conceded that entrainment has been proven with low electric lights.

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c. Appellant's daylight study contains numerous methodological flaws.

In addition to ignoring electric light, Appellant's claims of light reduction suffer from other methodological shortcomings. Mr. Clark's study did not include all units on Escala's eastern façade. Instead, he selected only those units directly adjacent to the Project. Ex. 10, pg. 1. This choice omitted half of Escala's eastern façade from his study, which are conveniently those units less affected by the Project. Clark Testimony, Day One. Even with this constrained sample set, Mr. Clark did not evaluate daylight within all rooms. Instead, he selected a single location in each unit to set a table-top sensor that took light measurement in four directions. Ex. 10, pg. 1. This sensor location was in the southernmost corner of each unit's living room next to the Project. Unsurprisingly, Mr. Clark's sensor locations also increased the perceived reduction of light in the "with" Project condition. *Id.* Lastly, even with these manipulations in his study, his "dramatic" reductions in light occur when one is ***facing away*** from the window for five hours daily without changing direction. This is a significant manipulation of the study parameters if one is attempting study light in good faith. As Ms. Fong and Ms. Bolser noted, these reductions could be significantly improved simply by turning around and facing towards the exterior windows. Clark's skewed "study" is not evidence of a new significant adverse impact.

Compounding Appellant's flawed methodology, Mr. Clark admitted he did not review the Escala's construction plans on file with the City, nor did he visit any of the units he studied on the Escala's 19th or 25th floors. Mr. Clark could not be certain of where walls were in each unit, which admittedly would impact the perception of light. *Id.* As Mr. Mott testified, the "as-built" City plans for the Escala's 19th Floor consolidated two units into one, so Mr. Clark's study improperly inserted an opaque wall where none existed. Mott Testimony; *see also* Ex. 56, Bates

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651-652. Mr. Clark did not refute that the City requires all buildings to be built according to the City's plans. Mr. Clark conceded that the reduction in the amount of light measured looking south in that 19th Floor center unit would be "closer to zero," rather than his estimate. Clark Testimony, Day Two, Part Two 5:07-5:12. Appellant failed to prove any adverse impact.

d. Appellant's use of the Circadian Stimulus metric is flawed.

Despite these fatal flaws, Appellant solely relies on Mr. Clark on claim that a decrease in daylight from the Project "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." Closing Argument, pg. 11. But Appellant's argument is scientifically unfounded and factually incorrect.

As an initial matter, Mr. Clark is an architectural lighting designer and is not qualified as an expert on the physiological and health-related impacts of light. Ex. 13. The Hearing Examiner should decline to give his lay testimony on this topic any weight. HER 2.17(c).

Mr. Clark's lack of expertise did not dampen his enthusiasm to opine on matters outside his architectural background.[10] In support of his claims on the "sufficient" number of days to entrain one's circadian system, Mr. Clark pointed to the CS metric promoted by the Lighting Research Center. As Mr. Clark testified, the Lighting Research Center scientists recommend that individuals receive at least one hour of light at 0.3 CS levels before 1 p.m. daily to support circadian entrainment. Clark Testimony, Day One. Yet, Dr. Brainard's unrefuted testimony

[10] In addition to Mr. Clark's study, he submitted a letter during the City's review asserting that "industry" was providing guidance for the application of circadian light for human health. Ex. 4, pg. 1. He cited a IESNA Technical Memorandum and a U/L Design Guideline in support of this assertion. At hearing, Mr. Clark conceded that the IESNA Technical Memorandum he cited was not only authored by a committee chaired by Dr. Brainard, but the document specifically refuted his claim by stating that it was "premature" to make design recommendations related to circadian lighting. Ex. 7, pg. 29. The U/L Design Guideline he cited was no more helpful to his claims about "industry" guidance because the U/L guideline specifically did not apply to residential uses. Ex. 6, pg. 25.

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detailed the flaws in the CS metric because it improperly combines data sets. Dr. Brainard Testimony, Day Two. Unlike EML or melanopic EDI, Dr. Brainard did not support the use of CS as a valid light measurement tool. Dr. Brainard also noted that no national or international standards body for lighting science has adopted the CS metric.[11] *Id.* Notably, neither Mr. Clark nor Dr. de la Iglesia rebutted Dr. Brainard's forceful scientific critiques of the CS metric.

But still, Mr. Clark's study using the flawed CS metric does not show an adverse impact. At hearing, Mr. Clark testified to a 51% reduction in the number of days that one could reach the 0.30 CS threshold inside the Escala 5th Floor northern unit (which he called the "Big Unit"). What Mr. Clark did not disclose was that this "reduction" only occurs if one spent ***all*** *daylight* ***hours*** before 1 p.m. solely seated at the table, with all lights turned off, and ***facing away*** from the window for five hours. The assumptions required to achieve these "reductions" belie reality. In that same Big Unit, were one to face a window (which is logical if one is seeking daylight), the reduction in the number of days that one would fail achieve the 0.30 CS threshold was a mere 2 percent (or six days out of the year). Ex. 10, pg. 16. And Mr. Clark's study omitted any consideration of electric lights or time spent outside the Big Unit, so the Big Unit's total "reductions" are likely even less impactful. Appellant failed to show an adverse impact.

Moving up the Escala tower, Mr. Clark's study of the 19th Floor Escala center unit layout was flawed where it inserted an opaque wall where one did not exist. Thus, the true impact on the number of days not achieving his own threshold was "closer to zero." Clark Testimony, Day Two, Part Two 5:07-5:12. On the Escala's 25th Floor, Mr. Clark's study showed the same zero

[11] Appellant may point to the U/L Design Guideline, which utilizes the CS metric in its standard. However, as Dr. Brainard noted, the U/L is not a recognized national standards body for light and human health. The U/L Design Guideline itself disclaims any health-related effects related to the application of its recommendations. Ex. 6, pg. 8.

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percent reduction in the number of days that did not achieve a 0.30 CS threshold after the development of the Project Ex. 10, pg. 16. Contrary to Appellant's claims that a "couple hundred" residents would face significant reductions in the amount of daylight received in the "with" Project condition, Appellant's study — using their skewed parameters and omissions and based on a scientifically suspect metric — show only slight to no reductions in the number of days that Escala residents cannot achieve at least one hour of 0.3 CS morning light in their units when facing a window. *See* Closing Argument, pg. 15. This is not a significant adverse impact.

e. Appellant failed to provide any scientific support for its claims.

Next, Appellant contends that the "health hazards of living in a dark cave all morning have been illuminated by numerous studies in the last 20 years." Closing Argument, pg. 17. Appellant also asserts that loss of access to daylight is "associated" with significant adverse health conditions such as cancer. *Id.*, pg. 11. Appellant's contentions of health impacts are false.

Throughout the City's review — including at hearing — Appellant failed to present ***any*** evidence to refute the fact that there is not yet a scientifically accepted metric to evaluate the impacts of light on human health, much less on to distinguish between health impacts between natural and electric light. Appellant cited ***no*** studies that demonstrated an empirical relationship between daylight alone and any health outcome. Moreover, Dr. de la Iglesia hedged his testimony, only extending as far as claiming that loss of daylight is "associated" with such health conditions. Dr. de la Iglesia did not — and cannot — allege causation between a reduction in daylight received within a residential unit and a health impact because the science does not support such a claim. In fact, Appellant conceded that "scientific studies documenting a specific dose response relationship [between light and health] do not exist." *Id.,* pg. 15. Dr. de la Iglesia

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failed to provide any affirmative evidence of adverse health impacts to Escala residents caused by a reduction in daylight received in their condos due to the Project. Of course, this is the only conclusion one could reach after Dr. de la Iglesia conceded that Appellant did not hire (or pay) him to conduct such studies of Escala and its residents. Dr. de la Iglesia Testimony, Day One.

During the City's review, Dr. de la Iglesia's letters cite the health-related impacts to shift-work, which is a distinct condition arising from overexposure to light at night. *See* Ex. 61, citations 13-19. Tellingly, Dr. de la Iglesia did not discuss these studies at hearing. With titles like "Night Shift Work, Genetic Risk and Type 2 Diabetes in the UK Biobank" and "Impact of Shift Work on the Circadian Timing System and Health in Women," this omission becomes clear because the studies cited do not stand for the proposition that Appellant wishes. *Id.* Instead, Dr. de la Iglesia's citations address a separate question, studying the impact of inappropriate levels of light ***at night.*** These studies prove nothing to the assist in the City's review of the impacts.

Furthermore, Dr. de la Iglesia's field work studies with high school and college students, which he readily admitted was a distinct (and much younger) population than the self-reported retirees living on Escala's east façade prove little for the Examiner's remand. Ex. 8. Dr. de la Iglesia's concerns of the health impacts of "social jetlag" where one is forced to wake up earlier due to social pressures fall flat against the Escala residents' proclaimed proclivity to stay inside in the morning. Overall, Dr. de la Iglesia's comments and testimony were wholly unavailing in Appellant's attempt to shoulder the burden to show an adverse health impact to Escala residents.

Faced with the inability to cite any empirical evidence, Dr. de la Iglesia retreated to generalities regarding the "associations" between the lack of exposure to daylight and health outcomes. Appellant analogizes his testimony to exposure to the Coronavirus in that while no

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dosage is known, the health risks are self-evident. Closing Argument, pg. 13. Exposure to light and darkness is not the equivalent of contagious, global pandemic that has taken over 210,000 American lives. Appellant's analogy is unavailing. Tellingly, Appellant failed to dispute Dr. Brainard's testimony regarding the lack of empirical evidence to support a "healthy" dosage threshold for daylight. The science of light and human health is evolving, but serious and substantial gaps in the scientific knowledge remain. *See* Ex. 44, Bates 300-302. As a result, Appellant did not meet its burden to prove significant adverse health impacts to its residents.

f. Appellant misconstrues the Lighting Addendum's discussion of average daylight hours spent outside the home; the Daylight Activity Study is key for the "without" Project condition, not as mitigation.

Lastly, Appellant misconstrues the Lighting Addendum's discussion of the average wakeful hours spent by Seattle metropolitan area residents outside one's home and use of electric lighting as proposing "mitigation." Closing Argument, pg. 13. This is a misconception. The Daylight Activity Study helps inform the City as to the background "without" Project condition.

Dr. de la Iglesia speculated that "if I need to live all my life in [the Escala], my health risks are going to be much higher." Dr. de la Iglesia Testimony, Day Two, Part Two 5:35-5:37. But, as demonstrated by Dr. Steffey and his colleague at Exponent, Dr. de la Iglesia's speculation is just that — conjecture. Instead, statistical data shows that the average Seattle metropolitan resident spends 4.3 wakeful daylight hours inside the home. For residents in households with a family income of over $150,000, the average wakeful daylight hours spent at home decreased to 3.8 hours per day. *Id.* The average unit price for a Downtown high-rise condominium translates to buyers with incomes well over $150,000/year. Statistically, Escala residents likely fall into the category of Seattle residents that spend nearly two-thirds of their

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wakeful daylight hours outside the home. *Id.* During that time, Escala residents are exposed to both natural and electric light. Appellant fundamentally misconstrues the purpose of the Daylight Activity Study. It does not suggest mitigation measures; instead, it reflects the existing baseline condition that need to be accounted for when factoring how and where Escala residents are being exposed to light throughout the daylight hours, including outside their condos.

Appellant argues that its self-styled "Survey Monkey" survey developed by its own property manager is a more predictive model of Escala resident behavior. Sosnowy Testimony. But Appellant never produced its "Survey Monkey" survey questions or results. As Dr. Steffey testified, such self-generated surveys are fraught with potential biases and statistical errors. Here, it is garbage in, garbage out. Appellant introduced no evidence to refute the Daylight Activity Study and has not disputed the accuracy of Exponent's work in its briefing.

For these reasons, even if the Hearing Examiner were to consider Appellant's health claims, they would not establish a significant adverse impact requiring preparation of an EIS.

4. The City properly determined that the loss of light on the Escala residential units does not result in a significant adverse environmental impact to human health.

Lastly, the Appellant argues that the Project will result in a significant adverse impact to human health. Closing Argument, pgs. 14-15. As shown above, this is incorrect.

Under SEPA, significant involves an evaluation of context and intensity and does not lend itself to a "formula or quantifiable test." WAC 197-11-330. The City's decision-making evaluated both criteria in the context of the comments submitted throughout the City's review.

The Revised MUP Decision noted:

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> The information provided by the applicant and identified in the Second EIS Addendum indicates that the reduction of light inside the Escala is expected to be less than moderate and is not expected to be significantly adverse. While de la Iglesia concludes that a reduction of light is generally detrimental to mental health during the winter and that such condition will become more prominent with the proposal, experts like Dr. Brainard conclude that electrical light and exposure to natural light in the course of leaving the residential unit to go outside to run errands, exercise, commute, go to appointments, and the like, can reduce the possibility of such outcomes, especially during the morning hours.
>
> The [Project Site] is in the downtown core, in a dense urban environment designed to encourage pedestrian activity and non-motorized transportation options. Parking is expensive and traffic is frequently congested in the area, making non-motorized modes of transportation more efficient and desirable. It is reasonable to expect that people who live in this area of the city and the Escala building will walk to many of the nearby destinations for goods and entertainment, even if they don't work outside the home.
>
> Further, there is no clear consensus of health outcomes based on a reduction of light due to the [Project]. While de la Iglesia concludes that long-term exposure to misalignment of lighting can be associated with higher instances of cancer, cardiovascular disease and metabolic disorders and depression, such associations of higher incidences of a particular disease does not establish that the [Project] will result in likely significant adverse human health impacts to residents of the Escala due to loss of light as a result of the [Project]. As noted in the *Brainard Study,* published studies evaluating the impacts of daylight on human health are limited and "lack control of many variables that are known to elicit change in circadian timing of human physiology such as exercise or activity levels, temperature, diet, previous light history or changes in photic condition.

Ex. 1, pg. 41.

After reviewing all the comments before the City and sitting through the two-day hearing, Ms. Bolser testified that nothing changed her analysis and conclusions set out in the Revised MUP Decision. Appellant failed to provide affirmative evidence of a new significant adverse impact. The Hearing Examiner should uphold the City's decision.

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F. Appellant waived Claims 1(a) and 1(e) by failing to present any evidence or legal argument to support its claims.

Appellant's Notice of Appeal included several claims regarding compliance with SEPA procedures and questioning the City's use of EIS Addenda (see Notice of Appeal Claims 1(a), 1(b), 1(c) and 1(e)). In its closing brief, Appellant addressed, in part, its claims regarding Claims 1(b) and 1(c). Claim 1(a) questions the age of the Downtown EIS that SDCI adopted and supplemental with EIS Addenda for the Project. Claim 1(e) claims the addendum (it is unclear which addendum to which Appellant refers) states that the substantive policies of SEPA under SMC 25.05.675 limit the scope of procedural disclosure. No evidence was presented at the hearing regarding these issues and no legal argument was presented in Appellant's closing brief, and therefore, they are waived. *Olympic Stewardship Found. v. Envtl. & Land Use Hrgs. Office*, 199 Wn. App. 668, 687, 399 P.3d 562 (2017) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration . . . We also do not consider claims unsupported by legal authority, citation to the record, or argument."); *see also King County v. Wash. State Boundary Review Bd*., 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) ("In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a light reference to the issue in the record.").

IV. CONCLUSION

For these reasons, the Applicant respectfully requests that the Hearing Examiner deny Appellant's claims and uphold the Revised MUP Decision.

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DATED this 13th day of October, 2020.

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