

1  
2  
3  
4  
5  
6  
7  
8 BEFORE THE HEARING EXAMINER  
9 FOR THE CITY OF SEATTLE

10 In Re: Appeal by

11 ESCALA OWNERS ASSOCIATION

12 Of Decisions Re Land Use Application  
13 for 1933 5<sup>th</sup> Avenue, Project 3019699  
14

Hearing Examiner File: MUP-20-012 (W)

Respondent City of Seattle Post-Hearing  
Brief

15  
16 I. INTRODUCTION

17 Appellant Escala Homeowners' Association ("Escala") fails to carry its burden to  
18 establish the environmental review of the Revised Decision on appeal was erroneous. SEPA  
19 requires affirmative evidence in order for appellant to prevail in its appeal. There are numerous  
20 issues with Appellant's evidence including Mr. Clark's light study that selectively analyzed only  
21 a portion of the Escala eastern-facing units (those with the more significant reduction of light),  
22 the use of CS, failure to study light impacts in the bedrooms, the failure to verify accuracy of  
23 Escala unit dimensions, failure to consider electric light in the Escala units as part of the existing  
24 condition, among others. Escala did not carry its burden under SEPA to provide affirmative  
25 evidence that the project will result in likely significant environmental Health impacts.  
26  
27

28 RESPONDENT CITY'S  
POST-HEARING BRIEF- 1

**Peter S. Holmes**  
Seattle City Attorney  
701 Fifth Ave., Suite 2050  
Seattle, WA 98104-7097  
(206) 684-8200

1 Second, contrary to Escala’s claims, SDCI did collect and include information in the  
2 Revised MUP decision consistent with the Examiner’s initial decision requiring remand and  
3 adequately identified in the Revised Decision gaps in relevant information or scientific  
4 uncertainty surrounding the measure of reduction of light, the standard associated with such  
5 reduction and documented the location of the most significant reduction in light of the Escala  
6 units. SDCI met its obligations under SEPA and Appellant’s appeal must be denied.  
7

## 8 II. FACTS

### 9 1. The Project.

10 The Project is a proposed 48-story mixed-use building with 431 apartment units, 155  
11 hotel rooms, retail and restaurant space, and below-grade parking for 239 vehicles. Ex. 1  
12 (“Revised MUP Decision”). The Project’s address is 1933 5<sup>th</sup> Avenue (“Project Site”) and will  
13 be located on the northeast corner of a block bounded by Virginia Street, 5<sup>th</sup> Avenue, Stewart  
14 Street and 4<sup>th</sup> Avenue. *Id.*, pg. 2. The Project Site is zoned Downtown Office Core 2 (“DOC-  
15 2”), and it is currently developed with three low-rise, vacant commercial structures. The Escala  
16 condominium (“Escala”) is located across an alley directly to the west of the Project Site. *Id.*  
17

### 18 2. Procedural History.

19 This project has undergone significant review and by the City over the last handful of  
20 years.  
21

#### 22 A. Prior Examiner Decision.

- 23 • On July 3, 2017, the City issued a SEPA determination of significance (“DS”) and  
24 notice of adoption of the Final Environmental Impact Statement for the Seattle  
25  
26  
27

1 Downtown Height and Density Changes (January 2005) (“FEIS”), as  
2 supplemented by the FEIS Addendum dated July 3, 2017 (“EIS Addendum”).

- 3 • On October 26, 2017, the City issued a MUP Decision for the Project. The MUP  
4 Decision included three components: (1) design review approval under the Seattle  
5 Municipal Code (“SMC” or “Code”) Chapter 23.41; (2) the City’s procedural  
6 compliance with SEPA, including the adoption of the Downtown FEIS for the  
7 Project and determination of EIS adequacy; and (3) imposition of conditions  
8 pursuant to the City’s substantive SEPA authority.
- 9 • On November 9, 2017, the Appellant appealed the MUP Decision (“Prior  
10 Appeal”). After a four-day hearing, the Hearing Examiner issued his Findings  
11 and Decision on the matter and upheld SDCI’s MUP Decision related to the  
12 Project’s design review approval and the legal adequacy of the City’s review of  
13 the Project’s potential environmental impacts related to transportation, alley  
14 operations, height, bulk and scale, and land use compatibility elements (“Prior  
15 Hearing Examiner Decision”).<sup>1</sup> The Hearing Examiner also dismissed  
16 Appellant’s procedural SEPA claims regarding the adoption of the FEIS and use  
17 of the EIS Addendum.
- 18 • However, the Hearing Examiner found that SDCI erred procedurally by failing to  
19 evaluate the impacts related to loss of light prior to the issuance of its  
20 environmental determination for the Project. The Hearing Examiner remanded the  
21  
22  
23  
24  
25

---

26 <sup>1</sup> The Hearing Examiner may take notice of the Prior Hearing Examiner Decision per Hearing Examiner Rule  
27 (“HER”) 2.18(c).

1 MUP Decision to SDCI for the “purpose of evaluating the [Project’s] impacts as  
2 they relate to the loss of light within Escala residential units.” *Id.*, pg. 21. The  
3 Prior Examiner’s Decision also required new terms to be included in the Project’s  
4 Dock Management Plan. *Id.*, pg. 21. In all other respects, however, the Hearing  
5 Examiner upheld the MUP Decision for the Project and denied Appellant’s  
6 appeal.  
7

- 8 • Applicant and the City of Seattle filed a joint motion for reconsideration on the  
9 remanded issue of health impacts related to the loss of light. As a result of this  
10 motion, the Hearing Examiner clarified his decision in an Amended Decision  
11 dated June 12, 2018.<sup>1</sup> The Amended Decision reiterated and clarified that the  
12 remand was limited to an evaluation of potential **health** impacts related to the  
13 potential loss of light within Escala residential units. *Id.*, pgs. 18-19.  
14

15 *B. Analysis of health impact related to loss of light required by Prior Hearing Examiner*  
16 *Decision.*

17 On remand, SDCI prepared the Revised Addendum on November 18, 2019. Ex. 39. The  
18 Revised Addendum provides analysis and information about the Project’s potential health  
19 impacts due to the reduction of light within the private residences located on the eastern façade  
20 of the Escala. The Revised Addendum included three expert studies prepared at the City’s  
21 request to respond to the Hearing Examiner’s remand decision.  
22

23 First, Dr. George Brainard authored a study detailing the state of the science on how light  
24 and darkness influences human health (“Brainard Study”). Ex. 39, Appendix B. The Brainard  
25

---

26  
27 <sup>1</sup> See Footnote 1.

1 Study noted that there is not yet a scientifically adopted metric to evaluate the impacts to *health*  
2 of light and darkness. Ex. 39, Appendix B, pgs. 8-9. Dr. Brainard also explained how there is  
3 presently “little peer-reviewed, published data” to support the contention that daylight or natural  
4 light is “superior” to electric light in supporting health. *Id.*, pg. 11.

5  
6 Dr. Brainard also summarized the biological and behavioral effects of light in humans  
7 including the intrinsically photosensitive retinal ganglion cells (or “ipRGCs”) that are the  
8 primary detectors of light for physiological regulations. *Id.*, pg. 1. The ipRGCs are different  
9 than the “rod and cone photoreceptors” used for vision. *Id.*, pgs. 2-3.

10 Dr. Brainard also discussed how light acts as a stimulus to regulate physiology, including  
11 the circadian system. Circadian Entrainment is a series of chemical, biological or behavioral  
12 changes over that 24-hour cycle, which in turn, synchronizes sleep- and arousal-promoting  
13 neurons to support sleep (or alertness). Ex. 39, Appendix B, pg. 5. As Dr. Brainard testified,  
14 typically light at night can work to disrupt circadian entrainment. *Id.*

15  
16 Second, the Revised Addendum included an analysis completed by architectural lighting  
17 experts at Stantec Consulting. Due to the lack of a scientifically adopted metric to evaluate the  
18 health impacts related to loss of light, Stantec applied a modified version of the commercially  
19 available WELL Standard to study light levels within the Escala residential units. Ex. 39,  
20 Appendix C (“WELL Standard Analysis”). The WELL Standard is a points-based system that  
21 establishes criteria for ten concepts including lighting.  
22

23  
24 The WELL Standard Analysis prepared by Stantec evaluated four of the eight WELL  
25 lighting elements that were applicable to the Examiner’s remand. Ex. 39, Appendix C, pg. 5.  
26  
27  
28

1 The Stantec report demonstrated that Escala would qualify for the WELL Standard lighting point  
2 in both the “without” and “with” Project conditions except in two situations.

3 The first exception related to WELL Standard study of light intensity for *visual*  
4 illuminance to perform tasks (measured in terms of spatial daylight autonomy or “sDA”). *Id.*,  
5 pgs. 11-12; *see also* Fong Testimony, Day Two. At hearing, the Parties agreed that such an  
6 evaluation is irrelevant to the question in the Hearing Examiner’s remand because circadian  
7 entrainment is governed by a separate nerve system than the visual system of rods and cones. *Id.*

8  
9 The second WELL Standard exception was relevant to the question of circadian lighting  
10 because it measured the equivalent melanopic lux (“EML”) of *electric* light within the Escala.  
11 EML is one of the emerging metrics that measures the type of light that stimulates human  
12 physiology, including the circadian system. Ex. 39, Appendix B, pg. 8. The WELL Standard  
13 Analysis showed that (based on the location of fixed lighting at the Escala in the City’s  
14 construction permit and reasonable assumptions of typical household lighting in the Escala units)  
15 the electric light performance inside these units could not achieve the 120 EML required to earn  
16 a WELL Standard point, either with or without the Project. Ex. 39, Appendix C, pgs. 11-12; *see*  
17 *also* Fong Testimony, Day Two.

18  
19 Stantec also created a study that evaluated the reduction in daylight inside the Escala  
20 units associated with the Project (“Stantec Daylight Study”). Ex. 2, Appendix C, pgs. 16; 23-51.  
21 Stantec noted there was no scientific consensus for establishing a “threshold” or level for the  
22 amount of light (either electric light, daylight, or a combination of the two) that is sufficient for  
23 human health. *Id.* Given the absence of any scientific consensus as to a threshold for a dosage  
24  
25  
26  
27  
28

1 of light for health, Stantec elected to set their line at 150 EML level. At hearing, Ms. Fong  
2 acknowledged that 150 EML the same as used in certain WELL Standard lighting concepts.

3 Using this 150 EML level, Stantec then studied all the rooms on the Escala's eastern  
4 façade on Floors 5, 19 and 28<sup>1</sup> for the five hours most relevant for circadian entrainment during  
5 the equinox and summer and winter solstice. Stantec's Daylight Study showed that even on the  
6 lowest level studied (5<sup>th</sup> Floor), the majority of rooms experienced daylight in an amount  
7 exceeding the 150 EML level in the "with" Project condition Ex. 2, Appendix C, pgs. 24-33.  
8 The same trends carried out on the 19<sup>th</sup> Floor. For instance, the 19<sup>th</sup> Floor center unit living  
9 room exceeded the 150 EML level for all hours studied on the equinox and for all but one hour  
10 studied on the winter solstice, which is the darkest day of the year. *Id.*, pg. 37. The Daylight  
11 Study did not reach any health-related conclusions regarding these impact of exposures at the  
12 measured EML levels.  
13

14  
15 Third, Exponent statisticians conducted an analysis of the amount of time people spend  
16 awake at home in the Seattle metropolitan region during daytime hours. Ex. 39, Appendix D  
17 ("Daylight Activity Study"). Authored by Dr. Duane Steffey, the Daylight Activity Study  
18 employed statistical best practices and drew from reputable sources such as the American Time  
19 Use Survey and U.S. Census American Community Survey. *Id.*, pg. 4. The Daylight Activity  
20 Study concluded Seattleites spend, on average, 4.3 wakeful daylight hours at home per day. *Id.*,  
21 pg. X. This translates to the average Seattle resident spending nearly two-thirds of wakeful  
22  
23

---

24 <sup>1</sup> At hearing, Appellant's architectural lighting witness attempted to deflect from his failure to model his study on  
25 the Escala's actual floor plans per approved City construction plans by alleging that Stantec failed to account for the  
26 marketing decision to omit a 13<sup>th</sup> floor. Clark Testimony, Day One. This is incorrect. Stantec's analysis  
27 specifically noted the omission of the Escala's 13<sup>th</sup> floor. Ex. 2, 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.

1 daylight hours outside the home, depending on the season. *Id.* For residents in households with a  
2 family income of over \$150,000, the average wakeful daylight hours spent at home decreased to  
3 3.8 hours per day. *Id.*

4 ***C. SDCI seeks comment and additional information on Lighting Issue.***

5 The City issued a Notice of Availability of the Revised Addendum on November 19,  
6 2019. Ex. 78. The City accepted comments on the Revised Addendum. Appellant and its  
7 consultants submitted comments on the Revised Addendum. Exs. 61-67 (“Escala’s Comments”).  
8 Senior Land Use Planner Shelley Bolser testified at hearing that she reviewed the Escala’s  
9 Comments. Subsequently, Ms. Bolser issued a correction request for more information in  
10 response to the Escala’s Comments. Ex. 84. The Applicant responded with, among other items,  
11 detailed explanation of the methodology employed by Stantec in its studies. Ex. 70.

12 ***D. SDCI issues Revised MUP Decision.***

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

20 While the studies in the second Addendum measure the reduction of light into  
21 residential units of the Escala, there is a lack of scientific consensus to determine  
22 how this loss of light may directly impact human health, particularly where there  
23 are other variables at play unrelated to any proposed development. Any potential  
24 impacts of reduced lighting on human health would be expected to be reduced by  
25 the use of electric lighting and by wakeful hours spend outside the home, since



1 wakeful hours spent outside the home expose people to daylight conditions.  
2 Consequently, even in light of the public comments and reports prepared by  
3 Horacio de la Iglesia and Edward Clark, SDCI concludes that the project's  
4 reduction of light into the Escala residential units does not result in probable  
5 significant impacts to human health.

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

7 The City also concluded that it had no authority to mitigate for impacts to human health  
8 due to loss of light within the Escala residential units (which were unlikely to be significant). *Id.*  
9 On May 5, 2020, Appellant appealed the Revised MUP Decision. The Hearing Examiner held a  
10 virtual hearing on September 14 and 15, 2020.

### 11 **III. ARGUMENT**

#### 12 **A. Standard of Review.**

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

18 The adequacy of the EIS (including the second addendum) must be reviewed under the  
19 rule of reason. The adequacy of an environmental impact statement is a question of law,  
20 reviewed de novo. Although review is de novo, the court shall give substantial weight to the  
21 agency's determination. RCW 43.21C.090. Courts examine the legal sufficiency of the data  
22 contained in an environmental impact statement under the "rule of reason" standard. The EIS and  
23 addendum must present decisionmakers with a reasonably thorough discussion of the significant  
24 aspects of the probable environmental consequences of an agency's decision. *Cascade Bicycle*  
25  
26  
27

1 *Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 498, 306 P.3d 1031 (2013); *In re Matter*  
2 *of Appeal of Unite Here Local 8*, Hearing Examiner File No. MUP-15-032, Order on Applicant's  
3 and Department's Motion to Dismiss (June 2, 2016), pg. 9 (reviewing the adequacy of the  
4 Addendum to Downtown Height and Density Changes EIS under rule of reason standard).

5  
6 The critical analysis is "whether the environmental effects of the proposed action are  
7 disclosed, discussed and substantiated by opinion and data." *Solid Waste Alternative Proponents*  
8 *v. Okanogan County*, 66 Wn. App. 439, 442, 832 P.2d 503 (1992) ("SWAP"). The Hearing  
9 Examiner does not "rule on the wisdom of the proposed development but rather on whether the  
10 [EIS and Addendum gives] the City...sufficient information to make a reasoned decision." *In re*  
11 *Matter of Appeal of Ballard Coalition*, Hearing Examiner File No. W-17-004, Findings and  
12 Decision (Jan. 31, 2018), p. 15.

13  
14 SDCI made a separate decision to use an addendum in this case, rather than a  
15 supplemental EIS ("SEIS") pursuant to WAC 197-11-600 and SMC 25.05.600. An SEIS is  
16 required in a case where, either due to substantial changes or new information, a proposal is  
17 likely to result in significant adverse environmental impacts; otherwise, the use of an addendum  
18 is appropriate. *Id.* Critically, in order for appellant to establish the preparation of a SEIS (or new  
19 EIS) is required in a case where an addendum is utilized, appellant must demonstrate the  
20 likelihood of new significant adverse impacts of a proposal.

21  
22 Courts have interpreted this mandate to require the application of the clearly erroneous  
23 standard when reviewing an agency's decision to issue a DNS, which is similar to the decision to  
24 use an addendum rather than an SEIS, both of which can be used when a proposal will result in  
25 no new significant impacts. *Murden Cove Preservation Ass'n. v. Kitsap County*, 41 Wn. App.

1 515, 523, 704 P.2d 1242 (1985); *Cougar Mountain Ass’n. v. King County* 111 Wn.2d 742, 747-  
2 749, 764 P.2d 264 (1988); *Indian Trail Property Owner’s Ass’n. v. City of Spokane*, 76 Wn.  
3 App. 430, 431, 886 P.2d 209 (1994). Under the clearly erroneous standard, reviewing bodies do  
4 not substitute their judgments for those of the agency and may invalidate the decision only when  
5 left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain*,  
6 *supra*, 111 Wn.2d at 747; *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978);  
7 *Ass’n of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 4 P.3d 115 (2000); *Moss v.*  
8 *Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001). An appellant does not meet its burden to  
9 show a decision is clearly erroneous if the evidence shows only that reasonable minds might  
10 differ with the decision. *See e.g., In the Matter of the Appeals of CUCAC and Friends of UW*  
11 *Open Space, et al.*, Hearing Examiner File Nos. S-96-002 and S-96-003, Findings and Decision,  
12 (July 15, 1996), p. 13; *see also In the Matter of the Appeal of Andrew Kirsh and Meredith*  
13 *Getches*, Hearing Examiner File No. MUP-08-003, Findings and Decision (May 23, 2008).

14  
15  
16 When an agency is presented with different expert opinions, “it is the agency’s job, and  
17 not the job of the reviewing appellate body, to resolve those differences.” *City of Des Moines v.*  
18 *Puget Sound Reg’l Council*, 98 Wn. App. 23, 852, 988 P.2d 27, 37 (1999).

19  
20 Therefore, Appellant must do more than simply provide other reasonable approaches or  
21 conflicting opinions—rather, Appellant must establish the analysis was unreasonable. As  
22 discussed below, Appellant has failed to meet its burden.

23  
24 To prove that a decision was clearly erroneous, the Appellants must produce affirmative  
25 evidence showing that new significant adverse impacts will occur because of the project.  
26 Specifically, where Appellants claim of a failure to adequately identify or mitigate adverse  
27

1 impacts, the Appellants must produce evidence that such significant adverse impacts will exist  
2 for a decision to be overturned. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719-720 (2002);  
3 *Moss v. City of Bellingham, supra*, 109 Wn. App. at 31. Mere complaints or claims without the  
4 production of affirmative evidence proving that the decision was clearly erroneous, are  
5 insufficient to satisfy an Appellants' burden of proof as a matter of law. *Id.*  
6

7 **B. Appellant's attempt to raises a new claim in its Closing Argument is untimely and**  
8 **must therefore be denied.**

9 Appellant raises a new claim, for the first time in this appeal in its closing brief, regarding  
10 whether the City violated SEPA because the City's Design Review Board ("Board") did not  
11 issue a new recommendation after the issuance of the Revised Addendum. Appellant's Closing  
12 at p.7:11- 10:18. Because this new claim is untimely, it must be denied.

13 According to the Hearing Examiner Rules, to be timely, an appeal must be filed by 5:00  
14 p.m. on the last day of the appeal period. HER 3.01(b). The appeal must contain a statement of  
15 the Appellant's issues on appeal. HER 3.01(d). Here, Appellant's appeal did not raise a claim  
16 related to the SEPA decision and the timing of design review. Appellant's Notice of Appeal  
17 lacks any reference or claim to "design review". Appellant cannot raise a new appeal issue at  
18 this late juncture. The Hearing Examiner Rules allow an Appellant to amend a claim within 10  
19 days of the initial filing. HER 3.05. This claim is untimely under the rules and cannot be  
20 considered by the Hearing Examiner. It must be denied.  
21  
22

23 **C. Appellant's claim the City improperly used the FEIS and Addenda fails as a matter**  
24 **of law.**

25 *i. Appellant's repeated argument has already been rejected by the Examiner twice.*  
26  
27  
28

1 Appellant spends much of its closing arguing that City improperly used an EIS  
2 Addendum here. This argument has been settled by the Examiner on two separate occasions.  
3 The Hearing Examiner rejected this argument in the Prior Appeal and in another development on  
4 the same block. *In the Matter of the Appeal of Escala Owners Association*, File No. MUP 19-  
5 031, Findings and Decision (May 11, 2020).  
6

7 As the Hearing Examiner has already ruled, Appellant's claim "that the City is  
8 procedurally barred by SEPA from adopting the FEIS and using the Addendum" must fail  
9 because "the City is permitted to take these actions to fulfill its SEPA procedural requirements."  
10 *See Escala Owners, supra*, pg. 15 (citing SMC 25.05 Sub-chapter IV; WAC 197-11-625; WAC  
11 197-11-630). This is based on the plain language of SEPA.  
12

13 Appellant again asserts two reasons for the supposed error of the City's action: (1) SEPA  
14 requires the City, every time it issues a determination of significance, to prepare a new EIS or  
15 Supplemental EIS to address any issues not adequately addressed in the prior EIS (Closing  
16 Argument, pp. 4-6); and (3) an EIS Addendum cannot be a substitute for an EIS or SEIS (*Id.*, pp.  
17 6-7).  
18

19 The Hearing Examiner specifically rejected each of these assertions in the prior *Escala*  
20 *Owners* appeal relating to this Project and rejected the same arguments in an appeal of a  
21 development on the same block. The Hearing Examiner, in her Order on Jurisdiction and  
22 Motion to Dismiss dated July 13, 2020, held that "Escala cannot use the new appeal to re-litigate  
23 the original issues from the first appeal . . . However, if the appeal's new issues stem solely from  
24 the revisions to implement the remand decision regarding shading, then these issues are properly  
25 before the Examiner." Appellant failed to show it's procedural claims in this appeal are new  
26  
27

1 issues resulting from the remand. Rather, Appellant's arguments are retreads raised and rejected  
2 in the Prior Appeal of this Project and a similar project on the block. Moreover, such arguments  
3 are incorrect as a matter of law and the Hearing Examiner should reject Appellant's repeated  
4 arguments.

- 5  
6 ii. Even if the Examiner considers these previously rejected arguments, Appellant's  
7 claim fails because SEPA authorizes use of existing environmental documents  
8 and addenda.

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

16 An SEIS is only required where, either due to substantial changes or new information, a  
17 proposal is likely to result in significant adverse environmental impacts; otherwise, the use of an  
18 addendum is appropriate. WAC 197-11-600. To argue for preparation of a SEIS (or new EIS)  
19 where an addendum is utilized, appellant must demonstrate the likelihood of new significant  
20 adverse impacts of the proposal. *Id.* As discussed below, Appellant failed to meet its burden.

21  
22 **D. Appellant has failed to meet its burden of proof to establish new probable**  
23 **significant adverse impacts to an element of the environment.**

24 SEPA defines "probable" as likely or reasonably likely to occur, as in "a reasonable  
25 probability of more than a moderate effect on the quality of the environment." SMC 25.05.794.  
26 In this context, "probable" is used to distinguish likely impacts from those that merely have a  
27

possibility of occurring but are remote or speculative. *Id.* This is not meant as a strict statistical probability test. *Id. See also SMC 25.05.060.D.1.*

**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 Revised Addendum, Appellant’s adequacy claim fails.

The Revised Addendum included a thorough evaluation of the current state of the science regarding the health-related impacts of light and darkness including 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. Dr. Brainard detailed the undisputed gaps in the scientific knowledge that remain that prevent the evaluation of health impacts of natural light. Ex. 44, Bates Stamp 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, an architectural lighting designer, to evaluate the “with” and “without” Project condition applying a modified version of a commercial comprehensive healthy building WELL Standard. Stantec thoroughly explained how it applied the WELL methodology and calculated results. Ex. 39, Appendix C, pp. 11-13.

Stantec also 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 quantified the numerical reduction in light using an EML metric.

Lastly, Exponent studied average Seattle resident’s daytime habits, concluding the average Seattle resident spent roughly 4.3 wakeful daylight hours within their residences. Ex.

39, Appendix D. At hearing, Dr. Steffey concluded that typical Seattle residents spend nearly two-thirds of their wakeful daylight hours outside the home. And Dr. Steffey testified that this pattern is not anticipated to shift greatly over the long-term. Further, Shelley Bolser and Dr. Steffey noted that the Daylight Activity Study reflects the existing baseline condition for factoring how and where Escala residents are being exposed to light throughout the daylight hours, including outside their condos.

In addition, the City's Senior Land Use Planner Shelley Bolser testified at hearing 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 the DOC-2 zone (which included the Project Site). Bolser Testimony, Day Two. Ms. Bolser testified that she reviewed the Revised 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. 68.

The Revised Addendum disclosed the scientific uncertainty as to a metric to measure the health impacts of light. Despite that uncertainty, the Revised Addendum also included multiple studies that discussed the reduction of light using the commercially available WELL Standard and Stantec's own "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 Revised



1 Addendum also included information that detailed the typical patterns for Seattle residents  
2 during daylight hours to help inform the City's evaluation of the background condition.

3 In total, the Revised Addendum disclosed and discussed the loss of light using one  
4 recognized commercial methodology and a Stantec originated study of only daylight.  
5 Appellant's experts disagree with the model being used, but overall, Mr. Clark did not object to  
6 Ms. Fong's analysis. Instead, he used it as a key component of his testimony. The reduction in  
7 natural light within the Escala's eastern façade units was thoroughly documented. Furthermore,  
8 the Revised Addendum disclosed and discussed the best available science to evaluate health  
9 impacts (or lack thereof) to residents in Escala's eastern façade. Appellant provided no  
10 affirmative evidence that the health impacts to Escala residents related to reduction in daylight  
11 from the Project were not disclosed, discussed and substantiated by data and expert opinion.  
12

14 **2. Without scientific consensus regarding the thresholds necessary to determine**  
15 **the potential health impact of a reduction in light on health, SDCI properly**  
16 **followed SEPA where there is incomplete information.**

17 Under SEPA, if there are "gaps in relevant information or scientific uncertainty  
18 concerning significant impacts, agencies shall make clear that such information is lacking or that  
19 substantial uncertainty exists." SMC 25.05.080.B. SDCI acknowledged this in its Revised MUP  
20 decision, stating "[t]he studies note that there is not yet any empirical basis for understanding the  
21 effects of reduced daylight on human health, and the research of impacts of reduced light on human  
22 health is inconclusive." Ex. 1, pg. 39.

23 SDCI weighed the need for the action with the severity of possible adverse impacts  
24 which would occur if the agency were to decide to proceed in the face of uncertainty; and  
25 choosing to proceed, SDCI generally indicated in the appropriate environmental documents its  
26

1 worst case analysis and the likelihood of occurrence, to the extent this information can  
2 reasonably be developed. SMC 25.05.080.C.

3 Contrary to Appellant's claim that SDCI used such uncertainty as "an excuse" to not  
4 require an EIS and that such uncertainty was used to "abort the assessment" (Appellant Closing  
5 at p. 11:19-21, p. 16:3-17:18), SDCI concluded:

- 6 • Scientific uncertainty exists and there is no threshold for determining how much light is  
7 necessary to support human health;
- 8 • It explained how the analysis conducted was a "worst case" analysis because it looked  
9 only at the units most impacted by the loss of light, p. 39;
- 10 • It thoroughly discussed the information provided by the Appellant's experts and  
11 requested Applicant to respond to key issues raised in public comments;
- 12 • After review of the studies provided by Appellant's experts, it found that "while the de la  
13 Iglesia report, the Clark report, and the public comments assert there are other professional  
14 opinions and methods of measuring light in the field of circadian light impacts, after careful  
15 evaluation by SDCI, this information does not demonstrate that the analysis used by applicant  
16 is faulty or that proposed development will have a probable significant impact to human  
17 health." Ex, 1, pg. 40;
- 18 • It considered whether the impact of loss of light on human health was significant based  
19 on SEPA's required considerations of context, duration, and intensity; and
- 20 • It found that "[t]he information provided by the applicant and identified in the Second EIS  
21 Addendum indicates the reduction of light inside the Escala residential units is expected to be  
22 less than moderate and is not expected to be significantly adverse."

23 Ex. 1, pp. 38-42.

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

1 **E. Appellant provides no affirmative evidence of likely significant adverse impacts to**  
2 **human health based on the reduction of light to the Escala units.**

3 To date, Appellant failed to present *any* evidence to refute the fact that there is no  
4 scientifically accepted metric to evaluate the impacts of light on human health, much less on to  
5 distinguish between health impacts between natural and electric light. Appellant cited no studies  
6 that contained empirical evaluation of the isolated impact (if any) of daylight on human health.  
7 Instead, Appellant concedes that “scientific studies documenting a specific dose response  
8 relationship [between light and health] do not exist.” *Id.*, pg. 15. Dr. de la Iglesias failed to  
9 provide any affirmative evidence of adverse health impacts to Escala residents stemming from  
10 the Project.  
11

12 The studies relied on by Appellant are all distinguishable from the present matter. Dr. de  
13 la Iglesia’s letters submitted to SDCI cite the health-related impacts to shift-work, which is a  
14 distinct condition arising from overexposure to light at night. *See* Ex. 62, citations 13-19.  
15 Additionally, Dr. de la Iglesia’s field work studies high school and college students, which is a  
16 different and much younger population than the self-reported retirees living on Escala’s east  
17 façade. Ex. 8. Rather, Dr. de la Iglesia testified regarding “associations” between lack of  
18 exposure to day light and human health impacts; however, as noted by Shelley Bolser in her  
19 testimony, an association is distinguishable from causation. SDCI had no evidence submitted by  
20 applicant or any commenters that the reduction in light due to the project would result in a likely  
21 significant impact to human health. Therefore, SDCI properly concluded that an EIS or SEIS  
22 was not required here.  
23  
24

25 Moreover, Appellant failed to evaluate (or even acknowledge) the existence and  
26 availability of electric lighting, which both parties’ experts agreed can entrain one’s circadian  
27

1 system. Brainard testimony; Dr. de la Iglesia testimony. There were numerous flaws with Mr.  
2 Clark and Dr. de la Iglesia's analysis, as detailed in the Revised MUP and at hearing. Ex. 22 at  
3 pp. 39-40; Brainard Testimony, Fong Testimony. Including but not limited Mr. Clark's  
4 assessment to analyze the reduction of light while facing away from the windows of the unit, the  
5 removal of many of the east facing units from the analysis where these units showed limited  
6 reduction in light, the failure to verify the unit design based on that permitted by the City, among  
7 others. *See* Exhibit 10, p. 1. Appellant failed to provide affirmative evidence necessary to  
8 prevail in its appeal.  
9

#### 10 IV. CONCLUSION

11 The City respectfully request that the Hearing Examiner dismiss Appellant's Claims and  
12 affirm the Revised Decision.  
13

14 DATED this 13<sup>th</sup> day of October, 2020.

15  
16 *s/ Elizabeth E. Anderson*, WSBA #34036  
17 Assistant City Attorney  
18 Seattle City Attorney's Office  
19 701 Fifth Ave., Suite 2050  
20 Seattle, WA 98104-7095  
21 Ph: (206) 684-8200  
22 Fax: (206) 684-8284  
23 [liza.anderson@seattle.gov](mailto:liza.anderson@seattle.gov)  
24 Attorneys for Respondent  
25 Seattle Department of Construction and Inspections  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

2 I certify that on this date, I electronically filed a copy of Respondent City's Post Hearing  
3 Brief with the Seattle Hearing Examiner using its e-filing system.

4 I also certify that on this date, a copy of the same document was sent via email to the  
5 following parties listed below:  
6

7 Claudia M. Newman  
8 David A. Bricklin  
9 [newman@bnd-law.com](mailto:newman@bnd-law.com)  
10 [bricklin@bnd-law.com](mailto:bricklin@bnd-law.com)  
11 *Attorneys for Appellant*

12 John C. McCullough  
13 Ian S. Morrison  
14 [jack@mhseattle.com](mailto:jack@mhseattle.com)  
15 [imorrison@mhseattle.com](mailto:imorrison@mhseattle.com)  
16 *Attorneys for Applicant*

17 DATED this 13<sup>th</sup> day of October 2020.

18 s/Alicia Reise  
19 ALICIA REISE, Legal Assistant  
20  
21  
22  
23  
24  
25  
26  
27