BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

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

I. INTRODUCTION

The applicant has responded to our 17 page closing argument with a 42 page brief. The excessive length was unnecessary and distracting. The legal and factual issues to be resolved are not that complicated.

The city's closing argument are excerpts from the applicant's brief with light editing and a couple of notable deletions. We do not address the city's brief separately as it is essentially a regurgitation of portions of the applicant's brief.

II. LEGAL ISSUES

A. An Addendum Cannot Be Used to Address "Significant" Impacts That Were Not Addressed in the 2005 EIS.

The parties do not dispute SEPA's basic command: If a project's impacts are significant, they must be addressed in an EIS. It goes without saying that the 2005 EIS did not address the health

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impacts of the loss of light in the Escala if the Douglaston project is built. The issue, therefore, is whether those loss of light impacts are significant. If they are, this matter must be remanded for preparation of an EIS that addresses that issue in the detail required in an EIS and with the procedures applicable to an EIS (*e.g.,* circulation of a draft EIS for review and comment by agencies with expertise and the public).

The applicant seeks to confuse the legal issue by arguing that the prior examiner decision in this case precludes this examiner from challenging the SDCI's use of an addendum to analyze the project's significant impacts that were not addressed in the old EIS. The applicant advances this claim by twisting the arguments we made in our opening brief. If you believe the applicant, we are asking this examiner to determine that an addendum cannot ever be used to provide information ancillary to an otherwise adequate EIS. Applicant's Post-Hearing Brief ("Resp.") at 18. That distorts our argument beyond recognition. We acknowledge that an addendum is an appropriate vehicle for providing information about newly identified impacts that are less than significant. But if the impacts are significant, they must be addressed in an EIS (or supplemental EIS). The applicant's inference that an addendum can be used to address newly identified *significant* impacts should be rejected.

Indeed, if the applicant's argument were correct, there would have been no remand in the first case. The examiner would have concluded that the health impacts—significant or not—could be addressed in an addendum. But the examiner ordered a remand. The remand was necessary because if further factual investigation indicated that the impacts would be significant, then an EIS would be necessary. The applicant's misdirected arguments should not distract from that fundamental proposition.

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B. The Applicant's Attack on the Prior Decision's Conclusion That Loss-of-Light Health Impacts Fall Within SEPA's Ambit is Untimely.

The applicant argues that health impacts associated with the loss of light are beyond SEPA's scope. Resp. at 23-24. This is an impermissible collateral attack on the first examiner's decision. The applicant asserts it "does not seek to relitigate the Hearing Examiner's remand in this forum," Resp. at 22, but then proceeds to do just that. The effort should be rejected.

Notably, while the SDCI brief echoes most of the applicant's closing argument, it does not include this one.

C. The Applicant's Assertion That We Are Belatedly Attacking the DRB Recommendation Misconstrues Our Argument.

The applicant raises a series of procedural arguments related to our reference to the DRB's recommendation. Resp. at 15 *et seq.* Our closing did not ask the examiner to review or overturn the DRB recommendation. Rather, we referenced the DRB recommendation to demonstrate the importance of preparing an EIS that addresses the significant adverse effects of the proposal's blocking Escala's access to light. *See* Escala Closing at 8-10. The examiner should not be distracted by the applicant's mischaracterization of our closing argument or the applicant's attack on that mis-characterized argument. [1]

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[1] Our reference to the DRB's ability to use an EIS when formulating its recommendation was meant, in part, to counter the applicant's undertone that an EIS would be useless because the health related impacts from a loss of light fall outside the city's substantive SEPA authority. Regardless of authority provided by SMC 25.05.675, state law requires city advisory panels like the DRB to "use" the information in an EIS when formulating their recommendations. "An environmental impact statement is more than a disclosure document. It shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions." WAC 197-11-400(4). Informing the DRB of the health impacts would have allowed the DRB to take that into account as it developed its recommendations on the Douglaston's impacts on the Escala. *See* Escala Closing at 7-10.

Furthermore, even if the City were to ignore state law and command its DRB to ignore the content of an EIS when making its design review recommendation, there is no parallel city code provision precluding the SDCI director from considering information in an EIS when deciding whether to adopt or modify the DRB's recommendations. The examiner should reject SDCI's efforts to hollow out its SEPA responsibilities.

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D. Uncertainty Regarding the Likely Extent of Health Effects Resulting from the Loss of Light Is No Excuse for Not Preparing an EIS.

The parties agree that the science regarding the health impacts of the loss of light is a new and rapidly advancing area of scientific study. That the human eye has special receptors besides rods and cones to receive the light waves critical for circadian entrainment was discovered only about 20 years ago.[2] It is not seriously disputed that the loss of light necessary to entrain the circadian system is associated with significant adverse health effects, including cancer, diabetes and various mental health and sleep-related sequalae. The conundrum is that scientists are still researching the issues that will allow more precise measures and predictions of the health consequences of living in the dark in the early morning hours.

That uncertainty presents an interesting legal issue, but fortunately the issue was anticipated and addressed by the authors of the SEPA rules. As discussed in our initial closing argument, uncertainty is not a valid excuse for aborting SEPA review. Closing at 15-17. Instead, the SEPA rules are quite specific on the methods to be employed when uncertainty is encountered:

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

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

We discussed the "if/then" construct of this rule in our opening and stated we did not expect the respondents to dispute that the "if" condition precedent was satisfied (*i.e.,* that information relevant

[2] These special receptors are called "intrinsically photosensitive retinal ganglion cells" or "ipRGCs."

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to the adverse health impacts associated with a loss of light is important but the means to obtain it are uncertain). Closing at 16. As expected, the respondents do not challenge that predicate. Instead, they contend that SDCI included the required worst case assessment in its analysis. Resp. Br. at 29; SDCI Br. at 18. But though the term "worst case" was used in the SDCI decision, it was not the worst case analysis called for by this rule.

The worst case analysis required by the rule would be an evaluation of the worst case consequences if the association between a loss of circadian light and adverse health effects turns out to be quite strong. That is, given testimony that scientists are not sure about the extent to which the predicted loss of light will result in cancer, diabetes, mental health problems, and other adverse effects, SEPA requires that the agency estimate the "worst case" outcome when making its threshold determination. That is not what SDCI did. SDCI did not estimate any adverse health effect outcomes—worst case, best case, or anything in between.

Instead, SDCI used the term "worst case" when describing the approach Stantec took in modeling the loss of light. It stated that Stantec viewed the outward looking perspective as the "worst case." Resp. at 29. The applicant cites that as proof that SDCI satisfied the SEPA rule requirement for a worst case assessment of the project's health impacts. Obviously, those are two different things. While modeling the loss of light is one step in evaluating the adverse health impacts, it is not the crucial step of informing the threshold determination and disclosing to the public and the decisionmaker the worst case, adverse health consequences that may result from this project. Whether the reduction in light is as modeled by Stantec using only the outward looking perspective or as modeled by Mr. Clark using all four directions, the ultimate issue remains: To what extent does that reduction in light result in serious adverse health impacts? It is the uncertainty regarding that

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fundamental health issue that triggers the need for a worst case assessment—but SDCI has failed to provide it.[3]

SEPA's uncertainty rule also requires the agency to "weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty." WAC 197-11-080(3)(b). The applicant asserts that the Director did the required weighing of need versus adverse impacts, Resp. at 29, but that assertion is not supported by any evidence in the record. That is not to say that the applicant does not cite the record; it does, referencing pages 38-42 of the Director's decision. *Id.* But nowhere in those pages is the required weighing undertaken. Statements are made regarding the validity of the applicant's and Escala's analysis, but at no point does the Director weigh the need for the project against its health impacts.

III. FACTUAL ARGUMENTS

A. There Would Be a Huge Loss of Light in the Escala Units if the Project Were Built in Its Current Configuration.

The substantial loss of light in the Escala units was demonstrated not just by Mr. Clark's analysis, but the analysis by the applicant's consultant, Stantec. The applicant's closing attempts to muddy the waters of a fairly basis scientific proposition. Locating a new building, towering over the Escala, just fifteen feet away, will cause a substantial loss of light in the east-facing units. That the applicant's own consultant reached conclusions nearly identical to Mr. Clark's should be sufficient to quickly move past this issue.[4]

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[3] The respondent's characterization of Stantec's model based on only a single, outward looking perspective as "worst case" is not correct either, as we discuss *infra* at 8-9. If Stantec had modeled all four directions, the loss of light estimates would have been even higher. *Id.* But for purposes of satisfying SEPA's worst case analysis requirement, that factual dispute is irrelevant: Regardless whether the Stantec model's use of only an outward looking perspective generated "worst case" estimates of loss of light, it did not assess the worst case *health impacts* that could result from that loss of light—which is the worst case analysis required by the SEPA rule.

[4] The applicant suggests bias in the evaluations which assess only the east-facing units, not the other units. That objection is nonsense. It makes no sense, of course, to evaluate loss of light in units that will not *(continued on next page)*

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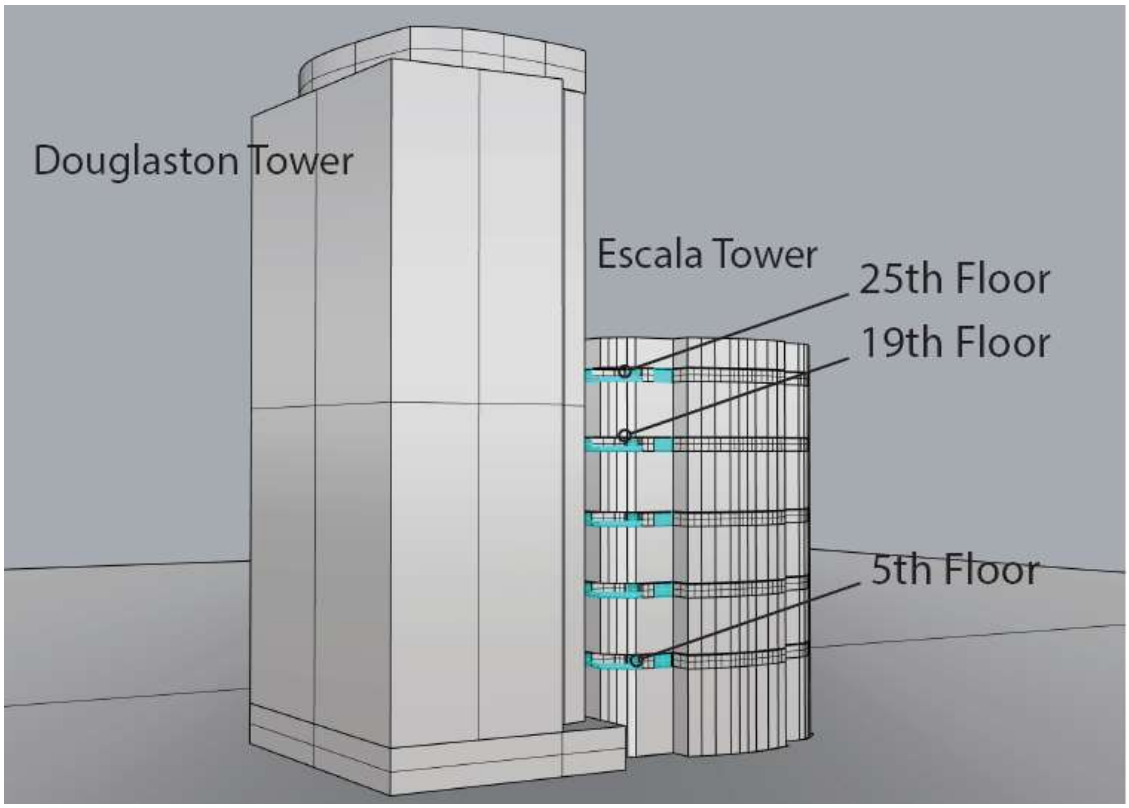

Mr. Clark modeled the hour of daylight before 1 p.m. when light would exceed the 0.3 "circadian stimulus" (CS) metric necessary to entrain (synchronize) the circadian systems in humans. Mr. Clark's analysis demonstrated that light reduction in the Escala units would range from 16% to 80%. The applicant contends that the CS metric is not the best metric to use for assessing circadian impacts, but did not dispute Mr. Clark's testimony that the CS metric has been peer reviewed, is used by numerous well-regarded institutions (he mentioned Rensselaer Polytechnical Institute, the United States General Services Administration, and the WELL building certification system, among others). While Dr. Brainerd does not hold it in high regard, Dr. Brainerd failed to identify anyone else who shares his views that CS does not provide useful insights into the loss of light necessary for circadian entrainment.

suffer any loss of light. Regardless how many units are not impacted, the undisputed evidence is that nearly 200 people, mostly elderly, live in those units.

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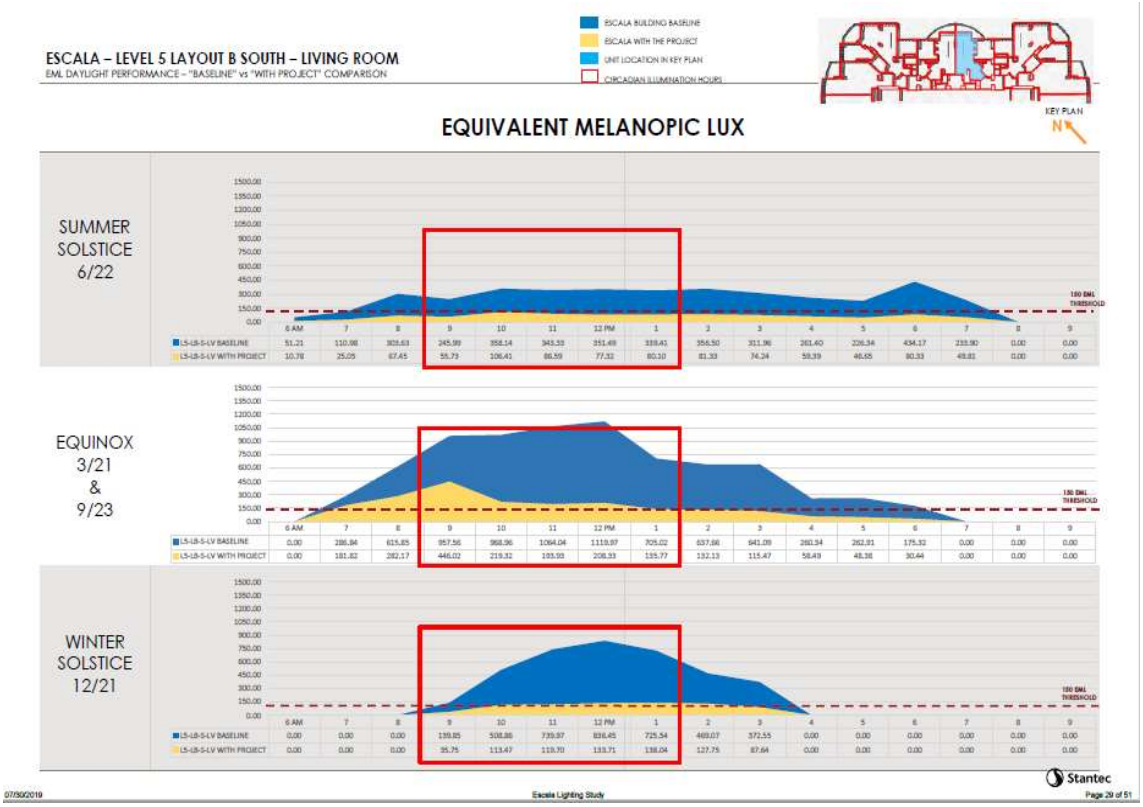
The applicant's technical challenges[5] to Mr. Clark's work ignores the bottom line: Mr. Clark's results were consistent with those generated by the applicant's consultant, Stantec (and the results of Mr. Loveland's analysis submitted during the first hearing examiner appeal (and re-submitted in this one)). Even though Stantec's approach was unduly generous to its client (by modeling only in the direction of someone looking directly out the window), it still demonstrated a huge drop in circadian light (using the "equivalent melanopic light" (EML) metric).



City Ex. 3 (Final Second Supplemental Addendum) at PDF 121.

[5] Because Mr. Clark's bottom line and Stantec's bottom line were in accord, we do not spend much time here addressing the applicant's critique of some details of Mr. Clark's work. That Mr. Clark's modeling of the 19th floor happens to be the 20th floor as numbered in the elevator does not change the conclusions one iota. And while Mr. Clark may have visited the 5th floor, but not the 19th, at least he visited the building and examined its setting—something Ms. Fong did not do at all.

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In Stantec's charts, the dark blue represents light reaching the units without the project and the yellow shows the little bit of light still reaching the units with the project. The loss in light necessary to trigger the circadian system is dramatic. The amount of light available in the "with project" condition is vanishingly small.

Stantec's model results are alarming, yet they probably were unduly optimistic. As Mr. Clark explained (and no witness denied), Stantec's model used only a single outward view perspective. This tends to minimize the impacts because residents would not be staring out the windows all the time—especially when their "view" is into a wall fifteen feet away. Mr. Clark's more balanced approach, employing views in all four directions, was more realistic.

The applicant is in a hard spot on this one. Its own consultant's modeling demonstrates a large drop in light to entrain the circadian system. The applicant's response was to have Dr. Brainerd eschew not just Mr. Clark's (and WELL's) use of the CS metric, but to criticize the EML metric used by Stantec. The discord in the applicant's ranks was manifest.

The means to resolve the conflict became evident during Brainerd's cross. There, he admitted that while he does not think the EML metric is the absolute best method for measuring circadian light impacts, he grudgingly acknowledged that it is nearly as good as the metric he prefers (melanopic EDI). His critique of the EML metric might be of interest to cutting edge scientists, but for practitioners and present purposes, his dissertation was irrelevant. (Perhaps that is why SDCI's copious copying of the applicant's closing brief did not include this part.)

Given Brainerd's acknowledgment that the two metrics were nearly equivalent, the drastic drop in light using the EML metric (as computed by Stantec and addressed by Clark) should have been more than sufficient for SDCI's environmental analysis. The results of that EML modeling input

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should leave the Examiner with a "definite and firm conviction"[6] that a mistake was made by SDCI when it concluded there would not be a significant loss of light.[7]

B. The Loss of Light Necessary to Entrain the Circadian System Is Associated with Serious Adverse Health Effects.

As discussed above, the applicant does not dispute that the loss of light necessary to entrain the circadian system is associated with serious health consequences, including cancer, diabetes and various mental health and sleep-related sequalae. Instead, its argument focuses on the lack of scientific tools to predict the prevalence of those impacts among Escala residents. We have addressed the legal significance of that uncertainty above.[8]

C. The Availability of Electric Light and Going Outside to Access More Natural Light Are Red Herrings.

The applicant continues to assert that electric light can provide an adequate substitute for natural light. "A photon is photon." If that is the case, why did Brainerd devote so much time and money to outfitting hospital rooms with special lighting systems to mimic natural light? And why did the Covid panel he referenced urge house-bound residents to get outside for access to natural light? Why did they not just tell people to turn on more lights in their homes?

The answer, as Dr. de la Iglesia explained, is that the human body has evolved over time to respond to different portions of sunlight in different ways. As explained in one of the applicant's exhibits, the newly discovered ipRGCs are much more sensitive to the shorter wavelengths than the

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[6] *Polygon v. Seattle,* 90 Wn.2d 59, 69 (1978).

[7] Another analysis using a metric not specific to circadian light indicated that there would be a 50% reduction in Escala units meeting the standard for spatial daylight autonomy. City Ex. 3 (Final Second Supplemental Addendum) at PDF 97 *et seq.* While this metric is not viewed today as being as useful as the EML metric, it was used by Stantec in this case and it further corroborates the dramatic loss of light in the affected units.

[8] The applicant asserts that one of the studies referenced by Dr. de la Iglesia cannot be used to link loss of access to daylight with adverse health effects because the study was based on night-shift workers getting too much light at night. Resp. at 38. This ignores Dr. de la Iglesia's testimony. He explained that the night shift workers also suffered from a loss of access to daylight in the mornings and that the adverse health effects were linked to that cause, too.

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longer wavelengths that activate the rods and cones used for sight. Applicant. Ex. 10 at 1. Household electric light does not mimic the wavelengths or intensity of natural light.[9] Nor, contrary to the assertion in the applicant's closing (at 33, n. 9), did Dr. de la Iglesia agree that entrainment could occur with very dim electric light. He explained that the study was based on extreme conditions that could not be used to predict outcomes in the real world.

Moreover, the applicant's consultant, Ms. Fong, demonstrated that there is not sufficient electric light in the Escala to even meet the WELL standard, so even if electric light were an adequate substitute, there is not enough of that either. Given the failure of the applicant to propose mitigation in the form of bolstering electric light in the Escala (Mr. Clark noted that Stantec indicated 24 additional fixtures would be needed in each unit!), the reference to the theoretical possibilities of more electric light in those units is a wasteful distraction.

On the other hand, given that the applicant persuaded SDCI that electric light was an adequate substitute for natural light, it is little wonder that SDCI concluded the impacts of losing access to morning light was inconsequential. From SDCI's perspective, the harm of losing that light will be remedied by turning on more lights in the Escala homes. Given SDCI's fundamentally flawed analysis that is not based on the science (and ignores our own experiences dealing with Seattle's gloomy winters, which are not remedied by turning on more lights in our homes), the Examiner should reverse the SDCI decision and require preparation of an EIS.

Equally off point are the references to the time spent outdoors by typical Seattleites. In addition to the mismatch between the "typical" Seattleite in the study and the retirees that predominate

[9] As stated in more technical terms in the applicant's exhibit: "[T]here is no single action spectrum or proxy that can describe all eye-mediated non-visual responses to light. . . . The relative contribution of each individual photoreceptor type can vary depending on the specific response and upon light exposure properties *such as intensity, spectrum, timing (external and internal circadian*), prior light history and sleep deprivation state of the individual." Applicant Ex. 10 at 2 (emphasis supplied).

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in the Escala, the argument ignores that Escala residents should not be forced to go outside when they awake on winter morning to access natural light that currently reaches their homes. The impact on their lives and health would result from construction of the new building, even if they could mitigate it by taking a walk every morning in the cold and rain.

IV. CONCLUSION

Exposing nearly two hundred elderly residents to adverse health effects like cancer, diabetes and serious mental health and sleep disorders crosses the threshold for requiring analysis in an EIS, especially when that threshold determination is informed by the worst case analysis required by the SEPA rules. Because the 2005 EIS did not analyze the issue, this significant issue must be analyzed now in an EIS.

Dated this 20th day of October, 2020.

Respectfully submitted,

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