BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of Appeal of

ESCALA OWNERS ASSOCIATION

of a Decision by the Director of the Seattle Department of Construction and Inspections

Hearing Examiner File
MUP-20-012(W)

Department Reference
3019699-LU

DECISION

I. FINDINGS OF FACT

1. Background. Escala Owners Association appealed Seattle Department Construction and Inspection's ("Department") approval of a 48-story building in Seattle's Belltown neighborhood. This is the second Escala appeal to the Examiner involving this project. On its first appeal, the Examiner largely upheld the City's decision, but remanded under the State Environmental Policy Act, Ch. 43.21C RCW, for further review of shading impacts on the adjacent Escala residences. The City completed this review and issued a revised decision, which Escala appealed. This appeal addresses only the new decision as it relates to evaluating shading impacts under SEPA.

2. Hearing Proceedings.

2.1 Pre-Hearing Deadlines. At a pre-hearing conference, filing deadlines were established, including deadlines for issue clarification, motions, and witness and exhibit lists.[1]

2.2 Jurisdictional Scope. The parties filed jurisdictional statements, and the Department and Applicant moved to dismiss certain issues. The Examiner determined she had jurisdiction, assuming Issues 1(a-c) and (e) were tied to the Department's Revised MUP, rather than being used to re-litigate earlier issues.[2]

2.3 Hearing. The hearing was held remotely on September 14 and 15, 2020. Ms. Anderson of the Seattle City Attorney's Office, 701 5th Ave., #2050, Seattle, WA 98104, represented the Department. Mr. Morrison and Ms. Kendall of McCullough Hill Leary, PS, 701 5th Ave., #600, Seattle, WA 98104, represented the Applicant, Jodi Patterson O'Hare. Mr. Bricklin of Bricklin & Newman, LLP, David Bricklin, 1424 Fourth Avenue, #500, Seattle, WA 98101, represented Appellant Escala Owners Association.

2.4 Witnesses.

2.4.1 Appellant. Mr. Clark, Director of Circa-Dies, LLC; Mr. Horacio de la Glacia, Director, UW Graduate Program in Neuroscience, Director and Professor, Dept. of Biology; and, Mr. Sosnowy, an Escala resident.

[1] Prehearing Order (February 11, 2020).
[2] Order on Jurisdiction and Motion to Dismiss (July 13, 2020).

2.4.2 Department. Ms. Bolser, Department Land Use Planning Supervisor.

2.4.3 Applicant. Mr. McCann, Sr. Planner, EA Engineering, Science and Technology, Inc.; Mr. Mott, AIA, Principal, Perkins + Will; Dr. Steffey, Ph.D., Principal Scientist and Practice Director, Exponent; Ms. Fong, Lead Lighting Principal in Charge, Stantec; and, Dr. Brainard, Ph.D., Department of Neurology, Thomas Jefferson University.

2.5 Exhibits. The Examiner's Office prepared a final exhibit list, which lists admitted Exhibits 1-85.

3. Project Description. 48-story mixed use building with 431 apartment units, 155 hotel rooms, retail and restaurant space, and 239 below-grade parking spaces.[3] It is at 1933 5th Avenue, on the northeast corner of a block bounded by Virginia Street, 5th Avenue, Stewart Street, and 4th Avenue. The site is zoned Downtown Office Core 2, and is developed with three low-rise vacant commercial structures. The Escala condominium is across an alley to the west.

4. SEPA Review Background.

4.1 Adopted EIS. The Department issued a SEPA Determination of Significance, adopted the EIS for the Seattle Downtown Height and Density Changes (2005), and supplemented this EIS by Addendum..[4] The MUP Decision the Department issued in 2017 included this SEPA review, the Director's Design Review Approval, Ch. 23.41 SMC, and, SEPA conditions.

4.2 Appeal. Escala appealed this original decision. After a four-day hearing, the Examiner upheld the Design Review, and EIS as it related to transportation, alley operations, height, bulk, scale, and land use compatibility. The Examiner remanded to evaluate project "impacts as they relate to the loss of light within Escala residential units."[5] Following a reconsideration motion, the Examiner clarified that the remand was limited to evaluating potential health impacts related to light loss within the Escala residential units.[6] The Examiner did not determine whether those impacts were significant, but that the Department needed additional information.

4.3 Additional SEPA Review. Following the remand, the Department evaluated health impacts from light, analyzing analysis prepared by three experts. A draft document was issued, with comments requested on the draft Lighting Addendum.[7] Appellant and its consultants submitted comment.[8] The Department reviewed the comment, with responses requested from the consultants.[9] The Applicant responded with, among other items, a detailed explanation of the methodology employed by Stantec in its studies.[10] Following the 19-month review period, the Department issued its Revised MUP Decision, including the adopted EIS, with the Lighting Addendum.[11]

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[3] Exhibit 1 (Revised MUP Decision).
[4] Testimony, Ms. Bolser, Day 2.
[5] Examiner's 2017 Amended Decision, p. 21. The Decision also added new terms to dock management.
[6] Amended Decision, pp. 18-19.
[7] Exhibit 78.
[8] Exhibits 61-67.
[9] Exhibit 84.
[10] Exhibit 70.
[11] Exhibit 1.

5. Updated SEPA Analysis. The updated SEPA analysis concludes there is not current scientific consensus for measuring or evaluating light reduction impacts (electric or daylight) on health and there is no proven "dose" of light required for health. However, the Department considered the project's impact significance based on considerations of context, duration, and intensity, and concluded the light reduction inside Escala's eastern units is not expected to be significantly adverse. These conclusions were based on the Lighting Addendum, which included studies from three lighting experts.

6. Experts Department Relied On: Key Conclusions.

6.1 Dr. Brainard, Thomas Jefferson University Light Research Program, made three basic conclusions. One, there is not a scientifically adopted metric to evaluate light's health impacts.[12] Two, there is no demonstrated difference in the physiological stimulation from electric light versus daylight on the human body.[13] And, three, it takes little light (electric or natural) to entrain the circadian system.

6.2 Denise Fong, an architectural lighting designer with Stantec, agreed there are not any standard metrics for analyzing light's health impacts. Stantec's study showed the project would reduce daylight within units on Escala's east side, though occupants will continue to receive daylight year-round.

6.3 Dr. Steffey, a statistics expert, concluded Seattleites on average spend 4.3 wakeful daylight hours per day inside their homes, and nearly two-thirds of wakeful daylight hours outside the home (*i.e.*, work, school, shopping). This time outside the home affects the baseline of electric light and daylight received.

7. Stantec's WELL Analysis

7.1 With no scientifically adopted metric to evaluate health impacts from light loss, Stantec applied a modified version of the WELL Standard to study light levels. This is a points-based system with criteria for evaluating a healthy building. WELL addresses ten elements such as air, water and materials, and also lighting. WELL has eight concepts for evaluating lighting, with only four relevant to health impacts. Under the Stantec analysis, Escala would qualify for the WELL Standard lighting "point" in both the "with" and "without" Project conditions, with two exceptions.

7.2 One exception relates to visual illuminance to perform tasks. The parties agreed this was not relevant to the health issue. This is because circadian entrainment is governed by the ipRGCs (intrinsically photosensitive retinal ganglion cells) system, not the visual rods and cones system central to accomplishing visual tasks. The ipRGCs refers to the retinal sensor system that supplies input for human circadian, neuroendocrine, and neurobehavioral regulations. This sensory system is the primary light detector for physiological regulation. Eyes process light through different pathways. One pathway deals with visual reflexes, the other physiological functioning. Only the latter relates to this appeal.

[12] Exhibit 37, Appendix B, pp. 8-9.
[13] Exhibit 37, Appendix B, p. 11 (there is "little peer-reviewed, published data" to support the contention that natural light is "superior" to electric light to support human health).

7.3 The second exception is relevant. It measures the equivalent melanopic lux or EML of electronic light within Escala. EML is an emerging metric for measuring the type of light that stimulates human physiology, including the circadian system.[14] Based on the location of fixed lighting at Escala in the City's construction permit and reasonable assumptions of typical household lighting, the electronic light performance inside these units could not achieve the 120 EML required to earn a WELL Standard point, with or without the project.[15]

8. Stantec's Daylight Study.

8.1 Stantec studied the daylight reduction inside the Escala units.[16] There is no scientific consensus for establishing a threshold level of light (natural or electronic, or a combination) sufficient for health. Stantec set the daylight analysis line at 150 EML because this is the same used in certain WELL Standard lighting concepts for electric light. Stantec studied the rooms on Escala's east façade on Floors 5, 19, and 28 for the five hours most relevant for circadian entrainment during the equinox and summer and winter solstices.

8.2 EML levels varied throughout, but were generally higher at the northern and southern units and increased as one moved up the tower. On the lowest level studied (5th Floor), the majority of rooms experienced daylight exceeding the 150 EML level in the "with" Project condition.[17] The same trends carried out on the 19th Floor. For instance, the 19th Floor center unit living room exceeded the 150 EM level for all hours studied on the equinox and for all but one hour studied on the winter solstice, the darkest day of the year.[18] The Daylight Study did not reach health-related conclusions regarding the impact of exposures at the measured EML levels. Instead, the Daylight Study provided information to aid the Department in responding to the Examiner's remand regarding daylight levels experienced with the Project.

9. Steffey Daylight Activity Study. This study addressed the time people spend awake at home in the Seattle area during daytime hours.[19] The Study concluded that Seattleites spend, on average 4.3 wakeful daylight hours at home per day.[20] This translates to the average Seattle resident spending nearly two-thirds of wakeful daylight hours outside the home, depending on the season. For residents in households with family income over $150,000, wakeful daylight hours at home per day decreased to 3.8. Escala residents are more likely to be in the latter category.

10. Electric Versus Natural Light for ipRGCs System Stimulation

10.1 The ipRGCs system regulates human physiology for purposes of the health impacts at issue. This is not light for reading or other activities, but the lighting levels necessary to stimulate this specific system. Dr. Brainard testified that for these purposes, there is no distinction between electric light and daylight. Intuitively, the two are different. But, in assessing the narrow health impact issue, Dr. Brainard explained, "a photon is a photon." For regulating the body's ipRGCs

[14] Exhibit 37, Appendix B, p. 8.
[15] Exhibit 37, Appendix C, pp. 11-12; Fong Testimony, Day 2; Exhibit 42.
[16] Exhibit 37, Appendix C, pp. 16, and 23-51.
[17] Exhibit 37, Appendix C, pp. 24-33.
[18] Exhibit 37, Appendix C, p. 37.
[19] Exhibit 37, Appendix D.
[20] Exhibit 37, Appendix D.

system, the body does not know the difference. And, typical household electric light levels will entrain one's circadian system.

10.2 This does not mean sunlight is not often preferred over electric light. Nor does this mean sunlight and electric light are otherwise indistinguishable. However, the evidence and testimony presented to the Examiner was that to stimulate the ipRGCs system, it does not matter whether the photon comes from the sun or a lamp.

11. Escala Analysis.

11.1 Mr. Clark is an architectural lighting designer, but not an expert on the physiological and health-related impacts of light.[21] His analysis, which addressed light loss, focused on the most affected units, or half the eastern facade.[22] He did not evaluate daylight in all rooms, but selected a single location in each unit, and used a table-top sensor to measure light in four directions. The sensor location was in the southern most corner of each unit's living room next to the Project. He measured light levels facing away from the window for five hours. By turning around and facing the exterior windows, the light reductions could be significantly improved.[23]

11.2 This approach does measure light reduction in the most extreme circumstance. But it would not reflect the experience of the average apartment dweller, who would move about and not always have his or her back to the windows. Based on this approach, Escala argues the Project "would lead to a substantial decrease in the number of days per year in which daylight would be sufficient to efficiently stimulate the circadian system."[24]

11.3 Mr. Clark testified that Lighting Research Center scientists recommend that individuals receive at least one hour of light at .30 CS levels before 1:00 p.m. daily to support circadian entrainment.[25] Dr. Brainard disputed this metric, testifying that no scientific national or international lighting standards body has adopted the metric.

11.4 At the hearing, Mr. Clark testified to a 51% reduction in the number of days that one could reach the .30 CS threshold inside the Escala 5th Floor northern unit. The reduction occurs if one spends all daylight hours before 1:00 p.m. seated at the table, with all lights turned off, and facing away from the window for five hours. If one were to face a window, the reduction in the number of days failing to achieve the .30 CS threshold falls to 2% or six days out of the year.[26] Mr. Clark's study omits consideration of electric lights or time spent outside the unit.

11.5 The 19th Floor Escala center unit layout added an opaque wall that does not exist, thus the actual impact on the number of days not achieving the CS level threshold was "closer to zero."[27] On the 25th Floor, Mr. Clark's study showed the same zero percent reduction in the number

[21] Exhibit 13.
[22] Exhibit 10.
[23] Testimony, Ms. Fong and Ms. Bolser.
[24] Closing Argument, p. 11.
[25] Clark Testimony, Day 1.
[26] Exhibit 10.
[27] Clark Testimony, Day 2.

of days that did not achieve a .30 CS threshold after Project development.[28] More generally, Appellant's study shows slight to no reductions in the number of days Escala residents cannot achieve at least one hour of .30 CS morning light in their units, if they face a window.

11.6 Regarding health impacts, Escala did not present evidence refuting there is not yet a scientifically accepted metric to evaluate impacts of light on human health, or to distinguish health impacts between natural and electric light. No studies were submitted demonstrating an empirical relationship between daylight alone and health outcome. Appellant's Closing Brief notes that "scientific studies documenting a specific dose response relationship [between light and health] do not exist."[29] Studies Dr. de la Iglesia referenced in comment cite to health-related impacts to shift-work, a distinct condition involving overexposure to light at night.[30] And, testimony on students getting up early and requiring additional sleep is a distinct situation from that presented in this appeal.

II. CONCLUSIONS OF LAW

1. Jurisdiction. The Hearing Examiner has jurisdiction over appeals of Type II Master Use Permit decisions.[31] However, given the earlier litigation, the appeal's jurisdictional scope was clarified through pre-hearing motions. The Examiner agreed with the parties' general view that she had jurisdiction. The Applicant and City had moved to dismiss subsets of Issue 1 (a-c and e), but the Examiner determined that as long as the appeal issues stemmed solely from the revisions to implement the remand decision regarding shading, then those issues are properly before the Examiner. The ruling was based on the assumption that the parties would tie arguments and evidence to the Revised MUP Decision, which is the only decision the Examiner has jurisdiction over. Issue 1(a) - (e) is attached.

2. Standard of Review.

2.1 The Revised MUP is based on the EIS, which includes the Lighting Addendum. EIS adequacy is a question of law, reviewed de novo, with substantial weight given to the decision.[32] The "rule of reason" is applied to an assessment of legal sufficiency. If the EIS, including the Addendum, provides decision makers with a reasonably thorough discussion of the project's significant and probable environmental impacts, it is upheld.[33] The question is not project wisdom, but whether the document provides sufficient information to make a reasoned decision.

2.2 The Addendum involved a determination that the new information did not reveal probable, significant adverse impacts, so is akin to a determination of non-significance, which is upheld absent clear error.[34] However, the functional equivalent of a supplemental EIS was prepared. [35] The Addendum was compiled based on technical analysis from three lighting experts, and their reports, and included a comment period, with supplemental information prepared in response before the revised document issued. This final Addendum amended an EIS.

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[28] Exhibit 10, p. 16.
[29] Escala's Closing Brief, p. 15.
[30] Exhibit 61, citations 13-19.
[31] SMC 23.76.004(B); SMC 23.76.004, Table A; SMC 23.76.006(C)(2).
[32] RCW 43.21C.090; SMC 23.76.022(C)(7).
[33] *Cascade Bicycle Club v. PSRC*, 175 Wn. App. 494, 508-509 (2013).
[34] *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 523 (1985).
[35] *See e.g., Thornton Creek Legal Fund v. Seattle*, 113 Wn. App. 34, 54-57 (2002).

2.3 The Department issued an addendum rather than a supplemental EIS, per WAC 197-11-600 and SMC 25.05.600. A supplemental EIS is required if due to substantial changes or new information, a proposal is likely to result in significant adverse environmental impacts. To require an EIS, Escala must demonstrate significant impacts are probable.

3. Issues Raised – Issues 1(a-e). The appeal is of the remand issue, which involves an assessment of the Project's health impacts on the Escala units due to shading, as set forth at Issue 1(d). Issues 1(a-c) and (e) require clarification. Issues 1(a-e) are at Attachment 1.

3.1 Issue 1(a), Downtown EIS Age. This precise issue was not revisited in this appeal at the hearing or in closing argument, so need not be addressed. Escala does argue the earlier EIS and new Addendum were insufficient, but the argument is subsumed within Issue 1(d).

3.2 Issue 1(b) and (c), Relating to SEPA's Authorization to Use Addenda. Escala does not argue that a non-project EIS and Addenda can never be used to fulfill project-level SEPA review requirements, but that the MUP Decision, which relies on the updated Addendum, was insufficient, so a supplemental EIS is required. This argument is made within the context of Issue 1(d), which addresses review adequacy of health impacts from reduced light.

3.3 Issue 1(e) – Challenge to Decision Document Statement on Scope of Procedural Review and Substantive Mitigation. This precise issue was not revisited in this appeal, so need not be addressed.

4. New Issue, Outside of Issues 1(a-e), Relating to Design Review Board.

4.1 Escala raises a new issue in closing briefing, which followed the hearing. It was not raised in the appeal or before the hearing. This is whether SEPA was violated because the Design Review Board ("DRB") did not issue a recommendation after Lighting Addendum issuance. The SMC and Hearing Examiner Rules do require timely appeal filing, which includes timely submission of issues.[36] In addition, the Examiner rejected the issue in earlier litigation, because the DRB issues a recommendation, with the Director issuing the final decision.

4.2 In the order addressing jurisdiction, the Examiner held that the issues raised were only those in 1(a-e), and that even these issues must be tied directly to the new MUP decision, and not be used to re-litigate the first appeal. "Escala cannot use the appeal to re-litigate 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."[37] The DRB question was not raised here, and was previously litigated. The Examiner cannot address this issue.

5. Element of the Environment, Increase in Shading as a Health Impact. The Applicant claims that health impact from shading is not a SEPA element of the environment which must be addressed in environmental review. This issue was decided in the earlier appeal, so the Examiner does not re-address it in this decision. The Examiner assumes, without independently deciding, that the remand issue is properly encompassed with SEPA's environmental elements.

[36] HER 3.01(b) and (d).
[37] Order on Jurisdiction and Motion to Dismiss (July 13, 2020), p. 2.

6. Department Analysis. There is no scientific consensus as to a specific threshold for how much light is needed for human health. Under SEPA, where there are "gaps in information or scientific uncertainty concerning significant impacts, agencies shall make clear that such information is lacking or that substantial uncertainty exists."[38] The Department made this disclosure. "The studies note that 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."[39] 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."[40] The Department weighed the need for the action with the severity of possible adverse impacts, and prepared a worst case analysis.[41] The Department's line of analysis was:

- 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 asssessed units most impacted by light loss;
- It considered the information provided by the Appellant's experts and requested Applicant to respond to key issues raised in public comments;
- After reviewing studies from 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, this information does not demonstrate that the analysis the applicant used is faulty or that proposed development will have a probable significant impact to human health;
- 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."[42]

The Department 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

[38] SMC 25.05.080(B).
[39] Exhibit 1, p. 39.
[40] SMC 25.05.080(C).
[41] SMC 25.05.080(C).
[42] Exhibit 1, pp. 38-42.

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 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.[43]

7. The Department provided a reasoned analysis. There are differences in expert opinion in some respects, though certainly not in all. The Department weighed these views, and provided a reasoned and thoughtful analysis. Reasonable individuals do differ on the approach which should be taken, and Escala residents have legitimate concerns. However, Examiner appellate purview is limited to whether under SEPA, Escala met its burden to prove the Project's health impacts from shading are of probable significance. Whether viewed under the rule of reason, or clear error, this burden was not met. The Department's analysis complied with SEPA. As SEPA's requirements were met, the Revised MUP Decision, with its updated SEPA analysis, should be upheld.

DECISION

The Department's MUP Decision is upheld, and the appeal is dismissed. Absent a timely appeal, this decision is final.[44]

Entered November 3, 2020.

Susan Drummond
Hearing Examiner Pro Tempore

[43] Exhibit 1, p. 42.
[44] Ch. 36.70C RCW (21-day appeal period to superior court); SMC 23.76.022(12).

Attachment 1
Appeal Issues

1. The revised MUP decision was issued in violation of the State Environmental Policy Act (SEPA), ch. 43.21A, and state and local regulations implementing that law. SEPA requires preparation of an environmental impact statement for project's that – like this one – will have significant adverse environmental impacts. The City issued the revised MUP decision without first completing an EIS that analyzed the project's environmental health impacts. The revised MUP cannot stand in the absence of the required EIS.

a. The City is relying on an EIS prepared fifteen years ago -- before this project was proposed and before the Escala existed – as providing the required analysis of this proposal's impacts on Escala's residents. The City's reliance on that EIS is bizarre and, in the words of more conventional legal standards, arbitrary and capricious.

b. The City also relies on two addenda it has published. But addenda are no substitute for an EIS. SEPA's obligation to prepare an EIS is not excused by issuing an addendum.

c. The addenda that were not the functional or substantive substitute for an EIS. The procedures for preparing an addendum are different from those for preparing an EIS. The content is different, too. The addenda are not adequate substitutes for the required EIS.

d. The addenda's analyses of the health impacts are misleading and incomplete. Among other things, the addenda ignore the connection between a loss of light and depression; they seek to minimize impacts by focusing on light conditions when a resident is facing the window, instead of facing the middle of the room; they minimize impacts by suggesting actions the residents could or should take to mitigate the impacts (SEPA's mitigation obligations fall on the applicant, not the neighbors); the mitigation measures suggested for the residents are not reasonable; and the addenda trivialize the impacts by suggesting that the lack of impact on other downtown residents somehow makes the impact to Escala's residents less significant.

e. The addendum's statement that the substantive SEPA policies in SMC 25.05.675 limit the scope of procedural disclosure and analysis of environmental impacts is incorrect. The scope of procedural disclosure and analysis of impacts that is required under SEPA is broader than and goes beyond substantive limitations in SMC 25.05.675.

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Decision** to each person listed below, or on the attached mailing list, in the matters of **ESCALA OWNERS ASSOCIATION**, Hearing Examiner Files: **MUP-20-012 (W)** in the manner indicated.

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Dated: November 5, 2020

/s/ Galen Edlund-Cho
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Legal Assistant