BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In the Matter of the Appeal of FISCHER STUDIO BUILDING CONDOMINIUM OWNERS ASSOCIATION from a decision issued by the Director, Seattle Department of Construction and Inspections	Hearing Examiner File: MUP-21-004 (DR, W) Department Reference: 3018037-LU CITY AND APPLICANT'S JOINT RESPONSE TO APPELLANT'S CLOSING BRIEF

I. INTRODUCTION

Appellant Fischer Studio Building Condominium Owners Association ("Appellant") filed a brief ("Appellant Brief" or "Appellant Br.") that fails to demonstrate any error, let alone clear error, by Respondent City of Seattle ("City"). The mixed-use downtown development ("Project") proposed by Respondent Jodi Patterson-O'Hare, acting as agent for 1516 2nd Condominiums, LLC ("Applicant"), was subject to a serious and thorough review that fully satisfied the requirements of the State Environmental Policy Act ("SEPA") and the Seattle Municipal Code ("SMC" or "Code") as described in the City's and Applicant's Joint Post-

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Hearing Brief ("Respondent Brief"). Appellant has not provided any evidence establishing that the Project as conditioned will create probable significant adverse environmental impacts or will be inconsistent with the Seattle Downtown Design Guidelines ("Downtown Guidelines").

In lieu of satisfying its burden of proof, Appellant accuses the Applicant of "literally steal[ing] the sky" and laments that if the City "does not need to consider [loss of light and human health] under SEPA, then there would be no limit to the amount of natural daylight developers could take away." Appellant Br. at 19, 24, 34. These statements embody the fallacies at the heart of this appeal. A building is not "stealing" when it develops to the height and density – on its own property – expressly allowed by City zoning. The Fischer Studio Building residents will continue to access natural light, even if less of it passes through the west-facing windows for a subset of 10 of its condos. Similarly, Appellant's plea for a "limit" on development improperly seeks to use SEPA to "dictate a particular substantive result," which conflicts with the direction of the statute. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 95, 392 P.3d 1025, 1032 (2017) (quotations omitted). Neither SEPA nor the City's design review process prohibits all impacts to the Fischer Studio Building or supports the notion of a "limit" on development that conflicts with the zoning adopted by the City Council.

II. ARGUMENT

A. Appellant cannot reassert abandoned or dismissed claims.

As explained at pages 39-40 of Respondents' Brief, Appellant abandoned its claims regarding historic resources, wind, conservation, renewable resources, and loss of housing by failing to present evidence in support of these claims. The Examiner should disregard the statements in Appellant's Brief that attempt to revive these issues, such as the allusions to

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historic resources and loss of housing at pages 2-3 and 54.[1] Similarly, Appellant devotes substantial space to arguing that its efforts to persuade the Downtown Design Review Board ("Board") to reach a different result regarding the Project were "ignored." Appellant Br. at 7-12. Appellant's claim that "the Design Review process did not allow for meaningful public participation and ignored significant issues," however, has been dismissed. Order on Motion to Dismiss, p. 4. Indeed, Appellant did not dispute that dismissal was required. *Id.* The Examiner should disregard these statements as well.

B. The City Demonstrated Prima Facie Compliance With SEPA.

Appellant fails to demonstrate any failure by the City to demonstrate *prima facie* compliance with the procedural requirements of SEPA. Appellant's generalized and speculative concerns regarding loss of light and human health did not obligate the City to do anything more than it did: accept and consider Appellant's comments and conclude that they did not require further analysis. There was no error.

1. Prima Facie Compliance.

Appellant attempts to stretch the concept of *prima facie* compliance with SEPA beyond what is supported by legal authority. Caselaw establishes that an agency may fail to demonstrate *prima facie* compliance with SEPA when it has failed to engage seriously in the SEPA process or has entirely ignored a relevant impact. *See, e.g.*, *Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54, 61 (1978) (failure of *prima facie* compliance when court "cannot tell whether the environmental significance of the Plan was even considered by the commissioners"); *Boehm v. City of Vancouver*, 111 Wn. App. 711, 721, 47 P.3d 137, 143 (2002) (City demonstrated *prima*

[1] Even if these claims were considered, they would fail because Appellant contradicts its own theory that the Fischer Studio Building will "fail to attract" future residents, asserting that the "owners of one west-facing unit" have "already *sold* their unit." Appellant Br. at 3 (emphasis added).

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facie compliance because it "thoroughly considered appropriate environmental factors"). In *Seattle Mobility Coalition*, HE File No. W-18-013, Amended Findings and Decision at 10 (Oct. 24, 2019), the Examiner found that an agency had failed to demonstrate *prima facie* compliance with SEPA because it had not responded to an entire section of the SEPA checklist – despite indicating that the checklist was the only basis for its threshold determination.

Appellant's framing of *prima facie* procedural requirements is inconsistent with this authority. Appellant suggests that the City failed to demonstrate *prima facie* compliance with the procedural requirements of SEPA when it "did not perform any further investigation after receiving Mr. Clark's comments raising concerns about human health impacts." Appellant Br., pp. 17-18. But Appellant fails to support its assertion that an agency is required to "perform" an "investigation" any time a comment raises "concerns," which would create an unworkable standard for environmental review. Instead, an agency is permitted to rely on its own discretion and expertise in determining whether the substance of a comment justifies further study. *See Boehm*, 111 Wn. App. at 720 (no failure of *prima facie* compliance when complained-of impacts "are merely 'speculative' and therefore, need not be considered"); *Seattle Mobility Coalition*, *supra*, at 6-7.

Similarly, Appellant suggests that an agency fails to demonstrate *prima facie* compliance if it does not "articulate a standard or threshold for determining [whether] impacts are significant." Appellant Br. at 22. This unsupported assertion conflicts with SEPA's regulations. Nothing in the procedures governing the content of environmental review or threshold determination process requires an agency to determine a "standard" in the manner Appellant suggests. *See* WAC 197-11-060, 197-11-330. Appellant's interpretation also conflicts with the definition of "significance," which "involves context and intensity and does not lend itself to a

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formula or quantifiable test." WAC 197-11-794(2). The City's consideration of the Project was not deficient because Seattle Department of Construction and Inspections ("SDCI") staff declined to take on a legislative role.

2. Loss of Light and Human Health

Appellant fails to establish a lack of *prima facie* SEPA compliance by the City regarding the issue of loss of light and human health.

First, Appellant cannot establish that any such consideration was required. *See* Respondent Br. at 16-17. Appellant asserts at page 18 of its Brief that the absence of specific questions on the environmental checklist was the "core basis" for Respondents' request for dismissal of the "loss of light and human health" SEPA claim, but this is incorrect. The checklist's *inclusion* of "light" and "environmental health" questions and corresponding *lack* of "light and human health" questions represents just one (of many) textual indications that this consideration is not mandatory. *See* Respondents' Joint Motion for Partial Dismissal and/or Partial Summary Judgment at 8-16; Respondents' Joint Reply in Support of Motion at 2-13. The Department of Ecology email cited at page 19 of Appellant's Brief does not indicate otherwise by suggesting a means by which the "loss of light" issue "could" be addressed. Contrary to Appellant's suggestion, the email says nothing about health impacts and establishes no requirement of any kind. Nor has Appellant provided any support for the assertion that any allegation of a health impact requires consideration as a "public health" issue. *See* Appellant Br. at 19.

Even if "loss of light and human health" *could* appropriately be considered under SEPA in some cases, that does not establish that such consideration was *required* here. Appellant provides no support for the suggestion that any time a public comment references an issue, the

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City is obligated to perform a "further investigation" of that issue in order to achieve procedural compliance with SEPA. *See* Appellant Br., p. 17. To the contrary, "SEPA review is not required for speculative worst-case scenarios." *Seattle Mobility Coalition,* HE File No. W-18-013, Amended Findings and Decision at 7 (Oct. 24, 2019); *accord, Boehm*, 111 Wn. App. at 720.

Here, Appellant fails to establish that Senior Land Use Planner Crystal Torres improperly responded to the comments submitted prior to the threshold determination. Appellant Br. at 17-18. As explained at pages 17-23 of Respondents' Brief, Ms. Torres made no error. Contrary to Appellant's suggestion, Ms. Torres did not ignore this issue; instead, she determined the alleged impacts "would not be significant" in the Project's downtown context and that Appellant's comments did not rise "to the level" of requiring further analysis. *Torres Testimony,* Day 4 Audio, Part 52. In *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 929, 319 P.3d 23, 28 (2014), the Court noted that there could be a failure of *prima facie* SEPA compliance if an agency had "entirely ignored" an impact. However, because the record demonstrated that the agency had given the appellants the "opportunity to present, project-specific scientific information" by accepting and considering comments ("a step not even required by statute"), there was no failure. *Id.* The same opportunity for comment and consideration of submitted comments was provided in this case and SCDI satisfied its *prima facie* SEPA obligation.

In addition, Ms. Torres's determination was an appropriate response to the one comment submitted by Mr. Clark ("Clark Comment"), which made no specific assertions of probable significant human health impacts. *See* Respondent Br. at 19-23**.** Indeed, Appellant implicitly concedes this through its assertion that Mr. Clark "indicat[ed] that the loss of light would be severe and likely result in human health impacts," Appellant Br. at 17, with no statement that those impacts to human health will be significant. Nor was Ms. Torres required to conduct an

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investigation regarding the speculative and attenuated suggestion that a reduction in natural light entering the Fischer Studio Building's west-facing windows would leave a subset of its residents in total darkness. *See* Respondent Br. at 22-23; *Seattle Mobility Coalition, supra,* at 7.

The *Escala Owners Association* appeal is cited in Appellant's Brief but does not support its arguments. *See* Appellant Br. at 19-20. In that case, the Examiner noted that the applicant's expert witness had acknowledged the potential for "negative health impacts." *Escala*, HE File No. MUP-17-035, Amended Findings and Decision at 19 (June 12, 2018). In this appeal, by contrast, there was no such acknowledgment; instead, as discussed below, Dr. Stephen Lockley testified that there is no likelihood of significant adverse human health impacts due to a reduction in natural light and that Appellant's assertions did not establish otherwise.

3. Loss of Light.

Appellant asserts that the City's alleged failure of *prima facie* SEPA compliance extended to the issue of "loss of light" apart from health impacts. Appellant's Notice of Appeal did not include this claim, and the Examiner should not permit Appellant to assert it at this late date. *See* Respondent Br. at 33.

Even if Appellant had raised this claim, it would fail. As Appellant itself states, the checklist prepared for the Project "addressed loss of light impacts." Appellant Br. at 19; *see* Ex. 68 at 27.[2] The City also considered the "loss of light" issue through the shadow studies incorporated by the design review process, *e.g.* Ex. 6 at 43-45; Ex. 20 at 5, and through its

[2] In response to Question 13.d, under the element of "Historic and cultural preservation," which requests "proposed measures to avoid, minimize, or compensate for loss, changes to, and disturbance to resources," the Checklist states: "Tower siting to minimize reduction in solar exposure, with a composition of minimized residential tower floor plates in the lower stories of the development, creating a large break in the massing mid-block, allowing light and air to the east and territorial outlook from the west. Increased plan/massing setbacks along alley at mid-block also provided." Ex. 68 at 27. A notation added by Ms. Torres states: "No SEPA mitigation is warranted per Overview Policies," providing further confirmation of the City's consideration of this issue. *Id*

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determination that City-adopted zoning standards and substantive SEPA policies provide sufficient mitigation for this issue. Ex. 21 at 25; *see* SMC 25.05.675.Q.1.d. This demonstrates that the issue was not "ignored" by the City and thus that there was no failure of *prima facie* compliance. Appellant fails to support its suggestion that the City was required to ignore its policies and analyze the "loss of light" to the satisfaction of Fischer Studio Building residents. The City's choice of an alternative approach was not a failure of *prima facie* compliance.

4. Light and Glare

Appellant next argues that the City failed to demonstrate *prima facie* compliance with SEPA regarding light and glare impacts. Appellant Br. at 20-23. Appellant does not contest that the City's Decision includes a condition requiring the Applicant, prior to issuance of a construction permit, to "[p]rovide additional information in order to ensure lighting at both the double-height lobby and the exterior void would not create glare or spill toward the alley." *See* Ex. 21 at 26. This condition evinces serious consideration of potential glare impacts and demonstrates *prima facie* compliance by the City.

Nonetheless, Appellant suggests that SEPA required the City to set a specific standard regarding how much glare would be acceptable. Appellant Br. at 21-22. Appellant cites no authority for this invented requirement; indeed, as Appellant acknowledges, the only regulation cited for this argument affirms the authority of an agency to note a potential impact during SEPA review and reserve more specific review until later. *See id.* (citing WAC 197-11-158). Even if SMC 25.05.675.K.2.b required the City to "assess" light and glare impacts "and the need for mitigation," as Appellant claims, *see* Appellant Br. at 22 n.40, that is exactly what the City did. Appellant notably fails to allege that Applicant will be unable to fulfill the condition or that the

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language in the condition and in SMC 25.05.675.K.2.d provide insufficient guidance for further review.[3]

Second, Appellant argues that because the condition as recommended by the Board would require "additional information at MUP review," *see* Ex. 20 at 23, the Decision "violated the City's design review regulations" by requiring information "prior to issuance of a construction permit" instead of during "MUP review." Appellant Br. at 22-23.[4] This argument is based on the assertion that SMC 23.41.008.F.3 compelled SDCI to adopt the "MUP review" language from the Board's recommendation as a literal requirement. *See id.* In other words, Appellant "questions compliance" with design review procedure. *See Escala*, *supra*, at 20. Its argument, therefore, must fail, because "procedural requirements under Chapter [23.41] are not within the Hearing Examiner's jurisdiction." *Escala*, *supra*, at 20. Even if this were not the case, Appellant's claim would not succeed. The condition imposed in the Decision ensures that the Board's request for lighting design that minimizes glare impacts will be fulfilled before the Project is completed. It was not clear error for the City to document the requirement in this manner.

C. Appellant Did Not Demonstrate Probable, Significant Adverse Impacts.

Appellant cannot demonstrate probable, significant adverse environmental impacts any more than it can demonstrate a failure of *prima facie* SEPA compliance. Appellant's arguments improperly seek to flip the burden of proof, raising a host of generalized assertions and insisting

[3] *See* Ex. 21 at 26 ("ensure lighting at both the double-height lobby and the exterior void would not create glare or spill toward the alley"); SMC 25.05.675.K.2.d ("Mitigating measures may include, but are not limited to: (1) Limiting the reflective qualities of surface materials that can be used in the development; (2) Limiting the area and intensity of illumination; (3) Limiting the location or angle of illumination; (4) Limiting the hours of illumination; and (5) Providing landscaping.").

[4] Appellant includes this argument in the section of its Brief that concerns *prima facie* SEPA compliance. *See* Appellant Br. at 22. These assertions are not linked to Appellant's SEPA claims and provide no support for them.

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that the City prove a negative. This fails to demonstrate clear error. The burden of proof in a SEPA appeal "is not met when an appellant only argues that they have a concern about a potential impact, and an opinion that more study is necessary," or when an appellant has "failed to identify what the significance" of claimed impacts would be. *Save Madison Valley*, HE File No. MUP-20-023, Amended Findings and Decision at 11-12 (June 18, 2021). No evidence presented during the hearing or cited in Appellant's Brief meets this standard, and Appellant fails to demonstrate clear error in the City's determination.

1. Loss of Light and Human Health

Nothing in Appellant's presentation at hearing established that the Project will result in probable, significant adverse impacts on human health due to loss of natural light. The discussion of this issue in Appellant's Brief conflates two largely undisputed propositions: improper circadian alignment – particularly in the shift work context – has been linked to adverse health impacts, and exposure to natural light can have beneficial effects. Even assuming both of these propositions are true, Appellant did not establish that circadian misalignment is a *probable* outcome here, let alone that secondary human health effects are either probable or significant. Nor has Appellant established that a diminution in a subset of Fischer Studio Building residents' ability to obtain the *benefits* of natural light from their western windows (even if such a diminution were to occur) would result in *probable*, *significant*, *adverse* health impacts.

First**,** Appellant fails to establish that Fischer Studio Building residents would experience a "probable" or "significant" effect on their ability to maintain circadian alignment. It is undisputed that human beings rely on light exposure in order to "entrain," *i.e.* to align their internal circadian rhythms of sleep and wakefulness with the world's 24-hour cycle, and health

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consequences can result from improper alignment. Ex. 36 at 5; Ex. 58 at 9-10. Relying on Dr. de la Iglesia's testimony, Appellant asserts that Fischer Studio Building residents will lose access to the natural light/dark cycle and experience a condition of circadian misalignment that is "associated with" and "has been linked to" various health issues. Appellant Br. at 27. Appellant's claim fails on the basis of its vagueness alone. *See* Respondent Br. at 29-30. Generalized assertions by Dr. de la Iglesia, such as the statement that the Project "will likely lead to adverse physical and mental health outcomes" that "could include" a range of outcomes, does not satisfy Appellant's burden of proof. *See* Ex. 36 at 9-10; *see Seattle Mobility Coalition*, *supra*, at 7 (expert's "conclusory statement" that was "not accompanied by analysis that quantified or measured impacts" fails to meet appellant's burden of proof).

In addition to their lack of specificity, Appellant's contentions are simply unconvincing. Dr. de la Iglesia agreed with Dr. Lockley that entrainment can be achieved through the use of electric light alone, though he suggested that electric light is not as "reliable" as natural daylight and is "not necessarily sufficient" to ensure "good" alignment. Ex. 36 at 5; *Iglesia Testimony*, Day 2 Zoom Recording, 2:05:30. These statements do not support Appellant's apparent assumption that Fischer Studio Building residents depend entirely on their west-facing windows for all light. *See* Appellant Br. at 27. Appellant attempts to create the impression that a reduction in natural light from the west will leave the Fischer Studio Building in total darkness, but the evidence confirms that residents have other windows, use electric light, and go outside. *See* Respondent Br. at 25-26. Dr. de la Iglesia stated that light entering a unit's kitchen window was "irrelevant" unless the resident was planning to "spend all day in the kitchen," but this only confirms the incorrectness of Appellant's assumption that residents *currently* spend all day in front of their western windows. *See Iglesia Testimony*, Day 2 Zoom Recording, 1:48:30.

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Likewise, Dr. de la Iglesia's assertion that Fischer Studio Building residents will be unable to avoid nighttime exposure to artificial light from the Project is contradicted by the assertion in the very same paragraph that residents will "keep their window shades down" during the day. Ex. 36 at 8.

One need not question Dr. de la Iglesia's understanding of human biology to recognize that the factual scenario he posits is unrealistic. Even if a hypothetical person whose only access to light was through a western window in the Fischer Studio Building might experience some circadian misalignment as a result, Appellant provided no evidence whatsoever indicating that this is the scenario faced by current residents. Instead, as Dr. Lockley explained, Appellant's claim depends on a "very large leap in logic" that conflates a new building's shadow with the "health problems associated with working night shifts over many decades." Ex. 58 at 22-23.

Mr. Clark's testimony regarding human health impacts was equally unpersuasive – both because of his lack of qualifications, *see* Respondent Br. at 26, and because he assumed the same unrealistic facts as Dr. de la Iglesia. Mr. Clark's "Circadian Stimulus" ("CS") analysis predicted a decrease in the number of hours during which the level of natural light reaching a person standing static in one place four feet from a west-facing Fischer Studio Building window from sunrise to 1 p.m. would exceed a CS-designated threshold. *Clark Testimony,* Day 2 Audio, Part 1, 00:55. Appellant cannot establish (and does not even argue) that this CS-threshold constitutes evidence of health impacts of any kind, let alone "probable" or "significant" impacts. Mr. Clark did not dispute Dr. Lockley's testimony that entrainment may be achieved at low light levels and from a variety of light sources, and he failed to explain how his model – which assumes a total lack of exposure to light from artificial sources, other windows, or the outdoors – could be seen as predictive of real-world impacts on human health in any way. It cannot. Mr. Clark's

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assumptions, like Dr. de la Iglesia's, were directly contradicted by the testimony of Fischer Studio Building residents. Respondent Br. at 25-26.

Next, rather than disputing Dr. Lockley's arguments on the merits, Appellant attempts to attack his credibility by citing an op-ed he authored describing the health benefits of daylight exposure. Appellant Br. at 29-33. This neither undermines Dr. Lockley's credibility nor supports Appellant's claim.[5] It is undisputed that daylight can have health benefits, and Dr. Lockley never suggested otherwise. But the advice to see increased access to daylight as a "simple step to better health," *see* Appellant Br. at 33, does not mean that the converse is true – either as a general matter or, especially, under the specific circumstances of this case. The article does not constitute affirmative evidence linking Appellant's broad assertions to probable, significant impacts *from* this Project *to* the Fischer Studio Building.

Appellant also misconstrues many of Dr. Lockley's statements. First, Dr. Lockley did not "paint a straw man" regarding Dr. de la Iglesia's position on entrainment. *See* Appellant Br. at 34. Instead, Dr. Lockley explained that the Project will not prevent a subset of Fischer Studio Building residents from achieving entrainment sufficient to avoid significant health impacts. Ex. 58 at 19-26. Dr. de la Iglesia expressed a generalized concern that artificial light may not be as reliable a method to achieve entrainment, but (as with all of his statements) failed to explain why this would supposedly lead to a probable, significant adverse impact in this case. Ex. 36 at 5; *Iglesia Testimony*, Day 2 Zoom Recording, 2:05:30.

Second, Dr. Lockley explained that the CS metric is not reliable because "no scientific conclusions can be reached about the health impacts of light using this model." Ex. 58 at 16.

[5] Appellant's suggestion that Dr. Lockley is simply lying is unpersuasive on its face. Dr. Lockley's undisputed credentials and his lengthy and detailed testimony belie any such insinuation.

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Appellant's response – that its claims did not depend on that model because impacts will be "dramatic" – only highlights the vague nature of its claims. Appellant Br. at 35.

Third, Dr. Lockley noted that the use of artificial light in the evening is "a larger concern" for health than delayed access to bright light during the day. Appellant responds that it is "impossible" for its residents to use less artificial light in the evening. Appellant Br. at 35. Even if this were true, it would not support Appellant's apparent assertion that the Project's impacts must be considered significant in compensation for computer and cell phone use by these residents.

Finally, Appellant argues that Dr. Lockley is not credible because he did not predict specific health outcomes for two Fischer Studio Building residents. This once again represents an improper attempt to shift the burden of proof from Appellant to Respondents, who are not required to prove "definitively" that "there will be *no* adverse health consequences" in order to defeat Appellant's claim. *See* Appellant Br. at 36. In addition, Dr. Lockley's refusal to comment on the health of individuals he had not examined in no way invalidates his conclusions. Dr. Lockley, again, did not contest that a severe reduction in light exposure can have health consequences, but his report explains that there is "no scientific basis for a reduction in *natural* light," rather than artificial light, "causing adverse effects on human health," as well as no basis for the assertion that construction of the Project will result in the type of severe light loss for which health consequences have been studied. Ex. 58 at 26 (emphasis added). Appellant did not rebut these statement during the hearing and has not done so in its Brief. Nor has Appellant pointed to any other specific, affirmative evidence of probable, significant health impacts resulting from loss of light. Appellant has failed to meet its burden of proof, and its claim fails.

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2. Loss of Light

Appellant attempts to employ an incorrect legal standard to establish that loss of light impacts unrelated to health will be significant. First, Appellant incorrectly suggests that because an online dictionary defines "moderate" as "average," an "EIS is required whenever impacts may be more than average." Appellant Br. at 15. Appellant then twists this language further, asserting that an EIS is required for *any* impact that is not "typical, frequent, or common." Appellant Br. at 25-26. These statements are incorrect. Appellant's line-drawing attempt conflicts with SEPA's definition of "significance" as a concept that "does not lend itself to a formula or quantifiable test." WAC 197-11-794(2). In addition, Appellant's assertion that *any* "uncommon" or "infrequent" impact is, by definition, "more than a moderate adverse impact on environmental quality" is self-evidently unworkable. *See id.*

Appellant has not provided evidence that a reduction of natural light will cause significant impacts of any kind. Mr. Clark asserted that Fischer Studio Building residents would experience a decrease in the number of hours during which their units would achieve the "50 lux" and "200 lux" metrics from natural daylight alone. *See* Ex. 26 at 9-10. As a result, he suggested, residents would need electric light to read unless sitting by the window and that their ability to "experience the warmth of the sun" would be reduced. *See* Appellant Br. at 25.[6] This

[6] Mr. Clark did *not*, as Appellant suggests, state that "50 lux is the amount of light a person would need to move around their house without bumping into things." Appellant Br., p. 24, *see also id.*, pp. 9, 25. Instead, when asked by counsel to describe 50 lux "in human terms," Mr. Clark said: "It would be when you walk into a movie theater before the movie starts. It's not super dim, but it's a little bit dimmer than it was in the lobby. It's what you would experience, it's what's recommended in fine dining. It's bright enough for mobility, it's bright enough to maybe read a menu, but it's not something that's going to be useful for visual acuity. It's just kind of a general recommended lighting for a home environment, essentially." *Clark Testimony*, Day 1 Zoom Recording, 5:34:45. Nothing in this testimony or the other exhibits cited by Appellant indicates that walking through an apartment is a task requiring "visual acuity" or otherwise supports the assertion that Fischer Studio Building residents will "need electric lights simply to move about their homes." Appellant Br., p. 25; *see* Ex. 26, pp. 6-7, 25-33; Ex. 32, pp. 18-26.

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does not establish a significant adverse impact. Again, the recitation of possible impacts is insufficient to meet Appellant's burden of proof. *See Save Madison Valley*, *supra*, at 12; *Seattle Mobility Coalition*, *supra*, at 7. Moreover, as Professor Lockley noted, however, a "photon is a photon" for purposes of stimulating the visual systems: the body does not distinguish between electric and natural light sources. Mr. Clark's study omitted any evaluation of the baseline electric light sources used in the Fischer Studio Building despite the testimony of Fischer Studio Building residents that they do use electric light sources in their units. *Ringen Testimony; see* Respondent Br. at 25-26. Mr. Clark's study proves nothing about the reduction of light where it omits such evaluation. Appellant's claim around the "loss of light" untethered from the alleged human health impacts does not come close to meeting its burden under SEPA and should be rejected.

3. Geotechnical Considerations

Appellant's claims regarding the alleged "risk of physical damage to the Fischer Studio Building" fail for the same reasons discussed above. Nowhere in the eight pages of the Appellant's Brief discussing this issue does Appellant actually state that the Project will have probable, significant adverse impacts to earth or to any other element of the environment. *See* Appellant Br. at 47-54. Instead, Appellant repeatedly expresses the "serious *concern*" that there is a "significant *risk* of physical damage" and insists that the City's threshold determination "should be reversed and remanded for further *evaluation* of these issues." *Id.* (emphasis added). As with Appellant's other claims, Appellant's "concern about a potential impact, and an opinion that more study is necessary" is insufficient to meet its burden of proof. *Save Madison Valley*, *supra*, at 11.

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Appellant provided no evidence going beyond this assertion. Appellant's expert witness, Darren Johnston, asserted only that there will be a risk, rather than a likelihood, of damage from the Project.[7] Although Appellant's Brief includes the statement that there is "likely to be significant damage" to the Fischer Studio Building, *see* Appellant Br. at 54, this is not actually an assertion that such damage is a probable impact of the Project. Instead, when read in context, along with Appellant's statement that "there is a *significant risk* of ground movement," this can only be interpreted as an assertion that significant damage to the Fischer Studio Building is likely *if that ground movement were to occur*. *See id.* (emphasis added). Nothing in Appellant's presentation or Brief suggested that damage is *probable*, only that it is possible. Again, this alone is a sufficient reason to deny this claim.

In fact, the evidence in the record demonstrates that the earth movement under the Fischer Studio Building alleged by Mr. Johnston – who is not a geotechnical engineer and performed no independent analysis of earth movement – will not occur. Matt Smith, a geotechnical engineer with more than 25 years of experience, explained that the City requires development projects using temporary excavation support systems to limit deflection (*i.e.* lateral deformation of soil) to 1 inch or less, but that the Project will exceed this standard by limiting deformation to 0.5 inches. *Smith Testimony*. A robust monitoring system will ensure that deflection is limited as planned and that construction activity will stop if there is a threat of exceedance. *Smith Testimony*.

[7] Appellant inaccurately reports that Mr. Johnston stated the Fischer Studio Building's floors are "double-cantilevered" and depend on unconnected beams. Appellant Br. at 51-52. While Mr. Johnston stated that this was possible, he did not claim that the beams *are* unconnected and admitted that whether and how they are connected is "unknown." *Johnston Testimony*, Hearing on Rebuttal, 3:30.

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Mr. Johnston's asserted that lateral movement adjacent to the shoring wall, which will be 16 feet away from the Fischer Studio Building, could be between 0.85 and 1.71 inches. Appellant Br. at 50. As both Mr. Smith and Mr. McIntosh explained, however, the amount of lateral movement will decrease with distance from the shoring wall. *Smith Testimony*, Day 4, Part 29, 00:30; *McIntosh Testimony,* Day 4, Part 42, 02:30. As a result, even if deflection at the level Appellant suggests could occur next to the shoring wall, any resulting movement at the Fischer Studio Building would be much less – indeed, Mr. McIntosh stated that he expected no soil movement under the Fischer Studio Building. *Id.* Appellant's suggestion that movement at the shoring wall "necessarily" means a similar amount of movement at the Fischer Studio Building is based on a faulty premise and contradicted by the record.

Appellant again attempts to compensate for its failure to meet its burden by improperly shifting that burden to Respondents. Appellant criticizes Respondents' witnesses for their supposed failure to prove that any and all risk would disappear. Appellant Br. at 53-54. But the burden is not on Respondents to make that showing; instead, Appellant is obligated to provide evidence that significant adverse impacts are probable, which it has failed to do. For example, Appellant makes much of statements indicating that settlement by up to half an inch is "possible" and "within the upper bounds" of a potential range, but these statements only confirm that Appellant's claimed impacts are "possible" rather than "likely." *See* Appellant Br. at 53-54. Further, Appellant's claims are based on ignoring key testimony by the *only* geotechnical engineers to provide evidence – Mr. Smith and Mr. McIntosh – that earth movement would be limited to .5 inch at the shoring wall and would reduce with distance so that *no* earth movement would occur under the Fisher Studio Building. *Smith Testimony*, Day 4, Part 29, 00:30;

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McIntosh Testimony, Day 4, Part 42, 02:30. Appellant has the burden of proof and did not meet it.

Finally, the Examiner should disregard the Appellant's unsupported assertion that construction issues implicate the "physical integrity of the Fischer Studio Building . . . as an important historic landmark." Appellant Br., p. 54. Having failed to substantiate its historic resources claims with expert testimony during the hearing, Appellant cannot now assert them in its Brief.

D. Appellant fails to show error in the City's design review decision.

1. Privacy and Light

Appellant fails to establish that consideration of "privacy," as well as consideration of "light" in the sense raised by its claims, are required by the design review process. For the reasons stated in Respondents' Joint Motion for Partial Dismissal, "privacy" is not a consideration required by the Downtown Guidelines. Appellant's unsupported assertions that privacy "would fit" under broad language in Chapter 23.41 (such as "promotion of public health and welfare" and "desirable urban feature") do not establish otherwise. *See* Appellant Br. at 42-43; *see also Nagele Testimony*, Day 3, Part 2, 1:13:00 (Board has not previously required a privacy study to her knowledge). The design review guidelines are not prescriptive even with regard to the issues that are specifically named, let alone those are not. Ex. 23 at 7 ("Design guidelines offer a flexible tool – an alternative to prescriptive zoning requirements . . . ."). Nonetheless, even if this consideration were required, the record establishes the well-considered and correct nature of the Board's approval of the Project. Respondent Br. at 45-48. The contrary opinion of Appellant's expert witness does not establish error by the City. *See id.*

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Contrary to Appellant's assertion, Respondents have not disputed that consideration of light can be "relevant" to the design review process. *See* Appellant Br. at 42-43. But as noted at page 44 of Respondents' Brief, the reference to "direct sunlight" in Downtown Guideline A1 concerns the amount of light reaching the project under consideration. Appellant cites no language from the guidelines requiring what it apparently seeks: the equivalent of a SEPA impacts analysis regarding light and adjacent residences. There is no such requirement. *See Torres Testimony*, Day 4, Part 48.

2. The City consistently applied the guidelines.

Section D.1 of Appellant's Brief asserts that the City's design review decision should be reversed because of the Board's alleged failure to examine light and privacy impacts with the same degree of "scrutiny" it applied to the 2015 Proposal. Appellant Br. at 38. This claim fails because it was entirely appropriate for the Board to consider two entirely different projects in a different manner. *See* Respondent Br. at 54-57. The Board's review of the 2015 Proposal examined an office building with entirely different massing and design, not a high-rise residential tower. Nor did the Board's request for additional alternative options mandate any specific consideration or design element. *See* Ex. 11 at 4. Indeed, the Board does not have the authority to do this – it can only apply the Guidelines, which expressly encourage flexibility. Ex. 23 at 7. Appellant's claim is essentially that once the Board has asked a development applicant to examine a particular issue, *any future proposal* for that site, regardless of use, must utilize the massing approach suggested by the Board's request. This is self-evidently absurd. The Board did not need to require the Project to utilize the same design as the 2015 Proposal in order to apply the Guidelines consistently.

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Nothing in Appellant's Brief counters these points or otherwise establishes that the City inconsistently applied the Downtown Guidelines. Section D.1 does not state that any guideline was inconsistently applied – indeed, it does not even reference any guideline. Appellant Br. at 38. Instead, Appellant argues that the Board did not require the same type of "analysis" for the Project as for the 2015 proposal; there was "no effort to ensure consistency"; and this alleged error was magnified because a Board member participated in both decisions. Appellant Br. at 39. Each of these assertions challenges the procedures employed by the Board in reaching its conclusions about the Project's consistency with the applicable guidelines. The Examiner lacks jurisdiction over the procedural requirements of SMC Chapter 23.41 and cannot consider these claims. *Escala*, *supra*, Amended Findings and Decision at 20.

Neither of the Code provisions that Appellant cites at page 38 of its Brief provides a basis for its claim. First, SMC 23.41.008.A.5 states that the Board "shall perform the following, as applicable: . . . Ensure fair and consistent application of Citywide or neighborhood-specific design guidelines." This provision applies to the review process utilized by the Board and does not directly concern a proposal's consistency with the design guidelines. Appellant's suggestion that the requirements of SMC 23.41.008.A.5 have been violated is inherently a procedural challenge that the Examiner may not consider.

Second, SMC 23.41.008.F.3.a states that SDCI "shall make compliance with the recommendation of the Design Review Board a condition of permit approval, unless the Director concludes that the recommendation . . . [r]eflects inconsistent application of the design review guidelines." Notably, this language does not support Appellant's claim that "SDCI's design review decision should be reversed," *see* Appellant Br. at 42, because SMC 23.41.008.F does not make consistent application of the guidelines a condition of approving a permit; instead, the

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consideration applies only to whether the Director makes compliance with the Board's recommendation a condition of approval. *Compare* SMC 23.41.008.F.2 *with* SMC 23.41.008.F.3. Appellant's claim therefore makes no sense: if it were to prove that the City improperly applied SMC 23.41.008.F.3.a, the only result would be that compliance with the Board's recommendation would *not* be a condition of approval.

Appellant's comparison of the Applicant's privacy study with the Dr. Adhya's conclusions, *see* Appellant Br. at 39-42, suffers from the same flaws as its other "consistency" arguments. Appellant's central assertion is that the Board improperly failed to recognize the supposed flaws in Applicant's analysis and require additional alternatives. *Id.* This, again, is a procedural argument that may not be asserted in this appeal. Appellant also contends that the Project should have been subject to a 2015 requirement for analysis that, in Appellant's own words, was "clearly aimed at understanding whether *office workers* would be able to peer into residences across the alley." Appellant Br. at 39 (emphasis added). Appellant cites no authority supporting its theory that the City clearly erred by failing to require the same analysis for a residential project. The City did not err.

3. The Project is consistent with the guidelines.

Appellant fails to establish that the Project as approved and conditioned will violate any of the Downtown Guidelines. It argues first that SDCI's design review decision should be reversed due to the alleged lack of "analysis" quantifying the amount of sunlight that will reach the Fischer Studio Building through the "gap" in the Project. Appellant Br. at 45. Despite asserting that the Project will "violate the specific terms of the city's Downtown Design Guidelines," Appellant once again fails to cite any such terms, to name any of the guidelines, or to explain how its challenge to the Board's "analysis" is anything other than an improper

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procedural claim. Appellant also does not actually contest that the gap will increase the amount of sunlight reaching the middle of the block, arguing only that the amount is not "reasonable" or "meaningful." *Id.* This does not establish inconsistency with any applicable guideline. Appellant's second argument, regarding privacy, fails for the same reason.

Appellant next asserts that the decision to place the larger "Mama Tower" on the north side of the Project Site was erroneous. This argument, again, largely depends on misrepresenting the record and the standard of proof. In particular, Appellant's assertion that the Board made the decision by ignoring all buildings other than towers, *see* Appellant Br. at 36, is contradicted by the Board's decision, which expressly describes the considerations related to the Fischer Studio Building and other "shorter buildings across the alley" that the Board employed. Ex 7 at 5. Likewise, Mr. Steinbrueck's disagreement with the Board's interpretations do not establish error by the City. *Alexandria Homeowners*, HE File No. MUP-15-001, Findings and Decision at 7 (June 17, 2015).

Appellant does cite one guideline to support its argument: Downtown Guideline B-2 ("Buildings on zone edges should be developed in a manner that creates a step in perceived height, bulk, and scale between the development potential of the adjacent zones."). According to Appellant, the Board violated this guideline by stating that the northern tower alignment would provide "a more sympathetic response to the shorter buildings across the alley by placing the 'baby tower' closer to the shorter building which created a better transition in height and scale," but failing to recognize that the shortest building may be redeveloped. Appellant Br. at 47; *see* Ex. 7 at 5. Even if this assertion could establish a project's inconsistency with Guideline B-2 (which it could not), it would not do so here, because the Applicant's design and Board's

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consideration of the Project's massing specifically considered the "development potential" of the area across the alley. *See* Respondent Br. at 49-50.

Appellant's distaste for the Project does not establish inconsistency with the Downtown Guidelines. All of Appellant's design review claims fail.

III. CONCLUSION

For the reasons, Respondents Applicant and City jointly request that the Hearing Examiner deny Appellant's appeal and uphold the City's Decision in all respects.

DATED this 16th day of July 2021.

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