BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

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| In the Matter of Appeal of:<br><br>ESCALA OWNERS ASSOCIATION<br><br>Of a Master Use Permit Decision issued by the Director, Seattle Department of Construction & Inspections | Hearing Examiner File: MUP-17-035<br><br>RESPONDENTS CITY OF SEATTLE AND JODI PATTERSON-O'HARE'S JOINT MOTION FOR PARTIAL RECONSIDERATION |

## I. INTRODUCTION

The Examiner issued his decision on the Escala Homeowners Association's ("Appellant's") challenge to the City of Seattle's ("City's") issuance of a master use permit ("MUP Decision") for a 48-story structure at 1933 Fifth Avenue ("Project") proposed by Jodi Patterson-O'Hare ("Applicant") (collectively with the City, "Respondents").

The Examiner's decision ("Examiner's Decision") affirmed the MUP Decision on all but one of Appellant's claims. With respect to that one issue, the Examiner remanded the MUP Decision because he found that the City did not have reasonably sufficient information about the loss of light to residential units within Escala prior to issuing a threshold determination. Examiner's Decision, Conclusion of Law 16 ("Conclusion 16"). The Examiner held there was



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"**nothing in the documents reviewed by the responsible official, or in this record, that evaluates the loss of light as a result of this proposal**." *Id.* (emphasis added).

Respectfully, Conclusion 16 is based on a clear mistake of material fact. The record contains sufficient evidence of an evaluation of the potential impact of loss of light in Escala's units prior to the issuance of the December 2015 threshold determination, namely the Perkins + Will Daylight Analysis provided in November 2015.[1] The record showed the City reviewed this analysis – both prior to the threshold determination and prior to the issuance of the MUP Decision.

Hearing Examiner Rules ("HER" or "Rules") 3.20(a)(4) authorize the Examiner to grant reconsideration if a decision was based on a "clear mistake as to a material fact." Contrary to the statements in Conclusion 16, the record amply demonstrates the City had reasonably sufficient information to support the City's threshold determination as to the loss of light impacts. Additionally, Escala failed to raise this issue in its Notice of Appeal and, therefore, the Examiner lacks jurisdiction to entertain the challenge in the Examiner's Decision. For these reasons, Respondents file a Joint Motion for Partial Reconsideration of Conclusion 16 ("Joint Motion").

## II. STATEMENT OF FACTS

The facts in this matter are contained in the administrative record. The relevant facts for the Joint Motion are discussed below.

## III. ARGUMENT

### A. Reconsideration standard.

Rule 3.20(a) establishes four circumstances in which the Examiner may grant a motion to reconsider. The standard applicable here is Rule 3.20(a), which provides, in pertinent part:

[1] Respondents provide a copy of the Perkins + Will Daylight Analysis for convenience as an Appendix to Motion.



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> The Hearing Examiner may grant a party's motion for reconsideration of a Hearing Examiner decision if one or more of the following is shown…
>
> (4) Clear mistake as to a material fact.

In this context, a "material fact" is one that is "significant or essential to the issue at hand." Black's Law Dictionary, 276 (3rd pocket ed. 2006).

**B. Conclusion 16 is based on a clear mistake as to a material fact.**

Respondents' sole objection with the Examiner's Decision and the basis for reconsideration in this Joint Motion relates to Conclusion 16, which reads:

> In advance of issuing the DS, the Director made a threshold determination which was required to be "based upon information reasonably sufficient to evaluate the environmental impact of the proposal." SMC 25.05.335. **At the time of the threshold determination, the Department lacked sufficient information to evaluate the proposal's impacts as they relate to loss of light within Escala's residential units.** As noted, the report from Mr. Loveland raised issues related to significant loss of light to Escala, as did his testimony, both of which were presented at an EDG meeting. Therefore, the Department was alerted to this as an issue at a phase of review in advance of a threshold determination. The record reflects that Design Review process was included in the Director's review and consideration as part of the threshold determination**. However, no analysis or request for additional information was executed related to this potential environmental impact**. Even the Applicant's witness, Mr. Meek, agreed that loss of light can have negative health impacts. **But there is nothing in the documents reviewed by the responsible official, or in this record, that evaluates the loss of light as a result of this proposal**. The reference to the shadow and view impact analysis in the SEPA analysis is not sufficient, as these consider different impacts. [footnote omitted]. Therefore, the Director did not have adequate information necessary to make a determination that there were no probable after significant impacts in this context. Without this information the Director could not have concluded that the proposal presented no new probable adverse significant impacts, and the Director's threshold determination was not based on reasonably sufficient information. The FEIS did not address this impact. This is clear error.

Examiner's Decision, pg. 17 (emphasis added).[2]

[2] Escala may argue that Conclusion 16 is a conclusion of law ineligible for reconsideration. Such an argument would be unavailing. It is well established that the labels used to distinguish findings of fact and conclusions of law are not controlling. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (if a tribunal mislabels a finding or legal conclusion, the reviewing tribunal considers it for what it really is). "If a determination concerns whether the evidence showed that something occurred or existed, it is properly labeled a finding of fact." *Goodeill v. Madison*



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Conclusion 16 relies on three incorrect facts to conclude clear error as to City's evaluation of the loss of light within Escala's units and order the remand on this limited issue. Therefore, the Examiner should grant this Joint Motion for two reasons under HER 3.20(a)(4).

First, the Examiner is mistaken as to the three factual underpinnings of Conclusion 16, namely: (1) "nothing in the documents reviewed by the responsible official, or in this record, that evaluates the loss of light in this proposal;" (2) no analysis "was executed related to this potential impact;" and (3) at the time of the threshold determination, the City "lacked sufficient information" to evaluate these impacts of loss of light on Escala units. Conclusion 16.

To the contrary, the City had reviewed the Perkins + Will Daylight Analysis as part of the 2nd Early Design Guidance meeting presentation made on November 3, 2015. Ex. 33, pg. 17. Using the daylight autonomy metric, the Perkins + Will Daylight Analysis evaluated the light levels anticipated at Escala after construction of the Project between the hours of 8 AM and 6 PM. *Id.* The Perkins + Will Daylight Analysis included evaluations of the comparative daylight autonomy for Escala units at levels 5, 15 and 28 of the 30-story Escala development. *Id.* Individual Escala units on those floors were analyzed. Perkins + Will concluded that the "light levels anticipated by the annual daylight simulations are consistent with the levels typically found in an urban environment…" *Id.* In short, the Perkins + Will Daylight Analysis directly addressed the issue raised in Conclusion 16 – evaluating the impacts of loss of daylight at Escala. As the Applicant's architect Erik Mott testified, this analysis was provided in response to a City request: "…[w]e [Applicant] were asked to consider the effect of the development on access to

*Real Estate,* 191 Wn. App. 88, 99, 362 P.3d 302 (2005). This Joint Motion challenges the intertwined factual determinations in Conclusion 16 about what happened in the City's review that form the basis for the conclusion.



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daylight and to our knowledge, this [Perkins + Will Daylight Analysis] was the most relevant and recognized methodology to do that." Mott Testimony (Day 2, Part 3 at 1:26:00).

The record also established that City's planner for the Project attended the 2nd Early Design Guidance presentation, which included the discussion of the Perkins + Will Daylight Analysis. *See* Ex. 8. At hearing, Ms. Bolser testified that she completed the City's review after the prior planner left the Department. Testimony of Shelley Bolser ("Bolser Testimony") (Day 4, Part 3 at 00:27:00) (noting that the prior planner attended the Project's design review meetings).

The City issued the threshold determination on December 15, 2016. Ex. 89.

The Examiner must defer to the City's determination of sufficiency of the information and not substitute his judgment unless left with a firm and definite conviction that a mistake was made. SMC 23.76.022.C.7; *Cougar Mountain Ass'n v. King County,* 111 Wn.2d 742, 747-749, 764 P.2d 264 (1988). Conclusion 16 points three times to a purported lack of evidence or analysis before the Examiner finds the threshold determination in error.[3] When viewed in the light of the record before the City's threshold determination, this conclusion is inconsistent with the record.

In addition, the Examiner also incorrectly concluded that even after the lighting issue was raised "no analysis or request for additional information was executed related to this potential environmental impact." Conclusion 16. This is also based on a mistake of material fact. The City disclosed and evaluated this impact of loss of light (also referred to as "shadowing") impacts as part of the environmental review and its decision. *See e.g.,* Ex. 28 (Addendum to FEIS), pgs. 6,

[3] Escala may cite Ms. Bolser's testimony on cross-examination about "Mr. Loveland's report" not being in the record. If so, that is an attempt at misdirection. Ms. Bolser testified that she reviewed all the materials in the City's "project portal" prior to issuing the MUP Decision, including Escala's presentation at the 2nd design review recommendation meeting, which included an excerpt of Mr. Loveland's initial analysis. Bolser Testimony (Day 4, Part 2 at 0:06:50); *see* Ex. 21, pgs. 8-13. But Mr. Loveland's February 20, 2018 report would not have been in the City's portal at the time of the MUP Decision issuance since it was prepared for the administrative hearing. Ex. 44.



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13-14 and Appendix G; Ex.83 (MUP Decision), pg. 26 (bulleted list), pg. 32 (shadow discussion, including impacts to nearby private properties). As Ms. Bolser testified, the City's environmental review – including incorporating design review board direction to set back and shape the tower and provide "notches" on the eastern façade – were all done in response to "try to maximize the access to natural daylight in the alley." Bolser Testimony (Dav 4, Part 3 at 0:28:55).

The factual underpinnings of Conclusion 16 and the corresponding remand constitute a mistake as to a material fact about the analysis the City had received and had reviewed regarding the potential impacts of the loss of light on Escala prior to making a threshold determination.

The record establishes that that City's threshold determination occurred after the Applicant presented the Perkins + Will Daylight Analysis. Ex. 17. Moreover, the City's planner was present and reviewed that Perkins + Will Daylight Analysis. Ex. 8. In fact, the City requested that the Applicant include the Perkins + Will Daylight Analysis. Mott Testimony, *supra*, (Day 2, Part 3 at 1:26:00). The record is clear and incontrovertible as to these facts. Escala's attorneys conceded this point at that time with their objections to the Perkins + Will Daylight Analysis in their comments on the Addendum. Ex. 27, pgs. 11-12 (criticizing study).

Conclusion 16 is founded on a clear mistake as to a material fact: what occurred during the City's review. The Examiner overlooked the Perkins + Will Daylight Analysis in reaching the incorrect factual findings that undergird Conclusion 16. This is inconsistent with the facts and reconsideration is merited per Rule 3.20(a)(4). The Examiner's should grant the Joint Motion.

Second, Conclusion 16 cannot be squared with the Examiner's Decision as a whole. The Examiner must give substantial weight to the City's decision. RCW 43.21C.090; SMC 23.76.022.C.7. Escala must present actual evidence of a probable significant adverse impact.



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*Boehm v. City of Vancouver,* 111 Wn. App. 711, 719, 47 P.3d 137 (2002). Escala cannot simply, as the Examiner noted, argue "they have a concern about a potential impact, or an opinion that more study or review is necessary." Examiner's Decision, Conclusion of Law 4.

As Ms. Bolser testified that after reviewing the entirety of the Project file, including the Perkins + Will Daylight Analysis, the excerpt of the Loveland study in the Escala's design review presentation and the voluminous Escala comments about lighting issues, she did not conclude that Code-compliant development in the densest part of downtown Seattle had a probable significant adverse impact relative to the loss of light inside Escala's units. Bolser Testimony (Day 3, Part 2 at 1:38:00). Instead, she found the Project is the type of development contemplated – as evaluated in the Downtown Height and Density Changes EIS – for the DOC-2 zone. Ultimately, the Examiner agreed. Examiner's Decision, Conclusion of Law 17. When viewed as a whole, the record proves (as reflected in the Examiner's Decision) that the City had sufficient information to conclude there were no probable significant adverse impacts in relation to loss of light impacts before issuing the MUP Decision. Accordingly, this provides an independent basis to grant the Joint Motion.

**C. Examiner lacks jurisdiction because Escala failed to raise this issue in its appeal.**

Lastly, Conclusion 16 addressed an issue not raised by Escala and, therefore, the Examiner lacks jurisdiction. As the Hearing Examiner found, Escala raised a multitude of challenges. Examiner's Decision, Findings of Fact 26-27. Yet, Escala did not appeal the MUP Decision challenging the City's lack of reasonably sufficient information related to loss of light issues prior to issuance of a threshold determination. *Id.* The Examiner correctly found Escala's "closest" challenge raised in its Notice of Appeal was that the "FEIS does not meet SEPA requirements because…the FEIS height, bulk and scale impacts including light impacts is



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adequate." *Id.,* Finding of Fact 26.a.ii.7. That challenge raised in the Notice of Appeal clearly and specifically goes to the adequacy of the FEIS, not to the City's threshold determination.

As a quasi-judicial official, the Hearing Examiner "has only the authority granted to it by statute and ordinance." *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P3d 1141 (2003); HER 2.03. The Code provides the Examiner "shall entertain issues cited in the appeal…" SMC 23.76.022.C.6. The Rules reinforce this obligation for specificity. HER 3.01(d)(3) (an appeal must contain "a brief statement of the appellant's issues on appeal, noting appellant's specific objections to the decision…"). The record is clear that Escala did not timely raise a specific objection regarding the sufficiency of the information before the City with regards to the loss of light before a threshold determination was issued. Examiner's Decision, Finding of Fact 26. As a matter of law, the Examiner lacks jurisdiction over this issue.[4] This provides another basis to reconsider Conclusion 16. The Examiner should grant the Joint Motion.

## IV. CONCLUSION

For these reasons, Respondents respectfully request that the Hearing Examiner grant the Joint Motion and revise Conclusion 16 to reflect the fact that City had reasonably sufficient information related to the loss of light impacts prior to the issuance its threshold determination.

DATED this 11th day of May, 2018.

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[4] Escala did not raise this challenge at hearing; this issue emerged only in the Examiner's Decision. Therefore, reconsideration is also warranted under HER 3.20(a)(1) where there was "[i]rregularity in the proceeding by which the moving party was prevented from having a fair hearing." Here, Respondents were first alerted to this issue of the City's threshold determination in the Examiner's Decision, depriving Respondents of an opportunity to object.

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