BEFORE THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

In Re: Appeal by ESCALA OWNERS ASSOCIATION of Decisions Re Land Use Application for 1933 5th Avenue, Project 3019699	NO. MUP-17-035 APPELLANT'S RESPONSE TO RESPONDENTS' JOINT MOTION FOR PARTIAL RECONSIDERATION

I. INTRODUCTION

The applicant's motion for reconsideration should be denied for three primary reasons. One, the motion misconstrues the Examiner's decision. The decision remanded for further consideration of the health impacts related to reduced light in Escala homes opposite the proposed tower. In discussing the adverse impacts associated with the reduced light in the Escala homes, the decision emphasized: "Even the Applicant's witness, Mr. Meek, agreed that loss of light can have negative health impacts." Conclusion 16. Notably, the motion for reconsideration emphasizes the sentence before this sentence and the sentence after this sentence, but not this one. *See* Motion at 3. But trying to divert attention from this sentence does not undermine its significance. The Examiner determined the Responsible Official lacked information regarding the health impacts of reduced light and remanded so that important issue would be addressed. Nothing in the motion addresses the

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health impacts of the reduced light. The motion should be denied for this reason alone. (Nor can the respondents' address the health issue for the first time in their reply. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809 (1992).)

Second, even regarding the reduction in light separate from the health issue, the respondents' mischaracterize the Perkins + Will Daylight Analysis in trying to demonstrate that there was adequate information regarding the amount of lost light stemming from the proposal. The Perkins + Will study made no effort to describe the extent to which light in the Escala homes would be reduced due to the project. To make such an estimate, the study would have had to first estimated (or measured) the amount of light reaching those homes under current conditions and then estimated the amount of light that would reach those homes if the new tower were to be built. The difference between those two measures of daylight would be an estimate of the amount of daylight lost due to the project.

Perkins + Will did not do that analysis. Perkins + Will estimated the amount of daylight that would reach the homes if the tower were to be built. But that study made no effort to estimate the baseline condition. It neither measured nor estimated the amount of daylight reaching those Escala homes now. Without a baseline, the amount of daylight loss due to the project could not be estimated. Nowhere in the Perkins +Will study is there any statement or estimate of the amount or degree to which daylight will be reduced due to the proposal. Without that information, the Responsible Official could not assess the significance of the impacts resulting from the proposal. The Examiner was correct to remand so that the Responsible Official could evaluate that degree to which daylight would be reduced, not simply assess the amount of daylight in the post-project scenario without any reference to how that compares to the current situation.

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Last, the motion asserts that the flaws in the threshold determination were not identified as issues in the notice of appeal. But the notice of appeal alleges, among other things, that the "light issues [play] a far more important role in human health . . . than the responsible official has recognized." Notice of Appeal, Issue 1.a. "The level of analysis and information on these subjects was inadequate and fell below meeting the burden required by SEPA. Fundamental information existed regarding impacts that SDCI failed to disclose and failed to include in its analysis." *Id.* These and other allegations discussed below were more than sufficient to put the respondents on notice regarding the issues raised by the appellant. The motion should be denied.

II. ARGUMENT

A. The Examiner's Decision is not Infected with a "Clear Mistake as to a Material Fact."

The respondents state their "sole objection" to the Decision relates to Conclusion 16. Motion at 3. They assert Conclusion 16 "relies on three incorrect facts." *Id.* at 4:1 We address them below in the same order raised in the motion.

The first factual finding challenged by the respondents is the finding that states that "nothing in the documents reviewed by the responsible official, or in this record, that evaluates the loss of light in this proposal." Motion at 4:6 (quoting Decision). The awkward syntax of that quote is because the motion does not quote the finding in full. The finding starts with the words, "But there is . . ." The omitted words are significant, because "but" signals that the finding is to be read in conjunction with the preceding sentence. The preceding sentence reads: "Even the Applicant's witness, Mr. Meek, agreed that **loss of light can have negative health effects."** Decision at 18 (Conclusion 16) (emphasis supplied). Thus, read in context, the challenged finding is that there is no evidence that the responsible official considered the health impacts of reduced light in the Escala homes. The respondents' motion never addresses that issue. The truth is that the Examiner correctly

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found that there was no evidence that the responsible official lacked information regarding the adverse health effects of reduced light in Escala. The respondents have made no effort to show otherwise. This part of the motion provides no basis for revising the decision.

The second alleged erroneous finding is that "no analysis 'was executed related to this potential impact.'" Motion at 4:8 (quoting Decision, Conclusion 16). The reference to "this" potential impact is, again, a reference to the health impacts associated with the reduced light in the Escala homes. The finding about "this potential impact" is followed by the sentence: "Even the Applicant's witness, Mr. Meek, agreed that **loss of light can have negative health effects."** Decision at 18 (Conclusion 16) (emphasis supplied). Read in context, the Examiner's finding that there was no analysis of "this potential impact" clearly relates to the potential health impact resulting from reducing the light reaching the Escala living spaces. As with the first alleged factual error, the Examiner correctly found that there was "no analysis" of the negative health effects and the respondents have not even tried to demonstrate otherwise. This part of the motion likewise provides no basis for revising the decision.

The third alleged erroneous finding is that "at the threshold determination, the City 'lacked sufficient information' to evaluate these impacts of loss of light on Escala units." Motion at 4: 9 (quoting Decision, Conclusion 16). Yet again, the reference for this finding is ignored by the respondents. The "lacked sufficient information" statement was made in reference to the health effects issue. The finding follows the Examiner's reference to Mr. Meeks' acknowledgment that reducing light in living units "can have negative health impacts." The finding is made in reference to the lack of sufficient (or any) information to evaluate the health consequences of reducing light in the Escala units. As with the other factual findings, the respondents take this finding out of context.

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Once its context is recognized, it is clear that the finding is justified (and, in any event, the respondents make no effort in their motion to show otherwise).

Because the three findings are all related to the absence of health effects information, the respondents' arguments challenging these findings are misplaced. And because the respondents have made no effort in their motion to demonstrate that these findings as to health effects are not supported by the record, they address that issue for the first time in their reply. *Cowiche Canyon Conservancy v. Bosley, supra*. The motion should be denied.

The challenge to these factual findings can be rejected for another reason, too, this one related to the limited scope of the Perkins + Will study. Even if the challenged findings were intended to address the loss of daylight in the Escala homes generally (not tied to health effects, in particular), the findings still would be valid. That is because the Perkins + Will study never addresses the amount by which daylight will be reduced in Escala.

The respondents argue that the Perkins + Will study establishes that the responsible official had information about the extent to which the project would cause a decrease in light reaching the living units in Escala. But the Perkins + Will study does no such thing. The study merely estimates the amount of light that will reach certain units, without ever addressing the extent to which those future light levels compare with current light levels. Without a base line for comparison, it is impossible to assess the extent to which the project would cause a reduction in light in the Escala units. Thus, even if the findings are read more broadly to apply to the project's lighting impacts, *i.e.*, the extent to which the project will reduce daylight in the Escala units, the findings are valid because the Perkins + Will study never addresses that fundamental issue.

The limited scope of the Perkins + Will study is clear. The study is summarized in a single page presented at the first EDG meeting. A copy of the one page was re-submitted by the

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respondents in conjunction with their motion. This one page is the entirety of the information which the respondents cite as demonstrating that the responsible official had information sufficient to assess the project's impacts on daylight in Escala. A review of that page quickly reveals that there is no baseline information presented. The modeling is said to reflect the conditions that will exist after the project is built. But no comparison with current conditions is provided. Without a baseline and without a comparison to a baseline, the *impact* of the project on daylight cannot be assessed. The reader does not know to what degree the modeled future is less than the current situation. Would the project reduce daylight in the Escala by a little or a lot? The reader has no clue. Thus, even if the Examiner's challenged findings were intended to address daylight impacts generally, the respondents still have not demonstrated that the responsible official had any information to assess the magnitude of that impact based on the Perkins + Will report (or otherwise).

B. The Notice of Appeal Adequately Identified the Issues to be Reviewed.

The respondents argue that the issue of the adequacy of the information considered by the responsible official was not raised as a separate issue in the Notice of Appeal. This argument is based on a misreading of the Notice of Appeal. It also ignores that SDCI's characterization of its threshold decision morphed during the course of the hearing.

First, the Notice of Appeal includes challenges to the adequacy of SDCI's SEPA review. Among the issues identified were these:

> The environmental review for the 5th and Virginia Proposal was inadequate. The project will have probable significant adverse impacts related to . . . environmental and human health, . . . [and] lack of daylight, ... Regarding . . . light issues, these elements place **a far more important role in human health . . . than the responsible official has recognized**. These impacts were not adequately disclosed, analyzed, or mitigated in the Addendum or in the FEIS. **The level of** analysis and **information on these subjects was inadequate and fell below meeting the burden required by SEPA**. **Fundamental information existed regarding impacts that SDCI** failed to disclose and **failed to include in its analysis**.

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Notice of Appeal at 3 -4 (Issue 1.a) (emphasis supplied).

The foregoing provided adequate notice that appellant was challenging the adequacy of the information used by SDCI in its SEPA review (including the threshold determination). The issue identifies that the responsible official had failed to recognize the human health impacts of lost access to daylight; that the "level of . . . information on these subjects was inadequate . . ." and that SCDI "failed to include in its analysis" "fundamental information . . . regarding [these] impacts." Thus, the claim that the issue was not presented in the Notice of Appeal does not withstand scrutiny.

Furthermore, the respondents' argument is based on a short term memory loss regarding SDCI's change of position regarding the threshold determination. The record reflects that SDCI issued two threshold determinations for this project. One was issued on December 15, 2016 (Ex. 89). The second was issued on July 3, 2017 (Ex. 89). While one DS used said the proposals "are likely and the other said the proposals "could" have probable significant impacts, both documents were determinations of significance, i.e., determinations that the project had significant impacts that required analysis in an EIS. By law, a determination of significance is a determination that the project "may" have significant impacts and that an EIS is required (or that a prior EIS will be utilized in whole or in part). WAC 197-11-360. As such, prior to the hearing, the appellant reasonably concluded that the issue was whether the old EIS adequately addressed the significant impacts, not whether there were significant impacts.

After issuing a DS, if at any time the agency decides it made a mistake and that the project will not have probable significant impacts and that an EIS is not required, the agency is required to withdraw the DS and issue a DNS. WAC 197-11-360(4). At no time prior to the hearing did SDCI withdraw either of the two DSs or issue a DNS.

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Yet at the hearing, SDCI's representative testified that even though two determinations of significance were issued, the agency really had not determined that there were any significant impacts and that no EIS was required at all. This characterization is wholly at odds with the legally established import of a DS – which is the document that the SEPA rules require to be issued when significant impacts are probable and an EIS will be produced. *See* WAC 197-11-360. While the Examiner accepted the staff's revision of the legal meaning of a DS and held that the DS did not have the meaning ascribed to it by the SEPA rules, appellant could hardly be faulted for accepting the DS at face value and drafting their appeal issues accordingly. That is, per the SEPA rules, the two DSs signified that the agency had determined that the project "may" have probable significant impacts and that an EIS was required. Given that, the issue was not so much whether the responsible official had adequate information for the threshold determination; we agreed a DS was the correct threshold decision. Rather, the issue was whether the EIS that the agency adopted to address the significant impacts adequately did so.[1]

Nonetheless, while the appeal notice did not focus on the information underlying the threshold determinations that the project had significant impacts, the Notice of Appeal did challenge the portion of the threshold determination that concluded (erroneously) that the old EIS adequately addressed the projects significant impacts. That part of the threshold determination was challenged on grounds, among others, that the responsible official had failed to recognize the human health impacts of lost access to daylight; that the "level of . . . information on these subjects was inadequate

[1] Respondents support their motion with the argument that concluding that there was inadequate information about health effects is inconsistent with the remainder of the decision. But the health effects findings and conclusions are obviously set forth as an exception to the Examiner's other conclusions regarding the adequacy of the e City's environmental review.. The health impact findings and conclusions also are consistent with the two DSs the city issued, each of which constituted a determination that the project warranted detailed environmental review – yet there still has been no review of the health effects by the city, either in the 2005 EIS or with regards to the current proposal.

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. . .” and that SCDI “failed to include in its analysis” “fundamental information . . . regarding [these] impacts.” The Notice of Appeal sufficiently raised the issue ultimately addressed by the Examiner.

The purpose of listing issues in the notice of appeal is to assure that the respondents have notice of the issues to be addressed, so they can fairly respond to them. There is no claim by the respondents that they were unable to address all of the issues appellants pursued at the hearing. And, if they were to raise that claim in their reply, it should be rejected because, as the Examiner likely observed, the respondents were amply armed to address all of the issues raised at the hearing.

III. CONCLUSION

For the foregoing reasons, the motion for reconsideration should be denied.

Dated this 23rd day of May, 2018.

Respectfully submitted,

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