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SEATTLE HEARING EXAMINER

In the Matter of the Appeal of
THE BALLARD COALITION

**of the adequacy of the Final Environmental
Impact Statement, prepared by the Seattle
Department of Transportation for the Burke-
Gilman Trail Missing Link Project**

NO. W-17-004

**DECLARATION OF JOSHUA C.
BROWER IN SUPPORT OF THE
BALLARD COALITION'S
RESPONSE IN OPPOSITION TO
MOTION TO INTERVENE**

I, Joshua C. Brower, declare and state as follows:

1. I am an attorney for the Ballard Coalition.
2. I am over 18 years of age, am licensed to practice law in the State of Washington, and am competent to testify in a court of law, and base this declaration on my own personal knowledge.
3. Attached as Exhibit A is a true and correct copy of the Order on Motion for Reconsideration, *In re Foss Maritime & Port of Seattle*, S-15-001 & S-15-002 (Seattle Hearing Examiner, July 14, 2015).

DECLARATION OF JOSHUA C.
BROWER IN SUPPORT OF RESPONSE
IN OPPOSITION TO MOTION TO
INTERVENE

Veris Law Group PLLC
1809 Seventh Ave, Suite 1400
Seattle, Washington 98101
TEL 206.829.9590
FAX 206.829.9245

1 4. Attached as Exhibit B is a true and correct copy of email communication between
2 the attorneys for the parties, and the attorneys for Cascade Bicycle Club (Cascade).

3 5. Attached at Exhibit C is a true and correct copy of portions of the transcript of the
4 hearing held before the Seattle Hearing Examiner, *In re Ballard Business Appellants*, W-12-002
5 (Seattle Hearing Examiner, Aug. 2, 2012).

6 I declare under penalty of perjury of the laws of the State of Washington that the
7 foregoing is true and correct.

8 DATED this 26th day of June, 2017.

9
10 VERIS LAW GROUP PLLC and
11 FOSTER PEPPER PLLC

12 /s/ Joshua C. Brower

13 Patrick J. Schneider, WSBA No. 11957
14 Joshua C. Allen Brower, WSBA No. 25092
15 Leah B. Silverthorn, WSBA No. 51730
16 Danielle Granatt, WSBA No. 44182

17 *Attorneys for the Ballard Coalition*

18 4815-2805-6651, v. 3
19
20
21
22

23 DECLARATION OF JOSHUA C.
24 BROWER IN SUPPORT OF RESPONSE
25 IN OPPOSITION TO MOTION TO
26 INTERVENE

Exhibit A

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeals of

S-15-001 and S-15-002

FOSS MARITIME and PORT OF SEATTLE

From an interpretation by the Director,
Department of Planning and Development

Director's Interpretation:
15-001

ORDER ON MOTION FOR RECONSIDERATION

1. On June 23, 2015, the Hearing Examiner issued an order allowing intervention by the "T-5 Intervenors" (T-5) in the above-referenced appeals, but limiting them to intervention pursuant to Hearing Examiner Rule (HER) 3.09(d), which allows a substantially interested person to intervene for the purpose of preserving an appeal. The Hearing Examiner also permitted T-5 to provide pre- and post-hearing briefs. On July 2, 2015, T-5 requested reconsideration of that order and seek to be able to participate in the hearing. No responses were filed by the other parties. For the reasons stated below, the motion is granted and T-5 will be permitted to participate at hearing but with limits as set forth below.

2. Hearing Examiner Rule 3.20 sets out the grounds upon which a party may seek reconsideration, including irregularity in the proceedings preventing a fair hearing, or a clear mistake as to a material fact.

3. Hearing Examiner Rule 3.09 governs intervention and provides:

(a) Intervention is not a substitute means of appealing a decision for those who could have appealed but failed to do so.

(b) A person, organization or other entity who has not filed an appeal may request by motion to participate in the appeal. The request must state how the person or entity making it is affected by or interested in the matter appealed, and must demonstrate a substantial interest that is not otherwise adequately represented. Except as provided in HER 3.09(d) below, a written request for intervention must be filed with the Hearing Examiner and served on all parties to the appeal no later than 10 business days prior to the scheduled hearing date.

(c) In determining the merits of a request for intervention, the Hearing Examiner shall consider whether intervention will unduly delay the hearing process, expand the issues beyond those stated in the appeal, or prejudice the rights of the parties. If intervention is granted, the Hearing Examiner may limit its nature and scope.

(d) The Hearing Examiner may allow a substantially interested person, organization, or other entity who has not filed an appeal to intervene for the sole purpose of preserving the right to appeal. Such intervention may be permitted at any time up to the start of the hearing.

4. T-5's motion argues that HER 3.20(a)(a) (irregularity in the proceedings) and (a)(4) (mistake as to material fact) apply to the Examiner's June 23 Order. T-5 asserts that the Examiner's order, which granted intervention status under 3.09(d), denies T-5 of the opportunity to participate. T-5 also asserts that a mistake as to a material fact has been made, because the

Order concludes that T-5's substantial interests are adequately represented by the Appellants Foss Maritime and Port of Seattle.

5. As noted in the June 23 Order, under HER 3.09(a), intervention is not a substitute means of appeal for those who could have appealed but failed to do so. While T-5 argues that it is being denied a fair hearing, T-5 did not appeal DPD's decision even though it opposes it. None of the filings indicate why it did not appeal the decision to the Hearing Examiner, or that it was somehow prevented by some procedural irregularity from doing so. Had T-5 appealed, it would have been able to fully participate as an appellant, and to exhaust its administrative remedies in the event of further review. Instead, it now relies on intervenor status, which must be limited by HER 3.09; the limits of HER 3.09 do not constitute a procedural irregularity.

6. T-5 has repeatedly cited the status granted to Intervenor Soundkeeper as support for granting its request, but the entities are differently situated. Soundkeeper would not have been in a position to appeal DPD's decision, since Soundkeeper agrees with DPD's decision. Furthermore, if the Hearing Examiner reverses a DPD decision, it is the final decision for the City. Thus, DPD will not pursue judicial review of the Examiner's decision, so a party who supports DPD's decision is left without recourse if that occurs.

7. To ensure that HER 3.09(a) is met, and that intervention here is not merely a substitute for an appeal that was not filed, the adequacy of representation already provided by the Appellants, and level of participation by the intervenor, must be considered. In this case, the initial order limited T-5 to pre- and post-hearing briefings.

8. T-5's stated interest in the matter has somewhat evolved over the course of its filings, and based on the assertions presented in its motion, the previous order will be amended. The motion asserts that T-5 is not adequately represented by the Appellants Foss Maritime or the Port of Seattle because T-5 represents a broader and more diverse range of the interests affected by DPD's decision, and that T-5's request meets the liberal standard of *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wash. App 618, 989 P.2d 1260 (1999), with regard to whether its interests will be articulated in this proceeding. T-5's motion also indicates that it would agree to limits on participation and coordinate its presentations with the other Appellants, to avoid delays or duplication at hearing. The Examiner agrees that a limited participation at hearing is consistent with HER 3.09, and therefore T-5 will be permitted to call one witness as it indicated it would do at the prehearing conference, and to have its counsel participate in the proceedings.

Entered this 14th day of July, 2015.



Anne Watanabe
Deputy Hearing Examiner
Office of Hearing Examiner
P.O. Box 94729
Seattle, Washington 98124-4729
(206) 684-0521 FAX: (206) 684-0536

**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 **Order of Continuance and Order on Motion for Reconsideration** to each person listed below, or on the attached mailing list, in the matter of **Foss Maritime Company and Port of Seattle**, Hearing Examiner Files: **S-15-001 & S-15-002**, in the manner indicated.

Party	Method of Service
<p>Foss Maritime Company c/o John C. McCullough McCullough Hill Leary, P.S. 701 Fifth Avenue, Suite 6600 Seattle, WA 98104 jack@mhseattle.com</p> <p>David R. West Garvey Shubert Barer drwest@gsblaw.com</p> <p>Laura Counley lcounley@mhseattle.com</p> <p>Dominique Barrientes dbarrientes@gsblaw.com</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>
<p>Port of Seattle c/o Traci Goodwin Senior Port Counsel PO Box 1209 Seattle, WA 98111 goodwin.t@portseattle.org</p> <p>Patrick Schneider Foster Pepper schnp@foster.com</p> <p>Adrian Winder winda@foster.com</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid</p> <p><input type="checkbox"/> Inter-office Mail</p> <p><input checked="" type="checkbox"/> E-mail</p> <p><input type="checkbox"/> Fax</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Legal Messenger</p>

<p>Brenda Bole boleb@foster.com</p>	
<p>Andy McKim DPD SMT-18-00 Andy.McKim@seattle.gov</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger</p>
<p>Eleanore Baxendale City Attorney's Office 701 Fifth Avenue, Suite 2050 Seattle, WA 98104 Eleanore.Baxendale@seattle.gov</p> <p>Rose Hailey Rose.Hailey@seattle.gov</p> <p>Trudy Jaynes Trudy.Jaynes@seattle.gov</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger</p>
<p>Molly Barker Veris Law Group molly@verislawgroup.com</p> <p>Joshua Brower josh@verislawgroup.com</p> <p>Patti Goldman Earthjustice pgoldman@earthjustice.org</p> <p>Matthew Baca mbaca@earthjustice.org</p> <p>Eudora Powell epowell@earthjustice.org</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger</p>
<p>Betty Galarosa Betty.Galarosa@seattle.gov</p> <p>Reta Cunnetubby-Gonzales Reta.Gonzales@seattle.gov</p> <p>Denise Minnerly Denise.Minnerly@seattle.gov</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger</p>

Sue Putnam Sue.Putnam@seattle.gov	
--------------------------------------	--

PRC PRC@seattle.gov	
------------------------	--

Dated: July 14, 2015



Tiffany Ku
Legal Assistant

Exhibit B

Leah Silverthorn

From: Josh Brower
Sent: Friday, June 16, 2017 9:37 AM
To: Ferguson, Erin; Cohen, Matthew
Cc: Pat Schneider; Danielle Granatt; Leah Silverthorn; Megan Manion
Subject: Re: Missing Link FEIS appeal

Erin and Matt, I may owe you both an apology: We have been operating under the assumption that the City and Cascade have a joint representation agreement under which you coordinate your litigation strategy and filings, but, based on your statements below, that is not the case (correct me if I am wrong).

Based on there being no such agreement, Matt why don't you file on the 19th, Erin you file on the 20th and we will file on the 27th.

And no Erin, we are not trying to cause "delay"—we are trying to avoid the situation the City and Cascade created before Judge Parisien where Matt's brief was filed out of sequence and we did not get an opportunity to review and respond to it.

Josh

Joshua C. Allen Brower
Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, WA 98101
206.829.8233 direct
206.829.9590 office
josh@verislawgroup.com

www.verislawgroup.com <<http://www.verislawgroup.com/>> IRS Circular 230 Disclosure: Any federal tax advice contained in this email is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another person any tax-related matter.

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On 6/15/17, 5:05 PM, "Ferguson, Erin" <Erin.Ferguson@seattle.gov> wrote:

Although I agree with Matt's take and disagree with the idea that the City has any obligation to respond in advance, I will nonetheless file our "no objection" on the 20th (it does not make sense to file our "no objection" until after the motion has been filed) to avoid any attempt on your part to delay this matter.

[image002]

Erin E. Ferguson

Assistant City Attorney
Land Use Section

Seattle City Attorney's Office
Civil Division
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Phone: 206-684-8615
FAX: 206-684-8284
Erin.Ferguson@seattle.gov<mailto:Erin.Ferguson@seattle.gov>

*** Please be aware that I am out of the office on Fridays.

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From: Josh Brower [mailto:josh@verislawgroup.com]
Sent: Thursday, June 15, 2017 4:32 PM
To: Cohen, Matthew <matthew.cohen@stoel.com>; Ferguson, Erin <Erin.Ferguson@seattle.gov>
Cc: Pat Schneider <pat.schneider@foster.com>; Danielle Granatt <danielle@verislawgroup.com>; Leah Silverthorn <leah@verislawgroup.com>; Megan Manion <megan@verislawgroup.com>
Subject: Re: Missing Link FEIS appeal

I am waiting for Erin's reply to my valid question.

Joshua C. Allen Brower
Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, WA 98101
206.829.8233 direct
206.829.9590 office
josh@verislawgroup.com<mailto:josh@verislawgroup.com>
www.verislawgroup.com<http://www.verislawgroup.com/>

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From: "Cohen, Matthew" <matthew.cohen@stoel.com<mailto:matthew.cohen@stoel.com>>
Date: Thursday, June 15, 2017 at 4:28 PM
To: Josh Brower <josh@verislawgroup.com<mailto:josh@verislawgroup.com>>, Erin' 'Ferguson <Erin.Ferguson@seattle.gov<mailto:Erin.Ferguson@seattle.gov>>

Cc: Pat Schneider <pat.schneider@foster.com<mailto:pat.schneider@foster.com>>, Danielle Granatt <danielle@verislawgroup.com<mailto:danielle@verislawgroup.com>>, Leah Silverthorn <leah@verislawgroup.com<mailto:leah@verislawgroup.com>>, Megan Manion <megan@verislawgroup.com<mailto:megan@verislawgroup.com>>
Subject: RE: Missing Link FEIS appeal

I recommend that you file by June 26, Josh, because HER 2.16 invites the Examiner to treat your failure to respond within 7 days as consent to the motion.

Matthew Cohen
STOEL RIVES LLP | 600 University Street, Suite 3600 | Seattle, WA 98101-4109
Direct: (206) 386-7569 | Mobile: (206) 714-1671
mcohen@stoel.com<mailto:mcohen@stoel.com> | www.stoel.com<http://www.stoel.com>

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From: Josh Brower [mailto:josh@verislawgroup.com]
Sent: Thursday, June 15, 2017 4:21 PM
To: Ferguson, Erin; Cohen, Matthew
Cc: Pat Schneider; Danielle Granatt; Leah Silverthorn; Megan Manion
Subject: Re: Missing Link FEIS appeal

Erin, can you confirm you will file it the 19th? We will not file our Response until both the City and CBC file.

Josh

Joshua C. Allen Brower
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1809 Seventh Avenue, Suite 1400
Seattle, WA 98101
206.829.8233 direct
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josh@verislawgroup.com<mailto:josh@verislawgroup.com>
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From: Erin' 'Ferguson <Erin.Ferguson@seattle.gov<mailto:Erin.Ferguson@seattle.gov>>
Date: Thursday, June 15, 2017 at 4:14 PM
To: Josh Brower <josh@verislawgroup.com<mailto:josh@verislawgroup.com>>, "Cohen, Matthew" <matthew.cohen@stoel.com<mailto:matthew.cohen@stoel.com>>
Cc: Pat Schneider <pat.schneider@foster.com<mailto:pat.schneider@foster.com>>, Danielle Granatt <danielle@verislawgroup.com<mailto:danielle@verislawgroup.com>>, Leah Silverthorn

<leah@verislawgroup.com<mailto:leah@verislawgroup.com>>, Megan Manion
<megan@verislawgroup.com<mailto:megan@verislawgroup.com>>
Subject: RE: Missing Link FEIS appeal

The City will file a 1page (1 line?) “no objection” to intervention, but I would not call that a brief.

[age002]

Erin E. Ferguson
Assistant City Attorney
Land Use Section

Seattle City Attorney’s Office
Civil Division
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Phone: 206-684-8615
FAX: 206-684-8284
Erin.Ferguson@seattle.gov<mailto:Erin.Ferguson@seattle.gov>

*** Please be aware that I am out of the office on Fridays.

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From: Josh Brower [mailto:josh@verislawgroup.com]
Sent: Thursday, June 15, 2017 4:06 PM
To: Cohen, Matthew <matthew.cohen@stoel.com<mailto:matthew.cohen@stoel.com>>; Ferguson, Erin <Erin.Ferguson@seattle.gov<mailto:Erin.Ferguson@seattle.gov>>
Cc: Pat Schneider <pat.schneider@foster.com<mailto:pat.schneider@foster.com>>; Danielle Granatt <danielle@verislawgroup.com<mailto:danielle@verislawgroup.com>>; Leah Silverthorn <leah@verislawgroup.com<mailto:leah@verislawgroup.com>>; Megan Manion <megan@verislawgroup.com<mailto:megan@verislawgroup.com>>
Subject: Re: Missing Link FEIS appeal

Erin, does the City plan to submit a brief? If so, we want to see both before we file a Response—I want to avoid the situation that happened with the Motion to Dismiss where the briefs were filed out of order/untimely.

Josh

Joshua C. Allen Brower
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josh@verislawgroup.com<mailto:josh@verislawgroup.com>
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From: "Cohen, Matthew" <matthew.cohen@stoel.com<mailto:matthew.cohen@stoel.com>>
Date: Thursday, June 15, 2017 at 3:57 PM
To: Josh Brower <josh@verislawgroup.com<mailto:josh@verislawgroup.com>>, Erin' 'Ferguson <erin.ferguson@seattle.gov<mailto:erin.ferguson@seattle.gov>>
Cc: Pat Schneider <pat.schneider@foster.com<mailto:pat.schneider@foster.com>>, Danielle Granatt <danielle@verislawgroup.com<mailto:danielle@verislawgroup.com>>, Leah Silverthorn <leah@verislawgroup.com<mailto:leah@verislawgroup.com>>, Megan Manion <megan@verislawgroup.com<mailto:megan@verislawgroup.com>>
Subject: RE: Missing Link FEIS appeal

Josh, I will file on Monday June 19. I propose that any response be served and filed by June 26, and that Cascade have until Friday June 30 to serve and file a reply, if necessary.

Matthew Cohen
STOEL RIVES LLP | 600 University Street, Suite 3600 | Seattle, WA 98101-4109
Direct: (206) 386-7569 | Mobile: (206) 714-1671
mcohen@stoel.com<mailto:mcohen@stoel.com> | www.stoel.com<http://www.stoel.com>

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From: Josh Brower [mailto:josh@verislawgroup.com]
Sent: Thursday, June 15, 2017 9:06 AM
To: Cohen, Matthew; Erin Ferguson (erin.ferguson@seattle.gov<mailto:erin.ferguson@seattle.gov>)
Cc: Pat Schneider; Danielle Granatt; Leah Silverthorn; Megan Manion
Subject: Re: Missing Link FEIS appeal

No Matt, you may not represent that to the Hearing Examiner and we intend to oppose intervention. Please suggest a briefing schedule for this issue.

Regards, Josh

Joshua C. Allen Brower
Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, WA 98101
206.829.8233 direct
206.829.9590 office
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From: "Cohen, Matthew" <matthew.cohen@stoel.com<mailto:matthew.cohen@stoel.com>>
Date: Wednesday, June 14, 2017 at 5:25 PM
To: Erin' 'Ferguson <erin.ferguson@seattle.gov<mailto:erin.ferguson@seattle.gov>>, Josh Brower <josh@verislawgroup.com<mailto:josh@verislawgroup.com>>
Subject: Missing Link FEIS appeal

Erin and Josh, the Cascade Bicycle Club plans to move to intervene in the Ballard Coalition's SEPA appeal. May we represent to the Hearing Examiner that your clients do not oppose Cascade's intervention? I hope to file on Monday, and would welcome your response to this inquiry by Monday morning.

Matthew Cohen
STOEL RIVES LLP | 600 University Street, Suite 3600 | Seattle, WA 98101-4109
Direct: (206) 386-7569 | Mobile: (206) 714-1671
mcohen@stoel.com<mailto:mcohen@stoel.com> | www.stoel.com<http://www.stoel.com>

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Exhibit C

SEATTLE HEARING EXAMINER

In the Matter of the Appeal of:) Hearing Examiner
) File: W-12-002
 THE BALLARD BUSINESS APPELLANTS)
)
 From a Revised Determination of)
 Significance, issued by the)
 Director, Seattle Department of)
 Transportation, regarding the)
 Burke-Gilman Extension)

Verbatim Transcript of Proceedings
 Held Before Hearing Examiner Anne Watanabe
 Transcribed from Audio Recording

August 2, 2012
 Seattle, Washington

TRANSCRIBED BY: Debra A. Roberts, CCR

A P P E A R A N C E S

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FOR THE APPELLANTS: PAT SCHNEIDER
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DANIELLE GRANATT
Veris Law Group
1809 Seventh Avenue, #1400
Seattle, WA 98101

FOR THE CITY: ERIN FERGUSON
Seattle City Attorney
600 Fourth Avenue, 4th Floor
Seattle, WA 98124

FOR CASCADE BICYCLE CLUB:
JEFFREY EUSTIS
Aramburu & Eustis
720 Third Avenue, #2112
Seattle, WA 98104

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Exhibit No. Appellant 171		217, 218

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1 along Alaska between --

2 MR. SCHNEIDER: Objection.

3 Madam Examiner, we have been
4 repeatedly prohibited in all three iterations of this
5 hearing from bringing up evidence of other trail
6 segments. Mr. Eustis was the most zealous objector to
7 any attempt to do that. And now he is offering
8 evidence about a section of the trail that is not
9 before us and that wasn't raised in Mr. Chang's memo.

10 MR. EUSTIS: As regards other sections
11 of the trail, I believe that Mr. Chang testified in
12 his own examination as to a section of trail lying --
13 adjacent to the port facilities. He testified to
14 several other sections of trail, and these sections
15 has been referred to not as in the context of
16 alternatives but they've been referred to as examples
17 where such things, objects, obstacles as fences,
18 barriers, et cetera, have not proposed a hazard.

19 MR. SCHNEIDER: Well, Madam Examiner,
20 we -- again, we have been limited in all three
21 proceedings. Mr. Chang's memo at least alerted us
22 ahead of time that we would be dealing with other
23 sections of trail so we were able to have Mr. Bishop
24 go look at them ahead of time and prepared a response.
25 There is -- not only is it unfair to have different

1 rules for one side than the other, but it doesn't
2 allow us to respond in any meaningful way if new
3 segments of the trail are being brought up at this
4 stage on the 11th hour and fifty-nine minute of this
5 hearing.

6 EXAMINER WATANABE: Well, the -- I
7 think what we're trying to grapple with here is he's
8 got to have some kind of frame of reference for the
9 basis of his opinion. I mean, I expect that on
10 cross-examination you'll want to know what his opinion
11 is based on.

12 If it's his experience with other
13 portions of the trail, he can't just speak in a
14 vacuum. So I'm going to overrule the objection.

15 Go ahead.

16 Q. Okay.

17 So Mr. Airs, I believe you were
18 process of identifying other sections of trail where
19 the presence of obstacles did not pose a hazard.

20 A. Right.

21 Q. And I'd have you identify those.

22 A. I was talking about along Alaskan Way
23 between Clay and Bell, I believe it is, there are
24 probably a half dozen obstacles in the multiuse trail
25 sidewalk, call it what you will. All the way down

1 reporting system where cyclists can report crashes,
2 stolen bikes, accidents, whatever.

3 Q. Okay.

4 And in the section along Alaskan Way,
5 north of Valley, is there data from Bikewise
6 indicating --

7 MR. SCHNEIDER: Madam Examiner, I
8 have --

9 Q. -- collisions on the trail?

10 MR. SCHNEIDER: My objection, this is
11 fundamentally unfair to my side to have this kind of
12 detail gone into about sections of trail that have
13 never been a part of this proceeding. I'm going to
14 ask for a continuance so that we can investigate these
15 sections of trail and respond to them, this testimony,
16 this is allowed to go forward.

17 It is fundamentally unfair to have
18 this sprung on us when every -- both you and your
19 predecessor have strictly limited the appellants to
20 presenting evidence about this section of trail on
21 Shilshole.

22 EXAMINER WATANABE: Can I ask, Mr.
23 Eustis, it does seem like we're now kind of plunging
24 into an examination of Mr. Airs over this other
25 section of trail. Where are we headed?

1 MR. EUSTIS: We are head to do provide
2 the basis for his opinion as to why I guess vertical
3 obstacles located in a trail would not pose a hazard
4 based upon the data that they have gathered about
5 sections of trail where those facilities exist. I
6 would --

7 EXAMINER WATANABE: So is this based
8 on something that's already in the record now? Are we
9 talking --

10 MR. EUSTIS: The section dealing with
11 the last -- excuse me. I'm sorry. I didn't mean to
12 interrupt.

13 EXAMINER WATANABE: No, that's all
14 right.

15 But this is a section on the trail --
16 this is new information about other sections of the
17 trail.

18 MR. EUSTIS: Yeah, in that --

19 EXAMINER WATANABE: Is that --

20 MR. EUSTIS: I would -- and I would
21 point out that it is Ballard business associates
22 that's the appellant. We did not know until Mr. --
23 actually, in the questions were asked of -- first of
24 Mr. Rodgers, when the hearing began, that this issue
25 of the ends of trails -- of barriers and fences was

1 going to become an issue. It had not been flagged as
2 an issue before. That was after we identified
3 witnesses, identified areas of testimony, identified
4 exhibits.

5 EXAMINER WATANABE: Right. So now,
6 and to --

7 MR. EUSTIS: So I --

8 EXAMINER WATANABE: And to clarify for
9 me as well, what you're asking for right now is for
10 Mr. Airs to discuss the new accident data on these
11 other -- on this other section?

12 MR. EUSTIS: I'm not asking him to
13 discuss the accident data.

14 What I'm asking him to, I guess,
15 essentially is to testify to the negative, that the
16 data collected by Bikewise does not -- the empirical
17 evidence does not show that hazards are created by
18 putting the types of physical objects in a shared
19 pedestrian/bicycle trail that he's identified, that
20 those have not created hazards. That's what I'm
21 asking him to identify.

22 EXAMINER WATANABE: Okay. And
23 Mr. Schneider, I don't know if you have anything to
24 add to your objection? I --

25 MR. SCHNEIDER: No. It is unfair to

1 have new sections of trail introduced at this stage in
2 the proceeding without giving us an opportunity to
3 examine and have our expert examine those sections of
4 trail and define this data.

5 Everything about these hearings and
6 your rulings at the out of this hearing made it clear
7 we were limited to the Shilshole segment, and
8 naturally to Mr. Chang's memo. We are now way outside
9 Mr. Chang's memo and other parts of the city.

10 EXAMINER WATANABE: All right. I'm
11 going to sustain the objection.

12 MR. EUSTIS: Okay.

13 Q. Let's see. Mr. Airs, in the notebook
14 that's in front of you, I'd like you to turn to -- I
15 believe it's maybe behind C1. I believe this would
16 be -- what is it? C -- CBC8? Seven. Okay.

17 CBC7, are you able to identify that
18 document?

19 A. I just want to make sure we're looking at
20 the same thing. I am looking at a memo from Ron
21 Scharf? Is that -- No?

22 Q. In memo two.

23 A. Yeah, two. Right. This is the memo
24 from -- to Ron Scharf from Tessa Gregoire, yeah.

25 Q. And would you identify this as comments by

1 Q. Okay.

2 And why were those trail segments
3 chosen?

4 A. These -- I believe these were sections
5 chosen to point out collision data on various types of
6 trail segments.

7 Q. Okay.

8 So, how -- how do each of those trail
9 segments relate to the adjacent streets?

10 MR. SCHNEIDER: Objection, Madam
11 Examiner. I think this is simply a back door attempt
12 to get round the ruling you just made about testimony
13 about other trail segments. The letter speaks for
14 itself. The testimony goes beyond anything that is in
15 the letter. You talk apparently about these other
16 trail segments that you've limited the testimony
17 about.

18 EXAMINER WATANABE: Right. I'm --

19 MR. EUSTIS: If I could respond?

20 EXAMINER WATANABE: Oh, Mr. Eustis,
21 please do.

22 MR. EUSTIS: These are comments to the
23 DNS, I guess as we will -- have been repeatedly
24 reminded, it's up to the lead agency to fully consider
25 environmental factors and to consider comments

1 rendered on the DNS. These are comments on the DNS.

2 It's part of the record.

3 MR. SCHNEIDER: I have no objection to
4 the comment letter or questions about the comment
5 letter. The questions I objected to were going beyond
6 anything that's in the comment letter.

7 EXAMINER WATANABE: All right. So I
8 take it the comment letter itself is not
9 objectionable, then, Mr. Schneider.

10 But I do think eliciting testimony at
11 this point about these photos, there's -- if there's
12 information that's already in the record about the
13 safety records -- seems to me that there is, about
14 these other segments, and if you --

15 MR. EUSTIS: Okay.

16 EXAMINER WATANABE: -- you want to
17 have them base his testimony on that, then fair
18 enough, his opinion on things that are already here.
19 But --

20 MR. EUSTIS: Okay.

21 EXAMINER WATANABE: It's a difficult
22 situation.

23 Q. Mr. Airs, you're familiar with the
24 sections that are shown in the photographs that are
25 attached to the Cascade letter?

1 A. I am.

2 Q. Okay.

3 And would it be fair to describe those
4 sections as showing segments of multiuse trail located
5 adjacent to arterials in industrial areas?

6 A. Yes.

7 Q. Okay.

8 With regard -- in terms of the data
9 that's presented with those photographs, do those data
10 from your assessment indicate that there is some
11 inherent hazard in locating a multiuse trail adjacent
12 to an arterial in an industrial area?

13 MR. SCHNEIDER: Could you identify
14 what data it is that you just referred to, please?

15 MR. EUSTIS: I'm referring to the data
16 in the letters, in the attachment.

17 MR. SCHNEIDER: Well, the -- only
18 thing I see that is data is the two page comment
19 letter. Is there some other data you're referring to?

20 MR. EUSTIS: Yes.

21 MR. SCHNEIDER: Where?

22 MR. EUSTIS: The data would be the
23 annotations to the photographs. I think you have the
24 wrong exhibit.

25 MR. SCHNEIDER: Well, I have the

1 comment letter.

2 MS. FERGUSON: It's the new --

3 MR. EUSTIS: I provided you a copy at
4 the beginning of the proceedings.

5 MS. FERGUSON: I believe you're
6 looking at the comment letter from last time.

7 MR. SCHNEIDER: May 8, 2012? Is this
8 your --

9 MR. EUSTIS: Mr. Schneider, if you'd
10 reference the copy of the document that I provided you
11 at the beginning of the hearing, I think you would
12 better understand the exhibit.

13 MR. SCHNEIDER: Give me a moment to
14 find --

15 EXAMINER WATANABE: We just need a
16 moment.

17 MS. FERGUSON: Would you like to
18 borrow my copy to speed things up?

19 MR. SCHNEIDER: That would be awesome.
20 Thank you.

21 Then could I ask whether the data that
22 we're talking about, which is apparently -- which I
23 now see it wasn't if the version of the comment letter
24 that I saw. So if I could voir dire for a moment?

25 Is the data that you're referring to,

1 Mr. Eustis, data that was part of the submittal to
2 Mr. Scharf, the Department of Transportation? Or is
3 it data that was created for this hearing?

4 MR. EUSTIS: Data included with the
5 comment letter to Mr. Scharf in response to the DNS.

6 MR. SCHNEIDER: So this is all stuff
7 that was submitted to SDOT in May of this year?

8 MR. EUSTIS: That is correct.

9 MR. SCHNEIDER: Okay.

10 And are the data points you're asking
11 about data points about the sections of the trail that
12 the examiner says we weren't going to hear evidence
13 on?

14 MR. EUSTIS: I guess I'm playing
15 witness here. But I believe that your objection was
16 sustained in response to a question that I had posed
17 about the east side of Alaskan Way, north of Valley,
18 and east side of Alaskan Way north of Valley is not a
19 section that is shown in these comments.

20 MR. SCHNEIDER: My objection was
21 broader than that, and I understood the ruling to be
22 broader, that we were not going to go into testimony
23 about sections of the trail that weren't before us and
24 that we weren't going to have additional testimony
25 that wasn't in this submittal.

1 EXAMINER WATANABE: That is correct,
2 Mr. Eustis. And I -- what I'm saying, instead, is
3 that if the witness wants to offer me an opinion based
4 on the information that is already in the record,
5 which might include the other segments that I see
6 described here, then, you know, just have him
7 reference that information as part of his opinion.

8 MR. EUSTIS: And that was my question
9 to Mr. Airs.

10 EXAMINER WATANABE: Okay.

11 MR. SCHNEIDER: And I thought we were
12 asking for we were asking for additional information.
13 If we're not, then I don't have an objection, as long
14 as it's based on what's in this document.

15 MR. EUSTIS: My question is based upon
16 the information that's contained in that document.

17 EXAMINER WATANABE: Go for it. At
18 least for now.

19 MR. EUSTIS: Okay.

20 Q. Mr. Airs, my prior question was, based
21 upon the three segments of trail and the data
22 contained within Cascade's comments, do you have an
23 opinion as to whether the placement of a multiuse
24 bicycle/pedestrian trail adjacent to an arterial in an
25 industrial area would create an inherent hazard for

1 A. That's correct.

2 Q. Okay.

3 So, since that data had been
4 collected, is there other collision data that's come
5 to your attention that would indicate that the
6 proposed design would remove existing hazards in the
7 existing layout for the circulation of cyclists?

8 A. The most recent example is the cyclist who
9 was hit by a car as the cyclist was trying to align
10 their bike up to cross the railroad tracks so they
11 wouldn't fall on the railroad tracks.

12 EXAMINER WATANABE: Objection. Madam
13 Examiner, this is a question about an area outside the
14 Shilshole segment. The railroad tracks are further to
15 the east. Mr. Eustis knows that. And I'm sure Mr.
16 Airs does too.

17 EXAMINER WATANABE: Is that --

18 MR. EUSTIS: Yes, but the issue is the
19 design of the trail. And my question is, would the
20 proposed design of the trail within the Shilshole
21 segment address or eliminate the hazard that resulted
22 in that collision? And that's what I'm talking about.

23 EXAMINER WATANABE: All right. I'll
24 allow you to continue on.

25 A. So, yes, the new design would eliminate

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C E R T I F I C A T E .

STATE OF WASHINGTON) ss.
COUNTY OF KING)

I, the undersigned Certified Court Reporter and Officer of the Court, hereby certify that the foregoing transcript of the recording is a full, true, and correct transcript to the best of my ability;

That I am neither attorney for, nor a relative or employee of any of the parties to the action or any attorney of counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this date: August 7, 2012.

/S/ DEBRAROBERTS

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