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 BALLARD COALITION'S DISPOSITIVE MOTION

I. INTRODUCTION

The Seattle Department of Transportation (SDOT) prepared a Final Environmental Impact Statement (FEIS) for its Missing Link proposal that goes backwards to a level of design – ten percent (10%)– that the King County Superior Court already has held is not adequate to identify and evaluate the proposal's environmental impacts. The Superior Court has retained jurisdiction to enforce its decision; and just last month the Superior Court denied SDOT's motion to dismiss the consolidated and pending appeals of the prior decisions in this matter, thereby continuing the Superior Court's supervisory jurisdiction. The Superior Court's determination that a ten percent (10%) level of design is inadequate is binding on the Hearing Examiner as the law of the case, and even if the Superior Court had not retained jurisdiction to enforce its Order, this issue of the level of design needed to identify probable significant adverse environmental

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impacts has been litigated and decided, and SDOT is collaterally estopped from re-litigating this issue today. The FEIS is inadequate as a matter of law, and the Ballard Coalition should not be put to the burden of proving something it already has proven.[1]

II. FACTS RELEVANT TO MOTION

This motion is based entirely on (1) the FEIS; (2) the files and pleadings in King County Superior Court File No. 09-2-326586-1 SEA (consolidated); and (3) the Hearing Examiner's prior decisions in the Ballard Coalition's prior administrative appeals of SDOT's SEPA review for the Missing Link. The relevant documents or excerpts are attached to the Declaration of Patrick J. Schneider ("Schneider Decl.").

A. Based upon a ten percent level of design, Hearing Examiner Watanabe upheld SDOT's DNS

The early procedural issue of SDOT's SEPA review of the Missing Link proposal was summarized in Finding number 2 of the *third* Hearing Examiner decision, File W-12-002, dated August 27, 2012 (Schneider Decl., Exhibit A):

> . . . The first DNS was issued in November of 2008, and was appealed by the Appellants. The Hearing Examiner affirmed the DNS in a decision issued in June of 2009, which was appealed by the Appellants. The King County Superior Court (KCSC) entered an Order on June 7, 2010, which ruled that SDOT had improperly piecemealed its review of the project, and remanded to SDOT for review of the trail segment located along Shilshole Avenue NW between 17th Avenue NW and Vernon Place NW (Shilshole Segment). A Revised DNS was issued by SDOT on February 1, 2011. The Appellants appealed the Revised DNS, which was affirmed by the Hearing Examiner on July 1, 2011. The Appellants appealed that decision to KCSC, which remanded the matter to SDOT in a Second Order of Remand dated March 2, 2012.

In response to the Court's 2010 decision that SDOT had piecemealed its SEPA review, SDOT prepared a Revised Determination of Nonsignificance for its Missing Link project, which the Ballard Coalition again appealed. On July 1, 2011, Deputy Hearing Examiner Anne Watanabe issued her Findings and Decision in File W-11-002, affirming SDOT's Revised

[1] The Ballard Coalition is the successor in interest to the Ballard Business Appellants and to the Petitioners/Appellants in all prior administrative and judicial appeals. This motion will use the term "Ballard Coalition" to refer to the petitioner in all related proceedings.

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Determination of Nonsignificance. Schneider Decl., Ex. B. One of the issues litigated before Hearing Examiner Watanabe in the second hearing was the appropriate level of design for SEPA review of the Missing Link proposal, and in Conclusion No. 9, the Hearing Examiner affirmed SDOT's use of a ten percent (10%) level of design (emphasis added):

> 9. The appeal also asserts that the project description is incomplete. It is true that SDOT has not specified or committed to specific safety measures or design tools that will be used on the project, and the Appellants' unease with this lack of specificity is understandable. But SEPA also requires that the environmental review be done at the earliest time, and SDOT routinely utilizes a **10 percent design level**, as in this case, for purposes of conducting environmental review. The evidence shows that SDOT regularly uses the kind of mitigation measures described at hearing, e.g., signage, warning devices, consolidation of driveways, and other measures. These measures are within SDOT's authority to require and would address the impacts that have been identified for this project. Under these circumstances, it was not unreasonable for SDOT to wait to identify which mitigation measures it will employ at a specific location. The project was adequately described for purposes of SEPA review.

Id. The Ballard Coalition appealed the second Hearing Examiner decision to the Court, which again reversed the Examiner in the Court's Second Order of Remand. Schneider Decl., Ex. C.

B. The Superior Court held that, for the Missing Link proposal, a ten percent (10%) level of design is not adequate to identify significant adverse environmental impacts under SEPA

In its Second Order of Remand the Court reversed the Hearing Examiner's second Decision on the very issue that is the subject of this Dispositive Motion: the Court held that the Examiner's Conclusion No. 9, which affirmed SDOT's use of a ten percent (10%) level of design, was not supported by substantial evidence. The Second Order of Remand states:

> 5. Hearing Examiner conclusion of law number 9 is not supported factually in the record and is reversed for the reasons stated in the Court's oral decision, a transcript of which is attached to this Second Order of Remand.
>
> 6. This matter is REMANDED to the Seattle Department of Transportation (SDOT) for the limited purpose of **more fully designing the Shilshole Segment so that the impacts of the proposal on the adjoining land use, and any proposed mitigation of those impacts, may be identified.**[2]

[2] *Id.* Emphasis added.

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The attached transcript of Judge Rogers' oral decision, beginning with the last paragraph on page 4, states (emphasis added):

> I conclude with limited issues that **SDOT has not sufficiently planned the project in order to even be able to consider whether there would be impacts in certain limited situations.** Let me be very clear. SEPA does not dictate the specific degree of project completion for SEPA review. It may be 10%. It may be 60%. It may be a different number entirely. All may be adequate depending on the project. The question is not the level of planning. **The question is whether or not there is enough to know whether it can be reviewed under SEPA for its impact. The reason for this is what hasn't been decided can't be reviewed.** Now this in many cases, the issue here for example, which is a very limited issue, would be simply a design issue as was testified to. But here the record in front of me, which is all I have, indicates that it may have, in fact, great impacts, among impacts supposed to be accounted for in the checklist. Secondly, if in fact there is impact, and I don't even know that there would be, if that decision was made later on it could make the decision potentially unreviewable. Again, the record is very ambiguous on this point. **It is simply not fair to defer decisions and to trust the party making the decisions to reach the right outcome**, because this defeats the entire policy of the checklist review. Conducting this issue, which again is a very limited issue, I've thought about a flip test which judges sometimes use. If Covich Williams was applying for a project that might severely impact an existing bike trial, would it be sufficient for a SEPA review to allow them to say to trust our future decisions for the impact it might have. And I dare say it would be [inaudible] appeal.
>
> Therefore, in conclusion of law no. 9, which states it was not unreasonable to let SDOT wait to identify which mitigation measures it would employ at specific locations that the project was adequately described for purpose of SEPA review, I find is not supported factually in the record.

Id. Judge Rogers **retained jurisdiction** to enforce his Second Order of Remand, stating in § 7:

> 7. This court retains jurisdiction over this matter, including judicial review of any further administrative appeals of actions taken in response to this order, and for entry of a final order upon compliance with this court's Second Order of Remand.

To date, such "judicial review of any further administrative appeals taken in response to [the Second Order] and for entry of a final order upon compliance" has not yet occurred.

C. In response to the Superior Court's Second Order of Remand, SDOT prepared plans at a twenty-to-thirty percent (20-30%) level of design, and Hearing Examiner Watanabe determined that the adverse environmental impacts discernible at that level of design were significant

In response to the Superior Court's Second Order of Remand, SDOT prepared new plans for the Shilshole Segment of the Missing Link and then issued a Reissued Revised Determination

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of Non-significance that the Ballard Coalition appealed to the Hearing Examiner. In the Hearing Examiner's third Decision, File W-12-002 dated August 27, 2012 (Schneider Decl., Ex. A), Hearing Examiner Watanabe found in Finding No. 7:

> 7. In response to the Second Order of Remand, SDOT had its engineering consultant, SVR, prepare a conceptual trail layout for the Shilshole Segment. The Shilshole Segment **is now at a design detail level of between 20 and 30 percent** . . .[3]

Over the course of a three-day hearing in July and August of 2012, the Ballard Business Appellants presented expert testimony and other evidence about the environmental impacts that were discernible at this twenty-to-thirty percent (20%-30%) level of design, and Hearing Examiner Watanabe agreed with Appellants that these environmental impacts were significant, as she summarized in her Conclusions 8 and 9:

> 8. The iterative nature of the engineering design process does not lend itself well to SEPA's requirements and the remanded nature of this appeal. In the 2011 appeal of the Revised DNS, SDOT argued, and the Examiner agreed, that SDOT had the ability and authority to adjust the trail proposal, including mitigation measures, as it progressed through the design process. But the Second Order of Remand referenced the lack of design detail as a basis for the remand. SDOT has provided more detail concerning the design, and again asserts that it can make additional adjustments going forward that will resolve traffic conflicts. However, **on the record as it exists now before the Examiner, the Examiner concludes that the proposal would have significant adverse impacts in the form of traffic hazards** along the Shilshole Segment because of conflicts between truck movements and the other vehicle traffic and trail users along the Segment.[4]
>
> 9. Therefore, the issuance of the DNS was clearly erroneous, and an Environmental Impact Statement will be required to address the impacts of the Shilshole Segment, rather than the preparation of another DNS.

Despite prevailing before the Examiner in August 2012, in September 2012 the Ballard Coalition filed an appeal in the King County Superior Court challenging a number of issues raised and decided in the first, second and third appeals to the Examiner, and that Court challenging is

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[3] Emphasis added.
[4] Emphasis added.

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stilling pending in the consolidated King County Superior Court Cause No. 09-2-326586-1 SEA.[5]

D. In response to this third Decision of the Hearing Examiner, SDOT prepared its FEIS by reverting to the ten percent (10%) level of design that the Court has already determined to be inadequate for SEPA review of the Missing Link proposal

In response to the Hearing Examiner's third Decision, SDOT prepared and issued a Draft EIS, and one of the undersigned attorneys for the Ballard Coalition, Josh Brower, submitted a comment letter that specifically addressed the inadequate level of design that SDOT was using in its environmental review:

> The Draft EIS is materially insufficient and fatally flawed because SDOT failed to sufficiently design each alternative route so it could properly assess potential significant adverse environmental impacts as Ordered by the Hearing Examiner in 2012 and Judge Rogers in 2011. . ..[6]

SDOT's response asserted:

> The EIS appropriately relies on designs at approximately 10% level of design for each of the build alternatives, which SDOT determined was sufficient to evaluate any potential significant adverse environmental impacts. . ..[7]

SDOT's ten-percent (10%) level of design was invalidated by Judge Rogers' Second Order of Remand as being insufficient for the SEPA analysis of the Missing Link because "SDOT has not sufficiently planned the project in order to even be able to consider whether there would be impacts in certain limited situations."[8] As Judge Rogers said in the Second Order of Remand,

> The question is whether or not there is enough to know whether it can be reviewed under SEPA for its impact. **The reason for this is what hasn't been decided can't be reviewed**.... It is simply not fair to defer decisions and to trust the party [SDOT] making the decisions to reach the right outcome, because this defeats the entire policy of the checklist review.[9]

SDOT, however, based the entire FEIS on the ten percent (10%) level of design that Judge Rogers rejected as inadequate to identify significant impacts.

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[5] This is the appeal the City recently unsuccessfully attempted to dismiss.
[6] Schneider Decl., Ex. D (pages 25 -26 of Volume 2 of the FEIS)
[7] *Id.*
[8] Schneider Decl., Ex. C, transcript at page 4, line 19-20.
[9] *Id.*

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E. SDOT tried and failed to persuade the Superior Court to dismiss its on-going jurisdiction over compliance with its Second Order of Remand

After Hearing Examiner Watanabe issued the third Hearing Examiner Decision in this matter in August 2012, directing SDOT to prepare an EIS for the Shilshole Segment of the Missing Link, the Ballard Coalition appealed her decision to Superior Court, in part because the Examiner's decision did not require an EIS for the entirety of the Missing Link. SDOT and the Appellants agreed to consolidate this new appeal with the pending appeal over which Judge Rogers retained jurisdiction, and the parties also agreed to stay the new appeal until SDOT issued its FEIS in response to the Hearing Examiner's third Decision. The consolidated judicial appeals were eventually assigned to Judge Parisien.

On April 12, 2017, the month before SDOT issued the FEIS and despite the parties' stipulated stay, SDOT filed a motion to dismiss the consolidated judicial appeals in which the Superior Court retains jurisdiction over "any further administrative appeals of actions taken in response" to the Second Order of Remand. A copy of SDOT's Motion to Dismiss is attached to the Schneider Declaration as Exhibit E, and a copy of the Ballard Coalition's Response in Opposition is attached as Exhibit F. SDOT argued that the prior Hearing Examiner Decisions and Superior Court Orders were not binding on any proceeding related to the adequacy of the FEIS because the issues in the pending/stayed judicial appeal were either moot or unripe. The Ballard Coalition argued that those Decision and Orders are binding on any proceeding related to the adequacy of the FEIS because the FEIS is "standing on the shoulders" of those prior Decisions and Orders. *Id.* *(quoting* the Washington State Supreme Court in *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 631, 860 P.2d 390 (1993)).

On May 18, 2017, Judge Parisien agreed with the Ballard Coalition by entering her Order Denying Respondents' Motion to Dismiss. Schneider Decl., Ex. G.

On May 25, 2017, SDOT published notice of the FEIS, and on June 8, 2017 the Ballard Coalition filed this appeal of its adequacy.

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III. ARGUMENT

A. SDOT and the Hearing Examiner are bound by the Superior Court's determination that a ten percent (10%) level of design is not adequate for SEPA review of the Missing Link

As demonstrated in the factual summary above, the FEIS is inadequate as a matter of law because SDOT based the FEIS on a ten percent (10%) level of design that the Court already has held to be insufficient for purposes of SEPA review. SDOT based its second Revised DNS on a ten percent (10%) level of design; the Hearing Examiner affirmed that level of design in the second Hearing Examiner Decision; and the Superior Court, in the Second Order of Remand, reversed the Examiner after determining that the ten percent (10%) level of design is not adequate to evaluate the environmental impacts of SDOT's Missing Link proposal under SEPA.

SDOT then developed its design for the Shilshole Segment to a twenty-to-thirty percent (20-30%) level and issued a Revised and Reissued DNS for the project. On appeal of that DNS, Hearing Examiner Watanabe in August 2012 determined that the adverse environmental impacts (traffic hazards) that could be identified at this 20%-30% level of design were significant and ordered SDOT to prepare an EIS for the Shilshole Segment of the Missing Link. In June 2016, SDOT issued a Draft EIS for the entire Missing Link, not just the Shilshole Segment, reverting to a ten percent (10%) level of design. In a comment letter on the Draft EIS, one of the attorneys for the Ballard Coalition reminded SDOT that the Court already had determined that a ten percent (10%) level of design is inadequate for SEPA review of the Missing Link proposal. SDOT nonetheless issued the FEIS a year later, in May 2017, without increasing the level of design.

In response to Mr. Brower's comment letter on the Draft EIS, SDOT simply asserted that it, SDOT, had determined that a ten percent (10%) level of design is "sufficient to evaluate any potential significant adverse environmental impacts." Schneider Decl., Ex. D (page 26 of Volume 2 of the FEIS).

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This determination is not SDOT's to make. The Superior Court already has determined otherwise in its Second Order of Remand, stating "SDOT has not sufficiently planned the project in order to even be able to consider whether there would be impacts in certain limited situations.... **The reason for this is what hasn't been decided can't be reviewed**...."[10] The Examiner confirmed the Court's determination by then concluding that at a significantly higher level of design, twenty-to-thirty percent (20%-30%), the Missing Link would create significant adverse environmental impacts in the form of significant traffic hazards.

When the Court denied SDOT's motion to dismiss Cause No. 09-2-326686-1 SEA, the Court confirmed that it continues to exercise on-going jurisdiction to enforce its determination that a ten percent (10%) level of design is inadequate for review of the Missing Link proposal. By reverting to a ten percent (10%) level of design, SDOT is disregarding both the Court's Second Order of Remand and the Hearing Examiner's determination that probable significant adverse impacts are present at a higher level of design. SDOT is concealing rather than disclosing such significant environmental impacts from both decision-makers and the public.

B. SDOT is collaterally estopped from disputing the Superior Court's determination

In its Second Order of Remand the Court expressly "retains jurisdiction . . . of any further administrative appeals of actions taken in response to this order, and for **entry of a final order upon compliance with this Court's Second Order of Remand**."[11] Even if the Superior Court had not retained such jurisdiction, however, SDOT would be collaterally estopped from re-litigating the issue of whether a ten percent (10%) level of design is adequate for SEPA review of the Missing Link project.

> Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, WASHINGTON PRACTICE, *Civil Procedure* § 35.32, at 475 (1st ed. 2003) (hereafter Tegland, *Civil Procedure*). It is distinguished from claim preclusion "'in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a

[10] Schneider Decl., Ex. C.
[11] Emphasis added.

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> different claim or cause of action is asserted.' " *Rains v. State,* 100 Wash.2d 660, 665, 674 P.2d 165 (1983) (emphasis added) (quoting *Seattle–First Nat'l Bank v. Kawachi,* 91 Wash.2d 223, 225–26, 588 P.2d 725 (1978)); *Kyreacos v. Smith,* 89 Wash.2d 425, 427, 572 P.2d 723 (1977); *see Shoemaker v. City of Bremerton,* 109 Wash.2d 504, 507, 745 P.2d 858 (1987); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 WASH. L.REV.. 805, 805, 813–14, 829 (1985) (hereafter Trautman, *Claim and Issue Preclusion*); Tegland, *Civil Procedure* § 35.32, at 475. Claim preclusion, also called res judicata, "is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation." *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n,* 72 Wash.2d 887, 894, 435 P.2d 654 (1967).
>
> The collateral estoppel doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. *Reninger v. Dep' t of Corr.,* 134 Wash.2d 437, 449, 951 P.2d 782 (1998). Also implicated are principles of repose and concerns about the resources entailed in repetitive litigation. Tegland, *Civil Procedure* § 35.21, at 446. Collateral estoppel provides for finality in adjudications. Trautman, *Claim and Issue Preclusion,* 60 WASH. L.REV. at 806.

Christensen v. Grant County Hospital District No. 1, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004) (footnotes omitted).

The Hearing Examiner has applied collateral estoppel in the past, e.g., *In the Matter of the Complaint of WILLIAM T. DEVNEY regarding Third Party Billing for Utility Services*, File No. US-10-006, Findings and Decisions, October 25, 2010. SDOT already has litigated and lost the issue of whether a ten percent (10%) level of design is adequate for SEPA review of the Missing Link proposal and the Ballard Coalition should not be required to prepare for and conduct another evidentiary hearing to prove again what it already has proven to the Superior Court's satisfaction. SDOT does not get another bite at these apples.

C. SDOT's failure to evaluate its proposal at a level of design that allows significant adverse impacts to be identified violates multiple SEPA requirements and makes its EIS inadequate as a matter of law

In response to Mr. Brower's comment letter on the Draft EIS, which reminded SDOT that it had designed its proposal at an inadequate level for SEPA review, SDOT asserted that the Superior Court's Second Order of Remand and the Hearing Examiner's third Decision were "made in the context of the adequacy of determinations of non-significance that are no longer

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valid and are no longer being relied upon." Schneider Decl., Ex. D (page 26 of Volume 2 of the FEIS).

The Second Order of Remand did far more than grant an appeal of a DNS: it remanded for the purpose of "more fully designing the Shilshole Segment so that the impacts of the proposal on the adjoining land uses, and any proposed mitigation of those impacts, may be identified." Schneider Decl., Ex. C § 6. SDOT takes the absurd position that having more fully designed the proposal to a level that allowed the Hearing Examiner to determine that the impacts were significant, SDOT now can un-design its proposal and revert to the prior level of design – ten percent (10%)– that the Superior Court found to be inadequate for identifying environmental impacts.

By preparing an EIS based on a level of design that does not allow probable significant adverse environmental impacts to be identified, SDOT violates multiple provisions of SEPA and frustrates the very purpose of an EIS, which is to inform decision-makers of the impacts of the proposed action.

SMC 25.05.400 states the purposes of an EIS, including (emphasis added):

> B. An EIS **shall provide impartial discussion of significant environmental impacts** and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality.

SMC 25.05.402 states the requirements of an EIS, including (emphasis added):

> A. EISs **need analyze only the reasonable alternatives and probable adverse environmental impacts that are significant**. Beneficial environmental impacts or other impacts may be discussed.

SMC 25.05.440 sets forth "EIS contents," and subsection E.5 states (emphasis added):

> 5. **Significant impacts on both the natural environment and the built environment must be analyzed**, if relevant (Section 25.05.444). This involves impacts upon and the quality of the physical surroundings, whether they are in wild, rural, or urban areas. Discussion of significant impacts shall include the cost of and effects on public services, such as utilities, roads, fire, and police protection, that may result from a proposal. EIS's shall also discuss significant environmental impacts upon land and shoreline use, which includes housing, physical blight, and significant impacts of projected

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> population on environmental resources, as specified by RCW 43.21C.110(1)(d) and (f), as listed in Section 25.05.444.

SDOT's FEIS violates SMC 25.05.400, 25.05.402, and 25.05.440 as a matter of law because it is based upon a ten percent (10%) level of design that the Superior Court has already determined, in an Order that is binding on SDOT, is not adequate to allow adverse impacts to be identified or adequately evaluated.

D. The FEIS is inadequate as a matter of law because the Hearing Examiner already rejected SDOT's "trust us to do it right later" design approach for the Missing Link

The Hearing Examiner, in the third Decision, *see* Schneider Decl., Exhibit A, confirmed that the Court will not permit SDOT to **design** the Missing Link after it completes the SEPA process, which is exactly what SDOT admits it is doing in the FEIS. In the third Decision, the Examiner stated:

> In the 2011 appeal of the Revised DNS, SDOT argued, and the Examiner agreed, that SDOT had the ability and authority to adjust the trail proposal, including mitigation measures, as it progressed through the design process. **But the Second Order of Remand referenced the lack of design detail as a basis for the remand.**

Exhibit A, Conclusion 8 (emphasis added). Despite clear direction and requirements from the Court to "more fully design" the Missing Link so it could be adequately analyzed under SEPA, which requirement was affirmed by the Examiner when she directed SDOT to prepare an EIS to identify and analyze significant traffic hazards, SDOT unwound the design from twenty-to-thirty percent (20% - 30%) down to ten percent (10%), the same level of design at which the Hearing Examiner had ***not*** been able to identify significant adverse impacts in the prior appeal hearing that led to the Court's Second Order of Remand. SDOT again is asking the decision-makers to "trust us" to identify and design away significant traffic hazards in a subsequent design process done after and outside of the SEPA process, and after City decision-makers will decide whether and where to build the trail.

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In the FEIS, SDOT makes numerous statements that it will somehow make the Missing Link safe and provide mitigation measures ***later***, when it actually gets around to designing the trail, e.g.:

> The alternatives described below are **conceptual routes** designed to provide distinct alternatives for analysis in the FEIS.

FEIS, Executive Summary, page ES-2, a copy of which is attached to the Schneider Decl. as Exhibit H. In addition to being a conceptual route, SDOT's Preferred Alternative even includes a section that has ***never*** been designed nor analyzed under any prior SEPA review outside of the FEIS:

> **Except for one minor route connection** (as described below), the Preferred Alternative does not contain any route segments or components that were not analyzed in the DEIS.

Id. (emphasis added). SDOT confirms throughout the FEIS that it has not identified the significant traffic hazards that the Hearing Examiner was able to identify only at the twenty-to-thirty percent (20% - 30%) level of design, let alone determined whether and to what extent such traffic hazards can be mitigated, e.g.:

> This section describes roadway modifications, intersection treatments, driveway design, and parking modifications that **could be incorporated** during the final design phase of the project **to address safety**, access, nonmotorized users, and vehicle types.

Id. at ES-6 (emphasis added). SDOT goes on to admit:

> Although the Preferred Alternative would improve overall safety compared to the No Build Alternative, there is **potential for some new impacts depending on final design**. Those potential impacts include:
>
> - Sight distance concerns at driveway crossings with the BGT Missing Link;
> - Conflicts between vehicles and nonmotorized users at trail crossings;
> - Conflicts between nonmotorized users and trail design features, such as planter strips and curbing; and
> - Conflicts between vehicles and trail design features, such as planter strips and curbing.

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> **These potential new impacts would be minimized through detailed review during the trail design process**, such as conducting detailed sight distance reviews at each driveway intersection **during final design**.

Id. at FEIS page 7-37 (emphasis added). The "potential impacts" listed above are the very same impacts the Coalition proved at the third Hearing and that the Examiner confirmed **would** create significant adverse traffic hazards. SDOT is doing it again: It is refusing to adequately design the trail now so that significant impacts can be identified in the EIS; instead SDOT is telling decision-makers to "trust" that it will identify and mitigate potential impacts later, **during final design**. Without the fundamental design information that the Court already has determined can only be identified at a higher level of the design (as the Hearing Examiner's decision later confirmed), the FEIS does not meet the requirements in the Second Order and is inadequate as a matter of law. Delaying critical decisions to address safety, access and mitigation measures is impermissible because:

> **. . . what hasn't been decided can't be reviewed**.... It is **simply not fair to** defer decisions and to **trust** the party [SDOT] making the decisions to reach the right outcome, because this defeats the entire policy of the checklist review.[12]

To do what SDOT is doing, which is to defer identification of significant impacts and possible mitigation until the future, after the FEIS has been used to make a decision, defeats the very purpose of an EIS, which is to inform decision-makers ***before*** a decision is made. It also is simply "not fair to defer decisions and to trust" an applicant to comply with SEPA, particularly when that applicant is also the SEPA lead agency with an inherent conflict of interest and years of history of noncompliance with SEPA for this very project, as the Court has twice concluded and the Hearing Examiner confirmed.

IV. CONCLUSION

SDOT's decision to revert to a ten percent (10%) level of design violates the Superior Court's Second Order of Remand and multiple provisions of SEPA, and flouts the Hearing Examiner's remand for the purpose of identifying and analyzing significant traffic hazards that she was able to identify only at a twenty-to-thirty percent (20% - 30%) level of design. SDOT's

[12] Schneider Decl., Exhibit C, page 5 of transcript, lines 1-2.

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actions undermine the very purpose of its FEIS, which is to inform City decision-makers about probable significant adverse environmental impacts *before* a decision is made about the Missing Link proposal.

An evidentiary hearing is unnecessary, and the Ballard Coalition asks the Hearing Examiner to find and conclude that SDOT's FEIS is inadequate as a matter of law. The Ballard Coalition also requests oral argument on this motion.

DATED this 17th day of July, 2017.

s/ Joshua c. Brower
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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed a copy of Ballard Coalition's Dispostive Motion and Declaration of Patrick J. Schneider ISO Ballard Coalition's Dispositive Motion with the Seattle Hearing Examiner using its e-filing system. I also certify at on this date, a copy of this document was sent via email agreement to the following parties listed below:

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DATED this 17th day of July, 2017.

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