BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of THE BALLARD COALITION of the adequacy of the FEIS issued by the Director, Seattle Department of Transportation for the Burke-Gilman Trail Missing Link Project.	Hearing Examiner File No.: W-17-004 RESPONSE IN OPPOSITION TO BALLARD COALITION'S DISPOSITIVE MOTION

I. INTRODUCTION

According to King County Superior Court Judge Jim Rogers, in his ruling on a prior appeal related to the Missing Link – the same ruling Appellant relies on in its Dispositive Motion:

> **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.**[1]

The degree of project development necessary to reasonably identify its environmental impacts is a question of fact, contrary to the Appellant's assertion otherwise. Considering the unique facts in the prior appeal, Judge Rogers held that a ten percent level of design was not sufficient to "be able to consider whether there would be

[1] Second Order of Remand, King County Superior Court No. 09-2-26586-1 SEA ("Second Remand Order"), Verbatim Transcript of Proceedings ("Transcript") at 4 (emphasis added), attached as Exhibit A to the Declaration of Erin E. Ferguson ("Ferguson Decl."). The Second Remand Order incorporated the Superior Court's oral ruling and attached the Transcript to the order.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

impacts in certain limited situations."[2] In an attempt to apply this narrow holding to the present case, the Appellant completely mischaracterizes Judge Rogers' ruling. First, that decision involved the adequacy of a Determination of Non-significance ("DNS"), which is significantly different than the Environmental Impact Statement ("EIS") under review here. Second, Judge Rogers' ruling pertained to only the Shilshole Segment, a small part of the larger Missing Link Project. The Hearing Examiner must determine whether the level of design relied upon for the purpose of the Missing Link Project EIS is appropriate based on the unique facts presented in this case.

Moreover, collateral estoppel applies, and the parties are bound by Judge Rogers' broader holding that "SEPA does not dictate the specific degree of project completion for SEPA review." The level of design SDOT relied upon in preparing the EIS for the Missing Link Project is both appropriate and consistent with the Court's earlier ruling, and the Motion should be denied.

II. FACTS RELEVANT TO OPPOSITION

The Appellant's Dispositive Motion relies on Judge Rogers' holding that that ten percent level of design of the Shilshole Segment was not adequate for purposes of reviewing the Seattle Department of Transportation's ("SDOT") issuance of a DNS for the Missing Link Project.[3] Pursuant to that holding, the Court remanded the matter to SDOT "for the limited 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."[4] As described in the FEIS and in the earlier proceedings, the

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[2] *Id.*

[3] Although the City does not agree with the Appellant's characterization of all of the facts, a more robust description of the procedural history of this case is set forth in Appellant's Motion and is not repeated here for brevity.

[4] Second Remand Order at 2 (Ferguson Decl., Exh. A) (emphasis added).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Shilshole Segment is only a portion of the full, approximately 1.4 mile long, Missing Link Project. The Shilshole Segment is a 0.3 mile stretch along Shilshole Avenue between 17th Avenue NW and NW Vernon Place.[5]

Pursuant to Judge Rogers' decision, SDOT prepared plans for the Shilshole Segment at a 20 to 30 percent level of design.[6] The remainder of the design remained unchanged, at approximately 10% level of design. SDOT then published a Reissued Revised DNS, which Appellant's predecessor in interest appealed. The Hearing Examiner found that the Shilshole Segment's 20 to 30 percent level of design was sufficient to assess impacts; found no error with SDOT's decision as to the rest of the trail, portions of which were designed to ten percent; and ordered preparation of an EIS on the Shilshole Segment portion only.[7] SDOT subsequently prepared an EIS assessing not only the Shilshole Segment, but the entire Missing Link.

III. ARGUMENT

A. The level of design SDOT relied upon in preparing Missing Link EIS was sufficient to reasonably identify the potential environmental impacts of the Project.

1. SEPA does not establish a specific percentage threshold of design.

Contrary to the Appellant's argument, SEPA does not establish a specific percentage threshold of design that is required prior to completion of environmental review. Instead, SEPA is much less precise and requires only that a project be sufficiently defined such that "the principal features of a proposal and its environmental impacts can

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[5] Hearing Examiner Decision, File W-11-002 (Ferguson Decl., Exh. B), at 2; FEIS at 1-1 and 1-2 (Ferguson Decl., Exh. C).
[6] Dispositive Motion at 4-5; Hearing Examiner Decision, File W-12-002 (Ferguson Decl., Exh. D) at 2.
[7] Hearing Examiner Decision, File W-12-002 (Ferguson Decl., Exh. D) at 8-9.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

be reasonably identified."[8] (Emphasis added.). That general directive is balanced against the simultaneous requirement that an EIS should be prepared "**at the earliest possible point** in the planning and decision-making process."[9] (Emphasis added.). Consistent with the WAC and SMC, Judge Rogers stated,

> 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.[10]

As noted by Judge Rogers, the question of whether an agency has reasonably identified a project's principal features is a question of fact that cannot be decided as a matter of law based on the percentage of design that is complete.

Appellant misconstrues Judge Rogers' prior holding to support its erroneous argument that SEPA establishes a specific threshold of design. First, Appellant ignores the Court's express disavowal of a specific percentage design threshold. Second, Appellant ignores the legal context in which the Court previously ruled that the City's prior design was deficient. The Court's previous ruling regarding use of a ten percent level of design arose in the context of a DNS for only the small Shilshole Segment of the Missing Link Project. The distinction between a DNS and an EIS is a critical legal distinction that, per the Superior Court's holding, impacts the appropriate level of design completion. A DNS is a "relatively superficial threshold environmental analysis" that "represents an agency decision not to undertake sophisticated environmental analysis before acting on a

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[8] WAC 197-11-055(2); Seattle Municipal Code ("SMC") 25.05.055(b).
[9] WAC 197-11-055(2); Seattle Municipal Code ("SMC") 25.05.055(b). *See also* WAC 197-11-406; SMC 25.05.406.
[10] Second Remand Order, Transcript of Proceeding (Ferguson Decl., Exh. A), at 4-5 (emphasis added).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

proposal";[11] signifies the agency's conclusion that the proposal will not have any probable significant adverse environmental impacts;[12] and is a "quite absolute agency choice which has major potential for subverting SEPA."[13] As the Superior Court stated, "[I]f 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."[14]

Here, however, the Hearing Examiner is reviewing an EIS for the entire project. Unlike a DNS, an EIS: analyzes the proposal under "intense environmental scrutiny and elaborate process requirements"; "is designed to systematically analyze and inform decisionmakers of all relevant and material environmental considerations" including significant environmental impacts; and allows for supplemental analysis even after the finalization of an EIS.[15] Unlike a DNS, where the agency has concluded that there are no impacts, the City's EIS includes rigorous analysis of potential impacts. Thus, the question of whether a project is sufficiently designed to support a conclusion of no impacts without further analysis (as in the case of a DNS) is fundamentally different, as a matter of law, than the question of whether a project is sufficiently defined to support the rigorous environmental review of an EIS. Judge Rogers' conclusions about the adequacy of the design related to a DNS are therefore irrelevant to the adequacy of the EIS. The fact that a DNS represents a more superficial, more absolute, and less detailed agency decision than an EIS supports requiring a higher level of design completion for a DNS than an EIS.

Third, Appellant ignores the limited factual context in which the Court previously ruled that the City's prior design was deficient. In the Second Remand Order, Judge

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[11] R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, §§ 14.01, 14.01[1][b] (2016).
[12] WAC 197-11-340.
[13] R. Settle, *supra*, § 14.01[1][b].
[14] Second Remand Order (Ferguson Decl. Exh. A) at 5.
[15] R. Settle, *supra*, §§ 14.01, 14.01[12].

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Rogers' ruling regarding the insufficiency of design applied only to the small Shilshole Segment, even though the rest of the Project was also designed to a ten percent level of design.[16] Further, in File W-12-002, the Hearing Examiner found that the Shilshole Segment's 20 to 30 percent level of design was sufficient to assess impacts and also found no error with SDOT's decision as to the rest of the trail, rejecting Appellant's challenges to the level of design.[17] Thus Judge Rogers and the Examiner previously declined to extrapolate the Court's conclusions related to that limited segment to the entirety of the Project. Appellant's claim that SDOT has "un-design[ed] its proposal and revert[ed] to the prior level of design"[18] distorts the facts and ignores the progression of design and additional analysis of the potential impacts along the Shilshole Segment,[19] in addition to the remainder of the Project, that has occurred since the Second Remand Order.

Therefore, the Examiner should reject Appellant's arguments that suggest SEPA or the Court's prior order establishes a specific threshold of design prior to completion of an EIS.

2. Determining the appropriate level of design requires a fact-dependent analysis of the nature of the project.

Appellant's argument rests on a gross over-simplification of project design. There can be no specific threshold of design that is required for SEPA purposes precisely because there is no universal definition of a "ten percent level of design." As explained in the attached Declaration of Darby Watson, Director of SDOT's Project Development Division,

> There is no universal definition for 10% design. Different agencies have different guidelines and different engineers within those agencies may have their own standard for what

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[16] Second Remand Order (Ferguson Decl., Exh. A) at 2.
[17] Hearing Examiner Decision, File W-12-002 at 2 (Ferguson Decl., Exh. D), 8-9.
[18] Dispositive Motion at 11.
[19] *See, e.g* FEIS at 1-1 and 1-17 (Ferguson Decl., Exh. C), describing one example of additional analysis that was performed between the DEIS and FEIS, in addition to design modifications and analysis done between the time the DNS was reversed and issuance of the DEIS.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

> each level of design entails, exercising their professional judgment. The level of detail provided at each design milestone varies by project depending on many factors, including the type of project, the goals of the design, and the availability of information, such as existing utility information, survey topography, etc. Even within a single design, the level of design may vary between different segments of a project alignment. Therefore, defining a level of design for plans is subjective.

A subjective, fact-dependent standard, such as the "ten-percent rule" championed by the Appellant, cannot be applied as a matter of law, particularly where the inquiry involves a completely different set of facts. At most, the Examiner is tasked with identifying whether the City reasonably identified the principal features of a proposal and its environmental impacts, which is an inherently factual determination that cannot be decided as a matter of law.

3. Appellant's arguments would prevent the City from complying with SEPA's directive to prepare an EIS "at the earliest possible point" in the planning process.

As noted above, SEPA requires that an EIS should be prepared "**at the earliest possible point** in the planning and decision-making process."[20] (Emphasis added.). Similarly, WAC 197-11-406 and SMC 25.05.406 both state, "The lead agency shall commence preparation of the environmental impact statement **as close as possible to the time the agency is developing or is presented with a proposal.**" (Emphasis added.).

The Washington Supreme Court has explained that "SEPA is designed to avoid crisis decision making by requiring meaningful early evaluations of environmental matters."[21] Thus, SEPA invites (and it is typical for) applicants to advance design beyond

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[20] WAC 197-11-055(2); Seattle Municipal Code ("SMC") 25.05.055(b).

[21] *Loveless v. Yantis*, 82 Wn.2d 754, 766, 513 P.2d 1023, 1030 (1973). *See also* R. Settle, *supra*, § 14.01 ("[Environmental impact] statements must be prepared early enough to inform and guide decisionmakers rather than rationalize or justify decisions already made.").

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

what has been done by the time of the FEIS. If there are substantial changes to a design that are likely to have significant adverse environmental impacts, or if new information indicates a proposal's "probable significant adverse environmental impacts" were not previously covered by the existing environmental documents, then SEPA invites supplemental analysis.[22]

Appellant's argument would necessarily delay environmental review and inhibit the City's ability to issue its EIS at "the earliest possible point in the planning and decision-making process." Appellant would instead require the City to make significant front-end investment in developing proposals without the benefit of the very environmental review that is supposed to inform that Project's development. SEPA does not require that result.

B. Appellant is collaterally estopped from re-litigating the Superior Court's determination that "SEPA does not dictate the specific degree of project completion for SEPA review."

The City does not dispute that collateral estoppel applies to the issue of whether SEPA mandates a specific level of project design based on Judge Rogers' resolution of that question; based on Judge Rogers' broader ruling, there is no set level of design required by SEPA. Collateral estoppel bars relitigation of an issue in a subsequent proceeding. Collateral estoppel applies when (1) the issue decided in the prior adjudication was identical with the one presented in the action in question; (2) the earlier proceeding ended in a final judgment on the merits; (3) the party against whom the plea is asserted a party or in privity with a party to the prior adjudication; (4) the application of the doctrine does not work an

[22] WAC 197–11–600(3)(b)(ii); *see, e.g., Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 542-44, 137 P.3d 31 (2006) (concluding that an FEIS was adequate, and a supplemental EIS was not required, even though the project applicant made "extensive modifications" to its proposal after the FEIS was issued).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

injustice on the party against whom the doctrine is to be applied.[23] Here, the only real question relates to the issue decided in the prior adjudication before the Superior Court.

Although Judge Rogers' ruling arose in a completely different factual context, the issue decided in the prior adjudication is identical to the issue presented by Appellant's Motion—the degree of project completion required for SEPA review. Although the Court did find that there was not sufficient design to determine the impacts on a portion of the Missing Link Project in the context of a DNS, Judge Rogers clearly held that SEPA requires no specific level of design completion and that different levels of design—including ten percent—may be adequate under different circumstances. This holding is binding on the parties and the Hearing Examiner should reject Appellant's invitation to apply a mischaracterized ruling to the circumstances of the present case.

Given that the Appellant agrees that collateral estoppel applies, there is no dispute that remaining three elements of collateral estoppel are satisfied. The prior proceeding ended in a final judgment on the merits. Appellant is the successor in interest to the appellants of the prior proceedings, and Washington courts have found privity in successors in interest.[24] And finally, application of collateral doctrine does not work an injustice on Appellant, because Appellant has already had a full opportunity to litigate this issue. Appellant is collaterally estopped from claiming that SEPA requires a specific percentage of design completion.

IV. CONCLUSION

For all of the reasons discussed above, Appellant's Dispositive Motion should be denied.

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[23] *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957, 961 (2004).
[24] *Bull v. Fenich*, 34 Wn. App. 435, 439, 661 P.2d 1012, 1014 (1983).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

DATED this 31st day of July 2017.

PETER S. HOLMES
Seattle City Attorney and
VAN NESS FELDMAN

Erin E. Ferguson, WSBA #39535
Tadas A. Kisielius, WSBA #28734
Dale Johnson, WSBA #26629
Clara Park, WSBA #52255
701 Fifth Ave., Suite 2050
Seattle, WA 98104
Tel: (206) 948-7406
E-mail: erin.ferguson@seattle.gov;
tak@vnf.com; dnj@vnf.com;
cpark@vnf.com

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of the City's Response in Opposition to Ballard Coalition's Motion with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date, a copy of this document was sent via email agreement to the following parties listed below:

Joshua C. Brower
Danielle N. Granatt
Leah B. Silverthorn
Email: josh@verislawgroup.com
danielle@verislawgroup.com
leah@verislawgroup.com
Attorneys for Plaintiff/Petitioner
Megan Manion, Legal Assistant
Email: megan@verislawgroup.com

Patrick J. Schneider
Foster Pepper LLC
Email: pat.schneider@foster.com
Brenda Bole, Legal Assistant
brenda.bole@foster.com
Attorneys for Plaintiff/Petitioner

Matthew Cohen
Rachel H. Cox
Stoel Rives LLP
Email: matthew.cohen@stoel.com
rachel.cox@stoel.com
Judy Shore, Practice Assistant
Judy.shore@stoel.com
Attorneys for Intervenor
Cascade Bicycle Club

Tadas Kisielius, WSBA #28734
Dale Johnson, WSBA #26629
Clara Park, WSBA #52255
Van Ness Feldman LLP
Email: tak@vnf.com; dnj@vnf.com
cpark@vnf.com
Marya Pirak, Paralegal

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Email: map@vnf.com
Attorneys for Respondent City of Seattle

Dated this 31st day of July, 2017, at Seattle, Washington.

s/ALICIA REISE, Legal Assistant

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200