BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

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	Hearing Examiner File W-17-004 SEATTLE DEPARTMENT OF TRANSPORTATION'S MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

Pursuant to Hearing Examiner Rules of Practice and Procedure 1.03 and 3.02, Respondent Seattle Department of Transportation ("SDOT") brings this Motion to dismiss certain issues set forth in Appellant Ballard Coalition's ("Appellant") Amended Notice of Appeal ("Appeal").

The subject of this appeal is SDOT's Final Environmental Impact Statement ("FEIS") for the proposed project to complete the Burke-Gilman Trail ("Project"). The Project will connect two segments of the multi-use trail with a marked, dedicated route to serve all trail users. The Examiner should dismiss the issues discussed below as a matter of law because the Appellant fails to state a claim for which relief can be granted or seeks relief that is outside of the Examiner's jurisdiction.

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This motion is based on the following:

- SEPA expressly authorizes lead agencies to develop and assess new alternatives in a Final EIS.
- Appellant's effort to obtain an advisory opinion about the proper shoreline permitting process is not ripe and exceeds the Examiner's jurisdiction.
- SEPA expressly authorizes SDOT to be the lead agency for review of its own proposals.
- SEPA expressly authorizes SDOT to designate its proposal as the "Preferred Alternative" and does not require SDOT to consider Appellant's preferred project design.
- Appellant is precluded from re-litigating issues that have been decided in earlier proceedings related to SEPA review of the Missing Link Project.

II. REQUEST FOR RELIEF

For the reasons explained below, the Examiner should dismiss the following issues or parts of issues[1] raised in the Appeal[2]:

- Issue II.C, which alleges legal error because the FEIS includes a connecting segment in its Preferred Alternative;
- Issue II.H, which alleges legal error because the FEIS failed to examine issues under the Shoreline Management Act;
- Part of Issue II.A which alleges legal error because SDOT acted as Lead Agency for its Project; and
- Parts of Issues II.A and II.B, which allege that SEPA requires SDOT to consider Appellant's preferred project design.

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[1] Appellant's notice of appeal does not include a concise statement of issues. Section II of the notice titled "issues" includes very broad headings that are followed by more detailed narrative argument which imply "sub-issues." This motion requests that the Examiner dismiss some of the general issues listed in the headings in their entirety. It also seeks to dismiss "sub-issues" included in the narratives.

[2] Appellant's notice of appeal, Section VI, purports to "reserve the right to amend this Notice of Appeal to state additional challenges to the adequacy of the FEIS . . .." Appellant is foreclosed from adding issues or amending its Notice of Appeal. Hearing Examiner Rules of Practice and Procedure Rule 3.05 ("For good cause shown, the Hearing Examiner may allow an appeal to be amended no later than 10 days after the date on which it was filed.").

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III. ARGUMENT

A. Standard of Review.

The Hearing Examiner Rules of Practice and Procedure ("Rules") address motions to dismiss. Rule 3.02 provides that the Hearing Examiner may dismiss all or part of an appeal if it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief or is "without merit on its face." *See also ASARCO Inc. v. Air Quality Coal.*, 92 Wn. 2d 685, 695-98, 601 P.2d 501, 510 (1979) (holding that a quasi-judicial body like the Examiner may dispose of an issue via summary judgment when there is no genuine issue of material fact).[3]

B. The Examiner should dismiss Issue II.C because SEPA invites Lead Agencies to develop and assess new alternatives in a Final EIS.

In Section II.C of its Appeal, Appellant challenges SDOT's inclusion of a minor segment of the Preferred Alternative in the FEIS on the grounds that SDOT had not previously included it or analyzed it in the DEIS. The Examiner should dismiss this issue because Appellant fails to state a claim for which relief can be granted. SEPA expressly invites lead agencies to advance and improve alternatives beyond the precise bounds of the alternatives that are included and analyzed in the DEIS. WAC 197-11-405; 197-11-560(1)(a) – (b).

The Preferred Alternative identified in the FEIS combines components of two of the build alternatives analyzed in the DEIS: the Shilshole South Alternative and the Leary Alternative.[4] The Preferred Alternative introduces a segment connecting these two alternatives, which begins at the intersection of NW Market St and 24th Ave NW, and proceeds south on the

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[3] Rule 1.03(c) provides that, in matters not covered by the Rules, the Hearing Examiner has discretion to determine the appropriate procedure and "may look to the Superior Court Civil Rules for guidance." CR 12(b)(6) allows dismissal of a claim if the pleadings fail to state a claim upon which relief can be granted. To the extent the Examiner deems it necessary to considers matters outside the pleadings, the motion can be treated as a motion for summary judgment under CR 56. CR 12(b)(6).

[4] FEIS at 1-7 and Figure 1-3, depicting the preferred alternative, at FEIS at 1-9, attached as Exhibit A to the Declaration of Erin Ferguson (Ferguson Decl.).

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west side of 24th Ave NW for approximately 125 feet before the intersection with the south side of Shilshole Ave NW.[5] This 125 foot connecting segment was not included in the DEIS and is the subject of the Appellant's claim. Importantly, however, SDOT's FEIS analyzes the entirety of the Preferred Alternative, including the connecting segment.[6] In addition, other alternatives considered in the DEIS were located on the other side of the same street and were similar in design. Appellant nevertheless challenges the FEIS's inclusion of the connecting segment solely on the grounds that it was not initially included or analyzed in the DEIS.[7]

Contrary to Appellant's claims, SEPA and the state and City implementing regulations expressly authorize SDOT's approach. In the FEIS, SDOT may "modify alternatives, including the proposed action" and may "develop and evaluate alternatives not previously given detailed consideration by the agency." WAC 197-11-560; SMC 25.05.560 (mirroring WAC 197-11-560). *See also* SMC 25.05.405 ("An FEIS shall respond to opposing views on significant adverse environmental impacts and reasonable alternatives which the lead agency determines were not adequately discussed in the DEIS."). Consistent with this authority, SDOT developed a Preferred Alternative that was informed by public comment and performed additional analysis of that new

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[5] FEIS at 1-8 (Ferguson Decl., Exh. A). The Shilshole North Alternative described in SDOT's DEIS evaluates the east side of 24th Ave NW for that 125 foot stretch of road. However, SDOT chose the west side of 24th Ave NW because it has better connectivity and directness of route. *Id.*

[6] *See, e.g.*, FEIS at 1-7 through 1-8 (noting that the west side of 24th Ave NW as chosen for "better connectivity and directness of route")(Ferguson Decl., Exh. A); FEIS Figure 1-5 illustrating the potential design of the Preferred Alternative along the approximately 125 feet connecting segment between NW Market St. and "not 54th" (Ferguson Decl., Exh. A); Table 1-1, at FEIS 1-30, identifying potential impacts within the connecting segment (Ferguson Decl., Exh. A); Technical Appendix A, Transportation Discipline Report at 4-37, Figure 4-12, Study Area Corridor Collisions, showing collision data related to the connecting segment (Ferguson Decl., Exh. B); and Technical Appendix C, Parking Discipline Report, Figure 5-1 showing parking impacts related to the connecting segment (Ferguson Decl., Exh. C).

[7] The Appellant incorrectly labels its claim as improper "piecemealing." It is important to clarify that the error they allege is not piecemealing. "Piecemealing" refers to a scenario when a lead agency excludes from environmental review a part of a proposal and reserves it for a subsequent SEPA process. *E. Cty. Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 441, 105 P.3d 94, 99 (2005). Even by Appellant's own characterization in the Notice of Appeal, that did not happen here. It is uncontroverted that SDOT reviewed the preferred alternative in its entirety (including the connecting segment) in the FEIS. They are not alleging that SDOT deferred analysis of that segment to a later

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alternative prior to the issuance of the FEIS. SDOT's action is entirely consistent with SEPA. SDOT committed no error when it developed and evaluated the new alternative, which simply combined two previously analyzed alternatives and added a short connecting segment. The Examiner should dismiss Issue II.C because the SEPA implementing regulations expressly contemplate including such features as the new connecting segment in the Preferred Alternative.

C. The Hearing Examiner should dismiss Issue II.H because the Examiner lacks jurisdiction over issues pertaining to Shoreline Permits and Exemptions.

In Issue II.H, the Appellant asserts that the FEIS did not sufficiently analyze the Project's consistency with shoreline regulations. While nominally styled as a SEPA challenge, Appellant is, in fact, inviting the Examiner to decide whether a shoreline permit or a shoreline exemption is required for this Project.[8] The Hearing Examiner dismissed this issue for lack of jurisdiction in prior appeals related to the Missing Link, and Appellant is estopped from raising it here. Moreover, the issue is beyond the scope of SEPA review.

1. Collateral estoppel precludes Appellant from raising the Shoreline issue.

The doctrine of collateral estoppel bars the Appellant from raising this claim because the same issue was resolved on jurisdictional grounds in an earlier proceeding related to this Project. Twice in earlier proceedings challenging SDOT's DNS for the Project, the Examiner dismissed the same issue for lack of jurisdiction. On the first occasion, the Examiner dismissed a claim that SDOT's SEPA Checklist and DNS did not adequately disclose or discuss the proposal's inconsistencies with the Shoreline Management Act ("SMA"). The Examiner held that:

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environmental review process. Instead, Appellant argues that the inclusion of a segment of an alternative in a FEIS that was not previously analyzed in the DEIS constitutes legal error. Appellant's claim is not "piecemealing."

[8] Appellant asserts that the "FEIS claims that the Project is exempt from obtaining a Shoreline Substantial Development permit..." and then argues that the FEIS should have assessed whether the project satisfies the exemption standard and whether the project disclose and analyze the Project's relationship to and conformity to the City's Shoreline Master Plan and Program." Appeal at 12.

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> The Hearing Examiner has no jurisdiction over permits or exemptions issued pursuant to the City's Master Program and will not, as suggested by the Appellant, use her authority over SEPA appeals to reach the merits of the SMA exemption issued for the proposal. There is no genuine issue of material fact here, and the Department is entitled to dismissal of this issue as a matter of law. The Department's motion is **GRANTED,** and Issue 4.6 is **DISMISSED**.[9]

On appeal, the Superior Court upheld the Examiner's decision, concluding that "The Hearing Examiner lacks jurisdiction regarding the Shoreline Management Act and Shoreline Master Program and Petitioners' collateral attack on the shoreline exemption for the trail was properly dismissed."[10] In a subsequent appeal to the Examiner of the re-issued DNS, the Examiner ruled that collateral estoppel barred the Appellant from raising shoreline issues.[11]

As previously described in SDOT's opposition to Appellant's Dispositive Motion, collateral estoppel bars re-litigation of an issue in a subsequent proceeding. It 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 injustice on the party against whom the doctrine is to be applied. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957, 961 (2004). All four elements are met.

Here, Appellant raises the same previously litigated shoreline issue, and the Examiner correctly determined that she was without jurisdiction in the context of a SEPA appeal to resolve the allegation that SDOT failed to adequately disclose or discuss the proposal's inconsistencies

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[9] In the Matter of the Appeal of The Ballard Business Appellants from a Determination of Non-Significance, Issued by the Director, Seattle Department of Transportation, Hearing Examiner File W-08-007, Order on Director's Motion in Limine, at 2 (Ferguson Decl., Exh. D).

[10] *Salmon Bay, et al., v. City of Seattle, et al.,* King County Superior Court No. 09-2-26586-1SEA, Order of Remand at 2, June 7, 2010.

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with the Shoreline Management Act in the course of its environmental review. Although the earlier proceeding involved a DNS, not the FEIS on review here, the fundamental legal question is the same: whether the Examiner has jurisdiction to decide SMA issues in the context of a SEPA review. The Examiner's prior dismissal of that issue for lack of jurisdiction precludes re-litigation in this SEPA appeal.

Moreover, the remaining elements of collateral estoppel are satisfied. The earlier proceedings resulted in a final decision about the merits of the SMA jurisdictional issue. Those proceedings involved the same parties. Indeed, Appellant admits that it is the successor in interest to the Ballard Business Appellants, who were party to the earlier appeals.[12] Finally, application of the doctrine does not work an injustice on the Appellant. Appellant had an opportunity to litigate the shoreline issue during the earlier proceedings, including appeal of the jurisdictional rulings. Moreover, Appellant will have adequate opportunity to appeal any shoreline permitting decision when one is made.[13] Because all four collateral estoppel factors are satisfied, the Appellant is barred from re-litigating this SMA issue in this appeal.

2. Questions about shoreline permitting are beyond the scope of this FEIS appeal.

Even if Collateral Estoppel does not apply, the Examiner should dismiss this issue. An appeal of an FEIS (especially one that is initiated before the agency has submitted a single application for a permit or an exemption) is not the proper forum for challenging the need for any specific permit. Upon submission of an application, the Department of Construction and

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[11] In the Matter of the Appeal of The Ballard Business Appellants from a Determination of Non-Significance, Issued by the Director, Seattle Department of Transportation, Hearing Examiner File W-11-002, Order, at 2 (Issue D ('SDOT failed to study the project's impacts on the shoreline environment')(Ferguson Decl., Exh. E).

[12] Notice of Appeal at 2 ("The Ballard Coalition is the successor in interest to, and includes many of the members of, the Ballard Business Appellants, which successfully appealed the Determinations of Nonsignificance (DNS) issued by SDOT between 2008 and 2012 for the Project.") Indeed, the Ballard Coalition, itself, asserts collateral estoppel is relevant, thereby conceding privity of parties. Ballard Coaltion Motion at 9-10.

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Inspections will review the Project for consistency with shoreline regulations. It is not SDOT's responsibility as the SEPA lead agency or the purpose of the FEIS to evaluate a project for compliance with specific permitting criteria, to usurp local decision-making, or to dictate a particular substantive result.[14] Rather, the FEIS is limited to informing the decision-maker of the environmental impacts of the project proposed in a permit application.[15] The decision-maker must determine compliance with permitting criteria at the time the permit application is filed, not before as part of SEPA review. Pre-determining the outcome of the permit application during the SEPA process would render the subsequent permitting process meaningless.

Appellant nominally cites to SMC 25.050.440 in support of its argument that SEPA requires the FEIS to analyze the Project's conformity with permit requirements. This regulation, however, mirrors state SEPA regulations and simply requires preparation of a fact sheet that includes a "list of all licenses which the proposal is known to require." SMC 25.05.440(A)(4). *See also* WAC 197-11-440(2)(d). Here, SDOT complied with this requirement by listing "Shoreline Master Program Review" as a subsequent step in the review process for the Project.[16] In any event, this notice does not require substantive evaluation of permit criteria or a determination of the outcome of the forthcoming permitting process.

Appellant will have an opportunity to address its claims related to shoreline regulations in a separate forum. Appellant cannot use this FEIS review to obtain an advisory opinion about

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[13] *See, e.g.*, Chapter 36.70B RCW, *Ecology v. City of Spokane Valley,* 167 Wn.App. 952, 964, 275 P.3d 367 (2012); *Samuel's Furniture v. Ecology*, 147 Wn.2d 440; 54 P.3d 1194 (2002), and Chapter 90.58.

[14] *Save Our Rural Env't v. Snohomish County*, 99 Wash.2d 363, 371, 662 P.2d 816 (1983) (citations omitted). *See also Sisley v. San Juan County*, 89 Wash.2d 78, 83, 569 P.2d 712 (1977) (SEPA supplements the permit system of the SMA); RCW § 43.21C.060 ("The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state"); R. Settle, *supra* at § 18.01[2] (SEPA is a supplement to the statutory authority of each agency).

[15] WAC 197-11-655(2) ("Relevant environmental documents, comments, and responses shall accompany proposals through existing agency review processes, as determined by agency practice and procedure, so that agency officials use them in making decisions.").

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which type of shoreline permit the Project may require. Issue II.H should be dismissed.

D. The Examiner should dismiss parts of Issue II.A because SEPA encourages SDOT to serve as the Lead Agency for review of its own proposals.

In Issue II.A, Appellant asserts that the FEIS is flawed because SDOT acted as both the Project proponent and the SEPA lead agency. Appeal at 6.[17] This claim is baseless and should be dismissed. It is barred by collateral estoppel and is contrary to the SEPA implementing regulations.

In the DNS appeal that preceded the current FEIS review, Appellant raised the identical issue—asserting that environmental review is not sufficiently independent or objective where SDOT acts as both the Project proponent and the SEPA lead agency. The Examiner concluded this claim is without merit, citing SMC 25.05.926 which provides that "[w]hen an agency initiates a proposal, it is the lead agency for that proposal." W-11-002, Decision at 10. Collateral estoppel bars Appellant's attempt to raise the same issue here; and, as discussed above, all the remaining elements of collateral estoppel are satisfied.

Even if collateral estoppel did not bar re-litigation of this issue, the Examiner should dismiss it because it fails to state a claim for which relief can be granted. The claim is contrary to SEPA and its implementing regulations. WAC 197-11-926, which is identical to SMC 25.05.926, directs SDOT to act as the SEPA lead agency for its projects. *See also* R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 10.01[1] (2016) ("The 'lead agency' has 'main responsibility for complying with SEPA's procedural

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[16] FEIS at FS-III (Ferguson Decl., Exhibit A).

[17] Appellant does not specifically allege that SDOT failed to comply with WAC 197-11-926(2) ("Whenever possible, agency people carrying out SEPA procedures should be different from agency people making the proposal."). Even if Appellant had raised such a claim, the claim would have no merit. First, by its plain language, WAC 197-11-926(2) is not mandatory. Second, the Hearing Examiner previously found that Mark Mazzola, the SDOT staff person who had prepared the SEPA checklist, the DNS, and now the EIS, is employed within a separate

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requirements' and sole responsibility for the threshold determination and EIS preparation and content … The fact that the lead agency is responsible for SEPA review of its own proposal does not in itself violate the appearance of fairness doctrine or other conflict of interest laws."). There is no basis for Appellant's claim and Issue II.A should be dismissed.

E. The Examiner should dismiss parts of Issues II.A and II.B, which allege that SEPA requires SDOT to consider Appellant's preferred project design.

1. SEPA allows an agency to designate its proposal as the "Preferred Alternative or Benchmark for the Alternatives Analysis."

In Issues II.A and II.B, Appellant asserts that SDOT "over-narrowly defined the 'Project Objective'" as creation of a multi-use trail, thereby "preclud[ing] the analysis of reasonable alternatives," "predetermining the outcome," and "fail[ing] to properly evaluate and analyze design alternatives, such as protected bicycle facilities or cycle tracks."[18] The Examiner should dismiss this claim because the SEPA Rules expressly allow SDOT's approach.

"[D]esignation of the proposal as the preferred alternative or benchmark for the alternatives analysis is commonplace and allowed by the SEPA Rules."[19] WAC 197-11-440 provides that in an EIS, "[o]ne alternative (including the proposed action) may be used as a benchmark for comparing alternatives. The EIS may indicate the main reasons for eliminating alternatives from detailed study." Further, WAC 197-11-060(3) directs agencies to "make sure that the proposal that is the subject of environmental review is properly defined," and allows agencies to then use the proposal "as an objective, as several alternative means of accomplishing a goal, or as a particular or preferred course of action." SDOT's approach in this case is consistent with these directives.

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division of SDOT which is charged with performing environmental review, and is not responsible for designing or implementing the Project. (Hearing Examiner Decision, File W-11-002, at 11).

[18] Appeal at 6.

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The purpose of the Project is, and has always been, to complete the existing regional multi-use trail, the Burke Gilman Trail ("BGT"). In the "Alternatives Considered but Not Included" section of the FEIS, SDOT examined several alternative facility types but excluded those designs from detailed study because they "would not maintain the same look and feel as the remainder of the BGT, nor would they provide an adequate level of comfort for users of varying abilities and activities," and "did not meet the project objective of a multi-use trail through the study area."[20]

SDOT examined the specific design offered by Appellant as a "reasonable alternative"—protected bicycle lanes such as cycle tracks—but concluded that such a bicycle-only facility does not accommodate the pedestrians and other non-motorized users who currently use the BGT.[21] It is simply not a multi-use alternative. In fact, it is not an alternative at all, but rather a fundamentally different project that ignores the broader purpose of the BGT,[22] is incompatible with existing BGT segments,[23] and would exclude a significant portion of BGT users.

SDOT properly defined its objective to complete the multi-use trail and the FEIS appropriately considered alternative means for accomplishing that objective. The Examiner should reject Appellant's attempts to frustrate that objective through consideration of a bicycle-only facility.

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[19] R. Settle, *supra* at § 14.01[2][b].
[20] FEIS at 1-33.
[21] *Id.*
[22] As described in the FEIS, the Missing Link Project's primary purpose is to connect the roughly 1.4-mile gap between existing segments of the BGT. FEIS at 1-3 (Ferguson Decl., Exh. A). The BGT is a multi-use trail that runs east from Golden Gardens Park in Seattle and connects to the Sammamish River Trail in Bothell, except for the missing segment through the Ballard neighborhood. Id. at 1-1 (Ferguson Decl., Exh. A). A multi-use trail "allows for two-way, off-street pedestrian, and bicycle use. Wheelchairs, joggers, skaters, and other nonmotorized users are also welcome." Id. at XIV (Ferguson Decl., Exh. A). The Project is intended to create a multi-use trail consistent with the existing BGT. Id. at 1-3 (Ferguson Decl., Exh. A).
[23] The specific design that Appellant proposed in its comment to the DEIS called for one-way cycle tracks on both sides of the street. FEIS Vol. 2 at 25, n.2 ((Ferguson Decl., Exh. F). The existing segments of the BGT run along

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IV. CONCLUSION

For the reasons stated above, SDOT respectfully requests that the Hearing Examiner grant SDOT's Motion and dismiss the issues identified in Section II herein.

DATED this 4th day of August, 2017.

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one side of the street only. Thus, Appellant's design not only calls for a different use, but is also a fundamentally different facility than the BGT.

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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 and the Declaration of Erin Ferguson with Exhibits A – F 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:

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Dated this 4th day of August, 2017, at Seattle, Washington.

s/ALICIA REISE, Legal Assistant

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