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BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:)
) Hearing Examiner File
THE BALLARD COALITION)
) W-17-004
of the adequacy of the FEIS issued by the)
Director, Seattle Department of) DECLARATION OF ERIN E. FERGUSON
Transportation for the for the Burke-Gilman)
Trail Missing Link Project)
)

I, Erin E. Ferguson, declare under penalty of perjury under the laws of the State of Washington the following:

1. I am over eighteen years of age, have personal knowledge of the matters herein, and am competent to testify regarding all matters set forth herein.
2. I am one of the attorneys for Respondent Seattle Department of Transportation in this matter.
3. Attached as Exhibit A is a true and correct copy of the following pages of Volume 1 of the FEIS for the "Burke-Gilman Trail Missing Link Project": FS-III, XIV, 1-1, 1-3, 1-7 through 1-9, 1-15, and 1-30. The entire FEIS can also be accessed at [http://www.seattle.gov/transportation/docs/bgt/EIS/Vol%201_BGT_FEIS_web_lowrez.p](http://www.seattle.gov/transportation/docs/bgt/EIS/Vol%201_BGT_FEIS_web_lowrez.pdf)
df

- 1 4. Attached as Exhibit B is a true and correct copy of page 4-37 of Technical Appendix B,
2 Transportation Discipline Report, Figure 4-12.
- 3 5. Attached as Exhibit C is a true and correct copy of page 5-5 of Technical Appendix C,
4 Parking Discipline Report, Figure 5-1.
- 5 6. Attached as Exhibit D is a true and correct copy of the Order on Director's Motion in
6 Limine, Hearing Examiner File W-08-007, dated February 11, 2009.
- 7 7. Attached as Exhibit E is a true and correct copy of the Order [on motion to dismiss],
8 Hearing Examiner File W-11-002, dated April 15, 2011.
- 9 8. Attached as Exhibit F is a true and correct copy of p. 25 Volume 2 of the FEIS for the
10 "Burke-Gilman Trail Missing Link Project."

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

13 DATED this 3rd day of August, 2017.

14
15 PETER S. HOLMES
16 Seattle City Attorney

17 By:



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23
Erin E. Ferguson, WSBA #39535

Exhibit A

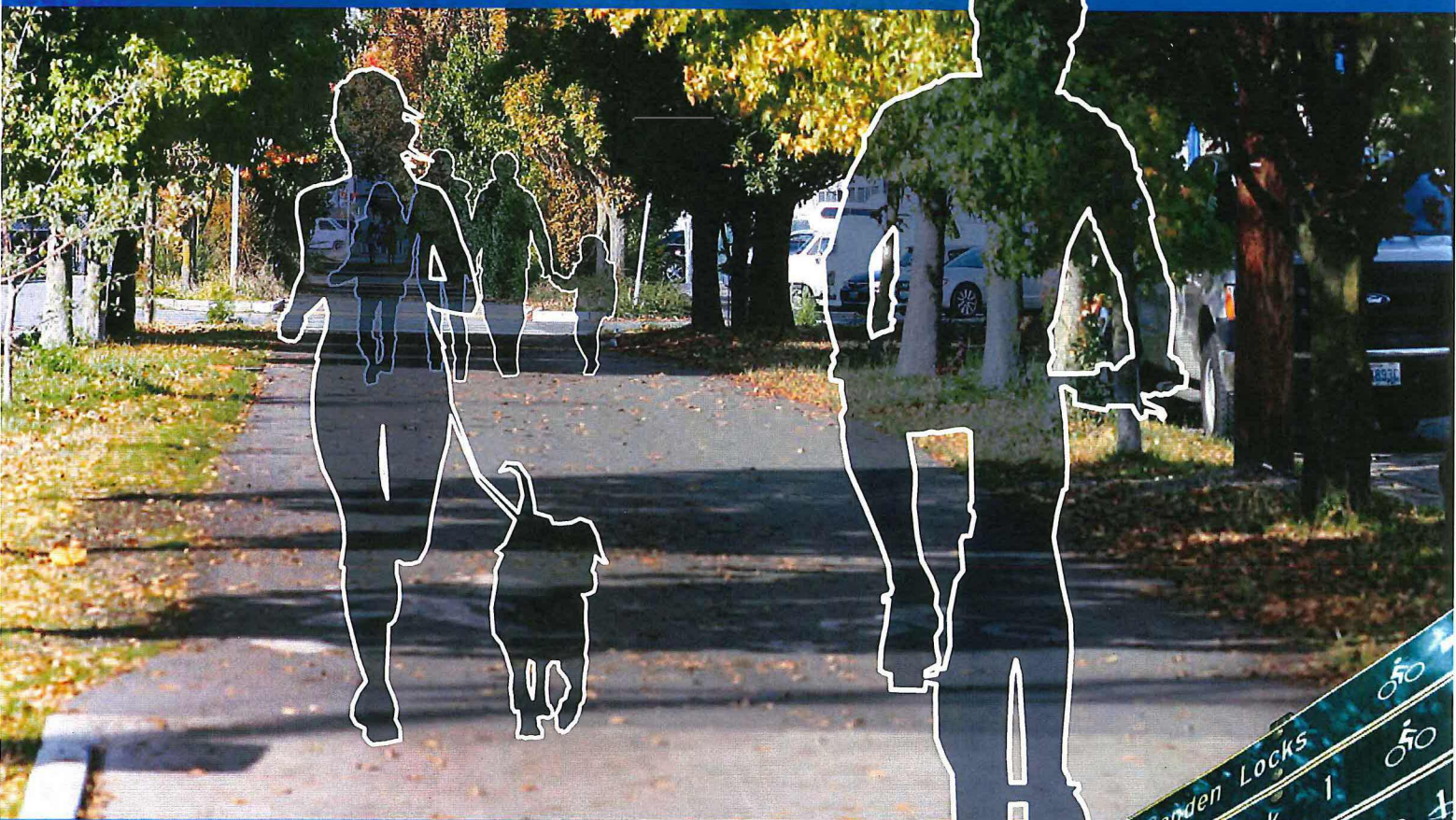
BURKE-GILMAN TRAIL MISSING LINK PROJECT



Seattle
Department of
Transportation

Final Environmental Impact Statement

May 2017



Permits, Licenses, and Approvals Likely Required for Proposal

- State Environmental Policy Act (SEPA)
- Seattle Shoreline Master Program Review
- National Pollutant Discharge Elimination System (NPDES) Construction Stormwater General Permit

Authors and Contributors

A list of authors and contributors is provided in Chapter 13 of the FEIS.

Location of Background Materials

Background materials used in the preparation of this FEIS are listed in Chapter 12, References. Several documents are available online at the project website:

http://www.seattle.gov/transportation/BGT_Ballard.htm.

Environmental Review

SDOT published the DEIS on June 16, 2016. A 45-day comments period was open until August 1, 2016 and included public meetings on July 14, 2016 and July 16, 2016. Based on the analysis in the DEIS, with input from the public comments and meetings with area businesses and interest groups, SDOT developed the Preferred Alternative, which combines components previously analyzed in the Build Alternatives. Volume 2 of the FEIS contains the responses to the comments. Final design and permitting are expected to be completed by early 2018, with construction beginning shortly thereafter. The project is anticipated to be complete by 2019.

GLOSSARY

<i>Term</i>	<i>Definition</i>
Best Management Practices (BMPs)	A method that can be used to minimize the amount of pollution entering surface waters. BMPs may include schedules of compliance, operation and maintenance procedures, and treatment requirements.
Bike Box	A bike box is a painted green space on the road with a white bicycle symbol inside. The bike box creates space before the intersection so that people on bicycles can cross the intersection ahead of traffic. This makes bicycles more visible and predictable to approaching drivers.
Build Alternative	An alternative to develop a multi-use trail to connect the existing segments of the Burke-Gilman Trail through the Ballard neighborhood.
Critical Habitat	Critical habitat is defined as specific geographical areas that contain physical or biological features essential to conservation of a species.
Crustal Fault	Faults formed by the deformation of the earth's crust.
Curb Radius (curb radii)	Curb radius is the radius defined by two sidewalks on perpendicular streets that come together at a corner. Curb radii directly impact vehicle turning speeds and pedestrian crossing distances.
Dissolved Oxygen	A measure of the amount of oxygen in the water that is available to be used by aquatic organisms.
Distinct Population Segment (DPS)	A distinct population segment is a vertebrate population or group of populations that is discrete from other populations of the species and significant in relation to the entire species. The federal Endangered Species Act provides for listing species, subspecies, or distinct population segments of vertebrate species.
Elevated Trail	Trail is elevated such that vehicles can pass underneath.
Endangered Species	A species that is in danger of extinction within the foreseeable future throughout all, or a significant portion, of its range.
Ethnographic	The study and systematic recording of human cultures.
Evolutionarily Significant Unit (ESU)	An evolutionarily significant unit is a Pacific salmon population or group of populations that is substantially reproductively isolated from other conspecific populations and that represents an important component of the evolutionary legacy of the species.
Fecal Coliform	A type of bacteria found in the intestinal tracts of mammals. The presence of high numbers of fecal coliform bacteria in a water body can indicate the recent release of untreated wastewater and/or the presence of animal feces. These organisms may also indicate the presence of pathogens that are harmful to humans.
Glacial Till	Unstratified material deposited by a glacier, consisting of clay, silt, sand, gravel, and boulders.



CHAPTER 1: PROJECT HISTORY AND ALTERNATIVES

1.1 Project Background and History

The Burke-Gilman Trail (BGT) is a regional trail that runs east from Golden Gardens Park in Seattle and connects to the Sammamish River Trail in Bothell, except for a missing segment through the Ballard neighborhood. Currently, the regional trail ends at 30th Ave NW by the Hiram M. Chittenden (Ballard) Locks on the west, and begins again at the intersection of 11th Ave NW and NW 45th St on the east. The Seattle Department of Transportation (SDOT) proposes to connect these two segments of the BGT with a marked, dedicated route that would serve all users of the multi-use trail. The proposed project to complete the regional facility is referred to as the Missing Link.

Completing this section of the BGT has been discussed and analyzed since the late 1980s. In the early 1990s, the City of Seattle (City) included the extension of the BGT in its comprehensive plan. By the late 1990s, the Seattle City Council passed a resolution outlining the guiding principles for extending the trail and developed an operating agreement between the Ballard Terminal Railroad (BTR) and the City to preserve the rail line in City ownership while continuing rail service to area businesses. The City Council adopted an ordinance, the Ballard Terminal Railroad Franchise Agreement, which granted BTR the right, privilege, and authority to construct and operate the railway in the railroad right-of-way. In the early 2000s, the City evaluated alternative routes for the trail. In 2003, the Seattle City Council adopted a resolution identifying Shilshole Ave NW as the preferred alignment for the Missing Link, with interim portions of the route to be located along Ballard Ave NW and NW Market St. In 2007, the City adopted the Bicycle Master Plan, which called for completing the trail. Environmental documentation was prepared for the Missing Link beginning in 2008 and was challenged multiple times. In 2012, after the third appeal to the City's Hearing Examiner over the project's environmental determination, the Hearing Examiner required SDOT to develop an environmental impact statement (EIS) related to traffic hazards on the Shilshole Ave NW segment of the project. As a result of the ruling, SDOT decided to prepare an EIS for the entire project and to include an evaluation of alternative routes. SDOT began preparation of an EIS in 2013. Figure 1-1 provides a general timeline of the Missing Link project history.

Changes from the Draft EIS

Chapter 1 includes a description of the newly developed Preferred Alternative, which was not analyzed in the DEIS. It also includes a revised description of Roadway Design and Safety Considerations, and summarizes the comments received on the DEIS.

1.2 Objectives

The BGT currently serves a large portion of Seattle and the region as a highly used nonmotorized transportation and recreational facility. The City has identified a need for recreational and commuter users of the Burke-Gilman Trail to have a safe, direct, and defined way to traverse through the Ballard neighborhood from either end of the existing trail (SDOT, 2007, 2009, 2015). There are a number of barriers between the existing trail ends for people walking and biking. Some streets lack sidewalks or other demarcated areas for pedestrians, and intersection and railroad crossings are substandard for bicycles. Many people have commented during public meetings and open houses that they do not feel comfortable riding bicycles or walking in the roadway, and some activities such as skateboarding are not allowed on city streets. Traffic surveys have shown that the lack of a direct and defined route between trail ends results in people dispersing along various streets through Ballard, which in turn increases the opportunity for conflicts between vehicles and nonmotorized activities (SDOT, 2014, 2015).

Therefore, the primary objective of the proposed project is to connect the roughly 1.4-mile gap between the existing segments of the BGT through the Ballard neighborhood. The project is intended to create a safe, direct, and defined multi-use trail for persons of all abilities, for a variety of transportation and recreational activities, and to improve predictability for motorized and nonmotorized users along the project alignment. Another objective of the project is to provide connections to the proposed nonmotorized networks shown in the Pedestrian Master Plan (SDOT, 2009) and Seattle Bicycle Master Plan (SDOT, 2014), while maintaining truck and freight facilities and access that support industrial and water-dependent land uses within the shoreline district and the Ballard-Interbay Northend Manufacturing and Industrial Center (BINMIC).

1.3 SEPA Process

This Final EIS (FEIS) has been prepared consistent with the State Environmental Policy Act (SEPA) (Washington Administrative Code [WAC] 197-11 and Seattle Municipal Code [SMC] 25.05). It is an analysis designed to help elected officials, community leaders, and the public understand the full range of environmental impacts that could result from the proposal. The City, as the SEPA lead agency, is responsible for fulfilling SEPA's procedural requirements. The FEIS describes potential adverse impacts of each alternative and describes proposed measures to reduce potential adverse impacts. SDOT received approximately 4,100 public comments on the Draft EIS (DEIS), which are included with their responses in Volume 2 of the FEIS. Since the issuance of the DEIS, the City has selected a Preferred Alternative that best meets the project's objective, which is fully analyzed in this FEIS.

The intent and purpose of this FEIS is to satisfy the procedural requirements of SEPA (Revised Code of Washington [RCW] 43.21c and City Ordinance 114057). This is a project-level EIS that encompasses all of the regulatory, transactional, and other actions necessary to complete the Missing Link. This document is not an authorization for an action, nor does it constitute a decision or a recommendation for an action.

1.3.1 Scoping

SDOT held its scoping process between July 17 and August 16, 2013, and held an open house on August 8, 2013 at Ballard High School. The focus of the open house was to receive comments related to alternative trail locations and the elements of the environment that should be evaluated in the EIS. Scoping is described in more detail in the *Burke-Gilman Trail Missing Link Environmental Impact Statement Public Scoping Meeting Comments Summary* available on the City website (SDOT, 2015).

From the intersection of 24th Ave NW and Shilshole Ave NW, SDOT determined that between the options of continuing on NW Market St to Leary Way or Ballard Ave NW, or turning onto Shilshole Ave NW, Shilshole Ave NW would be the most preferable alignment, as it would provide the most direct route to the trail's terminus at 11th Ave NW and NW 45th St. SDOT determined that the Leary Alternative was less preferable because of the number of high-volume roadway intersection crossings and transportation and transit impacts, and that the Ballard Avenue Alternative was less preferable because of similar concerns over the number of roadway intersection crossings in addition to the adverse impacts to the Ballard Farmers Market and Ballard Avenue Landmark District. SDOT then considered whether it would be best to locate the trail on the north or south side of Shilshole Ave NW. At this point in its deliberations, SDOT, in partnership with the City's Office of Economic Development, initiated discussions with transportation and trail experts, bicycle and trail advocacy groups, and representatives from Ballard maritime, industrial, and commercial businesses, about which alignments—either NW Market St or NW 54th St and either along the north or south side of Shilshole Ave NW—would work best for trail users and businesses along the route.

Ultimately SDOT decided that the Preferred Alternative is the NW Market St and Shilshole South alignment, as it best meets the project objectives. While an alignment along the north side of Shilshole Ave NW could provide more direct access into the Ballard Urban Hub neighborhood as trail users would not need to cross Shilshole Ave NW, there are far fewer roadway intersection crossings and fewer conflicts with business operations on the south side of roadway. In addition, there is a wider area of public right-of-way on the south side of Shilshole Ave NW that, combined with a general shift of the trail alignment toward the north, allows more room for business operations and for truck and freight movement in and out of driveways. For a comparison of the potential traffic hazards associated with each of the Build Alternatives, please see Section 1.8.

1.5 No Build Alternative

Under the No Build Alternative, no new multi-use trail would be constructed to connect the existing segments of the regional Burke-Gilman Trail. Trail users would continue to use the existing surface streets and sidewalks to travel between the existing trail segments, a distance of approximately 1.4 miles. Currently, trail users tend to use the most direct route, which is along Shilshole Ave NW. Pedestrians may opt for a street with sidewalks such as Ballard Ave NW or NW Leary Way. Shilshole Ave NW is used by passenger vehicles in addition to large commercial vehicles and trucks traveling to the adjacent industrial areas. There are no sidewalks on the south side of the street and sporadic sidewalks on the north side of the street. Unregulated parking occurs on both sides of the street. The No Build Alternative serves as the baseline condition against which the Build Alternatives are compared over time to their 2040 design year. The year 2040 was used as the timeline to analyze the impacts of the project. Over that time period, population and employment growth is expected to continue in the Ballard neighborhood, leading to an increase in traffic congestion, parking demand, and the number of people walking and biking.

1.6 Build Alternatives

1.6.1 Preferred Alternative

The Preferred Alternative (illustrated in Figure 1-3) is a combination of components of the previously analyzed Build Alternatives. 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. The

Preferred Alternative is most similar to the Shilshole South Alternative, but its westernmost portion contains elements of both the Leary and Shilshole North Alternatives. The Preferred Alternative does not share any segments or components of the Ballard Avenue Alternative.

There would be changes to parking areas, travel and motor vehicle lanes, as well as intersection configurations on both sides of the streets along the Preferred Alternative. The trail would accommodate users on a newly paved, grade-separated surface for most of its length. Route specifics are described below.

Beginning at the existing western trail end (at the Ballard Locks), the trail would continue east along the south side of NW 54th St until it turns into NW Market St. The trail would continue along the south side of NW Market St, until the intersection with 24th Ave NW. Up to this point, the Preferred Alternative follows the same route as both the Shilshole North and Leary Alternatives.

At the intersection of NW Market St and 24th Ave NW, the Preferred Alternative would head south on the west side of 24th Ave NW for approximately 125 feet before the intersection with the south side of Shilshole Ave NW.

The Preferred Alternative would then cross 24th Ave NW and proceed along the south side of Shilshole Ave NW, continuing onto the south side of NW 45th St to 11th Ave NW, and the eastern terminus of the trail. This section of the Preferred Alternative route is identical to the Shilshole South Alternative.

From the existing western trail end at the Ballard Locks, the trail would be north of the BTR tracks until just past 17th Ave NW, at which point the trail would cross to the south of the tracks. A signal would be installed at the intersection of Shilshole Ave NW and 17th Ave NW. The signal would facilitate nonmotorized user crossings of Shilshole Ave NW and allow for better traffic flow between Shilshole Ave NW and 17th Ave NW, which would provide a benefit to traffic mobility and trail users.

The trail width would vary somewhat throughout the corridor due to existing conditions and constraints, but would generally be between 10 and 12 feet wide. Based on the design concepts, the typical right-of-way on Shilshole Ave NW for this alternative would include a barrier or buffer zone adjacent to the railroad tracks, a multi-use trail, a barrier or buffer zone adjacent to the vehicle travel lanes, two vehicle travel lanes, and preservation or addition of parking areas where feasible (Figure 1-3). See Chapter 7, Transportation, for additional detail on this and all other Build Alternatives.

This route was addressed in the DEIS except for the approximately 125-foot section on the west side of 24th Ave NW. The west side of 24th Ave NW has better connectivity and directness of route than the east side of 24th Ave NW, which was evaluated as part of the Shilshole North Alternative.

1.6.2 Shilshole South Alternative

Under the Shilshole South Alternative, the multi-use trail would be primarily routed along the south side of Shilshole Ave NW (Figure 1-2). There would be changes to parking, lanes, and intersection configurations on both sides of the street along this alternative alignment. The trail would accommodate users on a newly paved surface for most of its length.

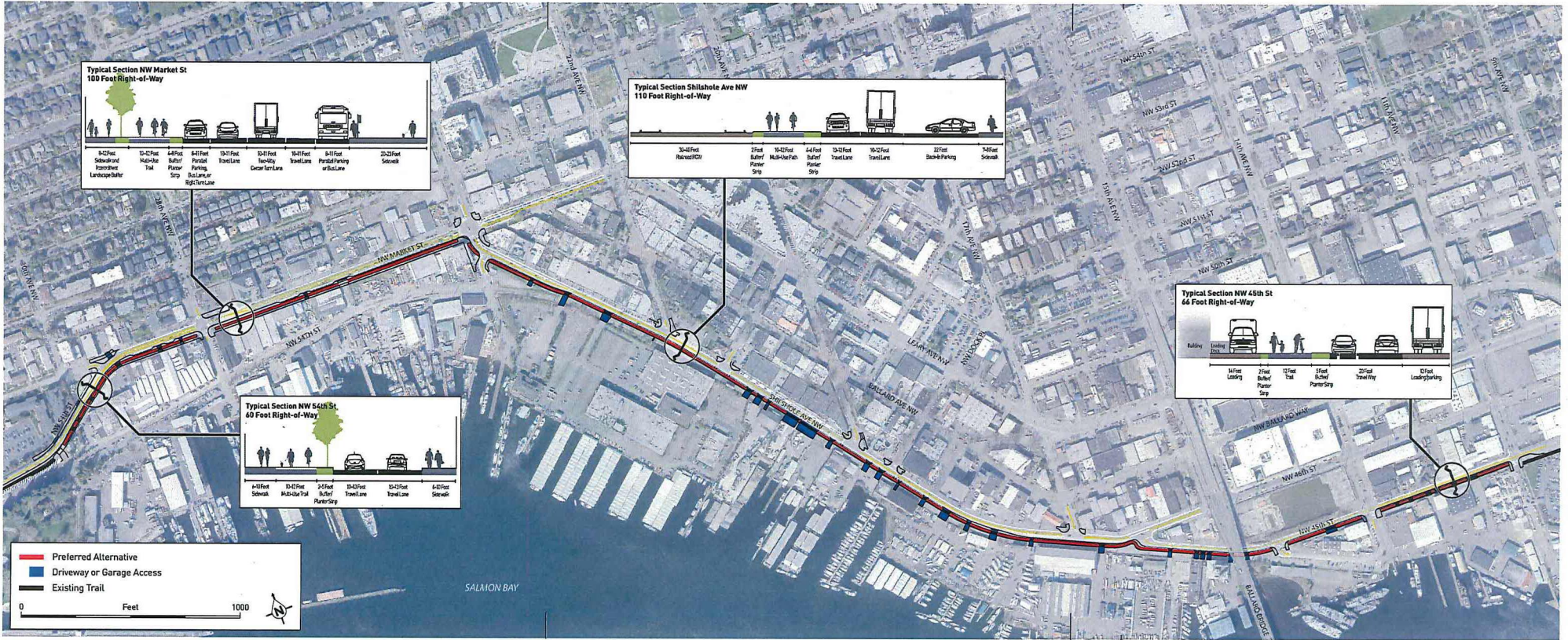


Figure 1-3. Preferred Alternative

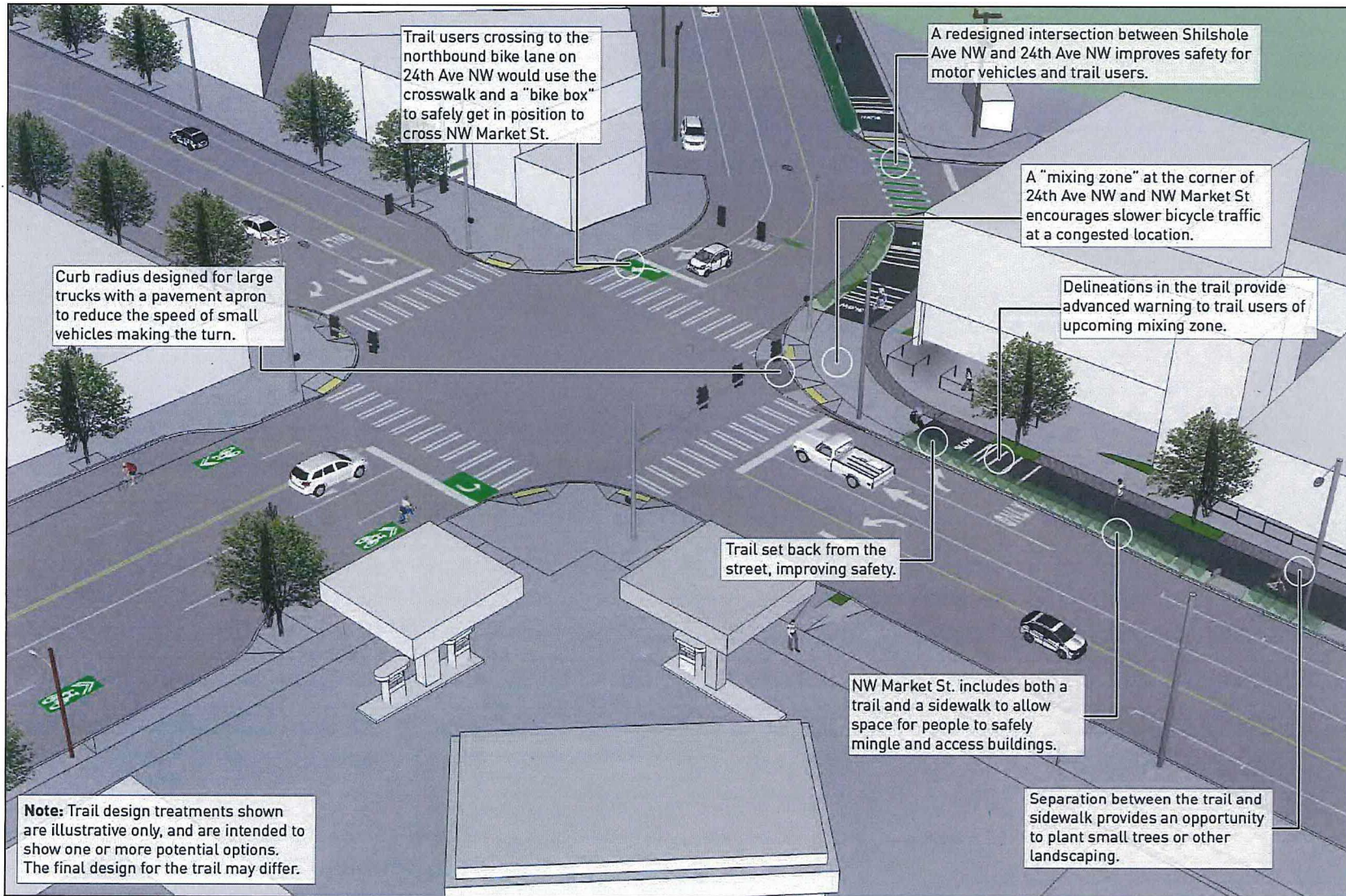


Figure 1-5. Potential Roadway Design and Safety Modifications (NW Market St and 24th Ave NW)

<i>Element</i>	<i>Preferred Alternative</i>	<i>Shilshole South Alternative</i>	<i>Shilshole North Alternative</i>	<i>Ballard Avenue Alternative</i>	<i>Leary Alternative</i>
Nonmotorized	<ul style="list-style-type: none"> Mixing zone of pedestrians, trail users, and business functions (sidewalk café) at 24th Ave NW/NW Market St intersection Some trail design components could create obstacles for trail users 	<ul style="list-style-type: none"> Heavy industrial nature, building orientation, and special truck movements on unimproved NW 54th St right-of-way affect nonmotorized experience Some trail design components could create obstacles for trail users 	<ul style="list-style-type: none"> Mixing zone of pedestrians, trail users, and business functions (sidewalk café) at 24th Ave NW/NW Market St intersection Some trail design components could create obstacles for trail users 	<ul style="list-style-type: none"> Some trail design components could create obstacles for trail users 	<ul style="list-style-type: none"> Mixing zone of pedestrians, trail users, and business functions (sidewalk café) at 24th Ave NW/NW Market St intersection Some trail design components could create obstacles for trail users
Central Segment (between 24th Ave NW and 15th Ave NW)					
Driveways	<ul style="list-style-type: none"> Crosses about 23 driveways/loading zones along this segment Driveways are primarily industrial Driveways are organized and delineated Areas with multiple driveways within close proximity, such as near Salmon Bay Sand and Gravel and Covich Williams 	<ul style="list-style-type: none"> Crosses about 23 driveways/loading zones along this segment Driveways are primarily industrial Driveways are organized and delineated Areas with multiple and wide driveways within close proximity, such as near Salmon Bay Sand and Gravel and Covich Williams 	<ul style="list-style-type: none"> Crosses about 37 driveways/loading zones along this segment Driveways are commercial/retail and industrial Driveways are organized and delineated Areas with multiple driveways within close proximity, such as Salmon Bay Sand and Gravel 	<ul style="list-style-type: none"> Crosses about 28 driveways/loading zones along this segment Driveways are primarily commercial/retail and industrial. Driveways are organized and delineated Areas with multiple driveways within close proximity, such as Ballard Hardware and Ballard Sheet Metal Works 	<ul style="list-style-type: none"> Crosses about 14 driveways/loading zones along this segment Driveways are primarily commercial/retail Driveways are organized and delineated
Intersections	<ul style="list-style-type: none"> There is 1 crossing of an unsignalized intersection approach 	<ul style="list-style-type: none"> There is 1 crossing of an unsignalized intersection approach 	<ul style="list-style-type: none"> There are 1 crossing of a signalized intersection approach and 5 crossings of an unsignalized intersection approach 	<ul style="list-style-type: none"> There are 1 crossing of a signalized intersection approach, 1 crossing of a rapid flashing beacon, and 6 crossings of an unsignalized intersection approach 	<ul style="list-style-type: none"> There are 2 crossings of a signalized intersection approach and 6 crossings of an unsignalized intersection approach

Exhibit B



Seattle
Department of
Transportation

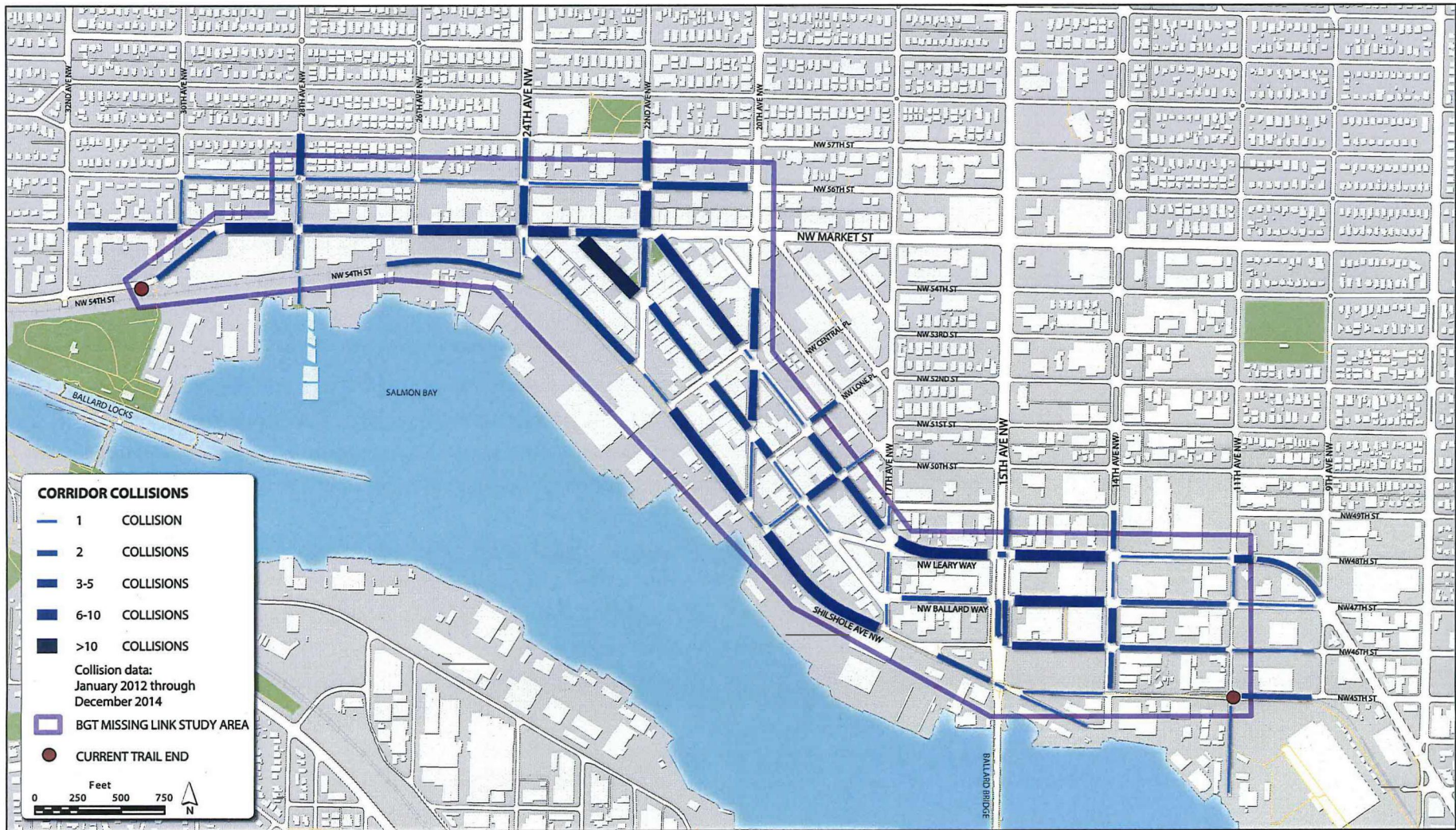
BURKE-GILMAN TRAIL MISSING LINK PROJECT

Transportation Discipline Report

Prepared by: Parametrix

Final Environmental Impact Statement
May 2017





SOURCE:
City of Seattle 2015; SDOT 2015c; Parametrix 2017
Service Layer Credits: Esri, USDA

Burke-Gilman Trail Missing Link
Figure 4-12
Study Area Corridor Collisions
April 2017

Exhibit C



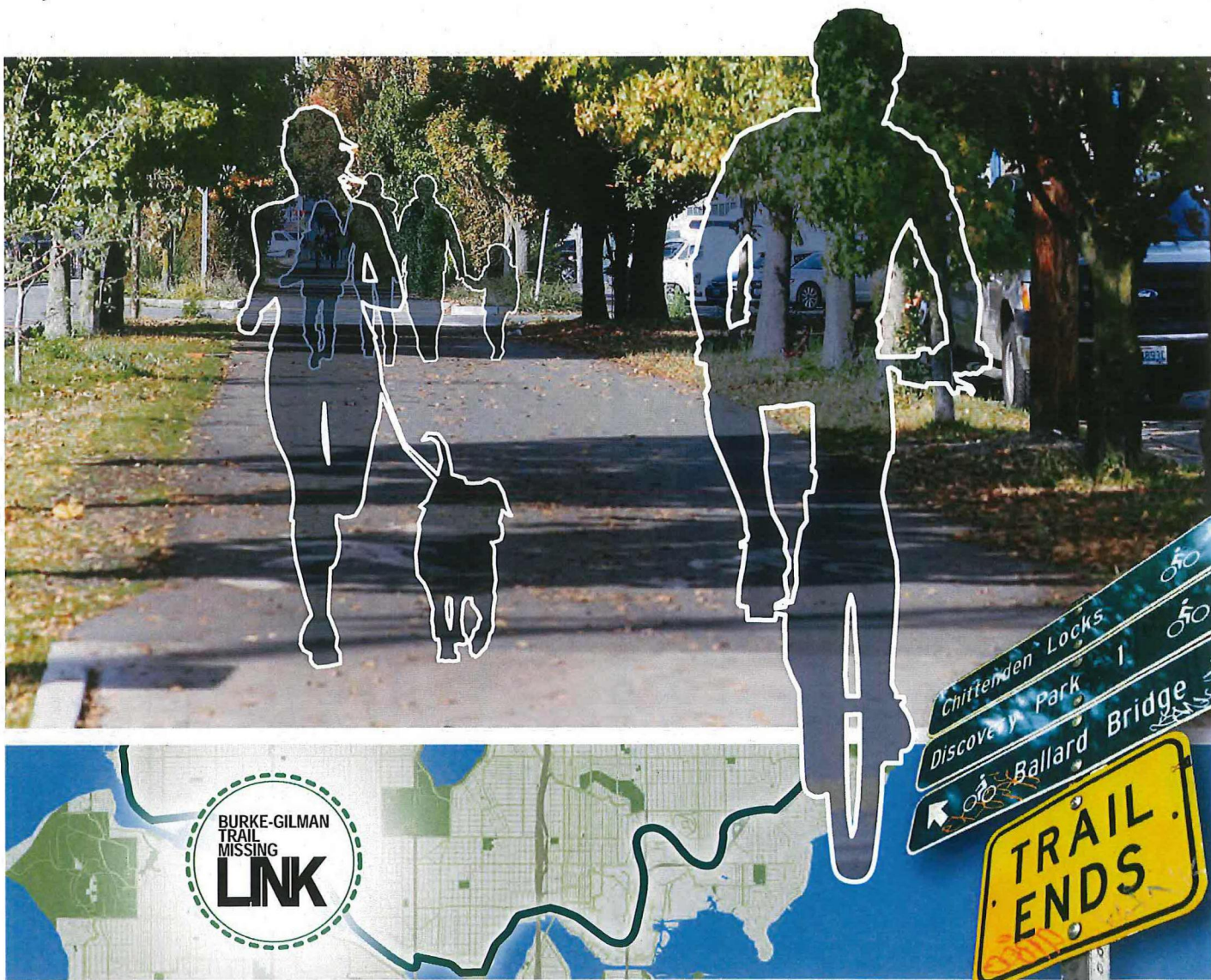
Seattle
Department of
Transportation

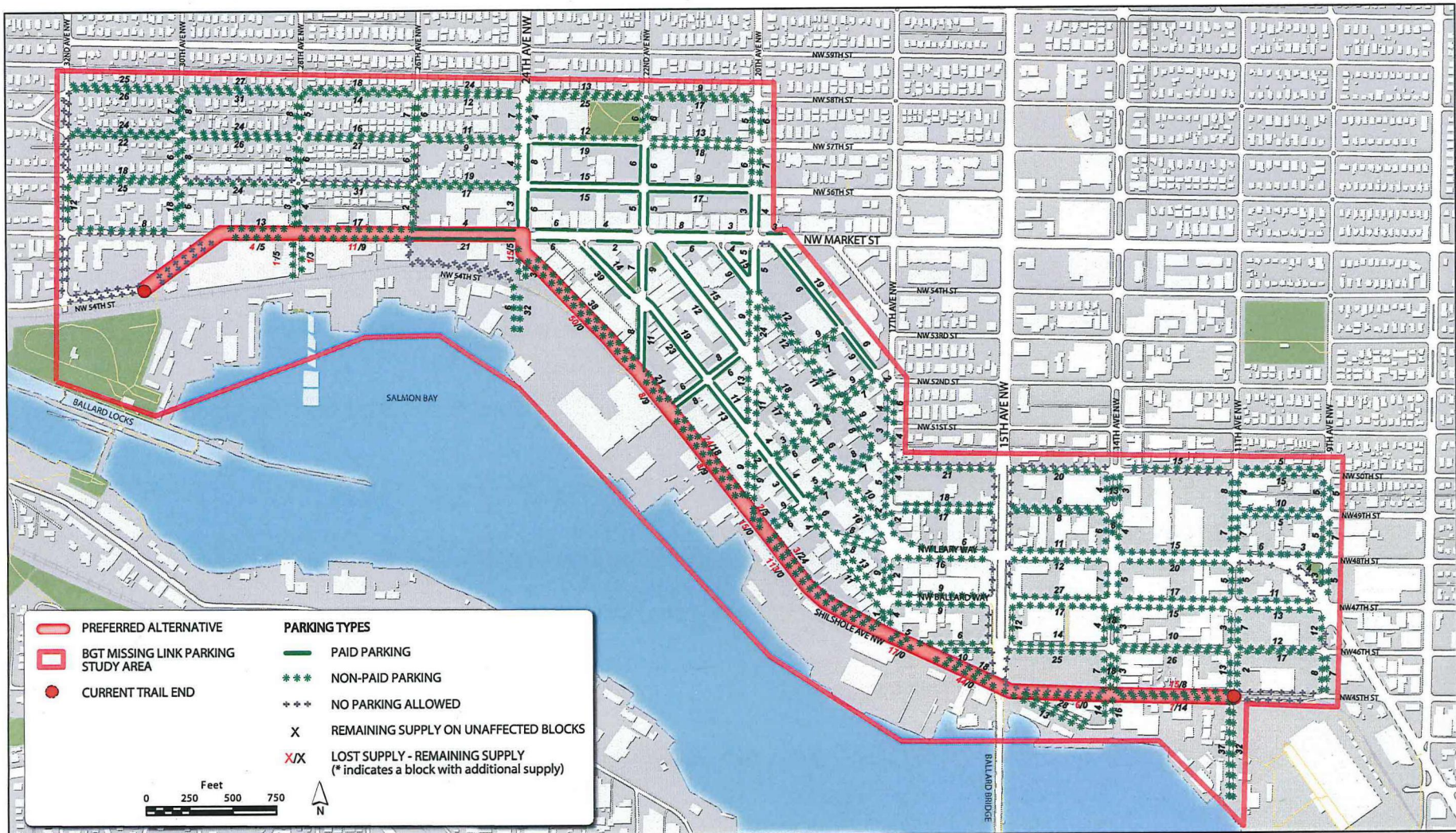
BURKE-GILMAN TRAIL MISSING LINK PROJECT

Parking Discipline Report

Prepared by: Parametrix

Final Environmental Impact Statement
May 2017





SOURCE:
 IDAX 2017; SDOT 2015e
 Service Layer Credits: Esri, USDA

Burke-Gilman Trail Missing Link
Figure 5-1
Preferred Alternative
On-Street Parking Supply
 April 2017

Exhibit D

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

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SEATTLE CITY ATTORNEY

In the Matter of the Appeal of

Hearing Examiner File:

W-08-007

THE BALLARD BUSINESS APPELLANTS

from a Determination of Non-Significance,
issued by the Director, Seattle Department
of Transportation

**ORDER ON DIRECTOR'S
MOTION IN LIMINE**

The Director of the Seattle Department of Transportation (Department) filed a motion in limine for an order barring the Appellant from presenting testimony, exhibits or argument on certain issues stated in the Appellant's Notice of Appeal. The Appellant filed a response to the motion, and the Director filed a reply to the response. The Hearing Examiner has considered the entire file in this matter.

Motion and Time for Response

Although the Department's motion is denominated a motion in limine, it does not seek merely to preclude evidence that would be immaterial or prejudicial. Instead, the motion is more properly characterized as a motion for a dispositive order dismissing certain appeal issues. The Appellant asserts that it has not had sufficient time to respond to such a motion, but it did not file a motion to extend the time for response. Further, the Department stated at the prehearing conference on January 16, 2009, that it would bring a motion to dismiss specifically identified appeal issues, and the briefing schedule for the motion was agreed to by the Appellant. As expected, the Department's motion seeks to dismiss the issues identified at the prehearing conference. And the time provided in the schedule for response is the same as that provided for any motion under the Hearing Examiner Rules (HERs). HER 2.16(b). The Appellant has not been prejudiced by the requirement that it respond to the Director's motion as scheduled.

Standard of Review

A motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Civil Rule 56(c).¹ A material fact is one upon which the outcome of the litigation depends. *Atherton Condominium Apartment-Owners Ass'n. v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Doubts as to the existence of a genuine issue of material fact are resolved against the moving party, and all facts and the reasonable inferences therefrom are considered in the light most favorable to the nonmoving party. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

¹ The Hearing Examiner may look to the Superior Court Civil Rules for guidance when a practice or procedure is not expressly addressed by the Hearing Examiner Rules. HER 1.03(c).

Issue 4.6

The Department moves to dismiss Issue 4.6, which states that the SEPA Checklist and DNS do not adequately disclose or discuss the proposal's inconsistencies with the Shoreline Management Act, Chapter 90.58 RCW, and the City's Shoreline Master Program, Chapter 23.60 SMC, "which direct the City to protect water-dependent uses." Notice of Appeal at 4. Attached to the Department's motion is a copy of the "Exemption from Shoreline Substantial Development Permit" obtained for the proposal. By the express terms of the exemption, the proposal is *consistent* with the Shoreline Management Act and the Master Program. 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**.

Issue 4.11

The Department moves to dismiss Issue 4.11, which states that the "DNS and the Checklist do not adequately disclose or discuss the Project's impact, incompatibility and conflict with the development of a streetcar on Ballard Avenue." Notice of Appeal at 4. The Department attached to its motion a memo, written after the DNS was issued, stating that SDOT does not anticipate that the streetcar will travel on Ballard Avenue. In response, the Appellant argues that the City could change its mind on the alignment, and that the adequacy of SEPA review "must be analyzed in the context of the ongoing possibility that the streetcar will be located on Ballard Avenue." However, the correct inquiry concerns what was known about the streetcar's potential alignment when the DNS was issued, and the extent to which the matter was evaluated in the SEPA Checklist for the proposal. The Director has not shown that there are no issues of material fact here. The Director's motion to dismiss Issue 4.11 is **DENIED**.

Issues 4.14, 4.15 and 4.16

The Department moves to dismiss Issues 4.14, 4.15 and 4.16. Issue 4.14 alleges that the "DNS and Checklist fail to adequately disclose and discuss proposed mitigation to avoid significant adverse impacts arising *from property owners being unable to perform building maintenance because of the project's alignment's and proximity to existing structures.*" Issue 4.15 makes the same claim with respect to significant adverse impacts *related to restricted access to existing structures along and adjacent to the Project alignment.* And Issue 4.16 makes the same claim concerning adverse impacts *from the proximity of the project to existing structures.* Notice of Appeal at 5 (emphasis added).

In response to the Department's motion to dismiss these issues as not addressing any of the "elements of the environment" under SEPA, the Appellant characterized them as addressing "blight of the built environment" that the Appellant claims would result from a trail being located adjacent to structures which, in turn, would "preclude property

owners from repairing and maintaining their property.” Appellant’s Response to City’s Motion in Limine at 6. The Response then states that blight is an issue “that must be analyzed and discussed pursuant to SEPA” and cites the introductory language to the City’s SEPA Overview Policy, and WAC 197-11-440(6)(e), a part of the SEPA Rules that addresses required content for environmental impact statements. The cited authorities have nothing to do with what must be addressed in a SEPA checklist or DNS. *See* SMC 25.05.960. However, the checklist must address, under “Land and shoreline use,” “Proposed measures to ensure that the proposal is compatible with existing and projected land uses”. SMC 25.05.960 B.8.1. The Department has not demonstrated that there is no genuine issue of material fact here and that it is entitled to an order dismissing these issues as a matter of law. The Department’s motion is **DENIED** as to Issues 4.14, 4.15 and 4.16. The Appellant will be permitted to pursue these issues at hearing to the extent that they fit under the requirement of SMC 25.05.960 B.8.1.

Issues 4.18 and 4.19

The Department moves to dismiss Issues 4.18 and 4.19. Issue 4.18 alleges that the “DNS and the Checklist fail to adequately disclose and discuss compliance with federal safety standards and guidelines.” Issue 4.19 alleges that the “DNS and the Checklist fail to adequately disclose and discuss who is liable for injuries that occur on the Project.” In response to the Director’s motion, the Appellant expanded on these issues, stating that they encompass transportation/traffic hazard impacts and impacts on public services. Appellant’s Response to City’s Motion in Limine at 5-6. In effect, the Appellant seeks to amend the issues on appeal through its response to the motion. However, the attempted amendment comes too late, *see* HER 3.05, and the Examiner will review the issues as stated in the Notice of Appeal.

SEPA does not include a requirement that unidentified “federal safety standards and guidelines” be discussed. Issue 4.18 asserts nothing about the proposal’s probable adverse impacts on the environment and fails under SEPA. The question of liability for injuries that occur on the project, posed by Issue 4.19, also has nothing to do with the proposal’s probable adverse impacts on the environment and fails under SEPA. There is no genuine issue of material fact here, and the Department is entitled to dismissal of these issues as a matter of law. The Department’s motion is **GRANTED** as to Issues 4.18 and 4.19, and they are each **DISMISSED**.

Entered this 11th day of February, 2009.

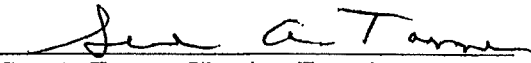

Sue A. Tanner, Hearing Examiner
Office of Hearing Examiner
P.O. Box 94729
Seattle, Washington 98124-4729
Phone: (206) 684-0521
FAX: (206) 684-0536

Exhibit E

**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

In the Matter of the Appeal of

THE BALLARD BUSINESS APPELLANTS

Hearing Examiner file:
W-11-002

From a Determination of Non-significance
By the Director, Seattle Department of
Transportation

ORDER

The Director, Seattle Department of Transportation (SDOT), moved to dismiss certain issues from this appeal on the basis of res judicata or collateral estoppel; to limit the remaining issues to consideration of impacts only within the portion of the proposed trail along Shilshole Avenue NW, between 17th Avenue NW and NW Vernon Place (hereinafter Shilshole Segment); and to dismiss Issue F, regarding the Ballard Siphon Project. The Appellants Ballard Business Appellants (Appellants) filed a response, and the Director filed a reply. The parties' filings on the motion have been reviewed by the Hearing Examiner, including the Hearing Examiner's June 9, 2009 orders and decision in W-08-007; the King County Superior Court Order of Remand dated June 7, 2010; and the Court of Appeals Commissioner Ruling dated September 16, 2010.

1. Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. Claim preclusion, or 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 the crucial issues or determinative facts determined in previous litigation. *Christiansen v. Grant County Hospital Dist. No.1*, 152 Wash. 2d 299, 306, 96 P.3d 957, 961 (2004) (citations omitted). For collateral estoppel to apply, it must be shown that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Id* at 307.

2. The Appellants assert that the doctrines of res judicata and collateral estoppel do not apply here because a final judgment has not yet been made. Appellants note that the Court of Appeals, in denying Appellants' motion for interlocutory review of the King County Superior Court (KCSC) Order of Remand, determined that the KCSC order "was not a final judgment." The Appellants also argue that the required element of unity of subject matter is not present here, because the underlying proposal is different, with new impacts that were not previously examined by SDOT or the Hearing Examiner in W-08-007.

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3. The Court of Appeals determined that the KCSC Order was not a final judgment for the purpose of deciding whether Appellants could appeal the KCSC Order. But the Court acknowledged that the Appellants might well be precluded from relitigating their positions on alternatives and safety after the remand, even if they would not be precluded from appealing any and all issues once a final judgment was entered. The KCSC Order is "final" for purposes of determining whether or not issues or claims must be precluded from this appeal. As to the "unity of subject matter," while the underlying proposal in the revised DNS now includes the Shilshole Segment in addition to proposed trail segment that was in the earlier DNS, the doctrine of preclusion applies if the issues in this appeal meet the tests for res judicata or collateral estoppel.

4. The motion seeks dismissal of Issue B ("SDOT failed to study alternatives"). The same issue was raised in the first SEPA appeal, and was dismissed by the Hearing Examiner. The Examiner concluded that SEPA did not require consideration of alternatives at the threshold determination stage of review. The Superior Court affirmed this dismissal, agreeing with the Examiner that there was no requirement under SEPA to consider alternatives at the threshold determination stage. The Appellants will be able to appeal the KCSC Order in the future, and suffer no injustice by being prevented from relitigating the same issue in the current appeal. Issue B is therefore dismissed.

5. Issue D ("SDOT failed to study the project's impacts on the shoreline environment") must also be dismissed. The issue, which alleges that the checklist fails to disclose the project's location in the shoreline, is the same issue which was dismissed prior to hearing by the Hearing Examiner in the 2009 appeal, for lack of jurisdiction. The Superior Court affirmed her dismissal, and the Appellants will be able to challenge that ruling at a later time. The elements for preclusion are met, and the motion is granted as to Issue D.

6. The motion seeks dismissal of the portion of Appeal Issue A pertaining to consideration of "safety" other than impacts on traffic mitigation or public services, and the project's lack of conformance to the standards in the WSDOT and SDOT Manuals. The Hearing Examiner in 2009 limited her consideration regarding alleged "safety hazard" impacts, to traffic mitigation (or traffic "hazards") and impacts on public services, and this ruling was affirmed by the KCSC Order. Again, this ruling is subject to challenge later, but the issue has been decided for purposes of this hearing, since all elements for preclusion are present. Issues on "safety" therefore, will be similarly limited in this proceeding to issues concerning traffic mitigation/hazards and impacts on public services.

7. As for the issue of compliance with the WSDOT and SDOT manuals, the Examiner's previous decision concluded that the mere fact that the proposal before her did not meet some of the referenced guidelines did "not demonstrate that it is inherently a traffic hazard;" W-08-007, Hearing Examiner Decision, Page 11. As to the portions of the proposal that are identical to that considered by the Hearing Examiner in the first appeal, this issue has already been decided and is therefore dismissed. But the previous

decision does not bar Appellants from offering relevant evidence, which may include the manuals, in support of their arguments regarding the new proposal.

8. Appeal Issue C ("SDOT Failed to Study the Project's Relation to the Existing Land Use Plan") states that the DNS and checklist do not adequately disclose or discuss the Project's inconsistencies with the goals and policies of the Comprehensive Plan, neighborhood. The same issue was considered and ruled upon by the Hearing Examiner in her 2009 decision (Conclusions 3, 5, and 6). The elements of preclusion are met here, and the motion is therefore granted as to Appeal Issue C.

9. SDOT also moves to dismiss Appeal Issue F, regarding the Ballard Siphon Project, as a claim of cumulative impacts. The Appellants agree that it is not a discrete appeal issue, but is rather an evidentiary matter concerning the proposal's impacts on the environment, which includes the Project. Appeal Issue F is dismissed as an appeal issue, but no ruling is made at this time concerning the admissibility of evidence about the Project.

10. Finally, SDOT's motion requests that new evidence (i.e., evidence not already in the record developed in the earlier hearing) be limited to that which relates to the Shilshole Segment. The Appellants correctly point out that the revised DNS is for the entire proposal, not merely the Shilshole Segment, and that the Hearing Examiner will be reviewing the revised DNS in its entirety. But collateral estoppel operates in this case to prevent re-hearing of the same issues and evidence which was or could have been raised in the first appeal concerning that DNS. The Appellants had the opportunity to fully present the issues and evidence to the Hearing Examiner concerning the original proposal and DNS, and will have the opportunity to seek further review of the KCSC Order. The motion to limit is therefore granted.

Entered this 15th day of April 2011.



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Exhibit F

BURKE-GILMAN TRAIL MISSING LINK PROJECT



Seattle
Department of
Transportation

Final Environmental Impact Statement

Volume 2: Comments and Responses

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- 09-010 | 19. What is the basis for that estimate?
20. What is SDOT's cost estimate to construct the Leary alternative?
21. What is the basis for that estimate?

C. SDOT Broke Its Promise to Study Both Design and Locational Alternatives in the EIS.

In 2013, Mayor McGinn and SDOT promised the Ballard community that the EIS would include both *design* and *locational* alternatives, including the Ballard Cycle Track Proposal.² The Ballard community demanded this promise because protected bicycle facilities—what SDOT is building throughout Seattle—are far safer compared to SDOT's current sidepath design to complete the Missing Link. SDOT broke its promise by failing to include any *design* alternatives in the DEIS and spent just *two* sentences in the DEIS explaining why it did not include protected bicycle facilities—see Page 1-28 of the DEIS.

Comments:

22. What is the basis for SDOT's policy decision to break its promise to the Ballard community and not include design alternative in the DEIS?
23. Since all of SDOT's Alternatives include a sidewalk next to the recreational trail, how come SDOT would not consider protected bicycle facilities with a similar adjacent sidewalk?
24. Explain how a sidewalk next to a protected bicycle facility would not provide "safe accommodations for pedestrians and other nonmotorized users"?
25. How would using a combination of protected bicycle facilities and adjacent sidewalks to complete the Missing Link be any different—better, worse, more safe, less safe—than the Westlake Cycle Track project?
26. Please explain why SDOT used a combination of a protected bicycle facility next to a sidewalk for other non-motorized users in Westlake but refuses to consider such a combination for the Missing Link?

D. The Draft EIS Does Not Comply With the Hearing Examiner's 2012 Order and Judge Rogers Order.

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. In Washington, the adequacy of an EIS is determined under the "rule of reason." See *Weyerhaeuser*, 124 Wn.2d 26, 41 (1994), citing *Barrie v. Kitsap Cy.*, 93 Wn.2d 843, 854 (1980). "To be adequate, an EIS must present decisionmakers with a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the agency's decision." See *Kiewit Const. Grp. Inc. v. Clark Cty.*, 83 Wn.App. 133, 140 (1996), citing *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 633 (1993); see also *Weyerhaeuser*, 124 Wn.2d at 38. Further, an EIS "must provide sufficient information to allow officials to make a reasoned choice among alternatives." See *Kiewit Const.* 83 Wn. App. at 140.

² <http://www.ballardcycletracks.com/PDF/CycleTracksPresentation.pdf>

09 - 011 When developing an environmental impact statement, SEPA requires that project proponents evaluate alternatives that accomplish the project objectives. The project objective has always been and remains completion of the Burke-Gilman Trail, which is a multi-use trail that accommodates pedestrians, bicycles, skaters, and other non-motorized forms of travel on a single trail.

When deciding upon alternatives to fully evaluate in the Draft EIS, SDOT determined that a cycle track or protected bike lane would not meet the project objectives, as these types of facilities are only meant for bicycles. Although some portions of each alternative may retain a sidewalk parallel to the trail, in order to maintain consistency with other existing portions of the Burke-Gilman Trail, the trail is multi-use throughout in all alternatives considered. Please see Section 1.9 of the FEIS for further discussion about the alternatives that were not carried forward.

09 - 012 As noted in Section 1.2 of the FEIS, the purpose of the project is to complete a multi-use trail. While protected bicycle lanes may fulfill the transportation needs through the area for cyclists, sidewalks do not fulfill the same purpose for pedestrians and other nonmotorized users. Sidewalks do not fulfill the same purpose as a multi-use trail for pedestrians and other nonmotorized users. Sidewalks are intended for entering and exiting businesses, tend to be more of a location for people gathering and mingling, may contain sidewalk seating, signage, and landscaping.

The Missing Link has existing established multi-use trail segments on either end, whereas the Westlake Cycle Track was intended only as a cycle track to facilitate bicycle ingress and egress to and through the Westlake area.