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 THE BALLARD COALITION'S RESPONSE IN OPPOSITION TO SDOT'S MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION

SDOT's Motion should be denied because it is confusing the rules and standards applicable to its motion and, even under the correct rules, SDOT has not and cannot meet its burden to prevail. Likewise, there are genuine issues of material fact that preclude summary dismissal. The Coalition is entitled to its day in court to present evidence to prove the issues properly raised in this appeal.

II. ARGUMENT

A. SDOT Cannot Meet the Standard For Dismissal or Summary Judgment

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As an initial matter, throughout its brief, SDOT conflates and fails to apply the appropriate standard for dismissal, mixing motions to dismiss under CR 12(b)(6) and summary judgment under CR 56. The applicable standard is as follows: HER 3.02 provides that the Examiner may dismiss an appeal if he or she "determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, or is without merit on its face, frivolous, or brought merely to secure delay." HER 3.02(a). SDOT correctly notes that HER 1.02(c) states that the Hearing Examiner "may look to the Superior Court Civil Rules for guidance." Motion at p. 3 fn. 3. SDOT then cites CR 12(b)(6), which allows for dismissal for "failure to state a claim upon which relief may be granted," and suggests the Examiner can consider this Motion as one for summary judgment under CR 56. *Id.* However, SDOT never sets forth the rule under which it moves, nor makes any effort to actually apply the standard under which its Motion should be reviewed. No matter. Under either standard, SDOT's Motion fails.

SDOT faces a very high hurdle to prevail on its Motion under CR 12(b)(6). Under that standard, "[d]ismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.' ***The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting allegations.*** A motion to dismiss is granted 'sparingly and with care' and, as a practical matter, 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'"[1]

Here, SDOT makes no attempt to prove how it meets these standards. SDOT simply cites to sections of its own Final Environmental Impact Statement (FEIS) as proof that the Coalition cannot prevail on a number of issues raised in the Notice of Appeal. In essence, SDOT is saying, "the FEIS is fine, trust us, we have done what we were required to do under SEPA and

[1] *Kinney v. Cook*, 159 Wn. 2d 837, 842, 154 P.3d 206, 209 (2007)(Internal citations omitted; emphasis added).

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thus there is no need to have an evidentiary hearing on the Coalition's issues." If a ***project proponent*** could simply cite to ***its own*** FEIS as the basis for a CR 12(b)(6) or summary judgment motion, there would be no hearings regarding the adequacy of an FEIS under SEPA. That is never the case and must be more so when the project proponent is also its own lead agency.

Here, the Examiner reviews the adequacy of an EIS and compliance with SEPA under the "rule of reason,"[2] and the Examiner must determine whether the discussion of environmental impacts and alternatives in the FEIS, as a whole, was reasonable.[3] Reasonableness is a question of fact and questions of fact are not amenable to dismissal under CR 12(b)(6) because, under that rule, the Examiner must "presumes all facts alleged in the" Coalition's Notice of Appeal "are true and may consider hypothetical facts supporting the" Coalition's claims. Here, SDOT has failed to meet its burden that its environmental review was unequivocally "reasonable" and that there are no set of facts — alleged to presumed — under which the Coalition can prevail and thus SDOT's Motion should be denied.

As an alternative to CR 12(b)(6), SDOT also cites *ASARCO Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 695-98, 601 P.2d 501, 510 (1979) for the proposition 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."[4] To the extent SDOT's Motion can be read as requesting the Examiner grant summary judgment, it likewise fails.

Summary judgment motions are reviewed under CR 56. To prevail SDOT bears the burden to prove that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

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[2] *See, e.g., Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 361, 894 P.2d 1300 (1995).
[3] *See, e.g., Weyerhaeuser v. Pierce* County, 83 Wn. App. 133, 142, 920 P.2d 1207 (1996).
[4] Motion at p. 3.

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and that the moving party is entitled to judgment as a matter of law." CR 56(c). Moreover, "[a]ll material evidence and all reasonable inferences therefrom must be construed most favorably to the nonmoving party"[5] (here, the Coalition), and the Examiner is "not permitted to weigh the evidence or resolve any material factual issues in ruling on a motion for summary judgment."[6] "Where different inferences can be reasonably drawn from evidentiary facts," summary judgment is not appropriate.[7] As discussed in greater detail below, genuine issues of material fact exist related to all four of the Coalition's issues being challenged in SDOT's Motion and thus, again, it must be denied under CR 56.

B. SDOT's Argument Regarding Development of New Alternatives Raises an Issue of Fact that Renders Dismissal and Summary Judgment Inappropriate

In its Argument at III.B of the Motion, SDOT asks the Examiner for a dispositive judgment on an issue the Coalition properly raised on appeal – whether certain portions of the Preferred Alternative were ever properly publically noticed and adequately evaluated to provide the decision maker sufficient information with which to meaningfully evaluate the environmental impacts of the proposed Project. *See* Section C of the Coalition's Notice of Appeal (corrected), filed in this matter on June 9, 2017. Proper notice and adequate evaluation are bedrock principles of SEPA. SDOT's Motion argues that the Coalition fails to state a claim upon which relief may be granted (CR 12(b)(6)), by narrowly reading the Notice of Appeal to suggest that the Ballard Coalition raises only a procedural error—the lack of public notice of a wholly new 125 foot segment of the Missing Link (the "New Segment") that was never mentioned nor analyzed in the Draft EIS. SDOT concedes that the New Segment was not part of its public notice, but claims that this issue does not affect the adequacy of the environmental review of the

[5] *Ashcroft v. Wallingford*, 17 Wn. App 853, 854, 565 P.2d 1224 (1977).
[6] *Fleming v. Smith*, 62 Wn.2d 181, 185, 390 P.2d 990 (1964).
[7] *Johnson v. Schafer*, 47 Wn. App. 405, 407, 735 P.2d 864 (1980).

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New Segment by claiming it can alter or expand other alternatives in moving from the Draft to the Final EIS.

SDOT's claim misses the point of the Coalition's challenge on this issue. The Coalition is not simply saying SDOT failed to tell decisionmakers about the New Segment; the Coalition is alleging that at hearing its evidence and testimony will prove that by failing to provide any meaningful public involvement in evaluating the New Segment, SDOT is once again improperly conducting SEPA review in a piece-by-piece evaluation of this Project, and that the New Segment creates significant adverse impacts that were not disclosed or evaluated in the FEIS. These failures render SDOT's SEPA review of the New Segment, and the project as a whole, inadequate.

If moving under CR 12(b)(6), SDOT must prove "beyond a reasonable doubt that no facts exist that would justify recovery."[8] If SDOT does not meet this high burden, dismissal under CR 12(b)(6) is not proper, and will not survive appellate review. Similarly, SDOT has not made any attempt to support an argument that there is no genuine dispute of material fact as to the reasonableness of SDOT's review of the New Segment such that summary judgment would be appropriate. SDOT's own Motion recognizes that the New Segment was not included in the DEIS and merely cites to the FEIS in an attempt to argue that the New Segment was adequately analyzed.[9] SDOT's citation to the FEIS is equivalent to merely pointing to its pleadings. SDOT did not meet its burden in its opening brief to demonstrate a lack of any genuine issue of material fact, and thus the burden does not shift to the Coalition to dispute this contention. Nevertheless, at hearing, the Coalition will present evidence that SDOT failed to adequately evaluate the impacts of this New Section, including, but not limited to, traffic hazards and safety issues posed

[8] *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 662, 272 P.3d 802 (2012) (quoting *Cutler v. Phillips Petrol. Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994)).
[9] Motion at p. 4 fn. 5.

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by this new and unique intersection. To refute the instant Motion, the Coalition is submitting the Declaration of Victor Bishop ("Bishop Decl."), which states the New Segment creates "hazards that were not disclosed in the DEIS or adequately evaluated in the FEIS" related to, for example, lane offsets that do not meet applicable design standards.[10] These factual issues render dispositive judgment inappropriate, whether under CR 12(b)(6) or 56.

The only authority SDOT cites in its Motion to justify its inclusion of the new and wholly unanalyzed New Segment is WAC 197-11-560, SMC 25.05.560, and SMC 25.05.405.[11] A cursory review of these statutes demonstrates the factual issues inherent in evaluating whether the FEIS complies with these sections. When responding to comments raised by a DEIS, WAC 197-11-560 and SMC 25.05.560 allow a project proponent to "develop and evaluate alternatives not given ***detailed*** consideration by the agency" in the DEIS, and SMC 25.05.405.C allows a project proponent to use a FEIS rather than a supplemental draft EIS if the alternatives "were not ***adequately*** discussed in the DEIS."[12] Here, the Coalition, in its Notice of Appeal raised the issue, and SDOT concedes, that the New Segment was not evaluated in connection with the DEIS. Since it was properly raised on appeal, there is a factual dispute whether this New Segment was adequately evaluated in the FEIS.[13] These are ***qualitative*** determinations that, at minimum, raise genuine issues of material fact as to the level of detail and adequacy of the New Segment and the ability of SDOT to move forward with an FEIS rather than solicit public input on the New Segment. SDOT's Motion raises the very factual issues that it claims are not present.

In its Motion, SDOT contends that it performed an adequate review and adequately disclosed environmental considerations to the public and the decision maker thereby entitling

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[10] Bishop Decl. at ¶ 4.
[11] *See* Motion at p. 4 lines 11-14.
[12] Emphasis added.
[13] Bishop Decl. at ¶ 4.

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SDOT to dismissal of the Coalition's issue as a matter of law. The Ballard Coalition has and will present evidence to demonstrate that SDOT failed to conduct an adequate environmental review of the project. *See* Bishop Decl. at ¶ 4. A factual dispute over the adequacy of analysis of the New Segment, and the Preferred Alternative as a whole, is not a proper subject for a motion to dismiss under CR 12(b)(6) or judgment under CR 56.[14] SDOT has not met its burden to show that there are no set of facts under which the Coalition could obtain relief and its Motion should be denied.

C. Issue II.H is Properly Before the Examiner and Should Not Be Dismissed Because this is the Proper and only Forum in Which to Develop the Factual Record Regarding the City's Compliance with SEPA's Requirements Relative to the Shoreline Management Act and the City's Shoreline Environment.

SDOT is reading Issue II.H inappropriately narrow and misconstruing it to in order to keep the Coalition from building a factual record regarding the City's failure to comply with SEPA's procedural requirements relative to the Shoreline Management Act ("SMA") in the only forum available to it to do so.[15] Additionally, the instant challenge is factually different from the earlier challenges and thus not subject to collateral estoppel. The City's Motion should be denied.

SDOT is trying to thread-the-needle in order to avoid any review of its attempts to skirt compliance with the SMA for the Missing Link.[16] In the FEIS, SDOT states the "Missing Link

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[14] "[T]he role of a reviewing court is to determine 'whether the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed and . . . substantiated by supportive opinion and data.'" *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 286, 525 P.2d 774 (1974) (as amended).

[15] While it is factually correct that the prior Hearing Examiners dismissed the Coalition's SMA-compliance challenges citing a lack of SMA jurisdiction, it is also correct that the Coalition disagrees with those decisions, both of which are being challenged in the pending appeal in King County Superior Court.

[16] In the prior proceedings SDOT insisted that the Missing Link is exempt from obtaining a Shoreline Substantial Development Permit ("SSDP") under the categorical exemption for minor repair and replacement of existing facilities. *See* Exhibit A to Declaration of Joshua Brower in Support of the Ballard Coalition's Opposition to SDOT's Motion for Partial Dismissal ("Brower Decl."), which includes a copy of a letter from Mr. Brower's former law firm, Tupper Mack Brower, dated February 11, 2009, to the Department of Ecology ("DOE") which requested DOE exercise is concurrent SMA jurisdiction because it appeared SDOT had improperly obtained a Shoreline

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project would be allowed in all zoning designations and the shoreline district within the study area" but does not state whether or not SDOT will obtain a Shoreline Substantial Development Permit ("SSDP") for the Project or again improperly obtain an exemption for it from the Seattle Department of Construction and Inspections (formerly DPD). At this juncture, since SDOT has not said whether or not it will obtain a SSDP for the Missing link, the problems for the Coalition are that:

1) the determination of whether a project is categorically exempt cannot be appealed to the Shorelines Hearing Board;

2) SEPA requires SDOT to analyze compliance with the SMA in the FEIS,[17] which SDOT has done to some level (*see e.g.,* SMC 25.05.444—shorelines are an element of the environment to be analyzed in an EIS); and

3) the current appeal before the Examiner is the only venue to challenge the sufficiency and adequacy of SDOT's SEPA compliance.

Professor Settle best explained these problems in his treatise, *The Washington State Environmental Policy Act: A Legal and Policy Analysis,*

> Since shoreline permits are initially granted or denied by local governments with appeal to the State Shoreline Hearings Board (SHB), the relative roles of local government and the SHB in determining SEPA compliance potentially ***is confusing***. A 1994 SEPA amendment attempts to resolve the uncertainty.
>
> The amendment confers upon the ***SHB exclusive jurisdiction over an administrative SEPA appeal related to a shoreline permit application that has been appealed to the SHB.*** Thus, for example, if a county has granted a shoreline permit application after issuing a SEPA DNS, and if the county's SEPA procedures allow for administrative appeal of a DNS, an aggrieved person previously might have appealed the DNS to the

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exemption for the Missing Link under the "repair and replacement" categorical exemption. Washington law clearly contradicts SDOT's claims because that exemption only applies to minor repair and replacement of ***existing facilities, not new construction like the Missing Link***. *See* WAC 173-27-040(2)(b).

[17] "Failure to engage in coordinated SMA and SEPA review can lead to 'coerced land use development.'" *Merkel v. Port of Brownsville*, 8 Wn.App. 844, 850, 509 P.2d 390 (1973).

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> county and the shoreline permit to the SHB. However, under the 1994 amendment, the SHB would have exclusive jurisdiction to decide the DNS appeal along with the shoreline permit appeal.[18]

Although not explicitly explained by Professor Settle, the corollary of the rule he describes also is true: ***If the SHB does not have jurisdiction to determine SEPA compliance***, such as in the case here where SDOT obtained a categorical exemption for the Missing Link (which it may do again), and categorical exemptions cannot be appealed to the SHB, ***the local jurisdiction before which the administrative appeal must be filed retains exclusive jurisdiction to review and evaluate the proponent's compliance with SEPA relative to the SMA***. That is exactly the case here.

Among the issues in this appeal, the Coalition is challenging the adequacy of SDOT's SEPA compliance in the FEIS related to the Missing Link's impact to portions of the City's designated Shoreline Environment. The earlier appeals were in the context of a DNS and were focused on whether or not SDOT properly obtained the exemption for the Missing Link from DPD (now SDCI) and thus the City's argument and reliance on collateral estoppel are misplaced.[19]

Here, the Coalition is challenging, ***and is entitled to build a factual record in the only forum available to it to do so***, as to whether SDOT adequately analyzed the true effects of the Missing Link on the Shoreline Environment and conformity to the City's Shoreline Master Program. For example, in the FEIS, SDOT makes numerous factual determinations regarding whether or not certain businesses are "water-related" or "water-dependent."[20] Based on those

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[18] R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis,* §19.01[7] (emphasis added).

[19] *See* Footnote 16 and Exhibit A to the Brower Decl.

[20] See FEIS at page 4-10 ("A water-dependent use is a use that cannot exist in a location other than a waterfront location, and is dependent on the water because of the intrinsic nature of its operations. A water-related use is a use or portion of a use not intrinsically dependent on a waterfront location but whose economic viability is dependent on a location in a shoreline district."); *see also* FEIS page 4-19 ("Of the 46 total parcels abutting or gaining access along the Preferred Alternative, 16 are water-dependent and 11 are water related (see Table 4-1)).")

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determinations, SDOT evaluated the impacts of the Missing Link on these businesses and uses, ultimately claiming that there are fewer "water-dependent and water-related uses" along the Preferred Alternative compared to the Shilshole South Alternative,[21] and that the Missing Link is consistent with the City's SMA applicable to the study area.[22] The Coalition is entitled to challenge SDOT's factual determinations regarding whether or not it properly characterized certain businesses as water-related instead of water-dependent (which it did incorrectly) and is entitled to challenge the adequacy of SDOT's SEPA determinations related to application and consistency with the City's SMP. These are factual determinations that can only be developed at the hearing and thus they are not amenable to dismissal under CR 12(b)(6) or CR 56. Again, in deciding the City's Motion, the Examiner must take all facts asserted in the Coalition's Notice and all hypothetical facts as true and must construe all of them in the light most favorable to the Coalition. The Coalition has sufficiently alleged facts to support the contention that SDOT has failed to comply with SEPA's mandate to consider land use laws, including the SMA. SDOT provided no evidence to the contrary, and thus did not meet its burden to support dismissal or summary judgement. In doing so, the City's Motion should be denied.

D. <u>The Fact that SDOT is the Lead Agency and the Project Proponent Creates an Issue of Fact to be Resolved at Hearing</u>

In its Argument III.D, SDOT asks the Examiner to dismiss "parts of Issue II.A" from the appeal. SDOT argues:

> 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. This claim is baseless and should be dismissed. It is barred by collateral estoppel and is contrary to the SEPA implementing regulations.

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[21] *See* FEIS at page 4-19.

[22] "The Preferred Alternative is consistent with adopted plans and policies, ***except for the BINMIC policies in the Comprehensive Plan that related to locating the trail within the BINMIC***." FEIS at page 4-21 (emphasis added).

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The language from page 6 of the Notice of Appeal that SDOT refers to is not an appeal issue: It is an assertion of a fact that is relevant to the appeal issue stated on page 4 of the Notice. The weight and relevance of this fact – that SDOT is both the project proponent/advocate and the SEPA lead agency, and therefor has an inherent conflict of interest – cannot be resolved on summary judgment before any evidence is offered.

This is the actual Issue II.A from the appeal:

> The FEIS disregards prior, binding orders of the Hearing Examiner and the Superior Court and provides even less adequate environmental review of significant adverse environmental impacts than the SEPA review that the Hearing Examiner determined to be inadequate in the Hearing Examiner's prior decision.

The two-page discussion in the Notice of Appeal that follows this statement of the issue provides a summary of factual evidence that will be offered at the hearing in support of this appeal issue, thereby giving additional notice to SDOT of the evidence and arguments that will be presented at the hearing. Again, the "issue" that SDOT moves to dismiss is not an appeal issue: The fact that SDOT acted as both the project proponent and the SEPA lead agency is just that – a fact that creates a conflict of interest, and the Ballard Coalition intends to offer evidence at the hearing regarding how this conflict of interest affected the content of the FEIS. This is a genuine issue of material fact and judgment under CR 12(b)(6) or CR 56 is inappropriate.

In addition, this portion of the City's Motion is not a dispositive motion at all. It does not move to dismiss an issue or even apply any standard: It is, in effect, a motion in *limine* asking the Examiner to rule as a matter of law that evidence that the Ballard Coalition might offer regarding SDOT's conflict of interest is not relevant. But SDOT offers no explanation for why this evidence is not relevant, and no reason why the Examiner should make a decision regarding relevance before evidence is offered. ER 401 defines relevant evidence:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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ER 402 says that relevant evidence is admissible unless there is a constitutional requirement, statute or rule providing otherwise:

> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

The principal reasons that evidence may be excluded in response to a motion in *limine* are stated in ER 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

SDOT makes no effort to demonstrate that evidence regarding SDOT's conflict of interest should be excluded pursuant to ER 403, just as it makes no effort to demonstrate that the evidence it seeks to exclude is not relevant under ER 401. SDOT has provided the Examiner with ***no*** basis to make an evidentiary ruling and exclude evidence as a matter of law, particularly since SDOT has not timely complied with the Ballard Coalition's discovery requests, and the Coalition therefore has not yet seen all the evidence related to this issue that the City has within its possession and control.[23] CR 56(f) also provides that the Examiner may postpone disposition on summary judgment in the event discovery is not yet complete, which is the case here.

The reasons that SDOT gives for excluding evidence are without merit. SDOT asserts that the "claim is barred by collateral estoppel and is contrary to the SEPA implementing regulations." As discussed above, the fact that SDOT acted as both project proponent and SEPA lead agency is not a claim, it is a fact asserted in support of a claim. This fact is not barred by collateral estoppel because the issue of how has SDOT dealt with its conflict of interest while preparing the EIS has never been the subject of litigation, and the Ballard Coalition does not

[23] Brower Decl. at ¶¶ 4-11 and Exhibit B.

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assert that the FEIS is invalid simply because SDOT acted as both project proponent and lead agency: No one disputes that such a dual role is allowed by the SEPA rules. But this dual role creates a conflict of interest and whether the lead agency allows its conflict of interest to adversely affect its responsibilities as lead agency is a legitimate ground for discovery and factual inquiry at the hearing.

If the Examiner were to "dismiss" the factual assertion on page 6 of the Notice of Appeal to which SDOT objects, the appeal issue, which is stated on page 4, would be unchanged: The Examiner would just be deciding as a matter of law that some unknown quantum of unidentified evidence will not be admissible at the hearing. But discovery is not complete, evidence has not been offered, and SDOT has not given the Examiner any basis to exclude evidence as a matter of law.

E. <u>The Ballard Coalition Correctly Noticed the Issue of a Lack of Discussion of Alternatives that Renders the FEIS Unreasonable—This is a Disputed Question of Fact that Is Not Subject to Dismissal or Summary Judgment</u>

In Section E of its argument, SDOT asserts that the Examiner "should dismiss parts of Issues II.A and II.B, which allege that SEPA requires SDOT to consider Appellant's preferred design." The Cascade Bicycle Club ("CBC") filed a Memorandum in Support of this part of SDOT's motion.

Here is the Ballard Coalition's statement of the Issue II.B that SDOT moves to dismiss:[24]

> Under SEPA, "[p]roposals should be described in ways that encourage considering and comparing alternatives. Agencies are encouraged to describe public or nonproject proposals in terms of objectives rather than preferred solutions." SMC 25.05.060.C.1.c. SDOT describes its project objective in the FEIS as the creation of a multi-use trail through the study area, but this "objective" is in fact a preferred solution that precludes the analysis of reasonable alternatives, *e.g.*, the creation of protected bicycle lanes, including a cycle track facility on Leary Avenue. The FEIS thus violates SMC 25.05.060 and the many provisions of the SEPA rules, including SMC 25.05.400 and 440, that require an

[24] This issue is not separately stated in section II.A of the Notice of Appeal: The last bullet point in the discussion in section II.A simply identifies SDOT's overly-narrow definition of the proposal as one of the reasons that the FEIS does not inform decision-makers about reasonable alternatives.

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EIS to study reasonable alternatives, including alternative ***designs*** not just locational alternatives, to achieve the Project objective.

SDOT does not cite any case law to support its Motion on this issue, and the only "evidence" that SDOT cites are certain pages from the FEIS itself, the document being challenged: In other words, SDOT is asking this Examiner to rule, as a matter of law, that the FEIS (***which SDOT drafted for its own proposal***) on its face demonstrates that it includes a reasonable discussion of alternatives, without allowing the Ballard Coalition to present evidence to the contrary.

The CBC Memorandum also does not cite any evidence, but unlike SDOT's motion, it does cite to case law (two SEPA cases and three NEPA cases), albeit in a very topical and cursory manner. The cases that the CBC cites all undermine its argument because each of these cases is authority for the fact that inclusion of proper alternatives is the very heart of an EIS and the failure to include proper alternatives is fatal to the adequacy of an EIS.

The cases CBC also show that question of whether or not SDOT included proper alternatives in the FEIS is, at heart, a factual determination that is not amenable to summary dismissal. In each of those cases the challenger was allowed to offer evidence (presumably after completing discovery, which has not yet happened in this appeal)[25] regarding the adequacy or lack thereof of the alternatives considered in the NEPA or SEPA EIS. None of these cases stands for the proposition that the reasonableness of the discussion of alternatives in an EIS can be decided by excluding evidence of unreasonableness, which is what SDOT and the CBC are requesting in the instant Motion.

Here is what the cases CBC cites actually hold and require: In *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn.App. 439, 442 (1992) (citing *Cheney v. Mountlake*

[25] *See* Brower Decl. ¶¶ 4-11.

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Terrace, 87 Wash.2d 338, 344, 552 P.2d 184 (1976)) the Court confirmed that "the adequacy of an EIS is subject to the rule of reason."

In *Brinnon Group v. Jefferson County*, 159 Wn.App. 446, 480 (2011) the Division II Court of Appeals explained the importance of including a board range of alternatives in an EIS, stating:

> SEPA requires an EIS to include a detailed discussion of alternatives to the proposed action. The required discussion of alternatives '***is of major importance, because it provides a basis for a reasoned decision among alternatives having differing environmental impacts.' EIS alternatives must 'include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.***'[26]

Likewise, in *Laguna Greenbelt v. U.S. Dept. of Transportation*, 42 F.3d 517, 523 (1994) the United States Court of Appeals, Ninth Circuit, explained that alternatives to be considered in an EIS include ***any alternative that can reasonably and feasibly achieve a project objective — which is ultimately an issue of fact***, stating:

> ...the concept of alternatives is 'bounded by some notion of feasibility.' The range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project.[27]

The second Federal case cited by the CBC, *Westlands Water District v. U.S. Dept. of the Interior*, 376 F.3d 853 (2004), provides some of the strongest support for the Coalition's position, stating:

> An agency issuing an EIS must '[r]igorously explore and objectively evaluate all reasonable alternatives,' '[i]nclude reasonable alternatives not within the jurisdiction of the lead agency,' and '[i]dentify the agency's preferred alternative.' '***The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.***'[28]

And:

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[26] Internal citations omitted; emphasis added.
[27] Internal citations omitted.
[28] 376 F.3d at 868. Internal citations omitted; emphasis added.

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> The touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.[29]

Determining whether or not SDOT properly obtained that touchstone is, inherently, a factual determination not amenable to resolution under CR 12 or 56. The last federal case CBC cites, *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1065, 1066-67 (1998), reinforces the holding and requirements articulated by the *Westlands* Court, and emphasizes the importance of including reasonable alternatives and not overly-narrowly describing a project's objectives to preclude reasonable alternatives as SDOT has done in its FEIS, stating:

> An EIS must describe and analyze alternatives to the proposed action. Indeed, the alternatives analysis section is the 'heart of the environmental impact statement.' The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal. ***The existence of reasonable but unexamined alternatives renders an EIS inadequate.***[30]
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>
> As Friends correctly argues, the discretion we have afforded agencies to define the purposes of a project is not unlimited. In *City of Carmel-by-the-Sea v. United States Department of Transportation,* 123 F.3d 1142 (9th Cir.1997), we observed that '***an agency cannot define its objectives in unreasonably narrow terms.***' In support of this statement, we cited then-Judge Thomas's opinion in *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190 (D.C.Cir.1991), which states:
>
> > ***[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality.***

As the cases CBC cite unquestionably demonstrate, an agency cannot define the objective of its proposal in an unreasonably narrow manner to achieve a preordained outcome. Whether SDOT has done so in this case is a question of fact to be resolved by evidence, and the reasonableness of SDOT's action cannot be resolved by excluding evidence of unreasonableness before such evidence is offered.

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[29] *Id.*
[30] 153 F.3d at 1065 (emphasis added).

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None of the cases cited by the CBC stand for the exclusion of relevant evidence regarding the reasonableness of the discussion of alternatives in an EIS, and the cases that CBC cites are simply cases where the discussion of alternatives was determined to be reasonable based on the facts before the court. In contrast, there are NEPA and SEPA cases where the court determined that the discussion was ***not*** reasonable, again based on the facts in the record. SEPA cases include *Weyerhaeuser v. Pierce County,* 124 Wash.2d 26, 38 (1994), where the Washington Supreme Court held that the discussion of alternatives to the location of a landfill was not reasonable, and *Kiewit Construction Group v. Clark County*, 83 Wn.App. 133, 142 (1996), where the Court upheld the requirement for a Supplemental EIS regarding the effect of truck traffic on bicyclists because the FEIS did not include a meaningful discussion of a reasonable (safer) alternative:

> ***Here, the SEIS was justified based upon Gilbert Western's failure to disclose the full effect of truck traffic on bicyclists and other trail users, and the company's failure to discuss meaningfully the alternative of direct access ramps onto State Route 14. The Board did not err in ordering an SEIS.***[31]

Similarly, under NEPA, there are many other Federal cases where the court concluded that the discussion of alternatives was unreasonable. Two recent examples (copies attached) are: *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 576 (2016) ("Because the Service . . . failed to consider any economically feasible alternative that would take fewer Indiana bats than Buckeye's proposal, it failed to consider a reasonable range of alternatives."); and *Gulf Restoration Network v. Jewell*, 161 F. Supp. 3d 1119, 1130 (2016) ("This case demonstrates the importance of providing a clear and meaningful analysis of alternatives . . . Clearly, the Trustees failed to evaluate whether there were reasonable restoration alternatives that would have conformed to the requirements of OPA and NEPA. Their failure to do so was arbitrary and capricious."").

[31] Emphasis added.

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Neither SDOT nor CBC proffer any evidence that demonstrates that the discussion of alternatives in the FEIS is reasonable: They simply ask the Examiner to accept its reasonableness at face value and exclude evidence to the contrary, but no authority supports SDOT's Motion, and its Motion requires the Hearing Examiner to accept as true all facts and reasonable inferences from the facts set forth in the Coalition's Notice of Appeal in the light most favorable to it.[32]

Since SDOT has not supported its motion with evidence, the Ballard Coalition is under no duty to present evidence to the contrary. Nonetheless, the Ballard Coalition includes with this Response the Declaration of Vic Bishop, the traffic engineer whose testimony at the last hearing before Examiner Watanabe demonstrated the existence of probable significant adverse environmental impacts in the form of traffic hazards.[33] Mr. Bishop's declaration affirmatively demonstrates that there are material issues of fact that preclude any decision that the FEIS's discussion of alternatives is reasonable as a matter of law.

III. CONCLUSION

As demonstrated above, SDOT's Motion must be denied because it cannot prevail under either CR 12 or 56 since there are facts — both alleged and hypothetical – that support the Coalition's issues properly raised in this appeal; or, there are genuine issues of material fact that preclude summary judgment. SDOT has not meet its burden to show that there are no set of facts under which the Coalition may prevail at hearing. In fact, SDOT's Motion raises purely factual issues, which are not the proper subject of a Motion to Dismiss, and will or have been contradicted by evidence presented by the Ballard Coalition at hearing. Moreover, this is the

[32] *Ashcroft*, 17 Wn. App at 854.
[33] *In re Ballard Business Appellants*, W-12-002, Findings and Decision of the Hearing Examiner for the City of Seattle, (Aug. 12, 2012) at pp. 8-9.

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only forum to create a factual record regarding SDOT's SEPA compliance regarding the City's Shoreline Environment.

DATED this 18th day of August, 2017.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following persons via the methods indicated:

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