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, Appellants.	Hearing Examiner File W-17-004 **CASCADE BICYCLE CLUB REPLY IN SUPPORT OF SEATTLE DEPARTMENT OF TRANSPORTATION'S MOTION FOR PARTIAL DISMISSAL**

In comments on the DEIS the Ballard Coalition ("Appellant") argued that the range of alternatives presented in the DEIS was defective because SDOT failed to analyze the option of building protected bike lanes or "cycle tracks" on Leary Way.[1] SDOT declined to study the bike lane/cycle track alternative, because SDOT found it to be inconsistent with the purpose of the project. The FEIS explains:

> A protected bicycle lane may have different forms, including cycle tracks, but they are designed exclusively to keep bicycles separated from motor vehicle travel lanes, parking lanes and sidewalks. A protected bicycle land does not provide accommodations for pedestrians and nonmotorized users of all abilities. Pedestrians and other nonmotorized users would have to use an adjacent

[1] Appellant lambasted SDOT for failing to study what it calls "the Ballard Cycle Track Proposal." Comments of August 1, 2016 from Josh Brower to Scott Kubly at 4, Ex. F to Declaration of Erin Ferguson (filed Aug. 4, 2017) ("Ferguson Declaration").

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> sidewalk. This type of facility does not meet the project objective of completing the multi-use trail through the study area. It would not maintain the feel of the existing trail on either side of the Missing Link, and would put people running or skating onto a sidewalk, which introduces potential conflicts with people gathering or milling about on sidewalks, or entering or exiting buildings.[2]

On appeal Appellant renewed its protests over the omission of a bike lane/cycle track from the alternatives analyzed in the DEIS. Notice of Appeal at page 6 (Issues 2A and 2B). SDOT moved to dismiss this issue, precisely because Appellant's favored alternative conflicts with SDOT's objective to complete the Missing Link as a multi-use trail. Seattle Department of Transportation's Motion For Partial Dismissal ("SDOT Motion") at 10-11. In response, Appellant filed a memo and a declaration from traffic engineer Victor Bishop. If the declaration contained any evidence bearing on this issue CR 12(c) would convert SDOT's motion into a motion for partial summary judgment. The Hearing Examiner adjudicates summary judgment motions under the provisions of CR 56, and applies the burden shifting scheme followed by Washington courts under CR 56.[3]

While Appellant presents its grievance as a challenge to the range of alternatives studied in the EIS, it actually constitutes a challenge to the lawfulness of the project purpose defined by SDOT. The purpose of the Missing Link project, to connect the 1.4 mile gap between the existing segments of the Burke Gilman Trail with a multi-use trail for persons of "all abilities,"[4] precludes Appellant's bike path suggestion as a SEPA alternative. Appellant's Response

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[2] FEIS § 1.9. The Ferguson Declaration at ¶ 3 submits into evidence the entire FEIS.

[3] *In the Matter of the Appeal of Protect Volunteer Park*, Hearing Examiner File MUP-17-015(W), Order on Motions For Summary Judgment at 2 (entered June 5, 2017) (hereafter cited as "*Volunteer Park*").

[4] FEIS § 1.2, Ex. A to Ferguson Declaration.

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concedes that Appellant's real grievance lies with "SDOT's overly-narrow definition of the proposal . . ." Ballard Coalition's Response In Opposition To SDOT's Motion For Partial Dismissal at ("Coalition Response") at 13, note 24. Appellant contends that "an agency cannot define the objective of its proposal in an unreasonably narrow manner to achieve a pre-ordained outcome." *Id.* at 16.

Courts routinely dispose of challenges on summary judgment that an agency's statement of purpose excluded reasonable alternatives. *Akiak Native Community v. United States Postal* Service, 213 F.3d 1140, 1148 (9th Cir. 2000) (affirming summary judgment entered by district court on the adequacy of a NEPA EIS, on ground that the range of alternatives considered need not extend beyond those reasonably related to the purposes of the project); *Hogback Basin Preservation Assn v. U.S. Forest Service*, 577 F.Supp.2d 1139, 1159 (W.D. Wash. 2008) (same). The opinions typically rely on the broad discretion vested in a government agency to define the goals of a project. *Solid Waste Alternative Proponents v. Okanogon County*, 66 Wn. App. 439, 445 (1992); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998).

To avoid summary judgment on this issue Appellant needed to present evidence *in response to the City's motion* that SDOT acted unreasonably in defining the project purpose to complete the Burke Gilman Trail through Ballard as a multi-use trail. Had Appellant presented such evidence the Hearing Examiner would evaluate it under the rule of reason, according deference to SDOT's definition of the scope and purpose of its project. *Solid Waste Alternative Proponents*, 66 Wn.App. at 445 (1992); *Northwest Ecosystem Alliance v. Rey*, 380 F.Supp.2d 1175, 1185 (W.D. Wash. 2005).

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But Appellant cites no evidence to support its contention that SDOT defined the goals of the project in an "unreasonably narrow manner." Coalition Response at 16.[5] Appellant simply asserts that the validity of SDOT's project purpose is a question of fact, and that the Hearing Examiner must not exclude "evidence of unreasonableness before such evidence is offered." *Id.*

Appellant misconstrues the burden it must meet as a party opposing a dispositive motion. Summary judgment motions are subject to a burden-shifting scheme. A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case. Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact. If the nonmoving party does not meet that burden, summary judgment is appropriate. *Volunteer Park, supra* note 2 at 2 (citing Washington caselaw). The nonmoving party cannot rely on argumentative assertions, speculative statements, or conclusory allegations to defeat summary judgment. *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007).

In the FEIS SDOT presented its reasons for rejecting Appellant's bike lane suggestion. If Appellant thought that SDOT defined its project purpose too narrowly it could have presented evidence to the Hearing Examiner that Appellant's preferred configuration would better

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[5] Appellant filed a declaration from traffic engineer Victor Bishop. But Mr. Bishop offers no views on the reasonableness of SDOT's decision that the Missing Link must serve users of all abilities. Instead, he opines about which type of "bicycle facility" is safest for bicycling. Declaration of Victor H. Bishop P.E. ¶7. Mr. Bishop's declaration concludes with a sweeping pronouncement that SDOT's analysis of alternatives is unreasonable because other options might be safer for everyone. *Id.* ¶ 8. Mr. Bishop cites no reasoning or evidence to support this conclusion. It is precisely the type of "conclusory allegation" that countless decisions (including *Volunteer Park*) hold inadequate to avoid summary judgment.

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accommodate the needs of all trail users. Appellant cannot meet its burden by incanting the magic words "issue of fact," by offering conclusory allegations from an expert with no supporting evidence, or by promising that evidence will be presented at hearing:

> An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e., information as to . . . a reality as distinguished from supposition or opinion." Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact. "The whole purpose of the summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence.

Volunteer Park, supra note 2 at 2 (citations omitted).

The alternatives that must be analyzed in an EIS flow from the purpose of the project.[6] In promoting an alternative that conflicts with SDOT's definition of the project purpose, Appellant had an obligation to show that SDOT's purpose was unreasonably narrow. When SDOT moved to dismiss Appellant's challenge, and pointed to the conflict between Appellant's preferred alternative and the project purpose, Appellant had a burden to come forward with evidence supporting its contention that SDOT's purpose was unreasonably narrow. Because Appellant failed to do that there are no issues of fact, and SDOT's motion should be granted.

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[6] WAC 197-11-440(5); *Weyerhaeuser v. Pierce County*, 124 Wash.2d 26, 38 (1994); *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 481 (2011); *Hogback Basin*, 577 F.Supp.2d at 1159.

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Dated this 28th day of August, 2017.

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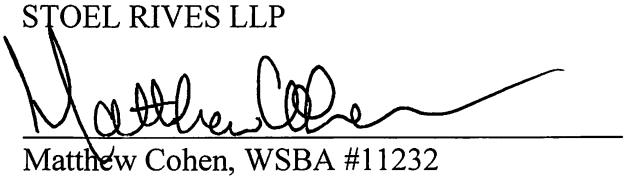

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CERTIFICATE OF SERVICE

I certify that on this date of August 28, 2017, I electronically filed a copy of the foregoing document with the Seattle Hearing Examiner using its e-filing system. I also certify that on this date I caused to be served a true and correct copy of the foregoing on the following persons in the manner listed below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: August 28, 2017 at Seattle, Washington.

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