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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 Final Environmental Impact Statement, prepared by the Seattle Department of Transportation for the Burke-Gilman Trail Missing Link Project)	SDOT’S MOTION <i>IN LIMINE</i> and MOTION TO QUASH SUBPOENAS OF CERTAIN CITY EMPLOYEES AND CONSULTANTS

I. INTRODUCTION & RELIEF REQUESTED

In its Preliminary Disclosure of Witnesses and Exhibits (Preliminary List), the Ballard Coalition (Coalition) has demonstrated its intent to call an unreasonable number of witnesses (up to 38) and to elicit testimony that is duplicative and exceeds the witnesses’ qualifications and expertise.¹ Additionally, the Coalition has listed 15 City witnesses, including 10 whose testimony would be either irrelevant or duplicative of the witnesses Seattle Department of Transportation (SDOT) has identified as its testifying experts that will be available for questioning. The Coalition’s plans for testimony at hearing violate the Rules of Evidence and appear designed to frustrate SDOT’s efforts to prepare for hearing and to force the City to

¹ Additionally, the Coalition has listed nearly 350 exhibits, as well as an additional 80 exhibits previously admitted in appeals related to the Burke Gilman Trail Missing Link Project (the Project).SDOT reserves its right to object to

1 expend unnecessary resources. Accordingly, SDOT asks the Examiner to grant this motion and
2 impose reasonable restrictions on the testimony the Coalition will present at the hearing that take
3 into account the focused and technical subject matter of this appeal, and the reasonable time
4 allotted for the hearing. Specifically, the Seattle Department of Transportation (SDOT) requests
5 that the Hearing Examiner grant SDOT's Motion to:

- 6 1. Limit the Ballard Coalition's presentation of witnesses, including rebuttal, to two
7 days of hearing;
- 8 2. Limit the testimony of fact witnesses to non-expert testimony;
- 9 3. Preclude the Coalition from presenting testimony and documentary evidence on
10 the advances in project design since the publication of the EIS;
- 11 4. Preclude Ballard Coalition from calling City witnesses on direct examination;²
12 and,
- 13 5. Quash subpoenas for depositions of specified City consultants and employees
14 whose testimony would be either irrelevant or duplicative of the witnesses SDOT
15 has identified as its testifying experts.

16 While the Coalition's List is preliminary, the Examiner's guidance on these issues at this stage of
17 the proceeding will help all parties prepare for hearing and complete final witness lists and
18 prehearing discovery.³ The Examiner's resolution of these issues will also avoid unnecessarily
19 using time at the hearing to resolve objections to witness qualifications and to duplicative and
20 irrelevant testimony. SDOT welcomes a prehearing conference to take up the issues raised in
21 this motion.

22 the admission of those exhibits, including but not limited to objections to the relevance of any of those exhibits to
23 the specific issues raised in the appeal.

² SDOT reserves the right to object to additional testimony at hearing.

³ Hearing Examiner Rule 12(e) requires motions to exclude evidence to be filed "at the earliest possible time in the proceedings in order to allow time for the other party to respond" and "to ensure that the Examiner will consider the motions on the merits." In light of the concerns raised by the Appellant's Preliminary List, SDOT is filing its motion in advance of the final list to allow the Coalition to respond and to provide adequate time for the Examiner to resolve this issue before hearing and for parties to prepare.

1 **II. ARGUMENT ON MOTION IN LIMINE**

2 Hearing Examiner Rule 12(b) provides that the “Examiner may exclude evidence that is
3 irrelevant, unreliable, immaterial, unduly repetitive, or privileged.”⁴ In addition, the Hearing
4 Examiner may limit the length of testimony to expedite the proceedings.⁵

5 **A. The Hearing Examiner should limit the Ballard Coalition’s presentation of
6 evidence to two days.**

7 In this appeal, the Examiner has set a hearing schedule that is more than adequate to take
8 up and resolve The Coalition’s issues. The Coalition’s challenge to the adequacy of the Project’s
9 EIS on specified grounds is technical and involves evaluation of expert analyses. It does not
10 warrant the testimony of 38 witnesses, including 17 lay witnesses that do not offer technical
11 expertise. The sheer number of witnesses included in the Coalition’s Preliminary List greatly
12 exceeds the needs of this case and the expectations set at the prehearing conference. It raises
13 serious concerns about the Coalition’s ability to present testimony within its portion of the five
14 days of hearing allotted by the Hearing Examiner. Therefore, in addition to the objections to the
15 substance of the witnesses’ anticipated testimony, addressed below, SDOT asks the Examiner to
16 limit the Coalition’s presentation of testimony (including testimony for the Coalition’s case-in-
17 chief, cross-examination and rebuttal) to two hearing days. This would ensure that all parties
18 have adequate time to present their case.⁶

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22 ⁴ Similarly, ER 403 provides that even relevant evidence may be excluded if its probative value is substantially
outweighed by considerations of “undue delay, waste of time, or needless presentation of cumulative evidence.”

23 ⁵ Hearing Examiner 2.14(e).

⁶ The remaining three days set for hearing would be reserved for opening and closing arguments, if provided, other
procedural matters, and the presentation of SDOT and Cascade Bicycle Club’s witnesses.

1 **B. The Hearing Examiner should exclude witnesses identified as presenting**
2 **unduly repetitive testimony.**

3 Based on the description of testimony in the Coalition’s Preliminary List, the Coalition
4 intends to present duplicative testimony. The description of proposed testimony of several
5 witnesses is identical, including the testimony of Scott Anderson and Nigel Barron, Nicole Grant
6 and Katie Garrow, and Craig Hatton and Ellen Hatton. The Preliminary List includes multiple
7 witnesses from several of the same businesses. More generally, the Coalition’s preliminary list
8 includes 18 witnesses proposed to testify regarding “traffic hazard impacts,” 17 witnesses to
9 testify about “safety” and “access,” 16 witnesses to testify about “land use,” 12 witnesses to
10 testify about “economic impacts,” and 9 witnesses to testify about “parking” impacts. Especially
11 given the technical nature of this appeal, the repetitive testimony by lay witnesses has limited
12 probative value. The Coalition should not be allowed to present identical testimony by more
13 than one witness or to present numerous witnesses to testify about the same subject matter.
14 While the Coalition can select among its list of lay witnesses, SDOT requests that the Hearing
15 Examiner grant this motion and preclude the Coalition from presenting unduly repetitive
16 testimony by directing the Coalition to reduce its list to eliminate repetitive testimony.

17 **C. Lay witnesses cannot present expert testimony.**

18 The Coalition lists four experts. The Coalition’s description of the testimony of its
19 remaining lay witnesses includes testimony that exceeds what is allowed by the rules.
20 Specifically, the Coalition intends to elicit expert opinion and technical testimony that only an
21 expert can provide. Pursuant to ER 701, lay witnesses are limited in the scope of testimony:

22 If the witness is not testifying as an expert, the witness' testimony
23 in the form of opinions or inferences is limited to those opinions or
 inferences which are (a) rationally based on the perception of the
 witness, (b) helpful to a clear understanding of the witness'

1 testimony or the determination of a fact in issue, and (c) not based
2 on scientific, technical, or other specialized knowledge within the
3 scope of rule 702. (emphasis added).

3 The Coalition’s 17 witnesses not identified as experts must be limited or excluded accordingly.⁷

4 Instead, all the descriptions of proposed testimony on the Coalition’s Preliminary List
5 indicate that the Coalition will ask these fact witnesses to share expert opinions that would
6 require scientific, technical, or other specialized knowledge of an expert witness, such as:
7 testimony regarding “traffic hazards,” “traffic delay,” “traffic safety impacts,” “access impacts,”
8 “parking impacts,” by witnesses without any engineering or design expertise; and testimony
9 regarding “land use compatibility” by witnesses without any expertise as a land use planner. The
10 Coalition’s seventeen lay witnesses should not be allowed to venture into this type of expert
11 opinion.

12 Additionally, several lay witnesses will present testimony that exceeds their first-hand
13 knowledge, which is precluded by the rules of evidence. Specifically, the following lay
14 testimony that should be excluded on those grounds:

- 15 • Testimony by Nicole Grant, Executive Secretary-Treasurer for the Martin
16 Luther King, Jr. County Labor Council of Washington and Katie Garrow,
17 Deputy Executive Secretary-Treasurer for the Martin Luther King, Jr. County
18 Labor Council of Washington regarding “trail usage” and “business operation
19 impacts,” as well as other impacts, where there is no indication Ms. Grant
20 owns or operates a business in the Project area or has any specialized
21 knowledge regarding trail usage.

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23 ⁷ *Ashley v. Hall*, 138 Wn.2d 151, 156 (1999) (“... admission of lay opinion testimony should be excluded where the sort of opinion expressed calls for that of an expert.”)

- Testimony by Mara Garrity of the Ballard Massage Center regarding access from Ballard Mill Marina and other marinas, as well as impacts to individuals who live aboard boats and vessels at those marinas, as well as impacts to the local live-aboard community, in general, that purport to exceed her first-hand experiences .
- Testimony by business owners along the Project corridor, including Paul Nerdrum, Warren Aakervick, and Scott Anderson, among others, regarding the compatibility of the project with land uses in the Ballard area in general, that exceed their first-hand knowledge.

The Hearing Examiner should grant SDOT’s Motion in Limine and preclude fact witnesses from offering expert testimony.

D. Testimony related to the advances in the Project design is irrelevant to this appeal of the adequacy of the EIS.

Based on descriptions of testimony in its Preliminary List, the Coalition intends to call witnesses to testify about SDOT’s advances in Project design that SDOT has prepared since the publication of the FEIS.⁸ The Examiner should exclude this and any other similar testimony or documentary evidence because it is irrelevant to the Coalition’s limited appeal of the adequacy of the EIS. An EIS adequacy appeal without the simultaneous appeal of the underlying project approval should be limited solely to the sufficiency of the environmental analysis of the design that was considered in the EIS. Appeals of EIS adequacy “must be decided on the basis of

⁸ Specifically, the descriptions of the testimony of Roque DeHerrera and Brian Surratt include discussion of the Design Advisory Committee, an entity that was convened to include additional stakeholder perspectives in the advances in project design.

1 evidence predating EIS issuance.”⁹ . Accordingly, the Coalition should be precluded from
2 eliciting testimony or presented documentary evidence related to design work that has been done
3 since issuance of the FIES, including but not limited to the proposed testimony of Roque
4 DeHerrera and Brian Surrat on the Design Advisory Committee process.

5 **E. The Ballard Coalition should be precluded from calling specific City**
6 **witnesses on direct examination.**

7 The team of experts and city employees involved in the Project is voluminous. In its list,
8 SDOT has identified a testifying witness on each subject raised by the Coalition. Those
9 witnesses will be available for questioning. In its list, the Ballard Coalition identifies 15
10 proposed witnesses who are either City employees or hired by the City to work on the Project.
11 Only four of those 15 are also on the City’s list: Mark Mazzola; Mark Johnson; Erinn Ellig; and
12 Morgan Shook. The Coalition should be precluded from calling the remaining 11 city witnesses
13 for several reasons.

14 First, the Hearing Examiner should preclude the Coalition from calling City witnesses to
15 testify regarding a particular subject matter where SDOT has identified its own witness on that
16 topic to avoid duplicative testimony and to facilitate an orderly and efficient hearing.¹⁰ For
17 example, although both Mark Mazzola and Jill Macik are identified as proposed witnesses on the
18 Coalition’s preliminary list, they are both staff in SDOT’s Environmental Services division and
19 were involved in the same aspects of preparing the EISs for the Project, so there is no need to
20 elicit testimony from both witnesses. SDOT has identified Mr. Mazzola as a witness and the

21 ⁹ R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14.01[1][c] (2016)
22 (“Under the rule of reason, it would be preposterous to expect an EIS to disclose and analyze facts that were not
23 known and not reasonably knowable at the time the EIS was issued. Thus, administrative and judicial appeals of EIS
adequacy must be decided on the basis of evidence predating EIS issuance.”). *See also In re King Cty. Hearing
Exam’r*, 135 Wn. App. 312 , 144 P.3d 345 (2006).

¹⁰ See HER 12(b) and ER 403.

1 Appellants may obtain the testimony sought on cross-examination. Therefore, the Ballard
2 Coalition should be precluded from calling Ms. Macik and limited to cross-examination of Mr.
3 Mazzola, as opposed to calling him on direct examination. Similarly, the Ballard Coalition
4 should be precluded from calling Claire Hoffman and Jennifer Hagenow and limited to the cross-
5 examination of Mark Johnson, who SDOT has identified as a witness, because all three of those
6 proposed witnesses are identified as testifying on the same topic. Likewise, Jeffrey Ferris should
7 be excluded as a witness, because his testimony would be duplicative of the testimony of Morgan
8 Shook, who SDOT identified as a witness. In each of these instances all the witnesses identified
9 to be excluded contributed to the same subject matter report and chapters in the EISs and their
10 testimony would be duplicative of the testimony of Mark Johnson, the witness SDOT has
11 identified.¹¹

12 Second, the testimony of certain listed City witnesses should be excluded because it is
13 irrelevant and would provide no probative value based on their limited involvement with the
14 issues raised in this appeal. Numerous witnesses identified on the Ballard Coalition's
15 Preliminary Witness List, including Scott Kubly, Ron Scharf, Art Brochet, Ben Perkowski,
16 Roque DeHerrera, and Brian Surratt, had limited or no involvement in the issues raised in the
17 appeal and did not perform any of the analysis included in the EIS, so their testimony should be
18 excluded as irrelevant and a waste of time.¹² For example, although Scott Kubly is designated as
19 SDOT's SEPA responsible official, he appropriately delegated a majority of that role to Mr.
20 Mazzola and his Environmental Services Group. Mr. Kubly did not perform any of the analysis
21 included in the FEIS and any of his knowledge or opinion regarding the issues on appeal would

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23 ¹¹ *State v. Trickel*, 16 Wn. App. 18, 33, 553 P.2d 139 (Div. 2 1976) (no error in limiting number of defendant's character witnesses). See also *Tumelson v. Todhunter*, 105 Wn. 2d 596, 603, 716 P.2d 890 (1986) (en banc) (witness testimony properly excluded as cumulative to other evidence presented).

1 be based on the analysis of SDOT’s witnesses, so he should be excluded as a witness.

2 Similarly, although Mr. Scharf was the former project manager for the Project, he was
3 not involved in performing any analysis or drafting any part of either the Draft or Final EIS and
4 has no personal knowledge regarding the “contents, analysis, and conclusions in the DEIS and
5 FEIS” which is the testimony sought by the Coalition. Mr. Brochet’s role was limited to public
6 outreach and communication, so he too has no first-hand knowledge regarding the SEPA
7 analysis at issue in this appeal. Neither Mr. Surratt, the Director of the Office of Economic
8 Development, nor his colleague Mr. DeHerrera, contributed to any analysis in the Draft or Final
9 EIS and do not possess the expertise to testify regarding the “business, land use and economic
10 impacts to Ballard-area businesses from the Missing Link,” as described as the testimony sought
11 by the Appellants.

12 Lastly, the Ballard Coalition should be precluded from calling Ben Perkowski as a
13 witness, because he has had limited involvement with the Project, the testimony proposed is
14 predominantly irrelevant to the appeal, particularly if SDOT’s Motion for Partial Dismissal is
15 granted, and SDOT has identified Mark Johnson and Mark Mazzola as witnesses, who can testify
16 to the same issues. Similarly, the Coalition has not established the relevance of the testimony of
17 Sharron Boswell, but to the extent they seek relevant testimony it too would be cumulative in
18 light of the testimony of Mark Johnson and Mark Mazzola.

19 Allowing the Ballard Coalition to call all of the City witnesses identified on their
20 preliminary list would cause undue delay, unnecessarily increases City costs, and result in the
21 presentation of duplicative evidence. Therefore, the Hearing Examiner should preclude the
22 Ballard Coalition from calling City employees or persons employed by the City to work on the

23 ¹² See HER 12(b) and ER 403.

1 Project on direct examination.

2 III. ARGUMENT TO QUASH SUBPOENAS

3 On September 22, 2017, the Coalition served SDOT with subpoenas directing eight city
4 employees and consultants to appear for depositions. The identified deponents include Scott
5 Kubly, Ben Perkowski, Claire Hoffman, and Jennifer Hagenaw. *See* Johnson Decl. Exh. A-D.
6 The Examiner should quash the subpoenas for these four deponents pursuant to HER 3.11. For
7 the reasons articulated in section II.E, above, depositions of these four witnesses would be
8 unduly burdensome, harassing and unnecessary under the circumstances of the appeal. As
9 explained above, the City is making available a testifying expert to address the topics with which
10 Ms. Hoffman and Ms. Hagenaw are familiar and there is no reason to seek duplicative discovery
11 from those consultants. Mr. Kubly did not perform any of the analysis included in the FEIS and
12 any of his knowledge or opinion regarding the issues on appeal should be based on the analysis
13 of SDOT's testifying witnesses. Likewise Mr. Perkowski has had limited involvement with the
14 Project and does not have information relevant to the issues in the appeal. Their depositions are
15 clearly unnecessary given the scope of this adequacy appeal and would be harassing. The City's
16 approach of making available its testifying witnesses for deposition is reasonable in light of the
17 circumstances of the appeal and its scope.

18 IV. CONCLUSION

19 Based on the arguments above, SDOT requests that the Hearing Examiner grant its
20 Motion in Limine to exclude repetitive, improper, and irrelevant presentation of testimony to
21 facilitate a more efficient hearing. Although not included in this Motion, because the Hearing
22 Examiner has not yet issued a decision, SDOT also preserves the right to object to additional
23 witnesses and testimony if SDOT's Motion for Partial Dismissal is granted. Similarly, SDOT

1 requests the Examiner to grant its motion to quash subpoenas of Scott Kubly, Ben Perkowski,
2 Claire Hoffman, and Jennifer Hagenaw.

3 DATED this 22nd day of September, 2017.

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