BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of	Hearing Examiner Files: **W-17-004**
THE BALLARD COALITION	
of adequacy of the FEIS issued by the Director, Seattle Department of Transportation	**ORDER ON MOTION TO DISMISS**

This matter concerns the appeal of the Final Environmental Impact Statement ("FEIS") issued by the City of Seattle Director of the Seattle Department of Transportation ("City" or "SDOT") for the Burke-Gilman Trail Missing Link Project ("Project"). The FEIS has been appealed by the Ballard Coalition ("Appellant"). The City has filed a motion to dismiss issues raised in the appeal ("Motion"). The Cascade Bicycle Club has filed a memorandum in support of the Motion. The Appellant has filed a response in opposition to the motion, the City has filed a reply to the response, and the Cascade Bicycle Club untimely filed a reply in support of the Motion. The Hearing Examiner has reviewed the file in this matter including the motion documents. For purposes of this decision, all section numbers refer to the Seattle Municipal Code ("SMC" or "Code") unless otherwise indicated.

The City moves to dismiss the following issues raised by Appellants in the appeal:

1. Whether SDOT should serve as the lead agency under State Environmental Policy Act ("SEPA").
2. Whether SEPA requires SDOT to consider Appellant's preferred project design.
3. Whether the FEIS includes an analysis concerning a connecting segment in its preferred alternative.
4. Whether the FEIS failed to examine issues under the Shoreline Management Act.

Quasi-judicial bodies, like the Hearing Examiner, may dispose of an issue summarily where there is no genuine issue of material fact. *ASARCO Inc.* v. *Air Quality Coalition,* 92 Wn.2d 685, 695-698, 601 P.2d 501 (1979). Rule 1.03 of the Hearing Examiner Rules of Practice and Procedure ("HERs") states that for questions of practice and procedure not covered by the HERs, the Examiner "may look to the Superior Court Civil Rules for guidance." Civil Rule 56(c) provides that 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."

"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." *Indoor Billboard/Washington, Inc.* v. *Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 70, 170 P.3d

10 (2007) (internal citations omitted) (emphasis added). "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." *Curran* v. *City of Marysville,* 53 Wn.App. 358, 367, 766 P.2d 1141 (1989), *quoting Grimwood* v. *University of Puget Sound, Inc.,* 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a question of fact. *Id.* "The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion than an issue exists without any showing of evidence." *Meissner* v. *Simpson Timber Co.,* 69 Wn.2d 949, 956, 421 P.2d 674 (1966) (citation omitted).

A. Whether SDOT should serve as the lead agency under State Environmental Policy Act ("SEPA").

The Notice of Appeal alleges:

> The FEIS does not "provide an impartial discussion of significant environmental impacts" and does not "inform decision-makers and the public of reasonable alternatives." The FEIS violates this requirement because: SDOT continues to be both the project proponent/advocate and the SEPA lead agency . . .

Notice of Appeal at 6.

The mere fact that SDOT is lead agency is not indicative that the FEIS is inadequate, and as a matter of law does not serve as a basis upon which the Appellant may challenge the FEIS. SMC 25.05.926 specifically provides "[w]hen an agency initiates a proposal, it is the lead agency for that proposal." *See* R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis,* § 10.01[1] (2016) ("The fact that the lead agency is responsible for SEPA review of its own proposal does not in itself violate the appearance of fairness doctrine or other conflict of interest laws.").

Therefore, issues challenging the adequacy of the FEIS based on the fact that SDOT is the lead agency are **DISMISSED.**

B. Whether SEPA requires SDOT to consider Appellant's preferred project design.

The City argues that the Appellant alleges that SEPA requires SDOT to consider Appellant's preferred project design. However, Appellant's Notice of Appeal alleges that SDOT failed to do an adequate alternatives analysis, and appears to identify its preferred alternative as an example of that inadequate analysis. The City's reading of the Appellant's argument is too narrow, and in this respect the Motion is **DENIED.**

Further, the City raises the issue that under the Code it has the obligation and authority to define the proposal. It certainly does, but its efforts in fulfilling this obligation are not immune from appeal. SMC 25.05.680.A.2.a.2. reads as follows: "The following agency environmental

determinations shall be subject to appeal to the Hearing Examiner by any interested person as provided in this subsection: . . . Adequacy of the Final EIS as filed in the SEPA Public Information Center." The Code does not designate the City's identification of the proposal as a separate decision from its environmental determination. The definition of the proposal is inherently part of the FEIS analysis, as it influences from the outset the potential significant adverse environmental impacts that will be considered in the analysis.

Finally, to the degree that the Appellant is challenging the alternatives analysis, even in part, on the basis that the City did not fully consider the Appellant's preferred alternative of a bicycle only facility, the Motion should be granted. The Appellant provided no supporting argument or affidavits in its response to the Motion on this point, and therefore under the standards of summary judgment that issue is **DISMISSED**.

C. Whether the FEIS includes an analysis concerning a connecting segment in its preferred alternative.

The Notice of Appeal states:

> SDOT failed to provide public notice of or appropriately evaluate a new segment of the preferred alternative . . .
>
> The FEIS includes virtually no additional information in the description of each Alternative, with the exception of what SDOT incorrectly characterizes as "one minor route connection" in its Preferred Alternative, which in fact is an entirely new segment of the route that was never analyzed prior to the release of the FEIS. . . . This new segment was ***not in any way included in the draft environmental impact statement,*** thus has never been analyzed or presented to the public for consideration or public comment as part of the Project.

Notice of Appeal at 7.

The City argues that as a matter of law lead agencies may "improve alternatives beyond the precise bounds of the alternatives that are included and analyzed in the DEIS," (Motion at 3) and that Appellant's issue should be dismissed for this reason. This is an overly narrow reading of the Appellant's issue. The Appellant alleges that SDOT did not provide adequate notice or analysis concerning the new segment. The Appellant does support its allegation by indicating that the new segment was not identified in the Draft EIS, but this is not sufficient cause to dismiss the issue in its entirety. The motion is **DENIED** with regard to this issue.

D. Whether the FEIS failed to examine issues under the Shoreline Management Act.

The Notice of Appeal states:

> At least two portions of the Preferred Alternative are located within the City's designated Shoreline Environment. Despite this, the FEIS claims that the Project is exempt from obtaining a Shoreline Substantial Development permit because "reconfiguring the existing right-of-way for the Missing Link would be allowed within the shoreline district under the SMP." SDOT is violating SEPA by: a) falsely asserting that it is proposing to repair and replace an existing development instead of building a brand new multi-user trail/Project where one has not previously existed; b) failing to analyze or disclose the true effect of the Project on the Shoreline Environment or conformity to the City's Shoreline Master Program; c) failing to properly and adequately disclose and analyze the Project's relationship to and conformity to the City's Shoreline Master Plan and Program, all as required by SEPA. *See e.g.,* SMC 25.05.444. SDOT is misrepresenting the scope and nature of the Project within the Shoreline Environment, and thus its SEPA analysis is fatally flawed and inadequate because the FEIS violates SEPA's policies and requirements, and its implementing policies regulations, including the City's Shoreline policies.

Notice of Appeal at 12.

The City argues both that the Appellant is collaterally estopped from raising, and that the Hearing Examiner has no jurisdiction to address, issues related to whether a shoreline permit or a shoreline exemption is required for the project that is the subject of the FEIS.

The City is correct that as a matter of law the Hearing Examiner has no jurisdiction over permits or exemptions under the City's Shoreline Master Program, and that this issue has been dismissed in relation to the proposal by past Examiners. To the degree that Appellant's issues concern the City's determination regarding shoreline permits or exemptions, these issues are **DISMISSED.**

The Motion does not challenge the Appellant's right to appeal the adequacy of the FEIS concerning potential significant impacts. Therefore, to the degree Appellant's issue challenges the FEIS because it 1) did not adequately "analyze or disclose the true effect of the Project on the Shoreline Environment," or 2) concludes that the proposal's conformity with the City's Shoreline Master Program provisions will mitigate significant impacts, this issue remains fairly before the Hearing Examiner.

Entered this 28th day of September, 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Order on Motion to Dismiss** to each person listed below, or on the attached mailing list, in the matter of **The Ballard Coalition**, Hearing Examiner File: **W-17-004,** in the manner indicated.

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Dated: September 28, 2017

Alayna Johnson
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