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7 **BEFORE THE HEARING EXAMINER**
8 **CITY OF SEATTLE**

9 In the Matter of the Appeal of:

Hearing Examiner File

10 **THE BALLARD COALITION**

W-17-004

11 of the adequacy of the Final Environmental
12 Impact Statement, prepared by the Seattle
13 Department of Transportation for the Burke
14 Gilman Trail Missing Link Project

THE BALLARD COALITION'S
RESPONSE IN OPPOSITION TO SDOT'S
SECOND MOTION IN LIMINE

15 **I. INTRODUCTION**

16 The Examiner should deny the Seattle Department of Transportation (“SDOT”)’s second
17 motion in limine because there is no basis to artificially restrain the Ballard Coalition’s (the
18 “Coalition”) opportunity to present its case. SDOT’s argument is entirely based on an inchoate
19 suggestion that the Coalition cannot possibly do so during the five day Hearing set by the
20 Hearing Examiner based solely on the number of witnesses and exhibits disclosed. Despite the
21 tens of thousands of unlabeled and uncategorized documents, the majority of which were
22 provided very late to the Coalition, the Coalition is still committed to preparing and presenting
23 its case within the five-day hearing. SDOT does not get to artificially shorten, change, or
24 otherwise require the Coalition to disclose its Hearing strategy, or do more than provide a
25

1 potential list of witnesses that it plans to call and the exhibits it may present at Hearing. The
2 Coalition has fully complied with the Examiner’s Orders.

3 The Coalition *is not* asking for another extension of the Hearing dates and is fully
4 committed to completing its case during the time allotted. To date, the Coalition has complied
5 with every deadline set by the Examiner in this matter. The Coalition’s final witness and exhibit
6 list does what witness and exhibit lists are intended to do: it gives notice to the opposing parties
7 of the documents that the Coalition may rely upon, and the witnesses it is likely to call at
8 Hearing. The Hearing Examiner’s Rules are clear: “Each party in an appeal proceeding has the
9 right to notice of hearing, presentation of evidence, rebuttal, objection, cross-examination,
10 argument, and other rights determined by the Hearing Examiner as necessary for the *full*
11 *disclosure of facts and a fair hearing.*” HER 3.13 (emphasis added). As set forth in the
12 Coalition’s response to SDOT’s first motion in limine, there is absolutely no legal basis for a
13 respondent in a State Environmental Policy Act (“SEPA”) appeal to dictate which witnesses the
14 Coalition may use to build its case in chief. Due process entitles the Coalition to present its
15 evidence in the manner of its choosing, which is, unfortunately but understandably voluminous
16 in light of the publication of a Final Environmental Impact Statement (“FEIS”) that consists of
17 thousands of pages and multiple volumes. Despite this, and in an effort to resolve the issues
18 before the Examiner, as detailed below, the Coalition will stipulate to removing 12 witnesses
19 from its witness list and will stipulate to provide SDOT an updated Exhibit List on November
20 21, as suggested by the Cascade Bicycle Club (“Cascade”).¹ As such, SDOT and Cascade’s
21 motions are without merit.

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25 ¹ Cascade filed a motion styled as a “Motion to Compel” on the due date for final motions in limine. Although Cascade’s motion is improper, the Coalition responds to the arguments made therein in this response.

1 **II. ARGUMENT**

2 **A. SDOT’S Own Defective Production Created the Need for Categorical Exhibit**
3 **Listing**

4 SDOT primarily complains about three categories of exhibits that it deems are
5 “irrelevant”: (1) responses to public record requests provided by SDOT; (2) documents obtained
6 through discovery in this matter; and (3) comments and correspondence to the draft and final
7 EIS. First, to hold these documents as irrelevant would require this Examiner to find that
8 SDOT’s document productions included knowingly irrelevant documents, in violation of the
9 rules of discovery. Second, categories (1) and (3) are specific to the EIS, which is the very
10 subject of this Hearing and are not irrelevant. Finally, it is illogical for SDOT to complain that it
11 does not know what documents that it disclosed to the Coalition in discovery and public records
12 responses. To believe this argument is to suggest that SDOT did not review or evaluate the
13 documents for relevance and subject matter prior to disclosure. If SDOT has an objection on the
14 basis of relevance to a particular document presented, it can make such an objection on the
15 record on a document-by-document basis. SDOT has identified no such document that it
16 believes is irrelevant, or set forth a basis for exclusion under the evidentiary rules or HER 2.17
17 and 3.11, which govern the admissibility of evidence before this tribunal.

18 Instead, SDOT suggests that it will be “prejudiced” if the Coalition does not identify
19 SDOT’s own documents. SDOT then claims that because the Hearing was moved to allow for
20 continued document review, that the Coalition now cannot complain about not yet completed
21 document review. As expressed at argument, the Coalition believed it needed more than the time
22 allowed to complete its review. In the interest of compromise, it lived with a short extension of
23 the Hearing dates, and commits to presentation of its evidence on the currently scheduled dates.
24 However, this does not mean that the Coalition’s attorneys are not continuing their diligent
25 review of the tens of thousands of documents produced by SDOT.

1 SDOT also cannot be heard to complain that they do not know which documents they
2 provided to the Coalition. The Coalition’s attorneys are doing their best to complete review of
3 the tens of thousands of uncategorized, unlabeled, and unsorted documents provided by SDOT
4 just a few short months ago. The Coalition has undertaken a herculean effort to prepare for this
5 Hearing, and due process does not support limiting the Coalition’s ability to present additional
6 documents in the way SDOT suggests. Certainly, were the Coalition to surprise SDOT at
7 Hearing with brand new documents prepared by the Coalition, SDOT’s objections might be
8 valid. But that is not the case here. SDOT created the document disclosure problem and it
9 cannot now be rewarded for its bad behavior by punishing the Coalition. Despite these clear
10 problems, as a compromise, the Coalition will provide an updated Exhibit List that identifies any
11 newly located documents on November 21, as requested by Cascade. No further relief is
12 necessary.

13 **B. The Coalition Adequately Disclosed Witnesses and Will Not Present Wholly**
14 **Duplicative Evidence**

15 The disclosure of initial witnesses in this matter gave the parties the opportunity to
16 conduct depositions or discovery related to those witnesses and exhibits. It is important for all
17 parties to remember that although the members of Coalition have pooled their resources, the
18 Notice of Appeal was filed by eight individual entities, each of which has the right to present
19 their factual evidence. Before finalizing its list, the Coalition narrowed its witness list from 34 to
20 22.² Because document review *is still* ongoing, and because of the expedited nature of this
21 litigation, the factual witnesses that are available to participate in the Hearing on behalf of the
22 Coalition are in flux. Nevertheless, the Coalition has agreed to a short five day Hearing and is
23 not requesting additional time. The Coalition intends to use its time wisely and will not present

24 _____
25 ² Some of the Coalition’s witnesses are listed as “or” or “and/or,” recognizing that the Coalition will not present both witnesses if one or the other can and does adequately testify regarding the anticipated evidence.

1 wholly duplicative witnesses. SDOT has presented no basis to exclude any particular witnesses
2 under the Hearing Examiner's Rules.

3 **1. *The Complexity and Timing of this Hearing Requires Flexibility in***
4 ***Which Witnesses to Call at Hearing***

5 The Coalition must be allowed the flexibility to call witnesses that are available during
6 this Hearing, which begins on the Monday following a holiday. Currently, the Coalition intends
7 to present approximately fifteen of the witnesses from the final witness and exhibit list, but
8 requires the flexibility to make changes based on the presentation of evidence and availability of
9 witnesses. Further, based on their presentation at depositions, the Coalition is concerned whether
10 some SDOT employees and contractors will be forthcoming in their testimony, and must be
11 allowed the flexibility to call the additional witnesses listed should these hostile witnesses
12 choose to be less than forthcoming.

13 Nevertheless, in an effort to avoid additional needless argument, and as a consequence of
14 the Coalition's on-going effort to refine its case while document review is still ongoing, the
15 Coalition will agree to eliminate the following witnesses from its final witness and exhibit list:

- 16 • Peter Schrappen
- 17 • Craig Hatton
- 18 • Ellen Hatton
- 19 • Brian McGarvey
- 20 • Ron Scharf
- 21 • Jill Macik
- 22 • Art Brochet
- 23 • Jennifer Hagenow
- 24 • Sharon Boswell
- 25 • Eileen Heideman
- Roque DeHerrera
- Brian Surrat

22 The Coalition does not agree to remove Claire Hoffman from the witness list. SDOT
23 argues that Ms. Hagenow and Ms. Hoffman are duplicative of the testimony of Mark Johnson.
24 However, Ms. Hoffman confirmed at her deposition that Mr. Johnson was primarily a high level
25 reviewer, that she was the primary consultant responsible for the day-to-day logistics of

1 coordinating the various subcontractors responsible for preparation of the sections of the FEIS,
2 and that she considered herself the “lead author” of the land use section of the FEIS. Declaration
3 of Leah B. Silverthorn (“Silverthorn Decl.”) at ¶ 3 & Ex. A (Tr. at p. 11:22-13:1 & 30:14-31:6).
4 There is no basis to exclude her testimony as duplicative. Although the Coalition does not
5 believe it necessary to concede removing these witnesses, in the interest of efficiency and
6 avoiding additional needless argument, it attaches a revised final witness list. Silverthorn Decl.
7 at ¶ 4 & Ex. B.

8 **C. A Timed Hearing is Unnecessary, Ineffective, and Deprives the Coalition’s**
9 **Members from a Full and Fair Presentation of Evidence on this Closed**
10 **Record Appeal**

11 The Coalition does not intend to call duplicative witnesses, and commits to presenting a
12 concise but thorough presentation of its case in chief. The Coalition does expect that
13 presentation of this case, rebuttal, and cross will take the entirety of the five days allotted for
14 Hearing. However, a “chess clock” type mechanism of the type proposed by SDOT is
15 inappropriate here, where the Coalition bears the burden of persuasion, and in any case, the
16 Coalition is entitled to more than half the time to reflect its additional burden. The number of
17 witnesses and exhibits identified by SDOT and the Coalition can be presented in the five days
18 allotted by the Hearing Examiner, and the Hearing Examiner can control the course of the
19 hearing in light of the evidence presented and the conduct of the parties in presenting it. Had the
20 parties intended to so limit the proceedings in the manner proposed by SDOT, the time for doing
21 so was at the parties’ initial pre-hearing conference, or in the second pre-hearing conference, not
22 mere weeks prior to Hearing.

23 **D. Cascade’s Motion to Compel is Untimely, Inappropriate, and Does Not Set**
24 **Forth Any Rule or Requirement that Would Justify the Limits Cascade**
25 **Proposes**

On November 10, 2017, Cascade filed what it calls a “motion to compel.” Cascade is well aware of the civil rule requirements for meet and confer prior to discovery motions, and

1 Cascade made no attempt to comply with the civil rules when filing its Motion to Compel. The
2 Coalition assumes that Cascade intended to file a motion in limine, because its primary
3 complaint appears to be that the Coalition should be limited to fewer witnesses and exhibits. As
4 described above, the Coalition has provided a revised witness list. The Coalition has met its
5 burden to provide notice of the list of exhibits from which it intends to present evidence.³
6 Nevertheless, in an effort to resolve the pending motions, the Coalition agrees to additional
7 identification to satisfy SDOT's objection regarding its own production documents, and will do
8 so on the November 21, 2017 date suggested by Cascade.

9 III. CONCLUSION

10 The parties have already agreed to, and this Hearing Examiner has set a Hearing for five
11 days. The Coalition has the right to, and will, present its case within the five day Hearing
12 allotted. SDOT cites no rule or requirement that renders it appropriate for SDOT to dictate
13 which witnesses the Coalition calls on which day, or in which order, or whether it may call
14 additional witnesses should hostile witnesses refuse to be forthcoming with testimony. This case
15 is important in many ways, and SDOT's attempt to limit the Hearing more than it already is must
16 be rejected as inconsistent with the "full disclosure of facts and a fair hearing" called for by HER
17 3.13. The Coalition respectfully requests that the Hearing Examiner deny the motions brought
18 by SDOT and Cascade.

19 DATED this 15th day of November, 2017.

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23 ³ Cascade's motion makes an oblique reference to "thousands" of exhibits. The Coalition assumes that Cascade is
24 referring to the exhibits admitted in the prior SEPA appeals of the Missing Link. Exhaustion of remedies has
25 required the parties, at each stage of the litigation, to re-admit the admitted exhibits from prior hearings to preserve
issues for appeal before the King County Superior Court, which has retained jurisdiction to enter a final order after
the Hearing Examiner concludes this Hearing.

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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:

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Dated at Seattle, Washington, this 15th day of November, 2017.

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