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 POST-HEARING BRIEF**

The Ballard Coalition ("Appellant") contends that the Final EIS for the Burke Gilman Trail Missing Link underestimates the environmental impacts of the project. Most of Appellant's grievances boil down to a claim that the Seattle Department of Transportation ("SDOT") did not expend enough resources analyzing the effects of completing the last 1.4 miles of the 20 mile Burke-Gilman Trail. Appellant alleges, for instance, that SDOT should have advanced the planning of the trail to the 30 percent design stage before writing an EIS,[1] that SDOT should have studied more alternatives,[2] that SDOT should have commissioned more "auto-turn" analyses.

[1] Ballard Coalition Notice of Appeal at 8; Claudia Hirschey, 11/27/17 Tr. 180.

[2] Notice of Appeal at 6.

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These demands go far beyond the scope and purpose of SEPA. The goal of SEPA is to give decision makers "sufficient information to make a reasoned decision." *Citizens Alliance To Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995); WAC 197-11-400(4). An EIS should be prepared early in the process,[3] not after project sponsors have invested so much money in the design of a project that changing it becomes prohibitively expensive. In evaluating challenges to an EIS Washington courts apply a cost-effectiveness test under the SEPA "rule of reason." Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis § 14.01[1][a] at pp. 14-18,19 (2015). In rejecting contentions that a county should have studied more alternatives to plans for a new landfill the Court of Appeals endorsed the county's authority to select what it believed to be the top two alternatives, and to reject others, even "reasonable alternatives," for reasons of cost, or for policy reasons. *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn.App. 439, 446, 832 P.2d. 503 (1992).

Applying these principles, SDOT's post-hearing brief addresses the plethora of theories on which Appellant's members hope to occupy the Missing Link right of way as an employee parking zone[4] for another few years. In this brief Cascade addresses two of Appellant's key contentions. This brief presents the evidence and the law showing that (1) SDOT followed the "rule of reason" in defining the purpose of the project as completion of a multi-use trail, and declining to analyze alternatives that do not conform to that objective; and (2) that the FEIS

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[3] "The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental effects can be meaningfully evaluated." WAC 197-11-060.

[4] Paul Nerdrum, 11/29/17 Tr. 778, 794-95.

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reasonably concludes that a multi-use trail will reduce traffic hazards in the study area, measured against the proper baseline of existing conditions that Appellant's experts never analyzed.

A. SDOT properly limited the range of alternatives studied in the EIS to those that complete the Burke-Gilman Trail as a multi-use trail.

The FEIS analyzes five build alternatives and the no build alternative. FEIS § 1.6.[5] In addition, SDOT included a section called "Alternatives Considered but Not Included." FEIS § 1.9. In that section SDOT explained that it declined to study cycle tracks in the EIS because they do not accommodate pedestrians or other non-motorized users, and because cycle tracks "would not maintain the look and feel of the existing trail on either side of the Missing Link." For these reasons SDOT said that cycle tracks "do not meet the project objective of completing the multi-use trail through the study area." FEIS at 1-33. SDOT also declined to study an elevated trail, for cost and ADA compliance reasons. *Id.*

Appellant contends that SDOT violated SMC 25.05.060 by "over-narrowly" defining the project objective as completion of a "multi-use trail, thereby predetermining the outcome." Notice of Appeal at 6. That section plainly states that a proposal may be presented in a SEPA document as "a particular or preferred course of action."[6] Appellant prefers the next paragraph of the rule, which states that proposals should be described in ways that "encourage considering and comparing alternatives."[7] Appellant contends that SDOT's definition of the project objective precluded analysis of "reasonable alternatives" such as cycle tracks on Leary Way. Notice of Appeal at 6.

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[5] The FEIS is Exhibit R-1. For brevity this brief refers simply to the FEIS.

[6] SMC 25.05.060(C)(1)(b).

[7] SMC 25.05.060(C)(1)(c).

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SDOT and Cascade moved to dismiss this issue on grounds that the bicycle-only alternatives offered by Appellant -- specifically the Leary Way cycle tracks -- do not meet the project objectives described above. SDOT Motion For Partial Dismissal at 11 (filed 8/4/2017); Cascade Memorandum In Support of SDOT Motion For Partial Dismissal at 1 (filed 8/4/2017). On this point the Hearing Examiner upheld Appellant's general right to appeal the City's definition of the proposal, but granted SDOT's motion to preclude a challenge based on its refusal to study a "bicycle only facility." Order On Motion To Dismiss at 3 (filed 9/28/17) :

> 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.

At hearing Appellant devoted much of its case in chief to challenging the City's alternatives analysis on precisely the theory that the Order dismissed from the appeal. Appellant's experts criticized the FEIS for failing to study various bicycle-only options, including an elevated concrete viaduct,[8] and cycle tracks on Leary Way.[9] They testified that cycle tracks would be safer than a multi-use trail, but Appellant's experts offered no design suggestions that would accommodate the "users of varying abilities and activities" that SDOT designed the proposal to serve. Nor did Appellant offer any evidence challenging the adequacy

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[8] Appellant hired a consulting firm to prepare a feasibility study for an elevated concrete viaduct. Ex. A-1 at 44-52. Mr. Bishop described it as a 2400 foot long concrete structure that would elevate the surface of the trail 21.5 feet above the ground, with ramps pitched at a five percent grade. 11/27/17 Tr. 119-121. He estimated that it would cost $13 million. Tr. 119.

[9] Notice of Appeal at 6; Claudia Hirschey, 12/05/17 Tr. 1881.

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of the alternatives analysis within the boundaries of the project objective -- a multi-use trail that serves a diverse group of users.

Against this backdrop, what remains of Appellant's contention that SDOT defined the proposal too narrowly? The *only* evidence that Appellant offered on alternatives omitted from the FEIS relates to bicycle-only alternatives that the Order On Motion To Dismiss dismissed from the appeal. Even if Appellant had offered material evidence, numerous decisions hold that lead agencies have broad discretion to define the purpose of a project, subject to the rule of reason. In *Solid Waste Alternative Proponents, supra,* the Court of Appeals upheld a county's policy decision to exclude from an EIS on a proposed landfill the alternative of shipping waste to a remote site: "The adequacy of an EIS must be judged by the application of the rule of reason. At some point, a decision must be made between what is reasonable and what is not. The agency's decision should be given great weight." 66 Wn.App. at 445 (citations omitted). *Accord, Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016): "Under the rule of reason, 'as long as the agency look[s] hard at the factors relevant to the definition of purpose,' we generally defer to the agency's reasonable definition of objectives."

Did SDOT violate the rule of reason here? The Department articulated two sound policy reasons for its decision to consider only multi-use trail routing alternatives. First, the Missing Link is the last gap in a 19.8 mile multi-use trail. FEIS at 5-4. SDOT planned the 1.4 mile Missing Link segment to mirror the look and feel of the 18.4 miles of trail that surround it on both sides. FEIS at 1-4. Second, SDOT defined the project purpose to require that the Missing Link accommodate not just bicyclists, but a broad range of non-motorized users, including those with disabilities. FEIS at 1-3. In addition to the reasons SDOT cited, it could have mentioned

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that the Seattle City Council has on several occasions authorized City agencies to acquire property to complete the Missing Link and other segments of the Burke Gilman Trail as a "Multi-Purpose Trail."[10] In light of these repeated statements by the Council of the City's policy to finish the Burke as a "multi-purpose trail," SDOT has statutory support for its statement of the project objective.

Granting to SDOT the deference that a reviewing tribunal owes to the lead agency's definition of the project objective, the Examiner has no basis under the rule of reason to second-guess SDOT's decision that the last leg of the Burke Gilman Trail should present the same look and feel as the rest of the Trail, and serve a diverse range of users, not just bicyclists.

Under the SEPA rules, the project purpose limits the range of alternatives that must be analyzed in an EIS. WAC 197-11-440(5)(b) characterizes "reasonable alternatives" as "actions that could feasibly attain or approximate a proposal's objectives . . ." In *Brinnon Group v. Jefferson County*, 159 Wn.App. 446 (2011) the Court of Appeals held that the range of "reasonable alternatives" in a SEPA EIS on a proposed comprehensive plan amendment to

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[10] *See*, e.g., Ordinance 122933 (enacted March 9, 2009), providing that for the Burke-Gilman Trail Extension project, real property interests must be acquired in Ballard "for multi-purpose trail and transportation purposes . . ." This ordinance specified that the property would be acquired through the form of an "Agreement For Multi-Purpose Trail Easement and Restrictive Covenant." http://clerk.seattle.gov/~archives/Ordinances/Ord_122933.pdf, Attachment 1, Exhibit B.

See also Ordinance 123957 (enacted September 4, 2012). This ordinance accepted an attached easement agreement (Attachment 2 to the ordinance) for a segment of the trail in Fremont. The Trail Easement accepted by the City Council was for "construction, operation, maintenance, improvement, enhancement and repair of a path or paths for pedestrians, bicycles and other non-motorized muscle-powered vehicles, small motorized wheelchairs and like equipment to permit handicapped use . . ." http://clerk.seattle.gov/~archives/Ordinances/Ord_123957.pdf

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permit a resort development had to allow the development. 159 Wn.App. at 481. Multiple federal decisions hold that an agency is not required to consider alternatives that do not accomplish the project purpose. See, e.g., *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998); *Laguna Greenbelt v. U.S. Dept. of Transportation*, 42 F.3d. 517, 524 (9th Cir. 1994); *Westlands Water District v. U.S. Dept. of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004).

All parties agree that project objectives described in the FEIS preclude intensive review of the cycle tracks and elevated viaducts with steep ramps that Appellant promoted at hearing. Notice of Appeal at 6; FEIS at 1-33. Because SDOT's project objectives are reasonable, Appellant's challenge to the scope of the alternatives analyzed in the FEIS has no merit.

B. The FEIS fairly disclosed the potential traffic hazards of the Preferred Alternative.

Appellant contends that the FEIS does not meet SDOT's SEPA obligation to evaluate the effect of the project on traffic hazards. Notice of Appeal at 7.

The FEIS finds that each of the "build" alternatives would improve safety for non-motorized users in the study area. FEIS at 7-31. The FEIS begins its analysis of this issue by documenting the baseline condition, including the high incidence of accidents in the study area involving non-motorized users. *Id.* at 7-22. With regard to bicycling hazards in the study area, the FEIS documents 45 Seattle Fire Department incident response events between January 2012 and December 2014.[11] Against this baseline the FEIS finds that a trail would reduce accident risk by "organizing and delineating" conflict points, by avoiding obstacles such as railroad tracks

[11] FEIS at 7-22.

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and by clearly separating "trail user space from the roadway." *Id.* at 7-31. With regard to the Preferred Alternative the FEIS emphasizes these benefits, while conceding that the Preferred Alternative could present some new safety impacts, including "sight distance concerns at driveway crossings . . ." *Id.* at 7-37.

The evidence that Appellant presented at hearing on safety issues is voluminous, but critically deficient. Appellant called three expert witnesses to opine that two way "side paths" in urban environments expose cyclists to safety risks, exacerbated by the presence of large trucks in the study area. Appellant's experts based these opinions mainly on academic studies from various cities in the United States and Europe. They cite academic journals on the risk of "contraflow" trails. They offered auto-turn simulations that modeled the width of trail that a large truck would cross as it turns out of a driveway.

Appellant's experts virtually ignore the baseline condition in which non-motorized users today struggle to navigate safely between the two ends of the Missing Link through the anarchy of Shilshole Avenue.[12] Mr. Bishop, for instance, testified about a set of auto-turn simulations that modeled trucks crossing the trail. Exhibit A-1, pages 2-39. He then applied a "Grading System For Evaluating Safety" that Mr. Bishop borrowed from an advocacy group called the Chicagoland Bicycle Federation to assign risk scores to each of the build alternatives in the FEIS. Exhibit A-1 at page 43.[13] Mr. Bishop did not calculate a risk score for the existing

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[12] "So there's real lack of definition in the corridor and I think it's been defined as chaos by a number of folks in this hearing." Blake Trask, 12/01/17 Tr. 1582. Scott Kuznicki, 11/28/17 Tr. 527 ("It's highly disorganized.").

[13] No witness endorsed the credibility of the Chicagoland rating system. Mr. Bishop commented, "I don't think it was particularly scientific, but it was the best they could come up with and it seems to be that nobody's come up with a better system . . ." 11/27/17 Tr. 111-12.

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condition. *Id.* When asked about the risks of riding a bicycle through the study area today Mr. Bishop acknowledged that "there all kinds of conflicts along Shilshole" but conceded that he did not analyze them. 11/27/17 Tr. 149. Mr. Bishop explained this omission by stating that the "few bicycles" traversing Shilshole Avenue today ride with the traffic. Tr. 149. When asked directly whether he did any work to assess the conflicts between truck movements and bicycles under the existing condition, Mr. Bishop said he had not. Tr. 150.

Scott Kuznicki presented videos that depict the "swept path" of a large truck entering and leaving driveways on Shilshole Avenue. Exhibits A-7 through A-10. Like Mr. Bishop he modeled the footprint of the Preferred Alternative trail in his videos, but he generated no models that depict the swept path of a large truck turning onto Shilshole Avenue today in a narrow opening between two parked cars. When asked about the Seattle Fire Department incident response data in the FEIS Mr. Kuznicki admitted that he did not review that data, but readily conceded that the study area is "hazardous to bicyclists." 11/28/17 Tr. 579. Mr. Kuznicki also volunteered that he rides Shilshole Avenue on his bicycle because "it is kind of thrilling and I like industrial areas . . . but I am extremely cognizant of the hazards that exist." 11/28/17 Tr. 579. Mr. Kuznicki also anticipated the testimony offered later in the hearing by City and Cascade witnesses when he commented that Shilshole Avenue "is not conducive to organization especially when it comes to parking. It's unpredictable." 11/28/17 Tr. 583.

SDOT's expert Bill Schulteiss said, "These guys weren't engineers, they were just two advocates. They developed this model intentionally to create a system where they could put pressure on agencies to build bike lanes in the street instead of doing the sidepaths and that was the purpose of that -- that model. It's not reliable." 11/30/17 Tr. 1240.

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Appellant's Notice of Appeal highlights the blind spot in Appellant's safety critique when it declares: "The Project will bring vulnerable users into direct conflict with industrial and maritime traffic and activities." Notice of Appeal at 7. Appellant's analysis ignores the fact that non-motorized users already confront these hazards. *See* Exs. R-37 through R-49 (photos and videos of cyclists and pedestrians trying to navigate Shilshole Avenue).

None of this testimony reaches the question that matters in evaluating the adequacy of an EIS -- what are the impacts of the project *as compared with the baseline condition*? "Without establishing the baseline conditions, there is no way to determine what effect the proposed action will have on the environment, and consequently, no way to comply with NEPA." *Western Watersheds v. Bureau of Land Management*, 552 F.Supp. 2d 1113, 1126-27 (D.Nev. 2008). In *Chuckanut Conservancy v. Washington State DNR*, 156 Wn.App. 274, 232 P.3d 1154 (2010) the Court of Appeals considered a SEPA challenge to a DNS timber harvest plan. The Court held that the effects of the proposal must be evaluated against the baseline condition of decades of logging. 156 Wn.App. at 292-93; 232 P.3d at 1163. In *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d 1067 (9th Cir. 2011) an environmental group challenged the adequacy of the baseline data on which the agency relied in analyzing the impacts of a new rail line. The Ninth Circuit held that without the baseline data there was no way to analyze the environmental impacts of the project. 668 F.3d at 1085.

The only one of Appellant's safety experts who even aspired to compare the risks of the build alternatives with the existing condition was Claudia Hirschey. Ms. Hirschey invented a method to quantify the relative risk of various alternatives, Ex. A-3 at 5, but it applies only to driveways. Ms. Hirschey assigned "conflict points" to each build and no-build alternative, based

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on the assumption that each driveway on a multi-use trail gets 17 conflict points and each driveway on a one way bike path rates 13 conflict points. Ex. A-3 at 7 (column one); 11/27/17 Tr. 221. Using this "quantitative" tool she counted the number of driveways on each of the build alternatives and the existing streets. She presented her arithmetic in a table that depicts "driveway conflicts" for each alternative. Ex. A-3, Table 1. Ms. Hirschey's Table 1 shows, for instance, that the driveways on the Preferred Alternative present 391 conflict points, as compared with 325 conflict points for the route of the Preferred Alternative under the existing condition. *Id.* On this basis Ms. Hirschey opined that the "assertions in the FEIS that this trail will be safer than existing conditions did not appear to be supported by safety analysis or data."

Ms. Hirschey did not attempt to quantify the risk to cyclists of the hazards that the City witnesses and Blake Trask discussed in their testimony -- cement trucks passing bicycles on narrow street lanes, Ex. R-49, 12/05/17 Tr. 1725, narrow or non-existent street shoulders, Ex. R-42, 12/01/17 Tr. 1589, vehicles parked in or close to the traffic lanes, Exs. R-37 and R-42, 12/01/17 Tr. 1580, 1589 and 12/05/17 Tr. 1727, pallets, truck tires and traffic cones placed by businesses in the right of way, Ex. R-38, R-44, R-47, 12/01/17 Tr. 1582, 1591, and 12/05/17 Tr. 1719, aggregate spills in the street, Ex. R-38, R-45, 12/01/17 Tr. 1582, and 12/05/17 Tr. 1715-1717, and railroad tracks crossing Shilshole Avenue at oblique angles. Ex. R-39, 12/01/17 Tr. 1587.

The most compelling evidence in the record about the relative risks of the Preferred Alternative and the existing condition appears in the accident statistics cited in the FEIS and in the testimony of Blake Trask and Bill Schultheiss. Mr. Trask testified based on field observations about the conditions that make Shilshole Avenue dangerous to non-motorized users

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and the ways in which the Preferred Alternative will improve safety for cyclists and pedestrians. 12/05/17 Tr. 1735-38, 1754:

> Q. Do you believe that the design features of the multiuser trail would address the concerns Mr. Brower asked you about, the chaos of the street?
>
> A. The project on a whole would. Not just the trail, but the project itself, which the FEIS talks to, organizes the street. And I think a number of the other witnesses talked about how it's not just this -- you don't just put this line of a trail, but you're putting curbs, you're reorganizing the parking, you're changing the corridor in a way that is really hard for a lot of people to visualize now. But ultimately it will make for a safer, more organized, more clearly delineated space throughout the corridor. It's not just about the trail.

This evidence is far more credible than a pseudo-quantitative assignment of "conflict points" based on a consultant's invented weighting system that considers only driveways.

Cascade in no way disparages the safety concerns cited by Appellant's experts. Cascade agrees that large trucks present heightened safety risks for bicycles. The most important finding from the evidence at hearing, however, is that the safety impacts of any proposal must be measured against existing conditions.[14] Unlike Appellant's experts the FEIS documented the traffic hazards of the baseline condition. The FEIS found, and Mr. Trask and Mr. Schultheiss confirmed, that the Preferred Alternative will reduce the safety risks facing non-motorized users by imposing defined boundaries and separated travel lanes on the existing chaos of Shilshole Avenue.

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[14] City expert Bill Schultheiss testified that the existing conditions are crucial to the analysis: "I mean, the purpose of this project as its purposing need is to improve safety of bicyclists. And, so, you're evaluating all your alternatives against the existing conditions." 11/30/17 Tr. 1236.

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In evaluating Appellant's challenge to adequacy of the traffic hazards analysis in the FEIS, the Examiner should apply these principles:

- Appellants bear the burden of proof to show that an EIS is inadequate, and SDOT's determination is subject to substantial weight. SMC 25.05.680(B)(3); RCW 43.21C.090.
- The baseline against which SEPA measures the effect of a proposal is the existing condition, not some hypothetical industrial zone exclusively dedicated to the movement of trucks. See authority cited at page 10, *supra*.
- There is no SEPA requirement that a lead agency reduce the relative risks of the alternatives analyzed in an EIS to a number, or that the lead agency choose the "safest" alternative.
- There is no requirement to even consider the relative safety of alternatives that were disqualified from inclusion in the EIS because they are inconsistent with the project purpose. See authority cited at page 6, *supra*.

Applying these standards, The Examiner should find that the FEIS discloses the safety impacts of the build alternatives with sufficient clarity to serve as a vehicle for City decision making. SEPA requires no more of an EIS.

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Dated this 22nd day of December, 2017.

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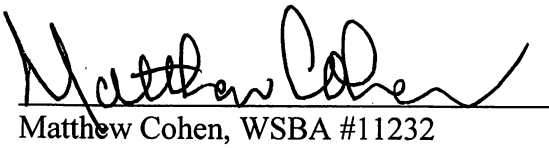

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CERTIFICATE OF SERVICE

I certify that on this date of December 22, 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: December 22, 2017 at Seattle, Washington.

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