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	Hearing Examiner File W-17-004 SEATTLE DEPARTMENT OF TRANSPORTATION'S RESPONSE BRIEF

The Coalition's Post-Trial Brief confirms that its case rests largely on mischaracterizations of the law and the facts. The Coalition's assertion that the FEIS[1] is "tantamount to a fourth DNS" is illustrative – it ignores the legal distinction between a DNS and an EIS;[2] dismisses the 300-page FEIS and its technical appendices, the public comment and review process, and all of the underlying data and analyses; and creates a false analogy. The rest of the Coalition's attacks on the FEIS are similarly flawed. Rather than identifying a material flaw in the FEIS, the Coalition's brief rests on mischaracterizations of what the FEIS says and

[1] All short cites and abbreviations used herein are the same as in SDOT's Post-Hearing Brief.
[2] *See* R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, at 14-4, 14-25 (2016) (describing a DNS as "an agency decision not to undertake sophisticated environmental analysis" with "major potential for subverting SEPA" and the EIS process as "intense environmental scrutiny and elaborate process requirements").

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what the witnesses said at the hearing – even their own witnesses – and holds the FEIS to its distorted view of SEPA's standards.

As shown in SDOT's Post-Hearing Brief, the FEIS is adequate, and nothing in the Coalition's brief changes that. The FEIS need only meet the rule of reason, need not discuss every impact or alternative,[3] does not require SDOT to select the safest trail or a trail with the least impacts,[4] does not call for the Examiner to rule on the wisdom of the proposed project,[5] and may even have minor technical errors or nondisclosures.[6] Given this standard, the robust analysis in the FEIS is more than sufficient to meet the rule of reason, and Coalition's appeal should be denied.

A. SDOT's Adequacy Determination Must Be Given Substantial Weight

The Coalition's brief confirms that the Coalition has no legal authority to support the claim its counsel tried to advance at the hearing – that the statutory deference granted to agencies can be eroded by evidence of purported agency transgressions unrelated to the appeal. The "clearly erroneous" standard to which the Coalition refers in its brief is the heightened standard of review that is required because of the deference that is owed to the agency's decision. The Coalition's arguments related to the clearly erroneous standard go to the merits of their appeal and should not be conflated with the question of whether the Examiner can ignore the statutorily required deference. For example, whether the EIS properly disclosed the potential impacts of the project, including potential impacts related to contraflow trail movement and whether the level of design was sufficient, are irrelevant to whether the Examiner is required to give deference to

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[3] *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. State, Dep't of Transp*., 90 Wn. App. 225, 230, 951 P.2d 812 (1998).
[4] *Glasser v. City of Seattle*, 139 Wn. App. 728, 742, 162 P.3d 1134 (2007).
[5] *Citizens All. To Protect Our Wetlands v. City of Auburn* (CAPOW), 126 Wn.2d 356, 362, 894 P.2d 1300 (1995).
[6] *Toandos Peninsula Ass'n v. Jefferson Cty*., 32 Wn. App. 473, 483, 648 P.2d 448 (1982).

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SDOT. The merits of those arguments are addressed below in this brief and in SDOT's Closing Brief.

The Coalition advanced only one argument at hearing solely to challenge the deference owed to SDOT – whether SDOT's advancement in design was improper. That argument has no relevance to this appeal. [7]

Moreover, there is no merit to their arguments that those actions were improper. As discussed in SDOT's Post-Hearing Brief, the steps SDOT took to advance the design of the Preferred Alternative before the FEIS's issuance were expressly permitted under SMC 25.05.070(D).[8] SDOT's decision to advance design after the FEIS's issuance, including advancing the Preferred Alternative design to 90%, were likewise permissible. SMC 25.05.070(A) only prohibits actions that limit the choice of reasonable alternatives "[u]ntil the responsible official issues a final determination of nonsignificance or final environmental impact statement."[9] After an EIS is issued, the only agency action that the Code limits during the pendency of an administrative appeal is the final authorization of permits.[10] All other actions, even 100% design development, are permitted. The Coalition's attempts to portray the design

[7] The Examiner has already dismissed this claim because it was not raised as part of the Coalition's appeal, and allowed evidence for the limited purpose of challenging deference. 12/1/17 Tr., at 1501:13 – 1502:2.

[8] SDOT's Post-Hearing Brief, at p. 8-9. As explained in SDOT's brief, SMC 25.05.070(D) allows "*developing plans or designs*, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal, as long as such activities are consistent with subsection 25.05.070.A." (Emphasis added.).

[9] SMC 25.07.070(A) states in full, "*Until the responsible official issues a* final determination of nonsignificance or *final environmental impact statement*, no action concerning the proposal shall be taken by a governmental agency that would: 1. Have an adverse environmental impact; or 2. Limit the choice of reasonable alternatives." (Emphasis added.).

[10] SMC 25.05.070(E) (stating, "No final authorization of any permit shall be granted until expiration of the time period for filing an appeal in accordance with Section 25.05.680, or if an appeal is filed, until the fifth day following termination of the appeal . . ..").

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development as evidence of a conspiracy or bias are unsupported, but, more importantly, they have no relevance to the issue of the FEIS's adequacy or deference due to SDOT on appeal.[11]

The "snowballing" concern cited by the Coalition also has no application here. In *King Cty. v. Washington State Boundary Review Bd. for King Cty.*,[12] the court described the snowballing concern in the context of its decision reversing a city's DNS and requiring the city to prepare an EIS. As the court described, an EIS is the cure to the snowballing concern—an EIS apprises decision-makers of environmental impacts and prevents projects from snowballing before its impacts are understood. There is no snowballing concern here because SDOT prepared an EIS that discloses impacts and informs decision-makers. By the time SDOT actually proceeded with additional design of the Preferred Alternative, the DEIS had been issued, SDOT was well aware of the potential impacts of the Project, and the FEIS was essentially issued concurrently with the advancement of the design.[13] The "snowballing" analogy is not applicable here.

B. The Level of Design Was Sufficient

The Coalition's claim that SDOT "un-designed" or "reduced the level of design" is another conspiracy theory with no merit or relevance. The issue before the Examiner is not how the Project's design compares to previous designs, or SDOT's motives or reasons for changing its designs; the sole issue is whether the Project's design was sufficient to evaluate impacts. The record is replete with testimony that the level of design was adequate to satisfy that objective.[14] Moreover, SDOT's witnesses repeatedly testified that the level of design used to support the EIS

[11] The Coalition's attempts to portray SDOT's comments to its consultants as evidence of a conspiracy also have no merit, and are addressed in detail in SDOT's Post-Hearing Brief, at p. 10-11.
[12] 122 Wn.2d 648, 860 P.2d 1024 (1993).
[13] 12/1/17 Tr., at 1494:4 – 1495:12 (testimony of M. Mazzola).

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was comparable to the design used for other similar EISs, confirming that the Project's design was similarly sufficient and reasonable.[15] Indeed, even the Coalition's witness confirmed that other EISs have been based on conceptual designs similar to the Project's level of design.[16]

The Coalition's argument that the design was inadequate is predicated on a legal theory that has been rejected by this Examiner and the superior court on three separate occasions in the course of this appeal alone. As Judge Parisien most recently concluded, "there is no specific design threshold below which a project is deemed insufficient for purposes of SEPA review."[17]

The Coalition's argument also rests on a false equivalency between the level of design needed to support a DNS with the design needed to identify and disclose impacts in an EIS. A DNS represents an agency decision not to undertake environmental analysis before acting on a proposal, while an EIS is an intense, rigorous analysis of potential impacts.[18] The fact that a DNS represents a more superficial, more absolute, and less detailed agency decision than an EIS supports requiring a higher level of design completion for a DNS than an EIS.

The Coalition has failed to identify any missing aspect of the design necessary to evaluate impacts. The only aspects cited in the Coalition's brief – lane widths and barriers – were specifically addressed in the Project's design.[19] As Mr. Phillips testified, the Project was

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[14] 11/29/17 Tr., at 918:1-14 (testimony of E. Ellig); 11/30/17 Tr., at 1075:15-19 (testimony of B. Phillips); 11/30/17 Tr., at 1301:16 -1302:25 (testimony of B. Schultheiss); 12/1/17 Tr., at 1466:13-16 (testimony of M. Mazzola).

[15] *Id.*

[16] 12/5/17 Tr., at 1906:13 – 1907:15 (testimony of C. Hirschey, describing the level of design analyzed in the Lynnwood Link EIS as a "conceptual design" that lacked "design elements [that] would be further detailed in later stages of project design"); *see also* 11/30/17 Tr., at 1035:18 – 1036:5 (testimony of B. Phillips, lead designer for both the Lynnwood Link and the Project, confirming that the two projects' levels of design were "very similar"); Coalition's Post-Trial Brief, at p. 8 (quoting testimony of M. Johnson, stating that Sound Transit has prepared EISs based on "preliminary engineering conceptual design");

[17] Order Denying Plaintiffs' LRC 7(b)(7) Renewed Motion to Enforce Second Order of Remand, filed in No. 09-2-26586-1 SEA on November 29, 2017.

[18] Settle, *supra* n. 2; *see also* SDOT's Response in Opposition to Ballard Coalition's Dispositive Motion, filed herein on July 31, 2017, at p. 4-5.

[19] *See* discussion in SDOT's Post-Hearing Brief, at p. 18, 35; 11/30/17 Tr., at 1032:20 – 1033:12, 1093:1-24 (testimony of B. Phillips).

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designed with specific widths and dimensions and did not feature barriers in the Preferred Alternative; the FEIS referred to a range of widths and the possibility of barriers to account for potential changes in final design.[20] Further, the FEIS discloses the potential impacts of barriers to the extent they might be added as the design is advanced (*e.g.*, Exhibit R-3, Technical Appendix B, at 5-19), and as explained by the City's traffic engineer, there are "many locations" in the City with varying lane widths.[21]

Given the Coalition's inability to identify anything missing in the design, the fact that the design was not labeled a 30% design is irrelevant. The level of design was adequate to assess impacts and the Coalition's arguments to the contrary are without merit.

C. The FEIS's Transportation and Parking Analyses Meet the Rule of Reason

1. *The Coalition has failed to identify any significant impacts that were not disclosed in the FEIS*

The Coalition's brief confirms that the Coalition has also failed to identify any significant traffic or safety impacts missing from the FEIS. On its face, the FEIS demonstrates that the Coalition's claims that certain analysis and data were purportedly not included in the EIS are simply incorrect:

- The Coalition's brief incorrectly claims the FEIS failed to disclose the risks of contraflow movements.[22] The FEIS discussed the risk, in virtually the same terms that the Coalition described the risk in its brief.[23] The FEIS also disclosed the risk

[20] *Id.* *See also* Exhibit R-10 (plan sheets for design of Preferred Alternative); Exhibit R-11 (plan sheets for designs of other build alternatives).

[21] 12/5/17 Tr., at 1804:21-23 (testimony of D. Chang). Moreover, if any changes to lane widths were to occur during final design that constitute "substantial changes" from the Project design that appear likely to have probable significant impacts, such changes can be addressed via a supplemental analysis, but is not grounds for determining that the EIS, based on the current design, is inadequate. WAC 197-11-600.

[22] Coalition's Post-Trial Brief, at p. 17 ("The EIS does not disclose or discuss the increased risks created by contraflow movements on the two-way bicycle sidepaths . . . .").

[23] *Compare* Exhibit R-3, Technical Appendix B, at 5-20 (stating, "Nonmotorized users on the BGT Missing Link would also be traveling in both directions on one side of the street. This would require vehicles crossing the trail to look both directions . . . .") *with* Coalition's Post-Trial Brief, at p 17 (stating, "drivers exiting a driveway across a contraflow sidepath have to look both ways instead of just one direction . . . .").

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in its discussion of the number of collisions that occur from contraflow movements under existing conditions.[24]

- The Coalition's brief repeats the incorrect conclusory testimony of Ms. Hirschey that "none" of the risks of conflict points were disclosed.[25] As discussed in SDOT's Post-Hearing Brief, the FEIS extensively discusses conflicts and conflict points.[26] The FEIS considered every driveway or intersection crossing as an area of potential conflict,[27] and it provided an inventory of every driveway or intersection crossing for each of the alternatives at Table 1-1.[28]

- The Coalition's brief repeats the incorrect conclusory testimony of Mr. Bishop and Ms. Hirschey that the FEIS failed to inventory or address all driveways, suggesting that the FEIS purported missed as many as 29 driveways according to Mr. Bishop.[29] As discussed further in the next section, Ms. Ellig testified that her team analyzed every single driveway that crosses every build alternative,[30] and conducted adequate analysis of the same issues of concern raised by the Coalition's witnesses.[31]

- The Coalition's brief repeats the incorrect conclusory testimony of Mr. Bishop that the FEIS failed to disclose impacts shown in his AutoTURN analysis of the intersection of Shilshole and Market.[32] The FEIS includes an AutoTURN analysis of that intersection.[33] The FEIS discloses the primary issue that Mr. Bishop raised in his testimony – the inability of large trucks to make a right turn onto Market – an issue that exists under existing conditions.[34]

- The Coalition's brief repeats the incorrect conclusory testimony of Mr. Bishop that the FEIS failed to disclose the "concentrated" or "localized" reduction of parking.[35] As discussed in SDOT's Post-Hearing Brief, it is undisputed that Mr. Bishop has zero experience performing a parking analysis of multiple alternatives for an EIS, and his methodology for calculating parking reduction was inappropriate for that specific context.[36] In any event, Figure 5-1 of the Parking Discipline Report clearly illustrates the "localized" parking reduction along the

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[24] Exhibit R-1, at p. 7-22 (stating "many collisions occurred when a vehicle was traveling in an opposite direction to the bicyclist").
[25] Coalition's Post-Trial Brief, at p. 22.
[26] SDOT's Post-Hearing Brief, at p. 27-28.
[27] *See*, *e.g.*, Exhibit R-3, Technical Appendix B, at 5-39 ("There could be conflicts at trail crossings with driveways and intersections").
[28] 11/29/30 Tr., at 903:1-13 (testimony of E. Ellig).
[29] Coalition's Post-Trial Brief, at p. 20-21, 23.
[30] 11/29/17 Tr., at 825:14-22.
[31] *See* Section C(2), *infra.*
[32] Coalition's Post-Trial Brief, at p. 23-24.
[33] Exhibit R-1, Appendix A, at A-3 to A-4.
[34] *Id.*
[35] Coalition's Post-Trial Brief, at p.27-28.
[36] SDOT's Post-Hearing Brief, at p. 36-38.

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Preferred Alternative, and Figures 5-2 to 5-5 illustrate the same for each of the other build alternatives.[37]

- Lastly, the Coalition's brief claims the FEIS "asserts that there will be no significant adverse environmental impacts" from the Project.[38] No such sweeping statement is contained in the FEIS, as evidenced by the Coalition's failure to cite to the FEIS. As discussed in SDOT's Post-Hearing Brief, the FEIS discloses all probable impacts generally without labeling the impacts as "significant" or "insignificant,"[39] an approach that is consistent with the Washington Supreme Court's recognition that significance is a "particularly subjective" judgment.[40] Moreover, the issue is not how impacts are labeled; the issue is whether impacts are disclosed.

The FEIS sufficiently discloses and discusses impacts. The Coalition and its witnesses' incorrect conclusory statements to the contrary do not render the FEIS inadequate.

The Coalition's reliance on *Kiewit Const. Grp. Inc. v. Clark Cty.*,[41] is misplaced. Indeed, the contrast between the Project FEIS and the EIS discussed in *Kiewit Const. Grp.* illustrates the difference between an adequate EIS and an inadequate one and supports SDOT's approach in this case. In *Kiewit*, the EIS noted that the proposed plant's additional truck traffic could be a non-mitigable impact on the nearby trail, but the EIS "[did] not address the specific impact of truck traffic on the bicycle trail."[42] Here, the above list is only a sampling of the specific potential impacts discussed in the FEIS, which also included calculations of delay at specific driveways along each alternative,[43] levels of service analysis, and projected increases in volumes of motorized and non-motorized travel.[44]

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[37] Exhibit R-3, Technical Appendix C.
[38] Coalition's Post-Trial Brief at p. 1.
[39] SDOT's Post-Hearing Brief, at p. 6. In several instances, the FEIS concludes that some specific impacts are not significant, with a discussion of why the impact is not significant. *E.g.*, Exhibit R-1, at p. 4-18; Exhibit R-3, Technical Appendix C (Parking Discipline Report), at p. 5-2. However, these limited conclusions and the fact that other impacts are not labeled do not equate to an assertion that there will be no significant adverse impacts.
[40] *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 277, 552 P.2d 674, 680 (1976).
[41] 83 Wn. App. 133, 920 P.2d 1207 (1996).
[42] *Id.* at 141.
[43] Exhibit R-3, Technical Appendix B, at Tables 5-5, 5-8, 5-10, 5-12, and 5-14.
[44] *Id.* at 3-1 to 3-3.

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Moreover, in *Kiewit*, the local government found that the EIS was inadequate, and the court's decision affirmed that finding. The court observed that judicial review of an agency determination that an EIS was inadequate is more likely to result in a holding of EIS inadequacy than judicial review of an agency determination of EIS adequacy,[45] which "is consistent with the statutory requirement that the agency determination be accorded substantial weight."[46] Here, SDOT's adequacy determination should be affirmed.

2. *The Coalition's criticisms of the FEIS mischaracterize the evidence, even their own experts' testimony, and ultimately reveal no material flaws*

In addition to failing to identify any significant impact not disclosed in the FEIS, the Coalition's criticisms of the FEIS's analysis rely on mischaracterizations of the evidence and testimony, even their own experts' testimony. For example, the Coalition's brief reiterates its claim that "multiple studies demonstrate that two-way sidepaths are two-to-three times more dangerous than other bicycle facilities,"[47] a claim that the Coalition's counsel repeated throughout the hearing and that Ms. Hirschey initially espoused.[48] But on rebuttal, Ms. Hirschey recanted that conclusory claim and significantly qualified her prior testimony. On rebuttal, she only stated that she had not "heard any testimony that claims a contraflow movement is as safe or safer *than traveling with the direction of traffic*;"[49] denied that contraflow movements are more dangerous than any other type of bicycle facility,[50] admitted that the contraflow movement is not a safety issue outside of driveways or intersections;[51] and admitted that because the Project

[45] *Kiewit*, 83 Wn. App. at 141.
[46] Settle, *supra* n. 2, at 14-24 n.112a (2016).
[47] Coalition's Post-Trial Brief, at p. 3
[48] 11/29/17 Tr., at 946:3-7 (Coalition's counsel's questioning); 11/27/17 Tr., at 217:18-23 (testimony of C. Hirschey).
[49] 12/5/17 Tr., at 1865:24 – 1866:2 (testimony of C. Hirschey) (emphasis added).
[50] 12/5/17 Tr., at 1898:23 – 1899:3 (testimony of C. Hirschey).
[51] 12/5/17 Tr., at 1900:14 – 1901:13 (testimony of C. Hirschey).

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provides separation from street traffic, the Project's design can provide a safer condition than existing conditions, where bicyclists ride in the road.[52]

Ms. Hirschey's testimony affirms the testimony of Mr. Schultheiss, who refuted the Coalition's interpretation of the two studies cited in the Coalition's brief, *The Risks of Cycling* and *The Safe Streets Boulder Report*. As Mr. Schultheiss explained, the studies are based on two locales, Finland and Boulder, Colorado, that have extensive and frequently-used networks of sidepaths, so a higher number of crashes is expected to occur on sidepaths as compared to the less frequently used roads. In fact, when comparing the number of accidents to the volume of cycling activity, Boulder has achieved a very near zero rate of serious injury or death on its sidepath network.[53]

The Coalition's claim that SDOT "concealed" these studies is another meritless conspiracy theory.[54] Again, the issue is not SDOT's motives or reasons for not discussing these studies; the only issue is whether specific acknowledgment and discussion of these studies are required to be included in the FEIS under the rule of reason. They are not. First, needless to say, the Coalition's mischaracterizations of these studies should not be incorporated in the FEIS. Moreover, as Mr. Schultheiss testified, many of the studies Ms. Hirschey cited are of questionable reliability.[55] The FEIS was instead based on industry-accepted local and national design manuals and guidelines, which incorporate studies on safety.[56] The FEIS's use of these guidelines, rather than the Coalition's studies, is reasonable.

[52] 12/5/17 Tr., at 1899:15 – 1901:13 (testimony of C. Hirschey).
[53] 11/30/17 Tr., at 1243:1 – 1245:11; 1250:1 – 1253:24 (testimony of B. Schultheiss).
[54] Coalition's Post-Hearing Brief, at p. 3.
[55] 11/30/17 Tr., at 1238:13 – 1245:11 (testimony of B. Schultheiss).
[56] 11/30/17 Tr., at 1026:14 – 1027:24, 1081:14 – 1082:4; (testimony of B. Phillips); 12/1/17 Tr., at 1357:18-23 (testimony of B. Schultheiss).

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The Coalition also mischaracterizes Mr. Schultheiss's testimony, claiming he testified that the location of the Preferred Alternative is "inconsistent" with AASHTO.[57] Mr. Schultheiss simply did not state that.[58] Mr. Schultheiss only noted that the AASHTO guidelines indicate that collisions may occur and that one cannot "guarantee safety" on the trail—an unremarkable principle that the FEIS discusses.[59] Mr. Schultheiss also testified that the Project would be "substantially safer" than existing conditions, where non-motorized users are "exposed to conflict continuously throughout their entire journey along the street."[60]

The Coalition also ignores Mr. Schultheiss's extensive testimony that the Project's design is consistent with the design guidelines. For example, the NACTO Guide explains the fact that contraflow movement can raise risks, a fact that the FEIS disclosed. But neither NACTO nor the other design guidelines indicate that contraflow movement is an unreasonable risk or should never be allowed. As Mr. Schultheiss explained, the guidelines provide factors to consider during design to mitigate risks and acknowledge that other designs may present trade-offs.[61] One-way trails, for example, would eliminate the contraflow risk, but in the Project area, would introduce risks from additional driveway and intersection crossings and higher traffic turning volumes at the north side of Shilshole.[62] The Coalition's portrayal of safety as a black-or-white, safe-or-

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[57] Coalition's Post-Trial Brief, at p. 25.
[58] *See* 12/1/17 Tr., at 1343:1 – 1346:22 (testimony of B. Schultheiss, cited in Coalition's Post-Hearing Brief at p. 25. At the Coalition's counsel's request, Mr. Schultheiss read a sentence from the AASHTO Bicycle Guidelines stating, "'Even if the number of intersections and driveway crossings is reduced, bicycle motor vehicle crashes may still occur at the remaining crossings located along the side path,'" and commented, "That's a statement that clearly indicates you can't guarantee safety.").
[59] *E.g.*, Exhibit R-3, Technical Appendix B, p. 5-19 to 5-20 (discussion of safety under the Preferred Alternative, noting "There could be conflicts at trail crossings with driveways and intersections," "sight distance concerns," and contraflow travel "requir[ing] vehicles crossing the trail to look both directions").
[60] 12/1/17 Tr., at 1286:3 – 1287, 1289:21 – 1290:13 (testimony of Bill Schultheiss).
[61] 12/1/17 Tr., at 1292:11 – 1293:25 (testimony of B. Schultheiss).
[62] 12/1/17 Tr., at 1288:1 - 1289:4 (testimony of Bill Schultheiss).

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unsafe question ignores all of the trade-offs and the need for professional judgment in design and focuses on a question that is not germane to the adequacy of the FEIS.

The Coalition also mischaracterizes the analysis done for the FEIS. For example, the brief highlights the fact that Ms. Hirschey "created an inventory of driveways based on the type of use/activity" and "unlike SDOT, inventoried and evaluated the type and frequency of vehicles."[63] Contrary to her conclusory and superlative testimony, the FEIS includes such analysis. As Ms. Ellig testified, SDOT and its consultants identified all driveways in the design of every build alternative. The Coalition's assertion that the FEIS omitted driveways from the Preferred Alternative is belied by the fact that their own AutoTURN analysis relied on the same underlying CAD files that were the basis of the City's design.[64] Indeed, Mr. Kuznicki claimed he could not recall finding any deficiencies in the City's driveway data upon which he relied.[65]

The EIS also analyzed each of the driveways for each of the alternatives. Table 1-1 of the FEIS provided a count of every driveway that crosses every build alternative, and included a summary of SDOT's analysis of all the driveways, including key information such as the primary uses and activities, areas of heavy traffic volume, sight distance issues, and areas where large trucks back into the driveways.[66] Further, Appendices A and C to the Transportation Discipline Report ("TDR") provided more detailed information about 44 driveways from all build alternatives, such as specifying the traffic volumes and the types and frequency of turning movements and vehicles found at each of the driveways.[67] These driveways were selected to

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[63] Coalition's Post-Trial Brief at p. 21.

[64] *See* Exhibit R-10 (Preferred Alternative design plan sheets); Exhibit A-1 (AutoTURN analysis prepared by Transpo Group); *see also* 11/30/17 Tr., at 1020:6 – 1022:10 (testimony of B. Phillips, comparing Exhibit R-10 and Exhibit A-1 and confirming that the two sets are the same).

[65] 11/28/17 Tr., at 458:21 – 459:9; 573:9-14 (testimony of S. Kuznicki).

[66] Exhibit R-1, Table 1-1 at p. 1-29 to 1-32.

[67] Exhibit R-3, Technical Appendix B, Appendix A, Appendix C. As the TDR explained, these appendices do not include every single driveway in the study area, but "[i]t is standard practice to analyze a sample of representative

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include a range of different land uses and traffic volumes, and to reflect a variety of locations on each of the alternatives.[68]

Finally, the TDR's analysis of each build alternative incorporates further detail about the analysis of all the driveways, including, for example, identifying those driveways that present unique sight distance issues.[69] Ms. Hirschey's statement that the City did not collect any data about these driveways is simply incorrect. The fact that Ms. Hirschey presented the driveway information differently in her report or conducted her inventory differently does not mean the FEIS's analysis was inadequate or failed to meet the rule of reason.

Similarly, the Coalition makes much of the fact that Ms. Hirschey developed a methodology and drafted a peer-reviewed report, ignoring the fact that the same was done for the FEIS.[70] The TDR included an entire chapter on the FEIS's methodology,[71] and Ms. Ellig testified extensively at the hearing about the methodologies used to assess traffic operations, freight, nonmotorized users, public transportation, freight rail, and safety.[72]

Setting aside the Coalition's mischaracterizations, at most the Coalition argues that SDOT's experts should have performed different analysis or that the FEIS should have discussed the impacts in a different manner. As discussed in SDOT's prior briefs, however, Washington courts reject such criticisms as "fly-specking."[73] A challenger can almost always find ways to

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driveways because the full range of impacts can be captured within the sample." *Id.* at p. 4-1. The 44 driveways in these appendices were chosen to represent a range of traffic volumes and uses. *Id.*

[68] 11/29/17 Tr., at 929:8-10.

[69] *E.g.*, Exhibit R-3, Technical Appendix B, at p. 7-37 ("there would be sight distance concerns for exiting vehicles at four driveways on the south side of NW Market St."), 7-11 (noting the locations of driveways with only one-way access); 7-32 to 7-33 (discussing changes to the roadway that would affect specific driveways).

[70] 11/29/17 Tr., at 817:9-17 (E.Ellig: "First, we develop a methodology that is reviewed by the consultant team and by the client"); *id.* at 840:17-23 (E. Ellig: "The methodology was peer reviewed by my team at Parametrix, as well as the [E]SA Team, as well as the City of Seattle").

[71] Exhibit R-3, Technical Appendix B, Chapter 3 ("Methodology").

[72] 11/29/17 Tr., at 822:5 – 840:16 (testimony of E. Ellig).

[73] *Mentor v. Kitsap Cty*., 22 Wn. App. 285, 290, 588 P.2d 1226, 1230 (1978).

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criticize or demand more from an EIS; thus, the issue is not whether the EIS performed the most exhaustive analysis or designed the safest project, but only whether the EIS meets the rule of reason, a "broad, flexible cost-effectiveness standard."[74] The Coalition has failed to identify any fatal flaw in the FEIS's analysis.

3. *SDOT's witnesses are credible and must be given deference*

The Coalition's claim that SDOT's witnesses lack credibility because of their "stake" in the Project has no merit. Under the Coalition's view, any person who works on an EIS has questionable credibility simply because of their work on the EIS – a view that is not supported by any authority or by logic. Moreover, the Coalition's critique applies more so to their experts, who were hired to critique the FEIS for this litigation. And while SDOT's witnesses testified that SDOT did not interfere with their professional opinions or judgment,[75] the Coalition's expert admitted that his opinion "depends on who my client is"[76]—an admission evidenced by his willingness to stamp design drawings for a prior iteration of the Project.[77]

Further, the Coalition did not dispute that SDOT, as the primary City agency with transportation expertise, should receive deference in choosing the appropriate methodology.[78] The Coalition's experts' difference in opinions did not establish that SDOT's approach was unreasonable or failed to meet industry standards, and thus failed to overcome the deference afforded to SDOT.

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[74] *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty*., 122 Wn.2d 619, 633, 860 P.2d 390, 399 (1993).
[75] 11/29/17 Tr., at 977:3 – 978:24 (testimony of E. Ellig); 11/30/17 Tr., at 1204:22 - 1205:25 (testimony of M. Johnson); 12/1/17 Tr., 1386: 1-8; 1384:2-12 (testimony of M. Shook); 12/1/17 Tr., 1456:25; 1457:1-23; 1466:8-16 (testimony of M. Mazzola).
[76] 11/28/17 Tr., at 556:14 – 557:9 (testimony of S. Kuznicki).
[77] 11/28/17 Tr., at 558:4 – 559:21 (testimony of S. Kuznicki).
[78] *City of Des Moines v. Puget Sound Regional Council*, 106 Wn. App. 836, 852, 988 P.2d 27 (1999) ("The Port and the FAA are agencies with expertise in forecasting aviation demand and should receive deference in choosing the appropriate methodology for forecasting aviation activity."); *see also Seattle Community Council Federation v.*

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D. The FEIS appropriately analyzed the potential land use impacts and economic factors related to the Project

Similar to the transportation and parking issues discussed above and as anticipated in SDOT's Post-Hearing Brief, the Coalition's brief mischaracterizes SDOT's conclusions and analysis, as well as SEPA's requirements related to the consideration of potential land use and economic impacts for the Project.[79]

1. *The Coalition mischaracterizes the consideration of economic impacts that is required in an EIS*

As described in SDOT's brief, economics is not an element of the environment under SEPA and certain subjects are explicitly excluded from consideration.[80] Besides the general consideration of economic factors required by Seattle's unique SEPA rules, economic or socioeconomic issues only rise to the level of a significant land use impact required to be included in an EIS if the likely result is physical blight.[81] Even then, the consideration required does not rise to the level proposed by the Coalition.

For example, in *Barrie*, the case the Coalition cites for its proposition that SDOT did not adequately disclose the potential economic impacts of the Project, the Court held that the discussion of economic impacts in one of the two EISs at issue in that case was "adequate under the rule of reason" based on a single paragraph that simply concluded that "the downtown could become a less desirable retail area" as a result of the action at issue and identified very broad mitigation measures related to the potential impact.[82] The other EIS at issue in *Barrie* did not

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Federal Aviation Administration, 961 F.2d 829 (9th Cir. 1992) ("[I]t is within an agency's discretion to determine which testing methods are most appropriate.").

[79] SDOT's Post-Hearing Brief, at p. 42-46.

[80] See SMC 25.05.450, SMC 25.05.448.C and 197-11-448.

[81] *W. 514, Inc. v. Cty. of Spokane*, 53 Wn. App. 838, 847, 770 P.2d 1065, 1070 (1989) (holding that downtown blighting consequences of a proposed shopping center would be an environmental impact, though plaintiffs failed to establish that such impacts were sufficiently probable to require EIS coverage).

[82] *Barrie v. Kitsap Cty*., 93 Wn.2d 843, 859, 613 P.2d 1148, 1157 (1980).

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discuss the potential blight impacts at all and the Court held it should have "set forth the responsible opposing views rather than ignoring the potential debilitating impact."[83]

Unlike the invalidated EIS in *Barrie* and contrary to the Coalition's assertions, the Missing Link FEIS did not ignore – or hide – the potential impacts of the Project. Rather, it addressed those potential negative impacts head-on:

> The operation of the BGT Missing Link *may add to the competitive pressures facing industrial users*, and *appropriate steps should be taken to avoid or mitigate these costs*. Given the economic trajectory of the study area, the incremental impact of any of the Build options for BGT Missing Link seems small by comparison. ***Displacement, or transformation, of existing businesses may necessarily take place*** *as Ballard continues to develop.*
>
> Based upon available data from the King County region, this analysis fails to find negative and statistically significant impacts to land prices for single-family, multi-family, commercial, mixed-use, industrial, or institutional properties. *However, while the economic impacts from operation of the BGT Missing Link are likely to be modest on average,* ***these results do not imply that a negative effect could not occur to some properties***.[84]

The Coalition's assertions that SDOT failed to identify the potential impacts of the project are simply wrong. The Economic Discipline Report, as well as other portions of the EIS, address potential economic impacts to the existing industrial maritime businesses identified in

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[83] *Id.*.

[84] Exhibit R-34, Economic Considerations Report, p. 5-1 (the Economic Considerations Report was also admitted separately as Exhibit A-17, which will be referenced throughout the remainder of this brief for ease of comparison to the Coalition's citations). Also, see Exhibit A-17, at p. 4-7, describing the specific potential adverse impacts on industrial users, and at p. ES-1 ("The higher traffic congestion levels associated with this alternative may impose economic costs to businesses operating in the study area, due to higher labor and delivery delay costs, as well as to residents and commuters who may experience longer traffic delays."), and ES-2 ("The extent to which these driveway delays may impact the profitability or viability of study area businesses is presently unknown but should be considered as potential economic issues."), as cited in SDOT's post-hearing brief.

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the Coalition's brief as not being addressed, including the potential for increased risk of accidents and the potential need to hire flaggers.[85] For example:

> …the operation of heavy machinery and trucks in an environment with more pedestrian and bicycle travelers ***may increase risk of accident***. Increases in risk of automotive accidents **could result in higher insurance *costs or require additional labor expenditures to employ traffic flaggers*** to avoid collisions. Industrial businesses may adapt somewhat by adjusting delivery schedules to times of day with relatively few pedestrians and bicyclists using the BGT. This may result in more scheduled hours of operation and higher labor costs for these users. These ***additional operating challenges are likely to increase costs of production for these users***, and these costs are unlikely to be passed on to consumers due to competition from producers elsewhere in the region.[86]

To the extent that any impacts or the failure of a priority use in the project area is possible, the FEIS disclosed that. Even the Coalition's economics "expert," stated that he could not say that the failure of any business was likely as a result of the Project. [87] Thus, there was no expert testimony that any business *will* fail or is *likely* to fail as a result of the Project, let alone evidence that all allowed land uses would be displaced to the extent there would be blight. The potential land use and economic impacts from the Project were adequately disclosed and analyzed and satisfies the rule of reason.

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[85] Coalition's Post-Trial Brief, at p. 31: 5-10. Although SDOT disagrees with how those potential impacts are characterized, they are nonetheless discussed in the FEIS and associated reports, contrary to the Coalition's assertions. Moreover, SDOT presented evidence that the need to hire flaggers is related to existing truck movements, not the trail. 12/5/17 Tr., at 1794:14 – 1795:6 (testimony of D. Chang).

[86] Exhibit A-17, at p. 4-7. Parking impacts are also addressed at p. ES-2 ("All of the Build Alternatives would result in some loss of on-street parking. However, the economic consequences would vary depending upon the current on-street parking utilization rate and the orientation of local commercial enterprises toward a customer base, employee commuting behaviors, and supplier dependency on automobile travel and parking.")

[87] 11/28/17 Tr.at 704:21-24 ("I wouldn't say likely" and "likely feels like a strong statement"). Although Mr. Cohen did answer one leading question whether the Project is likely to have "more than a moderate effect" affirmatively, he testified that his opinions were not based on any familiarity with SEPA and he clearly stated that he could not say that the failure of a business was "likely."

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2. *The existence of other information or potential approaches is insufficient to prove the analysis was inadequate; the land use and economic analysis more than satisfy the rule of reason.*

In addition to its specific critiques of the Economic Considerations Report, the Coalition argues that SDOT's experts should have performed different analysis or that the report should have discussed the impacts in a different way. But that argument amounts to "fly-specking"[88] and is insufficient to overcome the deference given to SDOT.

First, as discussed in SDOT's Post-Hearing Brief, the Coalition's basis for arguing SDOT should have done a different economic analysis is based solely on the testimony of a witness who repeatedly reminded this tribunal that he is not familiar with SEPA and not qualified to opine about what is or is not required by SEPA.[89] Moreover, SEPA does not require the consideration of remote and speculative impacts, such as the alleged impacts to the maritime "agglomeration." The testimony of Mr. Cohen illustrates the speculative nature of those impacts because he made clear that businesses are under stress or *perceive* that they are under stress from many factors and it is difficult to isolate what the impact of the Missing Link itself would be.[90] The Economic Considerations Report and the Land Use Chapter of the FEIS satisfies the broad, flexible rule of reason.

3. *The adequacy of the EIS is based on the contents of that document; changes between the draft and final versions are irrelevant.*

Much of the Coalition's argument is related to changes that were made between drafts and the final version of the Economic Considerations Report, which is irrelevant to the question

[88] *Mentor v. Kitsap Cty*., 22 Wn. App. 285, 290, 588 P.2d 1226, 1230 (1978).
[89] 11/28/17 Tr., at 714:2-23 ("Q: And so your opinion that Economic Considerations Report is inadequate, is that based on any prior experience, training, or real familiarity with SEPA? A: Not based on familiarity with SEPA" 714:8-12, and "…my understanding which is not as an expert on SEPA…" 714:16-17).
[90] In response to a question whether Mr. Cohen believes you could isolate the impact of the Project from other factors, Mr. Cohen responded, "to a degree." (11/28/17 Tr. 700: 3).

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at hand: whether the potential land use impacts and economic factors related to the Project were properly analyzed and disclosed. The adequacy of SDOT's FEIS is based on the contents of the final, adopted documents, not on any changes made from prior drafts. The final version of the Economic Considerations Report discussed the relevant economic factors and disclosed the potential impacts from the Project.[91]

Although the Coalition tried to portray a nefarious intent to cover up potential impacts of the Project, the evidence does not support the Coalition's conspiracy theory. The documentary evidence itself, in which the lead agency transmitted its comments to its consultant team, instead shows that SDOT worked collaboratively with its consultants, asked questions, and made suggestions to improve the quality and accuracy of the FEIS.[92] None of the authors of the FEIS, including the Economic Considerations Report changed their professional opinion because of any input from SDOT and they viewed the lead agency's input and feedback as typical practice in drafting an FEIS.[93]

Contrary to the Coalition's allegations that SDOT wanted to hide the potential impacts of the Project, the very first example they provide in their brief shows the contrary. The original language at section 4.2 provided that the "local economy will adapt to accommodate the

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[91] SDOT's Post-Hearing Brief, at p. 43-46.

[92] Exhibit A-22 (Comment spreadsheet regarding draft Economic Considerations Report). For example, Mr. Mazzola asked, "are there any examples or data to support the fact that businesses may have relocated due to the presence of a bike trail?" Mr. Mazzola also suggested that the consultant to change "damages" to "impacts" because "damages isn't a term that is typical to the SEPA evaluation … it would be better to be consistent with the way that we characterize impacts throughout the rest of the document and wanted to stay similar wit the terminology." And Mr. Mazzola also commented "I have a lot of concern and questions over how we're quantifying the cost of delays… I'd like to understand the methodology and the calculation that went into this analysis, what traffic volumes were used over what period of time, et cetera, and are all intersections treated the same in terms of the importance? If so, is that appropriate?" (Exhibit A-22, Comment 175). See, 12/1/2017, Tr. 1544-1548 (testimony of M. Mazzola).

[93] 11/28/17 Tr. 977:23-25 (testimony of E. Ellig), 11/30/17 Tr. 1205: 15-17 (testimony of M. Johnson), and 12/1/17 Tr. 1383: 1-8 and 1384: 8-12 (testimony of M. Shook).

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presence of the trail"[94] whereas the final report provided that "the local economy would likely adapt to accommodate the presence of the trail."[95] If SDOT's intent had been to minimize of hide the potential impacts from the Project, the original language guaranteeing adaptation to the Project would have been retained.

Some of the Coalition's other examples of the changes made between the drafts and final version of the Economic Considerations Report are misleading. Several of the examples the Coalition indicates were "entirely deleted from final version" were actually moved or included elsewhere, not entirely deleted. For example, the second example on page 35 of the Coalition's Post-Trial Brief, stating that the Missing Link "may impede some industrial users located adjacent to the trail…" was not "entirely deleted" from the final version; rather, it was included elsewhere.[96] Similarly, although the Coalition alleges that language related to the "competitive pressures facing industrial users" was "entirely deleted" from the final report, it was also just moved to a different section.[97]

In addition, the testimony of Mr. Shook illustrated that the changes were made not to hide the impacts, but primarily to be sure that there was support for the conclusions and that the information in the report would not be misinterpreted.[98] For example, a table showing the "delay cost" at certain driveways was removed, because Mr. Shook was concerned that businesses would misinterpret the dollar amount as an impact specific to them, rather than the societal cost of the delay as a whole.[99] In addition, the report was edited to be more "precise" in describing the potential impacts, including making sure that "could" and "would" were used appropriately

[94] Exhibit A-15, p. 4-3 (emphasis added).
[95] Exhibit A-17, p. 4-2 (emphasis added).
[96] *See* Exhibit A-17, p. 4-7.
[97] See Exhibit A-17, p. 5-2.
[98] Mr. Shook testified that he did not make the changes because SDOT told him to. 12/1/17 Tr. at 1383: 6-8.

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depending on the certainty the impacts would occur.[100] Mr. Shook testified that in his professional opinion, the conclusions in the final report are more accurate in the sense of disclosing the potential economic impacts from this project.[101] In summary, the adequacy of this FEIS should be judged on its face and SDOT's motives in editing the document are irrelevant to this appeal. However, even if the Examiner were to consider the SDOT's intent, the evidence does not support the nefarious motive the Coalition seeks to ascribe to SDOT and the authors of the FEIS.

D. Conclusion

For the foregoing reasons, the FEIS for the Burke Gilman Trail Missing Link Project should be affirmed.

DATED this 5TH day of January, 2018.

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[99] 12/1/17 Tr. at 1381-1382 (testimony of M. Shook).
[100] For example, the Coalition points to a change at p. 6-1 of the Economic Considerations Report that originally provided that delay "would" result in higher costs of production, but was changed to "could" because it is possible the businesses could adapt to the delay in a way that would reduce any impacts.
[101] 12/1/17 Tr. at 1383: 1-5 (testimony of M. Shook).

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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of the Seattle Department of Transportation's Response Brief with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date, a copy of this document was sent via email agreement to the following parties listed below:

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