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 REPLY TO THE BALLARD COALITION'S POST-TRIAL BRIEF**

The Ballard Coalition ("Appellant") devotes most of its 44 page post-hearing brief to two related themes: (1) a claim that the level of design of the build alternatives analyzed in the FEIS was not adequate to disclose the impacts of the project,[1] and (2) a contention that the FEIS concealed the safety risks of a two way trail by ignoring the hazards of "contraflow" movement.[2]

This reply shows that the evidence in the record simply does not support Appellant's theories. Appellant's experts could not explain how their analysis was hampered by the fact that SDOT wrote the EIS at approximately a 10 percent design stage. And the studies cited by Ms. Hirschey do not support her conclusion that a two way "sidepath" is more dangerous than other

[1] Ballard Coalition's Post-Trial Brief (hereafter "Coalition Brief") at 6-10.

[2] Coalition Brief at 17-27.

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designs, taking into account not just the contraflow traffic but the other design elements of a separated trail.

A. The design stage of the build alternatives analyzed in the FEIS was adequate to disclose the impacts of the project.

Since this appeal began, Appellant has sought to persuade any authority who would listen that a 10 percent level of design is inadequate to disclose the safety impacts of the build alternatives. Appellant filed a dispositive motion before the Hearing Examiner, seeking a ruling that 10 percent design is inadequate as a matter of law. The Examiner denied this motion, quoting Judge Rogers to the effect that "SEPA analysis does not mandate a specific level of design . . ." Order On Motion To Dismiss at 2 (filed 9/10/17). The Examiner framed the degree of project development necessary to reasonably identify environmental impacts as a question of fact for hearing. *Id.*

Appellant then filed a motion in Superior Court, asking Judge Parisien to reverse the Examiner's ruling. Judge Parisien denied that motion.[3] Appellant then asked Judge Rogers to enforce his prior order and quash these proceedings.[4] Judge Rogers referred this motion back to Judge Parisien, who denied it with this explanation:

> The Court finds that there is no specific design threshold below which a project is deemed insufficient for purposes of SEPA review. This was clearly stated by Judge

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[3] Order on Plaintiff's Motion To Enforce Second Order of Remand, filed in *Salmon Bay Sand and Gravel et al. v. City of Seattle et al.*, No. 09-2-26586-1 (King County Superior Court, entered 10/18/17) ("Salmon Bay Lawsuit"). Copy attached.

[4] Plaintiffs'/Petitioners LCR 7(b)(7) Renewed Motion To Enforce Second Order of Remand, filed in Salmon Bay Lawsuit on 11/02/17. Copy attached.

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Rogers in his prior ruling. Therefore, Plaintiff's argument that a ten percent of design is inadequate as a matter of law is unsupported.[5]

At hearing Appellant called experts to opine that the 10 percent level of design analyzed in the FEIS hampered their analysis. Appellant's brief cites only two examples to prove this point. First, Appellant quotes Claudia Hirschey testifying that the FEIS shows trail widths between 10 and 12 feet, rather than a set width that might be determined later in the design process. Coalition Brief at 7-8. Ms. Hirschey said that trail widths might be known at the 30 percent design stage, 11/27/17 Tr. 179-80, but she did not testify that the range of lane widths in the FEIS hampered her review of traffic hazards posed by the build alternatives. To the contrary, the balance of Ms. Hirchey's testimony laid out her methodology to compare the safety of alternatives by counting driveway conflict points, an exercise for which precise trail width information is unnecessary. Coalition Brief at 20 (summarizing Hirschey work).

Appellant's other example of adverse impacts not revealed at a 10 percent design stage is "impacts from barriers." Coalition Brief at 9. Vic Bishop testified that he could not analyze the hazards posed by the barriers that SDOT plans to build between Shilshole Avenue traffic lanes and the trail, because the FEIS does not show the exact width of the buffer strip between the trail and Shilshole Avenue traffic lanes. Coalition Brief at 9. Mr. Bishop expressed concern that the buffers might not be wide enough to accommodate a barrier while meeting City setback standards. *Id.* at 9, citing 11/27/17 Tr. 95-96.

Appellant cites the approximate configuration of trail widths and buffer widths as proof that the EIS did not fulfill the purpose of SEPA, Coalition Brief at 10, but the evidence the

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[5] Order Denying Plaintiffs' LRC 7(b)(7) Renewed Motion To Enforce Second Order of Remand, filed in Salmon Bay Lawsuit on 11/29/17. Copy attached.

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Coalition cites to support this point does not begin to make that case. As noted by SDOT and by Cascade in their opening briefs, SEPA review occurs at the preliminary stages of a project, before the lead agency has invested heavily in project design. Cascade Post-Hearing Brief at 2, citing WAC 197-11-060. An EIS need only provide enough information "sufficiently beneficial to the decision making process to justify the cost of its inclusion." *Preserve Our Islands v. Shorelines Hearings Board*, 133 Wn.App. 503, 539, 137 P.3d 31 (2006). Lane widths and setback distances are design details, to be established by SDOT engineering staff after the City selects the route of the trail. The cost of including those details in an EIS would be very high, because (as all parties agree) they would require that SDOT advance the design of all four build alternatives, not just the Preferred Alternative, prior to issuing a draft EIS. That cost is not justified by the "rule of reason," because the FEIS provides approximate trail and buffer widths within set ranges, and the final specifications for these details will not affect the decision to complete the Missing Link, or the choice among the alternatives analyzed in the FEIS.

Appellant cites no law supporting its position that the FEIS is inadequate because SDOT did not specify design details in the FEIS. Appellant's reliance on *Kiewit Constr. Group v. Clark County* [6] is misguided. Clark County prepared an EIS for Kiewit's proposed new asphalt plant. The project included a new access road that would cross a bicycle trail. But the EIS did not discuss the impact on the trail of the new truck traffic.[7] For this reason among others, County commissioners required a supplemental EIS, and the Court of Appeals upheld that decision.

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[6] 83 Wn.App. 133, 920 P.2d 1207 (1996)

[7] "The EIS does not address the specific impact of truck traffic on the bicycle trail." 83 Wn.App. at 141.

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Kiewit Construction stands for the principle that if an EIS flatly ignores the effects on a trail of new truck traffic, the EIS may be inadequate. The Missing Link appeal, however, involves an EIS that expressly addresses project impacts on freight mobility, traffic volumes and safety, including the potential for conflicts between trail users and trucks.[8] Appellant cites *Kiewit* not for its actual holding but for Appellant's supposition that the trail must be designed to a high level of detail to enable effective SEPA review.[9] *Kiewit* lends no support for this inference, and Appellant cites no other law to support its 10% design grievance.

A more informative decision for Appellant's level of design argument is *Citizens Alliance To Protect Our Wetlands v. City of Auburn*, 126 Wash.2d 356, 894 P.2d 1300 (1995). Citizens challenged an EIS for the proposed Emeralds Downs racetrack in Auburn. They argued that the FEIS failed to "fully disclose" the impact of the racetrack on traffic congestion. 126 Wash.2d at 368. The FEIS devoted substantial attention to traffic impacts, but the citizens wanted more details. In the words of the Supreme Court, "CAPOW's criticism is one of detail -- asserting that the FEIS lumped the impacts on traffic into the phrase "Worse LOS F." *Id.* The Supreme Court rejected the argument because it found that the FEIS described traffic impacts with enough detail to warn Auburn of the likely consequences of the racetrack. 126 Wash.2d at 369.

Given that the project purpose was to complete a multi-use trail, the FEIS focused on the classic SEPA review questions of whether to build the project and where to locate the trail. Appellant offers *no evidence* to support its contention that the early design stage of the build

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[8] FEIS, Chapter 7, Sections 7.3. To inform its review SDOT collected traffic data, including driveway turn counts, prepared auto-turn simulations, interviewed business owners, counted driveways, and shared all of this information with Appellant's experts. Erin Ellig, 11/29/17 Tr. 822-838.

[9] Coalition Brief at 14-15.

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alternatives analyzed in the FEIS deprived City decision makers of critical information needed to make a "reasoned decision." *Citizens Alliance*, 126 Wn.2d. at 370. Appellant's 10 percent design argument does not survive the "rule of reason."

B. The fact that the FEIS assigns less weight to the risks of contraflow movement than Appellant deems appropriate does not render the FEIS inadequate.

The second prong of Appellant's challenge to the adequacy of the FEIS is that it does not disclose the "increased" safety risks of contraflow movements on two way sidepaths. Coalition Brief at 3-4,17, 20, 21. The first problem with this argument is that the FEIS does discuss the risks of two way traffic on the trail, it just does not use the term "contraflow."[10] Appellant's real grievance is that the FEIS does not assign adequate weight to the risks of contraflow movement on a two way trail.[11] Appellant contends that the increased risk created by contraflow movements is "well document[ed] in accepted literature and reports . . ." *Id.* at 18. To prove this point, Appellant cites the testimony of Ms. Hirschey, and Ms. Hirschey relies on "a summary of findings from available research . . ." Ex. A-3 at 2. The research that Ms. Hirschey cites, however, does not support her "findings." Ms. Hirschey attached to her report (Ex. A-3) tiny excerpts from multiple papers. Other than a 2001 paper from a city planner in Helsinki, Ex. A-3

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[10] "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. For drivers of large vehicles with reduced visibility, it could be difficult to see in both directions of travel." Transportation Discipline Report, Ex. R-3 at 5-20.

[11] Appellant cross-examined SDOT witnesses on whether they were familiar with the studies cited by Ms. Hirschey, and if so, why they did not share that information with the consultants who wrote the EIS. Mazzola, 12/1/17 Tr. 1563.

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at 077,[12] the research that Ms. Hirschey cites generally treats contraflow movement as one factor among many that a planner should consider in designing bicycle paths. For instance, the WSDOT Design Manual chapter on Shared-Use Paths, Ex. A-3 at 99 through 121, provides design guidance for two way sidepaths with contraflow traffic. *Id.* at 104-05. It recommends a buffer between the street and the trail (like one that the FEIS envisions for the Missing Link), with a wider buffer for streets with higher traffic speeds. Where a wide buffer is not feasible the WSDOT Manual recommends a physical barrier such as a concrete Jersey barrier. *Id.* at 105. Nowhere does the Manual suggest that contraflow sidepaths should be avoided, or that they are more dangerous than other design options.

Ms. Hirschey cited a City of Boulder study for the finding that bicycles traveling in the contraflow direction on a multi-use path face three times the vehicle collision risk of bicycles traveling "in a single direction." Coalition Brief at 18. Ms. Hirschey took liberties with Boulder's findings. The Boulder Transportation Division did not find that contraflow sidepaths are more dangerous than one-way paths, or that two way paths should be avoided for safety reasons. Only Ms. Hirschey reaches that conclusion. Boulder's finding was that a higher percentage of accidents occur to bicycles moving against traffic than with traffic.[13] Bill Schulteiss provided the context that Ms. Hirschey did not mention -- that two way sidepaths are very common in Boulder, and that Boulder is one of the safest cities in the United States for bicycling. 11/30/17 Tr. 1251-53. His conclusion: "I would say that Boulder study is reliable.

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[12] Ms. Hirschey attached to her report one page from a Finnish essay entitled, "The Risks of Cycling." The main theme of this essay, apparent even from the one page abstract that Ms. Hirschey attached, is that cycling is much more dangerous than driving a car or taking public transit. Ex. A-3 at 077.

[13] Ex. A-3 at 078.

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It's a great study. It's just the conclusion she took from them were totally inappropriate." 11/30/17 Tr. 1253.

Ms. Hirschey cited the City of Vancouver and Massachusetts DOT Design Guidelines, Ex. A-3 at 089-094, and 095-098. She cited them for the guidance to design intersections to reduce conflicts. 11/27/17 Tr. 203. She did not mention that both guidelines promote off-street trails as preferred designs for safe cycling. The Vancouver Guidelines attached to Ms. Hirschey's report feature a photo of a two way trail like the Burke-Gilman with contraflow traffic, running adjacent to a major street, with a buffer between the trail and the street, and pavement markings like those proposed in the FEIS to guide drivers and cyclists. Ex. A-3 at 094. The Massachusetts Design Guide illustrates several of its design recommendations with diagrams of two way contraflow trails. Ex. A-3 at 097 and 098. Neither set of guidelines uses the word "contraflow."

Appellant's contention that the FEIS is inadequate because it fails to discuss the safety risk of two way side paths greatly exaggerates the importance of contraflow movement as a safety hazard. A few of the bicycle transportation design guidelines cited by Appellant and its witnesses identify contraflow movement as a risk factor, but many of those authorities nevertheless recommend two way trails as a preferred design because they separate motorized traffic from non-motorized trail users. In the case of the Missing Link the weight of the evidence presented at hearing was that the Preferred Alternative will improve safety for cyclists, pedestrians and other non-motorized users. See Cascade Post-Hearing Brief at 12 (citing testimony of Blake Trask). The Appellant's contention that contraflow traffic is so severe a safety risk as to require explicit discussion in the FEIS defies the rule of reason.

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Dated this 5th day of January, 2018.

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CERTIFICATE OF SERVICE

I certify that on this date of January 5, 2018, 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: January 5, 2018 at Seattle, Washington.

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ATTACHMENTS

The Honorable Suzanne Parisien

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SALMON BAY SAND & GRAVEL, INC., BALLARD CHAMBER OF COMMERCE, SEATTLE MARINE BUSINESS COALITION, BALLARD OIL COMPANY, NORTH SEATTLE INDUSTRIAL ASSOCIATION, and the BALLARD INTERBAY NORTHEND MANUFACTURING & INDUSTRIAL CENTER, Plaintiffs/ Petitioners, v. THE CITY OF SEATTLE, THE SEATTLE DEPARTMENT OF TRANSPORTATION, THE SEATTLE HEARING EXAMINER, and CASCADE BICYCLE CLUB, Defendants/Respondents.	No. 09-2-26586-1 SEA ~~[PROPOSED]~~ ORDER ON PLAINTIFFS' MOTION TO ENFORCE SECOND ORDER OF REMAND

ORDER ON MOTION TO ENFORCE SECOND ORDER OF REMAND

THIS MATTER having come before the King County Superior Court on a Motion to Enforce Second Order of Remand in the above captioned consolidated appeal, and the Court having reviewed the pleadings and papers filed herein*; now, therefore, the Court hereby orders as follows:

1. Plaintiffs' Motion to Enforce Second Order of Remand is Denied.

* The Court reviewed Plt's Motion and the Responsive materials from the City of Seattle and Cascade Bicycle Club. - SRP

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DATED this 18th day of October, 2017.

HONORABLE SUZANNE R. PARISIEN
in and for King County Superior Court

Presented by:

STOEL RIVES LLP

/s/ Sara Leverette
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THE HONORABLE JIM ROGERS
HEARING: November 9, 2017
ORAL ARGUMENT REQUESTED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

SALMON BAY SAND AND GRAVEL, INC.; BALLARD CHAMBER OF COMMERCE; SEATTLE MARINE BUSINESS COALITION; BALLARD OIL COMPANY; NORTH SEATTLE INDUSTRIAL ASSOCIATION; and, THE BALLARD INTERBAY NORTHEND MANUFACTURING & INDUSTRIAL CENTER, Plaintiffs/Petitioners v. THE CITY OF SEATTLE; THE SEATTLE DEPARTMENT OF TRANSPORTATION; THE SEATTLE HEARING EXAMINER; and, CASCADE BICYCLE CLUB, Defendants/Respondents.	NO. 09-2-26586-1 SEA[1] PLAINTIFFS'/PETITIONERS' LCR 7(b)(7)[2] RENEWED MOTION TO ENFORCE SECOND ORDER OF REMAND

[1] The parties agreed to consolidate the 2012 appeal, Cause No. 12-2-30454-8 SEA, under Cause No. 09-2-26586-1 SEA and assign it to Judge Rogers pursuant to an Agreed Order entered on December 12, 2012. Previously, the parties had similarly stipulated to consolidate the 2011 appeal, Cause No. 11-2-25099-7SEA, under Cause No. 09-2-26586-1SEA.

[2] LCR 7(b)(7) permits Petitioners to file motion so long as they can meet the following criteria: "No party shall remake the same motion to a different judge or commissioner without showing by affidavit the motion previously made, when and to which judge or commissioner, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge or commissioner." Petitioners meet all of these criteria as stated in the Affidavit/Declaration of Joshua C. Allen Brower ("Brower Decl.") filed in support of this Motion.

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I. INTRODUCTION

Plaintiffs/Petitioners ("Petitioners") respectfully submit this Motion asking Judge Rogers to interpret and apply his Second Order of Remand[3] to the current procedural posture/facts of this case since Judge Rogers' Order is controlling, because he retained jurisdiction over this matter, and because Judge Rogers, not anyone else, is in the best position to interpret and apply his Order. Five years ago, Judge Rogers held a 10% level of design inadequate—factually and as a matter of law—to disclose significant adverse impacts of the Seattle Department of Transportation's ("SDOT") Missing Link bicycle project (the "project") under the State Environmental Policy Act ("SEPA") and ordered SDOT to "***more fully design***[]" the project "***so that the impacts of the proposal on the adjoining land uses, and any proposed mitigation measures of those impacts, may be identified***."[4] SDOT complied and advanced the design to a 20%-to-30% level. On appeal of that increased design, the City's Hearing Examiner, in August 2012, agreed that it met Judge Rogers' standard and, based on the significant impacts disclosed at that level of design, ordered SDOT to prepare an environmental impact statement ("EIS") for the project because that level of design was sufficient to disclose significant adverse impacts. SDOT then spent five years and millions of dollars preparing the EIS and issued a Final EIS ("FEIS") in May 2017. Despite Judge Rogers' Order and Examiner Watanabe's Decision, SDOT's FEIS is based on a 10% level of design already held inadequate to disclose significant impacts. Unsurprisingly, SDOT's EIS based on a 10% design again discloses no significant adverse from the project, just like SDOT's three prior and insufficient SEPA reviews.

[3] A copy of the Superior Court's Second Order of Remand, Cause No. 09-2-26586-SEA (King Co. Sup. Ct. Mar. 2, 2012) is attached as Exhibit A to the Brower Decl. In that Order, this Court stated it "***retains jurisdiction over this matter, including judicial review of any further administrative appeals of actions taken in response to this order, and for entry of a final order upon compliance with this court's Second Order of Remand***." Order, page 2, ¶ 7 (emphasis added).

[4] Exhibit A, ¶ 6 (emphasis added).

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In June 2017, Petitioners filed a fourth appeal in this matter, challenging the adequacy of the EIS to the City's Hearing Examiner and alleging, *inter alia*, the EIS's 10% level of design violates Judge Rogers' Second Order of Remand. That appeal is pending, with a fourth evidentiary hearing set for November 27 to December 1, 2017. In August 2017, Petitioners filed a dispositive motion on this issue with the Examiner, which was denied on September 18, 2017, based on the Examiner's interpretation and application of Judge Rogers' Second Order of Remand. Petitioners then sought to enforce Judge Rogers' Order before this Court, filing a motion with the currently assigned Judge, Judge Parisien, who denied it on October 18, 2017, without findings or conclusions.

It will be a waste of Petitioners', Respondents', the Examiner's and this Court's resources for the parties to conduct a fourth hearing in this matter to determine, once again, that a 10% level of design is inadequate for SEPA review of the project. Resolution of this issue hinges on a proper interpretation and application of the Second Order of Remand. Pursuant to LCR 7(b)(7), Petitioners ask Judge Rogers to interpret and apply his Order because he retained jurisdiction to enter "a final order upon compliance with this court's Second Order of Remand" and because he is in the best position to know what his Order means and how it should be applied. The question to be answered is:

> Whether SDOT's decision to base its SEPA review in the EIS on a 10% level of design, already held insufficient to disclose impacts from the project and which is below the 20%-to-30% design level held sufficient to disclose impacts, complies with Judge Rogers' Second Order of Remand?

II. RENEWED MOTION

Petitioners renew their motion requesting this Court enforce its Second Order of Remand and direct the City to re-issue the EIS for the project based on a design level greater than 10% so the significant adverse environmental impacts can be fully disclosed, analyzed, and, if possible, mitigated. Petitioners seek to avoid the waste of resources required to relitigate/re-appeal an

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issue litigated in two evidentiary hearings and decided by this Court—both factually and as a matter of law. There is no need for another evidentiary hearing to once again prove SDOT failed to sufficiently design the project so it can properly be analyzed under SEPA.

III. RELIEF REQUESTED

Petitioners ask this Court to enforce its Second Order or Remand by directing SDOT to withdraw its current EIS and issue a revised EIS based on a "more fully design[ed]" project to at least the 20%-to-30% level of design—which Examiner Watanabe already held sufficient to disclose and analyze the project's significant adverse environmental impacts. In the mere months since the FEIS was issued, SDOT has already advanced the design well above this level. Petitioners also ask this Court to arrest the pending proceedings before the Examiner until SDOT complies with this Court's Order.

IV. STATEMENT OF FACTS

A. PROCEDURAL POSTURE

To refresh the Court's memory, the following is a synopsis of the odyessy-esque procedural history and posture of this case:

- On July 1, 2011, Examiner Watanabe, after holding a second evidentiary hearing, affirmed SDOT's Determination of Nonsignificance ("DNS") under SEPA, determining, in part, that a 10% level of design was sufficient.[5]
- Petitioners appealed to Superior Court arguing, *inter alia*, a 10% design is insufficient under SEPA to disclose, analyze, and determine the project's probable significant adverse environmental impacts.
- On March 2, 2012, Judge Rogers agreed and issued a Second Order of Remand ordering SDOT to "more fully design[] the Shilshole Segment so that the impacts of the proposal on the adjoining land uses, and any proposed mitigation of those impacts, may be identified."[6]

[5] *See* page 10, ¶ 9, Exhibit I to the Brower Decl.

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- In his Second Order of Remand, Judge Rogers explained his reasoning, stating,

> The question is not the level of [design] planning. ***The question is whether or not there is enough to know whether it can be reviewed under SEPA for its impact. The reason for this is what hasn't been decided can't be reviewed***…. It is simply not fair to defer decisions and to trust the party [SDOT] making the decisions to reach the right outcome, because this defeats the entire policy of [SEPA] review.[7]

- On April 30, 2012—less than 60 days after Judge Rogers issued his Second Order of Remand—SDOT issued another DNS asserting again the adverse impacts of the project would not be significant based on a 20%-to-30% level of design.
- Petitioners again appealed to Examiner Watanabe claiming there would be significant adverse environmental impacts even at that level of design.
- Examiner Watanabe conducted a third evidentiary hearing in this matter between July 18, to August 2, 2012.
- On August 17, 2012, Examiner Watanabe agreed with Petitioners stating, "[t]he [20-30 percent] level of design presented is adequate for purposes of identifying and evaluating the proposal's impacts."[8]
- Examiner Watanabe determined the project would have significant adverse impacts in the form of traffic hazards and directed SDOT to prepare an EIS for the Shilshole Segment,[9] stating,

> In the 2011 appeal of the Revised DNS, SDOT argued, and the Examiner agreed, that SDOT had the ability to and authority to adjust the trail proposal, including mitigation measures, as it progressed through the design process. ***But the Second Order of Remand referenced the lack of design detail as a basis for remand. SDOT has provided more detail concerning the design, and again asserts that it can make additional adjustments going forward that will resolve traffic conflicts.*** However, on the record as it exists now before the Examiner, ***the Examiner concludes that the proposal will have significant adverse impacts in the form of traffic hazards along the Shilshole Segment because of***

[6] Exhibit A to Brower Decl., page 2, ¶ 6.
[7] *Id.* at Transcript page 4, line 23, Transcript page 5, lines 1-9.
[8] Exhibit J to Brower Decl., page 8, ¶ 2.
[9] *Id.* at page 9, ¶ 8.

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> ***conflicts between truck movements and the other vehicle and trail users along Shilshole***.[10]

- SDOT spent $2.5 to $2.6 million and four years to issue the Draft EIS (June 2016) and another year to issue the Final EIS (May 2017).[11]
- Instead of advancing the design beyond the 20%-to-30% level, SDOT based it's SEPA analysis in the DEIS and FEIS on a 10% level of design.[12]
- In justifying its decision to revert to a 10% level of design, SDOT stated in the FEIS,

> SDOT disagrees with the commenter's characterization of the prior Hearing Examiner and Court orders, which were made in the context of the adequacy of determinations of non-significance that are no longer valid and are no longer being relied upon.[13]

- SDOT goes on in its response to that comment to state,

> [t]he EIS appropriately relies on designs at approximately 10% level of design for each of the build alternatives, ***which SDOT determined was sufficient to evaluate any potential significant adverse impacts***.[14]

- The DEIS and FEIS conclude there will be no significant adverse impacts—of any kind—from the project.[15]
- Petitioners appealed the adequacy of the FEIS to the City Hearing Examiner under Cause No. W-17-004. Because Examiner Watanabe retired, the appeal is before the City's new Examiner, Mr. Vancil.[16]
- A fourth, multi-day hearing is set for November 27 to December 1, 2017.[17] If that hearing goes forward, the issue of whether a 10% level of design is adequate to identify significant adverse impacts and whether SDOT can make critical design and mitigation decisions

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[10] *Id.* (Emphasis added).
[11] Exhibit D at page 34, lines 7-8 and page 44, line 7.
[12] *Id.*
[13] FEIS, Vol. 2, page 26, SDOT comment response 09-013, Exhibit K. This is the same argument SDOT made in its Motion to Dismiss filed before J. Parisien based upon *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 631, 860 p. 2d 390, (1993), and which the Court denied in May 2017.
[14] Brower Decl., Exhibit K.
[15] Exhibit D at page 77, lines 18-23.
[16] Brower Decl. at ¶ 6.
[17] *Id.* at ¶ 7.

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outside of SEPA will be re-litigated after having been litigated twice before Examiner Watanabe and once, on appellate review, before Judge Rogers.

- Before coming to this Court, Petitioners files a dispositive motion asking Examiner Vancil to rule the EIS inadequate as a matter of law because it is based on a 10% level of design, which, Petitioners argued, violates this Court's Second Order of Remand. Examiner Vancil denied Petitioner's motion on September 18, 2017, based on his reading/interpretation of Judge Rogers' Second Order of Remand.[18]
- Petitioners then filed a Motion to Enforce this Court's Second Order of Remand before Judge Parisien (the currently-assigned Judge).[19] Judge Parisien denied the Motion on October 18, 2017, without explanation.[20]

B. FACTS SUPPORTING RENEWED MOTION PURSUANT TO LCR 7(B)(7)

LCR 7(b)(7) provides:

> No party shall remake the same motion to a different judge or commissioner without showing by affidavit the motion previously made, when and to which judge or commissioner, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge or commissioner.

The Brower Decl. details the motion previously made, when and to which Judge, and the Order and decision of Judge Parisien. The following is a synopsis of the LCR 7(b)(7) "new facts and other circumstances," all of which are described in greater detail in the Brower Decl., and which establish Petitioners' renewed Motion meets the requirements in LCR 7(b)(7), including the following:

[18] *Id.* at Exhibit L.
[19] *Id.* at Exhibit B.
[20] *Id.* at Exhibit C.

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- Mr. Scharf, SDOT's long-time Project Manager for the Missing Link, confirmed in a comment to the draft cultural resources report for the DEIS that it is impossible to determine impacts from the project and necessary mitigation at a 10 % design, stating,

> These statements all indicate that tasks and consultations were performed in conjunction with mitigating impacts, ***but at 10% design this isn't possible***.[21]

- On October 25, 2017, Petitioners deposed Mark S. Mazzola, SDOT's environmental lead for the project responsible for ensuring "that [SDOT is] complying with the requirements of the state Environmental Policy Act" and "ensuring [SDOT's] review is technically sound and adequate in terms of SEPA, and that [SDOT] adequately identified all of the potential impacts to the natural and built environment as a result of this project.[22]
- Mr. Mazzola confirmed the following:
  - SDOT based its SEPA review in the EIS—both the DEIS and the FEIS—on an approximately 10% level of design.[23]
  - SDOT did not consider Judge Rogers' Second Order of Remand in making its decision to base the SEPA review in the EIS on a 10% level of design, stating,

> Q. Did Judge Rogers' decision play any role in the decision to use the ten percent level of design for the EIS?
>
> A. His decision did not play a role in terms of our determination that the design level that we reached in developing the alternatives for the EIS were a solution.[24]

  - The project analyzed in the DEIS and FEIS is, for all intents and purposes, in the same location and configuration as it was before Hearing Examiner Watanabe in 2012.[25]

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[21] Brower Decl., Exhibit H (emphasis added).
[22] Exhibit D, page 26, lines 4-17.
[23] *Id*. at page 66, lines 14-25 and page 67, lines 1-3.
[24] *Id*. at page 38, lines 1-12.
[25] *Id*. at page 67, lines 15-25.

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- Prior to issuing the FEIS, SDOT had advanced the design for the project beyond 10% to approximately 30%,

> A. So, what I can say, though, is when we started in earnest to develop the 30 percent design plan set, that would have been in the April/May time frame, if my memory serves me right.
>
> Q. And when was the final EIS published?
>
> A. It was published May 25th. I do remember that date.
>
> Q. Was the decision made to start increasing the level of design, then, before the EIS was published, the FEIS?
>
> A. Yes. As I had mentioned previously, once we decided on the preferred alternative, we started putting things in motion to begin delivering the project.[26]

- SDOT has currently designed the project to the 60%-to-90% level of design.[27]
- The EIS, based on a 10% level of design, concludes "that there are no significant impacts whatsoever to the environment from the proposed Missing Link…."[28]
- That conclusion in the EIS does not comport with the first draft of the Economic Discipline Report submitted to SDOT, which concluded multiple times that there would be significant adverse impacts from the project,[29] including,

  a. "The operational impacts may entail some 'winners', those whose businesses and residents benefit from increased accessibility and pedestrian/bike traffic, as well as '***losers', those who are detrimentally impacted by the trail*** from congestion of existing activity with increased pedestrian/bike traffic."[30]

  b. "Of the properties identified, it is expected that the Ballard Marina and Salmon Bay Sand and Gravel ***may be significantly impacted*** by the operation of the Shilshole South Alternative."[31]

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[26] *Id*. at page 44, lines 2-15.
[27] *Id*. at page 41, lines 23-25.
[28] *Id*. at page 77, lines 18-23.
[29] *Id*. at page 78, line10-25 and page 79, lines 1-2.
[30] Brower Decl., Exhibit E page 4-3, lines 7-10.
[31] *Id*. at page 4-12, lines 24-26.

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c. "…***it is estimated that the Shilshole South Alternative will result in significant negative economic impacts to property owners with studied driveways in the Ballard study region***."[32]

d. Table 4-3-3 estimates the added annual cost of delay at just one of Salmon Bay's five driveways will cost approximately $32,904/year.[33]

- SDOT decided to proceed with construction of the project nearly two months before it completed its SEPA review and issued the FEIS.[34]
  - SDOT's completed its SEPA process for the project when it published the FEIS on May 25, 2017.[35]
  - SDOT plans to construct the project in 2018 "regardless of whether another appeal to King County Superior Court would happen or not",

> Q. But again, just to be clear, your understanding is that the department has decided to move forward with the project if the hearing examiner affirms the adequacy of the EIS ***regardless of any judicial appeal***. Is that accurate?
>
> A. ***That is my understanding.***[36]

C. FACTS STATED IN PRIOR MOTION

- A side-by-side comparison of historic and current project documents show the project analyzed in the EIS is unchanged since 2008: *See* Exhibits M) SDOT's 2017 Figure 1-3 Preferred Alternative from the FEIS;[37] N) SDOT's Section B-B6 from its 2003 Ballard Corridor Design Study;[38] O) SDOT's 2011 Typical Cross Section J;[39] P) SDOT's 2010

[32] *Id.* at page 4-15, lines 10-12 (emphasis added).
[33] *Id.* at page 4-14, Table 4-3-3.
[34] Exhibit D at page 124, lines 2-22.
[35] *Id*. at lines 15-24.
[36] *Id.* page 77, lines 3-8 (emphasis added).
[37] Exhibit M.
[38] Exhibit N.
[39] Exhibit O (A-137 in Examiner proceeding W-12-002).

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Option 3 Two-Way Trail Adjacent to Roadway South;[40] and Q) SDOT's 2012 Trail Layout[41] establish.

Trail Feature	**Exhibit M**	**Exhibits N, O, P and Q**
Railroad ROW	30-40' RR ROW	29-32' RR ROW
South Buffer	2' Buffer/Planter Strip	2' buffer/fence
Trail	10-12' Multi-Use Path	10-12' Multi-Use Path -Trail
North Buffer	4-6' Buffer/Planter Strip	3-7' buffer/planting strip
Travel Lanes	Two 10-12' travel lanes	Two 12-foot' travel lanes
Parking	22' Back-in Parking	17-22' back-in/angle parking
Sidewalk	7-8' sidewalk	8-10' sidewalk
Location	South side	Same

- SDOT admits throughout the EIS that ***there is potential for new impacts that cannot be determined or decided until final trail design***, including:
    - sight distance concerns at driveways crossing the Missing Link,
    - conflicts between vehicles and non-motorized trail users,
    - conflicts between trail users and trail design features, and
    - conflicts between vehicles and trail design features.[42]
- The FEIS confirms SDOT is deferring critical design decisions until later, outside the SEPA process, so they cannot be reviewed or challenged:

FEIS	**Statement**
Chapter 1, Project History and	"***SDOT will continue working with property owners, businesses, residents and other***

[40] Exhibit P (A-76, W-11-002).
[41] Exhibit Q (A-145, W-12-002).
[42] *See* Exhibit R which lists the same "conflicts between truck movements and the other vehicle traffic and trail users along the Segment" already held by the Examiner to prove significant adverse impacts based upon a 20%-to-30% design in Exhibit I.

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Alternatives	***interested parties throughout the design phase of the project****….*"[43]
Chapter 4, Land Use	"***SDOT will coordinate with adjacent businesses and property owners throughout the design process*** with regard to modification of right-of-way."[44]
Chapter 5, Recreation	"***Design the trail*** to meet applicable accessibility guidelines, including current design standards for curves, sight distance, based on a design speed for the fastest users, bicyclists."[45]
Chapter 7, Transportation	"These potential new ***impacts would be minimized through detailed review during the trail design process, such as conducting detailed sight distance reviews at each driveway intersection during final design***. However, these impacts may not be eliminated entirely."[46] *** "***A number of design solutions will be considered in the final design to delineate and provide adequate sight distance for both nonmotorized users and vehicles at trail crossings***."[47] *** "SDOT will work with individual property and business owners…throughout the design process. ***Roadway modifications, intersection treatments, driveway design and parking lot changes will be incorporated during the final design phase of the project to address safety,*** access, nonmotorized users, and vehicle

[43] Exhibit S.
[44] Exhibit T.
[45] Exhibit U.
[46] Exhibit V (emphasis added), repeated on pages 7-42, 7-48, 7-53, 7-59.
[47] Exhibit J (emphasis added), repeated on pages 7-38, 7-43, 7-48, 7-54, 7-60.

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	types….[***w]ith the understanding that SDOT would make final design decisions.”***[48] *** “***The final design would also include safety considerations*** so that the trail operates safely….”[49] *** “SDOT will work with individual property and business owners…***throughout the design process to determine the best means of reducing potential conflicts along the trail alignment.”***[50]
Chapter 8, Parking	Working with individual property and business owners…***throughout the design process to better understand the parking needs along the alignment***.”[51]

- Years ago, Judge Rogers admonished,

> ***It is simply not fair to defer decisions and to trust the party [SDOT] making the decisions to reach the right outcome, because this defeats the entire policy of [SEPA] review***.[52]

V. ARGUMENT

The record before this Court proves—factually and as a matter of law—SDOT’s 10% design is insufficient; nea, as Mr. Scharf confirmed, it “isn’t possible”—to conduct SEPA review in compliance with Judge Rogers’ Second Order of Remand. SDOT’s decision to revert to a 10% level of design violates this Court’s Order directing SDOT to “***more fully design[]***” the project “***so that the impacts of the proposal on the adjoining land uses, and any proposed mitigation measures of those impacts, may be identified***.”[53] SDOT is collaterally estopped

[48] Exhibit W, page 7-62 (emphasis added).
[49] *Id.* pages 7-62 to 7-63.
[50] *Id.* page 7-63 (emphasis added).
[51] Exhibit X (emphasis added).
[52] Exhibit A Transcript page 5, lines 1-9 (emphasis added).
[53] Exhibit A, ¶ 6 (emphasis added).

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from re-litigating, and from forcing Petitioners to re-litigate, this issue in yet another evidentiary hearing.

A. SDOT IS COLLATERALLY ESTOPPED FROM ASSERTING A 10% LEVEL OF DESIGN IS ADEQUATE TO IDENTIFY SIGNIFICANT TRAFFIC HAZARDS

Examiner Watanabe stated in her first decision "[t]he project was adequately described for purposes of SEPA review" at a 10% level of design.[54] Judge Rogers disagreed and Ordered SDOT to "more fully design" the Shilshole Segment:

> 6. This matter is REMANDED to the Seattle Department of Transportation (SDOT) for the limited purpose of ***more fully designing*** the Shilshole Segment ***so that the impacts of the proposal on the adjoining land uses, and any proposed mitigation of those impacts, may be identified***.
>
> 7. This court retains jurisdiction over this matter, including judicial review of any further administrative appeals of actions taken in response to this order, and for entry of a ***final order upon compliance with this court's Second Order of Remand.***[55]

SDOT at first complied and issued a rushed DNS 60 days later, again concluding that at a 20%-to-30% design there would not be any significant adverse impacts that would require to prepare an EIS. On review, Examiner Watanabe disagreed with SDOT. She concluded that significant traffic hazards were evident at this 20%–to-30% level of design, should have been disclosed, and warranted preparation of a EIS. SDOT spent almost five years and millions of dollars preparing the EIS, but, in contravention to Judge Rogers' Second Order of Remand, did so based, once again, on a 10% level of design. Throughout the EIS and as confirmed by Mr. Mazzola and the documents submitted herewith:

- SDOT's long-time Project Manager, Mr. Scharf, agrees that it "***isn't possible"*** to disclose impacts at a 10% level of design;

[54] Exhibit I at Conclusion No. 9.
[55] Exhibit A, ¶¶ 6-7 (emphasis added).

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- The EIS at a 10% design once again does not disclose ***any*** significant adverse impacts despite the findings in the first ECONorthwest report to the contrary;
- SDOT decided to advance the project design to 30% ***before*** issuing the FEIS yet did not include this level of detail in the FEIS;
- SDOT decided to proceed with the project ***before*** it issued the FEIS;
- The project is currently at 60% to 90% design;
- SDOT considers its SEPA review complete and will not conduct any further SEPA review of the advanced 60% to 90% design of the project;
- SDOT is further designing the project outside of its SEPA review; and
- SDOT plans to build the project even if an appeal is filed to this Court.

Collateral estoppel prohibits SDOT from forcing Petitioners to again litigate before a new Examiner an issue these parties (including Intervenor) already litigated, twice before Examiner Watanabe and once before Judge Rogers. On appeal, Judge Rogers reversed Examiner Watanabe, and agreed with Petitioners that a 10% level of design is insufficient because the

> The question is not the level of [design] planning. ***The question is whether or not there is enough to know whether it can be reviewed under SEPA for its impact. The reason for this is what hasn't been decided can't be reviewed***…."[56]

Even SDOT's long-time project manager, Mr. Scharf agrees, admitting "***at 10% design this isn't possible.***"[57]

SDOT does not get to force Petitioners to litigate this issue again:

> Parties are collaterally estopped by judgment where the facts and issues claimed to be conclusive on the parties in the second action have been actually and necessarily litigated and determined in a prior action.

[56] Exhibit A at Transcript page 4, line 23, Transcript page 5, lines 1-9.
[57] Exhibit H (emphasis added).

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King v. City of Seattle, 84 Wn.2d 239, 243, 525 P.2d 228, 231 (1974) (citing *Henderson v. Bardahl Int'l Corp.*, 72 Wn.2d 109, 431 P.2d 961 (1967)). As the Washington Supreme Court explained,

> [C]ollateral estoppel prevents a second litigation of issues between the same parties even in connection with a different claim or cause of action.

Id. (citing *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 429 P.2d 207 (1967); *Goetz v. Board of Trustees*, 203 Kan. 340, 454 P.2d 481 (1969)).

Requiring Petitioners to factually litigate again, before a different Examiner, the issue of whether a 10% level of design is adequate for SEPA review of the project, and then potentially having to appeal this same issue again to this Court while SDOT proceeds to build the project, violates the meaning and purpose of collateral estoppel, and would waste the parties', the taxpayer's, and this Court's resources.

VI. CONCLUSION

SDOT's multi-year effort to conceal, rather than disclose, the adverse impacts its project will create must come to an end. SDOT's actions flout the very purpose of an EIS, which is to disclose significant impacts, WAC 197-11-400 ("An EIS shall provide impartial discussion of significant environmental impacts . . ."), not hide them behind an insufficient design rushed forward under the preposterous claim SDOT is conducting SEPA at the earliest possible stage in this 14+ year saga. SDOT's EIS discloses only insignificant impacts and acknowledges SDOT is deferring material design decisions until later, which SDOT began before it issued the EIS and has continued since then by progressing the design to 60%-to-90% as of October 2017. SDOT cannot be allowed to defeat the very purpose of an EIS and ignore this Court's Second Order of Remand by deferring decisions until after the SEPA process and designing the project outside of this Court's reach. It must comply with this Court's Order and issue an EIS based on a "more fully designed" project. Respectfully, Petitioners renew their request this Court interpret and

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enforce its Second Order of Remand and order SDOT to withdraw its EIS and reissue it based on the project's already advanced level of design.

Dated this 2nd day of November, 2017.

I certify that this memorandum contains 3,949 words, in compliance with the Local Civil Rules.

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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 via the methods indicated:

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Dated at Seattle, Washington, this 2nd day of November, 2017.

/s/ *Megan Manion*
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SALMON BAY SAND & GRAVEL, INC., BALLARD CHAMBER OF COMMERCE, SEATTLE MARINE BUSINESS COALITION, BALLARD OIL COMPANY, NORTH SEATTLE INDUSTRIAL ASSOCIATION, and the BALLARD INTERBAY NORTHEND MANUFACTURING & INDUSTRIAL CENTER, Plaintiffs/ Petitioners, v. THE CITY OF SEATTLE, THE SEATTLE DEPARTMENT OF TRANSPORTATION, THE SEATTLE HEARING EXAMINER, and CASCADE BICYCLE CLUB, Defendants/Respondents.	No. 09-2-26586-1 SEA ORDER DENYING PLAINTIFFS' LRC 7(b)(7) RENEWED MOTION TO ENFORCE SECOND ORDER OF REMAND

THIS MATTER having come before the King County Superior Court on Salmon Bay Sand & Gravel, Inc.'s, et al, ("Plaintiffs") LCR 7(b)(7) Renewed Motion to Enforce Second Order on Remand in the above captioned consolidated appeal, and the Court having reviewed Plaintiffs' LCR 7(b)(7) Renewed Motion to Enforce Second Order on Remand and responsive papers filed by the City of Seattle and Cascade Bicycle Club, and other papers filed herein; now, therefore, the Court hereby orders as follows:

SUZANNE PARISIEN, JUDGE
KING COUNTY SUPERIOR COURT
516 Third Avenue
Seattle, Washington 98104

Salmon Bay Sand & Gravel, Inc.'s, et al, LCR 7(b)(7) Renewed Motion to Enforce Second Order on Remand is DENIED.

Procedurally, the Court finds a lack of new facts, or other circumstances which would justify seeking a different ruling from Judge Rogers as required under LCR 7 (b) (7). Even assuming that plaintiffs met the requirements of LCR 7(b)(7), the Court finds that there is no specific design threshold below which a project is deemed insufficient for purposes of SEPA review. This was clearly stated by Judge Rogers in his prior ruling. Therefore, Plaintiff's argument that a ten percent of design is inadequate as a matter of law is unsupported.

DATED this 29th day of November, 2017.

HONORABLE SUZANNE R. PARISIEN

SUZANNE PARISIEN, JUDGE
KING COUNTY SUPERIOR COURT
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