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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

Salmon Bay Sand and Gravel Co., 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

The Cascade Bicycle Club,

Defendants/Respondents.

The Honorable

No.

VERIFIED COMPLAINT FOR DIRECT REVIEW UNDER SEPA, APPLICATION FOR WRIT OF REVIEW, COMPLAINT FOR DECLARATORY JUDGMENT, APPLICATION FOR CONSTITUTIONAL WRIT OF REVIEW, and REQUEST FOR INJUNCTION

Plaintiffs/Petitioners aver and allege as follows:

I. PARTIES

1.1 Plaintiffs/Petitioners are the Ballard Chamber of Commerce, a Washington non-profit corporation; Salmon Bay Sand and Gravel Company, a Washington corporation; the Ballard Interbay Northend Manufacturing & Industrial Center, an unregistered non-profit trade association (BINMIC); the North Seattle Industrial Association (NSIA), a Washington non-profit corporation; Ballard Oil Company, a Washington corporation; and the Seattle Marine Business Coalition (SMBC), a 501(c)(3) non-profit.

1 Plaintiffs/Petitioners are collectively known, for purposes of this appeal, as the "Ballard
2 Business Appellants" or "Appellants."

3 1.2 The Defendant/Respondent City of Seattle (hereafter "City") is a Washington Municipal
4 Corporation. This appeal challenges decisions and actions by two of its agencies or
5 officers: the Defendant/Respondent Seattle Department of Transportation (hereafter
6 "SDOT") and the Defendant/Respondent Seattle Hearing Examiner (hereafter "Hearing
7 Examiner").

8 1.3 Specifically, this appeal challenges the decision by SDOT that it describes as a decision
9 to "Proceed with construction of the Burke-Gilman proposed trail" (hereafter "the
10 Action" or "the underlying decision to proceed with the trail"). This appeal also
11 challenges the Determination of Non-Significance ("DNS") issued by SDOT for the
12 Action on November 26, 2008, pursuant to the State Environmental Policy Act
13 ("SEPA"). A copy of the DNS is attached as Exhibit 1.

14 1.4 This appeal also challenges the decision of the Hearing Examiner to uphold the DNS,
15 after an administrative appeal, in the Findings and Decision that she issued on June 9,
16 2009. A copy of these Findings and Decision is attached as Exhibit 2.

17 1.5 The Defendant/Respondent Cascade Bicycle Club (hereafter "CBC") is a Washington
18 nonprofit corporation that intervened in the proceedings before the Seattle Hearing
19 Examiner.

20 II. JURISDICTION AND VENUE

21 2.1 The subject matter of this appeal comprises actions taken by public officers of the City of
22 Seattle, and venue therefore is proper pursuant to RCW 4.12.020.

23 2.2 On June 17, 2008 SDOT published a "Notice of Action" pursuant to RCW 43.21C.080,
24 which identifies the subject Action and states that "Any action to set aside, enjoin,
25 review, or otherwise challenge such action on the grounds of noncompliance with the
26

1 provisions of chapter 43.21C RCW (State Environmental Policy Act) shall be
2 commenced on or before July 15, 2009."

3 2.3 This Court has jurisdiction to hear this appeal pursuant to the direct authority of RCW
4 43.21C.075, which provides an independent "basis for challenging whether
5 governmental action is in compliance with the substantive and procedural provisions" of
6 SEPA. The Ballard Business Appellants challenge the Action for its non-compliance
7 with SEPA, and direct review under RCW 43.21C.075 is therefore the proper cause of
8 action for invoking this Court's jurisdiction.

9 2.4 In the alternative, and only if the Court should determine that direct review under RCW
10 43.21C.070 is not an available means of obtaining judicial review, then this Court has
11 jurisdiction to grant review pursuant to a statutory writ of review, Chapter 7.16 RCW; an
12 action for declaratory judgment, Chapter 7.24 RCW; or a constitutional writ of review
13 pursuant to this Court's inherent constitutional authority to review the actions of the other
14 branches of government.

15 2.5 In addition, this Court also has jurisdiction to grant an injunction pursuant to Chapter
16 7.40 RCW.

17 2.6 The Ballard Business Appellants have exhausted their administrative remedies by
18 appealing the DNS to the Seattle Hearing Examiner.

19 III. STANDING

20 3.1 Any "person aggrieved" has a right to judicial review under SEPA. RCW 43.21C.075(4).

21 3.2 It is the City's responsibility under SEPA to use all practical means to "assure" its
22 citizens "safe" surroundings and to "attain the widest range of beneficial uses of the
23 environment without degradation, risk to health or safety, or other undesirable and
24 unintended consequences." RCW 43.21C.020(2) (b) and (c). In addition, the City must
25 recognize each citizen's "fundamental and inalienable right to a healthful environment,"
26

1 RCW 43.21C.020(3), and a built environment that is not safe is not a healthful
2 environment.

3 3.3 Appellants' interests are within the zone of interests protected by SEPA because
4 Appellants are concerned about the proposed trail's impacts on specific elements of the
5 environment, including its adverse impacts upon the existing maritime-industrial land
6 uses in the area, and the trail's creation of traffic hazards because of the unresolved
7 conflicts between recreational users of the trail and the industrial and commercial trucks,
8 forklifts, and other such traffic in the area. These traffic hazards may make it impossible
9 for the Appellants and the other maritime-industrial businesses along the route of the
10 proposed trail to continue to exist, despite the fact that the City's policy is to protect and
11 foster these maritime-industrial land uses in this unique area next to the Ship Canal.

12 3.4 SDOT's DNS and the Hearing Examiner's decision substantively fail to protect the
13 fundamental and inalienable right of every citizen of the state, including the Appellants,
14 to a safe and healthful environment. The Project will result in significant and unmitigated
15 adverse impacts to the use and enjoyment of the environment in this area, as well as the
16 existing structures along the proposed Project alignment. This portion of Ballard – from
17 11th NW to the Ballard Locks – is a critical corridor and an integral part of the maritime
18 and industrial business community in Seattle. The City's land use policies and goals give
19 special priority to water-dependent uses in this area; these maritime and industrial uses
20 are supposed to receive the highest priority and protection from non-compatible and
21 competing uses. Routing a recreational trail through the heart of the maritime/industrial
22 area ignores these policies and goals and will significantly and adversely impact the
23 Ballard Business Appellants. Numerous businesses, employing thousands of people, are
24 located in this maritime and industrial area in proximity to the proposed trail alignment.
25 User of the proposed trail will be in almost constant conflict with heavy trucks, an active
26 railroad, forklift traffic, maritime and industrial traffic and activities, loading docks,

1 commercial parking and busy arterial streets along its entire alignment. The Project, as
2 currently proposed, will have substantial adverse impacts to this maritime and industrial
3 community, and it is very likely a trail user will be hurt or killed by a vehicle serving this
4 maritime-industrial community.

5 3.5 Salmon Bay Sand and Gravel Company is a Washington corporation whose address 5228
6 Shilshole Ave NW, Seattle, WA 98107. Salmon Bay supplies concrete, sand, gravel and
7 construction products and has operated in Seattle for over 100 years. Salmon Bay's
8 business includes both wholesale and retail operations. It provides numerous jobs,
9 mainly at union-wages.

10 3.6 Salmon Bay is a member of numerous trade associations including the Appellant
11 organizations herein, the Ballard Chamber of Commerce, NSIA, BNMIC and SMBC.
12 Paul Nerdrum, Salmon Bay's Vice President, is a member of and has served in leadership
13 roles in many of these organizations.

14 3.7 Salmon Bay will suffer immediate, concrete and specific injury-in-fact if the proposed
15 trail is located as proposed. Phase 2 of the Burke-Gilman proposed trail, as described in
16 the Notice of Action (i.e., the "permanent route"), will be located directly in front of
17 Salmon Bay. Salmon Bay's operations will immediately and irreparably be negatively
18 impacted by having to cross the proposed trail, by the unsafe condition created by having
19 to cross the proposed trail, by the delay involved with having to cross the proposed trail,
20 and by the possibility of being put out of business or having to move its business
21 operations.

22 3.8 Salmon Bay operates five days a week, 10-½ hours per day. Salmon Bay delivers
23 approximately 140,000 to 175,000 yards of concrete annually in the greater-Seattle
24 region. Salmon Bay uses 25 concrete mixer trucks and approximately 12 flatbed dump
25 trucks and a pick-up truck for deliveries. Its concrete and delivery trucks will have to
26 cross the proposed trail approximately 200-300 times per day during the peak season

1 (Summer). Additionally, Salmon Bay's will-call pick-up service generates another
2 approximately 75-100 truck trips per day, many of which also will have to cross the
3 proposed trail. Salmon Bay's trucks also use the adjacent roadways, including roads
4 where the proposed trail will be located, for deliveries. Along 45th Ave NW, the
5 proposed travel lanes will be 9-feet wide. Salmon Bay's concrete trucks are 8'-6" wide,
6 leaving just three inches on either side.

7 3.9 Locating a recreational trail in an industrial area is inherently unsafe. A fully loaded
8 concrete mixer truck is more than 30-feet long and weighs about 72,000 pounds. It is
9 very difficult, and sometimes nearly impossible, to see a bicycle from a moving concrete
10 truck. Likewise, it is difficult if not impossible to stop a loaded concrete truck quickly in
11 order to avoid a cyclist. If one of Salmon Bay's trucks is involved in an accident with a
12 cyclist, this will impact its ability to obtain liability insurance, without which Salmon Bay
13 cannot operate. Salmon Bay's drivers are required to obtain commercial drivers licenses
14 (CDL), which may be revoked after such an accident. In either case, Salmon Bay's
15 business will be negatively impacted, and, in the worst-case scenario, shut down.

16 3.10 It is highly unlikely Salmon Bay could relocate. Salmon Bay is a water-dependent
17 industrial use located on industrially zoned land with water access. It requires, and has in
18 this location, intermodal access including barge, rail, and truck. Salmon Bay obtains raw
19 material via truck, rail and barge and delivers finished product via trucks. Salmon Bay
20 has approximately 5 driveways that will cross the proposed trail, the rail line Salmon Bay
21 uses will be located adjacent to the trail, and Salmon Bay's employees and customers will
22 have to cross the trail to access both its wholesale and retail locations. Salmon Bay has a
23 legitimate fear of being put out of business because it has happened before. When the
24 City located another portion of the Burke-Gilman Trail in front of a former industrial
25 business in Fremont, thereby limiting access to loading docks, that company went out of
26 business.

1 3.11 Ballard Oil Company is a Washington corporation whose address is 5300 26th Avenue
2 NW, Seattle, WA 98107. Ballard Oil has been in business for over 72 years and operates
3 six-days per week. Ballard Oil is one of four fixed, maritime fueling facilities in the
4 entire State of Washington, and one of two that service the north Pacific fishing fleet.

5 3.12 In addition to lube oil and waste oil, Ballard Oil supplies approximately 8 Million gallons
6 of fuel annually to the north Pacific Fishing fleet and other commercial vessels. All of
7 this fuel, lube oil and waste oil is transported to Ballard's facility by truck. Fuel is
8 delivered by tanker trucks that can carry approximately 9,000 gallons per trip.

9 3.13 Every drop of the fuel, lube oil and waste oil handled by Ballard Oil must cross the
10 proposed trail. The proposed trail will be located directly in front of Ballard's driveway
11 and in front of Stabbert Marine's driveway, which Ballard Oil also uses. Typically,
12 Ballard's trucks will cross the proposed trail approximately 8 to 40 times per day
13 (counting in and out trips) depending on the season and fuel demand. It will be very
14 difficult, if not impossible, for Ballard's drivers, all of whom are required to obtain
15 CDLs, to see cyclists and others using the trail. Likewise, it is difficult if not impossible
16 to stop a loaded fuel truck quickly in order to avoid a cyclist or other trail users. If one of
17 Ballard Oil's trucks is involved in an accident with a cyclist or trail user, this will impact
18 its ability to obtain liability insurance, without which Ballard Oil cannot operate. Ballard
19 Oil's drivers are required to obtain CDLs, which may be revoked after such an accident.
20 In either case, Ballard Oil's business will be negatively impacted, and, in the worst-case
21 scenario, shut down.

22 3.14 It is highly unlikely Ballard Oil could relocate. It is a water-dependent industrial use
23 located on industrially zoned land with water access. Ballard Oil must be on the water to
24 service its customers. The north Pacific fishing fleet is located on the Ship Canal because
25 it is a sheltered, fresh water port, home to myriad support services and industries. Other
26 former maritime fueling facilities located in what used to be industrial areas that are now

1 characterized by commercial and residential development have gone out of business,
2 leaving Ballard Oil and one other business as the remaining suppliers of maritime fuel for
3 many of its customers.

4 3.15 The Ballard Business Appellants also includes a number of trade, business and
5 community organizations. These associations and organizations will suffer injury-in-fact
6 because the proposed trail will substantially and adversely impact the use and enjoyment
7 of their members' properties and businesses along the proposed alignment, will harm
8 their members' businesses and people employed by those businesses, and will create an
9 unsafe combination of pedestrians/cyclists and industrial traffic and activities. The
10 Ballard Business Appellants will be harmed, collectively and individually, by the
11 significant adverse impacts of the proposed trail, including, but not limited to, safety,
12 traffic impacts, loss of parking and inconsistencies with the City's Comprehensive Plan,
13 zoning and land use regulations. The trade organizations included in the Ballard Business
14 Appellants are comprised of local business and property owners, many of whom own or
15 operate water-dependent industrial businesses or own property that is industrially zoned
16 and occupied by such water-dependent or industrial uses. The proposed trail will
17 undermine and negatively impact these businesses' and property owners' ability to
18 continue operating industrial businesses in these locations. Based on a 2002 City study,
19 the Ballard maritime industry generates approximately \$1 Billion of revenue annually.

20 3.16 The Ballard Chamber of Commerce is a Washington non-profit corporation whose
21 address is 2208 NW Market Street, Seattle, WA 98107. The Chamber's mission is to
22 "promote, support and protect Ballard's business interests." The Chamber is concerned
23 that the proposed trail will negatively impact its member-businesses by, among other
24 things, eliminating parking, an issue within SEPA's zone of interest. The Chamber also
25 is concerned that the proposed trail, by creating unsafe conditions or incompatible uses,
26

1 will negatively impact the broader Ballard business community, and in particular many of
2 its business members.

3 3.17 The BINMIC, whose address is 604 22nd Ave NW, Seattle, WA 98107-4027, is an
4 unregistered non-profit trade association. It was established in 1999 to provide
5 leadership and coordination amongst stakeholder organizations and groups representing
6 interests in the Ballard Interbay area. BINMIC and its members are actively involved in
7 public policy, public resource and development issues impacting the BINMIC area. The
8 BINMIC area is home to the majority of the United State's north Pacific fishing fleet.
9 BINMIC, as a trade organization, has worked to preserve the largest cluster of maritime
10 and fishing support services on the West Coast. BINMIC and its members will suffer
11 injury in fact from the unsafe condition created by locating the proposed trail in this area,
12 by the traffic and loss of parking impacts, and by injecting an incompatible use into this
13 maritime and industrial area. Traffic, parking and unsafe conditions from the proposed
14 trail will undermine BINMIC's members ability to continue operating businesses that
15 comprise the north Pacific fishing fleet and the associated support services. As the
16 steward of the BINMIC neighborhood plan, the BINMIC also will suffer injury because
17 the proposed trail is inconsistent with the goals and policies in the City's Comprehensive
18 Plan.

19 3.18 The North Seattle Industrial Association (NSIA) is a Washington non-profit corporation
20 whose business address is 604 22nd Ave NW, Seattle, WA 98107-4027 and whose
21 registered address is 3401 Evanston Ave N, # A. NSIA is a business association of
22 marine and industrial businesses and property owners. These businesses and property
23 owners are generally located in the industrially zoned areas of North Seattle in Fremont,
24 Ballard and the Interbay. The Association is centered on the Ballard Interbay Northend
25 Manufacturing and Industrial Center. The Association has been in operation for over
26 twenty years. The Association has over 50 members who are committed to maintaining a

1 viable and productive maritime, manufacturing, industrial environment in which these
2 businesses can prosper. NSIA will suffer injury-in-fact because the proposed trail will
3 negatively impact the ability of its member business to continue operating by creating
4 unsafe conditions, traffic and parking impacts, and incompatible land uses.

5 3.19 Seattle Marine Business Coalition (SMBC) is a 501(c)3 non profit organization whose
6 address is 2547 Perkins Lane W, Seattle, WA 98199. Founded in 1983, the Seattle
7 Marine Business Coalition represents the interests of 300 marine industrial land users
8 within the Seattle City limits. Its maritime and industrial members located in the
9 BINMIC area will suffer injury in fact because of the trail's inconsistency with the goals
10 and policies in the City's Comprehensive Plan; because of the unresolved safety issues
11 associated with the trail; because of the unresolved traffic issues associated with the trail;
12 because of the lost parking caused by the trail; and because the trail may force water-
13 dependent uses to relocate or go out of business.

14 IV. FACTUAL BACKGROUND

15 4.1 On April 14, 2003, the City Council adopted Resolution 30583, adopting a "preferred
16 route for the Burke-Gilman trail through Ballard" This "preferred route" includes
17 both permanent and interim alignments. The City did not conduct any SEPA review of
18 the preferred route until it issued the DNS at issue in this appeal. SDOT's SEPA review,
19 however, did not evaluate the entire preferred route, and neither SDOT nor any other City
20 agency has conducted SEPA review of alternatives to the preferred route.

21 4.2 On November 17, 2008, SDOT's Project Manger, Kirk Jones, signed the SEPA checklist
22 for what the checklist stated on page 4 was the preferred route: "The project follows the
23 preferred route for this portion of the Burke-Gilman Trail adopted by the Seattle City
24 Council through Resolution 30583 in April 2003." At the hearing before the Hearing
25 Examiner, however, Mr. Jones, admitted that the checklist did not address the
26 environmental impacts of the permanent portion of the preferred route on Shilshole

1 Avenue NW between 17th Avenue NW and NW Vernon Place. In other words, the City
2 left out an entire section of the preferred route in its SEPA evaluation. At the same time
3 Mr. Jones admitted this, he also confirmed the City has no intention of ever conducting
4 SEPA review for the omitted section of the trail since it considers it categorically exempt
5 even though it is part of the same “proposal” or “action” under SEPA. In light of this
6 revelation at the hearing, the Appellants’ attorneys brought a motion asking the Hearing
7 Examiner to reverse the DNS because Mr. Jones’ testimony demonstrated that the DNS
8 violated the requirement in SMC 25.05.060.C.2 that “Proposals or parts of proposals that
9 are related to each other closely enough to be, in effect, a single course of action shall be
10 evaluated in the same environmental document.” The Hearing Examiner denied
11 Appellants’ motion, stating that Appellants had not timely raised this issue by including it
12 in their Notice of Appeal, even though evidence of SDOT’s intention not to conduct
13 SEPA review for the excluded portion of the permanent route first came to light at the
14 hearing during Mr. Jones’ testimony.

15 4.3 The SEPA checklist does not examine the environmental impacts of any alternative
16 routes: neither alternative streets, nor alternative alignments, nor alternative designs
17 within the streets that the City Council selected as “preferred” in 2003. Appellants
18 identified this lack of alternatives as one of their appeal issues in their Notice of Appeal,
19 but at the Pre-Hearing Conference the Hearing Examiner granted the City’s oral motion
20 to dismiss this issue even though the Hearing Examiner’s rules require such motions to
21 dismiss be in writing, and require the opposing party be given time to respond in writing.
22 The Hearing Examiner later denied two motions for reconsideration of this dismissal. At
23 the outset of the hearing, the Hearing Examiner told Appellants they were not allowed to
24 ask questions about the sections of the SEPA rules that require the consideration of
25 alternatives and she barred Appellants from examining witnesses about possible
26 alternative alignments or alternative designs. The Hearing Examiner also barred

1 Appellants from examining witnesses regarding the environmental impacts of the
2 permanent section of the trail along Shilshole Avenue NW. The Examiner did this even
3 though she denied Appellants' motion to reverse based on SDOT's piecemealing of
4 environmental review and even though SDOT acknowledged that it does not intend to
5 conduct SEPA review of this portion of the permanent route that the City Council
6 selected as "preferred." The Examiner's rulings barred any discussion or examination of
7 an entire section of the preferred route.

8 4.4 The SEPA checklist does not identify the safety issues that will be created by the
9 proposed trail, including, but not limited to, the fact that the trail will be a "sidepath," a
10 species of trail that all relevant studies demonstrate is more dangerous than streets
11 without any bicycle facilities in them, let alone streets with properly designed bicycle
12 facilities. The SEPA checklist does not identify or analyze the fact that the design of this
13 particular sidepath creates safety hazards in addition to those that are inherent in
14 sidepaths. This sidepath will be especially dangerous because its design lacks adequate
15 sight distances for the trucks, forklifts, and other vehicles crossing the trail at numerous
16 driveways and other crossings. This sidepath also will be particularly dangerous because
17 it lacks the minimum width required for safety on significant portions of the trail. The
18 checklist also affirmatively misleads the public by asserting that the trail will be 12 feet
19 in width when substantial portions of it will be less than that, narrowing to 8 feet in
20 sections. The SEPA checklist thus fails to adequately address safety by failing to inform
21 the decision-maker of the ways in which the proposed sidepath will fail to comply with
22 the standards that are required or recommended by all local, state, and national
23 regulations and guidelines.

24 4.5 The SEPA checklist does not identify or discuss the many land use goals and policies
25 with which the trail is inconsistent, including goals and policies in the City's
26 Comprehensive Plan that the City must act in conformity with, nor does the checklist

1 acknowledge or analyze the facts that demonstrate that the trail will have an adverse
2 impact upon the industrial and maritime businesses, including water-dependent uses, that
3 these City policies are intended to protect and promote. Undisputed evidence at the
4 hearing demonstrated that the trail will negatively impact and possibly require closure of
5 these industrial, maritime, and water-dependent businesses; and that the entire maritime-
6 industrial area along the Ship Canal may suffer. None of these facts are acknowledged in
7 the checklist.

8 4.6 The checklist fails to adequately or completely discuss impacts from lost parking. The
9 parking study conducted for the SEPA checklist was not prepared by a traffic engineer,
10 failed to accurately count the number of parking spaces that will be lost, failed to analyze
11 the lost parking on an entire segment of the trail, failed to identify or analyze the effect of
12 this lost parking on adjacent businesses or the maritime-industrial area, and is based on
13 the anecdotal and personal opinions of its author rather than upon studies.

14 4.7 Grace Crunican, the SEPA Responsible Official, signed the checklist on November 26,
15 2008. Appellants named Ms. Crunican as one of their witnesses, but before trial the City
16 moved to exclude Ms. Crunican as a witness and the Hearing Examiner granted the
17 motion. At the hearing, none of the City witnesses knew whether Ms. Crunican had done
18 anything to discharge her duties as SEPA responsible official. Neither Mr. Mazzola, the
19 staff person who prepared the checklist, nor the Project Manager, Kirk Jones, discussed it
20 with her, and they also did not discuss with her the many safety and land use issues
21 omitted from the checklist and its supporting documents. The City failed to introduce
22 any evidence that Ms. Crunican even reviewed the checklist; even if she did, however,
23 the evidence also demonstrates that she was not informed about the safety or land use
24 impacts of the proposed trail when she made the threshold determination because none of
25 this information in the checklist.
26

1 4.8 SDOT failed to give the SEPA checklist the required independent evaluation that SEPA
2 requires. Mr. Mazzola, who prepared the checklist, and Mr. Jones, who signed it, were
3 both part of the project team whose job was to get the trail built. On November 5, 2008,
4 twelve days before he signed the SEPA checklist, and twenty days before Ms. Crunican
5 signed the DNS, Mr. Jones wrote a letter to the Ballard Chamber of Commerce, telling
6 the Chamber that SDOT had no plans to prepare an EIS. And as stated above, even if one
7 assumes, in the absence of any evidence, that the SEPA responsible official read the
8 checklist, it did not inform her of any of the safety and land use impacts of the proposed
9 trail, nor did it adequately or accurately inform her of the trail's impacts on parking or the
10 businesses that depend on that parking. SDOT allowed the project manager and a staff
11 member, both of whom were project proponents, to write the SEPA checklist and make
12 the threshold determination, and their lack of independence and objectivity is manifest
13 throughout the checklist.

14 V. ASSIGNMENTS OF ERROR AND ADDITIONAL FACTS

15 Appellants hereby assign error to the following actions and decisions of SDOT and the
16 Hearing Examiner:

17 5.1 The Hearing Examiner's dismissal, at the Pre-Hearing Conference, of the "alternatives"
18 issue from the appeal, the denial of Appellants' motions for reconsideration on this issue,
19 and the related ruling at the hearing that prohibited Appellants from even asking
20 questions about the many sections of SEPA that require the analysis of alternatives.

21 5.2 The Hearing Examiner's dismissal, at the Pre-Hearing Conference, of any discussion of
22 compliance with the City's Shoreline Master Program and the Shoreline Management
23 Act.

24 5.3 The Hearing Examiner's refusal to reverse the DNS based on SDOT's failure to examine
25 the environmental impacts of that portion of the permanent route of the trail on Shilshole
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1 Avenue NW, even though this is the central portion of the “preferred route” chosen by
2 the City Council in Resolution 30583. SDOT’s exclusion of the environmental impacts
3 of this portion of the trail from the checklist constitutes “piecemealing” that is prohibited
4 by SEPA.

5 5.4 The Hearing Examiner’s denial of pre-hearing discovery to Appellants.

6 5.5 The Hearing Examiner’s dismissal from the appeal of the issue of SDOT’s compliance
7 with federal safety standards and guidelines.

8 5.6 The Hearing Examiner’s refusal to allow Appellants to call as a witness or question Ms.
9 Crunican, the SEPA responsible official who issued the DNS.

10 5.7 SDOT’s failure to demonstrate that it gave the checklist and the environmental impacts of
11 the trail the “independent evaluation” that SEPA requires.

12 5.8 The Hearing Examiner’s refusal to allow Appellants to supplement their exhibit list with
13 documents that Appellants managed to discover by means of Public Records Act requests
14 during the course of the proceedings despite the Hearing Examiner’s refusal to allow
15 Appellants to conduct discovery.

16 5.9 The Hearing Examiner’s repeated rulings that safety was relevant only indirectly, through
17 the issue of impacts on public services.

18 5.10 The Hearing Examiner’s repeated rulings that traffic hazards were relevant to this appeal
19 only through their impact on public services.

20 5.11 The Hearing Examiner’s repeated interpretation of the Notice of Appeal to narrowly limit
21 or eliminate the issues raised by the Appellants, including her *sua sponte* ruling barring
22 Appellants from examining witnesses or presenting evidence regarding numerous goals
23 and policies in the City’s Comprehensive Plan.

24 5.12 The Hearing Examiner’s exclusion of evidence offered by the Appellants to which the
25 other parties did not object.
26

- 1 5.13 The Hearing Examiner's multiple findings and conclusions in favor of the City that are
2 not supported by substantial evidence.
- 3 5.14 The Hearing Examiner's failure to make findings regarding un rebutted evidence
4 presented by the Appellants.
- 5 5.15 The Hearing Examiner's conclusion that it is sufficient compliance with SEPA for a staff
6 person to testify in an appeal hearing that he "thought about" or "considered" issues or
7 information not included in the SEPA checklist, including unspecified information
8 regarding the traffic hazards and other safety issues created by the trail, and the adverse
9 land use impacts of the trail, when those purported "thoughts" or "considerations" are not
10 documented in the checklist or any other SEPA document, when those "thoughts" or
11 "considerations" were not presented in any form to the SEPA responsible official before
12 she made her threshold determination.
- 13 5.16 The Hearing Examiner's conclusion that accidents between bikes and trucks that may
14 make it impossible for industrial-maritime businesses to continue in business, create mere
15 economic impacts that are not within the scope of SEPA, instead of traffic safety and land
16 use impacts that are squarely within SEPA's scope.
- 17 5.17 The failure of the checklist to adequately identify or examine the adverse impacts on
18 safety, including the traffic hazards created by the trail.
- 19 5.18 The failure of the checklist to adequately identify or examine the adverse land use
20 impacts of the trail, including but not limited to, the trail's incompatibility with existing
21 maritime, industrial, and water-dependent land uses.
- 22 5.19 The failure of both SDOT and the Hearing Examiner to recognize that the adverse
23 environmental impacts of the trail, in particular the safety and land use impacts, are
24 significant.
- 25 5.20 The Hearing Examiner's decisions that allowed the City and Intervenors to introduce
26 evidence created after the date the DNS was issued, and even after the hearing started,

1 while precluding Appellants from introducing similar recently-created evidence obtained
2 by means of Public Records Act requests.

3 5.21 The Hearing Examiner's reliance in her Findings and Decision upon documents not
4 introduced into evidence by any party, and for which she gave no notice that she was
5 taking official notice: City Council Resolution 30408 and the Ballard Corridor Design
6 Study.

7 5.22 The cumulative weight and effect of the Hearing Examiner's decisions and discretionary
8 rulings violate the appearance of fairness doctrine. These decisions include: the grant of
9 an oral motion to dismiss the "alternatives" issue at the prehearing conference; the refusal
10 to address issues that came to light during the trial, such as the "piecemealing" of the
11 environmental review of the portion of the trail along Shilshole Avenue NW; the refusal
12 to allow Appellants to present evidence that they discovered, despite the prohibition on
13 discovery, after the deadline for identifying exhibits; the grant of the motion to prohibit
14 Appellants from calling or questioning the SEPA responsible official about the threshold
15 determination that was the subject matter of the administrative appeal; the decisions to
16 exclude evidence being presented by Appellants to which the City and the Intervenors
17 had not objected, so that the Hearing Examiner in effect brought and ruled on her own
18 objections to Appellants' evidence; the Hearing Examiner's *sua sponte* decision to bar
19 Appellants from examining witnesses on subjects squarely within the Notice of Appeal
20 and to which the City and Intervenors had not objected; the decisions to allow the City
21 and Intervenors to introduce evidence created after the date the appeal was filed and even
22 after the appeal hearing commenced, while precluding Appellants from introducing
23 similar evidence obtained pursuant to Public Records Act requests; the failure to make
24 findings and conclusions about undisputed evidence presented by Appellants that
25 supports their appeal, while making findings and conclusions that are favorable to the
26

1 City but not supported by substantial evidence; and the Hearing Examiner's failure to act
2 consistently with the prior decisions of her office on SEPA issues.

3 5.23 Because of these multiple violations of SEPA and errors of the Hearing Examiner, the
4 underlying Action is invalid and void.

5 VI. CAUSES OF ACTION

6 Based on the Factual Summary and Assignments of Error stated above, Appellants
7 challenge the underlying Action, SDOT's DNS, and the Hearing Examiner's Findings and
8 Decision pursuant to the following causes of action.

9 A. Direct Review Under SEPA

10 5.1 Appellants bring this appeal under RCW 43.21C.075, which creates a cause of action for
11 challenging the Action, the DNS, and the Hearing Examiner's decision on the ground that
12 they are not in compliance with the substantive and procedural provisions of SEPA.

13 B. Statutory Writ of Review

14 5.2 In the event that this Court determines that direct review under RCW 43.21C.075 is not
15 available, then Appellants will have no plain, speedy and adequate remedy at law, and
16 Appellants will be entitled to a statutory writ of review, also called a writ of certiorari,
17 pursuant to Chapter 7.16 RCW. Appellants will note a hearing on their application for a
18 writ, pursuant to LCR 98.40, in the event that this Court determines that direct review
19 under RCW 43.21C.075 is not available.

20 C. Declaratory Judgment

21 5.3 In the event that this Court determines that neither direct review pursuant to RCW
22 43.21C.075 nor a statutory writ of review pursuant to Chapter 7.16 RCW is available to
23 Appellants, then Appellants seek a declaratory judgment pursuant to Chapter 7.24 RCW.
24
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1 **D. Constitutional Writ**

2 5.4 In the event that this Court determines that none of Appellants statutory causes of action
3 are available to review the subject decisions, then Appellants invoke this Court's inherent
4 constitutional jurisdiction to review the subject actions.

5 **E. Injunction**

6 5.5 In the event that the City should proceed with construction of the trail during the
7 pendency of this Appeal, then Appellants are entitled to a temporary restraining order and
8 preliminary and permanent injunctions pursuant to Chapter 7.40 RCW and CR 65 in
9 order to prevent irreparable harm from construction of the trail before its adverse
10 environmental impacts, and the impacts of reasonable alternatives, have been identified
11 and analyzed by the decision-maker.

12 **VII. RELIEF REQUESTED**

13 6.1 Appellants request this Court to reverse the Findings and Decision of the Hearing
14 Examiner, reverse the DNS, reverse the Action, and remand this matter to SDOT for
15 preparation of an Environmental Impact Statement or, at a minimum, for preparation of a
16 new SEPA checklist and threshold determination that

- 17 a) Adequately identifies and analyzes the adverse environmental impacts of the
18 interim and permanent routes that constitute the "preferred route" chosen by the
19 City Council in Resolution 30583, including the permanent route on Shilshole
20 Avenue NW that was not examined in the existing checklist and DNS;
- 21 b) Identifies and examines the impacts of reasonable alternatives to the "preferred
22 route;"
- 23 c) Examines the proposal's consistency with the Shoreline Management Act and the
24 City's Shoreline Master Program;

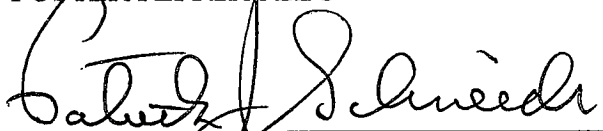
- 1 d) Identifies and analyzes the safety impacts of the proposed sidepath, including its
2 compliance with applicable design guidelines and standards for sight and stopping
3 distances and trail width;
- 4 e) Identifies and analyzes the parking and traffic impacts of the proposed trail; and
- 5 f) Identifies and analyzes the land use impacts of the proposed sidepath, including
6 its consistency with all applicable goals and policies in the Comprehensive Plan
7 and the City's Shoreline Master Program.

8 6.2 Appellants request appropriate injunctive relief prohibiting the City from constructing the
9 proposed trail during the pendency of this appeal; and

10 6.3 Appellants request such other relief as is just or equitable.

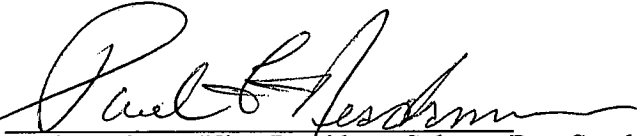
11 DATED this 14th day of July, 2009.

12 TUPPER MACK BROWER and
13 FOSTER PEPPER PLLC

14 

15 Richard L. Settle, WSBA No. 3075
16 Joshua C. Allen Brower, WSBA No. 25092
17 Patrick J. Schneider, WSBA No. 11957
18 Attorneys for Plaintiffs/Petitioners

1 VERIFICATION: I, Paul Nerdrum, hereby declare and affirm under penalty of perjury under the
2 laws of the State of Washington, that I have read the foregoing Complaint and believe the
3 contents to be true and accurate.
4

5 

6 Paul Nerdrum, Vice-President, Salmon Bay Sand & Gravel, Inc.
7 Signed at Seattle, Washington this 15th day of July, 2009.
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VERIFIED COMPLAINT - 21

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

EXHIBIT 1

**SEPA DETERMINATION OF NON-SIGNIFICANCE (DNS)
SEATTLE DEPARTMENT OF TRANSPORTATION
BURKE-GILMAN TRAIL EXTENSION – 11TH AVE NW TO THE BALLARD LOCKS**

Description of proposal: The Seattle Department of Transportation (SDOT) proposes to complete the "missing link" between existing segments of the Burke-Gilman Trail. The project will construct a marked, dedicated route for pedestrians and cyclists between 11th Ave NW and the Hiram M. Chittenden Locks, following the route adopted by the Seattle City Council in April 2003. Improvements include landscaping at key locations, storm water drainage controls, and traffic signals at two crossing points along Shilshole Ave NW. The trail is to be constructed in two phases: Phase 1 will construct the trail from 11th Ave NW to 17th Ave NW; Phase 2 will complete the trail between 17th Ave NW to the Locks. Construction will include both interim and permanent routes; interim portions of the trail will be indicated by directional signs.

Proponent and Lead Agency: SDOT, P.O. Box 34966, Seattle, WA 98124-4996.


Location of proposal: The project is located in the Ballard neighborhood of Seattle, Washington. The trail will generally travel along the south side of NW 45th St and Shilshole Ave NW between 11th Ave NW and the Ballard Locks, with portions of the trail traveling along Ballard Ave NW between 17th Ave NW and NW Vernon Pl and along NW Market St between 24th Ave NW and 28th Ave NW.

SDOT has determined that this proposal will not have a probable significant adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21C.030(2)(c). This decision was made after review of a completed environmental checklist and other information on file with the lead agency. This information may be examined in the Seattle Department of Planning and Development Public Resource Center at 700 Fifth Avenue, Suite 2000, Seattle. Documents are also available at the Ballard Branch of the Seattle Public Library, 5614 22nd Ave NW, Seattle and on the project website at <http://www.seattle.gov/transportation/ballardcorridor.htm>.

This DNS is issued under WAC 197-11-340(2) and Seattle Municipal Code (SMC) 25.05.340; the lead agency will not act on this proposal for 14 days from the issue date below. **Comments must be submitted by 5:00 p.m. December 10, 2008.**

Issue Date: November 26, 2008

SEPA Responsible Official: Grace Crunican, Director, SDOT



Signature

11-24-08
Date

Agency contact: Kirk Jones, Project Manager

Telephone: (206) 615-0862

Any interested person may appeal this DNS by submitting a Notice of Appeal and a \$50.00 filing fee to the Office of the Hearing Examiner located at 700 Fifth Avenue, Suite 4000, Seattle; mailing address: P.O. Box 94729, Seattle, WA 98124-4729; telephone: (206) 684-0521. **The appeal must be filed no later than 5:00 p.m. December 17, 2008.** The appellant should be prepared to make specific factual objections. See SMC 25.05.680 A(2)(a)(ii) for SEPA appeal procedures.

EXHIBIT 2

**FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE**

In the Matter of the Appeal of

Hearing Examiner File:
W-08-007

THE BALLARD BUSINESS APPELLANTS

from a Determination of Non-significance
issued by the Director, Seattle Department
of Transportation

RECEIVED

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FOSTER PEPPER PLLC

Introduction

Pursuant to the State Environmental Policy Act, Chapter 43.21C RCW, (SEPA), as adopted in Chapter 25.05 Seattle Municipal Code, the Director of the Seattle Department of Transportation issued a Determination of Non-significance for construction of the "missing link" of the Burke-Gilman Trail. The Ballard Business Appellants appealed the Director's determination.

The appeal hearing was held before the Hearing Examiner (Examiner) on April 6, 7 and 17, and May 8 and 11, 2009. Parties represented at the hearing were the Ballard Business Appellants, by Patrick J. Schneider and Joshua C. Allen Brower, attorneys-at-law; the Director of the Seattle Department of Transportation (SDOT), by Judith B. Barbour, Assistant City Attorney; and the Intervenor, Cascade Bicycle Club, by Jeffrey M. Eustis, attorney-at-law. The record was held open until May 22, 2009, to allow for the Examiner's site visit and submittal of the parties' closing arguments. The parties were also provided with an opportunity to respond to the Examiner's proposal to take notice of a map in the City's Master Bicycle Plan, although the Examiner ultimately determined that it was unnecessary to do so. Argument on other matters submitted after the close of the record is not part of the record and was not considered by the Examiner.

For purposes of this decision, all section numbers refer to the Seattle Municipal Code (SMC or Code) unless otherwise indicated. After considering the evidence in the record and inspecting the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal:

Findings of Fact

Background

1. The Burke-Gilman Trail is an improved mixed use trail constructed on former railroad right-of-way. The segment that is to extend from 11th Avenue Northwest to the Hiram M. Chittenden Locks (Ballard Locks) is referred to as "the missing link," as it will close the last gap in the Trail, which originates in Kenmore.

2. The developed portion of the Burke-Gilman Trail now ends at the edge of the Ballard Fred Meyer parking lot, and Trail users disperse onto various streets in Ballard between 11th Avenue NW and the Ballard Locks, including NW 45th Street and Shilshole Avenue NW. Cyclists must cross the railroad tracks in this area at an acute angle.

3. City Council Resolution 30408, adopted in 2001, directed SDOT to work with business and property owners, trail advocacy groups and community groups to complete a technical design study of options for a bicycle and pedestrian route between 11th Avenue Northwest and the Ballard Locks. The Ballard Corridor Design Study (2003) analyzed three alternative routes in terms of traffic, parking, safety and business operations and recommended one route, which it determined was also the safest route, as the "preferred route".

4. In 2003, the City Council adopted Resolution 30583 describing the preferred route for the trail. The Resolution directs SDOT to construct a new permanent trail along the south side of NW 45th Street from 11th Avenue NW to Shilshole Avenue NW; an interim trail or bike lanes along the south side of Shilshole Avenue NW to 17th Avenue NW; an interim signed bicycle route on 17th Avenue NW to Ballard Avenue NW, along Ballard Avenue NW between 17th Avenue NW and NW Vernon Place, and on Vernon Place between Ballard Avenue NW and Shilshole Avenue NW; a new permanent trail along Shilshole Avenue between NW Vernon Place and 24th Avenue NW; an interim trail on 24th Avenue NW from the rail corridor to NW Market Street, and along NW Market Street to 28th Avenue NW; a signed bicycle route on 28th Avenue NW to the rail corridor; and a new permanent trail on the north side of the railroad tracks from 28th Avenue NW to the Ballard Locks. Exhibit 20 at 3 and 7.

5. Resolution 30583 provides that to replace the interim routes, SDOT is to design and construct a permanent bicycle and pedestrian facility on Shilshole Avenue NW from NW 45th Street to NW Vernon Place, and a permanent trail on the railroad right-of-way from 24th to 28th Avenues NW. Exhibit 20 at 4.

6. Resolution 30583 also requires that SDOT collect baseline numbers on bicycle and pedestrian use of the Burke-Gilman Trail between 11th Avenue Northwest and the Ballard Locks, and then collect data on usage following construction to determine whether the public is using the interim sections of trail as intended, or deviating from the trail to follow the Shilshole Avenue and "Not 54th Street" (former railroad right-of-way) corridor. SDOT is to report its findings to the Council periodically and provide a recommendation for any modifications to the interim and permanent trail routes to encourage usage along the designated route. Exhibit 20 at 4-5. In addition, SDOT is to monitor preconstruction auto, bicycle and pedestrian accident data along the length of the route and for two years after the new route becomes operational. Exhibit 20 at 4.

7. The Comprehensive Plan's Transportation Element designates the preferred route for the missing link as a planned section of the City's Urban Trail System.

Proposal

8. The trail project is to be located entirely within City right-of-way except for the segment between 26th and 28th Avenues NW, where the right-of-way is too narrow for the trail, and the City must acquire a permanent easement across private property.

9. The project includes planned intersection improvements at Shilshole Avenue NW and 17th Avenue NW, and at Shilshole Avenue NW and NW Vernon Place. At Shilshole and 17th, a two-phase traffic signal with actuation by motor vehicles and pedestrians/bicyclists will be added along with a new eastbound left-turn pocket and a crosswalk across Shilshole Avenue on the west side of 17th Avenue. At Shilshole and Vernon, a new signal will be added to control all motorized and non-motorized traffic movements. The rail lines for the Ballard Terminal Railroad between NW Vernon Place and 24th Avenue NW will be relocated.

10. Resolution 30583 provides that the trail route is to be designed to "address safety concerns and to be compatible with water-dependent and industrial uses," and is to "ensure that the trail does not unnecessarily impede or delay" access to manufacturing and industrial businesses. "Examples of possible safety measures include pavement markings; regulatory, warning and wayfinding signs; pedestrian/bicycle signals; mechanical gates; mirrors; elevated crossings; etc." Exhibit 20 at 2.

11. Certain technical reports were prepared for the project, including a "No Effect Letter" under Section 7 of the Endangered Species Act, a "Cultural Resources Assessment" in response to Section 106 of the National Historical Preservation Act of 1966, a preliminary geotechnical evaluation, a final hazardous materials evaluation, and a transportation technical memorandum (Exhibit 8).

12. To determine non-motorized impacts on general-purpose traffic in the vicinity of the trail, the transportation report used a conservative projection of 50-100 pedestrian/bicycle crossings per hour in the two proposed new crosswalks at Shilshole and 17th Avenues NW and Shilshole Avenue and Vernon Place. This assumed the pedestrian phase signal would be triggered for each signal cycle.

13. The transportation report determined that the overall delay, level of service and queuing at the intersection of Shilshole and 17th Avenues would be significantly improved with the project, with a corresponding increase in traffic safety. For the intersection of Shilshole Avenue and Vernon Place, the report determined that there would be only modest signal-related delays for motorized and non-motorized traffic. The report also concluded that an "formalized trail alongside Shilshole Avenue will provide a safe environment for pedestrians and bicyclists to travel through this already heavily used corridor," that the new trail would provide a safe crossing of existing railroad tracks for bicyclists, and that the associated transportation improvements would improve safety overall for both motorized and non-motorized transportation modes. Exhibit 8 at 1, 5-7.

14. The consulting civil engineer for the project conducted a limited review of parking in the City right-of-way and on City property in the vicinity of the preferred route (Exhibit 9). Parking along the "not 54th" right-of-way, and weekend and nighttime counts, were not included in the review.

15. The limited review involved site visits over several days. The visits confirmed that right-of-way and City property along the preferred route is presently used for a railroad franchise that operates several times a week; driveways; private parking; private truck loading and unloading; and private business and contractor laydown areas; with most of the uses being unorganized and not expressly permitted by the City. The parking review noted the types of parking that currently utilizes various sections of right-of-way: commuting workers; delivery trucks; business customers; restaurant and nightlife patrons; Ballard Farmer's Market customers; and recreational vehicles and buses being used as housing.

16. Because the parking is unorganized, the number of vehicles parked within City right-of-way depends upon how the vehicles are parked on any given day. Using the average midweek day parking count, the parking review determined that the project would eliminate approximately 140 of approximately 480 available parking spaces. Although there would be improvements in parking efficiency that would add parking in certain areas, the study concluded that there would be a net loss of free, on-street parking along parts of the trail.

17. Based on a sample count from an aerial map, SDOT's Traffic Engineer estimated that approximately 2,000 on-street parking spaces are available within approximately a two-block area along the trail alignment. Because of the availability of other on-street parking and existing public and private off-street parking lots in the vicinity, any spill-over parking is expected to remain within the commercial-industrial area and should not affect nearby residential streets.

18. The project design team, including the consulting engineers, held extensive meetings with neighboring property owners to resolve access and operational issues created by the incorporation of City right-of-way into the trail, and by the juxtaposition of the trail and industrial/commercial facilities. In some cases, facilities located in the right-of-way are being redesigned to allow their continued use; in others, some operational changes will be required.

SEPA Checklist

19. Because the project required acquisition of additional right-of-way in a two-block area, it was not categorically exempt from SEPA and required preparation of a SEPA Checklist. The Checklist was prepared by the Senior Environmental Analyst in the Environmental Services Group of SDOT's Capital Projects Division. The Project Manager, a consultant to SDOT, was responsible for signing the Checklist.

20. In response to a Checklist question on the potential displacement of people and mitigation for displacements, SDOT stated that no businesses would be displaced, but that some would need to change the way they use the right-of-way as part of their business operations, and that SDOT would provide financial assistance for reconfiguring three loading docks currently located in the right-of-way. Exhibit 1 at 13.

21. In response to a Checklist question on the compatibility of the proposal with existing and projected land uses and plans, SDOT stated that the project is a transportation facility and will pass through industrial and commercial areas where the right-of-way is currently used by cyclists and pedestrians for recreation and commuting. SDOT also noted the project's various stormwater and intersection improvements, that signage, striping and paving will direct users along an organized path of travel, that signs will notify trail users of potential truck movements and business operations, and that driveways will be delineated with paint or pavement changes. SDOT also repeated the information from the parking study. Exhibit 1 at 15.

22. In response to the Checklist question, "What is the current comprehensive plan designation of the site?" SDOT stated that the Comprehensive Plan "designates this portion of the Burke Gilman Trail as a planned portion of the Urban Trail Network." Exhibit 1 at 14.

23. Under "Transportation," in the Checklist, SDOT discussed the information obtained from the parking review, and the project's relationship to the Ballard Terminal Railroad. In response to a Checklist question on how many vehicular trips per day would be generated by the completed project, SDOT stated that the project was not expected to generate additional vehicular trips but, instead, was intended to increase opportunities for non-motorized transportation. In this Checklist section, SDOT also discussed measures that are expected to improve overall organization and safety for all transportation modes as well as measures to reduce construction impacts. Exhibit 1 at 18-20.

24. In response to a Checklist question on whether the project would result in an increased need for public services, including fire and police protection, SDOT stated that it would not and discussed measures that SDOT would take during construction to avoid impeding emergency response vehicles.

SEPA Threshold Determination

25. The SDOT Environmental Analyst also prepared a recommended DNS for the project. The recommended DNS was based on the project plans; the SEPA Checklist, technical memoranda and the parking study; information acquired through discussions with the design team about the project and adaptations made to address adjacent property owner's concerns; City plans and regulations; and the Analyst's professional knowledge and experience and SDOT's experience in designing and constructing bicycle routes and other transportation improvements.

26. On November 24, 2008, SDOT issued a DNS for the project signed by the Department Director. A copy of the DNS is attached to the Notice of Appeal in the Hearing Examiner's file.

27. There was extensive testimony about the evaluation that led the Environmental Analyst to recommend a DNS. He considered existing conditions along the route and changes that would result from the project. He considered the Comprehensive Plan and the Bicycle Master Plan, including the fact that the preferred route was expressly included within both. He considered Comprehensive Plan goals and policies for the uses of industrial lands and maintenance of freight mobility, as well as Plan goals for encouraging alternative, non-motorized modes of transportation.

28. Specifically with respect to the neighborhood planning (Ballard/Interbay/North End Manufacturing and Industrial Center, "BINMIC") element, SDOT determined that policy 16 was internally inconsistent and relied on goal 11. Policy 16 supports BINMIC employees' commuting to work by bicycle and on foot but also supports locating recreational and commuter through trails away from industrial areas. Goal 11 supports commuting to work "to and through the BINMIC by bicycle and walking," but provides that operational requirements of adjacent property owners and users, and the safety of bicycle riders and pedestrians, must be considered in trail design and operation.

29. SDOT's Environmental Analyst was aware of the studies of the Ballard corridor in 2002 and 2003 that showed a need for improvements to organize traffic operations along the route. He also knew that the planned construction would improve intersection operations and provide more predictability and better direction for traffic. He determined that the project would make the right-of-way safer and more efficient for motorized and non-motorized vehicles and pedestrians.

30. The Analyst considered the existing industrial and commercial zoning in the area, noted that transportation facilities, including bicycle trails, are allowed in those zones, and considered the fact that the existing transportation uses of the project route would not change. He considered the concerns of adjacent landowners, the need to preserve existing land uses, and the design changes required to do so. He was aware that the project was providing funding for certain business owners to relocate parts of their facilities in the right-of-way and for the Ballard Terminal Railroad to relocate a portion of its tracks. He determined that facility and operational changes required of some businesses would have an impact that they may consider adverse, but decided that the impacts did not rise to the level of being significant. Therefore, he concluded that the project was consistent with adjoining property uses.

31. The Analyst considered whether the project would affect the ability of emergency responders to travel through the corridor or would increase demand for public services. He was aware of the number of accidents in a particular area on the proposed route but noted that police accident data identified them as primarily single bicycle accidents rather than collisions between bicycles and other vehicles. He also considered the fact that SDOT has extensive experience in building bicycle trails throughout the City and that

police reports showed that the number of accidents along those trails has been low. The Analyst testified that he considered the bicycle accident history on the route and along similar trails in the City together with project elements that would improve predictability by organizing travel, improving roadway surfaces, installing clear markings at driveways, installing warning signs, and improving traffic control for major intersections. In light of these factors, he determined that any adverse impact on public services would not be significant in light of the total size and scope of the City's public services.

32. The SDOT Environmental Analyst also considered the construction impacts of the project. He was aware that SDOT has lengthy experience in maintaining business access and minimizing disruptions as construction proceeds for a transportation project. He also knew that SDOT includes impact mitigation requirements in its contracts for construction work. He determined that construction impacts for the project would be adverse, but would be temporary and transitory in nature and would not rise to the level of significance.

Appeal

33. The appeal alleges that SDOT failed to review and analyze the current zoning and Comprehensive Plan designations for the area; and that the DNS and Checklist failed to disclose or discuss the proposal's inconsistencies with certain listed Comprehensive Plan goals and policies; incompatibility with existing industrial water-dependent uses, impacts on property access and level of service (LOS), construction related impacts, and impacts on public services. The appeal also alleges that the DNS and Checklist failed to adequately disclose or discuss proposed mitigation to avoid traffic impacts, impacts from lost parking, impacts from proximity to existing structures, impacts from property owners having restricted access to existing structures along the proposal route and being unable to perform building maintenance, and impacts on public services.

34. By prehearing order, several other issues raised in the Notice of Appeal, were dismissed. Also, issues concerning mitigation for impacts due to proximity of adjacent structures and restricted access to those structures, and impacts on owners' ability to maintain the structures (appeal issues 4.14, 4.15 and 4.16) were narrowed to allegations of project incompatibility with existing land uses, in accordance with SMC 25.05.444 B.2.a. Order on Director's Motion in Limine. At hearing, the Appellants withdrew Issues 4.1, 4.2, 4.7 and 4.11. Pursuant to SMC 25.05.680 and Hearing Examiner Rule 3.01(d), the Examiner limited the allegation in Issue 4.4 concerning Comprehensive Plan policies to the specific policies listed in the appeal issue.

Applicable Law

35. "When an agency initiates a proposal, it is the lead agency for that proposal." "Whenever possible, agency people carrying out SEPA procedures should be different from agency people making the proposal." SMC 25.05.926.

36. A proposed development requires an environmental impact statement (EIS) if there is a reasonable likelihood that it will have more than a moderate adverse impact on the quality of the environment. SMC-05-330, -782, and -794.

37. "Environment" means, and is limited to, those elements listed in Section 25.05.444 ... Environment and environmental quality refer to the state of the environment and are synonymous as used in these rules and refer basically to physical environmental quality."

38. As spelled out in SMC 25.05.444, the "environment" includes the built environment, including the relationship of the proposal to existing land use plans, vehicular traffic, parking, traffic hazards and public services, including fire and police services.

39. The lead agency determines whether an EIS is required through the threshold determination process. SMC 25.05.330. "The lead agency shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal" and may require more information of the applicant, conduct further study and consult with other agencies about the proposal's potential impacts. SMC 25.05.335.

40. If the responsible official "determines that there will be no probable significant adverse environmental impacts from a proposal," a determination of non-significance (DNS) is to be prepared. WAC 197-11-340(1).

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 25.05.680. The Department's DNS is to be accorded substantial weight, and the party appealing the decision bears the burden of proving that it is "clearly erroneous". SMC 25.05.680 B.3. A decision is clearly erroneous if the Examiner is "left with a definite and firm conviction that a mistake has been committed." *Moss v. Bellingham*, 109 Wn. App 6, 13, 31 P.3d 703 (2001)(citations omitted). SEPA requires "actual consideration of environmental factors before a DNS can be issued." *Norway Hill Preservation and Protection Ass'n. v. King County*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). The record must "demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Id.* at 276 (citation omitted).

2. The appeal issues are framed as claims that the "DNS and Checklist do not adequately disclose or discuss" various alleged project impacts. Yet nothing in SEPA requires that an agency's environmental review be completely contained within the Checklist and DNS. A DNS is simply a variation of a prescribed form and normally does not include an analysis of the proposal. *See, e.g.* SMC 25.05.970. An agency is required to review the Checklist, SMC 25.05.330 A.1, but it may also require more information of the applicant, conduct further study and consult with other agencies about the proposal's potential impacts. SMC 25.05.335. And it is expected that the agency will utilize its own knowledge and expertise in analyzing the proposal. As noted above, the question on

review is whether the agency actually considered environmental factors. *See Hayden v. City of Port Townsend*, 93 Wn. 2d 870, 881, 613 P.2d 1164 (1980), *overruled on other grounds, Save a Neighborhood Environment (SANE) v. City of Seattle*, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984). Therefore, the Examiner will review the appeal issues as if they were framed in terms of SDOT's actual consideration of the alleged project impacts.

3. The Appellants allege that SDOT failed to "review and analyze the current zoning and Comprehensive Plan designations" for the area and perceived inconsistencies with certain specified goals and policies of the Comprehensive Plan, but the record does not support this claim. The evidence shows that SDOT determined that transportation facilities, including bicycle facilities, are allowed in industrial and commercial zones and considered the fact that the transportation use of the route would not be changing. The evidence also shows that SDOT considered the Comprehensive Plan. Testimony from the SDOT Environmental Analyst demonstrated that he was familiar with applicable policies in the transportation, land use and neighborhood planning (BINMIC) elements of the Plan and considered them. However, he correctly determined that he was not required to include an analysis of each policy in the Checklist or DNS.

4. The Director's interpretation of BINMIC Goal 11 and Policy 16, on commuter bicycle trails through the BINMIC, was not shown to be clearly erroneous.

5. The evidence shows that in evaluating the impacts of the proposal, SDOT balanced Plan goals and policies supporting preservation of mobility and access for transport of freight with other goals and policies that encourage expansion of non-motorized means of transportation. There is no clear error here.

6. The Comprehensive Plan urban village goals and policies cited by the Appellants are designed to guide development of implementing regulations for industrial areas and have no application to development of a transportation facility within existing right-of-way.

7. The Appellants allege that SDOT failed to consider that the proposal is incompatible with existing industrial water-dependent uses, as property owners would be unable to perform building maintenance due to the project's alignment and its proximity to existing structures. However, testimony in the record established that maintenance of buildings abutting City rights-of-way is accomplished through a street use permit that in this case, would allow maintenance to be performed from the trail.

8. Appellants also claim that SDOT failed to consider the proposal's traffic impacts related to intersection LOS and property access, as well as mitigation for restricted access to existing structures adjacent to the project and for other unspecified adverse impacts caused by the project's proximity to existing structures. The Appellants provided no evidence on intersection LOS, but the Transportation Technical Memorandum analyzed it and found no deficiencies. The evidence on access concerns and proximity to structures shows that one property owner will need to redesign a loading dock located in the right-of-way, another will need to reconfigure forklift operations on its property to travel around the outside of the building, a third will need to use a flagger for truck-loading

operations in the right-of-way, and others will be required to follow Traffic Code regulations that require drivers to stop before emerging from a driveway and crossing a public path. *See* SMC 11.58.230. SDOT's determination that these were not significant adverse impacts, and that the trail was compatible with adjoining businesses, was not shown to be clearly erroneous. Thus, additional mitigation was not required.

9. The Appellants allege that SDOT failed to consider mitigation for traffic impacts and changes to traffic patterns. However, the Traffic Technical Memorandum determined that the LOS at the two key intersections would remain acceptable or improve with the project. Therefore, no mitigation for traffic impacts was required. The Appellants offered no relevant evidence on changes to traffic patterns.

10. Appellants allege that SDOT failed to consider mitigation for loss of parking resulting from the project. The Appellant's traffic engineer considered "available" parking spaces, rather than spaces actually used, and reviewed parking along the entire route. He estimated that 190, rather than 140, on-street parking spaces would be lost as a result of the project. Considering the amount of on-street and off-street parking available in the vicinity of the proposed trail, the loss of 190 parking spaces was not shown to rise to the level of a significant adverse impact. Thus, the Appellants did not demonstrate that mitigation for lost parking was required.

11. Appellants argue that SDOT was required to consider the project's impact on each adjoining business' need for on-street parking. The Appellants' cited no authority in SEPA for such a requirement, however, and the Examiner is aware of none.

12. No evidence was offered in support of the Appellants' allegation that SDOT failed to consider construction-related impacts. In any case, the evidence shows that SDOT has extensive experience in working with property owners to minimize construction-related impacts and includes construction mitigation requirements in its contract documents.

13. The Appellants claim that because the proposed route crosses "numerous, active industrial driveways and will be located next to an active railroad," it is not safe and will generate an increased demand for emergency services. Notice of Appeal at 5. They presented lengthy testimony on safety, citing the width of the trail at certain points, sight distances for vehicles exiting certain driveways along the trail, and the width of the separation between the railroad tracks and trail at some points. However, the Appellants did not show that SDOT failed to consider these potential impacts on public services, nor did they demonstrate that any adverse impacts on public services would be significant.

14. The Appellants cite the City's Right-of-Way Improvements Manual (Exhibit 2), Chapter 1020 of the WSDOT Design Manual (Exhibit 3), and the 1999 AASHTO "Guide for the Development of Bicycle Facilities" (Exhibit 30), and assert that the trail is inherently at traffic hazard because parts of it do not meet some of the width and sight distance standards in these publications. Section 4.13 of the City's Right-Of-Way Manual provides that "all bicycle facilities must comply with Chapter 1020 of the WSDOT Design Manual, which is consistent with the 1999 AASHTO Guide for the

Development of Bicycle Facilities.” (Exhibit 2 at §4.13) However, both the WSDOT Manual and AASHTO Guide include introductory provisions indicating that they are to serve as guidelines rather than mandatory standards. Exhibit 3 at §1020.01; Exhibit 30 at 1-2. The WSDOT Manual also provides that “[u]nique design problems are resolved on a project-by-project basis using guidance from the region's Bicycle Coordinator”. The fact that parts of the proposal do not meet some of the referenced guidelines does not demonstrate that it is inherently a traffic hazard.

15. The Appellants’ traffic engineer opined that a bicycle "side path" is inherently unsafe because drivers exiting driveways do not expect to have bicycles coming from the right. He also noted potential hazards at several driveways along the route. However, the engineer did not take into account the various tools at SDOT's disposal for adding predictability where driveways cross a trail. The evidence shows that SDOT has narrowed the trail and/or moved it away from property lines in some places to improve stopping sight distance; will remove existing impediments to sight distance, such as vegetation and fence posts; will use striping on the path and on driveways; and will install various warning signs and pavement surface changes at driveways. In addition, SDOT has authority to install signals for both drivers and bicyclists and, if necessary regulate the way certain existing driveways along the route are used. The evidence also shows that SDOT commonly uses these tools throughout the City.

16. The record shows that SDOT considered police accident data of one to two accidents per year for similar portions of the Burke Gilman Trail within the City, and anecdotal evidence of single bicycle accidents at the rail crossing on the existing route. However even if one accepts the 2008 Fire Department statistic, cited by the Appellants, of 37 aid responses, that number would represent less than one tenth of one percent of City aid responses per year. This was not shown to be a significant impact on the City’s public services.

17. Appellants argued that a bicycle/truck accident at an adjacent business’ driveway along the route could make it impossible for that business to continue, and that SDOT did not consider this impact on adjacent businesses. However, economic concerns are not included in SEPA's list of the elements of the environment. *See* SMC 25.05.444. "SEPA contemplates that the general welfare, social, economic and other requirements and essential considerations of state policy will be taken into account" by the decision-maker. SMC 25.05.448. Even an "environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision." *Id.* SDOT was not required to consider potential economic impacts of the proposal as part of its SEPA process.

18. The Appellants argue that SDOT failed to demonstrate that it independently evaluated the impacts of its own proposal. This issue was not included in the appeal and cannot be raised for the first time in closing argument. In any case, SDOT complied with SMC 25.05.926 by having someone other than a member of the project design team handle SEPA compliance, and the evidence showed that the Environmental Analyst did perform an independent review of the project’s impacts.


19. The Appellants argue that SDOT failed to compare the impacts of the trail in its proposed locations "with the impacts in another location, even elsewhere on the same streets". Appellants' Closing Brief at 7. This issue was not included in the appeal and cannot be raised for the first time in closing argument. A claim of failure to consider that the "same proposal may have a significant adverse impact in one location but not in another," SMC 25.05.330 C.1, could be viewed as part of appeal issue 4.13 on alternative alignments for the project, but that issue was dismissed by prehearing orders.

20. Although the Appellants strongly disagree with the City's decision to locate the missing link of the Burke-Gilman Trail within this busy industrial area, the wisdom of the proposal is not before the Examiner. Giving substantial weight to the Director's DNS, and considering the entire record in light of the policy of SEPA, the Examiner is not left with a definite and firm conviction that a mistake has been committed.

Decision

The Director's Determination of Non-significance is **AFFIRMED**.

Entered this 9th day of June, 2009.


Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner in this case is the final SEPA decision for the City of Seattle. Judicial review under SEPA must be of the decision on the underlying governmental action, if any, together with its accompanying environmental determination. Consult applicable local and state law, including SMC 25.05.680 and RCW 43.21C.075, for further information about the appeal process.

The person seeking review must arrange for and initially bear the cost of preparing a verbatim transcript of the hearing. Instructions for preparation of the transcript are available from the Office of Hearing Examiner, PO Box 94729, Seattle, Washington 98124-4729, (206) 684-0521.

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