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**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD
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BALLARD TERMINAL RAILROAD COMPANY, L.L.C.

PETITION FOR DECLARATORY ORDER

**VERIFIED REPLY OF THE CITY OF SEATTLE, WASHINGTON
IN OPPOSITION TO THE PETITION FOR DECLARATORY ORDER**

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I. Summary of Argument

The City of Seattle, Washington (“Seattle” or “the City”), hereby replies to the Petition for Declaratory Order, filed herein on December 12, 2018, by Ballard Terminal Railroad Company, LLC (“Ballard Terminal” or “BTRC”), and urges that the Board dismiss or deny the Petition.

Ballard Terminal’s claims against Seattle are, at their core, a dispute with the City over the implementation of a September 14, 1997, Operating Agreement (“Operating Agreement”) between Ballard Terminal and the City.¹ As explained in further detail below, and as established in longstanding Board precedent, the Board does not resolve contractual disputes and leaves those legal disputes to the state courts.² Given the legal and contractual nature of Ballard Terminal’s claims, the Board should adhere to its long-standing precedent and let a court resolve issues over the implementation of the Operating Agreement.

The Operating Agreement that is at the center of this dispute (and figures prominently in Ballard Terminal’s Petition) is a contract governed by laws of the State of Washington and addresses two specific and important objectives: (1) the preservation of rail service on a railroad known as the “Ballard Line,” which runs in a street right-of-way along NW 45th Street and Shilshole Avenue in the Ballard neighborhood; and (2) the City’s construction of the remaining

¹ As explained in further detail *infra*, the City is the successor-in-interest to the original contracting party, Adventure Trail, a non-operating Internal Revenue Code section 501(c)(3) corporation. The terms of the Operating Agreement reflect the original signatories’ understanding and intent that Adventure Trail would assign its rights and obligations under the contract to the City.

² See, e.g., *Eastside Community Rail, LLC – Acquisition and Operating Exemption – GNP RLY, Inc.*, slip op. at 7–8, STB Finance Docket No. 35692 (served Dec. 13, 2018). See also cases cited at note 67, *infra*.

segment of the Burke-Gilman Trail (“Trail”) in the same vicinity. The Trail is a regional multi-use trail that is 20 miles in length and is continuous with the exception of a 1.4-mile long segment in the Ballard neighborhood of Seattle that is known as the “Missing Link.” The Operating Agreement memorializes the parties’ agreement for achieving both objectives, including, specifically, the City’s right to construct and maintain the Missing Link Trail segment in the vicinity of the Ballard Line. In that Operating Agreement, Ballard Terminal expressly agreed that both the Trail and the rail line could exist within the ROW.³ Moreover, under that Operating Agreement, Ballard Terminal also expressly agreed that, if it were necessary to move the subject rail line within the ROW to accommodate the Trail, Ballard Terminal would do so, at the City’s expense. Ballard Terminal’s claims in its Petition amount to nothing more than an effort to litigate the terms of the Operating Agreement or use the Surface Transportation Board (“STB” or “Board”) to circumvent it entirely.

While Ballard Terminal advances a different interpretation of the material terms of the Operating Agreement, ultimately, that is a matter for a court, not the STB, to resolve. Precisely because the City has been unable to resolve this dispute with Ballard Terminal, on January 17, 2019, the City of Seattle filed a civil Complaint against Ballard Terminal, in King County Superior Court, King County, Washington (Docket No. 19-2-01794-5 SEA) to determine the parties’ respective rights and obligations under the Operating Agreement in effect and binding on the parties. That is the proper forum for resolving this dispute over a contract.

³ Here, the use of the term “right of way” (or “ROW”), in the Operating Agreement, refers to a street right-of-way, within which both the rail line and the Trail would exist. Ballard Terminal’s Petition may leave the reader with the impression that the term was intended to apply primarily to a right-of-way primarily, if not exclusively, for rail use. Accordingly, we will use “Street ROW” where that is the appropriate term, and “railroad ROW” where that may be more appropriate.

Even if Ballard Terminal's Petition raises issues that could potentially be within the Board's purview, the Board should nevertheless follow its precedent and dismiss the Petition without prejudice. That approach would allow the King County Superior Court to adjudicate the case brought by the City before determining whether anything remains to be decided by the Board, to avoid any conflict with the Court's rulings.

Finally, if the Board were to depart from its precedent and institute proceedings to reach the merits, it should nevertheless rule in the City's favor. Ballard Terminal's position is entirely unfounded. The only conceivable issue that could be before the Board under the Board's authority to regulate railroad operations and the Board's governing precedents,⁴ is whether the Trail will interfere with continued railroad operations. Here, the short answer is "no." The City will maintain the required minimum clearance of 8'6"—which is both the clearance required by regulation in the State of Washington and which conforms to industry standards.⁵ Given that the City will maintain necessary clearances to allow Ballard Terminal to continue its rail operations on the line, the Board has no jurisdiction to preempt Seattle's actions, because the Board's only authority, in a declaratory setting such as this, is to determine if there would be any significant interference with a railroad's operations.

⁴ E.g., *CSX Transportation, Inc.—Petition for Declaratory Order*, slip op. at 5–6, STB Finance Docket No. 33388 (Sub-No. 101) (served Aug. 27, 2008) ("*CSX Transportation*") (concluding preemption of the sale Agreement between the parties "is not necessary to allow CSXT to continue its rail operations on the line . . ."); *id.* at 6 ("We can assume that Conrail [the prior owner of the line] would not have entered into an agreement that would substantially interfere with its business. To the contrary, it is apparent that in reaching the Agreement, Conrail determined that the reserved easement would permit it to continue to provide rail service over the rail line traversing the Property.").

⁵ As explained in further detail, below, Ballard Terminal's references in its Petition to 10' clearances are not to a regulatory requirement nor are they based on industry practice. Rather they are based on Ballard Terminal's contested interpretation of the Operating Agreement, which will be adjudicated by the King County Superior Court.

More generally, the Missing Link will not interfere with rail operations because the Street ROW is sufficient to accommodate both.⁶ Indeed the Operating Agreement memorializes Ballard Terminal's understanding and agreement that the Street ROW at issue would allow both railroad operations and the Burke-Gilman multi-use Trail within the Street ROW. The terms expressly contemplated the types of improvements the City proposes, in general and in the vicinity of the three specific aspects of Ballard Terminal's operations highlighted in its Petition: the Western Pioneer Spur; the track along 45th Street NW; and "Not 54th Street." Ballard Terminal agreed to those terms, demonstrating that it believed improvements consistent with those terms would permit it to carry out its railroad operations without interference.⁷

Even without the Operating Agreement, there is no merit to Ballard Terminal's claims of interference. Seattle has retained the services of Mr. Stephen Sullivan of R.L. Banks and Associates, Inc., an independent consulting firm, to review the ROW and determine if the Trail would significantly interfere with Ballard Terminal rail operations, and whether Ballard Terminal can safely continue those operations while the City constructs the Missing Link and it is put into use. Mr. Sullivan, a more-than-40-year veteran of the railroad industry, unqualifiedly concluded that use of the Trail and Ballard Terminal rail operations may safely co-exist within the existing ROW.

⁶ This would be true even if those rail operations were extensive, but, in its Petition, Ballard Terminal failed to inform the Board that it moves only a few railcars per week, in one train, over the rail line at issue. Moreover, it currently only has one shipper—Salmon Bay Sand & Gravel Company, which is owned by Ballard Terminal's primary owner. Seattle Ex. No. 1 (Sullivan Verified Statement at 2). So, the times when the Trail would be in use and the railroad might be moving rail cars will be very infrequent, further demonstrating that the Trail will not interfere with rail operations.

⁷ Cf. *CSX Transportation*, *supra* n.6, slip op. at 5 (noting that the fact that railroad agreed to the sale agreement's terms suggests that the agreement's implementation would not interfere with railroad operations).

The Board should adhere to its longstanding precedent and allow the King County Superior Court to decide this contractual dispute. But even if the Board reaches the merits, the Board should conclude that the Street ROW can accommodate both the Ballard Terminal rail line, and the Burke-Gilman Trail, without interference with Ballard Terminal's rail operations. That being the case, the Board does not have authority to preempt the City's actions in attempting to complete the "Missing Link" for the use of its citizens.

II. Background

A. The Burke-Gilman Trail and the "Missing Link."

The Operating Agreement and railway franchise at the heart of this dispute address two specific and important goals: the City's construction of the so-called "Missing Link" to complete the Burke-Gilman Trail, and the preservation of rail service on the Ballard Line.⁸

The Burke-Gilman Trail is a regional multi-use trail in Seattle that runs east from Golden Gardens Park in the Ballard neighborhood of the City of Seattle and eventually connects to the Sammamish River Trail in the City of Bothell. Even without the completion of the "Missing Link," in a critical part of the Trail not far from downtown Seattle, the Trail is one of Seattle's most heavily used pedestrian and bicycling facilities, and it is used by both recreational users and commuters.⁹

The Trail traces its origins to a Seattle-based railway founded by Thomas Burke, Daniel Gilman, and ten other investors in 1885. Burlington Northern eventually acquired the line but

⁸ As stated in the Petition, the Ballard Line refers to the short-line railroad that Ballard Terminal operates, between milepost 0.09 and the end of the line at milepost 2.70, of a rail line previously owned by The Burlington Northern and Santa Fe Railway Company ("BNSF"). Petition at 8.

⁹ Seattle Ex. No. 3 at 1-1-1-4 (Final Environmental Impact Statement for the Missing Link Project ("FEIS")). The FEIS is a public governmental record available on the City's website, at <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project#projecthistory> (under the "Project History" heading)).

applied to abandon a majority of it in 1971.¹⁰ Seattle's citizens advocated for development of a trail along the old rail line. In 1978, the first 12.1 miles of the abandoned ROW opened as a public trail, and the City named the Trail after the founders of the original railroad.¹¹

Today, the Burke-Gilman Trail runs along a continuous 20-mile route, with the exception of the 1.4-mile-long Missing Link in the Ballard neighborhood. The Missing Link is bounded at one end where the Trail currently ends at 30th Avenue NW, near the Ballard Locks on the west, and at the other end where the Trail begins again at the intersection of 11th Avenue NW and NW 45th Street on the east.¹² While the City has evaluated several alternative routes to complete the Missing Link and complete the Burke-Gilman Trail (as described in further detail, below), its "Preferred Alternative," for which the City has advanced detailed designs for construction, runs primarily on Shilshole Avenue NW, in the vicinity of the Ballard Line. The map below shows the Preferred Alternative in a dotted red line, along with the other alternative routes the City analyzed.¹³

¹⁰ City of Seattle, Seattle Department of Transportation, Burke-Gilman History, <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project/burke-gilman-trail-history> (last visited Jan. 22, 2019).

¹¹ City of Seattle, Seattle Department of Transportation, Burke-Gilman History, <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project/burke-gilman-trail-history> (last visited Jan. 22, 2019).

¹² Seattle Ex. No. 3 at 1-1 (FEIS).

¹³ Seattle Ex. No. 3 at 1-6, Figure 1.2 (FEIS).



Figure 1-2. Proposed Alternatives

Within the Missing Link project area depicted in the above map, the Ballard Line exists entirely within the confines of the City's street ROW and runs through the Ballard industrial neighborhood, which sees traffic from freight trucks and vehicles. A large number of pedestrians and cyclists also currently travel on the City street ROW along Shilshole Avenue to get from one end of the Trail to the other, because it is the most direct route between the Trail's existing end points.¹⁴ Under existing conditions, parking is unregulated, no designated trail facilities exist, and only sporadic sidewalks are available in this area.¹⁵ As a result, cars frequently park on or

¹⁴ Seattle Ex. No. 3 at 1-7 (FEIS).

¹⁵ *Id.*

very near the tracks, and cyclists and pedestrians travel in the vehicle travel lane or the tracks. Existing conditions are depicted in the following photographs:¹⁶



¹⁶ Seattle Ex. No. 5, Hr'g Exs. R-48, A-25; Seattle Ex. No. 9 (Additional Photos of Ballard Line and Ballard Terminal Operations). As described in further detail below, the parties have litigated the adequacy of the FEIS for the Missing Link project. See Seattle Hearing Examiner File No. W-17-004, *In the Matter of the Appeal of The Ballard Coalition*. Seattle Ex. Nos. 3–7 are records from that proceeding, including FEIS excerpts (Seattle Ex. No. 3), photographs of existing conditions (Seattle Ex. No. 5), and excerpts from transcripts of the parties' witness testimony (Seattle Ex. No. 6).





B. The City Acquired the Ballard Line, and the City and BTRC Negotiated “Parallel” Rail and Trail Operations.

As summarized in the Board’s decision in STB Docket No. AB-544X, in the late 1990s, the City and other interested parties negotiated a plan that addressed the Ballard Line’s future and fulfilled the parties’ various goals—specifically, BNSF’s desire to abandon the unprofitable and embargoed line, the City’s desire to acquire the rail corridor in order to develop the final portions of the Trail, and certain shippers’ desire to preserve rail service.¹⁷ Two shippers formed BTRC with the intention of becoming the Ballard Line’s new operator and, as the Board’s decision summarized, the parties agreed Ballard Terminal would “continue to provide freight rail

¹⁷ Petition, App. D at 2 (*Sea Lion Railroad—Abandonment Exception—In King County, WA*, STB Finance Docket No. AB-544X (served Aug. 11, 1998)). At that time, there were four shippers. *Id.* at 4. Today, the only shipper on the Ballard Line is the owner of Ballard Terminal, the Salmon Bay Sand and Gravel Company. Seattle Ex. No. 1 at 2 (Sullivan Verified Statement).

service over a portion of the corridor while, at the same time, Seattle builds and maintains a parallel trail on a portion of the corridor.”¹⁸

As part of the parties’ plan, Adventure Trails, a Washington nonprofit doing business as Sea Lion Railroad (“Sea Lion”), acquired the Ballard Line from BNSF and became the line’s interim custodian.¹⁹ On September 14, 1997, Ballard Terminal and Sea Lion (as predecessor-in-interest for the City) entered into an Operating Agreement, in anticipation of the City’s future ownership of the corridor and the assignment of the Operating Agreement to the City.²⁰

The Operating Agreement refers to the Ballard Line as “the premises” or “the line” throughout the agreement.²¹ The premises runs from Seaview Avenue NW on the west and along Shilshole Avenue and NW 45th Street, at which point the premises run alongside the Trail’s existing eastern segment.²² The area in dispute (*i.e.*, the area within the Missing Link’s vicinity) is only a portion of the Ballard Line premises, and within the disputed area, the premises are entirely within the City street right-of-way.

The Operating Agreement’s stated purpose was “to preserve the line intact for rail use, trail use, and other compatible public purposes[.]”²³ The agreement recognized the City’s plan “for an extension of the Burke-Gilman Trail in the area between 11th Avenue and the Locks within the [Ballard Line] premises.”²⁴ The Operating Agreement specifically gives the City flexibility for implementation of a trail design within these areas by securing Ballard Terminal’s agreement that, upon request, it would “promptly” relocate its track “to accommodate trail

¹⁸ Petition, App. D, at 2–3.

¹⁹ *Id.* at 3.

²⁰ Petition, App. F at 1–2 (Operating Agreement (Sept. 14, 1997)).

²¹ *Id.* at 1.

²² *Id.* at Ex. D.

²³ *Id.* at 1.

²⁴ *Id.* at 11 (emphasis added).

construction” (at the City’s expense for all labor costs).²⁵ Additionally, Ballard Terminal agreed to “not engage in construction of rail or rail-related facilities which interfere with the trail to be constructed on the premises.”²⁶ In turn, the City agreed to construct the trail facilities “only in accordance with applicable regulations of [Washington Department of Transportation] or [Washington Utilities and Transportation Commission] relating to separation from centerline of rail,” while agreeing “as a matter of convenience” to provide ten feet of clearance between the rail line and the trail “where practical.”²⁷

Notably, the Operating Agreement does not define or restrict the Trail’s location, except in portions of the premises not subject to this dispute. The map that Ballard Terminal reproduces throughout its Petition, taken from Exhibit D to the Operating Agreement, depicts the entirety of the Ballard Line for illustrative purposes, but the actual terms of the Operating Agreement only incorporate and give effect to a limited portion of that map. The single reference to Exhibit D in the Operating Agreement in paragraph 10 states,

Owner and Operator agree that the trail (which, for this paragraph, may include pedestrian-only trail or path facilities, bicycle-only trail or path facilities, or some combination thereof) and railroad shall be constructed within the areas indicated in Exhibit D in all portions of the premises which are *not* in street right of way.²⁸

The underlined clause is critical because it limits Exhibit D’s applicability. The map in Exhibit D does not apply to the entire Ballard Line premises. Instead, the terms of the Operating Agreement only incorporate the portion of the map depicting the rail line where it operates outside the street ROW. That only occurs for the western-most end of the Ballard Line, along Seaview Avenue NW, where portions of the rail line premises are not in the street ROW and

²⁵ *Id.* at 10.

²⁶ *Id.* (emphasis added).

²⁷ *Id.* at 9.

²⁸ *Id.* at 8 (emphasis added).

where the Trail was long ago constructed. That western-most portion of the Ballard Line is well outside of the vicinity of the rail line premises at issue in this dispute. The map in Exhibit D has no bearing on the location of the Missing Link, where the rail line premises are entirely within the street ROW.

Consistent with the Operating Agreement's distinction between portions of the premises that are within or outside the City street ROW, Ballard Terminal's franchise agreement with the City includes a property description that identifies the specific portions of the Ballard Line that are within the City street ROW.²⁹ Because the portions of the Ballard Line that are relevant to this dispute are within the City street ROW, Exhibit D does not apply.³⁰

The City's grant of a 30-year railway franchise to Ballard Terminal, under Ordinance 118734, was also a part of the parties' plan. The franchise reiterates and reflects the general principles in the Operating Agreement. In the franchise, the City expressed its "long-held policy" of "support[ing] rail-served businesses," as well as its intent to "maintain a permanent linear corridor . . . for trail purposes" along the railroad ROW.³¹

The franchise gave Ballard Terminal the right to own and operate the Ballard Line on the City's property rent-free.³² In turn, the franchise agreement specifically reserved to the City "the

²⁹ Petition, App. G, Attach. A (Ordinance 118734 (Sept. 29, 1997)).

³⁰ Ballard Terminal's interpretation of Exhibit D is incorrect for other reasons as well. For example, Ballard Terminal argues the Missing Link must be constructed two blocks north of the railroad, on NW Leary Way/Ave., relying on Exhibit D's pink highlighting of NW Leary Way/Ave., labeled "Planned Bike Lanes." Petition at 7, 11. But the "Planned Bike Lanes" do not denote the Missing Link. As stated in paragraph 10, at the time of the Operating Agreement, the City had not decided whether the Trail would be pedestrian-only, bicycle-only, or a combination. These arguments and evidence, such as evidence of the original parties' understanding of the Operating Agreement, are part of the contractual dispute the City has brought before the King County Superior Court.

³¹ Petition, App. G at 1.

³² *Id.* at 2. At the time, the Ballard Line was not generating sufficient revenue to cover costs and service debt; nevertheless, Sea Lion represented to the Board that it believed Ballard

right to construct all public improvements (including trails) . . . across, underneath or above the tracks,” “full and complete right of access to any space occupied by such tracks and to all of said franchise right-of-way,” and the right to remove or relocate tracks, so long as such activities do not interfere with the railroad’s safe operation.³³ Like the Operating Agreement, the franchise did not define or identify a specific route for the Missing Link.³⁴

C. Ballard Terminal Litigated the Environmental Review of the Missing Link Project.

The Petition is not Ballard Terminal’s first challenge to the Missing Link project. On June 2016, the City prepared a Draft Environmental Impact Statement (“DEIS”) for the Missing Link project. Pursuant to the Washington State Environmental Policy Act (“SEPA”), the EIS’s purpose was to provide a detailed study of the existing conditions, probable significant environmental impacts, and project alternatives.³⁵ The DEIS analyzed four potential alternative routes, including the Leary Alternative, a route along NW Leary Way/Ave. (the route that Ballard Terminal claims the City is obligated to follow), as well as the Shilshole South Alternative along the south side of Shilshole Ave NW and NW 54th Street,³⁶ where Ballard Terminal’s tracks are located.³⁷

Terminal would be able to operate the line successfully by virtue of its ability to use the City’s property rent-free. Petition, App. D at 4.

³³ Petition, App. G at 3 (emphasis added).

³⁴ *Id.* The Petition cites Resolution 29474 (attached as Appendix E to the Petition) as support for placing the Trail in NW Leary Way/Ave. However, the Resolution was signed before the franchise ordinance and, unlike the franchise, is not binding law. Further, the Resolution describes the location as a “preferred” location and thus is not binding by its own language.

³⁵ Washington Administrative Code (“WAC”) 197-11-440.

³⁶ Seattle Ex. No. 3 at 1-5 (FEIS).

³⁷ *Id.* at 1-8–1-12.

The City solicited comments on the DEIS and received approximately 4,100 comments.³⁸ Of the comments that expressed a preferred route, 80% preferred the Shilshole South Alternative.³⁹ Based on the comments and on additional transportation analyses, the City developed and analyzed a Preferred Alternative in the FEIS.⁴⁰ The Preferred Alternative is largely similar to the Shilshole South Alternative, and it is the selected route for the Missing Link that Ballard Terminal challenges here.

The FEIS is a nearly 300-page document that extensively analyzed transportation and other impacts associated with each alternative, discussed the applicable transportation regulations and industry standards, and explained why the Preferred Alternative was ultimately selected. Among other considerations, the Preferred Alternative crosses the fewest intersections (which are associated with higher rates of injury-causing collisions⁴¹), improves the level of service at intersections, provides the best sight lines, and has lower freight truck volumes compared to the Leary Alternative.⁴² In contrast, the Leary Alternative has the highest number of intersection crossings of all the alternatives, worsens the level of service at intersections, reduces the sidewalk on one street by up to twelve feet, and has nearly four times the number of areas with sight distance concerns compared to the Preferred Alternative.⁴³

³⁸ *Id.* at 1-3.

³⁹ *Id.* at 1-5.

⁴⁰ *Id.* at 1-5-1-7.

⁴¹ *Id.*, App. B at 4-35-4-36 (Transportation Discipline Report (“TDR”) (May 2017)). The TDR, which was in Appendix B to the FEIS, provided more detailed data and technical information as a supplement to the FEIS.

⁴² *Id.* at ES-12-ES-14; 4-22.

⁴³ *Id.*

The FEIS also discussed the Preferred Alternative’s potential relocation of a portion of Ballard Terminal’s tracks.⁴⁴ The FEIS stated the track relocation would be coordinated with Ballard Terminal “so that impacts on rail operations would be minimized and so that rail operations could continue as before once construction is complete.”⁴⁵

Ballard Terminal and other entities, as members of an association called The Ballard Coalition, challenged the adequacy of the FEIS under SEPA.⁴⁶ After a six-day hearing, commencing November 29, 2018, including testimony about Ballard Terminal’s operations from Ballard Terminal’s general manager James Forgette (its witness herein) and owner Paul Nerdrum, the Seattle Hearing Examiner upheld the FEIS’s adequacy. With respect to potential railroad-related impacts, the Examiner concluded the FEIS “adequately disclosed the potential removal or relocation of railroad tracks,” and that “Appellant did not demonstrate that removal of railroad tracks would have a significant negative impact on the environment, or why coordination of such removal or relocation with rail owners would not mitigate impacts.”⁴⁷

The Ballard Coalition appealed the Examiner’s Findings and Decision to the King County Superior Court. The Superior Court issued its decision on the appeal on December 21, 2018. Although the Court concluded that the FEIS lacked sufficient information regarding the narrow and specific issue of some types of potential economic impacts to businesses, the Court

⁴⁴ *Id.* at 1-31–1-32.

⁴⁵ *Id.* at 7-36.

⁴⁶ Seattle Ex. No. 4 (Corrected Notice of Appeal, Seattle Hearing Examiner File No. W-17-004, *In the Matter of the Appeal of The Ballard Coalition* (June 9, 2017)). The filings in the SEPA proceeding are available on the Seattle Hearing Examiner’s website, at <https://web6.seattle.gov/Examiner/case/W-17-004>.

⁴⁷ Seattle Ex. No. 7 at 17 (Findings and Decision (Jan. 31, 2018)).

affirmed the FEIS's adequacy in all other respects, and specifically concluded that the FEIS's discussion of potential traffic hazards and safety impacts was adequate.⁴⁸

D. Ballard Terminal's Operations: Ballard Terminal Serves One Customer and Currently Operates in Direct Proximity to Vehicles, Pedestrians, and Cyclists.

As the Petition alluded, Ballard Terminal has only one customer—Salmon Bay Sand and Gravel (“Salmon Bay”).⁴⁹ In fact, Salmon Bay has been Ballard Terminal's only customer in the last three years, and in the last five to ten years, Ballard Terminal has had only one other customer.⁵⁰ In 2016, Ballard Terminal received approximately \$37,000 in total revenue and estimated that it hauled 120-130 cars.⁵¹ In 2017, it appears that Ballard Terminal increased its freight revenues to approximately \$67,000, implying that it transported approximately 200-225 railcars in 2017.

Ballard Terminal's current railroad activity is limited to moving approximately four rail cars of bulk materials to Salmon Bay approximately once per week.⁵² The train does not run on a regular schedule; instead, Ballard Terminal sets its own schedule for runs, in coordination with Salmon Bay.⁵³ Ballard Terminal currently operates in the middle of an active vehicle travel lane—NW 45th Street—and Ballard Terminal representatives testified that this placement “hasn't

⁴⁸ Seattle Ex. No. 8 (Order Granting in Part and Denying in Part Ballard Coalition's Challenge to the Adequacy of SDOT's EIS, King County Superior Court Cause No. 18-2-04988-1 (Dec. 21, 2018)).

⁴⁹ Forgette Verified Statement at ¶¶ 6, 7 (referring to Salmon Bay and stating that Ballard Terminal operates “depending on its shipper's needs”) (note use of the singular “shipper's”); *see also*, Petition at 13, 30 (same).

⁵⁰ Seattle Ex. No. 6 at 783–85 (Hr'g Tr., Paul Nerdrum (Nov. 29, 2017)). Paul Nerdrum is the vice president of SBSG and one of the owners of BTRC.

⁵¹ *Id.* at 1837–39 (Hr'g Tr., James Forgette (Dec. 5, 2017)).

⁵² *Id.* at 375–76 (Hr'g Tr., Tim Olstad (Nov. 28, 2017)). Tim Olstad is an SBSG employee.

⁵³ *Id.* at 405.

been a problem” for Ballard Terminal’s operations.⁵⁴ Contrary to Ballard Terminal’s claim that it “actively uses” the Western Pioneer Spur,⁵⁵ Ballard Terminal last used the spur for transloading over five years ago. Otherwise, Ballard Terminal has used the spur for occasional storage of parked railcars.⁵⁶ Moreover, Ballard Terminal’s alleged “improvements” to the Western Pioneer Spur⁵⁷ were made without notice to, or permission from, the City, and to the extent said improvements interfere with the proposed trail, constitute a breach of the Operating Agreement, as to which the City has now filed suit against Ballard Terminal.⁵⁸

E. The Missing Link’s Design Improves upon Existing Conditions and Safely Accommodates Parallel Rail and Trail Operations.

As described in text and depicted in photographs in section II.A and Seattle Ex. No. 9, above, under current conditions, a variety of modes of transportation use the street right-of-way in the vicinity of the Missing Link (truck, passenger vehicle, rail, pedestrian, and bicycle) but there are no dedicated bicycle facilities, parking is unregulated, driveways are undefined, and sidewalks are scarce. As a result, these existing conditions are generally unsafe for vehicles, pedestrians, and cyclists. During the SEPA hearing, the Ballard Coalition’s own transportation engineering expert characterized the existing conditions as “haphazard” and “disorganized.”⁵⁹ One of the Missing Link’s purposes is to improve upon these existing conditions by providing clearly designated travel lanes, trail facilities, and parking locations within the City street right-

⁵⁴ *Id.* at 773 (Hr’g Tr., Paul Nerdrum (Nov. 29, 2017)).

⁵⁵ Forgette Verified Statement at ¶ 15.

⁵⁶ Seattle Ex. No. 6 at 1826–27 (Hr’g Tr., James Forgette (Dec. 5, 2017)). At the hearing, Mr. Forgette testified that Salmon Bay last stored cars sometime in 2016.

⁵⁷ Petition at 20.

⁵⁸ Seattle Ex. No. 2 at ¶¶ 4.40, 4.41, 7.3 (Complaint for Declaratory Judgment, Injunctive Relief, and Breach of Contract, *City of Seattle v. Ballard Terminal Railroad Company*, Case No. 19-2-01794-5-SEA, No. 19-2-01794-5 SEA (“Complaint”)); *see also* Petition, App. F at 10.

⁵⁹ Seattle Ex. No. 6 at 454 (Hr’g Tr., Scott Kuznicki (Nov. 28, 2017)).

of-way, consistent with applicable regulations and industry design standards for vehicles, trails, and railroads.

Importantly, for this dispute, the current Missing Link design fulfills that purpose by allowing for safe, parallel rail and trail operations, as detailed in Mr. Sullivan's accompanying Verified Statement. Mr. Sullivan testifies that, in his professional judgment (based on 43 years' experience in the railroad industry), the required minimum clearance of 8'6" from the center line of the rail tracks to the edge of the Trail will assure that the Trail will not interfere with railroad operations. Moreover, other improvements to the rail line and the Trail (all paid by the City) will ensure that the Trail will not cause safety issues with Ballard Terminal's operations.

Mr. Sullivan has also evaluated the three specific aspects of Ballard Terminal's operations that the Petition identifies: the Western Pioneer Spur; the track along 45th Street NW; and "Not 54th Street." As reflected in his expert report and described in further detail below, the City's planned improvements will not interfere with these three specific aspects of Ballard Terminal's Operations.

F. The City Has Sought to Reach Resolution with Ballard Terminal.

Aware of Ballard Terminal's opposition to the Missing Link project, the City has consistently attempted to reach resolution with Ballard Terminal. Because the Operating Agreement gives the City significant flexibility with the Trail's design and with track relocation, the City sought Ballard Terminal's input into the Missing Link's design. The City specifically invited Ballard Terminal to join the Design Advisory Committee, a committee formed to provide input on the design's development, but Ballard Terminal declined to join the committee. The City also shared design drawings with Ballard Terminal showing 30%, 60%, and 90% design. Ballard Terminal did not comment except on the 90% design. The City also engaged Ballard

Terminal in negotiations and discussions, up to and including the Deputy Mayor and representatives of the Mayor's Office, but all of these discussions were ultimately fruitless.⁶⁰

Moreover, even though the City's planned improvements will not significantly interfere with these three aspects of Ballard Terminal's rail operations, the City has also sought to resolve Ballard Terminal's opposition through advancements and minor revisions to the Missing Link's design.⁶¹ The design revisions call for relocations and adjustments to the Trail and track alignments as allowed by the terms of the Operating Agreement. Although these design alterations have not yet been released to the public because the design process is ongoing, Mr. Sullivan has also examined the alternative designs and has discussed them with the City's engineers. Mr. Sullivan concluded that the alternative designs for the Trail would not significantly interfere with BTRC's operations, because of the configuration of those designs (such as moving the Trail from between the main line and the spur) and because the Trail would be installed in compliance with the minimum-clearance requirement (8'6" from the center line of the rail tracks to the edge of the Trail) in the applicable regulation of the State of Washington (which is consistent with industry standards), and 10' where practical. Therefore, Mr. Sullivan

⁶⁰ Seattle Ex. No. 2 at ¶¶ 4.27–4.32 (Complaint).

⁶¹ The final design of the Missing Link is not yet 100% complete and is still subject to modification. In a few places, depending on the determinations yet to be made about that final design, the rail tracks will likely have to be moved to accommodate the Trail, while allowing rail operations to continue without interference. Seattle Ex. No. 1 at 401505 (Sullivan Verified Statement). The possibility of such track relocation was contemplated by the parties when entering into the Operating Agreement, and the Operating Agreement expressly preserves Seattle's right, as Owner, to compel Ballard Terminal to relocate its tracks (at the City's expense) to accommodate the Trail. Any disputes under the Operating Agreement about relocating the tracks are matters to be resolved in the litigation in King County Superior Court, not before the STB. It is notable that Ballard Terminal's witness Forgette did not claim in his Verified Statement that Trail construction or relocation activities would interfere with rail operations, presumably because he knows both that such construction would not interfere with Ballard Terminal's limited operations and because Ballard Terminal agreed to such construction and track relocation.

concluded that both the original design and the alternative designs would not significantly interfere with rail operations or prevent Ballard Terminal from fulfilling its common carrier obligations and that there is no basis for the assertions and conclusions of Mr. Forgette, Ballard Terminal's witness to the contrary.⁶²

Notwithstanding the City's efforts to resolve this dispute, Ballard Terminal continues to deny the City's right to construct the Missing Link, as evidenced in its pattern of conduct and in the Petition. On January 17, 2019 the City filed the civil Complaint against Ballard Terminal in King County Superior Court referred to *supra*.⁶³ The Complaint seeks a declaratory order that the City has complied with its obligations under the Operating Agreement and the railway franchise by designing the Missing Link in a manner consistent with the terms of the Operating Agreement, and that Ballard Terminal has breached its contractual obligations by denying the City's right to construct the Missing Link.

G. The City Will Not Construct the Relevant Portions of the Missing Link in April 2019.

Ballard Terminal's Petition mischaracterizes the City's timeline for construction of the Missing Link. The City's website, which the Petition cited, states that the City anticipates starting construction of Phase 1 only in the first quarter of 2019.⁶⁴ The website shows that the City anticipates starting construction of Phase 2 in the third quarter of 2019 at the earliest. As the Petition itself admits, Phase 2 is the "focus" of the Petition because it spans the portions of

⁶² Seattle Ex. 1 at 4–8 (Sullivan Verified Statement).

⁶³ See *supra* note 58.

⁶⁴ City of Seattle, Seattle Department of Transportation, Burke-Gilman Trail Missing Link Project, <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project> (last visited Jan. 22, 2019) (cited in Petition at 7 n.8).

the railroad that Ballard Terminal claims will be impacted.⁶⁵ The Petition does not allege any impacts from Phase 1, which spans between NW 54th St and NW Market St., and thus its construction timeline is not relevant to the Petition.⁶⁶

Moreover, the timeline on the City's website does not reflect the Superior Court's recent decision remanding the FEIS for additional economics analysis. As a result, the design and construction of Phase 2 have been delayed.

III. Questions Presented

1. Whether the Board should become involved in a matter of contract interpretation involving legal issues arising under the laws of the State of Washington, especially given that a legal action has now been commenced by the City of Seattle against Ballard Terminal in King County Superior Court, to resolve the same issues?

2. If the Board reaches the merits of Ballard Terminal's claims, whether construction of a 1.4-mile segment of an otherwise-completed trail in the City of Seattle, in compliance with the applicable minimum-clearance requirement in Washington State regulations, which is consistent with railroad industry standards for such clearances, would interfere with railroad operations on an adjoining rail line, especially one over which only about 3-4 rail cars (in one train) move per week, to one shipper?

⁶⁵ Petition at 19.

⁶⁶ Ballard Terminal's assertion that the City's construction plans "break[s] its promise to the Division I Court of Appeals" is false and misleading. *Id.* at 36. Ballard Terminal's claim is based on a statement the City made nearly ten years ago, in the context of an appeal of an earlier threshold step in the SEPA process, and thus is not binding or relevant here.

IV. Argument

A. **The Board Should Not Institute a Proceeding Because This is a Dispute About the Parties' Rights and Obligations Under Contracts between the Parties; Under the Board's Precedents, Contract Disputes Are to Be Resolved in Court, Not at the Board.**

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or to remove uncertainty.⁶⁷ Here, the Board should exercise its discretion not to institute a proceeding, because this is a controversy over a contract in effect between the parties, governed by Washington State law.⁶⁸ Accordingly, the dispute should properly be resolved in court, as the Board's precedents require, rather than by the

⁶⁷ *Santa Cruz County Regional Transportation Comm'n—Petition for Declaratory Order*, slip op. at 2, STB Finance Docket No. 36213 (served Oct. 24, 2018) (citing *Bos. & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 14 n.2 (1st Cir. 2003); *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); and *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 675 (1989)).

⁶⁸ “The Board does not interpret State or local law to determine if a potential trail sponsor is complying with such law.” *City of Fishers, City of Noblesville, & Hamilton County, Ind. Petition for Partial Revocation of Exemption*, slip op. at 10 & n.11, STB Finance Docket No. 36137 (served Dec. 21, 2018) (citation omitted); *Norfolk & Western Railway Co.—Abandonment Exemption—Between Kokomo and Rochester in Howard, Miami and Fulton Counties, IN*, slip op. at 12, STB Docket No. AB No. 290 (Sub-No. 168-X) (served May 4, 2005) (“Given the Board’s limited role under the Trails Act (discussed above), we leave it to individual states to interpret and enforce state and local requirements applicable to any particular trail” (citing *Central Kansas Railway, Limited Liability Company—Abandonment Exemption—In Marion and McPherson Counties, KS*, slip op. at 5, STB Docket No. AB-406 (Sub-No. 6X) (served May 8, 2001) (“*Central Kansas II*”)). In *Central Kansas II*, the Board stated: “But we are not expert at the interpretation of all of these nuisance statutes, which vary from jurisdiction to jurisdiction, and we have found that it would be inappropriate, if not impossible, for us to try to establish in the abstract a standard by which a trail sponsor could demonstrate its fitness to manage and maintain a particular trail. . . . Thus, we agree with the Conservancy that we should leave to authorities of the State of Kansas the responsibility to interpret and enforce any state or local requirements applicable to this particular trail. Should a Kansas court determine that the Conservancy has, indeed, failed to manage the trail in a lawful manner, then we remain available to consider whether the interim trail use authority should be revoked.” *Central Kansas II*, slip op. at 5.

Board. In other words, the Board, cannot resolve any claimed uncertainty⁶⁹ about the Operating Agreement; only a court can.

Ballard Terminal's dispute with Seattle is controlled by the terms of the Operating Agreement. That Operating Agreement is a binding contract. The Board recently determined, in a matter involving Ballard Terminal and (ironically) at Ballard Terminal's urging, decided not to institute a declaratory proceeding under a Petition filed by Snohomish County, Washington. Rather, the Board determined that the dispute there involved a matter of law and contract, i.e., who owned (and perhaps owns) the property there in dispute and at what times. The Board therefore adhered to its long-standing precedent and determined not to institute a proceeding, but rather to let a court decide the ownership issue, because the Board does not decide matters of contract or legal issues that arise outside the Board's authority under the Interstate Commerce Act.⁷⁰ So too, should it decline to institute a declaratory proceeding here. Instead, the Board should affirm that that the parties should resolve their dispute in court, as the City has already sought to do.⁷¹

It bears repeating that the terms of the Operating Agreement do not support Ballard Terminal's assertions in its Petition. Notably, under Section 10 of the Operating Agreement, Ballard Terminal accepted the right to operate its railroad in the Street ROW, which is owned by the City, with the explicit understanding that the City intended to construct the Burke-Gilman

⁶⁹ The City of Seattle does not believe there is any uncertainty about the meaning of the provisions of the Operating Agreement discussed herein, including Ballard Terminal's obligations thereunder, but it recognizes that Ballard Terminal may claim otherwise, in King County Superior Court.

⁷⁰ *Eastside Community Rail, LLC – Acquisition and Operating Exemption – GNP RLY, Inc.*, slip op. at 7–8, STB Finance Docket No. 35692 (served Dec. 13, 2018).

⁷¹ Although the City believes there are no issues subject to Board review, if the Board determines otherwise, the City maintains its right to have an evidentiary proceeding before the Board.

Trail in the same Street ROW. Ballard Terminal agreed to cooperate with the City with respect to the Burke-Gilman Trail, including that it would move its tracks within the same street ROW – at the City’s expense—if need be to accommodate the Burke-Gilman Trail. Finally, the Operating Agreement does not specify the location of the trail in the vicinity of the Missing Link. Ballard Terminal’s reliance on a map attached to the Operating Agreement is misplaced and ignores the controlling terms of the Agreement itself, which only incorporated the map for a limited purpose that is unrelated to the area under dispute. Ballard Terminal is now trying to turn that Operating Agreement on its head, by arguing that the Owner’s (*i.e.*, the City’s) Trail ought to be moved (as much as two blocks, onto a busy City street) rather than to accommodate the City and its Trail in accordance with Ballard Terminal’s contractual obligations. While Ballard Terminal’s arguments are far-fetched, they present, at best, a dispute over the implementation of the material terms of a contract. The Board has been consistent over the years in letting courts determine the parties’ respective rights and obligations under contracts in effect between the parties, like the Operating Agreement in this case. There is every reason it should do the same here, especially because there is a pending court case between the parties in Superior Court in King County, Washington.

In that case, the City seeks declaratory relief that, under the Operating Agreement, Ballard Terminal (1) accepted its contractually provided ability to operate trains in the City-owned ROW at issue with the understanding that the City intended to complete the Missing Link, and (2) agreed to cooperate with the City during the construction of the Trail, including with respect to any necessary change in the location of the tracks (entirely within the existing Street ROW). The City is confident that the King County Superior Court will enforce its rights (and those of Ballard Terminal) under the Operating Agreement, and will conclude that the City

has every right to finish the Burke-Gilman Trail in the same Street ROW as exists the Ballard Terminal rail line, because Ballard Terminal agreed to the terms described herein in the Operating Agreement. That is the proper forum to resolve this dispute.

Even if Ballard Terminal's Petition raises issues that could potentially be within the Board's purview, the Board should nevertheless follow its precedent and dismiss the Petition without prejudice. That approach would allow the King County Superior Court to adjudicate the case brought by the City before determining whether anything remains to be decided by the Board, to avoid any conflict with the Court's rulings. Alternatively, if the Board departs from its longstanding precedent and does not dismiss this Petition, it should at least hold its proceeding in abeyance while awaiting the Court's ruling.

B. If the Board Reaches the Merits, It Should Conclude That It Lacks Jurisdiction to Preempt the Actions of the City of Seattle in Attempting to Construct the Missing Link, Because the Trail Would Not Prevent or Interfere with Continued Rail Operations by Ballard Terminal.

If the Board reaches the merits, despite the City's contention that the dispute should be resolved by the King County Superior Court, the Board should nevertheless rule in the City's favor on the merits. Ballard Terminal's position is entirely unfounded. The construction and use of the Missing Link will not interfere with Ballard Terminal's Operations.

1. The Issue Is Whether Installation of the Missing Link Should Be Preempted Because It Would Interfere with Railroad Operations.

Under the Board's governing statute and precedents, when a railroad is seeking to preempt State or local action, the question before the Board is whether railroad operations may continue when contract rights are enforced.⁷² The Board can exercise its preemptive authority to intervene if an activity would significantly interfere with railroad operations. This stems from the underlying governing statute. Under the Interstate Commerce Commission Termination Act

⁷² See, e.g., *CSX Transportation*, *supra* note 4; see also cases cited *supra* note 67.

of 1995 (“ICCTA”), 49 U.S.C. § 10501(b), the Board has “exclusive” jurisdiction over transportation by railroad in the United States (with certain exceptions not here relevant, such as with respect to “mass transportation provided by a local governmental authority”).⁷³ Under that authority, the Board may determine if certain non-railroad-related activities would interfere with railroad operations. It follows that, if those non-railroad-related activities would not interfere with railroad transportation, the Board lacks jurisdiction, but rather the matter is one for other governmental entities (if any) to regulate.⁷⁴ For example, in *CSX Transportation*, the Board determined that, based on expert testimony, the air rights property interest at issue would not interfere with rail operations because the minimum-clearance requirements would be met. On that basis, the Board denied CSX’s petition for declaratory relief.

Therefore, if rail operations may continue, notwithstanding the State or local government’s actions (including proposed construction of a trail or minor relocation of a rail line), the Board lacks jurisdiction to preempt the proposed State or local action.⁷⁵ If there were

⁷³ 49 U.S.C. § 10501(c)(2)(A).

⁷⁴ E.g., *City of Fishers et al.*, *supra* note 67, slip op. at 10 n.11 (“The Board does not interpret state or local law to determine if a potential trail sponsor is complying with such law. *See also Norfolk & W. Ry –Abandonment Ex. – Between Kokomo and Rochester in Howard, Miami, and Fulton Ctys.*, AB 290 (Sub-No. 168X), slip op. at 12 (STB served May 4, 2005) (“[W]e leave it to individual states to interpret and enforce state and local requirements applicable to any particular trail”).

⁷⁵ Ballard Terminal asserts that “Under the ICCTA, only this Board has the authority to permit a local government to require a railroad, like BTRC, to remove, reconfigure, or relocate its rail facilities.” Petition at 16 (citing *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1012-13 (W.D. Wis. 2000)). That assertion is not correct; here, Ballard Terminal has expressly agreed, in Section 10(a)-(e) of the Operating Agreement with the City, to accommodate a trail within the ROW, so long as such is constructed in accordance with State of Washington-required minimum clearances, and relocate (within the existing ROW) its rail lines (at the City’s expense) to accommodate the Burke-Gilman Trail, so long as doing so would not interfere with rail operations.

Moreover, the Board has repeatedly determined that “replacing existing track with substitute track constructed nearby is not within the reach of 49 U.S.C. 10901 and 10903 if there is no effect on: (1) service to shippers; (2) the carrier’s territory or traffic; (3) competition; or (4)

no interference with rail operations, there would be no basis for this Board to become involved, as it has often recognized.⁷⁶

Ballard Terminal's analogy to other cases addressing the Board's preemption authority is also misplaced because it fails to acknowledge critical distinguishing facts.⁷⁷ Ballard Terminal relies on cases addressing the Board's preemptive authority to address "unilateral" actions of local governments to relocate rail lines or condemn railroad facilities that materially impact rail operations and create unsafe operating conditions.⁷⁸ The City of Seattle does not dispute that general proposition, but it is not applicable to the instant dispute.

Most importantly, Ballard Terminal ignores that the City is not acting unilaterally or taking any property. The City already owns the Street Right of Way upon which the railroad operates, and Ballard Terminal has already agreed to changes to the Ballard Terminal's facilities, up to and including relocation of tracks in the Operating Agreement. Hence, this matter and dispute is very different from other "unilateral" efforts to exercise authority over a railroad. Moreover, as explained below, construction and use of the Missing Link will not interfere with Ballard Terminal operations or create unsafe operating conditions.

the carrier's revenue or operating expenses," and that there is "an absence of jurisdiction" if the proposed relocation operates "in the same manner as the existing line, no shippers are involved, and no new competitive territory is reached." *The State of Texas – Petition for Declaratory Order Regarding Highway Construction in Tarrant County, TX*, slip op. at 2, STB Finance Docket No. 32589 (served Feb. 7, 1995) (citing *Denver & Rio Grande Western Railroad Co. – Joint Project – Relocation over Burlington Northern Railroad Co.*, 4 I.C.C.2d 95, 97-99 (1987)). Here, the relocation of Ballard Terminal line was agreed to by Ballard Terminal, will not affect service to shippers, territory or traffic, competition, revenues, or operating expenses, the Ballard Line will be operated in essentially the same manner as before, and no new competitive territory would be reached.

⁷⁶ E.g., *CSX Transportation*; see also authorities cited in note 67, *supra*.

⁷⁷ Petition at 16–18 (citing *City of Auburn v. US Gov't*, 154 F.3d 1025, 1031 (9th Cir. 1998), as amended October 20, 1998; *City of Marshfield*, 160 F. Supp. 2d at 1012-13; and *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005)).

⁷⁸ See Petition at 16, 18.

2. The Trail Will Be at Least 8'6" from the Centerline of the Rail Tracks, Which Is Both the Washington State Regulatory Standard and the Industry Norm.

The Missing Link will not interfere with railroad operations because it will maintain regulatory and industry-standard minimum clearances. Under Board precedent, a project that maintains minimum clearances does not interfere with rail operations.⁷⁹

In this case, because there is no applicable federal minimum-clearance requirement, the applicable minimum-clearance requirement here is 8'6" under the State of Washington's applicable regulation.⁸⁰ Here, as Mr. Sullivan shows, the Trail would be separated physically from Ballard Terminal's rail line by at least the required minimum clearance of 8'6" under the State of Washington's applicable regulation.⁸¹ Both compliance with that minimum-clearance

⁷⁹ See *CSX Transportation*, *supra* note 4, slip op. at 5–8 (concluding that there would be no interference with rail operations from a proposed building over the rail line that would be built with more than the necessary clearances).

⁸⁰ Seattle Ex. No. 1 at 5. (Sullivan Verified Statement).

⁸¹ Ballard Terminal discusses the *City of Lincoln* case at length, describing the clearance that would have been provided there as 7.5 feet, which the Court concluded was inadequate. Petition at 26 (citing *City of Lincoln*, 414 F.3d at 859). Ballard Terminal's Petition disingenuously then tries to alter the facts in this dispute between the City of Seattle and Ballard Terminal, using words such as "appears" and "approximately" to attempt to fit the facts here to those in the *City of Lincoln* case. Ballard Terminal states: "SDOT's new configuration is less safe because it does not provide enough space for BTRC to safely operate as the Missing Link appears to be approximately 7.5 feet from the center line of BTRC's main line track and the new spur." Petition at 24 (emphasis added). In fact, as Mr. Sullivan, the City's expert, explains, the minimum clearance for the Burke-Gilman Trail, including the Missing Link, would be 8' 6" (8.5 feet), which is the minimum clearance requirement imposed by Washington law. See Petition at 34, where Ballard Terminal noted that SDOT intends to maintain a minimum clearance of 8'6" between the Trail and vehicular traffic on City streets. So, Ballard Terminal knows that the minimum-clearance requirement is 8.5 feet, not "approximately 7.5 feet," and that the SDOT intends to adhere to that clearance requirement. This sort of unsupported allegation, which is contrary to the Operating Agreement and unsupported by any witness or other evidence, is not the sort of allegation on which the Board can rely. Cf. *CSX Transportation*, *supra* note 4, slip op. at 6 n.10 (refusing to give credence to speculative statements not supported by evidence in the record).

requirement, and Mr. Sullivan's opinion based on his extensive experience in the railroad industry, confirm that the proposed Trail will not interfere with continued rail operations.

Ballard Terminal's arguments that a wider clearance is required is based on its misinterpretation of the terms of the Operating Agreement. While the dispute over the terms of the contract should be left to the state court, Ballard Terminal's position is unfounded. Under Section 10(b) of the Operating Agreement the parties agreed that the operative standard would be that the Trail would be constructed in accordance with applicable DOT or WUTC (Washington Utilities Transportation Commission) minimum-clearance requirements.⁸² Because there is no federal (i.e., DOT) minimum-clearance requirement, the contract incorporates the state's minimum-clearance requirement of 8'6". Thus maintaining that minimum standard is also consistent with the general separation requirements found in the contract.

Section 10(b) of the Operating Agreement documents the City's intention "as a matter of convenience" to provide 10' separation "where practical." But, "where practical" is not a minimum requirement; it is aspirational only. Similarly, the documentation of an intention to provide 10' "as a matter of convenience" is not a binding contractual obligation, but has been maintained for much of the Trail.

Finally, even if the Board (or, more properly, a reviewing court) were to infer a binding contractual commitment to maintain 10' of separation, the Contract includes tools by which the City can provide that amount of separation. Specifically, Section 10(e) of the Operating

⁸² Footnote 2 of the Operating Agreement states: "The parties concur that the applicable regulations include WAC 480-060-050. [WAC 480-060-050 is the regulation that includes the minimum-clearance requirement of 8'6" described by Mr. Sullivan.] As a matter of convenience, Owner intends to provide a ten-foot separation where practical." (emphasis added). The use of the words "desired" and "where practical" in Section 10(b) clearly indicate that a 10' clearance was not agreed to nor was it required, notwithstanding Petitioner's arguments to the contrary.

Agreement provides that the Parties agreed that the Operator (Ballard Terminal) would cooperate in relocating its rail line to accommodate a new Trail segment: “Owner shall have the right to require Operator to relocate its track in order to accommodate trail construction in accordance with this agreement” Plainly, that allows the City to require Ballard Terminal (at the City’s expense) to relocate the tracks to accommodate the new trail construction. Ballard Terminal’s argument to the contrary is frivolous, in light of the clear language of Section 10(e). Similarly, the City could change the location of the Trail, as needed. These, however, are issues related to the interpretation of a contract to be resolved in King County Superior Court, and not by this Board, precisely because the project maintains minimum clearances to meet regulatory requirements and industry standards.

Moreover, Ballard Terminal has tried to pull the wool over the Board’s eyes, with pictures and a story that imply that there are regular, ongoing rail operations along the line, creating a regular and serious safety or operational problem for the railroad if the Trail is completed in the ROW. What Ballard Terminal did not tell the Board is that it has only one shipper – its owner, Salmon Bay Sand & Gravel Company⁸³ – for which Ballard Terminal moves about 4 rail cars/week, in one train. That is the entirety of the rail operations, except for parking rail cars, along the lines at issue. (And a parked rail car is not a threat to safety of the Trail users.)

So, the picture Ballard Terminal tried to paint in the Petition for Declaratory Order, of an active rail line that would be disrupted by a Trail alongside, is misleading. In any event, the

⁸³ Forgette Verified Statement at ¶¶ 6, 7 (referring to Salmon Bay and “its shipper’s” needs); Petition at ¶¶ 13, 30 (referring in both places to Ballard Terminal “shipper’s needs”—*i.e.*, in the singular).

Trail will be built with the required Washington-State separation from the rail line, to ensure safety.⁸⁴ That is all that is required of Seattle in order to complete the Trail.

Similarly, Ballard Terminal's arguments in its Petition for a different location for the Trail two blocks away are irrelevant. The merits of one route for the Trail, or another, are not for this Board to determine. Nevertheless, Ballard Terminal's position is incorrect. The City, as part of the required SEPA process of considering alternatives, considered the possibility of moving the Missing Link portion of the Trail to Leary Street, some two blocks away, where Ballard Terminal would prefer the trail to be located. The City determined that superimposing the Trail onto an active City Street would be less safe than constructing the Trail in the ROW. That is a judgment that this Board should respect and the relevant facts and circumstances are not before the Board.

3. The City's Planned Improvements at "Not 54th Street" Will Not Interfere with Rail Operations.

Contrary to Ballard Terminal's claims, the City's plans to pave a roadway over which the rail line travels in the City-owned section of "Not 54th Street" between 24th and 26th Streets adjacent to Ballard Terminal track will not interfere with Ballard Terminal's rail operations. As a preliminary matter, it bears repeating that Ballard Terminal has already agreed to allow the City make precisely this type of roadway improvement in the proximity of its rail operations.⁸⁵ The Operating Agreement sets the parameters (to which Ballard Terminal agreed) of the types of activity and improvements that are acceptable in the vicinity of its operations and will therefore

⁸⁴ *E.g., City of Fishers et al., supra* note 67, slip op. at 10 n.11 ("The Board does not interpret state or local law to determine if a potential trail sponsor is complying with such law.") (citation omitted).

⁸⁵ Petition App. F at 10 (stating that the City "shall have the right to require Operator to relocate its track in order to accommodate trail construction," and "Operator shall promptly move its track at [the City's] written request").

do not interfere with its rail operations.⁸⁶ Ballard Terminal's effort to invoke the Board's jurisdiction is an illegal attempt to circumvent the terms of a contract.

More generally, even in the absence of the Operating Agreement, the improvement of "Not 54th" will not interfere with rail operations, based on common industry standards and the opinion of the City's rail safety expert. Industrial rail operations are common throughout North America and occur in major urban settings just like those on Ballard Terminal. The interface of streets and railroad is the common nexus of providing rail service to warehousing, distribution, and manufacturing districts in cities such as Seattle. Rail operations in industrial settings routinely occur within, across, and adjacent to city streets. In fact, Ballard Terminal encounters all these industrial rail operating conditions in the performance of its service obligations today. The method of Ballard Terminal's operation will not change as a result of the City's improvements to "Not 54th" Street ROW planned by the City. The method of operation is prescribed by the Code of Federal Regulations ("C.F.R.") and applies to common carriers such as Ballard Terminal. Ballard Terminal will continue to operate over Federal Railroad Administration (FRA) Class 1 regulated track not exceeding 10 MPH (49 C.F.R. § 213.9), ensuring leading movement point protection, ability to stop within ½ range of vision short of train, obstruction, switch improperly lined, or broken rail (Restricted Speed 49 C.F.R. 236.812). As such, the planned improvements by the City of Seattle to "Not 54th" will not prevent Ballard Terminal from performing its common carrier service obligations.⁸⁷

⁸⁶ *CSX Transportation*, *supra* note 4, slip op. at 5 (noting that railroad's consent to agreement suggests that the agreement's implementation would not interfere with railroad operations).

⁸⁷ Seattle Ex. 1 at 3–4 (Sullivan Verified Statement).

4. The City's Planned Improvements near the Western Pioneer Spur Will Not Interfere with Rail Operations.

Contrary to Ballard Terminal's arguments, the planned improvements will not interfere with Ballard Terminal's uses and current operational practices on the Western Pioneer Spur, adjacent to Shilshole Avenue, NW.

First, Ballard Terminal disingenuously asserts that the City's plans to relocate track in that vicinity would be "without BTRC's permission or agreement." Ballard Terminal agreed in the Operating Agreement to allow the City to relocate tracks to accommodate the Trail.⁸⁸ Any suggestion to the contrary is patently false. Ballard Terminal agreed to those terms, demonstrating that it believed those terms would permit it to carry out its railroad operations without interference.

Moreover, Mr. Forgette's opinion is based exclusively on 90% engineering designs and conceptual drawings. Mr. Forgette's conclusion is premature, because the City has yet to adopt a final plan for the Missing Link, particularly related to the Western Pioneer Spur.⁸⁹ Mr. Forgette's conclusion is also incorrect. As Mr. Sullivan testifies, he has reviewed all of the City's designs and concluded that the designs "did not present any condition that would make rail operations unsafe nor interfere with BTRC's transload services on the Western Pioneer Spur."⁹⁰

Further, as set forth in the Operating Agreement (*see especially* Section 10), the City has committed to ensuring that the Trail design will allow Ballard Terminal the ability to provide service to all its present and prospective customers. Mr. Sullivan testifies that the Operating

⁸⁸ Petition App. F at 10 ("Operator shall promptly move its track at [the City's] written request").

⁸⁹ Seattle Ex. No. 1 at 4–5 (Sullivan Verified Statement).

⁹⁰ *Id.*

Agreement provides a process for resolving either party's operational concerns, and BTRC's consent to the Operating Agreement's terms demonstrates its belief that these terms would allow BTRC to carry out its railroad operations without interference.⁹¹ In Mr. Sullivan's experience in the railroad industry, operational concerns that may arise are commonly resolvable through processes like the one provided in the Operating Agreement.⁹²

Here, under the Operating Agreement, the final design for the Burke-Gilman trail will include side clearances between the edge of the trail and the center line of Ballard Terminal's tracks of no less than 8'6", as prescribed by Washington Administrative Code,⁹³ and where practical, 10' of side clearance between the trail and the center line of Ballard Terminal's tracks.⁹⁴ Therefore, as a result of the City's determination to maintain at least the required minimum clearance of 8'6", and because the Operating Agreement provides tools for resolving operational concerns, the Trail will, by definition, not interfere with Ballard Terminal's performance of its common carrier obligations associated with the Western Pioneer Spur.⁹⁵

5. The City's Planned Improvements Near NW 45th Street Will Not Interfere with Rail Operations.

Ballard Terminal's assertions regarding the planned improvements to NW 45th Street also fail. In that vicinity, Ballard Terminal will operate within the reconfigured Street ROW, but that does not create an unsafe condition or otherwise interfere with rail operations. As with all of Ballard Terminal's other specific allegations, the improvements on NW 45th St are expressly

⁹¹ *Id.*

⁹² *Id.*

⁹³ See WAC 480-60-050(1) ("General rule. Side clearances must be at least 8 feet 6 inches unless one of the provisions below applies. If exceptions in subsections (2) through (5) or (7) of this section apply, full side clearance of 8 feet 6 inches shall be provided on the opposite side of the track from the platform."). This statute applies to all railroads operating in the State of Washington.

⁹⁴ Petition, App. F at 8–9 (Section 10(b)).

⁹⁵ Seattle Ex. No. 1 at 5 (Sullivan Verified Statement).

contemplated in the Operating Agreement. Because Ballard Terminal agreed to those terms, it has agreed that those terms would permit it to carry out its railroad operations without interference.

More generally, even in the absence of the Operating Agreement, there is no interference and no unsafe conditions. As Mr. Sullivan testifies, the type of operation Mr. Forgette has identified for NW 45th Street is a common method of operation for railroads in industrial areas of urban settings such as Seattle and is consistent with Ballard Terminal's operations. Rail operations in industrial settings routinely occur within, across, and adjacent to city streets. Ballard Terminal encounters all these industrial rail operating conditions in the performance of its common carrier service obligation today. The method of Ballard Terminal's overall operation will not change as a result of the improvements to NW 45th Street planned by the City. Ballard Terminal will continue to operate over FRA Class 1 regulated track not exceeding 10 MPH (49 C.F.R § 213.9), ensuring leading movement point protection, ability to stop within half range of vision short of train, obstruction, switch improperly lined, or broken rail (Restricted Speed 49 C.F.R § 236.812).

Also, as Mr. Sullivan explains, the final design of the Burke-Gilman Trail will provide for side clearances between the Trail and the center line of Ballard Terminal's tracks of no less than 8'6" as prescribed by WAC Code 480-60-050 and where practical, ten feet (10') of side clearance between the Trail and the center line of Ballard Terminal tracks along NW 45th Street. With regard to improvements and changes to Ballard Terminal tracks and facilities, the Operating Agreement clearly provides that all changes, including relocations and new

construction of track, facilities and crossings, will comply with federal and State of Washington Codes.⁹⁶

Further, the Operating Agreement reflects the parties' commitment to rely on FRA, Washington DOT, and WUTC applicable rules and regulations to resolve any disputes about such construction. Improvements, upgrades, and new construction of crossings, whether pedestrian or vehicular, will conform to 23 C.F.R. Part 655 subpart F,⁹⁷ under the oversight and authority of DOT and WUTC. Federal regulations also dictate how common carrier railroads, such as Ballard Terminal, are required to operate over public crossings. Those rules and regulations appear in 49 C.F.R. Part 222⁹⁸ and 49 C.F.R. Part 218.99⁹⁹ and are subject to FRA oversight to ensure compliance. As with "Not 54th Street" and the Western Pioneer Spur, the planned changes and improvements by the City of Seattle to the NW 45th Street right-of-way will not interfere with Ballard Terminal's rail operations.¹⁰⁰

In sum, after reviewing the project designs and Ballard Terminal's claims, Mr. Sullivan has concluded that based on the City's compliance with the minimum clearance requirements, and "because none of the proposed improvements would change the governing operating rules or method of operation from the way BTRC operates today in a congested urban-industrial environment subject to various federal regulations and oversight," the Trail's completion "will

⁹⁶ Seattle Ex. No. 1 at 6 (Sullivan Verified Statement); Petition App. F at 8–9.

⁹⁷ Compliance with U.S. Department of Transportation–Federal Highway Works Administration Manual of Uniform Traffic Control Devices (MUTDC).

⁹⁸ Regulations applying to leading or pulling movements of trains over pedestrian and highway crossings at grade.

⁹⁹ Regulations applying to shoving movements of trains over pedestrian and highway crossings at grade.

¹⁰⁰ Seattle Ex. No. 1 at 3–4 (Sullivan Verified Statement).

allow BTRC to continue to operate efficiently and safely.”¹⁰¹ Thus, even if the Board reaches the merits, Ballard Terminal’s claims of interference are unfounded, and preemption is not warranted.

C. Ballard Terminal Has Refused All Efforts by the City to Resolve This Dispute Amicably.

Various disputes involving the completion of the Burke-Gilman Trail have been ongoing for over 30 years. As recounted by Ballard Terminal, the environmental reviews of the Burke-Gilman Trail required rounds of court litigation and administrative litigation. But those reviews are now essentially completed (except for one limited issue now under consideration on remand). As described above, because of the remand of the one remaining issue, the City’s design and construction of Phase 2 of its project (the Phase that is the subject of Ballard Terminal’s Petition) have been delayed. After resolution of that final issue on remand and on completion of its pending court case, the City will be in a position to effectuate its longstanding proposal to complete the “Missing Link” segment of the existing Burke-Gilman Trail.

The City over the years has sought, on several occasions, to meet with opponents of the trail, including Ballard Terminal, to discern the reasons for its opposition to the Burke-Gilman Trail, and consider options that may be agreeable to all parties.

Ballard Terminal has refused any resolution that would accommodate the Trail along Shilshole Avenue. Instead, it filed the instant Petition, clearly indicating its desire to litigate this matter, just as it has (through a coalition) for several years challenged in administrative and court proceedings the City’s determinations about the Trail’s routing and approval.

It appears that Ballard Terminal has no interest in an amicable resolution of this dispute. That being the case, the City reluctantly has concluded that there is no point in requesting that

¹⁰¹ *Id.* at 2.

the STB refer this matter to STB mediation. Rather, the City believes the only way to resolve this matter is through the civil action it commenced recently in King County Superior Court.

In its Petition,¹⁰² Ballard Terminal requested a prompt resolution of this dispute, *i.e.*, within 60 days of its proposed “rebuttal” filing. As the City has separately shown in its December 18, 2018, letter herein requesting an extension of time, there is no right on the part of Ballard Terminal to file rebuttal testimony or other evidence. That being the case, the City would not be opposed to the same schedule proposed by Ballard Terminal, according to which the Board would resolve the dispute by April 2019 or at the earliest possible time thereafter, because the very filing of Ballard Terminal’s Petition has caused SDOT to delay completion of the final design of the Trail.¹⁰³

V. Conclusion

The Board should not institute a declaratory proceeding, but rather should conclude that this dispute is about Ballard Terminal’s contractual obligations to the City of Seattle, and therefore dismiss the Petition (without prejudice to re-filing later, if appropriate).

The City has filed suit in King County Superior Court (Case No. 19-2-01794-5-SEA) against Ballard Terminal to compel Ballard Terminal to abide by its obligations to the City under the Operating Agreement that is in effect with respect to the rail lines Ballard Terminal operates that are in dispute herein. Under the Board’s consistent precedents, disputes with respect to the parties’ rights and obligations under contract are to be resolved in court, not at the Board, and

¹⁰² Petition at 36.

¹⁰³ We do recognize the disruption that the recent governmental shutdown has caused, but trust that the Board could deny Ballard Terminal’s request to institute a declaratory proceeding relatively promptly, once it understands that Seattle will not construct the Trail with a clearance less than that required by law—8’6”—and that resolution of the dispute is clearly governed by contract (the Operating Agreement).

disputes about trail proponents' rights under State and local law are not to be resolved by the Board.

If the Board nevertheless reaches the merits, it should conclude that the right-of-way in question can accommodate both the Burke-Gilman Trail and Ballard Terminal's rail line, and that the Trail will not interfere with continued rail operations on that rail line. That being the case, if the Board should reach the merits, it should deny the Petition, because the only authority the Board has in matters such as this is if the action at issue would interfere with continued rail operations, and here, there would be no such interference.

Respectfully submitted this 28th day of January, 2019.



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EXHIBITS

- Seattle Ex. No. 1 - Verified Statement of Stephen Sullivan, R.L. Banks and Associates, Inc.
- Seattle Ex. No. 2 - Complaint for Declaratory Judgment, Injunctive Relief, and Breach of Contract, Superior Court in the State of Washington, King County Superior Court, Cause No. 19-2-01794-5 SEA
- Seattle Ex. No. 3 - Excerpts from the FEIS, May 25, 2017
- Seattle Ex. No. 4 - Corrected Notice of Appeal filed 6/9/17 Seattle Hearing Examiner File No. W-17-004
- Seattle Ex. No. 5 - Seattle Hearing Examiner Exhibits W-17-004, The Ballard Coalition. Six-day hearing commenced: 11/29/17
- Seattle Ex. No. 6 - Excerpts from Hearing Transcripts, Seattle Hearing Examiner File No. W-17-004
- Seattle Ex. No. 7 - Findings and Decision dated 01/31/18 – Seattle Hearing Examiner File No. W-17-004
- Seattle Ex. No. 8 - Order Granting in Part and Denying in Part Ballard Coalition's Challenge to the Adequacy of SDOT's EIS dated December 21, 2018, KCSC Cause No. 18-2-04988-1
- Seattle Ex. No. 9 - Additional Photos of Ballard Line and Ballard Terminal Operations

VERIFICATION

Louisa Miller, being duly sworn, states that she is over 18 years of age; that she is an employee of the City of Seattle, Washington; that she is Project Manager for the Burke-Gilman Trail Project; that she is familiar with the factual assertions made in the foregoing Reply of the City of Seattle; and that such assertions are true as stated.



Louisa Miller

Subscribed and sworn to before me, this 28th day of January, 2019:



R. Rebecca Bristor

Notary Public

My Commission expires 09/08/22, 2022



CERTIFICATE OF SERVICE

I, Amanda C. Kleiss, paralegal with Van Ness Feldman LLP, certify that I have this day served copies of document upon all parties of record in this proceeding, by legal messenger and email.

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Brower Law PS
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Executed this 28th day of January, 2019.



Amanda C. Kleiss

SEATTLE EX. NO. 1

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket 36261

BALLARD TERMINAL RAILROAD COMPANY, L.L.C. --**PETITION FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF STEPHEN M. SULLIVAN

I, Stephen M. Sullivan, do swear and affirm under penalty of perjury the following:

1. I am over eighteen years of age. I have personal knowledge of the facts contained in this verified statement and am otherwise competent to testify to the matters in this verified statement.

2. I am Managing Director of RL Banks & Associates, Inc. (RLBA), a railroad consulting firm providing economic, operational and engineering counsel in freight, high-speed and commuter railroads and light rail operations. I joined RLBA in 2013 after twenty-five years with the largest (Class I) interstate freight railroads and thirteen years with an industry trade association representing medium (Class II) and small (Class III) railroads. During my career with the Class I railroads, I held managerial responsibilities in line operations, strategic planning, multi-modal analysis, capital planning, and other matters. My trade association career featured daily interaction with freight and passenger railroads, both large and small, regarding service planning and design, capital investment, data analysis and regulatory compliance. I developed working relationships with Class I railroads, short lines, Amtrak, commuter railroads, and State, local and Federal government agencies. I have testified before Congress on railroad infrastructure and capital investment. A copy of my resume is attached as Sullivan Exhibit 1.

3. In connection with the above-captioned petition before the Surface Transportation Board, this verified statement is submitted in response to the verified statement of James Forgette, dated December 6, 2018, and submitted in support of the Petition for Declaratory Order filed December 12, 2018 by Ballard Terminal Railroad Company, L.L.C. (BTRC), wherein Mr. Forgette concludes that portions of the City of Seattle’s proposed Burke-Gilman trail, more commonly referred to as the “Missing Link,” would interfere with BTRC from performing its common carrier service obligation.

4. My opinions here are based on over 43 years of railroad operation experience and are held to a reasonable degree of professional certainty. Based on compliance with the minimum-clearance requirements of Washington State regulations, and because none of the proposed improvements would change the governing operating rules or method of operation from the way BTRC operates today in a congested urban - industrial environment subject to various federal regulations and oversight, I conclude that the City’s proposed improvements to the Burke-Gilman trail will allow BTRC to continue to operate efficiently and safely once the trail is completed.

BTRC’s Service- As I understand Ballard Terminal has only one customer—Salmon Bay Sand and Gravel (“Salmon Bay”).¹ In fact, Salmon Bay has been Ballard Terminal’s only customer in the last three years, and in the last five to ten years, Ballard Terminal has had only one other customer.² In 2016, Ballard Terminal received approximately \$37,000 in total revenue and estimated that it hauled 120-130 cars (approximately \$290/car)³ Ballard Terminal’s current railroad activity is limited to moving four-five rail cars of bulk materials to Salmon Bay

¹ Forgette V.S. at ¶¶ 6, 7 (referring to Salmon Bay and stating that Ballard Terminal operates “depending on its shipper’s needs”) (note use of the singular “shipper’s”); *see also*, Petition at 13, 30 (same).

² Hearing Transcript, Nov. 29, 2017, at 783-85 (Testimony of Paul Nerdrum, vice president of SBSG and one of the owners of BTRC).

³ Hearing Transcript, Dec. 5, 2017, at 1838-39 (Testimony of James Forgette).

approximately once per week.^{4 5} The train does not run on a regular schedule; instead, Ballard Terminal sets its own schedule for runs, in coordination with Salmon Bay.⁶ Ballard Terminal currently operates in the middle of an active vehicle travel lane—NW 45th Street—and Ballard Terminal representatives testified that this placement “hasn’t been a problem” for Ballard Terminal’s operations.⁷ Contrary to Ballard Terminal’s claim that it “actively uses” the Western Pioneer Spur,⁸ in late 2017 a Ballard Terminal representative stated that it last used the spur for trans-loading over five years ago. Otherwise, Ballard Terminal has used the spur for occasional storage of parked railcars.⁹

“Not 54th Street” Impacts- In his verified statement, Mr. Forgette has indicated that the planned improvements to a City of Seattle (City) - owned section of street right-of-way (ROW) “Not 54th Street” between 24th and 26th Streets adjacent to BTRC track would interfere with BTRC from performing its common carrier obligation by creating a paved roadway next to the rail line. His conclusion is incorrect. Industrial rail operations are common throughout North America and occur in major urban settings just like those on BTRC. The interface of streets and railroad is the common nexus of providing rail service to warehousing, distribution, and manufacturing districts in cities such as Seattle. Rail operations in industrial settings routinely occur within, across, and adjacent to city streets, and can be, and generally are, performed safely. In fact, BTRC encounters all these industrial rail operating conditions in the performance of its common carrier

⁴ Hearing Transcript, Nov. 28, 2017, at 275-76 (Testimony of Tim Olstad, SBSG employee).

⁵ BTRC reported freight revenues of \$67,266 in its 2017 Annual Report filing with the Washington Utilities & Transportation Commission, which, assuming a similar charge of approximately \$290/car, would equal approximately 4 to 5 cars per week in 2017 (the last year for which BTRC has filed a report, to the best of my knowledge).

⁶ Hearing Transcript, Nov. 28, 2017, at 405 (Testimony of Tim Olstad).

⁷ Hearing Transcript, Nov. 29, 2017, at 773 (Testimony of Paul Nerdrum).

⁸ Forgette V.S. at ¶ 15.

⁹ Hearing Transcript, Dec. 5, 2017, at 1826-27 (Testimony of James Forgette). At the hearing on December 2017, Mr. Forgette testified that Salmon Bay last stored cars sometime in 2016.

service obligation today. The method of BTRC's operation will not change as a result of the City's improvements to "Not 54th Street" ROW planned by the City. The method of operation is prescribed by the Code of Federal Regulations (CFR) and applies to common carriers such as BTRC. BTRC will continue to operate over Federal Railroad Administration (FRA) Class 1 regulated track not exceeding 10 MPH (49 CFR § 213.9), ensuring leading movement point protection, ability to stop within ½ range of vision short of train, obstruction, switch improperly lined, or broken rail (Restricted Speed 49 CFR 236.812).

As such, the planned improvements by the City of Seattle to the "Not 54th Street" right-of-way will not interfere with BTRC from performing its common carrier service obligation.

Western Pioneer Spur Impacts- In his verified statement, Mr. Forgette explains BTRC's uses and current operational practices on the Western Pioneer Spur, adjacent to Shilshole Avenue, NW. He further discusses the claimed negative impacts to BTRC based on 90% engineering designs and conceptual drawings. Because of these designs and drawings, Mr. Forgette concludes that the ultimate plan the City will adopt for construction of the Burke-Gilman trail along Shilshole Ave., NW will encroach on BTRC's operations and interfere with it from being able to provide service under its common carrier obligation to its customers. Mr. Forgette's conclusion is premature and incorrect. As I understand, the City has yet to adopt a final plan for the Burke-Gilman trail. However, all of the designs that I reviewed did not present any condition that would make rail operations unsafe nor interfere with BTRC's transload services on the Western Pioneer Spur.

In fact, as set forth in an Operating Agreement¹⁰ between the City of Seattle, as successor-in-interest to Sea Lion Railroad and as owner of the ROW over which BTRC operates, and BTRC

¹⁰ Operating Agreement September 14, 1997 between Sea Lion Railroad (owner) and Ballard Terminal Railroad (operator), assigned by Sea Lion Railroad to the City of Seattle as owner, September 16, 1997 (Operating Agreement).

as operator of the railroad, the City has committed to ensuring that the trail design will allow BTRC the ability to provide service to all its present and prospective customers. BTRC agreed to those terms in the Operating Agreement, demonstrating that it believed those terms would permit it to carry out its railroad operations without interference. In my experience in the railroad industry, it is common to have these types of issues arise. Section 10 of the Operating Agreement appears to contain a process for resolving such matters.

In accordance with the Operating Agreement, the final design for the Burke-Gilman trail will include side clearances between the edge of the trail and the center line of BTRC's tracks of no less than eight feet, six inches (8'6"), as prescribed by Washington State Code,¹¹ and where practicable, ten feet (10') of side clearance between the trail and the center line of BTRC's tracks.¹² Therefore, as a result of the City's determination to maintain at least the required minimum clearance of 8'6", and because the Operating Agreement provides a process for resolving either party's concerns about accommodating both the trail and rail operations, BTRC will, by definition, not be interfered with from performing its common carrier obligation when the trail is completed.

NW 45th Street Impacts- In his verified statement, Mr. Forgette suggests that the planned improvements to NW 45th Street, wherein BTRC will operate within the reconfigured street ROW, presents an unsafe condition and he may be suggesting (it is unclear precisely what Mr. Forgette is saying) that those improvements would interfere with BTRC from performing its common carrier obligation. As I have stated previously in this verified statement, the type of operation Mr. Forgette has identified here for NW 45th Street is a common method of operation for railroads in industrial areas of urban settings such as Seattle and consistent with BTRC's

¹¹ WAC 480-60-050 - applies to all railroads operating in the State of Washington –SIDE CLEARANCES (in part) (1) General rule. Side clearances must be at least 8 feet 6 inches unless one of the provisions below applies. If exceptions in subsections (2) through (5) or (7) of this section apply, full side clearance of 8 feet 6 inches shall be provided on the opposite side of the track from the platform.

¹² Operating Agreement, Section 10, subsection (b).

operations. Rail operations in industrial settings routinely occur within, across, and adjacent to city streets. BTRC encounters all these industrial rail operating conditions in the performance of its common carrier service obligation today. The method of BTRC's overall operation will not change as a result of the improvements to NW 45th Street planned by the City. BTRC will continue to operate over Federal Railroad Administration (FRA) Class 1 regulated track not exceeding 10 MPH (49 CFR § 213.9), ensuring leading movement point protection, ability to stop within ½ range of vision short of train, obstruction, switch improperly lined, or broken rail (Restricted Speed 49 CFR 236.812). Also, as I have mentioned previously, the final design of the Burke-Gilman trail will provide for side clearances between the trail and the center line of BTRC's tracks of no less than eight feet, six inches (8'6") as prescribed by Washington State Code 480-60-050 and where practicable, ten feet (10') of side clearance between the trail and the center line of BTRC tracks, along NW 45th Street. With regard to improvements and changes to BTRC tracks and facilities, the previously mentioned Operating Agreement between the City of Seattle and BTRC clearly provides that all changes, including relocations and new construction of track and facilities (including crossings), will comply with Federal and State of Washington Codes. Further, the Operating Agreement binds the parties to FRA, Washington State Department of Transportation (DOT), and Washington Utilities and Transportation Commission (WUTC) applicable rules and regulations. In this regard, improvements, upgrades, and new construction of crossings, whether pedestrian or vehicular, will conform to US Code of Federal Regulations (CFR) 23 CFR Part 655 subpart F,¹³ under the oversight and authority of DOT and WUTC. The CFR also dictates how common carrier railroads, such as BTRC, are required to operate over public crossings. Those rules and regulations are promulgated in 49 CFR Part 222¹⁴ and 49 CFR Part 218.99¹⁵ and are the oversight provenance of the FRA for compliance. As with "Not 54th Street" and the Western Pioneer Spur, the planned changes and

¹³ Compliance with U.S. Department of Transportation – Federal Highway Works Administration Manual of Uniform Traffic Control Devices (MUTDC).

¹⁴ Regulations applying to leading or pulling movements of trains over pedestrian and highway crossings at grade.

¹⁵ Regulations applying to shoving movements of trains over pedestrian and highway crossings at grade.

improvements by the City of Seattle to the NW 45th Street right-of-way will not interfere with BTRC from performing its common carrier service obligation,

The Operating Agreement contemplates that, when BTRC needs to perform track maintenance, the City will cooperate. If that were to become an issue, it would arise under the Operating Agreement, and would be an issue for a court, not the STB, as I understand it. In any event, I do not know of any such issue.¹⁶

Under the Operating Agreement, the City is obligated to provide appropriate signage and traffic control where necessary. BTRC has not raised an issue about the City's willingness to comply with its obligations, and so I assume it is not an issue. Even if BTRC were to do so, it would be an issue for a court, not the STB, as I understand it.

Conclusions- Mr. Forgette has assumed and inferred throughout his verified statement that the City of Seattle plans to create conditions through the construction of the Burke-Gilman trail which will interfere with BTRC from performing its common carrier service obligation to its customers. This is simply not correct. Inasmuch as both parties, BTRC and the City of Seattle, are governed by an Operating Agreement which clearly dictates the conditions for establishing the trail along BTRC's rail line to ensure BTRC's service requirements, Mr. Forgette's conclusion -- that the final trial design will interfere with BTRC from performing its common carrier obligation -- is incorrect. As previously stated herein, BTRC's overall method of operation will not change once the trail is completed; at locations where the trail and BTRC tracks are adjacent with one another, the City will maintain a side clearance of eight feet, six inches (8'6") from the center line of BTRC's tracks as prescribed by the Operating Agreement

¹⁶ While not a daily occurrence to railroads, temporary disruptions and changes to operations during public works projects and capital improvements to railroad infrastructure are a common practice within the industry. Generally, the details and conditions of these disruptions and changes are worked out with the relevant parties prior to, and throughout the project timeline, which can also result in railroad operational changes once the project work is completed. I have not chosen to address this directly in my Verified Statement because Mr. Forgette did not identify it as an issue in his VS. Given that the Operating Agreement addresses the trail construction and the accompanying BTRC track changes that BTRC agreed to, and given the frequency of BTRC service, I concluded that these are not issues or concerns for Mr. Forgette.

and Washington State Code 480-60-50, and, where practicable, ten feet (10') of side clearance from the center line of BTRC's tracks and the trail.

The Board has previously reviewed a railroad's claim that use of adjoining property would interfere with railroad operations. In STB Finance Docket No. 33388 (Sub-No. 101), CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER (served August 27, 2008), the Board concluded that, because the property owner's intended use of the property would comply with required clearances (there, overhead), and that the railroad had agreed to that overhead clearance, there would be no interference with railroad operations from the property owner's use of the property and would not be unsafe. The same is true here. The Operating Agreement, agreed to by BTRC, defines the conditions by which side clearance between the Burke-Gilman trail and the BTRC tracks and other conditions set forth in the Operating Agreement comply with applicable regulations and are consistent with industry standards and practices.

I swear under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of January, 2019.



Stephen M. Sullivan

Steve Sullivan

Managing Director

Education

BA, Economics, College of William and Mary, 1977

Professional Development and Certifications

Corporate Finance, the Wharton School, University of Pennsylvania

Executive Management, Penn State University

Project Management, Drexel University

Modal Analysis, University of Texas – Texas Research Development Foundation

Years of Transportation Experience

38

Qualifications

Prior to joining RLBA in 2013, Mr. Sullivan served for thirteen years as Vice President and Executive Director of the American Short Line & Regional Railroad Association (ASLRRA), a trade association comprised of 950 private and public sector railroad companies and their suppliers headquartered in Washington, DC. Mr. Sullivan directed initiatives and staff strategic alliances, financial management, administration, industrial safety and security, technology development/deployment, training, legislative and regulatory matters. Mr. Sullivan also developed new business processes, including technical process integrations that increased revenues and membership six to eight percent annually. In addition, Mr. Sullivan spearheaded railroad security/anti-terrorism challenges with Federal agencies at all levels, developing and implementing a comprehensive post-911 security plan re the industry's 550 railroads, directed, from concept to application, the design and deployment of a first-of-its-kind railroad risk mitigation process/model, and guidelines that apply generally and specifically to the safe transportation of crude by rail (CBR). For his efforts, he has received commendations and letters of appreciation from The White House, the Department of Transportation, the United States Coast Guard and the Department of Defense.

Prior to working at the ASLRRA, Mr. Sullivan held various operations, planning and corporate strategy management positions at Conrail, Inc., formerly a \$7 billion corporation and premier Northeast and Midwest freight railroad, headquartered in Philadelphia, PA. While Director of Corporate Strategy at Conrail, Mr. Sullivan acted as operations and geography expert throughout a \$12 billion merger, leading managers in areas of financial analysis, asset management, technology application and budgeting. Mr. Sullivan also held many other titles at Conrail, including Director of Planning and Strategy, Manager of Strategic Planning, Manager of Commercial Planning, Manager of Industrial Development, District Superintendent of Operations and Supervisor of Rules and Operating Practices.

Over the course of his career, Mr. Sullivan developed working relationships with Class I railroads, short lines, Amtrak, commuter railroads, state, local and federal government agencies as well as suppliers. He prepared position papers and testimony on behalf of Class II and Class III railroads and testified before Congress on railroad infrastructure and capital investment. Since joining RLBA in 2013, he has utilized his extensive railroad operations knowledge and experience on a variety of simulation, litigation support and strategic planning projects. Other initiatives include working with industry leaders to develop a CBR risk mitigation seminar and continued analysis on the changing regulations affecting the shipment of crude oil in tank cars.

Relevant Project Experience

- **FirstEnergy Generation, LLC** Provided an expert opinion on railroad operations and more specifically, the operational impacts of rerouting and detour routing of railroad trains resulting from weather-related conditions in a “force majeure” dispute between FirstEnergy and two class I railroads. Through deposition and arbitration testimony over a six-month period, helped client save tens of millions of dollars in liquidated damages.
- **Kansas City Southern** Analyzed the operational impacts to Kansas City Southern (KCS) that might result from the potential introduction of BNSF direct service into a jointly-owned (KCS and UP) and operated segment of railroad, known as the Rosebluff Lead, in the greater Lake Charles, LA area, particularly as it concerned the movement of crude-by-rail into the CITGO Lake Charles Manufacturing Complex. Prepared a Verified

Statement submitted to the Surface Transportation Board describing the significant negative impacts on the safety and fluidity of existing operations that would flow from granting BNSF's Terminal Trackage Rights.

- ***Mahoney, Silverman & Cross, LLC*** Provided litigation support relating to Mahoney, Silverman & Cross, LLC (MSC's) client's interest in reactivating a private at-grade railroad crossing a BNSF Railway (BNSF) right-of-way south of Lorenzo, Illinois. MSC sought RLBA's expertise due to the fact that MSC's client's farm land is bisected by a BNSF mainline commonly referred to as the "Transcon", which is amongst the busiest and most essential routes over which BNSF operates, resulting in very aggressive legal tactics enacted by BNSF. Mr. Sullivan conducted on-site right-of-way, operational safety analyses and grade crossing research as necessary as well as providing the affirmative testimony and deposition of an experienced RLBA operations expert.
- ***Total Petrochemical Inc.*** Provided expert litigation assistance supporting the company's stand-alone rate case against CSX Transportation. Mr. Sullivan assisted in the evaluation and construction of methodologies rebutting CSX's reply evidence pertaining to yard dwell times and drafted text presented to the Surface Transportation Board discussing various assumptions made by CSX to increase dwell times artificially and thus, associated cost, on a hypothetical stand-alone Total Petrochemical Railway.
- ***Howard Energy Partners*** Designed program and processes for a compliance audit of federal regulations from multiple agencies affecting the rail operations of a large Texas-based oil and gas client engaged in the loading and handling of crude oil in unit tank car trains. Assisted other RLBA personnel during an on-site audit designed to assess and evaluate the application of the regulations.
- ***Foulston Siefkin LLP*** Determined the feasibility of constructing a permanent grade crossing over Wichita Terminal Association (WTA) tracks to allow the commercial development of the client's 'landlocked' property. Mr. Sullivan authored a Verified Statement submitted before the Surface Transportation Board commenting on the minimal impact of the grade crossing on WTA's interchange operations with BNSF Railway. Drawing upon observations during the inspection and a review of WTA's records, Mr. Sullivan determined that with minor alterations, rail service could continue with minimal negative effect to railroad operations or safety.
- ***Sierra Club*** Evaluated the U.S. Department of Transportation's (DOT) proposed rule addressing crude and ethanol rail tank car safety and provided analysis in the form of a report that was submitted as part of the public comments of the Sierra Club and its coalition partners. Prepared a written report addressing the ability of the proposed tank car safety measures to mitigate safety risks to public health, safety, and the environment, while identifying specific measures that would improve tank car standards to reduce the risk of accidents.
- ***King County, Washington*** Provided legal and technical assessment of railroad right-of-way and railway engineering standards related to rail-banked property corridors held under the federal Rails to Trails Act. Provided expert testimony on the engineering and operational requirements of modern passenger and freight railroad including air and ground rights/needs. With Mr. Sullivan's strong testimony as a base, King County prevailed in its defense of its rights of ownership of railroad property corridors.

SEATTLE EX. NO. 2

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

CITY OF SEATTLE, a Washington municipal
corporation, acting through its Department of
Transportation;

Plaintiff,

v.

BALLARD TERMINAL RAILROAD
COMPANY, L.L.C., a Washington limited
liability company;

Defendant.

NO.

COMPLAINT FOR
DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF, AND
BREACH OF CONTRACT

Plaintiff City of Seattle (“City”), by and through its undersigned counsel, files this Complaint for Declaratory Judgment, Injunctive Relief, and Breach of Contract (the “Complaint”) against Defendant Ballard Terminal Railroad Company, L.L.C. (“BTRC”), and alleges as follows:

I. INTRODUCTION

1.1 This case arises from a dispute between the City and BTRC over the implementation of an Operating Agreement and a railway franchise granted by Ordinance 118734 that govern BTRC’s operation of a “short line” railroad on a line of railroad known as the “Ballard Line,” which operates in a street right-of-way along NW 45th Street and Shilshole Avenue in the Ballard neighborhood of Seattle.

1 1.2 In the 1990s, BTRC obtained the approval of the Surface Transportation Board
2 (“STB”) in the form of a “modified certificate of public convenience and necessity” to rehabilitate
3 and provide freight rail service on the Ballard Line, based on the Operating Agreement and the
4 City’s grant of a railway franchise to BTRC. The Operating Agreement and franchise set forth the
5 BTRCs rights and obligations with respect to its operation of the Ballard Line.

6 1.3 A portion of the area in which BTRC operates the Ballard Line is also the location in
7 which the City seeks to achieve its longstanding goal of completing the Burke-Gilman Trail
8 (“Trail”). The Trail is a regional trail that runs east from Golden Gardens Park in Ballard and
9 connects to the Sammamish River Trail in the City of Bothell. The Trail is a continuous 27-mile
10 route with the exception of a 1.4-mile long segment in the Ballard neighborhood, in the vicinity of
the Ballard Line, known as the “Missing Link.”

11 1.4 The Operating Agreement and the railway franchise memorialize the City’s goal and
12 establish its right to construct and maintain the Missing Link trail segment in the vicinity of the
13 Ballard Line. Specifically, the Operating Agreement recognizes that BTRC can continue to provide
14 freight rail service while, at the same time, the City builds and maintains a parallel trail on a portion
15 of the corridor. The Operating Agreement and the franchise recognizes that the two uses can co-exist
16 and operate safely. BTRC has a contractual obligation to allow and cooperate with trail construction
and operation.

17 1.5 The Operating Agreement specifically gives the City significant flexibility for
18 implementation of a trail design within the Ballard Line vicinity by securing BTRC’s agreement
19 that, upon request, it would “promptly” relocate its track “to accommodate trail construction.” BTRC
20 also agreed to “not engage in construction of rail or rail-related facilities which interfere with the
trail to be constructed on the premises.”

21 1.6 BTRC has failed to perform its contractual obligations and seeks to prevent the City
22 from constructing the Missing Link as anticipated and allowed under the Operating Agreement.
23 Without the City’s authorization, BTRC has constructed rail-related facilities that it now alleges

1 interfere with the trail to be constructed. Additionally, despite its contractual obligation to cooperate
2 with trail cooperation, BTRC has publicly and repeatedly taken the position that the City cannot
3 construct the Missing Link, and that the construction and operation of the Missing Link trail segment
4 will interfere with its rail operations.

5 1.7 The City files this Complaint seeking relief from BTRC's continuing efforts to avoid
6 performing its obligations under the Operating Agreement and the associated franchise.

7 **II. PARTIES**

8 2.1 The City incorporates all facts and allegations set forth in the paragraphs above and
9 below as if fully set forth herein.

10 2.2 The City is a Washington municipal corporation, acting through the Seattle
11 Department of Transportation, whose executive and administrative offices are located in King
12 County in Seattle, Washington.

13 2.3 BTRC is a Washington limited liability company whose principal office and
14 registered agent are located in King County in Seattle, Washington.

15 **III. JURISDICTION AND VENUE**

16 3.1 The City incorporates all facts and allegations set forth in the paragraphs above and
17 below as if fully set forth herein.

18 3.2 This Court has personal jurisdiction over the parties and subject matter jurisdiction
19 over the claims pursuant to RCW 2.08.010, chapter 7.24 RCW, chapter 7.40 RCW, and other
20 applicable law.

21 3.3 Venue is proper under chapter 4.12 RCW and RCW 36.01.050(1), inter alia, because
22 King County is where BTRC has its principal place of business, where the parties entered into the
23 agreements at issue, and where those agreements were to be performed.

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IV. STATEMENT OF FACTS

A. **The Operating Agreement Was Born from the Parties' Commitment to Achieve Two Compatible Objectives: Completion of a Regional Multi-Use Trail and Preservation of Rail Service.**

4.1 The City incorporates all facts and allegations set forth in the paragraphs above and below as if fully set forth herein.

4.2 The Operating Agreement that is the subject of this dispute addresses two specific and important goals: the City's construction of the Missing Link to complete the Burke Gilman Trail and the preservation of rail service on the Ballard Line.

4.3 The Burke-Gilman Trail is a regional multi-use trail in Seattle that runs east from Golden Gardens Park in Ballard and eventually connects to the Sammamish River Trail in the City of Bothell. The Trail is one of Seattle's most heavily used pedestrian and bicycle facilities, and it is used by both recreational users and commuters.

4.4 The Trail traces its origins to a Seattle-based railway founded by Thomas Burke, Daniel Gilman, and ten other investors in 1885. In 1971, the then-owner Burlington Northern Railroad applied to abandon the line, and Seattle's citizens advocated for development of a trail along the old rail line. In 1978, the first 12.1 miles of the right-of-way opened as a public trail, and the City named the trail after the founders of the original railroad.

4.5 The Burke-Gilman Trail runs along a continuous 27-mile route, with the exception of a 1.4-mile long segment in the Ballard neighborhood. Currently, the Trail ends at 30th Ave NW by the Ballard Locks on the west, and begins again at the intersection of 11th Ave NW and NW 45th St. on the east. This missing segment of the Trail is referred to as the "Missing Link."

4.6 It has been the City's objective for decades to construct the Missing Link and complete the regional trail, thereby providing safe pedestrian and bicycle transportation for its users throughout the length of the trail.

4.7 The other objective that prompted the Operating Agreement is the preservation of rail service along a railroad line known as the "Ballard Line." Historically, the Burlington Northern and

1 Santa Fe Railway Company (“BNSF”) operated the Ballard Line but announced its intent to abandon
2 the unprofitable and embargoed line. Despite the line’s lack of use, in the 1990s, four shippers that
3 had previously used the line wished to preserve rail service.

4 **B. The City and BTRC Negotiated an Operating Agreement and Railway**
5 **Franchise to Achieve These Objectives and That Expressly Contemplated the**
6 **Missing Link’s Construction.**

7 4.8 The City incorporates all facts and allegations set forth in the paragraphs above and
8 below as if fully set forth herein.

9 4.9 In the late 1990s, after BNSF announced its intent to abandon the Ballard Line,
10 BNSF, the City, the interested Ballard Line shippers, and Adventure Trail, a Washington State
11 501(c)(3) nonprofit corporation doing business as Sea Lion Railroad (“Sea Lion”), negotiated a plan
12 that addressed the Ballard Line’s future and fulfilled the parties’ two objectives.

13 4.10 Under the parties’ plan, Sea Lion agreed to acquire the Ballard Line, become the
14 “interim custodian” of the Ballard Line and the underlying real estate assets, secure an operator, and
15 coordinate a transfer of assets, transferring the underlying real estate interests to the City while
16 transferring the track and related rail assets to the rail operator. Two shippers formed BTRC to
17 become the Ballard Line’s new operator.

18 4.11 On September 14, 1997, Sea Lion and BTRC entered into the Operating Agreement
19 (Attachment A), which is incorporated herein by reference. The Operating Agreement is a binding
20 contract. The contract contemplated the City’s future ownership of the line’s real estate interests and
21 provided that Sea Lion would assign the Operating Agreement to the City.

22 4.12 The Operating Agreement’s stated purpose was “to preserve the line intact for rail
23 use, trail use, and other compatible public purposes.” The Operating Agreement recognized that the
City planned to construct “an extension of the Burke-Gilman Trail in the area between 11th Avenue
and the Locks within the premises.” The Operating Agreement refers to the Ballard Line as “the
premises” or “the line” throughout the agreement. Att. A at 1, 11 (emphasis added). Thus, the

1 agreement contemplated construction of the Trail on the City-owned real estate underlying the
2 Ballard Line.

3 4.13 In accordance with the City's planned trail construction, BTRC agreed to "promptly"
4 relocate its track "to accommodate trail construction" (upon the City's request and at the City's
5 expense), and BTRC agreed to "not engage in construction of rail or rail-related facilities which
6 interfere with the trail to be constructed on the premises." Att. A at 10.

7 4.14 On September 29, 1997, the Seattle City Council passed Ordinance 118734
8 (Attachment B), incorporated herein by reference. Ordinance 118734 granted BTRC a 30-year
9 railway franchise and the right to operate the Ballard Line on the City's property (the "Franchise").
10 The Franchise is a binding contract. The Franchise reiterates and reflects the general principles in the
11 Operating Agreement. In the Franchise, the City expressed its "long-held policy" of "support[ing]
12 rail-served business," as well as its intent to "maintain a permanent linear corridor . . . for trail
13 purposes" along the railroad rights-of-way. Att. B at 1.

14 4.15 Under the Franchise, the City allowed BTRC to operate the Ballard Line on the City's
15 property rent-free. Although the Ballard Line was not generating sufficient revenue to cover costs
16 and service debt, the parties believed the Franchise's rent-free arrangement would allow BTRC to
17 operate the line successfully. In turn, BTRC agreed to cooperate with the Missing Link's
18 construction, including by relocating its tracks at the City's request and by not constructing any rail
19 facilities that would interfere with the trail. Specifically, the Franchise reserved to the City "the right
20 to construct all public improvements (including trails) . . . across, underneath or above the tracks";
21 "full and complete right of access to any space occupied by such tracks and to all of said franchise
22 right-of-way"; and the right to remove or relocate tracks, so long as such activities do not interfere
23 with the railroad's safe operation. Att. B and 3-4 (emphasis added).

4.16 In a letter to the Council President endorsing the Franchise (Attachment C),
incorporated herein by reference, the City characterized the Franchise as a successful compromise
resulting from "[c]omplicated, arduous and lengthy negotiations" with rail proponents. The letter

1 celebrated the compromise for allowing the City to “retain ownership of a valuable public use
2 corridor” and “complete a significant section of the [Trail], while preserving rail service when and
3 where it is still needed.” Att. C at 1–2.

4 **C. Current Conditions Validate the Need to Construct the Trail.**

5 4.17 The City incorporates all facts and allegations set forth in the paragraphs above and
6 below as if fully set forth herein.

7 4.18 Since establishing operations on the Ballard Line pursuant to the Operating
8 Agreement and Franchise, the extent of the rail service the BTRC has provided over the Ballard Line
9 has been limited. For the last three years, BTRC has served only one customer, Salmon Bay Sand
10 and Gravel (“SBSG”), and in the last five to ten years, BTRC has had only one other customer.
11 Apart from occasionally storing parked railcars, the entirety of BTRC’s rail operations is limited to
12 moving four rail cars of bulk materials to SBSG approximately once a week.

13 4.19 Within the vicinity of the Missing Link, the Ballard Line exists entirely within the
14 confines of the City’s street right-of-way primarily on Shilshole Avenue, and runs through the
15 Ballard industrial neighborhood, which serves traffic from freight trucks and vehicles. Importantly,
16 a large number of pedestrians and cyclists also currently travel along this corridor on the City street
17 right-of-way to get from one end of the Trail to the other, because it is the most direct route between
18 the Trail’s existing end points. Under existing conditions, parking is unregulated, no designated trail
19 facilities exist, and only sporadic sidewalks are available in this area. As a result, cars frequently
20 park on or very near the tracks, and cyclists and pedestrians travel in the vehicle travel lane or along
21 the tracks.

22 **D. The City Prepared an Environmental Impact Statement for the Missing Link**
23 **Project.**

4.20 The City incorporates all facts and allegations set forth in the paragraphs above and
below as if fully set forth herein.

1 4.21 In June 2016, pursuant to the Washington State Environmental Policy Act (“SEPA”),
2 the City issued a Draft Environmental Impact Statement (“DEIS”) for the Missing Link Project. The
3 DEIS analyzed four potential alternative routes for the Missing Link, including one alternative—the
4 Shilshole South Alternative—that routed the trail along the south side of Shilshole Ave NW and NW
5 54th Street, where the Ballard Line is located.

6 4.22 The City solicited comments on the DEIS and received approximately 4,100
7 comments. Of the comments that expressed a preferred route, 80% preferred the Shilshole South
8 Alternative. Based on the comments and on additional transportation analyses, the City developed
9 and analyzed a Preferred Alternative in the Final Environmental Impact Statement (“FEIS”). The
10 Preferred Alternative is largely similar to the Shilshole South Alternative, and it is the selected route
11 for the Missing Link.

12 4.23 The FEIS extensively analyzed transportation and other impacts associated with each
13 alternative, discussed the applicable transportation regulations and industry standards, and explained
14 why the Preferred Alternative was ultimately selected. The FEIS also discussed the Preferred
15 Alternative’s potential relocation of a portion of BTRC’s tracks. The FEIS stated that any track
16 relocation would be coordinated with BTRC “so that impacts on rail operations would be minimized
17 and so that rail operations could continue as before once construction is complete,” and concluded
18 that the Missing Link project did not create probable significant adverse impacts on the railroad.

19 4.24 BTRC and other entities, as members of an association called The Ballard Coalition,
20 filed an appeal with the Seattle Hearing Examiner challenging the adequacy of the FEIS under
21 SEPA.

22 4.25 After a six-day hearing, the Examiner upheld the FEIS’s adequacy. With respect to
23 potential railroad-related impacts, the Examiner concluded the FEIS “adequately disclosed the
potential removal or relocation of railroad tracks,” and that “Appellant did not demonstrate that
removal of railroad tracks would have a significant negative impact on the environment, or why
coordination of such removal or relocation with rail owners would not mitigate impacts.”

1 4.26 The Ballard Coalition appealed the Examiner’s Findings and Decision to the King
2 County Superior Court in Docket No. 18-5-04988-1SEA. The Superior Court issued its decision on
3 the appeal on December 21, 2018. Although the Court concluded that the FEIS lacked sufficient
4 information regarding the narrow and specific issue of some types of potential economic impacts to
5 businesses, the Court affirmed the FEIS’s adequacy in all other respects, and specifically concluded
6 that the FEIS’s discussion of potential traffic hazards and safety impacts was adequate.

7 **E. The City Sought to Reach Resolution with BTRC.**

8 4.27 The City incorporates all facts and allegations set forth in the paragraphs above and
below as if fully set forth herein.

9 4.28 Since the FEIS’s issuance, the City has continued to advance the Missing Link’s
10 design, working extensively with an 11-member Design Advisory Committee (“DAC”) and with the
11 public. The City hosted ten DAC meetings, as well as a variety of workshops and public events to
12 gather feedback on the design. Although the City specifically invited BTRC to join the DAC, BTRC
refused to join.

13 4.29 Based on DAC and public input, the City has designed the Missing Link to a 95%
14 level of design. The current design is consistent with the Preferred Alternative but includes a number
15 of design additions and improvements, such as widened buffer zones, improved signage, and areas
16 where the trail will be widened or narrowed, depending on the surrounding conditions.

17 4.30 Throughout the design and outreach process, BTRC maintained its opposition to the
18 Missing Link, and the City has sought to address BTRC’s opposition through negotiations and
19 discussions with BTRC, up to and including the Deputy Mayor and representatives of the Mayor’s
Office.

20 4.31 The City has also sought to address BTRC’s opposition through minor revisions to
21 the Missing Link’s design. The design revisions call for relocations and adjustments to the Trail and
22 track alignments, designed to address the concerns BTRC has raised.

1 4.32 The City retained the services of an independent consulting firm with expertise in
2 railroad engineering and services to review the City's design. The consulting firm concluded that
3 under both the existing Missing Link designs as well as the revised design, BTRC's operations
4 would be able to safely continue.

5 **F. BTRC Disputes the City's Right to Construct the Missing Link.**

6 4.33 The City incorporates all facts and allegations set forth in the paragraphs above and
7 below as if fully set forth herein.

8 4.34 Under the Operating Agreement and Franchise, BTRC expressly agreed to the future
9 construction of the Missing Link within the right-of-way, and BTRC agreed to "promptly" relocate
10 its tracks upon request to accommodate the Trail. BTRC now disputes the City's right to remove or
11 relocate BTRC's tracks and the City's right to make improvements to or near the Ballard Line as
12 part of the Missing Link project. BTRC's position is contrary to Parties' agreements in both the
13 Operating Agreement and Franchise and represents an existing controversy between the City and
14 BTRC.

15 4.35 BTRC's position is set forth in a Petition for a Declaratory Order to the Surface
16 Transportation Board ("STB") filed on December 12, 2018 ("Petition") (Attachment D). The
17 Petition claims the City must be prohibited from removing or relocating BTRC's tracks or from
18 making improvements to or near the Ballard Line, alleging that the Missing Link will materially
19 interfere with BTRC's operations. The City has filed a letter with the STB requesting to file its
20 Reply to the Petition on January 23, 2019 (the same filing date that BTRC had proposed).

21 4.36 BTRC's position, as articulated in the Petition, is directly contrary to the terms of the
22 Operating Agreement and the Franchise to which it is a party. Under the agreements, BTRC
23 expressly agreed to the future construction of the Trail within the right-of-way.

 4.37 BTRC's position is also an effort to circumvent the City's ability to resolve disputes
through tools provided in the Operating Agreement, including design changes and relocation of
tracks. Under the agreements, BTRC agreed to "promptly" relocate its tracks upon request to

1 accommodate the Trail. Despite the City's good-faith efforts to reach resolution with BTRC, BTRC
2 has consistently maintained a position that turns the Operating Agreement on its head, arguing that
3 the Trail must be designed to accommodate the Ballard Line.

4 4.38 The City has complied with its obligations under the Operating Agreement and
5 Franchise by designing the Missing Link in a manner that can be safely constructed and operated
6 without interfering with BTRC's operations. Despite the City's performance, BTRC denies the
7 City's right to construct the Missing Link in the manner contemplated by the Operating Agreement
8 and Franchise.

9 4.39 BTRC asserts that the Operating Agreement precludes the City from constructing the
10 Trail along the Preferred Alternative's alignment. Att. D at 5. BTRC maintains that the City should
11 construct the Trail along a different alignment on Leary Avenue. However, the Preferred
12 Alternative's alignment is consistent with and allowed under the Operating Agreement, which
13 expressly contemplated construction of the Trail on the City-owned real estate underlying the
14 Ballard Line.

15 4.40 BTRC asserts that the Trail's construction would interfere with improvements that
16 BTRC has made to a part of the Ballard Line referred to as the Western Pioneer Spur. BTRC claims
17 it installed paved access on both sides of the Spur, giving it "unfettered access" to load, unload and
18 transload goods and freight. Att. D at 20. ("Transloading" involves the movement of freight from
19 one mode to another, such as from railroad to truck.)

20 4.41 BTRC's alleged improvements are a breach of the Operating Agreement. The
21 Operating Agreement prohibits BTRC from constructing rail or rail-related facilities that interfere
22 with the Trail's construction, unless BTRC sends proposed construction plans to the City and the
23 City consents to such construction. Att. A at 10. The City never received or consented to any plans
or notice of proposed construction from BTRC.

4.42 BTRC asserts that the Operating Agreement and Franchise should be preempted by
federal law and by the STB. However, the STB's jurisdiction arises only if the City's activities

1 significantly interfere with BTRC's rail operations. Because the City's activities do not significantly
2 interfere with BTRC's rail operations, the Operating Agreement and Franchise are enforceable
3 against BTRC and are not subject to preemption.

4 4.43 BTRC's efforts to stop the Missing Link project, its objection to the Missing Link's
5 alignment in the Ballard Line vicinity, its refusal to discuss or accommodate track relocations or
6 improvements, and the construction of improvements that interfere with the Trail, as evidenced by
7 its pattern of conduct and now in its Petition, constitute a breach of the Operating Agreement and
8 Franchise.

9 **V. CAUSE OF ACTION – CLAIM FOR DECLARATORY JUDGMENT**

10 5.1 The City incorporates all facts and allegations set forth in the paragraphs above and
11 below as if fully set forth herein.

12 5.2 There is an actual and presently existing controversy between the City and BTRC.
13 BTRC denies the City's right to construct the Missing Link. BTRC's position is directly contrary to
14 the terms of the Operating Agreement and Franchise.

15 5.3 A determination by the Court defining the extent of the City's right to construct the
16 Missing Link will provide a final and conclusive determination of the controversy between the
17 parties that has arisen from the Petition and from BTRC's assertion that the City does not have the
18 right to construct the Missing Link. Pursuant to chapter 7.24 RCW, the City is therefore entitled to a
19 declaration that: (1) the Operating Agreement and Franchise remain legal, valid, of full force and
20 effect, and binding on BTRC; (2) the City has the right to construct the Missing Link; (3) BTRC has
21 breached the Operating Agreement and Franchise through its actions; and (4) BTRC cannot take
22 actions to preclude, prohibit, or interfere with the Missing Link's construction. The City is also
23 entitled to an order pursuant to RCW 7.24.190 restraining BTRC from taking any further action
inconsistent with such a declaration.

1 **VI. CAUSE OF ACTION – CLAIM FOR INJUNCTIVE RELIEF**

2 6.1 The City incorporates all facts and allegations set forth in the paragraphs above and
3 below as if fully set forth herein.

4 6.2 The City has no plain, speedy or adequate remedy at law.

5 6.3 The City will suffer irreparable harm if BTRC is allowed to continue its campaign to
6 stop the Missing Link's construction.

7 6.4 For reasons including but not limited to those set forth above, the City is entitled to an
8 injunction enjoining BTRC from taking any further action to stop the Missing Link's construction.

9 **VII. CAUSE OF ACTION – BREACH OF CONTRACT**

10 7.1 The City incorporates all facts and allegations set forth in the paragraphs above and
11 below as if fully set forth herein.

12 7.2 The Operating Agreement and Franchise between the City and BTRC are valid and
13 binding written contracts.

14 7.3 BTRC, through its actions and inactions, has breached the Operating Agreement and
15 Franchise by failing to perform in compliance with the terms of the agreements. BTRC's breach
16 includes, but is not limited to, its efforts to stop the Missing Link project, its objection to the Missing
17 Link's alignment in the Ballard Line vicinity, its refusal to discuss or accommodate track relocations
or improvements, and the construction of improvements that interfere with the Trail, as evidenced by
its pattern of conduct and in its Petition to the STB.

18 7.4 The City is entitled to specific performance of the Operating Agreement and
19 Franchise by court order compelling BTRC's performance of all of its obligations, including but not
20 limited to cooperating with the Missing Link's construction, relocating tracks, and removing rail-
21 related facilities that interfere with the Trail.

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VIII. REQUEST FOR RELIEF

The City requests cumulatively, and in the alternative, that the Court grant the following relief:

8.1 All of the relief requested above, including without limitation the following:

8.2 An order for specific performance of all of BTRC's obligations under the Operating Agreement and Franchise, including but not limited to cooperating with the Trail's construction, relocating tracks, and removing rail-related facilities that interfere with the Trail.

8.3 A declaration that (1) the Operating Agreement and Franchise remain legal, valid, of full force and effect, and binding on BTRC; (2) the City has the right to construct the Missing Link; (3) BTRC has breached the Operating Agreement and Franchise through its actions; and (4) BTRC cannot take actions to preclude, prohibit, or interfere with the Missing Link's construction; together with an order restraining BTRC from taking any further action inconsistent with such a declaration.

8.4 An injunction enjoining BTRC from taking any further action to preclude, prohibit, or interfere with the Missing Link's construction.

8.5 Leave to amend this Complaint to add claims arising out of acts or omissions occurring after its initial filing and service;

8.6 An award of attorney fees and costs to the extent allowed by law; and

8.7 Further relief as may be just and equitable, including interim relief.

Respectfully submitted this 17th day of January, 2019.

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ATTACHMENT A

COPY

14 September 1997

Operating Agreement

This is an operating agreement between Adventure Trail (a Washington State IRC 501(c)(3) non-profit corporation ("Owner") and Ballard Terminal Railroad Company, LLC ("Operator") for operation of a line of railroad, owned by Adventure Trail, described as follows:

All that portion of the Ballard Branch acquired by Adventure Trail from Burlington Northern and Santa Fe Railroad Company ("BNSF") being more particularly described as BNSF MP .09 (that being approximately 1000 feet south of the clearpoint to the mainline) to end of line at BNSF MP 2.7 (that being approximately the south edge of Northwest 40th Street) in Ballard, all in Seattle in King County, Washington, including the "Olympic Stain" Spur, but excluding the "Bardahl" Spur. The aforementioned line of railroad is hereinafter referred to as "the line" or "the premises." The purpose of this Agreement is to preserve the line intact for rail use, trail use, and other compatible public purposes, provided, however, that Owner shall not be obligated to subsidize, directly or indirectly, rail use on the line other than as specifically provided herein. Adventure Trail shall do business as "Sea Lion Railroad Project" for purposes of this transaction and attendant regulatory proceedings, and shall be referred to as SLR herein.

1. Use. (a) As of the effective date of this agreement, it is the intent of the parties that while SLR is Owner, SLR shall have all common carrier obligations relating to the premises. Operator shall bear all responsibility to provide all freight rail services during the period of SLR ownership on an as needed basis pursuant to this contract. SLR agrees to furnish Operator (a) ten thousand dollars (\$10,000) to repair and to rehabilitate the track and ties, such amount payable upon tendering of receipts by Operator for actual expenditures for repair and rehabilitation, along with certification that the work has been completed in a satisfactory manner, and (b) up to eighteen thousand five hundred dollars (\$ 18,500) to pay for the first year of freight railroad liability insurance in a form satisfactory to SLR, in an amount no less than \$5,000,000 per incident, \$5,000,000 aggregate. Operator assumes responsibility to pay all costs of repair, rehabilitation and insurance above these specific amounts, and further agrees to provide all other railroad services (including but not limited to maintenance, rehabilitation, operation, interchange, and billing) reasonable or necessary to ensure safe and prudent operation without any further compensation from Owner, and to hold Owner harmless from all liability or claims (including claims for penalties and attorneys' fees) in the event Operator fails to discharge any or all of its obligations to provide such services.

(b) The parties acknowledge that SLR intends to seek authorization to railbank the premises pursuant to 16 U.S.C. 1247(d) and to transfer the underlying real estate to City of

Seattle free of any current common carrier obligation as quickly as reasonably possible, consistent with the other terms of this Operating Agreement, after the date upon which the railbanking authorization becomes effective. It is the intent of the parties that Operator obtain a modified certificate of public convenience and necessity ("modified PCN") (49 C.F.R. 1150.21, et seq.) upon the City's ownership of the premises, and for this operating agreement to be assigned by SLR to the City to serve as the operating agreement underlying the modified PCN. Once the modified PCN is issued, it is the intent of the parties that, from that point forward, Operator shall have the only extant current common carrier obligations with respect to the premises. It is the intent of the parties to cooperate in taking prudent and efficient actions to accomplish these intents. This Operating Agreement is intended to serve as a contract to provide services as needed during the period of SLR ownership of the premises, and as an Operating Agreement upon assignment to the City of Seattle, including for purposes of a notice for modified PCN.

(c) During the period of SLR ownership, and after SLR transfers ownership to the City of Seattle, Owner hereby grants to Operator permission to use any and all of the Owner's rights and licenses in the line and between the line and the point of interconnection with BNSF as may be necessary for the purpose of providing rail freight service. The rights granted to Operator relate solely to the provision of rail service on the line, and Operator may not use the line for any other purposes without the prior written authorization of Owner. During the period when SLR is Owner, SLR shall have the right to control dispatch.

(d). In the event operation of a railroad on the premises conflicts with any current trail use on that portion of the premises east of Eighth Avenue, Operator shall undertake one of the following three courses of action: (i) cease operation over any such portion of the premises; (ii) move (at Operator's expense) the tracks and ties, or reconfigure the tracks and ties, such that there is no conflict; or (iii) seek a waiver of any regulation resulting in such a conflict (provided, however, that Owner will cooperate in seeking such a waiver). When the City becomes Owner, Owner at the request of Operator will consider approval of a plan by Operator permitting Operator to close the trail during brief intervals when rail equipment is actually moving adjacent to the trail. Owner will cooperate with Operator in seeking rehabilitation grant money to move track and ties if necessary, provided however there is no liability upon Owner.

2. Inspection. Owner or its duly authorized representative, upon reasonable notice to Operator, shall have the right to inspect any and all rail facilities for the purpose of verifying Operator's compliance with the terms and conditions of this agreement. Further, the parties hereto agree that a Federal Railroad Administration (FRA), Washington Department Transportation (DOT), or Washington Utilities and Transportation Commission (WUTC) rail inspector shall perform a total inspection of the trackage prior to

commencement of rail service, said inspection to serve as a base inspection for all future maintenance and/or rehabilitation efforts on the trackage. The trackage shall be subject to FRA, DOT, and WUTC (as used herein, FRA, DOT and WUTC shall include successor agencies) inspection until termination of this agreement. Operator agrees to abide by such inspections and to address any and all concerns raised in these various rail inspections, consistent with the remainder of this agreement. Nothing herein shall limit the City's lawful police powers of inspection under its Charter and any applicable franchise.

3. Ownership of Track and Ties. Upon (i) transfer of all Owner's real estate interests in the line to the City of Seattle, (ii) effectiveness of a modified PCN for BTRC, and (iii) payment by Operator of ten dollars in compensation, Owner shall execute, and Operator shall accept, a bill of sale transferring by quitclaim to Operator all Owner's right, title and interest in the track, ties and other track material in the property. Such transfer shall be AS IS, WHERE IS, without any warranties, including warranties of title, merchantability, or suitability for any purpose or use. Operator shall employ such material for purposes of providing railroad services in Ballard. Upon acquisition of said material from Owner, Operator shall own and have the right to remove any of said material; provided, however, that in the event (i) this agreement is terminated, (ii) Owner enters into an agreement with a subsequent operator to provide rail services, and (iii) Owner notifies Operator that it wishes to re-acquire sufficient track for through operation, then Operator shall not cause any track or tie to be removed which shall cause the rail facilities to be less serviceable than as of the date Owner acquired the rail facilities, and Operator shall sell said track to Owner or Owner's designee for the price paid by Operator to Owner for same. In the event Owner or Owner's designee wish to acquire Additions constructed by Operator at Operator's expense, Owner or Owner's designee shall have the right to acquire said Additions at net liquidation value (NLV) using the methodology for calculation of NLV employed by the Surface Transportation Board; provided, however, that if the acquisition is for freight or excursion passenger rail purposes and within five years of the effective date of this Agreement, Owner's designee shall acquire the property at a price mutually agreed upon between Owner's designee and Operator.

4. Additions. Owner hereby grants to Operator the right to make such Additions to the rail facilities as Operator may require to permit rail freight or passenger (consistent with paragraph 25) service, at Operator's sole expense, consistent with the remainder of this agreement. The term "Additions" shall mean capital improvements which are in addition to the rail facilities provided by Owner. Operator shall own and have the right to remove any of said Additions which can be removed without causing the rail facilities to be less serviceable than before said Addition was made.

5. Conditions on service. (a) During operations under this Agreement pursuant to a modified PCN, Operator shall have no obligation to provide freight rail services unless shippers meet the following term and condition as a condition to receiving service:

Shippers or prospective shippers must ship at least 30 carloads/year, averaged over a rolling three year period.

(b) During operation, Operator shall be responsible for the normal and regular work required to keep the rail facilities in a condition necessary to enable safe operations. Owner shall not be responsible for track, tie, or roadbed maintenance, repair, rehabilitation, or operation. No owner subsidy shall be provided for the line, other than as specifically provided herein.

(c) No interest in land, or title to real estate, shall transfer to Operator under this agreement, with the exception of the parcel referenced in paragraph 6 in the event Operator exercises the option therein set forth, and with the exception of the lease of the parcel provided in paragraph 9.

(d) Operator shall not interrupt any business access except as necessary to provide rail services or to comply with applicable regulations.

6. Locomotive facility. Operator may acquire by purchase the property identified in Exhibit A from SLR, pursuant to the terms and conditions set forth below. (i) Operator must inform SLR in writing that it wishes to proceed within thirty (30) days of the effective date of this agreement, (ii) Operator must assume all environmental liability for said parcel and hold SLR harmless from same, (iii) the parties must agree on a property description, and on the square footage to be leased or conveyed (said description shall presumptively be that set forth in Exhibit A, provided that either party may request corrections for forty five days after the effective date of this Operating Agreement), (iv) the transfer shall be made prior to the date of transfer of all other real estate interests in the corridor to the City, (v) SLR shall have no obligation to convey the property unless STB authorizes railbanking of the premises, and said authorization becomes effective, (vi) Operator shall bear all costs of closing, including recording fees, excise and property taxes, and so forth, (vii) the transfer shall be by quitclaim deed by SLR to Operator of all interests it receives from BNSF, subject to whatever restrictions BNSF places upon SLR, without any warranty of title, or propriety for any particular use, (viii) Operator shall pay in cash to SLR \$14.50 per square foot times the total amount in square feet of property to be conveyed, in cash, at closing, and (ix) should rail service cease on the line, Operator agrees to offer the property to City for acquisition for 120 days at a price to be mutually agreed upon.

7. Modified PCN. Upon transfer of the real estate underlying this line to the City of Seattle, Operator shall secure a modified certificate of public convenience and necessity (modified PCN) pursuant to 49 C.F.R. § 1150.21, et seq., or equivalent order for

operators of state or local government owned railroads previously authorized for abandonment from the Surface Transportation Board. Operator shall be responsible for all costs associated with obtaining such order, but shall have the right to recover those costs (and any other regulatory costs or expenses) from any shippers or prospective shippers. A form of application for the modified PCN is attached as Exhibit B.

8. Liability for operations, disclaimer and insurance. (a)

Upon commencement of rail operations (including any repair or rehabilitation) on the premises by or under the authority of this agreement, Operator shall be responsible for all legal liability arising from said operations, shall hold Owner harmless from same (including claims for attorneys' fees, court costs, or penalties), and shall obtain insurance, satisfactory to Owner, for such operations.

(b) Owner makes no representations or warranties with respect to the condition of the property, including the right of way, for any purpose, or with respect to compliance with any environmental laws, or with respect to the existence of, or compliance with, any required permits of any governmental agency. Operator acknowledges to Owner that Operator has fully inspected the premises and is not relying on any statements made by Owner or Owner's agents with respect to the condition of the premises, including any rail, track or other track material, or crossings, and that Operator assumes the responsibility and risks of all conditions, including such defects and conditions, if any, that cannot be observed by casual inspection.

(c) (i) Operator shall, at all times during the term of this Agreement, obtain and maintain continuously, at its own expense, and promptly supply to such representative of Owner as Owner may from time to time designate in writing, evidence of a policy or policies of insurance for railroad purposes, in a form and in amounts acceptable to Owner prior to the initiation of rail service. Owner shall not be obligated to approve Operator's insurance coverage unless it includes all the conditions and specifications enumerated below:

(A) A policy of Comprehensive Railroad Liability Insurance, including coverages known as

- (1) premises/operations liability
- (2) products/completed operations
- (3) personal/advertising injury
- (4) contractual liability
- (5) bill of lading
- (6) foreign rolling stock
- (7) fire suppression expenses
- (8) pollution clean-up expenses
- (9) stop gap or employers contingent liability

(B) Such policy or policies shall provide the following minimum limits:

(1) bodily injury and property damage:
\$5,000,000 each occurrence, \$5,000,000 aggregate. Property

damage coverage shall include coverage for clean-up of spills of hazardous material on the rail corridor or from the rail corridor to adjacent property.

(2) stop gap employers liability:

\$1,000,000 each accident, \$1,000,000 disease-policy limit,
\$1,000,000 disease-each employee.

(3) Owner will consider reducing the insurance coverage specified in item (1) above to \$3,000,000 per occurrence and aggregate after three years experience with actual operations.

(C) In the event rail passenger service is instituted, any such service shall be insured in an amount not less than \$10,000,000 per occurrence/aggregate.

(D) The maximum deductible or self-insured retention shall be \$25,000, and shall be subject to approval by Owner to ensure conformity to this provision.

(E) Operator shall include any subcontractors or agents as insureds under its policies or require such subcontractors or agents to maintain insurance acceptable to Owner, which insurance shall be specified in writing prior to commencement of work by the subcontractor or agent after consultation with Owner, but shall not be less than general commercial liability insurance in an amount no less than \$1,000,000 per incident, \$2,000,000 aggregate.

(F) Operator shall maintain a policy (or policies) of General Commercial Liability in an amount no less than \$1,000,000, and Business Automobile Liability, including coverage for owned, non-owned, leased or hired vehicles written on an insurance industry standard form (CA 00 01) or equivalent. Such policy (or policies) shall provide a minimum limit of \$1,000,000 for bodily injury and property damage per accident.

(G) All insurance provided under this agreement shall be endorsed to include the Owner (including any successor Owner), its officers (including elected officials if a successor is a political subdivision or the City), employees, agents and volunteers as additional insured. In addition, Operator's insurance shall be primary as respects Owner (including any successor Owner), and any insurance maintained by Owner shall be excess and not contributing insurance with the Operator's insurance.

(H) The following clause shall be made part of all said policies of insurance: "It is agreed that in the event of material change or cancellation, this company shall give forty-five (45) days prior written notice to the Owner of the property, addressed to: Property Manager, SLR, P.O. Box 17883, Seattle, WA 98107, or, if the Owner is the City of Seattle, to Seattle City Risk Manager, Room 103, Municipal Building, 600 Fourth Avenue, Seattle, WA 98104-1891."

(ii) (A) If any policy is written on a claims made form, the retroactive date shall be prior to or coincident with the effective date of this agreement. The policy shall state that coverage is claims made, and state the retroactive date. Claims made form coverage shall be maintained by the Operator for a minimum of six years following expiration or earlier termination of this agreement, and Operator shall annually provide Owner with proof of

renewal. If renewal of the claims made form of coverage becomes unavailable, or economically prohibitive, Operator shall purchase an extended reporting period ("tail") or execute another form of guarantee acceptable to Owner to assure financial responsibility for liability for actions, inactions, and services.

(B) Owner shall have discretion to require Operator to provide reasonable security (e.g., interest bearing escrow account, irrevocable letter of credit, bond, or third party guarantee), acceptable to Owner, that Operator will have sufficient assets to discharge, and will discharge, its obligation under subparagraph (ii) (A) above with respect to claims made coverage. In addition, Owner shall have discretion to require Operator to provide similar reasonable security, acceptable to Owner, to ensure that Operator will have sufficient assets to cover the entire amount of any self-insured retention provided in the insurance coverage herein. Unless otherwise agreed, acceptable security shall constitute a fully-funded interest bearing escrow account at a federally-insured institution containing funds at all times equal to no less than the self-insured retention amount, or \$25,000, whichever is greater.

(iii) As evidence of insurance coverage, the following documents must be provided to Owner prior to occupancy of the premises by Operator:

(A) a certified copy of the policy or policies

(B) copies of all relevant endorsements naming Owner as an Additional Insured, showing the policy number, and signed by an authorized representative of the insurance company on Form CG2026 (ISO) or equivalent

(C) copies of all relevant "Endorsements Form Lists" to the policy or policies showing endorsements issued on the policy, and including any company specific or manuscript endorsements

(D) evidence of compliance with subparagraph (H) above

(E) for commercial general liability and business automobile liability insurance, a copy of a "separation of insureds" or "severability of interests" clause, indicating in substance that, except with respect to the limits of insurance, and any rights or duties specifically assigned to the first named insured, the insurance applies as if each named insured were the only named insured, and separately to each insured against whom claim is made or suit is brought.

(iv) All policies shall be subject to approval by Owner as to form, coverage, and being primary to all other insurance. Owner also shall require each company to be rated A-:VII or higher in the current A.M. Best's Key Rating Guide, and to be licensed to do business in the State or Washington, or a surplus Lines carrier authorized to do business in the State of Washington.

(v) Operator and its insurer(s) shall waive their rights of subrogation against Owner for damages arising from any risk covered by the required insurance policies or any other coverage maintained by Operator. Operator's insurance shall be primary with respect to any insurance carried by Owner.

(vi) At the request of Owner (which request may be made no more frequently than five year intervals), the minimum levels of

coverage herein shall be adjusted in proportion to changes in the consumer price index (or successor index) from its base in January 1997.

(vii) Failure to comply with insurance coverage requirements or failure to comply with indemnity requirements shall constitute material breach of this agreement.

9. Surface Transportation Board. (a) Owner and Operator will cooperate in any required filings before the Surface Transportation Board, or its successor. Operator acknowledges that Owner contemplates filing a petition for exemption, requesting expeditious treatment and an exemption from "offer of financial assistance" provisions, to permit railbanking of the premises under 16 U.S.C. § 1247(d); and that Owner intends to transfer the premises to City of Seattle upon the effectiveness of a railbanking order. Owner acknowledges that Operator intends to file for a modified PCN in order to serve as Operator for the City of Seattle when the City obtains ownership of the railbanked corridor. Operator will supply to Owner letters from each shipper on the line for the two years preceding suspension of service by BNSF in the form attached in Exhibit C-2 evincing support for the transactions and relationships contemplated pursuant to this Operating Agreement. Such letters may be employed before the STB and in other relevant public forums. Upon request, Operator will support Owner's position in any STB railbanking proceeding in writing. Upon request, Operator will also obtain letters of support specifically for filing with STB the aforementioned shippers in the form attached in Exhibit C-1. If Operator has become a common carrier on the line by the time of said railbanking petition of Owner, Operator will participate in the filing of the railbanking petition requesting identical relief (abandonment or discontinuance, as the case may be, coupled with railbanking) to that sought by Owner. Upon request, Owner will support Operator's filing for a modified PCN subsequent to a railbanking authorization.

(b) This agreement is subject to whatever conditions are imposed by the Surface Transportation Board, or its successor.

10. Rail and Trail facilities. (a) Owner and Operator agree that the trail (which, for this paragraph, may include pedestrian-only trail or path facilities, bicycle-only trail or path facilities, or some combination thereof) and railroad shall be constructed within the areas indicated in Exhibit D in all portions of the premises which are not in street right of way. Owner and Operator agree to design their respective facilities such that crossings of tracks are as safe as reasonably possible, by use of approaches close to right angle, or appropriate rubberized crossing materials, or similar measures. Operator agrees to design Additions and configurations so as to minimize crossing of trail facilities. Owner and Operator shall avoid damage to each other's facilities.

(b) Owner and Operator agree that new trail facilities (other

than crossings)¹ may be constructed only in accordance with applicable regulations of DOT or WUTC relating to separation from centerline of rail.² At the request of Operator, Owner will consider installing dividers between the rail and trail at limited locations consistent with applicable guidelines for bicycle facilities or, in the case of purely pedestrian facilities, guidelines issued by the City for same,³ provided that separation of such dividers from the centerline of the rail is consistent with applicable regulations of DOT or WUTC. The desired width for the trail corridor between Eighth and Eleventh Avenue shall be twenty (20) feet in width, but may be reduced to no less than eighteen and one half (18-1/2) feet in order to accommodate an additional line of track installed by Operator. Owner shall be responsible to install appropriate informational and safety signage relating to any new trail construction in accordance with applicable City of Seattle guidelines.⁴

(c) Owner and Operator acknowledge that there are certain portions of the rail corridor where the available width for new trail development purposes, taking into account Washington State regulations for minimum trail clearances, unless the rail line is moved, is less than ten feet, and where trail facilities have not yet been constructed. In all such instances, Owner reserves the right to develop a trail, but in the event of trail development, will limit trail use to pedestrians, employing appropriate City of Seattle guidelines for pedestrian facilities, and will develop a bicycle trail at suitable alternative locations. Nothing herein shall prohibit use of sidewalks or existing streets by motorized or non-motorized users, or pedestrians.

(d) In the event trail maintenance or construction damages rail facilities owned by Operator, Owner shall be responsible for the costs of repair. In the event railroad maintenance or construction damages trail facilities, Operator shall be

¹ For purposes of this subparagraph, new trail facilities means any trail facility within the premises constructed from Eighth Avenue west.

² The parties concur that the applicable regulations include WAC 480-60-050. As a matter of convenience, Owner intends to provide a ten foot separation where practical.

³ The applicable guidelines for bicycle paths and trails are currently set forth by the American Association of State Highway and Transportation Officials in "Guide for the Development of Bicycle Facilities" (August 1991), particularly at p. 24. The applicable City of Seattle guidelines for purely pedestrian facilities are (a) Seattle Street Improvement Manual and (b) City of Seattle Standard Plans and Specifications.

⁴ See footnote 3 and Manual for Uniform Traffic Control Devices.

responsible for the costs of repair.

(e) Owner shall have the right to require Operator to relocate its track in order to accommodate trail construction in accordance with this Agreement; provided, however, that a continuous track on the premises shall be provided unless Operator consents otherwise. Unless otherwise agreed, Operator shall promptly move its track at Owner's written request to accommodate the construction of trail facilities. Owner shall be responsible for the direct labor costs of such movement, plus five (5) per cent overhead based on those costs with respect to the entire premises, except that, with respect to that part of the premises north of Seaview Avenue, N.W., owner shall be responsible for the costs of retaining structures, grading, drainage, and engineering associated with trail installation north of Seaview Avenue N.W., and shall not otherwise be responsible for the costs of any new ballast, track, ties, or other material used in such move. Owner and operator shall enter into a written agreement regarding any construction project to be undertaken associated with movement of rail to accommodate trail development on the premises north of Seaveiw Avenue, N.W. The construction agreement referred to herein will ensure that owner is only responsible for reimbursing operator for those costs specified above caused by owner's plan to develop a trail on the premises, and the parties will endeavor to minimize owners' s cost to the extent possible. Consent to an agreement shall not be unreasonably withheld. Owner shall reimburse Operator for such direct labor costs upon receipt of an itemized bill from Operator. Operator shall use reasonable care in the construction of all new or moved rail facilities. Owner shall use reasonable care in the construction of all new or moved trail facilities. The provisions of paragraph 1(d) shall govern the portion of rail with trail east of Eighth Avenue. Owner shall be responsible for design and installation of a safe crossing for the trail north of Seaview Avenue in the event of trail development.

(f) Operator shall not engage in construction of rail or rail-related facilities which interfere with the trail to be constructed on the premises. Owner shall not be responsible for the costs of moving any new rail or rail-related facilities which interfere with the trail. Operator may tender Owner proposed construction drawings for all new facilities, to such person as Owner identifies in writing. If Owner within thirty days of receipt of said drawings does not state a determination that interference will or may occur, Owner shall be deemed to have made a determination of no interference and shall be responsible for costs for moving said facilities in accordance with this paragraph in the event the facilities are constructed and later found to interfere.

(g) Operator and City both covenant and agree to keep their respective portions of the premises free and clear of debris and equipment not in actual use for rail or trail construction, maintenance or operations.

(h) Notwithstanding any other provision of this agreement, Operator shall have access to, and full responsibility for, all

signals, including grade crossing signals, used or installed for operation of this railroad line.

(i) Effective when City becomes Owner under this Operating Agreement, City undertakes to provide Operator with 120 days notice, and a subsequent opportunity to consult, prior to City's presentation of a request for initial authorization or financing for an extension of the Burke-Gilman Trail in the area between 11th Avenue and the Locks within the premises. Nothing herein shall require advance notice to Operator of, or otherwise abridge any right of the City to engage in, site-specific and ordinary bicycle or pedestrian improvements, site-specific safety improvements, or sidewalk installation, replacement, or repair in the referenced area.

11. Transload. (a) Taking note that this Operating Agreement is in accordance with the Burke-Gilman Agreements between the City and BNSF, and that said Agreements provide for certain lease cancellations by BNSF in the event of transfer pursuant to the Agreements, SLR agrees to request BNSF to terminate all leases for the property described in Exhibit E prior to transfer to SLR. Provided said leases are terminated, Owner and Operator agree that, for the duration of this operating agreement, Operator shall have a lease providing for exclusive use to the property described in Exhibit E for transload purposes. The lease with Operator shall provide that any fixture remaining upon the premises shall become the property of Owner at the termination of this operating agreement. Operator shall leave the premises free and clear of any contamination or debris at the termination of this operating agreement.

(b) Operator shall be solely responsible for all losses, claims of damage, or liability (including liability for attorneys fees, court costs, penalties, or environmental contamination) arising from its use of the area set forth in Exhibit E, and shall hold Owner harmless from same.

12. Indemnities. (a) Operator shall defend Owner (with counsel approved by Owner) and shall fully indemnify Owner, and hold Owner and its officers, employees, and agents harmless from any and all losses, claims, actions, judgments, property damages, death, personal injuries, or damage suffered by any person or entity arising out of resulting from any occurrence of property damage, death or injury (i) in or on the premises occupied or used by Operator, including common carrier liability, (ii) arising from Operator's operations on or off the premises, and (iii) arising from the violation of any law or breach of any franchise or operating agreement, including this agreement by Operator, or any of its officers, directors, employees, agents, or contractors. In the event Operator fails to defend (or to defend adequately in the opinion of Owner) the suit, Owner shall have the right to assume the defense and to be held harmless from all costs arising from same, including costs for legal counsel and all fees and charges related thereto; provided, however, that Owner may always

participate in a proceeding at its own expense. Under this indemnity, Operator shall be responsible promptly to satisfy any final judgment adverse to the Owner or Owner and Operator jointly.

(b) The indemnity provided in this paragraph is intended to be broad and comprehensive. It shall not be diminished by the fact, if it is a fact, that the liability in question may have been contributed to by the negligence of the Owner, its officers, employees, or agents, provided, however, that Owner shall be liable if the liability arises solely and entirely from the fault of the Owner.

(c) The indemnification provided by this paragraph has been mutually negotiated by the parties and shall survive the termination of the Operator's franchise, the Operator's surrender of use and occupancy, and expiration or termination of this agreement. This indemnity is for the sole benefit of Owner, and shall not inure to the benefit of any third party other than Owner, its successors, and Owner's (or successor's) officers, employees, or agents. Operator waives, with respect to the Owner (and its successors) only, its immunity under RCW Title 51, Industrial Insurance, and to any other industrial insurance, workers' compensation, disability, or employee benefit legislation of any jurisdiction which would otherwise be applicable.

13. Environmental. (a) Operator (i) shall cause the premises under its control or use, and all Operator's operations thereon, to be conducted in accordance with all environmental laws and orders of any governmental authorities having jurisdiction, (ii) shall obtain, keep in effect, and comply with all governmental permits and authorizations required by environmental laws with respect to the premises under Operator's control or use, and with respect to Operator's operations, and (iii) shall furnish Owner with copies of all such permits and authorizations, including any amendments or renewals thereof, upon request, and notify Owner promptly in the event of expiration or revocation of such permits or authorizations.

(b) Operator's indemnity in paragraph 12(a) shall also apply to hold Owner harmless from any claims (including claims for attorneys' fees, court costs, or penalties) relating to any hazardous, dangerous or toxic material, waste, substance, or other pollutant or contaminant (hereinafter collectively referred to as "hazardous material"⁵) arising out of, or resulting from (i) Operator's operations, (ii) the violation of any law or breach of this agreement by Operator or any of its officers, directors, employees, agents or contractors, (iii) the release by Operator of any hazardous material on the premises controlled or used by Operator or involving Operator's operations outside the premises.

⁵ It is the intent of the parties that hazardous material shall include such substances, materials and wastes as are currently or as become regulated or subject to clean-up authority under any local, state or federal law.

under its control or use. In the event Owner must take action to respond to such claims, Operator shall indemnify Owner for all costs which Owner incurs, including all clean-up and remediation costs, including attorneys', consultants' and contractor's fees to achieve compliance with applicable laws, regulations, and orders.

(c) Owner shall have the option, at Owner's expense, to require an environmental audit of the premises used by the Operator at any time, and shall have a right of entry for same. If Owner at any time has reasonable grounds to believe that Operator is not complying with the terms of this paragraph or that a release of a hazardous substance has occurred or is about to occur, Owner may require Operator to furnish Owner with an environmental audit or site assessment, at Operator's expense, conducted by a qualified consultant acceptable to Owner. If such environmental audit does not disclose noncompliance or a release by Operator, Owner shall promptly reimburse Operator for all costs incurred in connection with such environmental audit.

(d) Nothing in this agreement shall be construed to abridge the rights of Owner or Operator to pursue the liability of responsible third parties for contamination of the premises, and the parties agree to undertake reasonable measures to assist each other in any such endeavor.

(e) Unless Owner specifically agrees otherwise in a writing signed by Owner, Operator shall not store, treat, recycle, manufacture, refine or generate hazardous material on the premises, except as may reasonably be necessary for its own operations, or as incidental to a shipment. Operator shall not dispose or release hazardous material on the premises. Operator in all events shall conduct its operations so as to comply with all applicable environmental laws and to minimize the likelihood of any releases on, in, above, under or from the premises.

(f) Operator shall undertake all investigatory, preventive, and remedial actions reasonably necessary to comply with applicable environmental laws, regulations, and requirements, or to prevent or minimize property damage, personal injury, or damage to the environment, or threat of same, by releases or exposure to hazardous materials in connection with the premises or Operator's operations. Operator shall promptly notify Owner of any spill or release of a hazardous material, any violation of law relating to same, any lawsuit filed or threatened regarding same, any notice, fine or penalty regarding same, and any investigation or proceeding regarding same, arising in connection with the premises or Operator's operations.

(g) Sixty (60) days prior to the expiration of this agreement, or upon receiving notice of termination, Owner shall have the right (including a right of entry) to conduct an environmental assessment designed to establish the environmental condition of the premises. Upon completion of the assessment, Owner shall provide Operator with a copy of an environmental report that describes the results. The parties agree that there shall be a presumption (which shall be rebuttable) that the assessment shall establish the environmental condition of the premises as of the

date this agreement terminates. Nothing in this agreement shall be construed as (I) a presumption or determination that any contamination or hazardous substance disclosed in such assessment was caused by Operator or during Operator's occupancy of the premises, or (II) an undertaking by Operator to cure or address any such contamination or hazardous substance, or (III) a waiver by Operator of any claim of responsibility by either party against the other, or any other person or entity, relating in any manner to any such contamination or hazardous substance.

(h) Notwithstanding any other provision in this agreement, in the event of a breach of this paragraph by Operator, Owner upon reasonable notice and opportunity to cure (which notice and opportunity to cure may be as short as twenty four hours in the event of an emergency involving a release or threatened release of a hazardous substance) may suspend all or a portion of this agreement, or, if the release involves an imminent danger to the public, may terminate this agreement. Owner may also exercise any remedies otherwise available in law. Nothing in this subparagraph shall be construed as a waiver by Operator of any claim against Owner for wrongful termination or suspension of this agreement.

(i) Nothing herein shall be construed to constitute a waiver of, or release of, or a limitation upon, the rights or responsibilities of the Owner or Operator in any future action pursuant to the Washington Model Toxics Control Act, RCW Chapter 70.105D, or the Comprehensive Environmental Response, Compensation and Recovery Act, 42 U.S.C. 9601, et seq., as either statute is amended or supplemented, or pursuant to any successor statute.

14. Laws to be observed. Operator shall keep fully informed of all Federal and State laws, all local laws, ordinances, regulations, injunctions and all final orders and decrees of bodies of tribunals having any jurisdiction or authority, which in any way affect the performance of this agreement, including without limitation any laws, ordinances, regulations, orders, or decrees, identified herein. Operator shall at all times observe and comply with all such laws, ordinances, regulations, and all final orders and decrees (to the extent not preempted by federal law) and shall protect, hold harmless and indemnify the Owner against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, injunction, or final order or decree.

15. Assignment. Operator shall not assign its right or delegate its duties under this agreement, or any part hereof, without the prior written consent of Owner. The parties contemplate that SLR shall assign all its interests in this Operating Agreement to City of Seattle pursuant to the form of assignment attached as Exhibit F. Upon such assignment, SLR shall be deemed relieved of all obligations to Operator.

16. Term. The term of this agreement shall be thirty years, subject to cessation of operations or termination of the agreement as provided herein.

17. Breach. In case of breach of this agreement by Operator, Owner shall give Operator no less than thirty (30) days notice to cure, in writing, stating the breach that has occurred, the basis for viewing the occurrence (or non-occurrence) as a breach, and a request or demand that the breach be cured. Upon request, Owner will reasonably cooperate in effecting cure (so long as consistent with applicable law, and so long as costs of cure are borne by Operator). If cure is not substantially affected within the time specified in the notice (no less than thirty (30) days calculated from delivery of said notice), Owner may declare this agreement terminated if the breach is material, or, alternatively, and also in the case of non-material breaches, shall have a right to require suspension of rail operations until the breach is remedied, or shall have a right of entry to make such repairs or modifications (or to perform such work) as is necessary to remedy the breach, charging all costs and expenses to the Operator, which shall pay the amount within thirty (30) days. For purposes of this Agreement, material breach shall include, but not necessarily be limited to, failure to maintain required insurance coverage, use of the premises by the Operator for purposes other than rail or rail-related purposes, failure to comply with final FRA, DOT or WUTC orders, failure to remedy environmental conditions caused by the Operator, failure to discharge common carrier (freight railroad) obligations, failure to comply with paragraph 25 (relating to passenger uses), and/or failure to comply with any portion of paragraph 9 (cooperation before STB).

18. Other termination and termination generally. (a) Owner may terminate this agreement if the level of freight rail usage decreases below an average of 30 carloads per year averaged over any 36 month period.

(b) During the period SLR owns the premises, Operator may not terminate this agreement without the prior written consent of SLR. Upon assignment of this agreement to the City of Seattle, Operator may terminate this agreement upon sixty (60) days prior written notice to the City of Seattle, compliance with all the terms of this Agreement, and satisfaction of any applicable regulations or requirements of the Surface Transportation Board, or its successor.

(c) In the event of termination, Operator upon request of Owner shall cooperate in any required filings before the Surface Transportation Board, or its successor, to secure a prompt termination of any applicable operating authority and in a fashion so as to secure preservation of the premises under 16 U.S.C. 1247(d).

(d) Nothing herein shall be construed to limit or to abridge the City's rights of termination provided in the City's Charter applicable to franchise agreements generally.

19. Notices. All notices under this agreement shall be deemed delivered if posted by U.S. Mail, postage pre-paid, first class, or sent by express delivery (one or two day service), or by

2 fax transmission, to the addressees or (if appropriate) fax numbers
3 provided below:

4 If to Owner, to: Property Manager

5 SLR

6 P.O. Box 17883

7 Seattle, WA 98107

8 Fax number: (206) 706-1991

9
10 If to Operator, to: Byron Cole, Managing Member

11 Ballard Terminal Railroad Company, LLC

12 5228 Shilshole Ave. N.W.

13 Seattle, WA 98107

14 Fax number: (206) 781-0984

15
16 These addresses may be changed provided notice is given in
17 writing.

18
19 20. Severability. In the event any section, paragraph,
20 sentence, clause or phrase contained herein shall be determined,
21 declared, or adjudged invalid, illegal, unconstitutional, or
22 otherwise unenforceable, such determination, declaration, or
23 adjudication shall in no manner affect the other sections,
24 paragraphs, sentences, clauses, or phrases of this agreement, which
25 shall remain in full force and effect as if the section, paragraph,
26 sentence, clause or phrase declared, determined, or adjudged
27 invalid, illegal, unconstitutional or otherwise unenforceable were
28 not originally a part thereof.

29
30 21. Governing law. This agreement shall be governed by the
31 laws of Washington.

32
33 22. Amendment. This agreement may be modified or amended
34 only in a writing referring to this agreement and executed by both
35 parties. In the event of a conflict between this agreement and the
36 applicable franchise ordinance, the franchise ordinance shall
37 control.

38
39 23. Subsidies. Except for financial contributions which
40 SLR has committed to make in paragraph 1, in no event shall Owner
41 be responsible for repair, rehabilitation, maintenance, or
42 operation of rail facilities, or property in the corridor used or
43 occupied by Operator. Notwithstanding the above, Owner will
44 cooperate with Operator in seeking to facilitate grants or loans
45 for rehabilitation, provided, however, that Owner on no account
46 will be liable for repayment of said grants or loans except to the
47 extent of salvage value in the event Owner owns the salvage. SLR
48 agrees to send a form of letter in support of a rehabilitation
49 grant request substantially in accordance with Exhibit H.

50
24. Survival. All indemnities and allocations of liability,
including associated insurance provisions, shall survive expiration

or earlier termination of this agreement.

25. Passenger use. Owner shall permit passenger use on the following conditions: (a) insurance requirements for said use as set forth in this agreement are met, (b) FRA or DOT inspectors certify that the line meets at least FRA Class I standards (or higher standards if applicable for passenger service), (c) the engineer for any passenger operation is FRA-certified, (d) all equipment employed meets FRA, DOT, WUTC and other applicable standards, and (e) Operator receives prior written approval from Owner (if the City, through its Director of Transportation) of an operating plan (i) covering hours of operation and boarding/deboarding locations consistent with maintaining safe traffic flow, egress and ingress to abutting businesses, and the provision of adequate parking, (ii) demonstrating consistency with trail use, compatibility with freight service, and showing that the primary purpose of the line remains freight rail service, (iii) identifying safety measures to be implemented during passenger operations at crossings, and (iv) consistent with the construction and operation of passenger facilities in connection with commuter rail use of the BNSF mainline.

26. Conformity to acquisition contract. In the event the contract for acquisition of the premises by SLR from Burlington Northern Santa Fe Railway imposes terms or conditions more stringent than this agreement, the acquisition contract terms or conditions shall control. A copy of the most recent form of acquisition contract is attached as Exhibit I. The parties agree that the acquisition contract, when executed and delivered by both parties, shall be automatically substituted for the form of contract attached as Exhibit I upon delivery (by hand, express, or U.S. Mail, postage pre-paid, first class) by Owner to Operator.

27. Effective date. This agreement shall become effective at such time as SLR obtains authority from the Surface Transportation Board, or its successor, to acquire and in fact acquires the premises from The Burlington Northern and Santa Fe Railway Company. (A draft form of notice of exemption for that purpose is attached as Exhibit G.) Until such time as SLR obtains the property pursuant to an effective notice of exemption (or other appropriate authorization from the Surface Transportation Board, or its successor), the parties shall not be obligated to each other, other than to cooperate in efforts to achieve the conditions precedent to the effectiveness of this agreement.

28. Miscellaneous. (a) All parties to this Agreement attest that they have freely and willingly entered into this Agreement, with advise of counsel, and that neither this Agreement nor any provision within it is the result of superior bargaining power or duress. Furthermore, all parties to this agreement represent to each other that they neither can nor will take the position that this Agreement, or any portion of this Agreement, is a contract of

1 adhesion.

2 (b) Notwithstanding any other provision of this Agreement,
3 Operator shall conform to the provisions set forth in Exhibit I
4 relating to salvage activities and utilities.

5 (c) The parties jointly undertake to support the provision of a
6 letter in the form set forth in Exhibit J to BNSF.

7 (d) The parties acknowledge that SLR and Seattle intend to enter
8 into a memorandum of understanding substantially in the form set forth
9 in Exhibit K.

10
11 29. Separate counterparts. BTRC and SLR agree that this
12 Operating Agreement may be executed in separate counterparts and shall
13 be deemed accepted when the counterparts are delivered by each to the
14 other. Delivery may be evinced by transmission by fax of executed
15 signature pages to (in the case of BTRC) Stephen L. Day, Esq. at 206-
16 292-9988, and (in the case of SLR) Fred Wert at 202-706-1991. City's
17 approval as to form may be evinced by appropriate signature on either
18 counterpart. The parties will cooperate in achieving fully executed
19 originals should the separate counterpart method be initially
20 employed.

21
22 Ballard Terminal Railroad Company, LLC

23
24 by: Paul Henderson

25
26
27 Sea Lion Railroad Project

28
29 by: Fred Wert

30
31
32 The form of this agreement is acceptable for purposes of future
33 assignment to the City of Seattle.

34
35 Seattle Department of Transportation

36
37 by: Dayl G. G. G.

38
39 Exhibit A: parcel for locomotive facility
40 Exhibit B: form of application for modified PCN
41 Exhibit C-1: form of support letter for STB
42 Exhibit C-2: form of general support letter
43 Exhibit D: rail and trail maps
44 Exhibit E: parcel for transload
45 Exhibit F: form of assignment to City of Seattle
46 Exhibit G: form of "notice of exemption for acquisition and
47 operation"
48 Exhibit H: form of letter supporting grant application
49 Exhibit I: form of BNSF-SLR purchase agreement, including
50 conditions relating to salvage and utilities
51 Exhibit J: form of City letter to BNSF regarding compliance
52 with Burke-Gilman agreements
53 Exhibit K: form of MOU SLR/Seattle

Shared Use of Corridor

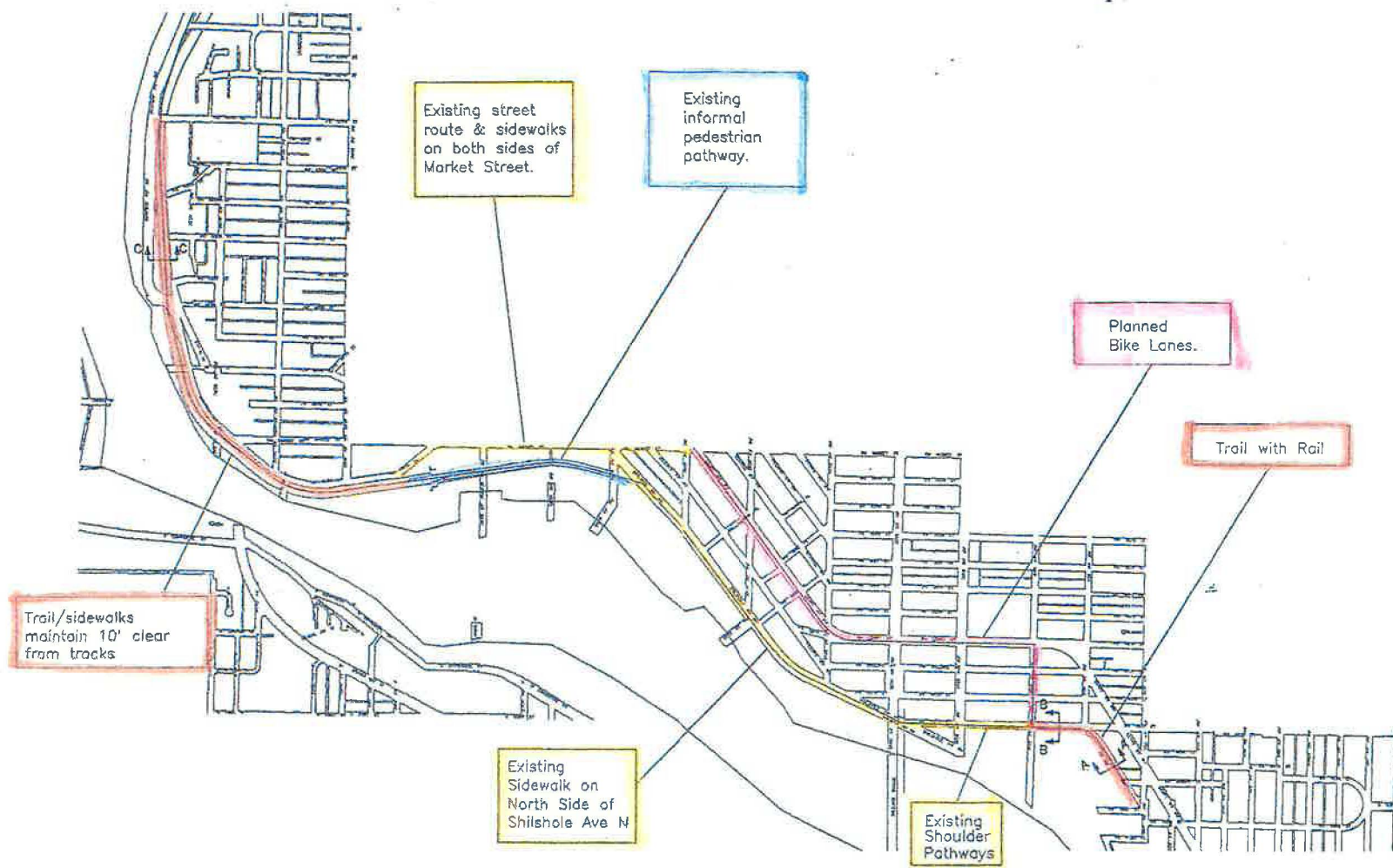
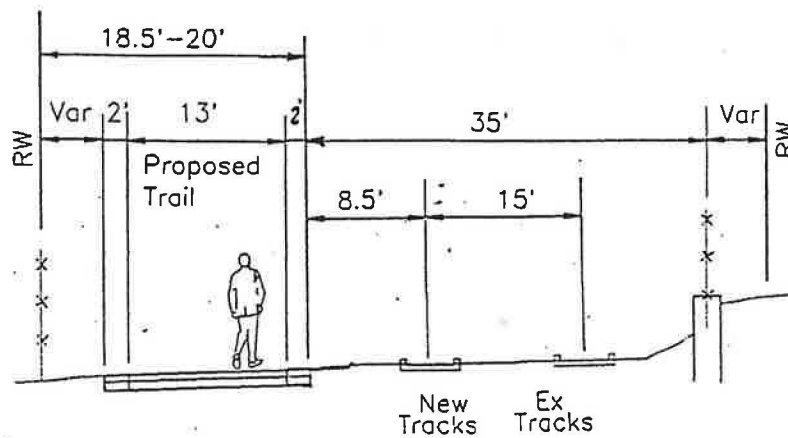
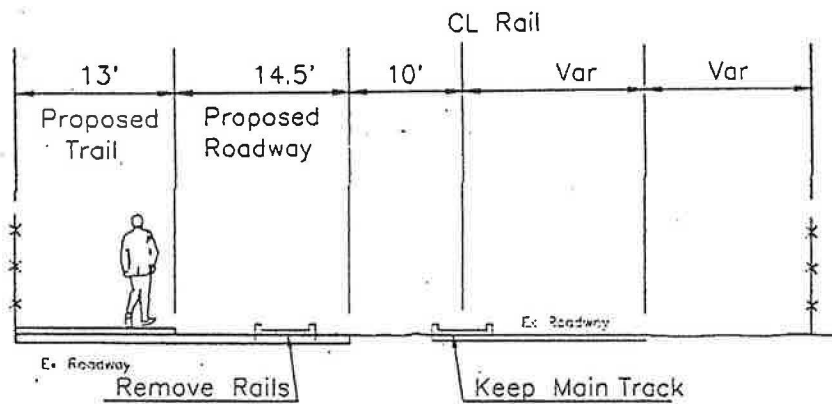


Exhibit D1



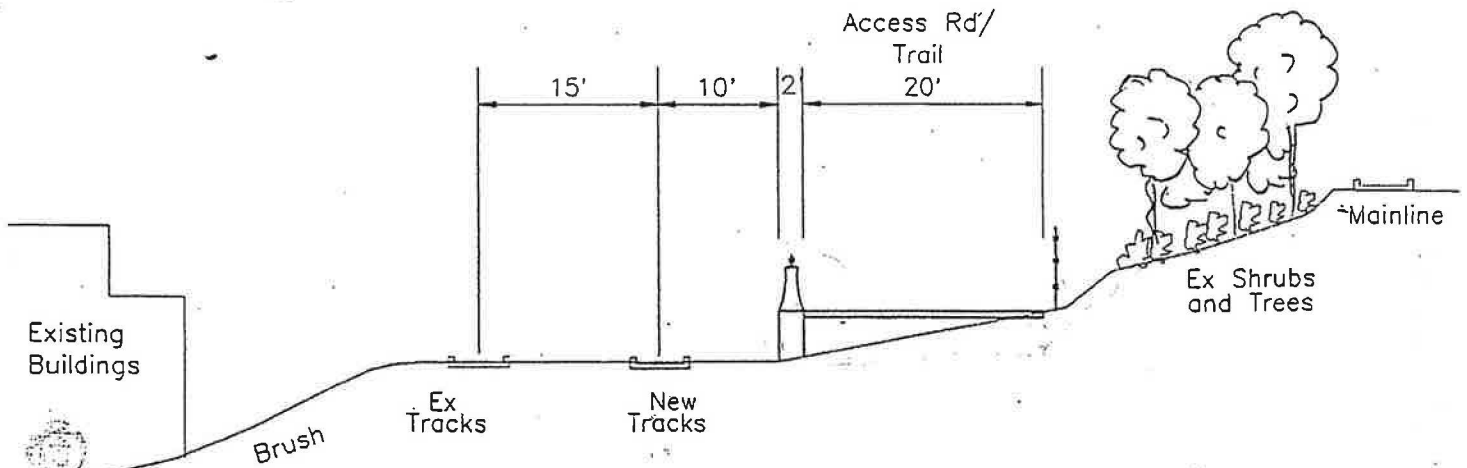
Section A-A

Typical Section
Between 8th & 45th
Looking Northwest



Section B-B

Typical Section
on 45th between
BNRR & 11th



Section C-C

Typical Section
North of Seaview
Looking North

ATTACHMENT B

ORDINANCE 118734

AN ORDINANCE granting to the Ballard Terminal Railroad Company a railway franchise and the right, privilege and authority to locate, lay down, construct, maintain, own, and operate standard gauge railway tracks in, upon, along and across that portion of the Burlington Northern and Santa Fe Railway Company's former Fremont to Ballard, Washington Branch Line right-of-way between 6th Avenue Northwest and Northwest 67th Street for a term of thirty years, specifying terms and conditions under which this franchise is granted, and providing for acceptance of the franchise, its terms and conditions.

WHEREAS, the Burlington Northern and Santa Fe Railway Company (BNSF) has expressed its intention to abandon that part of its line between BNSF Milepost 0.09 and BNSF Milepost 02.70 in the Ballard area of the city; and

WHEREAS, in 1988 the Burlington Northern Railroad Company and The City of Seattle set forth their joint objective to maintain a permanent linear corridor along selected railroad rights-of-way for trail purposes, including the right-of-way designated as the "North Ship Canal," being the Section from Third Avenue NW to the connection with the north/south rail line at NW 68th Street, which Section includes the above Mileposts; and

WHEREAS, the City's long-held policy is also to support rail-served businesses along the selected railroad rights-of-way; and

WHEREAS, Resolution 29474, passed November 12, 1996, reiterated the City's commitment to railbanking the North Ship Canal right-of-way for trail purposes and specified a preferred location for the trail's extension; and

WHEREAS, the Ballard Terminal Railroad Company (BTRC) recently has been formed to provide rail service to businesses located in the Ballard industrial area; and

WHEREAS, BNSF intends to enter into agreements that will result in the right-of-way being railbanked and owned by the City, and the rails, ties and other track materials being owned and used for rail service by BTRC pursuant to a modified certificate of public convenience and necessity issued by the Surface Transportation Board as authorized by 49 C.F.R. 1150.21 *et seq.*; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Conditions of Grant.

(a) That The City of Seattle ("the City") does hereby grant to Ballard Terminal Railroad Company ("Grantee"), a railway franchise and the right, privilege and authority to locate, lay down, construct, maintain, own and operate standard gauge railroad tracks in, upon, along and across Burlington Northern and Santa Fe Railway Company's current Milepost designations M.P. 0.09 to M.P. 02.70 of the existing rail line previously owned by the Burlington Northern and Santa Fe Railway Company in Ballard, for a term of thirty (30) years, expiring at 11:59 p.m. on September 29th, 2027.

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1 (b) That this ordinance shall be effective only when the following conditions
2 are first satisfied: (i) that an interchange agreement with Burlington Northern and Santa Fe Railway
3 Company exists to which Grantee is a party; (ii) that the rail line has been authorized for preservation
4 under 16 U.S.C. § 1247(d) as administered by the Surface Transportation Board; (iii) that the City has
5 acquired the rail line pursuant to 16 U.S.C. § 1247(d); (iv) that Grantee has entered into an Operating
6 Agreement with The City of Seattle in conformity to this ordinance and specifying a program of joint
7 use permitting for interim trail use alongside rail use at least in those locations where the rail is not in
8 street right-of-way; (v) that Grantee has obtained a modified certificate of public convenience and
9 necessity as provided for in 49 C.F.R. § 1150.21-23 for operation of the rail line; (vi) the City's Risk
10 Manager has approved liability insurance policies in accordance with Section 14 herein; and (vii) that
11 the City shall not acquire any freight railroad common carrier obligations by reason of this ordinance
12 and the Operating Agreement entered pursuant thereto.

14 (c) The Operating Agreement shall provide that Grantee shall not be required
15 to pay a fee for use of City property under this ordinance, provided (i) Grantee agrees to be fully
16 responsible for all costs of maintenance, operation, and rehabilitation of the railroad, including but not
17 limited to maintenance of crossings, acquisition of liability insurance, maintenance of way, and all
18 liability for accidents occurring on the property used by the railroad or arising out of railroad operations,
19 and provided further (ii) Grantee shall provide a minimum level of freight rail service equal to 30
20 carloads picked up or delivered to freight rail customers on the line, per year, averaged over any three-
21 year period, as more particularly specified in the Operating Agreement. In the event the minimum level
22 of service is not met, or the conditions stated at Section 1 (c) (ii) are not met, the Operating Agreement
23 shall provide that, in addition to such other remedies as may be available to the City, the City in its
24 discretion may require Grantee to take appropriate action in conformity to instructions from the City
25 within no less than ninety days to terminate freight rail service, including appropriate filings with any
26 agencies with rail regulatory jurisdiction.

28 (d) The Director is authorized to enter into an Operating Agreement consistent
29 with this ordinance. The Director is further authorized to allow passenger use on terms and conditions
30 as provided in said Operating Agreement.
31
32
33

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1 (e) The City may, from time to time, cooperate with Grantee in seeking grants
2 in aid from State sources for rehabilitation of the line, provided, however, that the City shall not be liable
3 for repayment of the grant except to the extent funds are available to the City from salvaged materials
4 attributable to the grant in the event rail service is discontinued and provided further that the City at its
5 option may impose a fee sufficient to recover its costs for administering the grant.
6

7 **Section 2.** The tracks of standard gauge railway shall be located, laid down, constructed and
8 maintained within the portions of right-of-way described on Attachment A hereto.
9

10 **Section 3.** The City shall retain the same control of the streets, avenues, multi-use trails, and
11 other rights-of-way in and across which said railway tracks shall be laid down as over other streets,
12 avenues, multi-use trails and other rights-of-way within the City, and shall have the right at all times by
13 general ordinance, to regulate the speed of the locomotives, cars and trains within the limits of the
14 franchise right-of-way herein granted, and the maximum period of time for which such locomotives, cars
15 and trains shall be allowed to blockade travel along and across the streets, avenues, multi-use trails and
16 intersecting streets embraced in this grant, and shall have such further control and police power over
17 such franchise rights-of-way and tracks, and the use thereof, as the City Charter and the Federal and
18 State Constitutions and laws may now or hereafter permit. Grantee shall comply with SMC Chapter
19 11.66, Railroad Operation and shall erect and maintain all such safety devices, warning signs and
20 signals, lights and appliances as may be necessary to protect and facilitate public travel across each and
21 every track herein authorized.
22

23 **Section 4.** The City hereby reserves to itself and its Grantee the right to construct all public
24 improvements (including trails) and to install and carry all public utility facilities across, underneath or
25 above the tracks hereby authorized, and the City reserves to itself full and complete right of access to
26 any space occupied by such tracks and to all of said franchise right-of-way, together with the right to
27 open and excavate the ground beneath said tracks, or within said franchise right-of-way, for all purposes
28 of construction, maintenance, repair, operation and inspection of any public utilities and public
29 improvements which rights shall, however, be exercised in such manner as not to interfere with the safe
30 operation of locomotives, cars and trains on said tracks. In all cases involving a possibility of such
31 interference, or removal of lateral support or excavation beneath the tracks of Grantee, sixty (60) days'
32
33

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1 written notice shall be given Grantee, and Grantee shall, at its own cost and expense, remove, relocate,
2 support, reinforce said tracks as necessary, provide flagging, and shall also furnish an authorized agent
3 or representative at Grantee's own cost and expense, who shall supervise such removal, relocation,
4 support, reinforcement or excavation or other work; provided that, in case of emergency repairs, the
5 length of such notice may be less than sixty (60) days, but not less than twelve (12) hours. Grantee shall
6 have the option of requiring that any such construction, repair, renewal, maintenance or inspection of
7 municipally owned utility be done by tunneling or jacking beneath said tracks, if such utility determines
8 that tunneling or jacking is practicable, and upon Grantee's providing assurances, satisfactory to such
9 municipally owned utility, that Grantee will pay the extra cost of tunneling or jacking, over the cost of
10 open cutting. If it is necessary that such tracks should be removed, relocated, supported, or reinforced
11 during the progress of the construction, repair, renewal, maintenance, or inspection of any municipally
12 operated utility, or for any public improvement, Grantee shall remove or relocate said tracks and shall
13 construct and place such support and provide a flagman as necessary, and shall attend to the replacement
14 and readjustment of its tracks, all at its own cost and expense. Grantor may agree to assume a share of
15 the costs for removal or replacement of track due to any such public improvement or public utility that
16 generally parallels said tracks and requires the removal of more than 100 feet of track.
17
18

19 **Section 5.** Grantee shall be solely responsible for the maintenance and safety of the right-of-
20 way granted herein, including all tracks and all grade crossings, and shall cooperate and coordinate with
21 the City of Seattle Director of Transportation to assure adequate rehabilitation, repair and maintenance
22 of all tracks and grade crossings herein authorized, all at Grantee's sole cost and expense. Grantor shall
23 issue permits to Grantee which shall set forth the terms and conditions for railroad track work within the
24 limits of The City of Seattle, pursuant to applicable law, including State and Federal Law.
25

26 **Section 6.** Grantee shall construct and maintain the tracks herein authorized so that the top of
27 the rail thereof shall at all times conform to the street grade (except where change is made in separation
28 of grades), and the City hereby reserves the right to change the grade of any streets, avenues or public
29 places at any time, and when the City shall change such grade the Grantee, by acceptance of this
30 ordinance, hereby covenants and agrees with the City, to waive any and all damages that it may sustain
31 on account of having to readjust its tracks by reason of such change of grade. Such waiver is made upon
32
33

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1 condition that any change of grade hereafter made by the City to the streets and avenues upon which the
2 franchise is hereby granted, shall not be unreasonable, or such as to interfere with the proper and
3 practical operation of said track when the same shall have been adjusted to said new grade.

4
5 **Section 7.** Grantee shall, upon permit issued by the Director or such other body as may in the
6 future be by law authorized to act, allow each owner or occupant of a warehouse or industry contiguous
7 or adjacent to said track herein authorized, or to any street, avenue or other public place along or across
8 which said tracks shall be constructed, a spur track or tracks connecting said track with such warehouse
9 or industry; provided, however, that Grantee may require that such spur track or tracks and all street
10 grading, surfacing or paving appertaining to the right-of-way of such spur track or tracks, be constructed
11 and maintained at the expense of such owner or occupant of such warehouse or industry; and provided
12 further that any such spur track shall start from such point on said track as Grantee shall determine upon
13 as the most proper therefor; and shall be subject to such rules and regulations as to the opening and
14 closing of switches controlling access to and as to the use of said track as Grantee may from time-to-
15 time establish. All of the obligations and duties of Grantee expressed in this franchise shall apply with
16 full force and effect to each and every spur track laid down, constructed, maintained or operated by
17 Grantee connecting with the tracks or right-of-way granted in Section 1 of this franchise.

18
19 **Section 8.** Nothing contained in this ordinance shall be construed as granting an exclusive
20 franchise or privilege for the use of the right-of-way described in Section 2, or any portion thereof, and
21 the rights granted by this ordinance shall be subject to the right of the City Council to at any time
22 hereafter, to repeal, amend or modify this ordinance and grant, with due regard to the rights of Grantee
23 and of the interests of the public, and to cancel, forfeit and abrogate any right or privilege granted by this
24 ordinance if the franchise hereby granted is not operated in full accordance with the provisions hereof, or
25 at all, and at any time during the grant to acquire by purchase or condemnation, for use of the City itself,
26 all the property of the Grantee within the limits of said streets and right-of-way at a fair and just value,
27 which shall not include any valuation of the franchise itself, which franchise shall thereupon terminate.

28
29
30 **Section 9.** Except as herein provided, this franchise and the rights herein granted, or any
31 interest in them, shall not be sold, assigned or mortgaged without the consent of the City by ordinance.
32 Nor shall the same in such event accrue to the benefit of the purchaser, assignee or mortgagee unless
33

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1 within sixty (60) days after such consent it or they shall file with the City's Finance Department and
2 City Clerk an acceptance of all the rights, privileges and authorities hereby granted, subject to all the
3 conditions, restrictions, specifications and requirements herein expressed.

4
5 **Section 10.** (a) Grantee and any permitted successors or assigns, shall defend (with
6 counsel approved by the City), and shall fully indemnify and hold the City and its officers, employees,
7 and agents harmless from any and all losses, claims, actions, judgments, property damages, death,
8 personal injuries, or damages suffered by any person or entity arising out of or resulting from (1) any
9 occurrence of property damage, death or injury in or on the franchise right-of-way, including common
10 carrier liability; (2) the Grantee's operations on or off the franchise right-of-way; (3) the violation of
11 any law or breach of this Franchise Agreement or Operating Agreement by the Grantee or any of its
12 officers and directors, employees, agents or contractors; and (4) any release of hazardous material arising
13 out of Grantee's operations, actions or inactions. It is intended that the foregoing indemnity shall be
14 broad and comprehensive. In the event any suit, claim or action is brought against the City, Grantee,
15 upon notice of the commencement thereof, shall defend the same, at no cost and expense to the City,
16 and promptly satisfy any final judgment adverse to the City or to the City and Grantee jointly; Provided,
17 that in the event the City determines that one or more principles of governmental or public law are
18 involved, the City retains the right to participate in such action at its own expense.

19
20 (b) The above liability shall not be diminished by the fact, if it be a fact, that
21 any such death, injury, damage, loss, cost, or expense may have been, or may be alleged to have been,
22 contributed to by the negligence of the City or its officers, employees, or agents, unless such negligence
23 is solely and entirely the fault of the City.

24
25 (c) The indemnification provided by this section shall survive the termination
26 of the Grantee's franchise, the Grantee's surrender of use and occupancy of the franchise right-of-way,
27 and expiration of this Franchise Agreement. This indemnity is for the sole benefit of the City and shall
28 not inure to the benefit of any third party. The Grantee waives, with respect to the City only, its
29 immunity under RCW Title 51, Industrial Insurance, and to any other industrial insurance, workers
30 compensation, disability, or employee benefit legislation of any jurisdiction which would otherwise be
31 applicable.

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(d) The Operating Agreement may provide additional conditions consistent with this section.

Section 11. Grantee, by its acceptance of this ordinance, does covenant and agree with The City of Seattle, that whenever the City separates the grades of existing or future streets and multi-use trails by the construction, reconstruction, renewal, maintenance, and/or widening of any overhead structure across the franchise right-of-way herein granted, Grantee will bear its proportionate share of all costs incident to the span crossing said right-of-way and the piers or abutments supporting such span. Such proportionate share shall be determined on the ratio the length of the portion of the span crossing said right-of-way bears to the total length of said span, and Grantee shall pay its aforesaid share upon proper billing therefore by the Director; provided, however, that this section shall not apply to future changes or additions to the existing 15th Avenue North West bridge structure (Ballard Bridge).

Section 12. Insurance.

(a) The Grantee shall, at all times during the term of this Agreement, obtain and maintain continuously, at its own expense, and file with the City's Risk Manager, evidence of a policy or policies of insurance satisfactory to the City's Risk Manager, as further specified in the Operating Agreement, including a policy of Comprehensive Railroad Liability Insurance for operations in an amount no less than \$5,000,000 for bodily injury and property damage; provided, however, the Risk Manager may consider reducing said coverage to no less than \$3,000,000 based on at least three years of experience with actual operations.

(b) The Operating Agreement shall provide such additional terms and provisions relating to insurance for rail operations (including operating by Grantee's contractors or subcontractors) as shall reasonably protect the City from liability arising out of Grantee's actions or actions.

Section 13. The Operating Agreement may provide that rail operation and rail equipment shall be inspected by the Federal Railroad Administration (FRA), Washington State Department of Transportation (WSDOT), Washington Utilities and Transportation Commission (WUTC) or successor agencies, or equivalent inspectors and that Grantee should be responsible to remedy, at Grantee's

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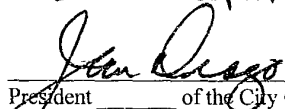
1 expense, all deficiencies identified in any inspection. Grantee shall be responsible to comply with all
2 laws and regulations relating to railroad operations. Nothing herein shall reduce the City's police
3 powers of enforcement and inspection.

4
5 **Section 14.** In order to claim the benefits of this ordinance and to acquire the rights, privileges
6 and authorities hereby granted, Grantee must, within two (2) months after this ordinance becomes
7 effective file in the office of the City's Finance Department and City Clerk a copy of a resolution duly
8 adopted by its Board of Directors, or by the Executive Committee of said Board, which copy shall be
9 duly certified and attested by its proper officer, under its corporate seal, or comparable documentation of
10 acceptance approved by the Seattle City Attorney's Office, accepting the benefits of this ordinance, and
11 the rights, privileges and authorities hereby granted, subject to all the conditions, restrictions,
12 specifications and requirements expressed.

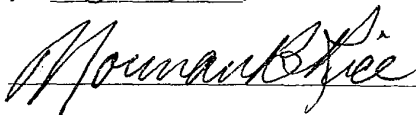
13
14 **Section 15.** Any act consistent with the authority and prior to the effective date of this
15 ordinance is hereby ratified and confirmed.

16
17 **Section 16.** This ordinance shall take effect and be in force thirty (30) days from and after its
18 approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after
19 presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

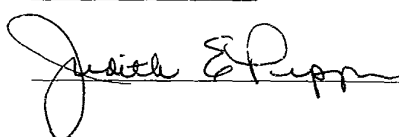
20 Passed by the City Council the 29th day of September, 1997, and signed by me in open
21 session in authentication of its passage this 29th day of September, 1997.

22
23 
24 President _____ of the City Council

25 Approved by me this 6th day of October, 1997.

26
27 
28 Mayor

29 Filed by me this 6 day of October, 1997.

30
31 
32 City Clerk

33 (Seal)

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FRANCHISE DESCRIPTION

Portions in Former BNSF Right of Way

Those portions of The Burlington Northern and Santa Fe Railway Company's (formerly Northern Pacific Railway Company) former Ballard Line right of way, varying in width on each side of the Railway Company's Main Track centerline, as located and constructed upon, over and across Section 13, Township 25 North, Range 3 East of the Willamette Meridian, King County, Washington, more particularly described as follows, to-wit:

That portion of Lots 1 and 28-30, Block 4 of Ross Addition to the City of Seattle, as recorded in Volume 2 of Plats, page 96, Records of King County, Washington, lying 7.5 feet on each side of the Main Track centerline, as measured at right angles; also,

That portion of Lots 3 and 4, Block 3 of Ross Addition to the City of Seattle, as recorded in Volume 2 of Plats, page 96, Records of King County, Washington, lying 7.5 feet on each side of the Main Track centerline, as measured at right angles; also,

Those portions of Lots 8-11 in Block 1 of Ross Home Addition, as recorded in Vol. 11 of Plats, page 25, Records of King County, Washington, lying 7.5 feet on each side of the Main Track centerline, as measured at right angles; also,

Those portions of Lots 1 and 6-8, Block 2 of Ross Addition, as recorded in Vol. 2 of Plats, page 96 Records of King County, Washington, lying 7.5 feet on each side of the Main Track centerline, as measured at right angles; also,

Those portions of Lots 1 and 2, Block 4 of Fern Addition to the City of Seattle, as recorded in Volume 7 of Plats, page 52, Records of King County, Washington, lying 7.5 feet on each side of the Main Track centerline, as measured at right angles; also,

Those portions of Lots 5-8, Block 1 of Fern Addition to the City of Seattle, as recorded in Volume 7 of Plats, page 52, Records of King County, Washington, lying 7.5 feet on each side of the Main Track centerline, as measured at right angles; also,

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That portion of Lot 1, Block 2 of Fern Addition to the City of Seattle, as recorded in Volume 7 of Plats, page 52, Records of King County, Washington, lying Southwesterly of a line drawn parallel with and distant 7.5 feet Northeasterly, as measured at right angles from the Main Track centerline; also,

Those portions of Lots 10-14, Block 18 of Denny's Addition to Ballard and Seattle, as recorded in Volume 14 of Plats, page 16, Records of King County, Washington, lying Northeasterly of a line drawn parallel with and distant 23.5 feet Southwesterly, as measured at right angles from the Main Track centerline; also,

Those portions of Lots 5-8 and 15-18, Block 17 of Denny's Addition to Ballard and Seattle, as recorded in Volume 14 of Plats, page 16, Records of King County, Washington, together with the 12.0 foot wide alley in said Block 17, lying Northeasterly of a line drawn parallel with and distant 23.5 feet Southwesterly, as measured at right angles from the Main Track centerline, and lying Southwesterly of a line drawn parallel with and distant 15.0 feet Northeasterly, as measured at right angles from the Main Track centerline; also,

That portion of 60.0 foot wide vacated Northwest 44th Street (formerly Salmon Street) as vacated by Ordinance 79548, lying Northeasterly of a line drawn parallel with and distant 23.5 feet Southwesterly, as measured at right angles from the Main Track centerline, and Southwesterly of a line drawn parallel with and distant 15.0 feet Northeasterly, as measured at right angles from the Main Track centerline; also,

Those portions of Lots 1- 4 and 19 - 22, Block 16 of Denny's Addition to Ballard and Seattle, as recorded in Volume 14 of Plats, page 16, Records of King County, Washington, together with the 12.0 foot wide alley in said Block 16, lying Northeasterly of a line drawn parallel with and distant 23.5 feet Southwesterly, as measured at right angles and radially from the Main Track centerline, and Southwesterly of a line drawn parallel with and distant 15.0 feet Northeasterly, as measured at right angles and radially from the Main Track centerline; also,

Those portions of The Burlington Northern and Santa Fe Railway Company's (formerly jointly owned by the Northern Pacific Railway Company and Great Northern Railway Company) former Ballard Line right of way, varying in width on each side of said Railway Company's Main Track centerline, as located and constructed upon, over and across Sections 11 and 12, all in Township 25 North, Range 3 East of the Willamette Meridian, King County, Washington, more particularly described as follows, to-wit:

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That portion of Lots 5, 6, 19, 20, 21 and 22, Block 174 of Gilman Park, as recorded in Volume 3 of Plats, page 40, Records of King County, Washington, being 10.0 feet wide on each side of said Lead Track centerline as now located and constructed; also,

That portion of Lots 6 and 19, Block 171 of Gilman Park, as recorded in Volume 3 of Plats, page 40, Records of King County, Washington, being 10.0 feet wide on each side of said Lead Track centerline as now located and constructed; also,

That portion of Lots 6 and 19, Block 168 of Gilman Park, as recorded in Volume 3 of Plats, page 40, Records of King County, Washington, being 10.0 feet wide on each side of said Lead Track centerline as now located and constructed; also,

That portion of Government Lot 2 of said Section 11, Township 25 North, Range 3 East lying contiguous to and Southwesterly of Shilshole Avenue Northwest, and Northeasterly of a line drawn parallel with and distant 8.5 feet Southwesterly, as measured at right angles from said Railway Company's relocated siding track centerline, bounded on the Northwest by the Northeasterly extension of the Northwesterly line of Lot 5, Block 8 of Ballard Tide Lands, and bounded on the Southeast by the Southeasterly line of vacated 22nd Avenue Northwest (formerly 3rd Avenue West); also,

Those portions of The Burlington Northern and Santa Fe Railway Company's (formerly Great Northern Railway Company) former Ballard Line right of way, varying in width on each side of said Railway Company's Main Track centerline, as located and constructed upon, over and across Sections 10 and 11, all in Township 25 North, Range 3 East of the Willamette Meridian, King County, Washington, more particularly described as follows, to-wit:

That 17.0 foot wide portion of said Railway Company's right of way, being 8.5 feet wide, as measured at right angles, on each side of the Main Track centerline as located and constructed upon, over and across Government Lot 2 all in said Section 11, Township 25 North Range 3 East, bounded on the East by the Southwesterly line of Shilshole Avenue and bounded on the West by the Easterly line of 24th Avenue Northwest; also,

That 17.0 foot wide portion of said Railway Company's right of way, being 8.5 feet wide, as measured at right angles, on each side of the Main Track centerline as located and constructed upon, over and across Government Lot 3 and the East 520.0 feet of Government Lot 4, all in said Section 11, Township 25 North, Range 3 East, bounded on the East by the West line of 24th Avenue Northwest, and bounded on the West by the West line of the East

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520.0 feet of said Government Lot 4, **EXCEPTING THEREFROM**, the right of way for 28th Avenue Northwest; also,

That 20.0 foot wide portion of said Railway Company's right of way, being 10.0 feet wide, as measured at right angles, on each side of the Main Track centerline upon, over and across Government Lot 4, of said Section 11 and Government Lots 3, 2 and 1 of Section 10, all in Township 25 North, Range 3 East, bounded on the East by the West line of the East 520 feet of said Government Lot 4 of Section 11, and bounded on the North by the easterly extension of the north line of Lot 10 of Block 15 of Ballard Tide Lands according to the recorded plat thereof, **EXCEPTING THEREFROM**, the rights of way for 40 foot wide 30th Avenue Northwest, 80 foot wide 32nd Avenue Northwest, 66.0 foot wide West 57th Street, 80.0 foot wide Market Street, and for Seaview Avenue Northwest at Northwest 60th Street, **ALSO EXCEPTING THEREFROM** that portion of said Railway Company's right of way, lying within an area between two lines drawn parallel and concentric with and distant 150.0 feet wide on each side of a line lying directly below the centerline of said Railway Company's Bridge No. 4 over said Ballard Line right of way, and over and across Salmon Bay Waterway; also,

That 35.0 foot wide portion of said Railway Company's right of way, being 10.0 feet wide, as measured at right angles, on the Westerly side, and 25.0 feet wide, as measured at right angles, on the Easterly side of the Main Track centerline upon, over and across Government Lot 1 of Section 10, Township 25 North, Range 3 East, bounded on the South by the Easterly extension of the North line of Lot 10 of Block 15 of Ballard Tide Lands according to the recorded plat thereof, and bounded on the North by the Easterly extension of the South line of Lot 3 of said Block 15 of Ballard Tide Lands; also,

That 20.0 foot wide portion of said Railway Company's right of way, being 10.0 feet wide, as measured at right angles, on each side of the Main Track centerline upon, over and across Government Lot 1 of Section 10, Township 25 North, Range 3 East, bounded on the South by the Easterly extension of the South line of Lot 3 of Block 15 of Ballard Tide Lands according to the recorded plat thereof, and bounded on the North by the North line of said Section 10; also,

That 20.0 foot wide portion of said Railway Company's right of way in Government Lot 4 of Section 3, Township 25 North, Range 3 East, lying East of Block 16 of Ballard Tide Lands, being 10.0 feet wide, as measured at right angles, on each side of the Main Track centerline, bounded on the South by the South line of said Section 3 and bounded on the North by the South margin of Northwest 67th Street; and

Portions in City Street Right of Way

Those portions of City Streets, all in Sections 3, 10, 11, 12 and 13, Township 25 North, Range 3 East, Willamette Meridian, King County, Washington, more particularly described as follows, to-wit:

That portion of 80.0 foot wide Northwest 40th Street (formerly Ross Place) lying 7.5 feet on each side of the Main track centerline, as measured at right angles; also,

Those portions of 66.0 foot wide 6th Avenue Northwest and 80.0 foot wide Northwest 41st Street lying 7.5 feet on each side of the Main Track centerline, as measured at right angles; also,

Those portions of 60.0 foot wide Northwest 42nd Street and 60.0 foot wide 7th Avenue Northwest, lying 7.5 feet on each side of the Main Track centerline, as measured at right angles; also,

Those portions of 60.0 foot wide Northwest 43rd Street and 66.0 foot wide 8th Avenue Northwest, lying 7.5 feet on each side of the Main Track centerline; also,

That portion of 60.0 foot wide Bright Street (formerly West 44th Street) lying Northeasterly of a line drawn parallel with and distant 23.5 feet Southwesterly, as measured at right angles from the centerline of said Mainline Track, and Southwesterly of a line drawn parallel with and distant 30.0 feet Northersterly, as measured at right angles from said Main Track centerline; also,

That portion of the East 33.0 feet of 9th Avenue Northwest (formerly 2nd Avenue East and Eastern Avenue), lying Northeasterly of a line drawn concentric with and distant 7.5 feet Southwesterly, as measured radially from the Main Track centerline; also,

That portion of Northwest 45th Street (formerly "A" Street) East of the Northerly extension of the East line of 9th Avenue Northwest (formerly 2nd Avenue East and Eastern Avenue), lying Southwesterly of a line drawn concentric with and distant 15.0 feet Northeasterly, as measured radially from the Main Track centerline; also,

That 15.0 wide portion of Northwest 45th Street (formerly "A" Street) and the East 33 feet of 9th Avenue Northwest (formerly 2nd Avenue East and Eastern Avenue), as provided by Ordinance No. 972, from the City of

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Ballard, bounded on the East by the East line of 9th Avenue Northwest, and the Northerly extension thereof, and bounded on the West by a line drawn parallel with and distant 45.0 feet Northeasterly, as measured at right angles from the Southwesterly line of 100.0 foot wide Shilshole Avenue Northwest, according to the plat of Gilman Park, as recorded in Volume 3 of Plats, page 40, Records of King County, Washington; also,

Those 15.0 foot wide portions of Northwest 45th Street (formerly "A" Street), Northwest 46th Street (formerly "B" Street), Northwest Ballard Way (formerly West 47th Street or "C" Street) and Northwest Leary Way (formerly West 48th Street or "D" Street), being 7.5 feet wide on each side of said Railway Company's Lead Track centerline, as now located and constructed, as provided by Ordinance No. 1114 from the City of Ballard; also,

The Southwesterly 45.0 feet of 100.0 foot wide Shilshole Avenue, bounded on the Southeast by the Easterly margin of 15th Avenue Northwest according to the plat of Gilman Park, as recorded in Volume 3 of Plats, page 40, Records of King County, Washington, and bounded on the Northwest by the Southwesterly extension of the North line of Lot 21, Block 72 of said plat of Gilman Park; also,

That 17.0 foot wide portion of 24th Avenue Northwest, being 8.5 feet wide as measured at right angles on each side of the Main Track centerline; also,

That 17.0 foot wide portion of 28th Avenue Northwest, being 8.5 feet wide, as measured at right angles, on each side of the Main Track centerline; also,

That 20.0 foot wide portion of 40 foot wide 30th Avenue Northwest, being 10.0 feet wide, as measured at right angles, on each side of the Main Track centerline; also,

That 20.0 foot wide portion of 80 foot wide 32nd Avenue Northwest, being 10.0 feet wide, as measured at right angles, on each side of the Main Track centerline; also,

That 20.0 foot wide portion of 80 foot wide Northwest Market Street, being 10.0 feet wide, as measured at right angles, on each side of the Main Track centerline; also,

That 20.0 foot wide portion of Seaview Avenue Northwest at Northwest 60th Street (also known as the Seaview Crossing), being 10.0 feet wide, as measured at right angles, on each side of the Main Track centerline; also,

Portions in Easement from BNSF

That 20.0 foot wide portion of an easement area across the right of way of the Burlington Northern Santa Fe Railway Company's Seattle to Everett Main Line granted to the City by said Railway Company being 10.0 feet wide, as measured at right angles, on each side of the Ballard Line Main Track centerline, as located and constructed upon, over and across Government Lot 1 of Section 10, Township 25 North, Range 3 East, W.M., King County, Washington, bounded between two lines drawn parallel and concentric with and distant 150.0 feet, as measured at right angles and radially on each side of a line lying directly below the centerline of said Railway Company's Bridge No. 4 over the Main Track, and over and across Salmen Bay Waterway;

AND THE END OF THIS DESCRIPTION.

ATTACHMENT C



City of Seattle

Norman B. Rice, Mayor

Executive Department - Office of Management and Planning

Judy Bunnell, Director

MEMORANDUM

September 9, 1997

TO: Jan Drago, Council President

FROM: Judy Bunnell, OMP Director
Daryl Grigsby, SEATRA Director
Mary Jean Ryan, OED Director

SUBJECT: Franchise Ordinance for Ballard Terminal Railroad Company

The Office of Management and Planning, SEATRA, and the Office of Economic Development have reviewed the legislation granting a railroad franchise to the Ballard Terminal Railroad Company for the purpose of maintaining rail service along the Ballard rail corridor. All of these departments find that this franchise, in concert with requirements of its associated agreements, will provide significant economic, recreational, and mobility benefits to Seattle's citizens, businesses, the City as a purveyor of utilities and transportation infrastructure, and the region.

Entering into this franchise agreement is consistent with implementing City policy regarding support for industrial uses located in industrially-zoned land, as well as for providing a city-wide urban trails system, both being integral elements in achieving the vision of the Comprehensive Plan. To put it concisely, the terms of this franchise will yield more than was anticipated when the City began its study of how to extend the Burke-Gilman Trail. Not only will the city retain ownership of a valuable public use corridor, it will be able to complete a significant section of the trail, while preserving rail service when and where it is still needed.

Introduction of this legislation represents a significant milestone in the effort to preserve rail service for businesses in the Ballard industrial area, while securing for future generations a corridor for trail and other public uses. This is being accomplished through the cooperation of many parties, yet has not come easy. Getting to this point has required

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Council President ~~Laage~~
September 9, 1997
Page 2

the involvement of staff from SEATRAN, SPU, Law, the OED, the Neighborhood Planning Office, Risk Management, DON, several councilmembers (most recently Councilmember McIver) and the Mayor's Office, as well as representatives of business, local residents, the bicycling community, and the state. It has taken much time, investigation, review, and negotiation on all sides to craft an agreement that both meets the City's interests without the loss of amenity, the burden of liability, and undue expense to the City, and also assures that the franchised rail operator has the flexibility to service the needs of Ballard shippers, operate a safe and successful business, and sustain its obligations as a common carrier within the city.

To satisfy the numerous and, at many points, conflicting interests of the stakeholders in this endeavor, both the City and the rail proponents have had to work hard at finding solutions that are mutually acceptable. Complicated, arduous and lengthy negotiations over the last year have produced this franchise agreement. Obviously, it contains compromise on both sides, yet it represents the best of efforts and intentions to have rail service and a public trail system co-exist in a successful manner. Further, while this franchise contains some elements unique to the context of the agreement and essential to its implementation, it has been constructed to be as consistent as possible with other recent franchises granted by the City, and with an eye toward avoiding setting any new precedents for the City in this regard.

Staff will be briefing the Transportation Committee at its next meeting about this legislation and the steps involved in fully realizing its implementation subsequent to its passage. We anticipate that all councilmembers will have many specific questions concerning the complexities of implementing this agreement, and look forward to addressing these through your review. Barry Reiss of SPU is the project manager for the Burke-Gilman Trail Extension; he can provide historical and technical information regarding the trail's routing, design and construction. Peter Lagerwey of SEATRANS' Bicycle and Pedestrian Program and Judy Barbour of Law can elucidate the policy and legal aspects of corridor acquisition. The engineering expertise of Mark Clemmens and trail designers Amy Yamabe and Leanora Rines of SEATRANS has been invaluable in creating a viable plan for the integration of trail, rail and roadway. City Risk Manager Pamela Hughes and Peter Hapke of Law were diligent in assuring that all agreements adequately protected the City from operational and environmental liability. Ben Wolters of OED and Eric Chipps of OMP have been directly involved in the rail service facet of this project; they can discuss the economic implications for the Ballard area concerning the rail's operation. All will be happy to provide information and briefings at your convenience.

In summary, we are all proud to have been involved in the creation of this legislation, and we endorse its passage.

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ATTACHMENT D

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket 36261¹

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.

PETITION FOR A DECLARATORY ORDER

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Co-Counsel for Ballard Terminal Railroad Company

For Filing: December 11, 2018

¹ In a decision served on August 11, 1998, the underlying proceedings in Adventure Trail D/B/A Sea Lion Railroad--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33486 were consolidated with Sea Lion Railroad--Abandonment Exemption--In King County, WA, STB Docket No. AB-544X.

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket 36261

BALLARD TERMINAL RAILROAD COMPANY, L.L.C.

PETITION FOR A DECLARATORY ORDER

I. INTRODUCTION

The Ballard Terminal Railroad Company, L.L.C. (hereinafter referred to as the “BTRC” or the “Railroad”) hereby petitions this Board, pursuant to 49 U.S.C. § 10501(b)(2) and other applicable authority, for a declaratory order determining that the City of Seattle, acting by and through its Department of Transportation (hereinafter referred to interchangeably as either the “City” or “SDOT”), is preemptively prohibited from removing or reconfiguring track actively used by the Railroad; is preemptively prohibited from relocating an active drive-lane of a City street so that it is directly on top of an active rail line, forcing the Railroad to operate within a City street (both with and against the flow of vehicle traffic); and, is preemptively prohibited from making roadway improvements adjacent to the active rail line. The City’s proposed actions are part of, or related to, SDOT’s efforts to construct an approximately 1.4 mile section (the “Missing Link”) of the multi-user, recreational, regional Burke-Gilman trail (“BGT”). SDOT’s actions will create unsafe operating conditions for the Railroad, will materially impede the Railroad’s ability to operate, and will impede the Railroad’s ability to perform routine track maintenance and repair. More specifically, BTRC respectfully requests that the

Board order SDOT to redesign the Missing Link to eliminate material impacts to the Railroad by:

- Prohibiting SDOT from removing or reconfiguring approximately 550 linear feet of track (the “Western Pioneer Spur”), which BTRC actively uses for car storage, loading, unloading and transloading;²
- Prohibiting SDOT from relocating an active vehicle travel lane of NW 45th Street in the Ballard neighborhood of Seattle so that the travel lane is located directly on top of and runs on top of a portion of active rail track, thereby forcing the Railroad to operate in an unsafe condition within a public street, going both with and against the flow of vehicle traffic, including passenger vehicles and heavy freight;³ and
- Prohibiting SDOT from making roadway improvements to an unopened public right-of-way, locally known as “Not-54th St.,” that will place vehicle traffic dangerously close to operating rail tracks and that will unreasonably and materially impede BTRC’s ability to perform routine track maintenance and repair.⁴

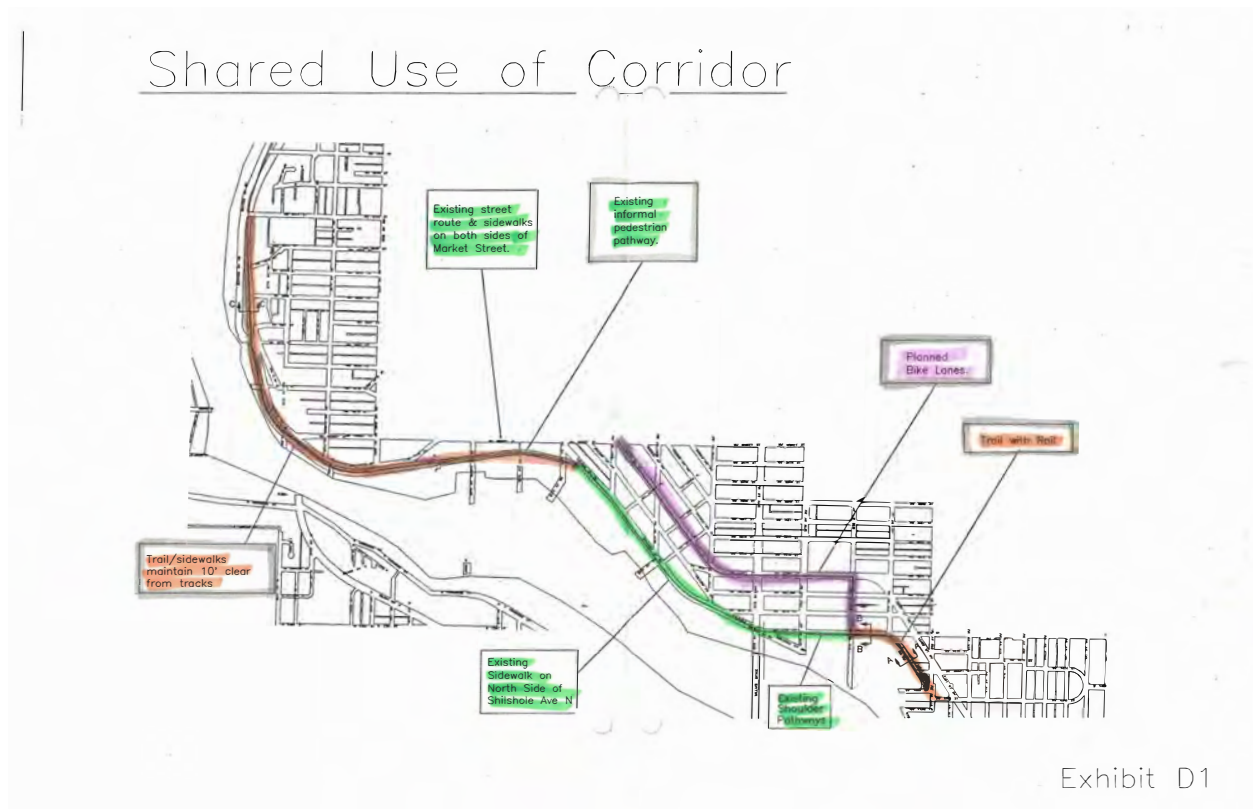
SDOT’s actions will substantially and materially impact BTRC by removing/reconfiguring active rail track used to provide rail service and generate income; will force the Railroad to operate in an extremely dangerous conditions and environments; and will materially impede the Railroad’s ability to perform routine maintenance and repair. In contrast, SDOT can easily relocate the Missing Link away from BTRC’s active rail line: In fact, as

² Exhibit 1 to the Verified Statement of James Forgette (hereinafter the “Forgette Statement”) depicts the location and condition of BTRC’s Western Pioneer Spur.

³ Exhibits 5 and 6 to the Forgette Statement show SDOT’s plans to relocate the active vehicle travel lane of NW 45th St. so it is located directly on top of BTRC’s active railroad tracks.

⁴ Exhibit 7 to the Forgette Statement shows SDOT’s paving plan for Not-54th Street.

part of the agreements in 1996 between BTRC and the City that were the precursor and foundation for the original proceedings before the Board in this Docket, the City agreed to an alignment that located the Missing Link away from the rail line as follows:⁵



Despite clear agreement in 1996 regarding the location of BGT improvements, beginning in about 2001, the City changed its mind and has, for the past 17+ years been trying to build the Missing Link directly adjacent to BTRC's active tracks located along NW 45th Street and Shilshole Avenue Northwest in the Ballard neighborhood of Seattle as follows:

⁵ See Appendix A, which is a copy of Exhibit D1 to the Operating Agreement.

BTRC further moves that all Rebuttals be filed within twenty-one (21) days of the due date for Replies, on February 13, 2019. And BTRC respectfully requests that the Board issue a ruling within sixty (60) days of completion of briefing.

BTRC is seeking a prompt decision and the above-schedule because it appears the City has changed its long-held position that it would not build the Missing Link until all local environmental appeals are completed, and instead SDOT is now pushing to begin construction in early 2019 even though such an environmental appeal is ongoing. In 2009, SDOT represented to the Washington State Court of Appeals, Div. I, that it would not build the Missing Link until all appeals are completed.⁶ Recently, SDOT appears to have changed its position because it issued a new Notice of Action on July 19, 2018⁷ and SDOT, on its website, says:

“Construction is expected to begin in early 2019.”⁸

This case is straightforward and thus an accelerated briefing schedule and prompt decision is warranted. On one hand, SDOT’s actions will materially impede the Railroad’s ability to operate and to do so safely. On the other hand, SDOT can easily redesign the Missing Link and locate it in any other public right-of-way owned and controlled by the City, including moving it just two (2) blocks away to NW Leary Way/Ave as originally agreed in 1996.

III. Factual Background

⁶ A copy of the City’s statement and representation to the Washington State Court of Appeals, Div. I, is attached as Appendix B.

⁷ See Appendix C.

⁸ <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project>

This multi-decade saga began in the 1990s when BNSF indicated it wanted to abandon the already-embargoed Ballard Line. In response, a group of entities, including the City and the to-be-formed BTRC, came together to protect and preserve the Ballard Line for continued rail service while simultaneously preserving portions of the corridor for rails-to-trails and rails-with-trails. On February 26, 1999, in Finance Docket No. 33486, the Board issued and approved a modified certificate of public convenience and necessity (“MCPCN”) authorizing BTRC to operate a line of railroad (the “Ballard Line”) between milepost 0.09 and the end of the line at mile post 2.70, a distance of almost 3 miles in the Ballard District of Seattle, King County, WA. The Board had previously approved, on August 11, 1998, abandonment of the Ballard Line by Adventure Trail, Inc. (d/b/a Sea Lion Railroad (“Sea Lion”)) in Sea Lion Railroad—Abandonment Exemption—In King County, WA et al., STB Docket No. AB 544X, et. al. As part of the Sea Lion abandonment proceedings, the City acquired title to the real property underlying the Ballard Line, conditioned, in part, on the Board approving the MCPCN authorizing BTRC to operate a railroad along the Ballard Line.⁹

The instant dispute before the Board is the culmination of 10-plus years of litigation regarding the City’s attempts to move the location of the Missing Link from where the City told the Board it would build the trail in the 1990s, and to instead build the Trail in a location directly in conflict with BTRC’s rail operations. This issue is finally ripe for Board adjudication because SDOT recently developed its plans for the Missing Link to 90% or greater and intends to begin construction of the Missing Link in early

⁹ See Appendix D, AB 544X, at page 3 (“If abandonment is permitted, Sea Lion proposes to transfer ownership of the Ballard Line real estate to Seattle, sell the track and related rail assets to BTRC for a nominal amount, and assign its operating agreement with BTRC to Seattle”); see also FD 33486 authorizing acquisition and operating exemption.

2019.¹⁰ Thus, the location and impacts of the Missing Link to BTRC are known and subject to Board review.

1. The Missing Link was not Supposed to be Located Adjacent to the Active Railroad Line

When this process began over twenty years ago, the City clearly indicated it would construct the Missing Link away from the Railroad in order to protect and preserve rail service on the Ballard Line. On November 12, 1996, the Seattle City Council adopted Resolution 29474¹¹ (the “Manning Resolution”) in which the Council stated “the guiding principles for extending the Burke-Gilman Trail; to reiterate the City’s commitment to ‘Railbank’ the Ballard rail corridor; [and] to state a preferred alternative for extending the trail....” Some of the “guiding principles” articulated in the Manning Resolution included the City’s desire to:

- Create safe facilities that are conducive to non-motorized, alternative transportation that minimizes negative impacts on adjacent businesses.
- Preserve the vitality of businesses located within the Ballard industrial corridor.
- Encourage and promote continued rail service by private sector.

[And]

- Maintain safe and efficient access to businesses for customers and transport of freight.

The Manning Resolution included preferred trail routes/locations for the different segments of the Trail. The preferred location for the eastern-most section was a separated, multi-use trail from the BGT’s then-current terminus at 8th Avenue Northwest northward and westward on the south side of the railroad tracks to 11th Avenue Northwest, while the preferred location for the western most section was a multi-user

¹⁰ See <https://www.seattle.gov/transportation/projects-and-programs/programs/bike-program/burke-gilman-trail-missing-link-project>.

¹¹ See Appendix E, which is a copy of Resolution 29474, colloquially known as the “Manning Resolution” after its sponsor.

trail within the rail corridor from the Government Locks to Northwest 67th Street, both of which sections the City constructed.¹² For the center section—the Missing Link—the preferred location was a multi-user trail on the east side of 11th Avenue Northwest from 45th Avenue Northwest to Northwest Leary Way and from there bike lanes on each side of Northwest Leary Way to Northwest Market Street.¹³

On September 14, 1997, BTRC entered into an “Operating Agreement” with Adventure Trail (i.e., Sea Lion Rail), which was acting as a proxy for the City, for operation of a short line railroad on the Ballard Line.¹⁴ Sea Lion, for itself and the City as the intended transferee, granted BTRC all rights to operate a railroad providing freight service,¹⁵ and agreed to convey all right, title and ownership of the track and ties to BTRC.¹⁶ The parties also agreed Sea Lion would file a petition before this Board to permit railbanking of the premises pursuant to 16 U.S.C. § 1247 (d).¹⁷ Section 10 of the Operating Agreement controls the City’s construction of any type of trail (e.g., pedestrian-only, bicycle-only or multi-user) within the Corridor, stating, in relevant parts:

10. Rail and Trail facilities. (a) Owner and Operator agree that the trail (which, for this paragraph, may include pedestrian-only trail or path facilities, bicycle-only trail or path facilities, or some combination thereof) and railroad shall be constructed within the areas indicated in Exhibit D in all portions of the premises which are not in street right of way. Owner and Operator agree to design their respective facilities such that crossings of tracks are as safe as reasonably possible, by use of approaches close to right angle, or appropriate rubberized crossing materials, or similar measures. Operator agrees to design Additions and configurations so as to minimize crossing of trail facilities. Owner and Operator shall avoid damage to each other's facilities.

¹² See Section 3 of Resolution 29474.

¹³ See Appendix E, Section 5 of Resolution 29474.

¹⁴ See Appendix E, Section 1(b), of the Operating Agreement.

¹⁵ Id. at Section 1(c).

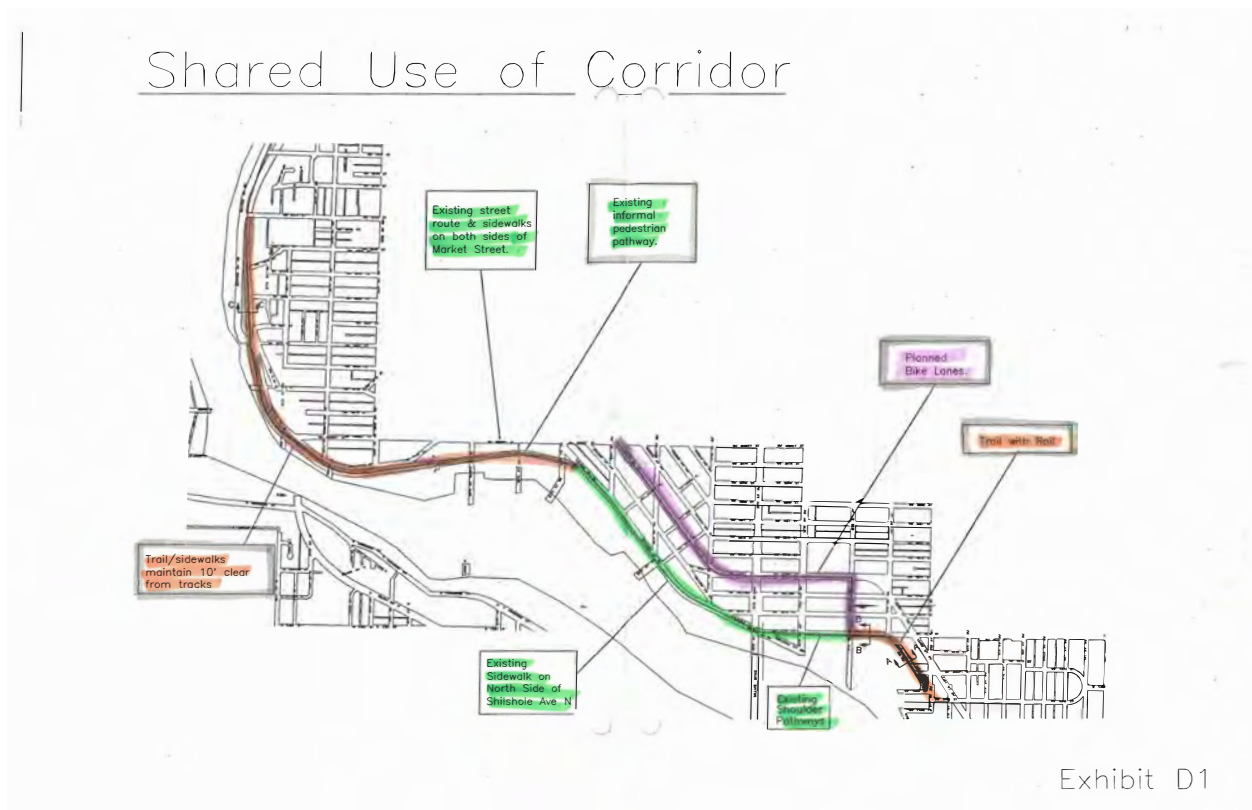
¹⁶ Id. at Section 3.

¹⁷ Id. at Section 9.

(b) Owner and Operator agree that new trail facilities (other than crossings) may be constructed only in accordance with applicable regulations of DOT or WUTC relating to separation from centerline of rail.

(e) Owner shall have the right to require Operator to relocate its track in order to accommodate trail construction in accordance with this Agreement; provided, however, that a continuous track on the premises shall be provided unless Operator consents otherwise.¹⁸

Exhibit D1 to the Operating Agreement (see Appendix A) is a map showing the agreed-upon locations for trail facilities to be constructed within the Corridor, as follows:



2. BTRC Obtained a 30-Year Franchise to Operate the Railroad

On September 29, 1997, the Seattle City Council adopted Ordinance 118734 granting a 30-year railway franchise to BTRC to operate a railroad on the Ballard Line subject to the Board approving the acquisition and exemption for Sea Lion and the City,

¹⁸ Id. at Section 10 (emphasis added).

and the Board issuing a MCPCN to BTRC.¹⁹ The railway franchise expires at 11:59 PM on September 29, 2027.²⁰ In Section 4 of Ordinance 118743, the City reserved unto itself the right “to construct all public improvements (including trails) and to install and carry all public utility facilities across, underneath or above the tracks hereby authorized...” and reserved the “full and complete right of access to any space occupied by such tracks and to all of said franchise right-of-way” provided the City’s exercise of these reserved rights does not “interfere with the safe operation of locomotives, cars and trains on said tracks.”²¹ Ordinance 118743 incorporated and authorized the terms and conditions of BTRC’s Operating Agreement, which is an attachment to the Ordinance.²²

3. The Board Approved a MCPCN Authorizing BTRC to Operate the Railroad

As discussed supra, on February 26, 1999, in FD 33486, the Board issued and approved a MCPCN authorizing BTRC to operate a line of railroad along the Ballard Line, and also permitted the City to acquire title to the real property underlying the Ballard Line, conditioned, in part, on the Board approving the MCPCN authorizing BTRC to operate a railroad along the Ballard Line.²³ As the Board explained in AB 544X,

Thus, under the parties’ plan, BTRC will continue to provide freight rail service over a portion of the corridor while, at the same time, Seattle builds and maintains a parallel trail on a portion of the corridor.²⁴

¹⁹ See Appendix G, Ordinance 118743.

²⁰ Id. at Section 1(a).

²¹ Id. at Section 4 (emphasis added).

²² Id. at Sections 12 and 13 and pages 25 to 49 of the Ordinance.

²³ See Appendix D, AB 544X at page 3 (“If abandonment is permitted, Sea Lion proposes to transfer ownership of the Ballard Line real estate to Seattle, sell the track and related rail assets to BTRC for a nominal amount, and assign its operating agreement with BTRC to Seattle.”); see also FD 33486 authorizing acquisition and operating exemption.

²⁴ Id. at page 3.

As part of obtaining Board approval for the acquisition and exemption of the Ballard Line, Sea Lion and the City convinced the Board they intended for continued rail service instead of an acquisition-to-abandonment scenario as alleged in the Land Conservancy case.²⁵ The Board, in reliance on these assurances, approved the acquisition and exemption, and issued the MCPCN authorizing BTRC to operate the Ballard Line.

4. BTRC's Rail Line, Facilities and Operations.

BTRC's Ballard Line includes, among other facilities, a mainline track, a siding that serves Salmon Bay Sand & Gravel Company, a spur or stub track referred to as the "Western Pioneer Spur," a locomotive yard located towards the eastern third of the line, run-around tracks near the eastern terminus, and two interchange tracks near the western terminus.²⁶ BTRC currently operates its Ballard Line on any day of the week, at all hours of the day depending on its shipper's needs, by picking up inbound cars at the interchange with the BNSF at approximately milepost 0.09 and pulling the cars easterly.²⁷ It is BTRC's practice, whenever possible, to pull cars instead of shoving them because that is safer.²⁸

5. The City has Been Trying to Change the Location of the Missing Link for Nearly 20 Years—In Contravention to its Representations to the Board

The agreements, actions and Board approvals discussed above were premised upon the City's agreement to locate and construct trail facilities away from the railroad,

²⁵ Id. at page 5, citing The Land Conservancy of Seattle and King County—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 (STB served September 26, 1997).

²⁶ See Forgette Statement at ¶ 6.

²⁷ Id. at ¶ 7.

²⁸ Id. at ¶ 8.

in the locations shown on Exhibit D1²⁹ to the Operating Agreement. Despite this, and based on lobbying efforts by bicycle advocates beginning in 2001, the City changed its mind and has been trying to build the Missing Link adjacent to BTRC's tracks since 2003. In 2003, the City Council adopted Resolution 30583³⁰ (voting 7-2) changing the preferred route for the Missing Link from the agreed-upon routes discussed (and shown on Exhibit D-1) above to a new "preferred" route along Northwest 45th Street-Shilshole Avenue Northwest and "Not-54th Street, directly adjacent to the BTRC tracks. Five years later, in 2008, SDOT, acting as the project proponent and its own lead agency for environmental review under the State Environmental Policy Act ("SEPA") issued itself a determination of non-significance ("DNS") for the Missing Link, concluding it will not have any significant adverse environmental impacts. A group of Ballard businesses, trade unions and trade associations (collectively referred to herein as the "Coalition") appealed the DNS to the City's Hearing Examiner who conducted the first trial in early 2009, ultimately upholding SDOT's DNS. The Coalition appealed the Hearing Examiner's decision to King County Superior Court, and in 2009 Judge Rogers reversed the Examiner, agreeing that SDOT had piecemealed its SEPA analysis and remanded the matter to the City for further SEPA review. In 2011, SDOT issued to itself its second SEPA DNS for the Missing Link, and the Coalition again appealed the DNS to the City's Hearing Examiner, who conducted a second trial, again ultimately upholding SDOT's revised DNS. The Coalition again appealed the Examiner's decision and in 2012 Judge Rogers again agreed with the Coalition, reversing the Examiner and remanding the project to SDOT to "more fully design" the Missing Link in order to identify and disclose

²⁹ See Appendix A.

³⁰ See Appendix H, Resolution 30583.

the project's significant adverse environmental impacts on the local maritime and industrial community, which includes the BTRC. In 2012, SDOT hurriedly prepared a new design for the Missing Link and issued to itself its third revised SEPA DNS. Again, the Coalition appealed to the City's Hearing Examiner, who, after conducting a third trial, in August 2012, agreed with the Coalition that SDOT's decision to move the Missing Link and locate it through the heart of an industrial area bisected by the railroad will have significant adverse environmental impacts and ordered SDOT to prepare an Environmental Impact Statement ("EIS"). The EIS was intended to disclose and discuss the significant safety and traffic hazards created by locating the trail along Shilshole Avenue, adjacent to the railroad tracks. Four years later, in June 2016, SDOT issued the Draft EIS for the Missing Link, again concluding there will be no significant adverse environmental impacts from its project. The Draft EIS focused on building the Missing Link on the new preferred route selected by the City in 2003, adjacent to the railroad. In May 2017, SDOT issued its Final EIS, selecting nearly the exact same location for the Missing Link as chosen in 2003, which moved the trail from the location agreed upon and presented to this Board, so the trail will be directly adjacent to the operating railroad.³¹

The Coalition then appealed the adequacy of the EIS to the City's Hearing Examiner, who, in January 2018, ruled for SDOT and upheld the EIS adequacy. That decision is under appeal to the King County Superior Court.

IV. PETITION

A. Legal Authority

³¹ See https://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/Vol%200_BGT_FEIS_Exec%20Summ_web_lowrez.pdf

Courts and this Board have long held that the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) preempts state and local governments, including the City of Seattle here, from unilaterally removing, relocating, reconfiguring or condemning railroad facilities or taking actions that create unsafe railroad operating conditions under the guise of local land use authority exercised for public health or safety reasons.³² Under the ICCTA, only this Board has authority to permit a local government to require a railroad, like BTRC, to remove, reconfigure or relocate its facilities.³³

As the Court explained in Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000),

Courts that have considered the ICCTA preemption clause have found its language to be clear and broad. *“It is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.”* A Georgia district court stated that “[t]he most natural reading of section 10501(b)(2) is that federal remedies provided by the ICC Termination Act are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise.”³⁴

In the City of Auburn case, the 9th Circuit Court, ruling on a case of first impression regarding the preemption issue, rejected a local Washington city’s attempt to limit a railroad’s operation under the guise of “environmental” regulations (i.e., NEPA, which is the federal equivalent of Washington’s SEPA) stating:

³² See Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1012–13 (W.D. Wis. 2000)(Court stated: “Effective January 1, 1996, the ICCTA extensively revised rail transportation law in the United States. The Act abolished the Interstate Commerce Commission (ICC) and replaced it with the Surface Transportation Board (STB). . . . The ICCTA has a preemption clause which provides: “Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b)(2). “Transportation” is broadly defined in the ICCTA and includes: (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange or passengers and property.”

³³ Id.

³⁴ Id. (internal citations omitted).

...if local authorities have the ability to impose “environmental” permitting regulations on the railroad, such power will in fact amount to “economic regulation” if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.³⁵

Consistent with the holding in City of Marshfield, the Court in City of Auburn concluded:

“We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it.”³⁶

In preempting and restricting a local city’s attempt to relocate active railroad facilities, the Court in Wisconsin Cent. Ltd. explained that the City of Marshfield’s attempt to relocate actively used track by means of condemnation of the railroad’s track, also is a form of regulation solely within the STB’s purview and beyond the reach and control of local land use authority:

Defendant attempts to distinguish attempts to regulate railroads from exercises of state police power to promote public safety. It argues that its actions do not constitute “regulation” within the meaning of the ICCTA. According to defendant Congress intended only to preempt direct economic regulation of rail transportation by the States. In contrast, it characterizes its proposed action as a “relocation” of plaintiff’s passing track in the interest of providing for highway safety. Defendant relies on *Board of Hudson River Regulating District v. Fonda J & G Railway Co.*, 249 N.Y. 445, 164 N.E. 541 (1928), for the proposition that relocation of railroad property is not its regulation.

The ICCTA does not define “regulation” in section 10102. Nevertheless, the plain meaning is apparent. “Regulation” is the “act or process of controlling by rule or restriction.” See Black’s Law Dictionary 1289 (7th ed.1999).

The Court holds that condemnation is regulation. In using state law to condemn the track defendant is exercising control—the most extreme type of control—over rail transportation as it is defined in section 10102(9). Characterizing condemnation as relocation does not change this conclusion. Were the condemnation properly considered a relocation, the act of forcing WCL to relocate its passing track is no less an exercise of control over transportation by the City through its laws than is outright condemnation.

³⁵ City of Auburn v. U.S. Gov’t, 154 F.3d 1025, 1031 (9th Cir. 1998), *as amended* (Oct. 20, 1998)

³⁶ City of Auburn, 154 F.3d at 1031.

This application of state law would mire the railroads in the very type of regulation from which Congress sought to free them. Under defendant's formulation every municipality in Wisconsin would have the ability to condemn or "relocate" any railroad property deemed to implicate public health or safety. Giving effect to the condemnation authority of municipalities over railroad property conflicts with Congress' purpose in enacting the ICCTA.³⁷

Courts have consistently validated this Board's exercise of its preemptive authority to prohibit local jurisdictions from taking even relatively small amounts of right-of-way used for rail and transportation purposes, where doing so materially impacts rail operations and creates unsafe operating conditions.³⁸ Such is the case here. BTRC respectfully requests that the Board exercise its preemptive authority to prohibit the City of Seattle from removing or reconfiguring track actively used by the Railroad; prohibit the City from moving an active drive-lane of a City street so that it is directly on top of the rail line, thereby forcing BTRC to operate in an unsafe condition within a City street (both with and against the flow of vehicle traffic); and prohibit the City from making roadway improvements adjacent to the active rail line that will create unsafe conditions and impede the Railroad's ability to perform routine track maintenance and repair, all as part of SDOT's efforts to construct a recreational trail, the Missing Link.

B. SDOT's Current Design for the Missing Link Either Removes, Reconfigures or Relocates BTRC's Tracks, Materially Impacting BTRC's Ability to Operate and Creates Unsafe and Dangerous Conditions

SDOT's current preferred location and design for the Missing Link will cause significant and material impacts to BTRC and undermine its ability to operate its railroad

³⁷ Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 to 1015 (W.D. Wis. 2000)(emphasis added).

³⁸ See City of Lincoln v. Surface Transp. Bd., 414 F.3d 858 (8th Cir. 2005)

safely and efficiently. SDOT should be prohibited from doing so pursuant to City of Lincoln and other relevant authority cited above.

SDOT's design for the Missing Link is the product of a Design Advisory Committee ("DAC"), which began working in May 2017, with the final DAC meeting conducted on September 13, 2018.³⁹ SDOT's design is currently at 100% for Phase I (the westerly section located entirely on NW Market Street, which SDOT intends to start building in early 2019) and at or beyond 90% for Phase II of the Missing Link, which are the sections located on Shilshole Avenue NW and NW 45th Street, and which, along with SDOT's proposed work on "Not-54th Street" discussed below, are the focus of this petition.⁴⁰

C. SDOT's Plans to Either Permanently Remove or Reconfigure BTRC's Western Pioneer Spur Will Materially Impact Its Ability to Operate its Railroad Safely and Efficiently: The Board Should Prohibit SDOT from Doing Either and from Locating the Trail Directly Adjacent to the Rail Line.

1. BTRC's Western Pioneer Spur.

BTRC's "Western Pioneer Spur" is approximately 550 linear feet long and runs westerly from the switch located just to the east of the Ballard Bridge at 15th Avenue NW in the Ballard neighborhood of Seattle, WA (hereinafter the "Western Pioneer Spur" or the "Spur").⁴¹ Photographs showing the location, configuration and condition of the Western Pioneer Spur and Switch are attached as Exhibit 1 the Forgette Statement.

BRTC currently accesses the Western Pioneer Spur by pulling cars easterly, from the BNSF interchange near the western terminus a couple miles away, past the Western Pioneer switch and then shoving the cars onto the Spur.⁴² Cars are retrieved by pulling them off-the Western Pioneer Spur and taking them to the run-around tracks

³⁹[https://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/2017_1017_DAC_WorkPlan_WEB\(0\).PDF](https://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/2017_1017_DAC_WorkPlan_WEB(0).PDF)

⁴⁰See generally,

https://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/2018_0913_BGT_DAC10_Presentation_FINAL.pdf

⁴¹ Forgette Statement, ¶ 9.

⁴² Id. at ¶ 10.

near the eastern terminus, where the locomotive changes ends on the consist, to pull the cars back to the interchange.⁴³

BTRC improved the Western Pioneer Spur by installing paved access on both sides of the Spur, giving BTRC unfettered access to load, unload and transload goods and freight.⁴⁴ This is an ideal location to perform these operations since this is a 24/7 truck load and unload zone.⁴⁵ Truck access on the southern side of the Western Pioneer Spur is located between the siding and either an adjoining building or fence, thereby making this area very protected and safe for loading, unloading and transloading operations.⁴⁶ The northerly side of the Western Pioneer Spur provides safe truck access because it is between the mainline and the siding and far enough from Shilshole Avenue NW, the active vehicle right-of-way.⁴⁷ Currently, there are no nearby or adjacent improvements, such as a bicycle trail, that impede access and use of the Western Pioneer Spur.⁴⁸

BTRC needs unobstructed access to use the Western Pioneer Spur for its operations.⁴⁹ BTRC actively uses the Western Pioneer Spur, including using it for car storage for BTRC customers and, as needed, for loading, unloading and transloading freight for BTRC customers.⁵⁰ BTRC is currently negotiating with a potential customer interested in using the Western Pioneer Spur for transloading bulk product.⁵¹

The following photographs show how BTRC has loaded/unloaded freight at its Western Pioneer Spur:

⁴³ Id.

⁴⁴ Id. at ¶ 11.

⁴⁵ Id.

⁴⁶ Id. at ¶ 12.

⁴⁷ Id.

⁴⁸ Id. at ¶ 13.

⁴⁹ Id. at ¶ 14.

⁵⁰ Id. at ¶ 15.

⁵¹ Id. at ¶ 16.

FREIGHT CARS BEING LOADED at WESTERN PIONEER



View Looking West



View Looking East Toward Ballard Bridge



As the above photographs show, BTRC has access on the southern side of the Western Pioneer Spur that is located between the siding and either an adjoining building or fence, thereby making this area very protected and safe for loading, unloading and transloading operations.⁵² The northerly side of the Western Pioneer Spur provides safe access areas because it is away from Shilshole Avenue NW, the active vehicle right-of-way.⁵³

2. SDOT Plans to Either Remove or Reconfigure BTRC's Western Pioneer Spur: In Either Case, Doing So Will Materially Impact BTRC and Create Dangerously Unsafe Conditions.

⁵² Id. at ¶¶ 12-14.

⁵³ Id.

SDOT intends to either eliminate (completely remove) or reconfigure BTRC's Western Pioneer Spur, without BTRC's permission or agreement: In either case, SDOT's actions will materially and negatively impact BTRC's operations.⁵⁴

Relevant portions of SDOT's 90% design plans that include BTRC's Western Pioneer Spur---- Rail Relocation Plan, Sheets RR-102 to RR-104--are attached as Exhibit 2 to the Forgette Statement. As shown in SDOT's 90% design plans, Exhibit 2, SDOT would entirely eliminate BTRC's Western Pioneer Spur. SDOT's action would materially and negatively impact BTRC because it invested money and resources designing and improving the Western Pioneer Spur, actively uses it, has historically used this siding, and is currently negotiating with a potential customer for expanded use of this siding.⁵⁵ BTRC needs the Western Pioneer Spur to maintain and grow its business operation since the Western Pioneer Spur is BTRC's main resource for expanding its business and revenue.⁵⁶

At the September 13, 2018 DAC meeting, SDOT unveiled a "roll-plat" showing how it might reconfigure--instead of eliminate--BTRC's Western Pioneer Spur—again, with no permission or input from BTRC, as follows:⁵⁷

⁵⁴ Id. at ¶ 17.

⁵⁵ Id. at ¶ 20.

⁵⁶ Id.

⁵⁷ Id., Exhibit 3 to Forgette Statement; see also, https://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/2018_0913_BGT_DAC10_Presentation_FINAL.pdf (graphic plans, sheet #3).

Graphic plans



SDOT's reconfiguration plan for BTRC's Western Pioneer Spur, depicted above, would materially and negatively impact BTRC for numerous reasons,⁵⁸ including:

- SDOT's new configuration is less safe because it sandwiches the Missing Link, a recreational trail, between the main line tracks and new Spur, putting trail users into very close proximity to active rail tracks without sufficient setback or safety barriers;⁵⁹
- SDOT's new configuration is less safe because it does not provide enough space for BTRC to safely operate as the Missing Link appears to be approximately 7.5-feet from the center line of BTRC's main line track and the new spur. Because of this configuration and proximity, trail users

⁵⁸ Forgette Statement at ¶ 22.

⁵⁹ Id. at ¶ 23.

would be in direct conflict with train movements, be in danger in the event of a derailment and in danger from even routine loading, unloading and transloading operations, which currently occur far from Shilshole Avenue;⁶⁰

- SDOT's new configuration is less safe because it forces trail users to navigate between stored rail cars and active train movements. Train crew members would also have inadequate clearance to ride on the side of railcars;⁶¹
- SDOT'S new configuration impacts BTRC by eliminating its service roads. Currently, trucks access the service road from either end (east or west) and can pull up next to either side of a rail car located on the Western Pioneer Spur. This would be impossible under SDOT's new configuration because BTRC would not be able to bring trucks next to rail cars on this new spur, making it unusable for loading, unloading or transloading;⁶² and
- SDOT's new configuration negatively impacts BTRC's ability to maintain and grow its operation because prospective customers want to transload at BTRC's Western Pioneer Spur, which could not be done safely and efficiently under SDOT's plan.⁶³

In a factually similar case directly on point and controlling of the instant matter before the Board, City of Lincoln v. Surface Transportation Board,⁶⁴ the Court upheld the STB's decision to preemptively prohibit the City of Lincoln, Illinois from: 1) removing railroad track and facilities actively used by the Lincoln Lumber Company ("LLC"); and 2) constructing a recreational bicycle trail in close proximity to the active railroad that would create dangerously unsafe conditions.⁶⁵ In City of Lincoln, the Board exercised

⁶⁰ Id. at ¶ 24.

⁶¹ Id. at ¶ 25.

⁶² Id. at ¶ 26.

⁶³ Id. at ¶ 27.

⁶⁴ 414 F.3d 858, (8th Cir. 2005).

⁶⁵ City of Lincoln, 414 F.3d at 861-862.

its preemption jurisdiction under 49 U.S.C. § 10501(b) to prohibit the City of Lincoln from using its state-law power of eminent domain to acquire a portion of railroad right of way in order to construct a mixed use trail (i.e., a bicycle and pedestrian trail exactly like the Missing Link at issue here) and to improve the City's storm drainage system.⁶⁶ To support its petition before the Board seeking a declaratory order permitting it to acquire the rail right of way via state-based eminent domain, the city hired a consultant who opined that existing obstructions "interfered with rail operations more than the city's project would."⁶⁷ In reply to the city, the LLC, which owns and operates the railroad, just like BTRC is doing here, provided this Board evidence that:

it would not be able to get equipment to the tracks for maintenance or to handle derailments if its right of way were narrowed. LLC expressed concerns about the safety of trail users in the case of a derailment or while I joists or large pieces of lumber were being unloaded from center beam cars. These concerns were heightened by the fact that its calculations showed that at one point the trail would be only 7.5 feet from the rail. LLC also projected significant increases in rail traffic and described its plans to develop a railroad terminal area and rebuild a sidetrack. It proposed several alternative routes for the trail.⁶⁸

This Board held in favor of the LLC and rejected the city's claim that the LLC did not need all of the right-of-way to operate its railroad, concluding that "all of these activities are part of transportation by rail as defined in 49 U.S.C. § 10102(9), and the proposed trail could interfere with these transportation activities," and also concluding that the city was unable to refute the "LLC's contentions that the trail [located just 7.5 away] would create safety hazards."⁶⁹ The Court upheld the Board, finding the Board had correctly

⁶⁶ Id. at 858.

⁶⁷ Id. at 859.

⁶⁸ Id. (emphasis added).

⁶⁹ Id. at 860.

concluded that the city's plan would materially impact rail operations and create unsafe conditions.⁷⁰

As it did in City of Lincoln, this Board should preemptively prohibit SDOT from taking the actions described above because they will materially impede BTRC's ability to operate and grow its railroad, and because placing a mixed-use trail within 7.5-feet of the track will create unreasonably unsafe conditions similar to what was proposed and rejected in City of Lincoln. Here too, SDOT's plans will put trail users in direct conflict with train movements and those users will be in danger in the event of a derailment and even from routine loading and unloading operations.

D. SDOT Plans for the Missing Link Also Will Create Unsafe Operating Conditions by Relocating BTRC's Main Track Along 45th Street NW so the Track is Located Directly Within an Actively Used Vehicle Travel Lane.

Currently, the eastern portion of BTRC's Ballard Line is located adjacent to NW 45th Street in Seattle.⁷¹ The active rail line is located immediately to the north of what was the west-bound drive lane of NW 45th Street but which is currently configured as an interim portion of the Missing Link, as depicted below:⁷²

⁷⁰ Id. at 861-82.

⁷¹ Forgette Statement at ¶ 28.

⁷² Id. at ¶ 29.



Looking east, BTRC mainline track as currently configured on NW 45th Street in Seattle.⁷³

Interim trail.

⁷³ Id. at ¶ 30.



As the above photographs show, while this is not a perfect configuration because the rail line is located so close to the active trail, it is better than SDOT's proposal to reconfigure this area to accommodate the Missing Link, which, as Mr. Forgette verified, will make this area unsafe.⁷⁴ It will make it unsafe because SDOT wants to relocate approximately 1,991 linear feet of main line track (as depicted above) to the south (moving it to the right in the above first two photographs) while at the same time moving the eastbound and westbound vehicle travel lanes of NW 45th St. northward (to the left in the above first two photographs) so the active eastbound vehicle travel lane is directly on top of BTRC's rail line.

This plan is depicted in SDOT's Burke-Gilman Trail 90% Submittal drawings, including its Channelization and Signing Plans, Sheets CH17 to CH20, and its Rail Relocation Plans, Sheet RR-105, which are attached as Exhibits 5 and 6, respectively, to the Forgette Statement.

SDOT's plans will force BTRC's train to operate in a street used by every size and type of vehicle, moving at speeds of 20 MPH or greater.⁷⁵ BTRC operates the Railroad on any day of the week, at all hours of the day depending on its shipper's needs.⁷⁶ Since BTRC moves its train in both directions on this track, when it is heading east, the train will be heading in the same direction as traffic in the lane that the tracks occupy but when the train is heading west, it will be traveling directly into oncoming vehicle traffic. This is extremely dangerous.⁷⁷

SDOT has not included any signals or warnings to alert drivers that they will be driving behind a slow (10 MPH or less) train, going well under the posted speed limit, which, in Mr. Forgette's experience operating trains, will encourage vehicle drivers to perform unsafe maneuvers to get around the train, thereby making this area and operation even more dangerous.⁷⁸

Notwithstanding how dangerous it is to locate a train in an active drive lane, SDOT's new configuration does not provide enough room for BTRC's train to move safely since the travel lanes appear to be approximately 11' or 12' wide and a rail car can be up to

⁷⁴ Id. at ¶ 31.

⁷⁵ Id. at ¶ 34.

⁷⁶ Id. at ¶ 7.

⁷⁷ Id. at ¶ 35.

⁷⁸ Id. at ¶ 36.

11' wide; because of that, the rail car will occupy or hang-over the entire travel lane, possibly crossing over the center-lane into the other lane, and train crew members would have inadequate clearance to ride on the side of railcars as they do now.⁷⁹ SDOT's plan also creates unsafe conditions by forcing BTRC's locomotive to cross the westbound travel lane to enter/exit the locomotive storage area, for which, again, SDOT did not provide any gates or signals to regulate this movement and make it safe.⁸⁰

In sum, as Mr. Forgette, explained, operating a train in the middle of an active travel lane with a 20 MPH speed limit *is extremely dangerous*. SDOT should be preempted from relocating BTRC's rail tracks and from relocating active travel lanes as proposed because SDOT's plans for the Missing Link "would prevent or unduly interfere with railroad operations and interstate commerce," and would "create safety hazards."⁸¹

E. SDOT's Plans to Improve "Not 54th Street" Will Create Unsafe Conditions and Materially Impede BTRC's Ability to Perform Routine Maintenance and Repairs

In a corollary and related project, SDOT plans to make substantial improvements to dedicated but unopened public right-of-way that used to be part of the BNSF Ballard Line and to which the City acquired title as part of the Sea Lion acquisition and exemption approved by this Board, locally known as "Not-54th Street."⁸² Not-54th Street is currently largely unimproved, narrow and tightly constrained,⁸³ as shown in the photographs below:

⁷⁹ *Id.* at ¶ 37.

⁸⁰ *Id.* at ¶ 38.

⁸¹ *City of Lincoln, supra*, at 860.

⁸² *See* Forgette Statement at ¶ 41.

⁸³ *Id.* at ¶ 42.



Not-54^{th84}

⁸⁴ Id. at ¶ 42.





As these photographs show, Not-54th St. has a rough dirt and gravel surface adjacent to the Ballard Line tracks and the currently unimproved portion of Not-54th is used solely for rail traffic with the occasional pedestrian, etc.⁸⁵ Heavy freight trucks and light vehicles do not use this area because it very narrow—there is not enough room for trains and vehicle traffic together—and the surface is unimproved and highly irregular.⁸⁶ It is very hard for vehicle traffic to navigate this area because it is narrow and tightly constrained by the existing railroad tracks; even without a train present, vehicles need to have one side of their wheels inside the rails.⁸⁷

Despite this, SDOT plans to improve a portion of Not-54th Street-- between NW 24th Street and NW 26th Street--by paving the area to the north of the active rail tracks (the area to the right as shown in the above photograph), to create a vehicle travel lane

⁸⁵ *Id.* at ¶ 42 and 43.

⁸⁶ *Id.* at ¶ 44.

⁸⁷ *Id.* at ¶ 45.

and an adjacent sidewalk.⁸⁸ As depicted in SDOT's paving plan, it intends to pave right up to the edge of rail tracks. While the plan shows an "8.5' Min. Clearance" between the centerline of track and the edge of a passenger car, SDOT does not intend to install any physical barrier or fence to maintain a safe operating distance between the travel lane and BTRC's active rail operations and thus moving vehicles will be traveling directly adjacent to a moving train with no barrier or separation.⁸⁹

Since this portion of Not-54th is heavily industrialized, large freight vehicles (e.g., tractor trailer trucks, box trucks and tandem fuel tanker trucks, etc.), would be permitted to travel westbound on Not-54th next to the rail tracks where they cannot presently travel.⁹⁰ As Mr. Forgette attested, in his professional experience based on nearly 2 decades of railroad operations, there is simply not enough room for cars/trucks, much less big trucks, to safely operate next to the active rail tracks in this portion of Not-54th Street, and there would not be enough room for train crew members to safely operate the train.⁹¹ Also, SDOT's action to pave this area will make it a *de facto* portion of the Missing Link by providing a paved surface for bicycle riders, thereby inviting incompatible and often inexperienced users into a dangerous and tightly constrained area next to active rail tracks with no fence or physical barrier.⁹² Again, SDOT should be preempted from improving Not-54th because SDOT's plans "would prevent or unduly interfere with railroad operations and interstate commerce," and would "create safety hazards."⁹³

⁸⁸ *Id.* at ¶ 46; see also Exhibit 7 to the Forgette Statement, which is a copy of SDOT's paving plan for this area.

⁸⁹ *Id.* at ¶ 48.

⁹⁰ *Id.* at ¶ 49.

⁹¹ *Id.* at ¶ 50.

⁹² *Id.* at ¶ 51.

⁹³ City of Lincoln, *supra*, at 860.

Conclusion

For the reasons articulated above, BTRC respectfully requests that the Board preempt and prohibit SDOT from removing or reconfiguring BTRC's Western Pioneer Spur; from relocating an active vehicle travel lane of NW 45th Street so that it is located directly on top of and runs on top of a portion of active rail track; and from making roadway improvements to Not-54th St. because all of SDOT's actions will unreasonably and materially impede BTRC's ability to operate its railroad and will create unsafe conditions for doing so. BTRC also respectfully requests an expedited briefing schedule calling for Replies no later than forty (days), plus three (3) for service, from the filing date (i.e., all Replies by January 23, 2019), with any Rebuttals due twenty-one (21) days later (i.e., February 13, 2019). This would permit a decision to be issued in April, 2019. An expedited schedule is necessary because the City of Seattle is taking steps to break its promise to the Division I Court of Appeals (see Appendix A) and intends to begin construction of the Missing Link in early 2019.

Respectfully submitted this 11th day of December, 2018.

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Supporting Documents

Appendices

Description

Appendix A	Exhibit D1 to the Operating Agreement
Appendix B	Div. I, Court of Appeals Decision
Appendix C	Notice of Action
Appendix D	AB 544X
Appendix E	Resolution 29474
Appendix F	Operating Agreement
Appendix G	Ordinance 118743
Appendix H	Resolution 30583

SEATTLE EX. NO. 3

BURKE-GILMAN TRAIL MISSING LINK PROJECT



Seattle
Department of
Transportation

Final Environmental Impact Statement

May 2017





CHAPTER 1: PROJECT HISTORY AND ALTERNATIVES

1.1 Project Background and History

The Burke-Gilman Trail (BGT) is a regional trail that runs east from Golden Gardens Park in Seattle and connects to the Sammamish River Trail in Bothell, except for a missing segment through the Ballard neighborhood. Currently, the regional trail ends at 30th Ave NW by the Hiram M. Chittenden (Ballard) Locks on the west, and begins again at the intersection of 11th Ave NW and NW 45th St on the east. The Seattle Department of Transportation (SDOT) proposes to connect these two segments of the BGT with a marked, dedicated route that would serve all users of the multi-use trail. The proposed project to complete the regional facility is referred to as the Missing Link.

Completing this section of the BGT has been discussed and analyzed since the late 1980s. In the early 1990s, the City of Seattle (City) included the extension of the BGT in its comprehensive plan. By the late 1990s, the Seattle City Council passed a resolution outlining the guiding principles for extending the trail and developed an operating agreement between the Ballard Terminal Railroad (BTR) and the City to preserve the rail line in City ownership while continuing rail service to area businesses. The City Council adopted an ordinance, the Ballard Terminal Railroad Franchise Agreement, which granted BTR the right, privilege, and authority to construct and operate the railway in the railroad right-of-way. In the early 2000s, the City evaluated alternative routes for the trail. In 2003, the Seattle City Council adopted a resolution identifying Shilshole Ave NW as the preferred alignment for the Missing Link, with interim portions of the route to be located along Ballard Ave NW and NW Market St. In 2007, the City adopted the Bicycle Master Plan, which called for completing the trail. Environmental documentation was prepared for the Missing Link beginning in 2008 and was challenged multiple times. In 2012, after the third appeal to the City's Hearing Examiner over the project's environmental determination, the Hearing Examiner required SDOT to develop an environmental impact statement (EIS) related to traffic hazards on the Shilshole Ave NW segment of the project. As a result of the ruling, SDOT decided to prepare an EIS for the entire project and to include an evaluation of alternative routes. SDOT began preparation of an EIS in 2013. Figure 1-1 provides a general timeline of the Missing Link project history.

Changes from the Draft EIS

Chapter 1 includes a description of the newly developed Preferred Alternative, which was not analyzed in the DEIS. It also includes a revised description of Roadway Design and Safety Considerations, and summarizes the comments received on the DEIS.

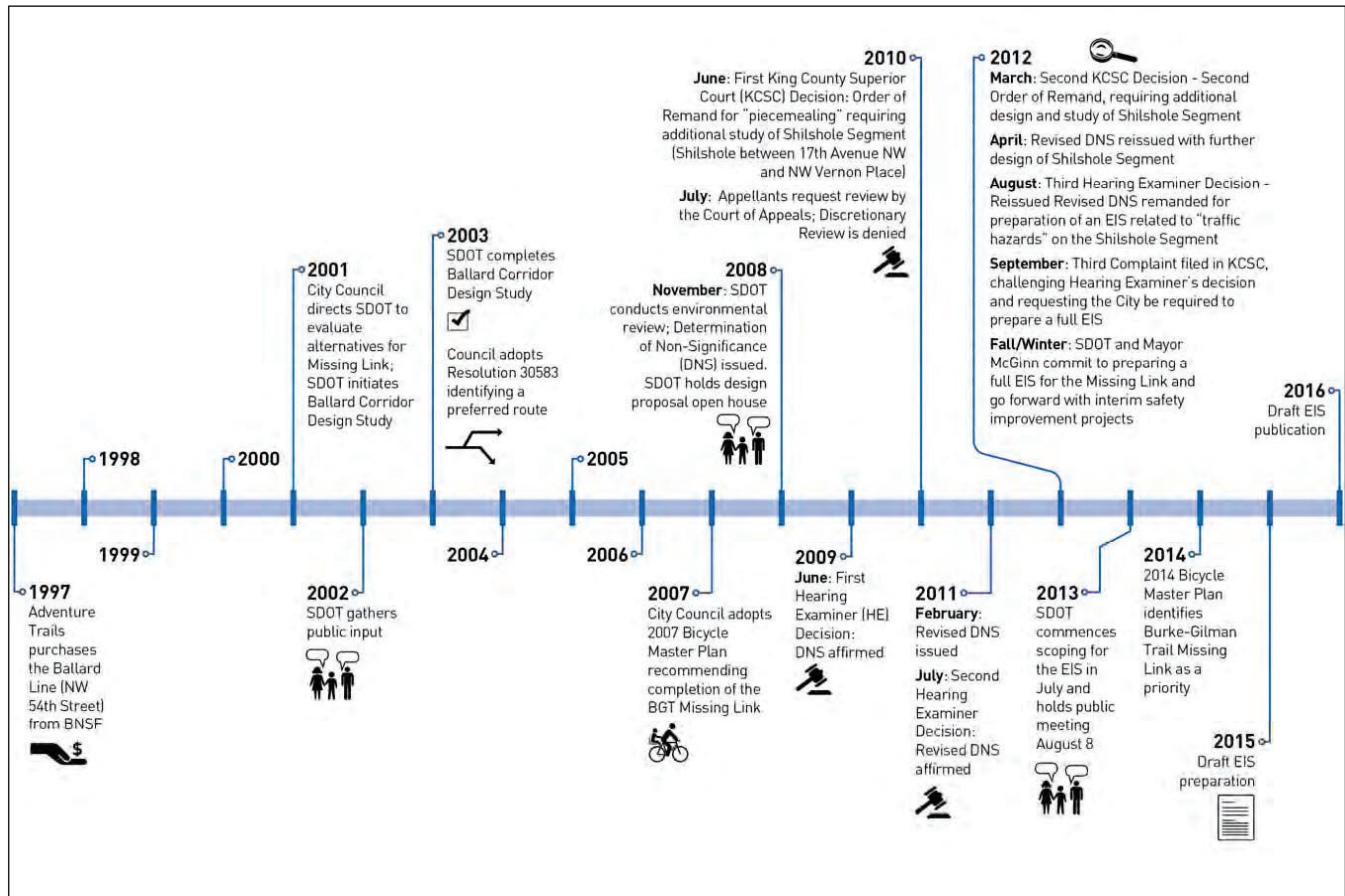


Figure 1-1. Missing Link Project History Timeline

1.2 Objectives

The BGT currently serves a large portion of Seattle and the region as a highly used nonmotorized transportation and recreational facility. The City has identified a need for recreational and commuter users of the Burke-Gilman Trail to have a safe, direct, and defined way to traverse through the Ballard neighborhood from either end of the existing trail (SDOT, 2007, 2009, 2015). There are a number of barriers between the existing trail ends for people walking and biking. Some streets lack sidewalks or other demarcated areas for pedestrians, and intersection and railroad crossings are substandard for bicycles. Many people have commented during public meetings and open houses that they do not feel comfortable riding bicycles or walking in the roadway, and some activities such as skateboarding are not allowed on city streets. Traffic surveys have shown that the lack of a direct and defined route between trail ends results in people dispersing along various streets through Ballard, which in turn increases the opportunity for conflicts between vehicles and nonmotorized activities (SDOT, 2014, 2015).

Therefore, the primary objective of the proposed project is to connect the roughly 1.4-mile gap between the existing segments of the BGT through the Ballard neighborhood. The project is intended to create a safe, direct, and defined multi-use trail for persons of all abilities, for a variety of transportation and recreational activities, and to improve predictability for motorized and nonmotorized users along the project alignment. Another objective of the project is to provide connections to the proposed nonmotorized networks shown in the Pedestrian Master Plan (SDOT, 2009) and Seattle Bicycle Master Plan (SDOT, 2014), while maintaining truck and freight facilities and access that support industrial and water-dependent land uses within the shoreline district and the Ballard-Interbay Northend Manufacturing and Industrial Center (BINMIC).

1.3 SEPA Process

This Final EIS (FEIS) has been prepared consistent with the State Environmental Policy Act (SEPA) (Washington Administrative Code [WAC] 197-11 and Seattle Municipal Code [SMC] 25.05). It is an analysis designed to help elected officials, community leaders, and the public understand the full range of environmental impacts that could result from the proposal. The City, as the SEPA lead agency, is responsible for fulfilling SEPA's procedural requirements. The FEIS describes potential adverse impacts of each alternative and describes proposed measures to reduce potential adverse impacts. SDOT received approximately 4,100 public comments on the Draft EIS (DEIS), which are included with their responses in Volume 2 of the FEIS. Since the issuance of the DEIS, the City has selected a Preferred Alternative that best meets the project's objective, which is fully analyzed in this FEIS.

The intent and purpose of this FEIS is to satisfy the procedural requirements of SEPA (Revised Code of Washington [RCW] 43.21c and City Ordinance 114057). This is a project-level EIS that encompasses all of the regulatory, transactional, and other actions necessary to complete the Missing Link. This document is not an authorization for an action, nor does it constitute a decision or a recommendation for an action.

1.3.1 Scoping

SDOT held its scoping process between July 17 and August 16, 2013, and held an open house on August 8, 2013 at Ballard High School. The focus of the open house was to receive comments related to alternative trail locations and the elements of the environment that should be evaluated in the EIS. Scoping is described in more detail in the *Burke-Gilman Trail Missing Link Environmental Impact Statement Public Scoping Meeting Comments Summary* available on the City website (SDOT, 2015).

All of the trail location information obtained as part of the scoping process was incorporated into the alternative development and screening process, as described in Section 1.4.1 of the DEIS.

1.4 Alternative Development

1.4.1 Screening

SDOT received a number of suggestions during scoping in 2013 for potential routes to complete the Missing Link. SDOT mapped all possible route segments identified in the public scoping period, along with several additional segments suggested by SDOT staff and consultants. Overall routes through the study area were broken into smaller segments for review, and included a street block or number of blocks that would likely remain intact as part of a larger route. Segments were added in addition to those suggested by the public, including street blocks that could be used to connect streets in a reasonable way.

Engineers and planners from SDOT, in conjunction with their consultants (engineers, transportation planners, environmental planners, trail designers, and scientists), evaluated 55 route segments using the screening criteria listed below in a charrette-style workshop held in March 2015.

Screening criteria were developed by SDOT and their consulting team to narrow down the possible alternative segments and remove unworkable or infeasible segments from further consideration. The criteria included factors critical to the development of a safe, multi-use trail that would be similar in design and feel to the remainder of the BGT system. The screening criteria included the following factors:

- Directness of route,
- Number and types of trail crossings (driveways and intersections),
- Street and arterial classification,
- Adjacent land uses, and
- Right-of-way width.

At the workshop, each route segment was evaluated to create reasonable alignments that best meet the project objective. Using the screening criteria, the number of route segments was reduced to 31 segments. Segments that were eliminated either did not meet the criteria or did not provide a reasonable connection where another segment better met the criteria and/or provided a more direct or safe connection. The remaining segments were combined by the team to create a range of trail alignments through the study area that incorporated a broad range of options. The route segments were connected into three feasible alternative routes and seven route segments that would allow potential links to “mix and match” route segments.

Once the general alignments were determined, the route was further refined. To reduce the number of intersection crossings, the trail was located on the side of the street that resulted in fewer intersection crossings. In general, this meant that the trail would be located on the south side of east-west trending streets and on the west side of north-south trending streets.

Several team workshops were held over the next 3 months as the routes were being developed to refine the trail details and crossings. The trail alignments were named for the general east-west trending street on which they are located: the Shilshole South Alternative, the Ballard Avenue Alternative, and the Leary Alternative.

Following review of the three alternatives in June 2015, SDOT decided to include a fourth alternative, along the north side of Shilshole Ave NW, called the Shilshole North Alternative, because this alignment meets the screening criteria and does not result in more intersection crossings than the Ballard Avenue or Leary Alternatives. Ultimately, after issuance and review of the DEIS, SDOT developed an additional Build Alternative, identified as the Preferred Alternative in this FEIS.

This FEIS evaluates the five Build Alternatives described above, along with the No Build Alternative. Refer to Section 1.6 and Figure 1-2 for descriptions and depictions of the alternative alignments and connector segments.

1.4.2 Development and Selection of the Preferred Alternative

As described in the DEIS, all four Build Alternatives that SDOT evaluated would meet the project objectives to provide a safe, direct, and defined multi-use trail for persons of all ages and ability, improve predictability for users along the project alignment, and maintain truck and freight facilities and access that support industrial and water-dependent uses in the area. However, several factors unique to each alternative could make some alternatives better suited to meeting the project objectives than others and could result in different potential adverse impacts to the natural and built environment. Upon further evaluation of the merits of each alternative, SDOT determined that the Shilshole South Alternative best meets the project objectives, but with some modifications to that route.

SDOT began the process of selecting a Preferred Alternative after review of the public comments on the DEIS. Approximately 80% of the public comments received on the DEIS expressed a preference for the Shilshole South Alternative. However, SDOT also received a substantial number of comments related to concerns over the project's potential conflicts with and impacts to adjacent commercial and industrial businesses. Based on those comments, SDOT made the decision to analyze motor vehicle volumes and movement at several additional driveways and roadway intersections and to conduct additional parking studies during night and weekend time periods.

After re-examining the driveway volumes and vehicle movements, SDOT determined that, starting from the Ballard Locks, it would be preferable for the trail to run along NW 54th St to NW Market St, rather than along the unimproved NW 54th St right-of-way all the way to Shilshole Ave NW. Locating the trail along the unimproved NW 54th St right-of-way would exacerbate a pinch point between vehicles needing to access properties south of the roadway, the Ballard Terminal Railroad tracks, and business access garages that open immediately into the public right-of-way. In addition, the trail would need barriers or fences on either side to prevent motor vehicles from driving along the trail due to the otherwise narrow roadway. In contrast, SDOT determined that an alignment along NW Market St, west of 24th Ave NW, would allow for a more pleasurable trail user experience with minimal diversion from the desired line of travel, without the need for physical barriers on either side of the trail. Further, the trail would take advantage of and help activate the new developments occurring along NW Market St, west of 24th Ave NW, and provide an easier access point to the Burke-Gilman Trail for people coming from the north.



Figure 1-2. Proposed Alternatives

From the intersection of 24th Ave NW and Shilshole Ave NW, SDOT determined that between the options of continuing on NW Market St to Leary Way or Ballard Ave NW, or turning onto Shilshole Ave NW, Shilshole Ave NW would be the most preferable alignment, as it would provide the most direct route to the trail's terminus at 11th Ave NW and NW 45th St. SDOT determined that the Leary Alternative was less preferable because of the number of high-volume roadway intersection crossings and transportation and transit impacts, and that the Ballard Avenue Alternative was less preferable because of similar concerns over the number of roadway intersection crossings in addition to the adverse impacts to the Ballard Farmers Market and Ballard Avenue Landmark District. SDOT then considered whether it would be best to locate the trail on the north or south side of Shilshole Ave NW. At this point in its deliberations, SDOT, in partnership with the City's Office of Economic Development, initiated discussions with transportation and trail experts, bicycle and trail advocacy groups, and representatives from Ballard maritime, industrial, and commercial businesses, about which alignments—either NW Market St or NW 54th St and either along the north or south side of Shilshole Ave NW—would work best for trail users and businesses along the route.

Ultimately SDOT decided that the Preferred Alternative is the NW Market St and Shilshole South alignment, as it best meets the project objectives. While an alignment along the north side of Shilshole Ave NW could provide more direct access into the Ballard Urban Hub neighborhood as trail users would not need to cross Shilshole Ave NW, there are far fewer roadway intersection crossings and fewer conflicts with business operations on the south side of roadway. In addition, there is a wider area of public right-of-way on the south side of Shilshole Ave NW that, combined with a general shift of the trail alignment toward the north, allows more room for business operations and for truck and freight movement in and out of driveways. For a comparison of the potential traffic hazards associated with each of the Build Alternatives, please see Section 1.8.

1.5 No Build Alternative

Under the No Build Alternative, no new multi-use trail would be constructed to connect the existing segments of the regional Burke-Gilman Trail. Trail users would continue to use the existing surface streets and sidewalks to travel between the existing trail segments, a distance of approximately 1.4 miles. Currently, trail users tend to use the most direct route, which is along Shilshole Ave NW. Pedestrians may opt for a street with sidewalks such as Ballard Ave NW or NW Leary Way. Shilshole Ave NW is used by passenger vehicles in addition to large commercial vehicles and trucks traveling to the adjacent industrial areas. There are no sidewalks on the south side of the street and sporadic sidewalks on the north side of the street. Unregulated parking occurs on both sides of the street. The No Build Alternative serves as the baseline condition against which the Build Alternatives are compared over time to their 2040 design year. The year 2040 was used as the timeline to analyze the impacts of the project. Over that time period, population and employment growth is expected to continue in the Ballard neighborhood, leading to an increase in traffic congestion, parking demand, and the number of people walking and biking.

1.6 Build Alternatives

1.6.1 Preferred Alternative

The Preferred Alternative (illustrated in Figure 1-3) is a combination of components of the previously analyzed Build Alternatives. Except for one minor route connection (as described below), the Preferred Alternative does not contain any route segments or components that were not analyzed in the DEIS. The

Preferred Alternative is most similar to the Shilshole South Alternative, but its westernmost portion contains elements of both the Leary and Shilshole North Alternatives. The Preferred Alternative does not share any segments or components of the Ballard Avenue Alternative.

There would be changes to parking areas, travel and motor vehicle lanes, as well as intersection configurations on both sides of the streets along the Preferred Alternative. The trail would accommodate users on a newly paved, grade-separated surface for most of its length. Route specifics are described below.

Beginning at the existing western trail end (at the Ballard Locks), the trail would continue east along the south side of NW 54th St until it turns into NW Market St. The trail would continue along the south side of NW Market St, until the intersection with 24th Ave NW. Up to this point, the Preferred Alternative follows the same route as both the Shilshole North and Leary Alternatives.

At the intersection of NW Market St and 24th Ave NW, the Preferred Alternative would head south on the west side of 24th Ave NW for approximately 125 feet before the intersection with the south side of Shilshole Ave NW.

The Preferred Alternative would then cross 24th Ave NW and proceed along the south side of Shilshole Ave NW, continuing onto the south side of NW 45th St to 11th Ave NW, and the eastern terminus of the trail. This section of the Preferred Alternative route is identical to the Shilshole South Alternative.

From the existing western trail end at the Ballard Locks, the trail would be north of the BTR tracks until just past 17th Ave NW, at which point the trail would cross to the south of the tracks. A signal would be installed at the intersection of Shilshole Ave NW and 17th Ave NW. The signal would facilitate nonmotorized user crossings of Shilshole Ave NW and allow for better traffic flow between Shilshole Ave NW and 17th Ave NW, which would provide a benefit to traffic mobility and trail users.

The trail width would vary somewhat throughout the corridor due to existing conditions and constraints, but would generally be between 10 and 12 feet wide. Based on the design concepts, the typical right-of-way on Shilshole Ave NW for this alternative would include a barrier or buffer zone adjacent to the railroad tracks, a multi-use trail, a barrier or buffer zone adjacent to the vehicle travel lanes, two vehicle travel lanes, and preservation or addition of parking areas where feasible (Figure 1-3). See Chapter 7, Transportation, for additional detail on this and all other Build Alternatives.

This route was addressed in the DEIS except for the approximately 125-foot section on the west side of 24th Ave NW. The west side of 24th Ave NW has better connectivity and directness of route than the east side of 24th Ave NW, which was evaluated as part of the Shilshole North Alternative.

1.6.2 Shilshole South Alternative

Under the Shilshole South Alternative, the multi-use trail would be primarily routed along the south side of Shilshole Ave NW (Figure 1-2). There would be changes to parking, lanes, and intersection configurations on both sides of the street along this alternative alignment. The trail would accommodate users on a newly paved surface for most of its length.

Figure 1-3. Preferred Alternative

Beginning at the existing western trail end at the Ballard Locks, the trail would continue east along the north side of the unimproved NW 54th St right-of-way until the intersection with Shilshole Ave NW, just east of 24th Ave NW. The trail would then proceed along the south side of Shilshole Ave NW, continuing onto the south side of NW 45th St to the eastern project end at 11th Ave NW. From the existing western trail end at the Ballard Locks, the trail would be north of the BTR tracks until just before 17th Ave NW, at which point the trail would cross to the south of the tracks. A signal would be installed at the intersection of Shilshole Ave NW and 17th Ave NW for trail users crossing Shilshole Ave NW to access 17th Ave NW.

The trail width would vary somewhat throughout the corridor due to existing conditions and constraints, but would generally be between 10 and 12 feet wide, with one short segment that narrows to 8 feet wide. Based on the design concepts, the typical right-of-way on Shilshole Ave NW for this alternative would include a barrier or buffer zone adjacent to the railroad tracks and vehicle travel lanes, a multi-use trail, two vehicle travel lanes, and preservation of parking areas where feasible. A detailed map showing this alternative was presented in the DEIS. See also Chapter 7, Transportation, for additional detail on this and for all other Build Alternatives.

1.6.3 Shilshole North Alternative

Under the Shilshole North Alternative, the multi-use trail would be primarily routed along the north side of Shilshole Ave NW (Figure 1-2). Beginning at the existing western trail end at the Ballard Locks, the trail would continue east along the south side of NW 54th St until it turns into NW Market St. The trail would continue along the south side of NW Market St, until it crosses 24th Ave NW and turns south on the east side of 24th Ave NW. The trail would then proceed east along the north side of Shilshole Ave NW to the intersection with NW 46th St. A signal would be installed at the intersection of Shilshole Ave NW and 17th Ave NW for trail users crossing 17th Ave NW. It would continue along the north side of NW 46th St underneath the Ballard Bridge to 11th Ave NW. At this point the trail would turn south along the east side of 11th Ave NW until it connects to the eastern end of the existing trail at NW 45th St.

There would be changes to parking, vehicle travel lanes, and intersection configurations on both sides of the streets in this alternative. The typical right-of-way on NW Market St would include sidewalks on both sides of the street, the multi-use trail, a buffer zone, parallel parking or bus zone on both sides of the street, two vehicle travel lanes, and center turn lane. The typical right-of-way on Shilshole Ave NW for this alternative would include a barrier or buffer zone and informal parking adjacent to the railroad tracks, two vehicle travel lanes, parallel parking area, buffer area, multi-use trail, and sidewalk. The existing gravel shoulder on the south side of Shilshole Ave NW would be maintained. These elements would vary along the trail due to the existing road configuration and structures. A detailed map showing this alternative was presented in the DEIS. See also Chapter 7, Transportation, for additional detail on this and for all other Build Alternatives.

1.6.4 Ballard Avenue Alternative

Under the Ballard Avenue Alternative, the multi-use trail would be primarily routed along the south side of Ballard Ave NW (Figure 1-2). Beginning at the existing western trail end at the Ballard Locks, the trail would continue east along the north side of the unimproved NW 54th St right-of-way until 28th Ave NW. At this point the trail would turn north along the east side of 28th Ave NW until it reaches NW 56th St. The trail would then turn east along the south side of NW 56th St to the intersection with 22nd Ave NW. At 24th Ave NW and NW 56th St, a new pedestrian-activated signal would be installed to facilitate the trail crossing of 24th Ave NW. The trail would turn south along the west side of 22nd Ave NW, cross NW Market St, and proceed south to Ballard Ave NW. At this point the trail would turn southeast along the south side of Ballard Ave NW and continue east on the south side of NW Ballard Way to the intersection with 15th Ave NW. The trail would then turn south onto the one-way road on the west side of 15th Ave

NW, which could potentially be converted to trail only use (no vehicles). The trail would cross to the south side of NW 46th St at a newly signalized intersection and proceed east across 11th Ave NW. It would then turn south along the east side of 11th Ave NW to the eastern trail end at NW 45th St.

There would be changes to parking and vehicle travel lane configurations on all streets traversed by this alternative. The typical right-of-way on Ballard Ave would include pedestrian sidewalks on both sides of the street, buffer zone, two vehicle travel lanes, and parallel parking area on the north side of the street. These elements would vary along the trail due to the existing road configurations and structures. A detailed map showing this alternative was presented in the DEIS. See also Chapter 7, Transportation, for additional detail on this and for all other Build Alternatives.

1.6.5 Leary Alternative

Under the Leary Alternative, the multi-use trail would be primarily routed along the south side of Leary Ave NW (Figure 1-2). Beginning at the existing western trail end at the Ballard Locks, the trail would continue east along the south side of NW 54th St until it turns into NW Market St. The trail would continue east along the south side of NW Market St, crossing 22nd Ave NW. At 22nd Ave NW, the trail would turn southeast on the south side of Leary Ave NW. The trail would continue east along the south side of Leary Ave NW, which becomes NW Leary Way, to 11th Ave NW. At this point, the trail would turn south along the east side of 11th Ave NW to the current trail end at NW 45th St.

There would be changes to parking, vehicle travel lanes, and intersection configurations on both sides of the street along this alternative. The typical right-of-way on Leary Ave NW would include buffer zones on both sides of the street, a multi-use trail, parking areas on both sides of the street, sidewalks on both sides of the street, two vehicle travel lanes, and one two-way center left turn lane. The typical right-of-way on NW Market St would include a sidewalk, the multi-use trail, a buffer zone, two vehicle travel lanes, center turn lane, and parking areas on both sides of the street. These elements would vary along the trail length due to the existing road configuration and structures. A detailed map showing this alternative was presented in the DEIS. See also Chapter 7, Transportation, for additional detail on this and for all other Build Alternatives.

1.6.6 Connector Segments

The alternatives above are conceptual routes designed to provide distinct alternatives for review in the DEIS. There are a number of possibilities to connect segments of the routes, and six segments were identified in the DEIS as the most likely connectors (Figure 1-2). These segments could be used as connections between portions of the previously identified alternative routes and could be on either side of the road; however, none of these connectors were selected as part of the Preferred Alternative.

- Ballard Avenue NW;
- NW Vernon Place;
- 20th Avenue NW;
- 17th Avenue NW;
- 15th Avenue NW; and
- 14th Avenue NW.

<i>Element</i>	<i>Preferred Alternative</i>	<i>Shilshole South Alternative</i>	<i>Shilshole North Alternative</i>	<i>Ballard Avenue Alternative</i>	<i>Leary Alternative</i>
Sight Line Concerns	Buildings set back from property lines except near Ballard Mill Marina. Trail has been buffered in this area by relocating rail line adjacent to property lines.	Buildings set back from property line except near Ballard Mill Marina. Trail placement is constricted by existing rail line and is adjacent to buildings in this area.	Buildings constructed up to property lines, but trail is buffered from property lines by sidewalk	Buildings constructed up to property lines, but trail is buffered from property lines by sidewalk	Buildings constructed up to property lines, but trail is buffered from property lines by sidewalk
Traffic/Roadway Changes	- Intersection of 17th Ave NW and Shilshole Ave NW signalized - Railroad tracks removed or relocated closer to property frontages between Hatton Marine driveway (about 600 feet west of 17th Ave NW) to just east of Ballard Bridge to allow additional right-of-way space for the trail	- Intersection of 17th Ave NW and Shilshole Ave NW signalized - Railroad tracks may be removed or relocated to allow additional right-of-way space for the trail	Intersection of 17th Ave NW and Shilshole Ave NW signalized	Rapid flashing beacon installed at 15th Ave NW and NW 46th St	NW Leary Way/ Leary Ave NW reduced by one lane in each direction
Nonmotorized	- Trail crossing with active rail line - Some trail design components could create obstacles for trail users	- Trail crossing with active rail line - Some trail design components could create obstacles for trail users	Some trail design components could create obstacles for trail users	- Potential user conflicts with Ballard Farmers Market - Some trail design components could create obstacles for trail users	- Sidewalk reduced by about 12 feet on NW Market (between 24th Ave NW and 22nd Ave NW) to add the BGT Missing Link in heavy pedestrian, transit, and commercial/retail corridor - Some trail design components could create obstacles for trail users

<i>Element</i>	<i>Preferred Alternative</i>	<i>Shilshole South Alternative</i>	<i>Shilshole North Alternative</i>	<i>Ballard Avenue Alternative</i>	<i>Leary Alternative</i>
East Segment (Between 15th Ave NW and 11th Ave NW)					
Driveways	• Crosses about 8 driveways/loading zones along this segment • Driveways are primarily industrial • Driveways are organized and delineated	• Crosses about 7 driveways/loading zones along this segment • Driveways are primarily industrial • Driveways are organized and delineated	• Crosses about 9 driveways/loading zones along this segment • Driveways are commercial/retail and industrial • Driveways are organized and delineated • Crossing with heavy traffic volume driveway (Ballard Blocks)	• Crosses about 6 driveways/loading zones along this segment • Driveways are primarily industrial • Driveways are organized and delineated	• Crosses about 7 driveways/loading zones along this segment • Driveways are commercial/retail • Driveways are organized and delineated
Intersections	• There are 3 crossings of an unsignalized intersection approach	• There are 3 crossings of an unsignalized intersection approach	• There are 2 crossings of a signalized intersection approach and 3 crossings of an unsignalized intersection approach	• There is 1 crossing of a signalized intersection approach and 2 crossings of an unsignalized intersection approach	• There are 4 crossings of a signalized intersection approach, and 2 crossings of an unsignalized intersection approach
Sight Line Concerns	• Buildings constructed up to property lines, but trail is buffered from property lines by parking	• Buildings constructed up to property lines, but trail is buffered from property lines by parking	• Buildings constructed up to property lines, but trail is buffered from property lines by sidewalk	• Buildings constructed up to property lines, but trail is buffered from property lines by sidewalk	• Buildings set back from property lines, but trail is buffered from property lines by sidewalk
Traffic/Roadway Changes	• NW 45th St restored to two-way traffic • Railroad tracks along NW 45th St would be removed or relocated to allow additional right-of-way space for the trail	• NW 45th St restored to two-way traffic • Railroad tracks along NW 45th St would be removed or relocated to allow additional right-of-way space for the trail	• NW 45th St restored to two-way traffic	• NW 45th St restored to two-way traffic	• NW 45th St restored to two-way traffic
Nonmotorized	• Some trail design components could create obstacles for trail users	• Some trail design components could create obstacles for trail users	• Some trail design components could create obstacles for trail users • Trail crossing with inactive rail line	• Some trail design components could create obstacles for trail users • Trail crossing with inactive rail line	• Some trail design components could create obstacles for trail users • Trail crossing with inactive rail line

way for loading and unloading activities may have to alter their operations under the Preferred Alternative. All other loading zone spaces and driveways along the Preferred Alternative would remain the same as the No Build Alternative.

Nonmotorized Facilities

The Preferred Alternative would provide a dedicated 10- to 12-foot wide multi-use trail for nonmotorized users for the entire length of the study area. Additional nonmotorized improvements under the Preferred Alternative could include curb treatments, pavement markings and treatments, signage, wayfinding, and lighting.

The trail would cross approximately 39 driveways and loading zone spaces under the Preferred Alternative. Trail crossings with driveways and intersections would be clearly delineated, which would improve comfort and safety for nonmotorized users in the study area compared to the No Build Alternative. The Missing Link would organize and create predictability at potential conflict points between vehicles and nonmotorized users. Vehicles would be required to stop for trail users at all driveway and trail intersections. However, after stopping before the trail, vehicles would continue forward over the trail and stop at the roadway. It is possible that vehicles blocking the trail would occasionally delay trail users during the day. On average, trail users could have to wait 15 to 25 seconds for a vehicle to clear the trail.

Signal timing for both vehicles and nonmotorized users would be included at study area intersections. Signal timing would be optimized for all movements so that delay would be minimized for nonmotorized users and vehicles.

Public Transportation

There would be minimal impacts from the Preferred Alternative on transit. At the intersection of NW Market St and 28th Ave NW, which is on a transit corridor, there could be additional delay compared to the No Build Alternative. This intersection would operate at LOS B under the Preferred Alternative compared to LOS A under the No Build Alternative. This could affect transit travel times and speeds near this intersection. However, this intersection would continue to operate at an acceptable LOS and mitigation would not be required.

Freight Rail

Under the Preferred Alternative, the BTR tracks would be relocated between the Hatton Marine driveway (approximately 600 feet west of 17th Ave NW) and just east of the Ballard Bridge. This could include removing pieces of siding, or passing rail (rail line that allows trains to pass each other) that are no longer used, or relocating track to allow additional right-of-way space for the trail. All track relocation would be coordinated with BTR so that impacts on rail operations would be minimized and so that rail operations could continue as before once construction is complete.

The Preferred Alternative would provide improved separation between nonmotorized users and the rail line, which would improve safety and provide adequate sight distance along Shilshole Ave NW. The BGT Missing Link would cross the rail line near the Ballard Mill Marina. Signage and other design elements would be provided to warn nonmotorized users of train activity.

Safety

The Preferred Alternative would improve safety for nonmotorized users and motor vehicles in the study area. Under the Preferred Alternative, a dedicated bicycle facility would improve predictability at conflict

BURKE-GILMAN TRAIL MISSING LINK PROJECT



Seattle
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Table ES-4 summarizes the key operational impacts that vary by alternative. Refer to the individual chapters in the FEIS for a more complete discussion of impacts. Geology, Fish and Wildlife, Utilities, Air Quality & Greenhouse Gas, and Cultural Resource impacts are not included in this table as the differences between alternatives are minor.

Table ES-4. Operational Impacts Varying by Alternative

<i>Element of the Environment</i>	<i>No Build Alternative</i>	<i>Preferred Alternative</i>	<i>Shilshole South Alternative</i>	<i>Shilshole North Alternative</i>	<i>Ballard Avenue Alternative</i>	<i>Leary Alternative</i>
Land and Shoreline Use	• Would not alter current land uses. • Inconsistent with land use plans that emphasize multimodal transportation.	• 44% of the alignment is adjacent to industrial uses.	• 54% of the alignment is adjacent to industrial uses.	• 41% of the alignment is adjacent to industrial uses.	• 38% of the alignment is adjacent to industrial uses.	• 21% of the alignment is adjacent to industrial uses.
Recreation	• Inconsistent with adopted plans promoting more trails. • Potential for user conflicts on public streets that lack adequate pedestrian or bicycle facilities.	• Similar recreational experience to existing BGT. • Disconnected from commercial areas of Ballard. • Would increase access to shoreline street ends. • Crosses 6 roadway intersections, both signalized and unsignalized.	• Similar recreational experience to existing BGT. • Disconnected from commercial areas of Ballard. • Would increase access to shoreline street ends. • Crosses 6 unsignalized roadway intersections.	• Similar recreational experience to existing BGT. • Crosses 14 roadway intersections, both signalized and unsignalized.	• Landmark District would provide a different recreational experience. • Conflicts with Farmers Market. • Increase in trail user conflicts with pedestrians along Ballard Ave NW. • Crosses 15 roadway intersections, both signalized and unsignalized.	• Commercial district would provide a different recreational experience. • Crosses 17 roadway intersections, both signalized and unsignalized. • Potential for increased trail user conflicts along NW Market St.

<i>Element of the Environment</i>	<i>No Build Alternative</i>	<i>Preferred Alternative</i>	<i>Shilshole South Alternative</i>	<i>Shilshole North Alternative</i>	<i>Ballard Avenue Alternative</i>	<i>Leary Alternative</i>
Transportation	6 intersections would operate at Level of Service (LOS) E or F in 2040 due to projected traffic growth.	- Crosses approximately 39 driveways and loading zones. - Would improve LOS at study intersections. - Up to 4 driveways could have sight distance concerns. - Rail line would be relocated.	- Crosses approximately 37 driveways and loading zones. - Would improve LOS at study intersections. - Up to 8 driveways could have sight distance concerns. - Rail line could be relocated.	- Crosses approximately 54 driveways and loading zones. - Would improve LOS at study intersections. - Potential delays for transit along NW Market St. - Up to 28 driveways could have sight distance concerns.	- Crosses approximately 41 driveways and loading zones. - Would improve LOS at study intersections. - Potential user conflicts with the Farmers Market. - Up to 18 driveways could have sight distance concerns.	- Crosses approximately 29 driveways and loading zones. - Would worsen LOS at study area intersections. - Reduces the sidewalk by up to 12 feet on NW Market St to provide the BGT Missing Link. - Potential delays for transit along NW Market St and Leary Ave NW. - Up to 17 driveways could have sight distance concerns.
Parking	No change to parking supply.	344 on-street parking spaces removed.	279 on-street parking spaces removed.	206 on-street parking spaces removed.	198 on-street parking spaces removed. 86 of those on-street spaces that would be removed are paid parking spaces.	82 on-street parking spaces removed.

<i>Element of the Environment</i>	<i>No Build Alternative</i>	<i>Preferred Alternative</i>	<i>Shilshole South Alternative</i>	<i>Shilshole North Alternative</i>	<i>Ballard Avenue Alternative</i>	<i>Leary Alternative</i>
Loading Zones	• No changes to loading zones.	• Potentially remove or relocate 2 unrestricted loading zone spaces and 2 truck-only loading zone spaces.	• No removal of designated loading zone spaces. • Some undesignated loading zone loss.	• Potentially remove or relocate 10 unrestricted loading zone spaces and 14 truck-only loading zone spaces.	• Potentially remove or relocate 10 unrestricted loading zone spaces, 2 truck-only loading zone spaces, and 2 commercial vehicle loading zone spaces.	• Potentially remove or relocate 8 unrestricted loading zone spaces, 3 passenger loading zone spaces, and 4 truck-only loading zone spaces.



Seattle
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BURKE-GILMAN TRAIL MISSING LINK PROJECT

Transportation Discipline Report

Prepared by: Parametrix

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Table 4-7 summarizes medium and large vehicle (classes 4-13) counts collected in the study area between January 2013 and September 2015 at locations shown on Figure 4-7 (IDAX, 2015; SDOT, 2015b). Table 4-7 was revised from the Draft EIS to include class 4 vehicles, which were inadvertently not included. All freight vehicle counts were rounded to the nearest five vehicles to account for daily fluctuations. Although freight truck volumes are typically highest during the midday, the volumes for other transportation modes in the study area, such as nonmotorized users and general-purpose vehicles, are higher during the PM peak hour. The analysis evaluates the conditions for all modes during the PM peak hour to show the worst-case impacts.

Table 4-7. 2015 Daily and PM Peak Freight Volumes (January 2013 to September 2015)

<i>ID</i>	<i>Location</i>	<i>PM Peak Northbound/E astbound Volume</i>	<i>PM Peak Southbound/W estbound Volume</i>	<i>Daily Volume</i>
1	NW 54 th St west of NW Market St	15	20	560
2	28 th Ave NW north of NW Market St	5	5	50
3	NW Market St west of 24 th Ave NW	25	20	790
4	NW 56 th St west of 24 th Ave NW	0	0	25
5	NW 56 th St east of 24 th Ave NW	5	5	120
6	Shilshole Ave NW southeast of 24 th Ave NW	15	5	380
7	22 nd Ave NW south of NW 56 th St	5	5	145
8	22 nd Ave NW south of NW Market St	5	0	90
9	Leary Ave NW south of NW Market St	55	10	820
10	Ballard Ave NW southeast of 22 nd Ave NW	5	40	495
11	NW Vernon Pl northwest of Shilshole Ave NW	5	5	70
12	17 th Ave NW north of Shilshole Ave NW	30	5	465
13	Shilshole Ave NW west of NW 46 th St	10	20	515
14	NW Ballard Way east of 17 th Ave NW	20	5	550
15	NW 46 th St west of 15 th Ave NW	20	35	520
16	NW 45 th St west of 14 th Ave NW	5	5	125
17	14 th Ave NW south of NW Ballard Way	10	10	360
18	NW Leary Way east of 14 th Ave NW	20	40	1,290
19	11 th Ave NW north of NW 46 th Ave NW	5	5	215

Note: Counts were rounded to the nearest five vehicles to account for daily fluctuations. For counts that had between one and four vehicles recorded, the number was rounded up to provide a conservative estimate of impacts.

The City recently updated the Freight Master Plan, which was adopted by the City Council on October 3, 2016. The Freight Master Plan identified locations where safety issues and bottlenecks exist for freight transportation. In the study area, 15th Ave NW has been identified as a high bottleneck location, meaning that freight truck volumes and congestion are expected to be high. The City also identified the intersections of 15th Ave NW/NW Market St and 15th Ave NW/NW Leary Way as locations with safety concerns (SDOT, 2015g). The intersection of 15th Ave NW and NW Market St would not be crossed by the BGT Missing Link. Please see Section 4.2.2 for analysis of the intersection of 15th Ave NW and NW Leary Way.

Table 4-11. Collisions by Corridor 2012-2014

<i>Corridor</i>	<i>Total Collisions</i>	<i>Property Damage Only</i>	<i>Injury</i>	<i>Fatality</i>
11 th Ave NW between southern dead end and NW Leary Way	2	2	0	0
14 th Ave NW between NW 45 th St and NW 49 th St	9	5	0	0
15 th Ave NW (including on-ramp from NW Ballard Way)	6	2	3	0
17 th Ave NW between Shilshole Ave NW and NW 49 th St	3	1	0	0
20 th Ave NW between Shilshole Ave NW and Russell Ave NW	8	6	1	0
22 nd Ave NW between Shilshole Ave NW and NW 57 th St	12	11	1	0
24 th Ave NW between Shilshole Ave NW and NW 57 th St	7	6	1	0
28 th Ave NW between southern dead end and NW 57 th St	5	4	0	0
30 th Ave NW between NW Market St and NW 56 th St	1	1	0	0
Ballard Ave NW between NW Market St and NW 48 th St, NW Ballard Way between Ballard Ave NW and 11 th Ave NW	41	29	1	0
Leary Ave NW/NW Leary Way between NW Market St and NW Ballard Way	38	25	6	0
NW 45 th St between 9 th and 11 th Ave NW, NW 45 th St between 14 th Ave and 15 th Ave NW	3	1	1	0
NW 46 th St between 9 th Ave NW and 15 th Ave NW	6	2	3	0
NW 54 th St between 24 th Ave NW and NW Market St	4	2	2	0
NW 56 th St between 20 th Ave NW and 30 th Ave NW	9	5	1	0
NW Dock Pl between Shilshole Ave NW and Russell Ave NW	7	6	0	0
NW Ione Pl between Leary Ave NW and Russell Ave NW	2	2	0	0
NW Market St between Leary Ave NW and 32 nd Ave NW	38	26	9	0
Shilshole Ave NW between 24 th Ave NW and NW 45 th St	26	19	5	0
Total	227	155	34	0

Source: SDOT, 2015c

Note: "Not Enough Damage" and "Non-State Matched" collision records are only included in the "Total Collisions" aggregation.

Table 4-12. Collisions by Intersection 2012-2014

<i>Intersection</i>	<i>Total Collisions</i>	<i>Property Damage Only</i>	<i>Injury</i>	<i>Fatality</i>
11 th Ave NW and NW Ballard Way	2	1	0	0
11 th Ave NW and NW Leary Way	6	2	3	0
14 th Ave NW and NW 45 th St	1	0	1	0
14 th Ave NW and NW 46 th St	18	13	5	0
14 th Ave NW and NW Leary Way	8	4	3	0
15 th Ave NW (Northbound) and NW Leary Way	15	12	3	0

<i>Intersection</i>	<i>Total Collisions</i>	<i>Property Damage Only</i>	<i>Injury</i>	<i>Fatality</i>
15 th Ave NW (Southbound) and NW Leary Way	2	1	1	0
20 th Ave NW and Ballard Ave NW	1	0	1	0
20 th Ave NW and Leary Ave NW	3	2	0	0
20 th Ave NW and Shilshole Ave NW	2	1	0	0
22 nd Ave NW and Ballard Ave NW	1	0	1	0
22 nd Ave NW and NW 56 th St	2	1	1	0
22 nd Ave NW and Shilshole Ave NW	3	1	1	0
24 th Ave NW and NW Market St	4	3	1	0
24 th Ave NW and NW 56 th St	2	2	0	0
24 th Ave NW and Shilshole Ave NW	2	1	1	0
26 th Ave NW and NW Market St	1	1	0	0
28 th Ave NW and NW 56 th St	1	0	0	0
28 th Ave NW and NW Market St	1	0	1	0
30 th Ave NW and NW Market St	2	2	0	0
Ballard Ave NW and NW Ballard Way	2	2	0	0
Ballard Ave NW and NW Dock Pl	3	2	1	0
Ballard Bridge Off-Ramp and NW Ballard Way	3	2	1	0
Ballard Ave NW and NW Market St	2	2	0	0
Leary Ave NW and NW Dock Pl	3	2	1	0
Leary Ave NW and NW Ione Pl	3	2	1	0
Leary Ave NW And NW Leary Way	2	0	1	0
Leary Ave NW and NW Market St	7	4	3	0
Leary Ave NW and NW Vernon Pl	2	1	1	0
NW 54 th St and NW Market St	4	3	1	0
Shilshole Ave NW and NW Vernon Pl	1	0	1	0
Shilshole Ave NW and NW 46 th St	1	0	1	0
Shilshole Ave NW and NW Dock Pl	1	0	0	0
Total	111	67	35	0

Source: SDOT, 2015c

Note: "Not Enough Damage" and "Non-State Matched" collision records are only included in the "Total Collisions" aggregation

Figure 4-12 summarizes all of the collisions that occurred in the study area, including collisions between motor vehicles, pedestrians, and cyclists, for one-block segments (in Table 4-11, collisions are summarized for multi-block corridors). As shown on Figure 4-12, the single block segment of Ballard Ave NW between NW Market St and 22nd Ave NW had the highest number of collisions compared to other single block segments in the study area, with 13 collisions over the 3-year period. The majority of collisions in the study area were property damage-only collisions with parked vehicles.

SEATTLE EX. NO. 4

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SEATTLE HEARING EXAMINER

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**

NO. W-17-004

NOTICE OF APPEAL

[CORRECTED]¹

The Ballard Coalition, an unincorporated association of labor, business, and industry groups, which includes among its members the Martin Luther King, Jr. County Labor Council of Washington, AFL-CIO (Labor Council), General Teamsters Union Local No. 174 (Teamsters), Salmon Bay Sand & Gravel Company (Salmon Bay), the Ballard Terminal Railroad (BTRR), the Ballard Interbay Northend Manufacturing & Industrial Center (BNMIC), the North Seattle Industrial Association (NSIA), CSR Marine (CSR), and the Seattle Marine Business Coalition (SMBC) (collectively, the "Ballard Coalition"), hereby submits this Notice of Appeal of the May 25, 2017 Final Environmental Impact Statement (FEIS) issued by the Seattle Department of Transportation (SDOT) for the Burke Gilman Trail Missing Link Project (the Project), a copy of which is available at http://www.seattle.gov/transportation/BGT_Ballard.htm and a courtesy copy of Vol. 1 of which is included with the original Notice of Appeal filed with the Hearing Examiner.

¹ The Ballard Coalition is submitting this Corrected Notice of Appeal to change citations to the Seattle Municipal Code, Chapter 25.05, instead of WAC Chapter 197-11, and to correct typographical/gramatical errors.

NOTICE OF APPEAL
[CORRECTED]

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1 The Ballard Coalition is the successor in interest to, and includes many of the members
2 of, the Ballard Business Appellants, which successfully appealed the Determinations of
3 Nonsignificance (DNS) issued by SDOT between 2008 and 2012 for the Project. *See e.g.*, the
4 Findings and Decision of the Hearing Examiner, File W-12-002, issued August 27, 2012
(Hearing Examiner's Prior Decision).

5 I. INTRODUCTION

6 SDOT's FEIS for the Project again fails to comply with the policies and requirements of
7 the State Environmental Policy Act (SEPA) and its implementing regulations, and fails to
8 comply with the City of Seattle's (City's) SEPA policies. The FEIS also fails to comply with the
9 Hearing Examiner's Prior Decision and with the March 2, 2012 Order of the King County
Superior Court.

10 The Ballard Coalition respectfully requests that the Hearing Examiner find the FEIS
11 inadequate as a matter of law, and order SDOT to prepare and issue a Draft and Final EIS that
12 complies with the Hearing Examiner's Prior Decision, the Court's Order, and that addresses the
13 many additional deficiencies set forth herein.

14 A. PARTIES

15 The members of the Ballard Coalition² are labor organizations, trade and business
16 associations, or entities that own, operate or represent businesses and/or workers in Ballard, or
17 own or lease properties in Ballard located adjacent to or in the vicinity of the Project that will be
18 adversely affected by the Project, including:

19 1. The Martin Luther King, Jr. County Labor Council of Washington, AFL-CIO, is a
20 Washington non-profit corporation, whose address is 2800 First Avenue, Suite 206, Seattle, WA
98121, telephone 206.441.8510;

21 2. The Teamsters are a labor association, whose address is 14675 Interurban Ave.
22 South, Suite 303, Tukwila, WA 98168, telephone 206.441.6060;

23 ² Additional labor, business and industrial groups and associations may join the Coalition on or before the
24 prehearing conference to be held in this matter. In that case, the Coalition will provide an updated list.

1 3. Salmon Bay Sand & Gravel Co. is a Washington corporation, whose address is
2 5228 Shilshole Ave NW, Seattle, WA 98107, telephone 206.784.1234;

3 4. BNMIC is an unregistered non-profit trade association, whose address is 604
4 22nd Ave NW, Seattle, WA 98107-4027;

5 5. NSIA is a Washington non-profit corporation, whose address is 3500 1st Avenue
6 West, Seattle, WA 98107, telephone 206.440.2660;

7 6. Ballard Terminal Railroad, L.L.C. is a Washington company, whose address is
8 4725 Ballard Avenue NW, Seattle WA 98107, telephone 206.782.1447;

9 7. CSR Marine is a Washington corporation, whose address is 4701 Shilshole
10 Avenue NW, Seattle, WA 98107, telephone 206.632.2001; and

11 8. Seattle Marine Business Coalition is a Washington non-profit corporation, whose
12 address is 2201 West Commodore Way, Seattle, WA 98199, telephone 206.285.1707.

13 Salmon Bay, Ballard Terminal Railroad, and CSR Marine are businesses located adjacent
14 to or in the vicinity of the Project; are water-dependent or water-adjacent industrial uses, located
15 on industrially zoned land; and have driveways, loading areas, railroad tracks or access that
16 require truck and rail crossings across the Project, and/or require intermodal access including
17 barge, rail, and truck. Each of these businesses would be adversely affected, resulting in
18 immediate, concrete, and specific injury-in-fact if the Project proceeds as set forth in the FEIS.

19 The BINMIC is an unregistered non-profit trade association; NSIA is a business
20 association of marine and industrial businesses and property owners; the SMBC represents the
21 interests of 300 marine industrial land users within the Seattle City limits; the Labor Council is
22 the central body of labor organizations in King County; and the Teamsters are an association
23 representing the interests of workers including, but not limited to, heavy freight drivers, truck
24 drivers, equipment operators, transit operators, and dock workers. For each of these
25 organizations, one or more of its members' interests will be adversely affected, resulting in
26 immediate, concrete, and specific injury-in-fact if the Project proceeds as set forth in the FEIS.

B. BALLARD BUSINESS APPELLANTS' LEGAL REPRESENTATIVES

1 The above named parties are represented in this matter by Joshua C. Allen Brower, Leah
2 B. Silverthorn, and Danielle N. Granatt, Veris Law Group PLLC, Seattle, WA 98101, telephone
3 (206) 829-9590, fax (206) 829-9245, email josh@verislawgroup.com, leah@verislawgroup.com,
4 and danielle@verislawgroup.com; and Patrick J. Schneider, Foster Pepper PLLC, 1111 Third
5 Avenue, Suite 3000, Seattle, WA 98101, telephone (206) 447-2905, fax (206) 749-1915, and
6 email pat.schneider@foster.com.

7 II. ISSUES ON APPEAL

8 A. THE FEIS DISREGARDS PRIOR, BINDING ORDERS OF THE 9 HEARING EXAMINER AND THE SUPERIOR COURT AND PROVIDES 10 EVEN LESS ADEQUATE ENVIRONMENTAL REVIEW OF 11 SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS THAN THE 12 SEPA REVIEW THAT THE HEARING EXAMINER DETERMINED TO 13 BE INADEQUATE IN THE HEARING EXAMINER'S PRIOR DECISION

14 Evaluation of this Project under SEPA began as early as 2008. The Ballard Business
15 Appellants appealed, and in August 2012, after multiple rounds of appeals—before the Hearing
16 Examiner, the King County Superior Court, and the Washington Court of Appeals, Div. I.—the
17 Hearing Examiner ordered SDOT to prepare an EIS on the Shilshole Segment portion of the
18 Project. *See* Hearing Examiner's Prior Decision at 9-10. In 2013, SDOT announced that it
19 planned to prepare an EIS for the entire Project.

20 The Hearing Examiner's Prior Decision concluded that "the proposal would have
21 significant adverse impacts in the form of traffic hazards along the Shilshole Segment because of
22 conflicts between truck movements and the other vehicle traffic and trail users along the
23 Segment." *Id.* The Hearing Examiner's Prior Decision was based upon a 20% - 30% level of
24 Project design. In the FEIS, SDOT admits it based its entire SEPA evaluation for the Project "on
25 designs at approximately 10% level of design for each of the build alternatives." SDOT further
26 admits that the recently announced Preferred Alternative for the Project, which it did not select
until the FEIS, is still at 10% design and includes a segment that was never included in any prior
alternatives or SEPA evaluation.

1 In its Second Order of Remand issued March 2, 2012, in Cause No. 09-2-26586-1 SEA
2 (consolidated), the King County Superior Court determined that a 10% level of design was not
3 sufficient to identify the adverse impacts of the Project under SEPA. The Court remanded the
4 matter to SDOT "for the limited purpose of more fully designing the Shilshole Segment so that
5 the impacts of the proposal on the adjoining land uses, and any proposed mitigation of those
6 impacts, may be identified." The Superior Court retained jurisdiction over this matter, and
7 another Department of the Superior Court retains such jurisdiction today, having recently
8 rejected the City's attempt to dismiss appeal pending under consolidated Cause No. 09-2-26586-
1 SEA.

9 The FEIS not only has been prepared in violation of the Superior Court's Second Order
10 of Remand, the FEIS does not acknowledge or disclose the Project's probable significant adverse
11 impacts that the Hearing Examiner, in her Prior Decision, determined to exist based upon
12 SDOT's 20% - 30% level of design. Instead of disclosing these probable significant adverse
13 environmental impacts, the FEIS vaguely asserts that adverse impacts that it does not identify
14 with specificity will be mitigated when the Project is more fully designed in the future. The
15 FEIS thus affirmatively conceals rather than discloses the Project's significant adverse
16 environmental impacts that the Hearing Examiner's Prior Decision has already determined to
exist.

17 In sum, the FEIS does not comply with the Hearing Examiner's Prior Decision or with
18 the Court's Second Order of Remand. The FEIS conceals rather than discloses the Project's
19 probable significant adverse environmental impacts that the Hearing Examiner has already
20 determined will result from those portions of SDOT's Preferred Alternative that are similar to, if
21 not exactly the same as, the prior routes analyzed in SDOT's previous SEPA reviews, all of
22 which have been found to be deficient. The FEIS thus violates the very purpose of SEPA, which
23 is to inform decision-makers, and violates multiple provisions of the SEPA Rules, including, but
not limited to, SMC 25.05.400 and .440.

24 In addition, by concealing rather than disclosing the Project's probable significant
25 adverse environmental impacts that the Hearing Examiner has already identified, the FEIS

1 demonstrates that it violates the very purpose of an EIS, as set forth in SMC 25.05.400.B: The
2 FEIS does not “provide an impartial discussion of significant environmental impacts” and does
3 not “inform decision-makers and the public of reasonable alternatives.” The FEIS violates this
4 requirement because:

- 5 • SDOT continues to be both the project proponent/advocate and the SEPA lead
6 agency;
- 7 • SDOT improperly failed to properly evaluate and analyze design alternatives, such as
8 protected bicycle facilities or cycle tracks, along with locational alternatives for the
9 Project, even though this issue was properly raised during Project Scoping and even
10 though the City promised it would do so; and
- 11 • SDOT improperly and over-narrowly defined the “Project Objective,” *see e.g.*
12 Section 1.2 and remainder of FEIS, to be the completion of a “multi-use trail,”
13 thereby predetermining the outcome.

14 **B. SDOT IMPROPERLY DESCRIBED THE PROPOSAL AS A PREFERRED
15 SOLUTION, NOT AN OBJECTIVE, CONTRARY TO SEPA’S
16 REQUIREMENTS**

17 Under SEPA, “[p]roposals should be described in ways that encourage considering and
18 comparing alternatives. Agencies are encouraged to describe public or nonproject proposals in
19 terms of objectives rather than preferred solutions.” SMC 25.05.060.C.1.c. SDOT describes its
20 Project objective in the FEIS as the creation of a multi-use trail through the study area, but this
21 “objective” is in fact a preferred solution that precludes the analysis of reasonable alternatives,
22 *e.g.*, the creation of protected bicycle lanes, including a cycle track facility on Leary Avenue.
23 The FEIS thus violates SMC 25.05.060 and the many provisions of the SEPA rules, including
24 SMC 25.05.400 and 440, that require an EIS to study reasonable alternatives, including
25 alternative *designs* not just locational alternatives, to achieve the Project objective.
26

1 **C. SDOT FAILED TO PROVIDE PUBLIC NOTICE OF OR**
2 **APPROPRIATELY EVALUATE A NEW SEGMENT OF THE**
3 **PREFERRED ALTERNATIVE—IT IS IMPROPERLY PIECEMEALING**
4 **THE PROJECT, AGAIN.**

5 The FEIS includes virtually no additional information in the description of each
6 Alternative, with the exception of what SDOT incorrectly characterizes as “one minor route
7 connection” in its Preferred Alternative, which in fact is an entirely new segment of the route
8 that was never analyzed prior to the release of the FEIS. SEPA requires that the lead agency
9 provide public notice of environmental review of a Project and that the public have the
10 opportunity to comment on such Project. SMC 25.05.510 & 25.05.535. *See also* WAC 197-11-
11 060 (requiring that the agency “make certain that the proposal that is the subject of
12 environmental review is properly defined.”) This new segment was *not in any way included in*
13 *the draft environmental impact statement*, thus has never been analyzed or presented to the
14 public for consideration or public comment as part of the Project.

15 **D. SDOT FAILED TO ADEQUATELY STUDY TRAFFIC HAZARDS AND**
16 **SAFETY**

17 SEPA requires SDOT to evaluate the Project’s safety and traffic hazards sufficient for a
18 decisionmaker to evaluate alternatives. *See, e.g.* SMC 25.05.060.D; SMC 25.05.060; and SMC
19 25.05.444. The Project will create significant, unmitigated adverse traffic hazards. The
20 Preferred Alternative will cross numerous industrial driveways (approximately 55) and roadways
21 along its nearly mile-and-a-half stretch—*or one driveway/roadway every 144 feet* – in the
22 middle of a heavily populated urban area where numerous businesses, that provide thousands of
23 family-and union-wage jobs, are either directly adjacent to or in the immediate vicinity of the
24 Project. The Project will be a recreational attraction for children and families but will have
25 limited site distances and inherent safety issues. The Project will bring vulnerable users into
26 direct conflict with industrial and maritime traffic and activities. The Project is in almost
 constant conflict with heavy trucks, a railroad, forklift traffic, maritime and industrial traffic and
 activities, loading docks, commercial parking, and busy arterial streets along its entire alignment.

1 It is very likely a trail user will get hurt or killed. SDOT's failures to evaluate safety and traffic
2 hazards include, but are not limited to, the following:

3 • SDOT's AutoTURN analysis is incomplete and fails to adequately evaluate traffic
4 hazards and safety;

5 • SDOT's AutoTURN analysis is incomplete because it is not based on an
6 evaluation of the actual trucks/vehicles that use existing driveways;

7 • SDOT's traffic and safety evaluation relies on incomplete information about the
8 nature and extent of the businesses and uses along the Project and is not based on any developed
9 or accepted methodology;

10 • The FEIS improperly relies on future studies and outreach that have yet to occur
11 and are undefined;

12 • The FEIS is incomplete and inadequate because SDOT is using an on-going
13 process occurring after the FEIS was issued, its Design Advisory Committee (DAC), to a)
14 conduct public outreach to impacted and affected businesses and property owners along the
15 Preferred Alternative routes to obtain information that should have been included in the Draft
16 and FEIS; b) further design the Preferred Alternative to 30%, 60%, 90% and 100%, which
17 further design should have been performed before and included in the Draft and FEIS; and c)
18 evaluate whether a multi-use trail such as the Preferred Alternative can be designed to operate
19 safely in the selected location, which evaluation and information should have been included in
20 the Draft and FEIS;

21 • The FEIS fails to adequately evaluate and/or confirm the Project's consistency
22 with the: a) Washington state department of transportation (WSDOT) design manual (WSDOT
23 Manual); b) SDOT's own right-of-way improvements manual (ROW Improvement Manual); c)
24 WSDOT's city and county design standards for all Alternatives or design standards; d) the
25 design standards contained in the AASHTO "guide for the development of bicycle facilities"; e)
26 the design standards contained in the National Association of City Transportation Officials
(NACTO) urban bikeway design guide; or f) the Federal Highway Administration (collectively,
Design Standards).

• The Project as currently designed violates the Design Standards because the FEIS
fails to confirm consistency with Design Standards, including, without limit, multi-user trail
location, trail width, design speed; sight distances; crossing designs, intersection designs, and
other standards articulated in and contained within the Design Standards;

1 • SDOT does not adequately apply and conform the Project to the Design
2 Standards, which in turn causes, among other things, traffic hazards, obstacles, shy-distance
3 violations, increased conflicts between motorized and non-motorized users, and dangerous sight
distance concerns;

4 • The FEIS's failure to evaluate all traffic hazards and safety considerations renders
5 it inadequate and constitutes impermissible piecemealing.

6 **E. SDOT FAILED TO ADEQUATELY CONSIDER THE PROJECT'S**
7 **CONSISTENCY WITH APPLICABLE LAND USE REGULATIONS**

8 The Project as currently designed is incompatible with the City's 2035 Comprehensive
9 Plan, adopted in November of 2016 (the Comprehensive Plan). The City of Seattle's SEPA
10 statutes and regulations are codified at SMC 25.05 et seq. SMC 25.05.444.B.2.a requires that the
11 EIS evaluate "Land Use", which is defined as the Project's "*relation to existing land use plan.*"
(emphasis added), i.e. the Comprehensive Plan.

12 This portion of Ballard—from 11th NW to the Ballard Locks-- is a critical corridor and an
13 integral part of the maritime and industrial business community in Seattle. A significant portion
14 of the Preferred Alternative is designated a "Major Truck Street" in the Comprehensive Plan,
15 prioritized for heavy freight movement. Likewise, the City's land use Policies and Goals in its
16 Comprehensive Plan give special priority to water-dependent uses in this area; and these
17 maritime and industrial uses receive the highest priority and protection from non-compatible and
18 competing uses. Routing a recreational trail such as the Project through the heart of the
19 maritime/industrial area ignores these Goals and Policies and will significantly and adversely
20 impact the built-environmental and the Ballard Coalition. At a minimum, SDOT is required to
conduct a balancing analysis to determine whether the Project is compatible with these Goals and
Policies in the Comprehensive Plan, which it failed to do in the FEIS.

21 The FEIS does not adequately disclose or discuss the Project's inconsistencies with
22 the goals and policies in the Comprehensive Plan and its attendant neighborhood plans including,
23 but are not limited to, the following goals and policies:

24 AL-P32:

BI-G1:

BI-G2:

1	BI-G4:	GS 1.17:	T-5.9:
2	BI-G5:	GS 1.18:	LU-10.2:
3			
4	BI-G6:	GS 1.20:	LU-10.3:
5	BI-G8:	GS 1.21:	LU-10.11:
6			
7	BI-G10:	ED-G2:	LU-10.16:
8	BI-G11:	TG-1:	LU-10.26:
9			
10	BI-P2:	TG-6:	LU-10.27:
11	BI-P3:	T-6.1:	T 2.5:
12			
13	BI-P5:	T-6.4:	LU-G10:
14	BI-P5:	T-6.5:	SA-P40:
15			
16	BI-P11:	T-6.8:	SA-P1:
17	BI-P14:	T-8.2:	SA-G8:
18			SA-G18:
19	BI-P15:	T-5.3:	SA-G33:
20			
21	BI-P21:	T-5.7:	SA-P76:

In addition, the FEIS failed to include and consider, or dismissed with no evaluation, actual impacts on certain existing and future businesses, freight, rail, and other uses, and locations and configurations. The FEIS failed to obtain and rely on adequate, correct and complete information regarding actual business activities and other operations that will be

1 affected by the Project, and in fact admits the Draft EIS contained numerous material errors and
2 omissions regarding existing land uses and businesses that will be impacted and affected by the
3 Project. The FEIS is thus insufficient to analyze appropriate SEPA elements of the environment.

4 The FEIS also does not adequately disclose or discuss the Project's inconsistencies with
5 the goals and policies in the following plans and policies:

- 6 • The Crown Hill/Ballard Neighborhood Plan, which does not apply to the Project
7 Area;
- 8 • Ballard-Interbay Northend Manufacturing and Industrial Center (BINMIC)
9 Neighborhood Plan, which specifically states the Project should not be located in the
10 BINMIC area;
- 11 • The City of Seattle Ballard Urban Design and Transportation Framework Final
12 Report (City of Seattle, 2016a);
- 13 • The Seattle Move Ballard Draft Plan (SDOT, 2016b);
- 14 • The City of Seattle Freight Master Plan (SDOT, 2016a); and
- 15 • The Shoreline Master Program Code (SMC 23.60A).

16 **F. SDOT FAILED TO ADEQUATELY STUDY PARKING IMPACTS**

17 SDOT failed to adequately obtain information and analyze parking impacts from the
18 Project, including but not limited to its use of unsupported inferences and assumptions, its flawed
19 and insufficient Traffic Study, and a failure to evaluate actual conditions and uses of parking in
20 the vicinity of the Project. The FEIS makes incorrect and unsupported assumptions and
21 conclusions regarding the impact of removing parking within the Project area. The Coalition
22 will be adversely impacted by the Project's elimination of parking spaces.

23 **G. SDOT FAILED TO ADEQUATELY EVALUATE CUMULATIVE
24 IMPACTS**

25 SDOT failed to accurately, adequately, or reasonably describe and consider the
26 cumulative effects of the Project as required by SEPA. SEPA acknowledges that a project or
action may create undue impacts when combined with the cumulative effects of prior or

1 simultaneous developments and requires a reasonable assessment of certain factors in
2 determining whether the project or action may be conditioned or denied to lessen or eliminate its
3 cumulative effects on the environment. *See* SMC 25.05.670; *see also* SMC 25.05.792. SDOT
4 woefully failed to adequately or reasonably assess the cumulative impacts that may result from
5 the Project, including but not limited to, the cumulative impact caused by the Project in
6 conjunction with other planned or anticipated projects in the vicinity of the Project, including,
7 without limit, Seattle Public Utilities' Combined Sewer Outflow (CSO) project. SPU is under a
8 Consent Decree to complete the CSO project by 2025. A portion of the CSO project will be
9 located exactly where SDOT plans to construct nearly one-third (1/3) of the Preferred
10 Alternative. SDOT will either have to wait until after SPU constructs the CSO project or, if
11 SDOT goes first, SPU will tear out nearly one-third of the Project and SDOT will have to rebuild
12 and replace it. None of this is disclosed or discussed in the FEIS.

13 **H. SDOT FAILED TO STUDY THE PROJECT'S IMPACT ON THE** 14 **SHORELINE ENVIRONMENT**

15 At least two portions of the Preferred Alternative are located within the City's designated
16 Shoreline Environment. Despite this, the FEIS claims that the Project is exempt from obtaining
17 a Shoreline Substantial Development permit because ""reconfiguring the existing right-of-way
18 for the Missing Link would be allowed within the shoreline district under the SMP." SDOT is
19 violating SEPA by: a) falsely asserting that it is proposing to repair and replace an existing
20 development instead of building a brand new multi-user trail/Project where one has not
21 previously existed; b) failing to analyze or disclose the true effect of the Project on the Shoreline
22 Environment or conformity to the City's Shoreline Master Program; c) failing to properly and
23 adequately disclose and analyze the Project's relationship to and conformity to the City's
24 Shoreline Master Plan and Program, all as required by SEPA. *See e.g.*, SMC 25.05.444. SDOT
25 is misrepresenting the scope and nature of the Project within the Shoreline Environment, and
26 thus its SEPA analysis is fatally flawed and inadequate because the FEIS violates SEPA's
policies and requirements, and its implementing policies regulations, including the City's
Shoreline policies.

1 **VI. RESERVATION OF RIGHTS**

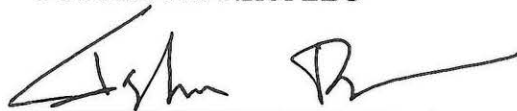
2 The Ballard Coalition reserve the right to amend this Notice of Appeal to state additional
3 challenges to the adequacy of the FEIS relating to the impacts and mitigation of the Project and
4 reasonable alternatives to the Project.

5 **VI. RELIEF REQUESTED**

6 The Ballard Coalition respectfully requests that the Hearing Examiner find and determine
7 the FEIS to be inadequate and order SDOT to prepare a new draft and final EIS that properly and
8 completely analyzes the probable significant adverse environmental impacts of the Project and
9 that addresses the many deficiencies set forth herein.

10 DATED this 8th day of June 2017.

11 VERIS LAW GROUP PLLC and
12 FOSTER PEPPER PLLC

13 

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18 Attorneys for the Ballard Coalition

19 4823-4063-5466, v. 6
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25 NOTICE OF APPEAL
26 [CORRECTED]

SEATTLE EX. NO. 5



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CHEVROLET

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TRACKS

A-254.37



A-254.38











BALLARD TERMINAL RR.











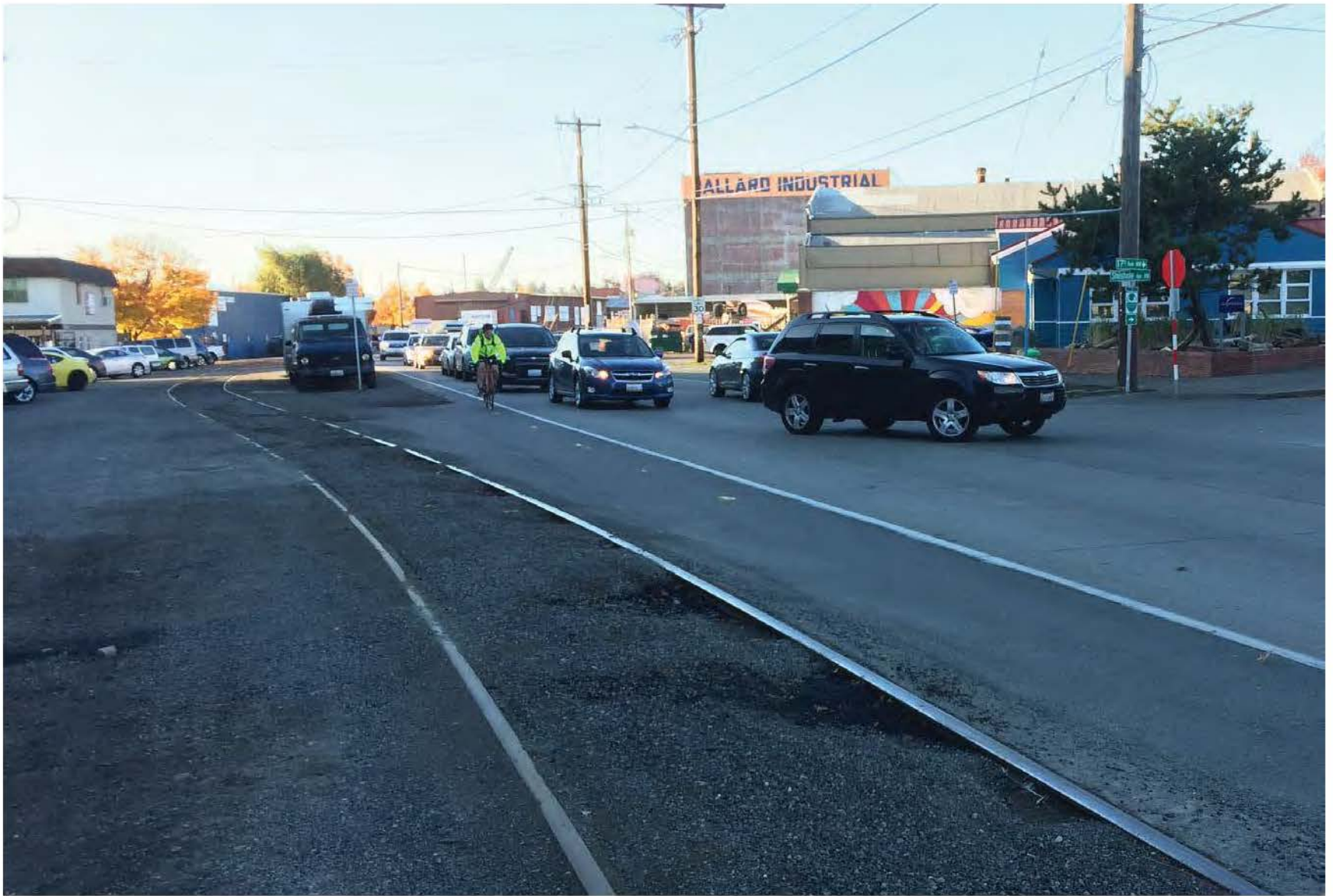
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Date: 10/27/17



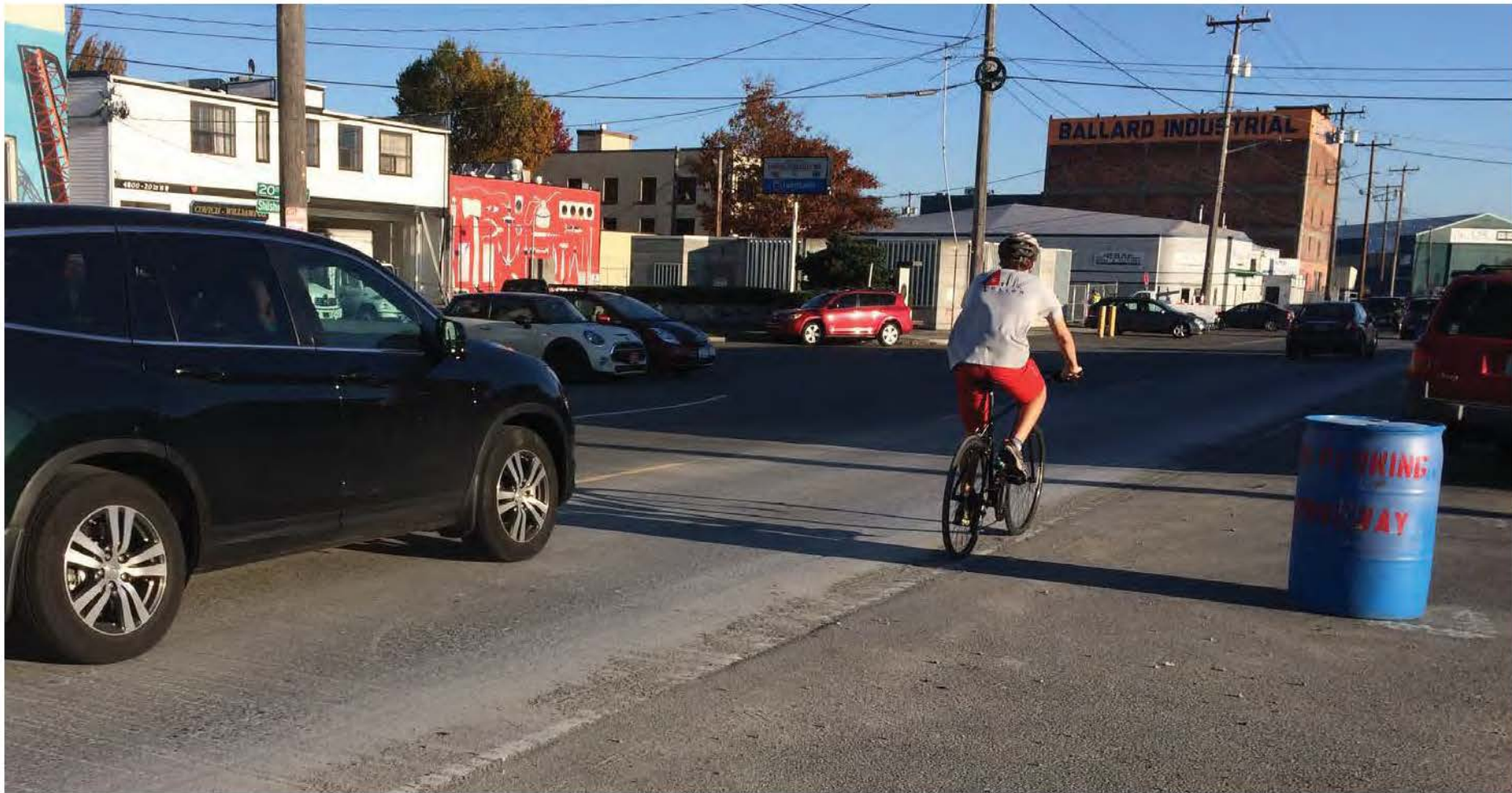
Location: NW 20th Ave & Shilshole Ave NW.

Date: 10/27/17

CBC - 4



Location: 17th Ave NW & Shilshole Ave NW.
Date: 10/26/17



Location: 20th & Shilshole Ave NW.
Date: 10/26/17



Location: NW 45th St & Shilshole Ave NW.
Date: 10/26/17

CBC - 7



Location: NW Vernon Pl & Shilshole Ave NW.

Date: 10/27/17

CBC - 8



Location: NW Vernon Pl & Shilshole Ave NW.
Date: 10/27/17

CBC - 9



Location: NW 22nd Ave & Shilshole Ave NW.
Date: 10/27/17

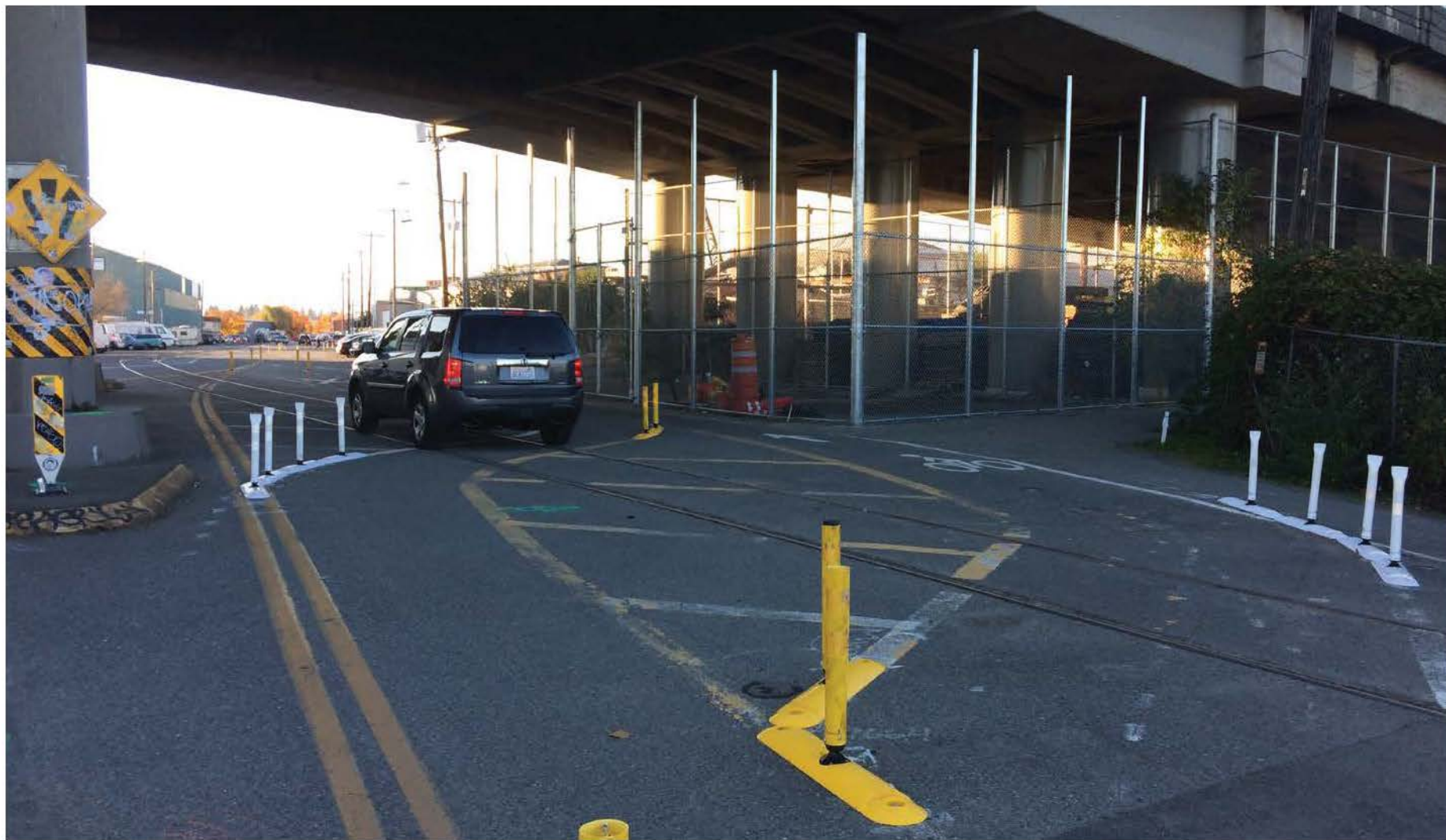


Location: NW 22nd Ave & Shilshole Ave NW.
Date: 10/27/17



Location: NW Vernon PL & Shilshole Ave NW.
Date: 10/26/17

CBC - 12



Location: NW 45th St & Shilshole Ave NW.
Date: 10/26/17



Location: NW 20th Ave & Shilshole Ave NW.
Date: 10/27/17



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Date: 10/27/17



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Date: 10/27/17



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Date: 10/27/17



Location: NW 45th St & Shilshole Ave NW.
Date: 11/6/17



Location: NW 45th St & Shilshole Ave NW.
Date: 11/6/17

CBC - 19

SEATTLE EX. NO. 6

TIM OLSTAD

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1 Thank you. 2 MR. COHEN: And I have none. 3 THE HEARING EXAMINER: Thank you, 4 Mr. Cohen. 5 EXAMINATION 6 BY THE HEARING EXAMINER: 7 Q. Mr. Anderson, I just wanted to ask 8 you about one item. You mentioned that there's a 9 curfew on? 10 A. Yes. 11 Q. Can you expand on what that is? What its 12 parameters are? Where it comes from? 13 A. Yeah. They don't want the large semi- 14 trucks going through rush hour. So there's a curfew 15 from 6 a.m. to 9 a.m. in the morning and from 3 p.m. 16 to 6 p.m. at night. 17 Q. And that's by the City? 18 A. Yes. 19 Q. Okay. And what are the bounds of that? 20 Just no trucks crossing into your property or? 21 A. There's a -- well, it's no -- it's for 22 the road; the city streets. 23 Q. They actually can't be on that street in 24 that area? 25 A. Right. Right.	1 THE HEARING EXAMINER: And do you 2 swear or affirm that the testimony you are providing 3 at today's hearing will be the truth? 4 MR. OLSTAD: Yes. 5 THE HEARING EXAMINER: Thank you. 6 Your witness. 7 TIM OLSTAD, 8 a witness, having been previously sworn, 9 was examined and testified as follows: 10 DIRECT EXAMINATION 11 BY MR. BROWER: 12 Q. Good morning, Mr. Olstad. What is your 13 business address? 14 A. 5228 Shilshole Avenue Northwest. 15 Q. And for whom are you employed? 16 A. Salmon Bay Sand and Gravel. 17 Q. What is your job at Salmon Bay Sand and 18 Gravel? 19 A. I'm the batch plant operator. I am in 20 charge of loading and ordering materials; loading 21 the ready-mix concrete trucks. 22 Q. And any other duties as the batch plant 23 manager? 24 A. Yeah. I coordinate all the deliveries of 25 add-mix materials, bulk, add-mix materials bulk,
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1 Q. From -- 2 A. Yes. 3 Q. You -- and Ballard? 4 A. Yeah. You can be on my property all you 5 want. It doesn't matter, but it's the city streets. 6 Q. So what happens is they end up staying on 7 your property until the curfew passes? 8 A. Yes. Or parking on the side of the road. 9 Q. Right. Okay. Thank you, Mr. Anderson. 10 A. You're welcome. 11 THE HEARING EXAMINER: Redirect? 12 MS. GRANATT: I don't have any 13 questions for him. 14 THE HEARING EXAMINER: Thank you for 15 your testimony, Mr. Anderson. 16 THE WITNESS: Yep. You're welcome. 17 Thank you. 18 MR. BROWER: You ready? 19 THE HEARING EXAMINER: Yes. 20 MR. BROWER: The Coalition calls Tim 21 Olstad. 22 THE HEARING EXAMINER: Mr. Olstad, 23 would you please state your name for the record, and 24 spell your last name? 25 MR. OLSTAD: Tim Olstad, O-l-s-t-a-d.	1 cement materials, powder dry materials. 2 Q. And this is the Salmon Bay Sand and 3 Gravel, Ready-Mix Concrete Plant that's located on 4 Shilshole Avenue? 5 A. That is correct. 6 Q. There's been a lot of discussion about 7 how many driveways Salmon Bay has. Is it four or 8 five? 9 A. We have two to the west towards Market, a 10 center driveway that is between the two plants, and 11 then an exit driveway, as well as a loading dock all 12 lining Shilshole. 13 Q. If you'd give me a second, maybe I can 14 get an image up that will help us clarify this. 15 (Pause in proceedings.) 16 So what I put up on the screen, it's 17 really just to help us illustrate and understand 18 this. I'm not going to ask you to testify to 19 anything technical about this figure. We've been 20 using numbers on the driveways. I'm going to start 21 here. This is driveway 9, which is, I think you 22 said to the west? Is this one of the driveways? 23 A. Yes. 24 Q. And so this, would you say this is west 25 or north?

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1 their delivery inventory schedule. 2 Q. And what about wet bulk? How often is 3 that delivered? 4 A. Again, one -- you know, any day -- one 5 day a week to four/five? Just depends on the volume 6 of business. 7 Q. Are they arriving at all times during the 8 day, or do they always come in the morning, or the 9 afternoon? 10 A. Any given time during the course of a 11 day. 12 Q. And what are your hours of operation? 13 A. Well, this morning I opened at quarter to 14 five -- excuse me, quarter to six, and I had my 15 first dry cement tanker delivery at six. And we run 16 until we're done, whatever time that may be. 17 Q. Do you often run past five o'clock at 18 night? 19 A. Oh, yeah. 20 Q. So what time sometimes? 21 A. 7/8. 22 Q. And that really depends on the job? 23 A. Yep. 24 Q. Do you know where the add-mix and wet 25 bulk materials are coming from?	1 companies? 2 A. National. 3 Q. And do you -- you said sometimes you see 4 the same drivers, but are you seeing different 5 drivers often? 6 A. Oh, yeah. Oh, yeah. At any given time, 7 it will be somebody completely new. I never know. 8 Q. So somebody who's never been to Shilshole 9 before? 10 A. Correct. 11 Q. Do you have to do anything special to get 12 these drivers in and out of Salmon Bay Sand and 13 Gravel? 14 A. That depends on the individual driver's 15 ability to read a map. Sometimes I have to converse 16 with them and, you know, guide them in from any 17 given location that they found themselves in in 18 Seattle. 19 Q. Do you use flaggers to aid in the 20 navigating? 21 A. No. 22 Q. Why not? 23 A. It's just impractical. 24 Q. Why is it impractical? From a cost 25 perspective or a logistics?
Page 373	Page 375
1 A. The company that transports them is 2 located in Kent. The materials are coming out of 3 various plants and factories in the U.S. So the 4 trucking company has a headquarters here in Kent, 5 but they also have -- they're throughout the U.S. 6 Q. So I think you said the dry and wet bulk 7 materials are coming from west Seattle and Kent? Do 8 they also come from the Duwamish area? 9 A. Yes. 10 Q. Did you say that? 11 A. Yes. 12 Q. Do you know if the drivers are local and 13 familiar with Shilshole? 14 A. The wet bulk material drivers are 15 typically not local. Occasionally, I'll see the 16 same ones, you know, over again, but most of them 17 are traveling from out of state. The cement -- the 18 dry bulk material drivers are mostly local. A 19 couple of them are out of Canada, a couple are out 20 of Centralia, but for the most part they're local. 21 Q. Why are the drivers coming from out of 22 state? 23 A. It's just depending on the delivery 24 company; how they're being dispatched. 25 Q. So are these local companies, national	1 A. Cost and logistics. So this morning for 2 example, if we were employing flaggers, I would have 3 had to have a flagger there at quarter to six. 4 Q. And -- 5 A. And then all day. 6 Q. All day. 7 A. Yeah. 8 Q. So -- 9 A. Until we're done. 10 Q. So it could be 12/14 hours a day? 11 A. Easy. 12 Q. And how many flaggers would you need? 13 A. Well, you would -- I'm not familiar with 14 the law; the zoning laws on that or the laws itself. 15 But I would assume entrance driveway and exit 16 driveway, you would have to have those two places 17 manned. And that would just be the two main 18 driveways, but all the other driveways are still in 19 play as well. 20 Q. Does Salmon Bay Sand and Gravel receive 21 bulk materials by rail? 22 A. Yes. 23 Q. How often does that happen? 24 A. Once a week -- minimum of once a week 25 four cars

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1 come -- four cars go away empty, four cars come in 2 loaded. 3 Q. And where are those cars stored? 4 A. They are stored down the -- alongside the 5 trail down by Shilshole back towards Golden Gardens. 6 Q. And which rail line brings them to you? 7 Is it Ballard Terminal? 8 A. Ballard Terminal. Yeah. 9 Q. So you coordinate with Ballard Terminal 10 for the delivery and pickup of those cars? 11 A. That's correct. 12 Q. I think you also mentioned Salmon Bay 13 Sand and Gravel receives bulk material by barge? Is 14 that correct? 15 A. That is correct. Yeah. 16 Q. And what material comes in by barge? 17 A. Sand and gravel. 18 Q. So that the other material of Ready-Mix 19 concrete? 20 A. That is correct. 21 Q. Do you sometimes have to bring that 22 material in by truck, the sand and gravel? 23 A. Oh, yeah. Oh, yeah. 24 Q. Why is that? 25 A. On any given occasion. Well, a prime	1 A. Yes. 2 Q. And in addition to the 26 ready-mix 3 concrete trucks, does Salmon Bay have other trucks? 4 A. Dump trucks and flat beds -- boom crane 5 flatbed trucks. 6 Q. How many of those? 7 A. Two of each. 8 Q. And about how many trips a day are they 9 making? 10 A. Again, depending on the volume, four to 11 eight per each of those trucks easily. 12 Q. So two what -- I think you said four 13 trucks coming times -- between four and eight trips 14 a day? 15 A. Yep. 16 Q. So we're talking 116 to a 130 trips a 17 day? 18 A. Easily. And then, that doesn't include 19 any of the bulk deliveries that we get. Those 20 bagged sand and gravel materials and cement 21 materials that come in via the other vendors and 22 semi-trucks, nor does that include any of the 23 customer dump-trucks or any of the customers with 24 their trucks and trailers that are getting bulk 25 materials or bagged materials.
Page 377	Page 379
1 example is just the last month, the month of 2 November. It's an annual closure of the locks where 3 our tugs and barges come through. We have to stock 4 -- anticipate our needs and stock for that previous 5 to the locks closure. But depending on the needs, 6 we may fall short on the materials and therefore 7 we're trucking them in. 8 Q. On average, you know, assuming that the 9 locks are open and operating, so you can get the 10 sand and gravel in by barge. How many trips per day 11 -- well, let me back up a second. How many ready- 12 mix trucks does Salmon Bay have in its fleet? 13 A. 26. 14 Q. And on average, how many trips per day 15 are those ready-mix concrete trucks making? 16 A. Anywhere from 50 to 100 plus. 17 Q. And is that a trip in and a trip out? 18 A. One trip in, one trip out; that's just to 19 get a load. But then they also have trips at the 20 end of the day coming in empty and cleaning up and 21 going home for the day. 22 Q. And where do they go home to? 23 A. We have two different lots. The trucks 24 are parked in Ballard off-site. 25 Q. That's a truck yard?	1 Q. So those would be trucks that come to 2 that overhead loading area? 3 A. Correct. 4 Q. And isn't there a loading -- is there a 5 loading dock between the bulk area and the exit 6 driveway? 7 A. That's correct. Yeah. 8 Q. Okay. And what happens there? 9 A. Customer pick up, you know, pickup trucks 10 get both sand and gravel bags or cement bags in that 11 space. 12 Q. So do people pull up nose first or back 13 in? 14 A. Back in. 15 Q. So people would back into that loading 16 dock? 17 A. Yep. 18 Q. Okay. And is your understanding that the 19 Burke-Gilman Trail Missing Link would run in front 20 of all of those driveways and that loading dock? 21 A. That is correct. That is my 22 understanding. 23 Q. So, I mean, so in addition to Salmon 24 Bay's fleet of trucks, and all of the delivery 25 trucks delivering bulk and -- dry bulk, and add-mix,

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1 A. Yes. Typically, yes. 2 Q. Okay. 3 A. But again, we're kind of dependent on 4 Burlington Northern. They -- Ballard Terminal has 5 to coordinate with Burlington Northern. So when 6 Burlington Northern brings their loads to the 7 transfer point where we can pick them up, that's -- 8 we're dependent on that. 9 Q. Uh-huh. And if you looked over a period 10 of say, a year, would it work out to one delivery a 11 week? 12 A. I would have to say yes to that. Yeah. 13 Q. Or less? 14 A. No. It's usually just the once -- once a 15 week because again, our allotment of rail cars 16 depending on our business, sometimes they can't keep 17 up with getting them to us, so... 18 MR. COHEN: Right. Okay. No further 19 questions. Thank you. 20 THE WITNESS: Okay. 21 THE HEARING EXAMINER: Redirect? 22 MR. BROWER: Mr. Examiner, I'm asking 23 the witness to look at Volume -- I believe it's 1 24 Exhibit A-310.21, which is the figure that we have 25 up on the TV. I figured it would be easier to just	1 Q. And then, 9B, is that the overhead bulk 2 area where the trucks pull in and -- 3 A. Well, are we calling 9D the main exit 4 driveway? 5 Q. Yes. 6 A. So 9C would be the tunnel underneath the 7 plant, or is that the loading dock out on Shilshole? 8 MR. KISIELIUS: Objection, 9 Mr. Examiner. 10 MR. BROWER: I'm going to use a 11 question. 12 MR. KISIELIUS: Thank you. 13 BY MR. BROWER: 14 Q. What is between the tunnel and the main 15 exit? 16 A. The loading dock. 17 Q. So let's call that 9C. 18 A. Okay. 19 Q. Okay. So just so everybody is clear, 10 20 is not up Salmon Bay driveway? 21 A. No. No, I don't -- 10 looks like Covich 22 on this map to me. 23 Q. Got it. So 9 is the main entrance in on 24 the east and 9D is the main entrance out on the 25 west?
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1 put it in front of him. 2 Thank you, Tadas, for the suggestion. 3 REDIRECT EXAMINATION 4 BY MR. BROWER: 5 Q. Tim, this is the figure that you've been 6 quizzed on -- on the TV. 7 (Counsels confer.) 8 THE HEARING EXAMINER: Actually -- 9 MR. BROWER: A-310.21, I believe? 10 THE HEARING EXAMINER: Josh, I'd be 11 grateful if you could put it up there, because I 12 don't have your exhibits. 13 MR. BROWER: Sure. And it's page 021 14 of that exhibit. I have it on the screen as well. 15 THE HEARING EXAMINER: Thank you. 16 BY MR. BROWER: 17 Q. Just -- now that you have this in front 18 of you, I want to get a clean record here. 19 A. Yeah. 20 Q. So starting again on the western edge, 21 driveway 9, is that the main western entrance? 22 A. That is correct. 23 Q. And 9A is the covered entrance that 24 Mr. Kisielius was asking you about? 25 A. That's correct.	1 A. Correct. 2 Q. Excuse me, the east. 3 A. Correct. 4 Q. Perfect. And, Mr. Olstad, I handed back 5 to you some notes you gave me this morning. They 6 relate to, I believe, the number of bulk sand and 7 gravel trips that Salmon Bay used during the lock 8 closure? Is that correct? 9 A. That is correct. Yes. 10 Q. Okay. 11 MR. KISIELIUS: Mr. -- can I just 12 interject really quickly? 13 Same as yesterday, the witness can use 14 notes to refresh his recollection, but to the extent 15 that he's doing so, we are entitled to take a look, 16 so we'd appreciate that. 17 MR. BROWER: Would you mind handing 18 them around? Great. 19 THE WITNESS: No. 20 MR. BROWER: Great. 21 MR. KISIELIUS: Thank you. 22 BY MR. BROWER: 23 Q. And you just showed them to me this 24 morning? 25 A. Yep. That's correct. The back page is a

SCOTT KUZNICKI

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1 clear and concise as we'd on a clock. So we'll just 2 have to work with that. I don't know what else to 3 tell you about it. 4 MR. BROWER: Thank you. We're on of 5 time for right now, I think. 6 What's your sense of how much more 7 time we've got -- that you've got to go through? We 8 only have three more witnesses, so... 9 THE HEARING EXAMINER: So we're doing 10 fine. 11 MR. BROWER: We trying to be efficient 12 as -- 13 THE HEARING EXAMINER: One's an 14 expert, so that could -- that'll take some time. 15 MR. BROWER: Two. 16 THE HEARING EXAMINER: Two are 17 experts. 18 MR. BROWER: But I don't think they'll 19 take as long as -- 20 THE HEARING EXAMINER: Even if they 21 take as long as yesterday, we've still got -- I 22 think we're in the range of doing fine and -- 23 MR. BROWER: Wonderful. Thank you. 24 THE HEARING EXAMINER: Okay. Thank 25 you, all. We'll see you after lunch.	1 NOVEMBER 28, 2017 2 AFTERNOON SESSION 3 --oOo-- 4 THE HEARING EXAMINER: On the record. 5 MR. KISIELIUS: Are the deposition 6 transcripts in here? 7 THE ASSISTANT: I don't think so. 8 MR. KISIELIUS: Not that it's a big 9 deal. 10 THE HEARING EXAMINER: Is it your 11 witness, Ms. Granatt? 12 MS. GRANATT: Yes. It -- Josh just 13 stepped out. And he'll be right back, and he's 14 getting me water. 15 MR. BROWER: Okay. We're ready. 16 THE HEARING EXAMINER: Are you both? 17 Okay. All right. We're ready. 18 MR. BROWER: Go ahead. 19 THE HEARING EXAMINER: Please state 20 your name and spell your last name for the record. 21 MR. KUZNICKI: Good afternoon. My 22 name is Scott Kuznicki. My last name is spelled 23 Kilo-Uniform-Zebra-November-India-Charlie-Kilo- 24 India. 25 THE HEARING EXAMINER: Do you swear or
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1 MR. BROWER: Thank you. 2 (Lunch recess taken.) 3 --oOo-- 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	1 affirm that the testimony you provide in today's 2 hearing will be the truth? 3 MR. KUZNICKI: Yes, sir. 4 SCOTT KUZNICKI, 5 a witness, having been first duly sworn, 6 was examined and testified as follows: 7 DIRECT EXAMINATION 8 BY MR. BROWER: 9 Q. Good afternoon, Mr. Kuznicki. Thank you 10 for joining us today. Would you please state your 11 business address for the record? 12 A. I work for the Transpo Group, and it's on 13 113th Avenue Northeast just south of Northeast 124th 14 Street in Kirkland. 15 Q. So you know how to get there, you just 16 don't know how to send mail to it? 17 A. I use email. 18 Q. Good. Would you please state your 19 educational background for us starting after high 20 school? 21 A. I have a Bachelor of Science degree from 22 the University of Wisconsin Platteville in civil 23 engineering. 24 Q. And would you please state your 25 professional degrees or certifications for the

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1 you helped -- did you help write that parking study? 2 A. I wrote that parking study. 3 Q. And did that make it into the 4 environmental documentation? 5 A. I believe that it did. It was referenced 6 in the Parking Discipline Report. 7 Q. So the Parking Discipline Report in this 8 FEIS actually refers to your work from 2011? 9 A. Yes. In addition to another study that 10 was prepared by SvR in 2008. 11 Q. Mr. Kuznicki, do you hold a commercial 12 driver's license? 13 A. Yes, sir. 14 Q. How long have you had a commercial 15 driver's license? 16 A. I've had a commercial driver's license 17 for 19 years. 18 Q. Have you driven trucks similar in size to 19 those that frequent the businesses within the study 20 area? 21 A. Yes, I have. 22 Q. How often have you done that? 23 A. Approximately once every two to three 24 years I'll drive some type of commercial vehicle in 25 some capacity.	1 A. We were there generally to observe 2 traffic operations and in particular, understand 3 conflicts for bicyclists, because my concern is that 4 I want bicyclists riding through this area to be 5 safe. So having the opportunity to ride in 6 Mr. Acrovick's vehicle and get a sense of the sight 7 distance constraints that he faces when trying to 8 pull out onto Shilshole was instructive, yes. 9 Q. And what did you observe? 10 A. Well, we observed that bicycle activity 11 in the area is somewhat haphazard at this time. We 12 observed people on bicycles riding the wrong way on 13 the street. We observed bicyclists disobeying 14 traffic control devices. We observed bicyclists 15 that seemed to be unaware of the movements of 16 commercial vehicles because of the use of personal 17 listening devices, for example. And from the 18 viewpoint of a truck, you definitely see more from a 19 longer distance when you are in a position to look. 20 So -- and we also observed that because Shilshole 21 can be a very busy street, and is a somewhat 22 disorganized area, it's difficult to predict where 23 these bicyclists will be or where other commercial 24 vehicles might pull in and out, for example. 25 Q. In your work reviewing the FEIS at issue
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1 Q. Why do you have a CDL? 2 A. Because it's fun. 3 Q. Does it inform your work as a 4 professional traffic engineer? 5 A. I believe that the experience of 6 operating commercial vehicles has helped me 7 understand the constraints that commercial vehicle 8 operators face. 9 Q. Have you ever driven or ridden with a CDL 10 driver through the study area? 11 A. Yes. 12 Q. Who was that? 13 A. I rode in a truck with a 53-foot trailer 14 with Warren *Acrovick. 15 Q. Would that be what's known as a WB-67? 16 A. That is the vehicle upon which the AASHTO 17 WB-67 is based, yes. 18 Q. And when did you drive with Mr. Acrovick? 19 A. I rode with Mr. Acrovick -- I believe it 20 was towards the end of October. 21 Q. Of this year? 22 A. Yes, sir. 23 Q. During that drive, did Mr. Acrovick 24 describe any challenges of driving in this area and 25 did you observe those challenges?	1 here, the Transportation Discipline Report and the 2 Parking Discipline Report, did you find any 3 discussion of the challenges that you just 4 described? 5 A. I believe that the report said that there 6 would be -- that the -- and I don't want to -- I 7 can't exactly quote it for you. But I believe that 8 the finding of the report is that the impacts would 9 be insignificant. 10 Q. Did you find any thorough discussion in 11 any part of the FEIS that you reviewed that talked 12 about sight distances? 13 A. I don't recall seeing specific 14 information regarding sight distances for either 15 stopping or turning particularly related to 16 driveways since driveways were not explicitly 17 analyzed in this report from the standpoint of a 18 typical engineering intersection analysis despite 19 the fact that there seems to be a fairly heavy 20 commercial vehicle volume at some of these 21 driveways. 22 Q. Do you think there should have been more 23 discussion in the EIS about the driveways and the 24 interaction of heavy commercial vehicles? 25 A. If I were writing the report, I probably

PAUL NERDRUM

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1 businesses along the Coal Train route? 2 A. No. We always understand the responses 3 in the context of who the interviewee is, and so we 4 scrutinized them and we seek to validate them. It 5 depends what the question is or what the answer is. 6 So if it's a question about the characteristics of 7 the business such as what they do, what are their 8 main lines of business, how large is their 9 employment base, their work force, those kind of 10 questions we take directly from the business. But 11 if it's speculative, particularly when the case of 12 it's speculative, we use that feedback to inform our 13 own research design, and our own research questions. 14 So we use the businesses who we see as a type of 15 expert who is on the ground to provide us input to 16 inform our own research questions which we then run 17 with and go and do our own queries and inquiries. 18 So in those -- with those questions, it 19 informs the direction of our analysis and then we 20 also seek to try to validate their analysis. But we 21 would never -- we never just take verbatim. If we 22 do take their -- if it's not a statistical analysis, 23 which is most times the case, if it's not a 24 statistical analysis and we want to report what they 25 say, we would simply say this business says this.	1 if we don't talk to businesses. 2 Q. Wonderful. Thank you, Mr. Cohen. 3 MR. BROWER: No further questions. 4 THE HEARING EXAMINER: Thank you, 5 Mr. Cohen. 6 THE WITNESS: Okay. 7 MR. BROWER: Do we -- are we going to 8 take a morning break or just keep going? 9 THE HEARING EXAMINER: We're going to 10 take a break, but let's -- we've got a few minutes. 11 Where are we with -- 12 MR. BROWER: We have one witness left. 13 THE HEARING EXAMINER: One witness. 14 Okay. What's your estimate on time for? 15 MR. BROWER: Under an hour for him. 16 Maybe we could take a break beforehand? 17 THE HEARING EXAMINER: Yeah. I need 18 time to get this thing going again. I think I'm 19 just going to rip the batteries out and see what 20 happens. 21 MR. BROWER: Hit it. 22 THE HEARING EXAMINER: Okay. We'll 23 take a break and come back at a quarter to. Thank 24 you. 25 MR. BROWER: Thank you.
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1 We're not -- if you report it in a study, 2 we would say "businesses reported these things." 3 These are perceptions. We're not necessarily saying 4 these are true. We never -- we don't like to 5 conflate the analyst's understanding and 6 interpretation with the direct input or the comment 7 of the business. 8 Q. Mr. Cohen, in response to a question 9 asked by Ms. Ferguson, I believe you started to say 10 that getting information on insurance and flaggers 11 would be the "low-hanging fruit"? 12 A. That's correct. 13 Q. Why is that the low-hanging fruit? 14 A. Because I think that it's one of those 15 types of estimates where it would be easy to talk to 16 businesses, to ask them, to get a sense for how much 17 a flagger costs. Or we could go to U.S. Bureau of 18 Labor and Statistics Occupational Employment 19 Statistics database and look up an occupation that 20 resembles or is perhaps even exactly is a 21 construction flagger, for instance, or flagger, to 22 direct traffic. So that would not be difficult. 23 That would be something that's readily available and 24 we can come up with a reasonable and I believe 25 defensible estimate of what that cost would be even	1 (Recess taken.) 2 THE HEARING EXAMINER: All right. 3 We're back on the record and we're on to the next 4 witness from the Appellants. 5 MR. BROWER: Ballard Coalition calls 6 Paul Nerdrum. 7 THE HEARING EXAMINER: Please state 8 your name for the record and spell your last name. 9 MR. NERDRUM: Paul Nerdrum, 10 N-e-r-d-r-u-m. 11 THE HEARING EXAMINER: Do you swear or 12 affirm that the testimony you provide in today's 13 hearing will be the truth? 14 MR. NERDRUM: I do. 15 PAUL NERDRUM, 16 a witness, having been previously sworn, 17 was examined and testified as follows: 18 DIRECT EXAMINATION 19 BY MR. BROWER: 20 Q. Good morning, Mr. Nerdrum. Thank you for 21 joining us. 22 Would you please state your business 23 address for the record? 24 A. Our business address is 5228 Shilshole 25 Avenue Northwest, and we're located on both sides of

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1 wants to remove some of your railroad tracks? 2 MR. KISIELIUS: Objection. He's 3 leading the witness again. 4 THE HEARING EXAMINER: Sustained. 5 BY MR. BROWER: 6 Q. Have you had discussions with the City 7 about impacts to the railroad? 8 A. The City has had no discussion with me on 9 that. 10 Q. Have you reviewed the plans for this 11 trail? 12 A. I have. Mainly it was the location ones 13 I just recently reviewed. 14 Q. All right. Based on the information in 15 the EIS, were you concerned as the owner of the 16 railroad of potential impacts to it? 17 A. Yes. 18 Q. And what were your concerns? 19 A. Well, I believe in the length of the 20 corridor that we operate that rail on, we also have 21 areas where we have railroad tracks and cargo load 22 and unload areas. And the placement of the trail in 23 an area that would eliminate our ability to do that 24 would make functionally our railroad not as operable 25 as it is currently.	1 Q. Does the railroad currently operate 2 inside a travel lane on the road right now? 3 A. We do. 4 Q. Where? 5 A. Northwest 45th Street. We operate on 6 that from about where the Fred Meyer store is down 7 by 9th Avenue Northwest. 8 Q. You're right in the middle of the road? 9 A. Yes. 10 Q. Is that a problem? 11 A. In the middle of the road, there hasn't 12 been a problem. Not many cars want to compete with 13 you when you're moving a locomotive down the center 14 of the road. 15 Q. Sure. Now do you -- when a locomotive is 16 moving are there other people around it? Train 17 operators or rail -- what do you call them, rail 18 men? 19 A. The rail operators or brakemen that are 20 there depending on what the need is. If they're 21 spotting cars down in our south storage area, the 22 run around track down there, there needs to be one 23 plus the engineer. And he's either bobtailing the 24 last car in line or he's leading, if they're backing 25 in to it. And he's in radio communications with the
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1 Q. And why is that? You mentioned run 2 around. What does that mean? 3 A. When you switch cars and when we're out 4 you have to bring the air change pump, drop off 5 empty cars, bring back loaded cars, spot them in 6 locations and you may have to take and run around 7 with the locomotive to get to the other end, or to 8 return back to the interchange point to spot cars or 9 pick cars back up. So you need to be able to have 10 two pieces of track side by side that you can move 11 the locomotive past and then come back and get by 12 those cars. If the cars are actively being 13 unloaded, you obviously can't move those cars, 14 because they're being unloaded. So you need a -- 15 sections within that that you can run around from 16 one end to the other to move empty or loaded cars. 17 Q. So if the trail had those impacts, would 18 the railroad be able to keep in -- operating? 19 A. We'd have a difficult time in areas where 20 you need to perform those services, and any 21 preclusion of our ability to do that hampers or 22 limits the ability of the railroad to operate. 23 Q. Would that be a significant impact to 24 that business? 25 A. That would be a significant impact.	1 engineer. 2 Q. And again, did anybody from the City 3 during the course of preparing the EIS talk to you 4 or anybody else at the railroad about potential 5 impacts to its operation? 6 A. Not to my knowledge. 7 Q. Do you know if there's any discussion of 8 those impacts in EIS? 9 A. I don't think I've seen any. 10 Q. (Pause.) Mr. Nerdrum, I think you talked 11 generally about the impacts of the trail. We're 12 shifting back now to Salmon Bay Sand and Gravel; the 13 cost of flaggers, if you had to use them, to get 14 your trucks in and out. 15 A. Yes. 16 Q. Would added delay from the trail also 17 impact your business? 18 A. Yeah. I was going to add that, we load a 19 truck every three minutes when we're batching 20 concrete. If we had trucks stacked up because they 21 could not get out, then our cost to operate that 22 truck driver and equipment is about \$92.60 an hour. 23 Q. So time is money? 24 A. Time is money. 25 Q. And about how many trips a day on average

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1 MR. COHEN: I have some questions. 2 CROSS-EXAMINATION 3 BY MR. COHEN: 4 Q. Mr. Nerdrum, it's nice to see you again. 5 A. Good to see you again. 6 Q. I want to start with Ballard Terminal 7 Railroad. 8 A. Uh-huh (affirmative response). 9 Q. You said that you are one of the owners? 10 A. Correct. 11 Q. In fact, you own 99 percent of Ballard 12 Terminal Railroad? Correct? 13 A. That's correct. 14 Q. And does Byron Cole still own the other 15 one percent? 16 A. Actually, James Forgette, the new 17 operations manager. 18 Q. Okay. And Ballard has how many 19 customers? 20 A. Our primary customer is Salmon Bay Sand 21 and Gravel, but we have service in about 10 22 different customers over the life of our railroad. 23 Including the City of Seattle and King County? 24 Q. How about us let's say in the last three 25 years?	1 Ballard did you do that trans load? 2 A. On the south end of our line would be 3 just south of 45th -- between 45th and 43rd we have 4 a double track run around that we use for trans load 5 purposes. 6 Q. And the bakery facility is Bellevue is 7 now gone? 8 A. I don't know. 9 Q. Okay. How long has it been since you did 10 that trans load? 11 A. I'm going to guess three to four years. 12 We did it for about three years, and it was probably 13 six times or seven times a year. It takes about 14 four truck loads to empty a railcar of flour. And 15 it's probably been three or four years since we last 16 did that. 17 Q. So other than the flour trans loads three 18 years ago, no other customers served by Ballard 19 Terminal Railroad other than Salmon Bay in the last 20 three years? 21 A. Yeah. Not that I can recall. 22 Q. What if you went five years? 23 A. Then you'd be back into the flour -- 24 Q. The flour? 25 A. Yeah.
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1 A. Salmon Bay would have been our primary 2 customer. 3 Q. Any other customers in the last three 4 years? 5 A. No that's -- yeah, we may have done a 6 flour trans load for the Safeway Bakery. It would 7 be about three years ago, maybe four now. 8 Q. And is that Safeway Bakery still there? 9 A. Well, it was in Bellevue, they lost their 10 rail service over there. And so, we did trans loads 11 of railcars of flour. We trans loaded them onto the 12 truck and then they trucked it over to the bakery. 13 I don't know if the Safeway Bakery is still in 14 Bellevue or not. 15 Q. I'm sorry. I'm -- let me make clear. 16 I'm asking only about the Ballard Line. I know you 17 have other railroads as well. 18 A. No. I'm talking about the Ballard line. 19 Q. Okay. 20 A. Yeah. 21 Q. So -- 22 A. We trans loaded flour from railcars on 23 the Ballard line and then those trucks delivered 24 them to the bakery -- Safeway in Bellevue. 25 Q. And where did you do that -- where in	1 Q. Anybody else? 2 A. No. We brought a couple of boats in for 3 what at the time was CSR -- yeah, where CSR is 4 located. Used to be a different -- it was Seaview 5 East Shipyard, and they brought down some boats I 6 think from Canada or Alaska on railcar and we 7 unloaded their boats for them; brought their 8 railcars in and unloaded the boats. 9 Q. Okay. How long ago was that? 10 A. Gosh, it's got to be 10 years? 11 Q. Okay. You indicated that Ballard 12 Terminal Railroad operates pursuant to a franchise 13 agreement with the City? 14 A. Correct. 15 Q. The City owns 100 percent of the railroad 16 right of way that Ballard operates on, do they not? 17 A. I believe that's correct. 18 Q. And the franchise agreement is the 19 vehicle that enables Ballard to operate on that 20 track at all? 21 A. Correct. 22 Q. And that right of way is rail banked? 23 A. That is correct. 24 Q. All the way to Fred Meyer? 25 A. I believe it is rail banked from the

JAMES FORGETTE

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1 perfectly safe. 2 Q. Does everyone follow the rules of the 3 road? Is that what bicyclists do? 4 A. You're asking me a question that's global, 5 so expectation is that everybody follows the rules 6 of the road, just like a traffic signal. 7 Q. Okay. So am I to understand then that 8 this trail is safe, in your opinion, because you 9 assume all the truck drivers and all the bicyclists 10 are going to follow the rules of the road? 11 A. Yes. 12 Q. Isn't federal -- aren't federal funds 13 being used for this project? 14 A. I can't -- I can't speak to the funding. 15 MR. SCHNEIDER: Nothing further. 16 MR. KISELIUS: We have no further 17 questions for Mr. Chang. 18 THE HEARING EXAMINER: Okay. So 19 you're finished, Mr. Chang. 20 MR. KISELIUS: This is actually not 21 one of the witnesses -- 22 THE HEARING EXAMINER: This is not a 23 direct, okay. Thank you, Mr. Chang. We're all glad 24 to see you feeling better. 25 Now we're moving on. Anything	1 MR. FORGETTE: Yes. 2 THE HEARING EXAMINER: Thank you. 3 JAMES FORGETTE, 4 a witness, having been previously sworn, 5 was examined and testified as follows: 6 DIRECT EXAMINATION 7 BY MR. BROWER: 8 Q. Good morning, Mr. Forgette. 9 A. Good morning. 10 Q. By whom are you employed? 11 A. The Ballard Terminal Railroad Company. 12 Q. And what is your position with the Ballard 13 Terminal Railroad? 14 A. General manager. 15 Q. And for how long have you been the general 16 manager? 17 A. Approximately 18 months. 18 Q. So since about mid 2016? 19 A. Correct. 20 Q. And how long have you been with the 21 Ballard Terminal Railroad? 22 A. About 16 and a half years. 23 Q. And during your course of employment what 24 positions have you held with the railroad? 25 A. Engineer, conductor, designated supervisor
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1 further from the City? 2 MR. SCHNEIDER: No. 3 MR. COHEN: No, your Honor. 4 THE HEARING EXAMINER: And the 5 intervenor. Okay. 6 If we could take down the easel and 7 the illustrative, make sure the audience can still 8 see. 9 Appellants, what are we looking at 10 for rebuttal? 11 MR. BROWER: We have three rebuttal 12 witnesses, and I think we can get through two of 13 them before lunch for sure. And then the third one 14 after lunch. 15 THE HEARING EXAMINER: Okay. Let's 16 give it a shot. 17 MR. BROWER: The Coalition calls 18 James Forgette. 19 THE HEARING EXAMINER: Please state 20 your name for the record and spell your name. 21 MR. FORGETTE: James O. Forgette, 22 Junior. J-A-M-E-S, F-O-R-G-E-T-T-E. 23 THE HEARING EXAMINER: Do you swear 24 or affirm that the testimony you're providing at 25 today's hearing will be the truth?	1 (inaudible) engineers, maintenance-of-way track 2 inspector, operations manager, training officer, and 3 currently general manager. 4 Q. Did you work for a railroad before joining 5 Ballard Terminal? 6 A. Yes, I worked for the Burlington Northern, 7 which is now the Burlington Northern Santa Fe. 8 Q. And for how long did you work for BNSF? 9 A. Approximately a year and a half. 10 Q. Are you also an owner of Ballard Terminal? 11 A. I am. 12 Q. And how much do you own of Ballard? 13 A. Ten percent. 14 Q. Does Ballard Terminal Railroad only 15 operate the short line in Ballard? 16 A. No, we operate two other railroads. 17 Q. So you have three railroad lines in total. 18 A. Correct. 19 Q. What are those other two rail lines? 20 A. We have the Meeker Southern Railroad down 21 in East Puyallup. And we have the Eastside Freight 22 Railroad that runs (inaudible) Woodinville and 23 Snohomish, Washington. 24 Q. In total how much active mainline track 25 does Ballard Terminal have amongst all three of

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1 opportunity for testimony to, I guess attack the 2 City and its efforts in compliance with SEPA, for 3 the purposes of challenging the deference that is 4 owed, I'm not sure that this is rebuttal for that, 5 so I don't know quite how we're getting there in 6 this context. So I would sustain that objection. 7 MR. KISELIUS: Thank you. 8 THE HEARING EXAMINER: Okay. 9 Q. (By Mr. Brower) Just going back to one 10 last question, Mr. Forgette. So the removal by the 11 City of any track that you use, would that be an 12 impact to the railroad? 13 A. Yes, it would. 14 MR. BROWER: Thank you. Nothing 15 further. 16 MR. COHEN: May I have just a minute. 17 THE HEARING EXAMINER: Um-hmm. 18 MR. KISELIUS: The City doesn't have 19 questions for Mr. Forgette. 20 MR. COHEN: I do, your Honor. 21 THE HEARING EXAMINER: Um-hmm. 22 CROSS-EXAMINATION 23 BY MR. COHEN: 24 Q. Mr. Forgette, looking again at Exhibit R10 25 at page Bates stamp COS00006, the one that	1 those transloads? 2 A. Of the transloading, it's been (inaudible) 3 I would say at least five. 4 Q. Mr. Nerdrum testified that the only rail 5 freight customer of Ballard Terminal Railroad at 6 this point is Salmon Bay. 7 Do you agree with that? 8 A. I guess it depends on the definition of 9 customer. (inaudible) we do receive inbound loaded 10 freight for Salmon Bay, but we do also offer other 11 services to shippers like car storage. 12 Q. And that's the reference to CalPortland 13 you mentioned? 14 A. Correct. 15 Q. And are you currently storing cars for 16 CalPortland? 17 A. We're not. 18 Q. How many cars did you store for 19 CalPortland in 2016? 20 A. I don't know how many cars, but I would 21 say it probably would have been 10-15 cars at a 22 time. 23 Q. And for what length of time? 24 A. It's usually for two to three and a half 25 months.
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1 Mr. Brower was just asking you about. 2 A. Yes. 3 Q. Could you point out to me again the 4 Western Pioneer siding you were referring to? Where 5 does it begin and where does it end? 6 A. Well, in this -- it's the middle track. 7 I'm trying to see where it begins. 8 Q. The middle track as in between the two 9 tracks shown here? 10 A. That's correct. And (inaudible) joins up 11 (inaudible) not showing on this page. 12 Q. Does it join up with the mainline at some 13 point east of this sheet? 14 A. Yes. 15 Q. And you indicated that the railroad uses 16 that siding? 17 A. That's correct. 18 Q. What does it use -- for what purpose does 19 the railroad use -- 20 A. For tran -- for transloading and for 21 storage of cars. 22 Q. Transloading of what? 23 A. The last (inaudible) transloaded there was 24 frozen fish. And then after that we had flour. 25 Q. And how long ago was that, most recent of	1 Q. Where did you store those cars? 2 A. We stored them at the Western Pioneer 3 siding and at the (inaudible) street yard and south 4 of (inaudible). 5 Q. Mr. Forgette, my understanding is that 6 Ballard Terminal Railroad owns none of the track 7 over which you operate in Ballard; is that true? 8 A. I'm not a hundred percent positive on 9 that, but that's my understanding. 10 Q. Have you looked at whether your operating 11 agreement with the City of Seattle authorizes you to 12 store cars on that track? 13 A. It's been some time, but I believe I have. 14 Q. Have you confirmed that with the City? 15 A. Not recently, no. 16 Q. Did -- 17 A. But -- 18 Q. Go ahead. 19 A. But as a common carrier, that would be 20 under federal authority what we can do on our tracks 21 in terms of storing cars and (inaudible) cars that 22 are empty. So as a railroad common carrier we have 23 every right to store cars on that City right-of-way. 24 Q. And you never asked the City whether you 25 have their permission to do that?

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1 table indicating gross intrastate operating revenues 2 at the bottom of page four? 3 A. Correct. 4 Q. You see that? 5 A. Yes. 6 Q. All right. And is the number depicted 7 there \$35,852? 8 A. Yes. 9 Q. And that's the total gross intrastate 10 operating revenues of Ballard Terminal Railroad in 11 2016? 12 A. Correct. 13 Q. Yeah. And there is also interstate 14 revenues; correct? 15 A. Same page up above? 16 Q. Um-hmm. 17 A. Okay. 18 Q. \$3,200; is that correct? 19 A. That's correct. 20 Q. So the total revenues of Ballard Terminal 21 Railroad in 2016 would be about \$37,000? 22 A. Correct, yeah, 37, 38. 23 Q. Um-hmm. And if we wanted to figure out 24 how many cars you delivered in 2016, you would 25 divide that \$37,000 number by \$200 a car; is that	1 going to say we hauled about -- this is 2016? 2 Q. Uh-huh. 3 A. I'm going to say we -- let me do some 4 thinking here. I'm going to say we hauled about 120 5 cars, 120, 130 is my guess. 6 Q. Thank you. 7 MR. COHEN: No further questions. 8 MR. BROWER: Can we have this marked, 9 please. What number are we on? 10 THE HEARING EXAMINER: This will be 11 A24. 12 (Exhibit No. A24 Marked.) 13 REDIRECT EXAMINATION 14 BY MR. BROWER: 15 Q. Mr. Forgette, do you recognize what's been 16 marked as A24? 17 A. I do. 18 Q. And what is that? 19 A. It's a letter from CalPortland. 20 Q. Would you please read it into the record? 21 By the way, when did CalPortland -- did CalPortland 22 give you that letter? 23 A. They did. 24 Q. And when did you get it? 25 A. I got this last week, I believe.
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1 correct? 2 A. No, that's not correct. Because we get 3 paid per car at Ballard two different ways. We get 4 the \$200 from Salmon Bay Sand & Gravel and then we 5 get a portion of the Burlington Northern Santa Fe 6 rate. So it would be those combined. 7 Q. But the Burlington Northern Santa Fe rate 8 would only apply to the \$3,200 obtained through 9 interstate revenues? 10 A. No, I believe that the Burlington Northern 11 Santa Fe revenue would be included in the 35,815. 12 Q. So from -- to understand what Salmon Bay 13 realized, you'd need to deduct the BNSF charges from 14 the 35? 15 A. Well, I think what you would -- you would 16 take what we get per car, I guess the way I would do 17 it I would take what we get from the BNSF per car, 18 from the Salmon Bay Sand & Gravel per car, add that 19 as one car, and then divide that 35,815, and that 20 would show you how many cars. 21 Q. From that number can you estimate the 22 number of cars? 23 A. Got a calculator? 24 Q. Sure, but if you -- 25 A. I'm going to say we hauled about -- I'm	1 Q. Would you please read what CalPortland 2 says, I think it's two sentences? 3 A. To whom it may concern. CalPortland's 4 cement division has historically utilized Ballard 5 Terminal Railroad for winter car storage for excess 6 cement railcars. CalPortland fully intends to 7 continue utilizing Ballard Terminal for off season 8 railcar storage for the foreseeable future. Best 9 regards, Wayne Johnson, Seattle Cement Terminal 10 Manager. 11 Q. Do you know Mr. Johnson? 12 A. I do. 13 Q. And he sent you that letter? 14 A. He did. 15 MR. BROWER: Based on Mr. Cohen's 16 line of testimony, I move to admit this into the 17 record. 18 MR. COHEN: Do you have a number for 19 it? 20 THE HEARING EXAMINER: Yes, this is 21 A24. 22 Any objection? 23 MR. COHEN: No objection. 24 And I'd like to ask, your Honor, that 25 R54 be admitted, as well.

SEATTLE EX. NO. 7

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

In the Matter of the Appeal of

Hearing Examiner File:

W-17-004

THE BALLARD COALITION

of adequacy of the FEIS issued by the Director,
Seattle Department of Transportation

Introduction

In May of 2017, the Director of the Seattle Department of Transportation (“SDOT” or “City”) issued a State Environmental Policy Act (“SEPA”) Final Environmental Impact Statement (“FEIS”) for the Burke-Gilman Trail Missing Link Project (“Project” or “Missing Link”). The FEIS has been appealed by the Ballard Coalition (“Appellant”).

The appeal hearing was held on November 27, 28, 29, 30, December 1, and 5, 2017, before the Deputy Hearing Examiner (“Examiner”). The Appellant was represented by Joshua Brower and Patrick Schneider, attorneys-at-law. The City was represented by Erin Ferguson and Tadas Kisieličius, attorneys-at-law. The Intervenor, Cascade Bicycle Club (“Cascade”), was represented by Matthew Cohen, attorney-at-law. The Examiner visited the site on December 22, 2017.¹ The parties submitted final written closing arguments on January 5, 2018, and the record closed on that date.

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 reviewing the site, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

Procedural History

1. SEPA review for the Missing Link project has passed through several iterations, including three Determinations of Non-significance that preceded the FEIS. The first Determinations of Non-significance (“DNS”) was issued in November of 2008, and was appealed to the Hearing Examiner. That DNS was affirmed in a decision issued in June of 2009, which was in turn appealed to King County Superior Court (“KCSC”). The KCSC entered an Order on June 7, 2010, which ruled that SDOT had improperly piecemealed its review of the project, and remanded to SDOT for review of the trail segment located along Shilshole Avenue NW between 17th Avenue NW and Vernon Place NW (“Shilshole Segment”). A Revised DNS was issued by SDOT on February 1, 2011. This Revised DNS was appealed

¹ The site visit included walking each of the Build Alternatives identified in the FEIS, and adjacent neighborhood areas. The Examiner was joined by the party representatives for a portion of the Preferred Alternative.

and was affirmed by the Hearing Examiner on July 1, 2011. That decision was appealed to KCSC, which remanded the matter to SDOT in a Second Order of Remand dated March 2, 2012. On April 23, 2012 SDOT issued a third DNS labeled “Reissued Revised Determination of Non-significance” for the Missing Link project. The third DNS was appealed, and on August 2, 2012 the Hearing Examiner reversed and remanded it to SDOT for the preparation of an EIS on the Shilshole Segment after finding that there would be significant traffic hazards.

2. SDOT followed the Hearing Examiner’s ruling on the third DNS with a decision to prepare an EIS for the entire Missing Link project, and to include an evaluation of alternative routes. The FEIS was issued on May 25, 2017, and determined by the SDOT Director to be adequate.

Proposal and FEIS

3. “The Burke-Gilman Trail (“BGT”) is a regional trail that runs east from Golden Gardens Park in Seattle and connects to the Sammamish River Trail in Bothell, except for a missing segment through the Ballard neighborhood. Currently, the regional trail ends at 30th Ave NW by the Hiram M. Chittenden (“Ballard”) Locks on the west, and begins again at the intersection of 11th Ave NW and NW 45th St on the east.” Exhibit R1 at 1-1. The Missing Link “proposes to connect these two segments of the BGT with a marked, dedicated route that would serve all users of the multi-use trail.” *Id.*

4. The primary objective for the proposal:

is to connect the roughly 1.4-mile gap between the existing segments of the BGT through the Ballard neighborhood. The project is intended to create a safe, direct, and defined multi-use trail for persons of all abilities, for a variety of transportation and recreational activities, and to improve predictability for motorized and nonmotorized users along the project alignment. Another objective of the project is to provide connections to the proposed nonmotorized networks shown in the Pedestrian Master Plan (SDOT, 2009) and Seattle Bicycle Master Plan (SDOT, 2014), while maintaining truck and freight facilities and access that support industrial and water-dependent land uses within the shoreline district and the Ballard-Interbay Northend Manufacturing and Industrial Center (BINMIC).

Exhibit R1 at 1-3.

5. The Project will connect the two existing segments of the multi-use trail with a marked, dedicated route to serve all trail users.
6. The FEIS evaluated five Build Alternatives, including a Preferred Alternative, and also evaluated a No Build Alternative. The Build Alternatives are identified as the Preferred, Shilshole South, Shilshole North, Ballard Avenue, and Leary Alternatives, (Exhibit R1 at

ES-2), and are described at Exhibit R1 at ES-2 to ES-5, and depicted at Exhibit R1 Figure ES-1.

7. The Missing Link would be constructed primarily within the existing street right-of-way. Project construction activities will include removal of existing concrete, asphalt and compact gravel to construct the multi-use pathway.
8. The parties do not dispute that the FEIS relies on designs that are at approximately ten percent level of design for each of the Build Alternatives.
9. The Build Alternatives are generally described to include “roadway modifications, intersection treatments, driveway design, and parking modifications,” that include an array of design and safety improvements and modifications. The Project includes improvements such as: railroad crossings; stormwater drainage controls; relocation of underground utilities and reconstruction of existing driveways; traffic controls, warning signs and signals to direct vehicles, bicycles and pedestrians; and trail design features such as colored pavement and markings. Features common to all Build Alternatives are described at Exhibit R1 at 1-13 to 1-25, depicted in Figures 1-4 to 1-11, and addressed in detail in a number of other areas throughout the FEIS. See, e.g., Exhibit R1 at 7-1 to 7-66 (FEIS Chapter 7: Transportation).
10. The roadway network considered by the FEIS is described as:

The roadway network within the study area consists of principal, minor, and collector arterial streets, as well as local access streets . . . Most roads in the study area are classified as local access streets.

Principal arterial roadways are the foundation of the city’s transportation network, designated as the major thoroughfares for trucks, motor vehicles, and transit vehicles. In the study area, NW Leary Way, a portion of NW Market St, and 15th Ave NW are defined as principal arterials, meaning that they serve as primary routes for vehicle trips between urban centers and as connections to the regional transportation network.

Minor arterials distribute traffic from the principal arterials to collector arterials and local access streets, and provide connections to community destinations. In the study area, NW 46th St, Shilshole Ave NW, a portion of NW Market St, and 24th Ave NW are minor arterials.

Collector arterials collect and distribute traffic from principal and minor arterials to local access streets or directly to local destinations. . . . In the study area, 14th Ave NW and 20th Ave NW are considered collector arterials.

. . .

There are also Major and Minor Truck Streets within the study area . . . Major Truck Streets are arterial streets that provide connections between and through industrial land uses, commercial districts, and urban centers

(SDOT, 2016). Minor Truck Streets provide connections to and from urban villages and commercial districts, and secondary connections to Major Truck Streets (SDOT, 2016). Major Truck Streets in the study area include:

- Shilshole Ave NW;
- NW Leary Way;
- 15th Ave NW; and
- NW Market St between 24th Ave NW and the eastern boundary of the study area.

Minor Truck Streets in the study area include 24th Ave NW between Shilshole Ave NW and the northern boundary of the study area.

Exhibit R1 at 7-4.

11. The FEIS primarily analyzes and discloses traffic impacts in chapter 7. That discussion is supported by further analysis in a Transportation Discipline Report in Exhibit R3, Appendix B. The FEIS includes disclosure and discussion of existing conditions, freight activity, driveway and intersection existing conditions and projected impacts with the proposal in place, and identifies potential mitigation for impacts associated with the proposal. The FEIS traffic analysis includes driveway turn counts, delay of freight deliveries at specific driveways along each alternative (*see, e.g.*, Exhibit R3 Transportation Discipline Report at Tables 5-5, 5-8, 5-10, 5-12, and 5-14), auto-turn simulations (Exhibit R1 Appendix A), level of service analysis (*see, e.g.*, Exhibit R1 at 7-6 to 7-10), notes from interviews with business owners along the preferred route with driveways that would cross the preferred alternative, and projected volume of motorized and non-motorized travel (*Id.* at 3-1 to 3-3). *See e.g.* Exhibit R1 at 7-1 to 7-66.
12. The FEIS analysis relied on the PM peak hour to identify potential transportation delay, because it represents the highest volume for the aggregate of all transportation modes, and allowed the reviewers to include the worst-case scenario for traffic in the analysis.² Use of PM peak hour is standard in such analyses.
13. Driveways along the Preferred Alternative, and many other driveways within the Project area, are utilized by a wide variety of vehicles, including very large trucks and trailers involved with the industrial operations. These operations require that vehicles cross the trail alignment many times during the course of a working day. Some of these large vehicles, *e.g.*, 75-foot tanker trucks, will utilize turning movements in or out of their driveways so as to use portions of the Shilshole Avenue right-of-way to complete their movements. Some of these movements are not permitted uses of the street right-of-way,

² Appellant argued in closing that PM peak hour is not the worst-case scenario, because the PM peak also includes traffic volumes that are lower than other times of the day. However, this ignores the fact that the highest volume of traffic for the day does occur within the PM peak hour. Exhibit R3 Transportation Discipline Report Figure 3-2 at 3-4.

but occur under current conditions.

14. As part of the FEIS traffic analysis, the City reviewed the driveways along the Build Alternatives and evaluated turning movements. In preparation of the design for the FEIS the City identified all of the driveway crossings for each Build Alternative. Sixteen driveway owners were interviewed to obtain information on business operations and driveway use. Exhibit R1 at 7-2. *See also* 7-11.

The FEIS also included AutoTURN analysis in its consideration of turning movements relative to driveways and intersections. "AutoTURN" is a computer software program that depicts the turning radii of vehicles, and produces a diagram of the radii onto an autocad base drawing.

AutoTURN analyzes the swept path of vehicle maneuvers to determine the appropriate roadway design to accommodate turning vehicles. AutoTURN was used to simulate ingress and egress from driveways as well as maneuvers through intersections for large vehicles. During preliminary design of the trail, a WB-50 (a large semitrailer truck) and a single-unit truck (similar in length to a cement truck) were used to evaluate vehicle swept path. This allows trail designers to determine the appropriate width for driveways as well as the appropriate curb radii for intersections to accommodate large vehicle turning movements in the study area. AutoTURN was completed for a sample of driveways in the study area . . . During final design of the trail, AutoTURN would be completed for individual driveways, and SDOT would work with property owners to determine the most appropriate design vehicle for each individual driveway.

Exhibit R1, Appendix A at A-1.

15. The FEIS included a description and analysis of current conditions of existing intersections, and discussed the Project design relative to these intersections. The FEIS intersection analysis included the intersection of Shilshole Avenue and Northwest Market Street, and discloses the current inability of large trucks to make a right turn on to Northwest Market Street.

16. Concerning safety, the FEIS determined:

The Missing Link would improve safety for nonmotorized users and motor vehicles in the study area. A dedicated bicycle facility would improve the predictability at conflict points between motor vehicles and cyclists and reduce the likelihood of collisions because potential conflict points would be clearly identifiable by both motor vehicle drivers and trail users. Potential conflict points would be clearly organized and delineated, which would allow motor vehicle drivers and trail users to be aware of where to travel cautiously. A dedicated facility would also reduce the likelihood of

nonmotorized injury incidents by providing a facility that safely traverses or avoids obstacles in the study area such as the railroad tracks. The Missing Link would be designed to clearly delineate trail user space from the roadway, and would include safety features such as buffers, pavement markings, raised crosswalks, curb treatments, signage, and lighting.

Exhibit R1 at 7-31.

17. The FEIS analyzed and disclosed the impacts associated with contraflow³ on a sidepath design. For example, the FEIS stated:

Nonmotorized users on the BGT Missing Link would also be traveling in both directions on one side of the street under any of the Build Alternatives. This would require vehicles crossing the trail to look both directions for nonmotorized users before continuing across the trail. For drivers of large vehicles with reduced visibility, it could be difficult to see in both directions of travel. 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.

Exhibit R1 at 7-32.

Mitigation for such impacts associated with contraflow identified in the FEIS included: curb extensions, pavement markings, raised crosswalks, signalized intersections, rapid-flashing beacons at road crossings, and medians. *See, e.g.,* Exhibit R1 at 7-32; Exhibit R3, Transportation Discipline Report, at 1-5.

18. The FEIS disclosed throughout its description of the Preferred Alternative route, and in its traffic analysis, the industrial truck traffic that typifies existing conditions in the area of the proposal.
19. The FEIS disclosed the risk of traffic conflicts, particularly conflicts between vehicles and non-motorized users at driveways and intersections. The FEIS considered every driveway and intersection as an area of potential conflict, and included an inventory of each driveway or intersection for each of the Build Alternatives in Table 1-1 "Potential Traffic Hazards by Alternative Segment." Exhibit R1 at 1-29.
20. Potential impacts associated with sight distances were addressed for the specific Build Alternatives. For example, with regard to the Preferred Alternative, the FEIS indicated:

there would be sight distance concerns for exiting vehicles at four driveways on the south side of NW Market St between the Ballard Locks driveway and 26th Ave NW where buildings are constructed up to the property lines. Buildings and structures adjacent to the trail could reduce visibility for both

³ Contraflow is non-motorized traffic flowing in opposite directions on a single trail.

vehicles and trail users. Sidewalks would be provided between the properties and the trail, which would improve sight distances by providing a buffer of 10 feet from the property frontage.

Exhibit R3, Transportation Discipline Report, at 5-20.

21. Appellant's traffic expert, Claudia Hirschey, analyzed traffic and safety issues related to the Missing Link by gathering independent data, inventorying existing conditions, creating a methodology to study and assess safety issues, and reviewing several reports related to contraflow bicycle sidepaths. Through her analysis she highlighted the concerns of potential conflicts between vehicle (especially truck) traffic and bicycles raised by the contraflow design. Ms. Hirschey testified that there should be greater emphasis in the FEIS analysis on the level of conflict between bicyclists, pedestrians, vehicles and trucks. In a report she produced, she illustrated that the Missing Link will create four new conflict points for pedestrians and bicyclists at each driveway crossing due to contraflow design. Exhibit A3 at 211. However, Ms. Hirschey's conflict point diagram did not identify any conflict point not disclosed in the FEIS. Instead Ms. Hirschey's diagram took driveway and intersection areas identified for potential conflicts in the FEIS, and simply broke down those areas to describe specific conflict points within the conflict areas identified by the FEIS. Ms. Hirschey's analysis did not identify any new significant negative impact not already disclosed in the FEIS.
22. Ms. Hirschey inventoried and evaluated the type and frequency of vehicles at each driveway along the Preferred Alternative. She testified that based on her opinion the Preferred Alternative would be more dangerous than the No Build Alternative, but did not provide a quantified analysis to demonstrate this conclusion. For example, Ms. Hirschey did not quantify the existing dangers and risks to cyclists using the streets along the Preferred Alternative route including, but not limited to: narrow lanes, gravel in the road way, cement trucks passing cyclists, narrow or non-existent street shoulders, the absence of dedicated bike lanes or other facilities, parked vehicles located adjacent to traffic lanes (often in a haphazard or disorderly manner), the use of the right of way for materials storage, and railroad tracks crossing portions of the street at oblique angles.
23. Ms. Hirschey also criticized the FEIS for using PM peak hour in its traffic analysis instead of truck peak hour. However, Ms. Hirschey did not do any independent analysis for truck peak hour, did not demonstrate how this would meet industry standards for traffic analysis, and did not account for how this type of analysis would allow for consistency in comparison between FEIS alternatives.
24. Appellant's witness, Victor Bishop, testified that the Preferred Alternative will create traffic hazards not disclosed in the FEIS. Mr. Bishop performed an AutoTURN analysis for each of the driveways along the Preferred Alternative, and included in his analysis data concerning the largest trucks that would use each driveway. Mr. Bishop testified that the FEIS failed to properly inventory all of the driveways along the Preferred Alternative. However, his testimony on this point was inconclusive, as during the hearing he reduced the number of driveways he thought the City had not considered, and City testimony

showed that some of the driveways considered separate by Mr. Bishop had been treated as single consolidated driveways by the City. Thus, it was a dispute over labeling certain driveways and not whether they had been considered in the FEIS analysis or not. *See, e.g.*, Exhibit R55. Mr. Bishop also incorrectly indicated that the FEIS failed to include the intersection of Shilshole Avenue and Northwest Market Street in its AutoTURN analysis.

25. The Appellant's experts also expressed concern about the proposal because it is not designed to allow trucks to turn at all locations "within lane," but instead provides for trucks moving "within available pavement" including portions of opposing lanes or the road shoulder in their turning movement. The Appellants did not cite any design standard that requires accommodating truck traffic within lane in all areas. In contrast, the City's Freight Master Plan specifically provides that Major Truck Streets are arterial streets that "accommodate" significant freight movement, and equates the term "accommodate" with the same design concept as "within available pavement." *See* Exhibit R7 at 24 and 79.
26. Appellant's experts in part based their opinions on safety concerns for a contraflow trail design by attempting to contrast it with a single-track design. The Appellant proposed one-way cycle tracks on both sides of the street in its comments on the Draft EIS. However, the existing segments of the Burke Gilman Trail ("BGT") run along one side of the street only. The purpose of the Project is to complete the existing regional multi-use trail. In the "Alternatives Considered but Not Included" section of the FEIS, the City examined several alternative facility types but excluded those designs from detailed study because they "would not maintain the same look and feel as the remainder of the BGT, nor would they provide an adequate level of comfort for users of varying abilities and activities," and "did not meet the project objective of a multi-use trail through the study area." Thus, Appellant's design calls for a different facility than the BGT, and one which would not meet the Project's objective. The Appellants did not present evidence indicating the feasibility of one-way trails or any other design alternative, or for such alternatives to meet the project's objective.
27. The City's expert William Schulteiss identified in his testimony author bias for several of the reports relied upon by Ms. Hirschey. Regarding one of the studies from Boulder, Colorado, which seemed to report a high number of incidents occurring on contraflow sidepaths, Mr. Schulteiss also clarified that Boulder has an extensive and highly used network of sidepaths, and that proportionately the number of incidents was very low. He also described current conditions in the area of the Preferred Alternative as chaotic and presenting cyclists with numerous potential conflicts. He testified that in this case a contraflow sidepath would be safer than riding in the street under current conditions.
28. The Missing Link design is consistent with the City's Pedestrian Master Plan and Bicycle Master Plan, which prioritize the project and call for placing the trail generally along the route of the Preferred Alternative. The design of the proposal is also consistent with the City's Freight Master Plan which calls for truck route planning to consider areas designated as priority areas in the Pedestrian Master Plan and the Bicycle Master Plan. Exhibit R7 Appendix C at 8.

29. To inform the FEIS parking analysis (Exhibit R1 at 8-1 to 8-34), the City prepared a parking discipline report. The author of the report, Ryan LeProwse, testified that the methodology of the parking analysis is common in his profession and that it included: existing studies regarding parking supply and utilization, new data collection, and review of additional recent data. The parking discipline report describes the existing conditions for publicly available on-street and off-street parking within and surrounding the entire Missing Link study area. The area of the parking discipline report is depicted in Exhibit R1, Figure 3-1. Mr. LeProwse indicated the study area was based on the location of all of the Build Alternatives in order to allow for an equal comparison to the no build alternative. The methodology and assumptions utilized by the authors are explained in the parking discipline report. The report conservatively included unregulated parking spaces⁴ in its count for current parking supply, and then removed those spaces from the projected supply under the Build Alternatives although some of those spaces may continue to exist. The parking discipline report found:

The Preferred Alternative would permanently remove approximately 344 on-street parking spaces. In some instances, unregulated parking within the public right-of-way that has historically been used for private businesses, where vehicles are double- and triple-parked, will no longer be available. This parking was accounted for in the parking supply and parking removal counts, even though it is technically unregulated, because it is important to comprehensively document all parking impacts. Overall, the loss of these on-street parking spaces represents 11% of the on-street parking supply, which is 9% of all parking in the study area.

Exhibit R3 at ES-1.

30. Appellants challenged the adequacy of the FEIS parking analysis, because it did not analyze parking impacts on a block-by-block basis. On behalf of the Appellant, Mr. Bishop analyzed parking displacement in the area of Shilshole Avenue under the Preferred Alternative, and found that in the area he analyzed 299 parking spaces will be lost out of a total supply of 454, and concluded that this would be a significant impact to parking supply in the area. Exhibit A1. However, Mr. Bishop's analysis did not address the availability of currently underutilized parking within walking distance of the areas that may experience loss of existing parking spaces.
31. Some of the parking spaces along Shilshole Avenue are currently utilized by employees of nearby businesses, although exact numbers are not known, and Appellant's witnesses testified that they were concerned about the impact of parking changes on their businesses. However, no evidence was introduced by the Appellant to demonstrate or quantify the allegation that there will be a significant negative impact on drivers or businesses due to employees having to park in some cases one block away from their current potential parking spaces.

⁴ Unregulated parking is located within the City right-of-way in areas that are not marked for or dedicated to parking.

32. The FEIS disclosed the potential removal or relocation of railroad tracks as part of the Preferred Alternative, and called for coordination with the rail provider “to reduce disruption to track use” to mitigate any impacts associated with such removal or relocation. Exhibit R3, Transportation Discipline Report, ES-1 and 5-11.
33. Appellant’s economics impact expert Spencer Cohen indicated that the Project will cause adverse economic and land use impacts. Mr. Cohen testified that the delay caused to freight traffic having to wait to cross the route of the Preferred Alternative would cause economic harm. Mr. Cohen’s analysis was based on reports that included analysis of conditions in the Seattle area for marine based industries. Mr. Cohen did not identify any specific impacts that might occur in the area of the proposal as a result of the project. He did not perform any analysis to determine if there would be such impacts.
34. The FEIS identified various impacts to businesses and land use patterns in the area. For example, the FEIS indicated “[i]ncreasing delays in access . . . could contribute to increased operational costs for some businesses.” Exhibit R1 at 4-21. In addition, the FEIS indicated impacts to businesses that currently “use the City right-of-way to access parking or loading zone spaces on their properties” were discussed and analyzed by the FEIS, which indicated businesses “might need to relocate their access points,” that this “would potentially change how private property owners use the space between their buildings and the City’s right-of-way, and that some businesses could expect impacts such as having to “accommodate freight by relocating loading zones or driveways.” Exhibit R1 at 7-30.
35. The FEIS identifies potential mitigation to reduce impacts on adjacent land uses, and expressly alerts decision makers that “minimizing the extent of the trail within the BINMIC could minimize impacts.” Exhibit R1 at 4-35.
36. ECONorthwest produced an Economic Consideration Report (“ECR”) to support the EIS analysis. The ECR supplemented information drawn from the Transportation and Parking Discipline Reports. Its purpose was to “understand the likely economic consequences for the region from the BGT Missing Link.” Exhibit A17 at ES-1. The ECR analyzed the economic impacts of operating the Missing Link on single-family, multi-family, and industrial properties, and also examined the economic impacts of traffic delays and parking impacts.
37. The Appellant raised concerns regarding changes made between the draft version of the ECR and the final ECR. For example, the draft ECR stated:

The operation of the BGT Missing Link may significantly impede some industrial users located adjacent to the trail due to the congestion of industrial traffic and pedestrian use. Significant impacts mean that these industrial users are likely to experience disruptions to business activity that are unlikely to be overcome or mitigated without large cost.

Exhibit A15 at 4-9. And the final ECR stated:

The operation of the BGT Missing Link may impede some industrial users located adjacent to the trail due to the congestion of industrial traffic with pedestrian and bicycle use.

Exhibit A17 at 4-7.

The following draft ECR language was removed from the ECR:

At these points, the congestion of pedestrian and bike travelers with industrial traffic may cause significant economic harm. Significant impacts result from the interference of the business operations of industrial properties due to pedestrian and bicycle traffic. This interference may result in the decreased profitability and in extreme cases, result in some industrial users going out of business.

Exhibit A15 at 4-9.

At the hearing Morgan Shook, Director of ECONorthwest, indicated that some of these changes in the ECR had occurred because he was not certain the available evidence supported the definitive nature of the findings in the draft ECR, and that for other changes, information included in the drafts was technical in nature and could be confusing to readers.

38. The final ECR concludes in part:

The operation of the BGT Missing Link may add to the competitive pressures facing industrial users, and appropriate steps should be taken to avoid or mitigate these costs. Given the economic trajectory of the study area, the incremental impact of any of the Build options for BGT Missing Link seems small by comparison. Displacement, or transformation, of existing businesses may necessarily take place as Ballard continues to develop.

Exhibit A17 at 5-1. And,

while the economic impacts from operation of the BGT Missing Link are likely to be modest on average, these results do not imply that a negative effect could not occur to some properties.

Id.

39. The City continued work to develop the project design for the Preferred Alternative following publication of the FEIS. Approximately two months prior to publication of the FEIS the City had reached a level of design of approximately 90 percent completion. In addition, the City estimated it might complete the final design and permitting for the project

by early 2018. No actual decision as to proceeding with the Project has been made by the City.

Appeal

40. The Appellant filed a timely appeal of the FEIS. By prehearing orders dated September 18, 2017 and September 28, 2017, certain issues raised in the Notice of Appeal of the FEIS were dismissed.
41. The appeal of the FEIS raised the following issues:
- a. Whether the FEIS's reliance on a 10 percent level of project design was adequate;
 - b. Whether the FEIS's alternative analysis was adequate;
 - c. Whether proper notice had been issued concerning a segment of the Preferred Alternative;
 - d. Whether the FEIS adequately considered potential adverse traffic and safety impacts;
 - e. Whether the FEIS adequately considered the proposal's consistency with applicable land use regulations;
 - f. Whether the FEIS adequately considered potential adverse parking impacts;
 - g. Whether the FEIS adequately considered cumulative impacts; and
 - h. Whether the FEIS adequately considered potential adverse impacts to the shoreline environment.
42. At the hearing the Appellant argued that the Examiner did not owe deference to the City as the lead agency, because certain alleged actions by the City undermined this requirement. To support its argument that deference was not owed to the City the Appellant introduced evidence concerning an alleged violation of SMC 25.05.070.A.2 (*e.g.* moving forward with design of the Preferred Alternative). Appellant did not raise violation of SMC 25.05.070.A.2 as an issue in its Notice of Appeal. Therefore, evidence related to this section of the Code was allowed at the hearing only to address the argument concerning deference, and not for purposes of determining if there had been a violation of those provisions of the Code.

Applicable Law

43. "To be adequate, the EIS must present decisionmakers with a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the agency's decision. Adequacy is judged by the 'rule of reason,' a 'broad, flexible cost-effectiveness standard,' and is determined on a case by case basis, considering 'all of the policy and factual considerations reasonably related to SEPA's terse directives.'" *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. State, Dept. of Transp.*, 90 Wn.App. 225, 229, 951 P.2d 812 (1998) (citations omitted).
44. "In determining whether a particular discussion of environmental factors in an EIS is adequate under the rule of reason, the reviewing court must determine whether the environmental effects of the proposed action are sufficiently disclosed, discussed, and

substantiated by supportive opinion and data.” *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 644, 860 P.2d 390 (1993).

45. In an appeal of an FEIS “the decision of the governmental agency shall be accorded substantial weight.” RCW 43.21C.090.
46. “The requirement that only reasonable alternatives be discussed in an EIS is intended to limit the number of alternatives considered, as well as the detailed analysis required for each alternative. WAC 197-11-440(5)(b)(i). The discussion of alternatives in an EIS need not be exhaustive if the impact statement presents sufficient information for a reasoned choice of alternatives.” *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn.App. 439, 446, 832 P.2d 503 (1992).
47. SMC Chapter 25.05 details the City’s environmental policies and procedures, and SMC Chapter 25.05 Subchapter IV identifies requirements for an Environmental Impact Statement.
48. “The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decisionmaking process, when the principal features of a proposal and its environmental impacts can be reasonably identified.” SMC 25.05.055.A.
49. “Agencies shall make certain that the proposal that is the subject of environmental review is properly defined . . . A proposal by a lead agency or applicant may be put forward as an objective, as several alternative means of accomplishing a goal, or as a particular or preferred course of action.” SMC 25.05.060.
50. SMC 25.05.070 describes limitations on actions during the SEPA process including:
 - A. Until the responsible official issues a final determination of nonsignificance or final environmental impact statement, no action concerning the proposal shall be taken by a governmental agency that would:
 1. Have an adverse environmental impact; or
 2. Limit the choice of reasonable alternatives.
 - ...
 - D. This section does not preclude developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal, as long as such activities are consistent with subsection 25.05.070.A.
- SMC 25.05.070.A and D.
51. Pursuant to SMC 25.05.400.C, “Environmental impact statements shall be concise, clear, and to the point, and shall be supported by the necessary environmental analysis. The

purpose of an EIS is best served by short documents containing summaries of, or reference to, technical data and by avoiding excessively detailed and overly technical information.”

52. SMC 25.05.402 calls for the following in EIS preparation:

EISs need analyze only the reasonable alternatives and probable adverse environmental impacts that are significant. Beneficial environmental impacts or other impacts may be discussed.

The level of detail shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or referenced.

Description of the existing environment and the nature of environmental impacts shall be limited to the affected environment and shall be no longer than is necessary to understand the environmental consequences of the alternatives, including the proposal.

SMC 25.05.402 A, B and D.

53. SMC 25.05.440.D.2 requires that an EIS describe the preferred alternative and alternative courses of action indicating that:

Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.

a. The word "reasonable" is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.

b. The "no-action" alternative shall be evaluated and compared to other alternatives.

c. Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts either directly, or indirectly through requirement of mitigation measures.

54. SMC 25.05.440.D.2.f requires an EIS to “Present a comparison of the environmental impacts of the reasonable alternatives, and include the no action alternative. Although graphics may be helpful, a matrix or chart is not required. A range of alternatives or a few representative alternatives, rather than every possible reasonable variation, may be discussed.”

55. SMC 25.05.440.E.6.a calls for economic issues to be included in every EIS, stating that the analysis shall include: “Economic factors, including but not limited to employment, public investment, and taxation where appropriate, provided that this section shall not authorize the City to require disclosure of financial information relating to the private applicant or the private applicant's proposal.”

56. SMC 25.05.448 provides:

SEPA contemplates that the general welfare, social, economic, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives and in making final decisions. However, the environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision or to contain the balancing judgments that must ultimately be made by the decisionmakers. Rather, an environmental impact statement analyzes environmental impacts and must be used by agency decisionmakers, along with other relevant considerations or documents, in making final decisions on a proposal. The EIS provides a basis upon which the responsible agency and officials can make the balancing judgment mandated by SEPA, because it provides information on the environmental costs and impacts. SEPA does not require that an EIS be an agency's only decisionmaking document.

57. Concerning mitigation measures identified in an EIS, SMC 25.05.660.B provides:

EISs are not required to analyze in detail the environmental impacts of mitigation measures, unless the mitigation measures:

1. Represent substantial changes in the proposal so that the proposal is likely to have significant adverse environmental impacts, or involve significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; and
2. Will not be analyzed in a subsequent environmental document prior to their implementation.

Conclusions

1. The Examiner has jurisdiction over this appeal pursuant to Chapter 23.76 SMC. Appeals are considered de novo, and the Examiner must give substantial weight to the Director's decisions. SMC 25.05.680.B.3. The Appellant bears the burden of proving that the FEIS is legally insufficient within the standards set by SEPA.
2. In reviewing the adequacy of the FEIS the Examiner does "not rule on the wisdom of the proposed development but rather on whether the FEIS [gives] the City . . . sufficient information to make a reasoned decision." *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass*, 90 Wn.App. at 362. In this case, the members of the Ballard Coalition hold reasonable concerns regarding the proposal, and its impacts on their businesses. However, it is not the Examiner's role to determine that such impacts should not be allowed, but only to determine if the City's environmental review of those impacts is adequate under the standards of SEPA in the context of the legal issues raised by the Appellant.
3. The Appellant cites no authority to support its argument that the "substantial weight" standard of deference owed to the City as SEPA lead agency, and which is mandated by SMC 25.05.680.B.3 and RCW 43.21C.090, can be overcome when the City may have

taken certain actions that the Appellant considers wrong. Moreover, even if such authority existed, the Appellant has not demonstrated, as it argues, that: (1) the City “concealed” potential impacts of sidepaths crossing multiple driveways; (2) the City directed consultants to use language in reports “that minimizes impacts” or removes reference to impacts; (3) the ten percent level of design for the proposal was *per se* inadequate according to a previous court ruling or SEPA standards; or (4) the City violated SMC 25.05.070.A.2.

4. In its closing argument the Appellant reiterates an argument dismissed in a pre-hearing motion - that the FEIS is inadequate as a matter of law, because it relies on designs that are at approximately ten percent level of design for the Build Alternatives. The Appellant restates its earlier argument that this level of design was determined inadequate at an earlier stage of litigation for the planning that is the subject of the FEIS by King County Superior Court Judge Jim Rogers in King County Superior Court File No. 09-2-326586-1 SEA (consolidated). As indicated in the Order on the Motion, the Court’s decision expressly states the principle opposite that argued by the Appellant. In addition, Appellant cites no authority supporting its argument that SEPA requires a certain percentage of design for purposes of environmental review. Appellant’s argument that a ten percent level of design is inadequate as a matter of law is unsupported.
5. Appellant did not demonstrate that a ten percent level of design was inadequate as a matter of fact. Appellant argued that ten percent design was inadequate, but in elaborating on why the design in this case was inadequate only alleged that impacts associated with lane width and barriers lacked adequate analysis within the FEIS due to the ten percent level of design, and did not raise any other specific objections related to the level of design. The FEIS identified a range of trail widths, and accounted for the possibility of barriers. Appellant did not identify any significant impacts associated with these project elements that were not addressed by the FEIS. The FEIS’s analysis of potential impacts associated with these project elements are adequate under the rule of reason.
6. The record does not support Appellant’s allegation that the City violated SMC 25.05.070.A.2. The City’s efforts to proceed with designing the Preferred Alternative are specifically allowed by SMC 25.05.070.D. The City has made no decision, and has taken no action that would “limit the choice of reasonable alternatives.”
7. The FEIS analysis of contraflow impacts is not inadequate merely because it does not contrast a contraflow design with a single-track design that does not meet the objectives of the proposal.

An agency need follow only a ‘rule of reason’ in preparing an EIS, and ... this rule of reason governs ‘both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.’” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (quoting *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978)) (citation omitted). Under the rule of reason, “as long as the agency ‘look[s] hard at the factors relevant to the definition of purpose,’ we generally defer to the agency’s reasonable definition of objectives.” *Theodore Roosevelt Conservation P’ship*, 661 F.3d at 72 (quoting *Citizens*

Against Burlington, 938 F.2d at 196) (alteration in original). *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (2016).⁵

SMC 25.05.060. indicates “Agencies shall make certain that the proposal that is the subject of environmental review is properly defined . . . A proposal by a lead agency or applicant may be put forward as an objective, as several alternative means of accomplishing a goal, *or as a particular or preferred course of action.*” (emphasis added)

SMC 25.05.440.D.2 requires that an EIS describe the preferred alternative and alternative courses of action and that “reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives.”

Here the contraflow design fulfilled the Project objective as defined by the City, and its impacts were disclosed in the FEIS.

In addition, to the degree that the Appellant is challenging the alternatives analysis, even in part, on the basis that the City did not fully consider the Appellant's preferred alternative of a bicycle only facility, the Appellant failed to brief that issue during pre-hearing motions and the City's motion on summary judgment was upheld on that issue. The Appellant provided no supporting argument or affidavits in its response to the Motion on that point, and therefore under the standards of summary judgment it was dismissed.

8. The analysis of every driveway and truck type that uses those driveways along the Preferred Alternative is not necessary to disclose the impacts associated with driveway crossings and the trail. The Appellant's analysis of driveway crossings did not identify any new significant impact that was not disclosed in the FEIS.
9. The weight of the evidence presented supports the determination of the FEIS that the Preferred Alternative will improve safety for non-motorized users over existing conditions. With regard to the concerns for safety raised by the Appellant, many of these are existing conditions for cyclists, and are not created by the Missing Link proposal.
10. The Appellant did not demonstrate that contraflow cycle traffic on a sidepath is so severe a safety risk that additional discussion or analysis was required beyond that already found concerning such potential impacts in the FEIS. The FEIS satisfies the rule of reason with the level of analysis it provides concerning environmental impacts associated with conflicts arising from a sidepath contraflow design.
11. The FEIS adequately disclosed the potential removal or relocation of railroad tracks. Appellant did not demonstrate that removal of railroad tracks would have a significant negative impact on the environment, or why coordination of such removal or relocation with rail owners would not mitigate impacts.

⁵ “Because NEPA is substantially similar to SEPA, . . . [courts] may look to federal case law for SEPA interpretation.” *International Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn.App. 512, 525, 309 P.3d 654 (2013).

12. The City's methodology for the FEIS's traffic, safety, and parking impacts analysis was consistent with industry-accepted standards and is legally adequate under the rule of reason. Further, the Appellant did not identify any new significant negative impacts to the environment concerning traffic, safety, or parking, that were not disclosed by the FEIS.
13. The FEIS is not required to disclose impacts to individuals or individual businesses, but is instead intended to disclose impacts to the environment as a whole. The FEIS is not inadequate where it may have not disclosed impacts to specific businesses. The Appellant did not demonstrate that economic impacts to land uses in the area of the proposal were not addressed by the FEIS.
14. The City did evaluate the economic impacts of the proposal in accordance with SEPA's analysis requirements, and its level of analysis fulfills the rule of reason. With regard to sections from the ECR that were highlighted by the Appellant as having been removed or changed, this language would have been confusing to readers of the FEIS and would not have enhanced the analysis, but was overly technical in nature, or the language changes were within the discretion of the FEIS preparers to present as they did because it best represented the information they had available. *See* SMC 25.05.400.C. Further, with the exception of using the term "significant" in some language of concern to the Appellant, the FEIS and ECR disclose and discuss the same impacts to businesses as the draft ECR.⁶
15. The Appellant argues in its closing brief that the Project is not consistent with the goals and policies of the BINMIC, and that this is not disclosed in the FEIS, but Appellant did not demonstrate how the Project is inconsistent with the BINMIC.
16. The Appellant cites no authority for the proposition that impacts analyzed by the FEIS must be labeled as "significant" or "not significant," and that failure to provide such labeling indicates inadequacy of the FEIS. An agency's determination of significance with regard to environmental impacts is a threshold question under SEPA, to determine if an EIS is required. Once the agency is committed to the environmental review required by an EIS, the question becomes one of adequacy of the analysis of impacts for purposes of disclosure to a decision maker, and whether it passes muster under the rule of reason. Labeling an impact "significant" is no longer required. An FEIS must address significant impacts in its analysis, and may address non-significant impacts. SMC 25.05.402 However, there is no requirement to use the term "significant" to distinguish between impacts in an EIS.
17. The Appellant cites *Kiewitt Construction Group, Inc. v. Clark County*, 83 Wn.App. 133, 920 P.2d 1207 (1996) for the proposition that an EIS is inadequate if it fails to include sufficient disclosure and discussion of the relative safety impacts of the proposal. However, in *Kiewitt* the court found the EIS inadequate because it failed to include *any* discussion or analysis of impacts related to truck traffic on a bicycle trail. In this case, the

⁶ See also paragraph 16 below concerning the use of the term "significant."

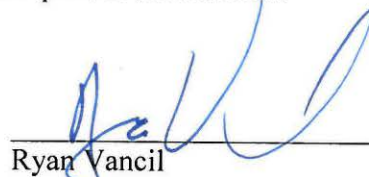
FEIS discussed and analyzed the specific impacts that may arise in the context of the proposed trail and traffic.

18. In accordance with SMC 25.05.055.A the FEIS was prepared “at the earliest possible point in the planning and decisionmaking process, when the principal features of a proposal and its environmental impacts” could be reasonably identified. While additional detail of review of certain impacts or of project design, or different methodologies of analysis may be possible, the FEIS need only evaluate the Build Alternative’s general suitability for the Missing Link proposal in order to enable the City to decide how to proceed with the proposal. The FEIS is not required to consider every conceivable effect or alternative to a proposed project. *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. State, Dept. of Transp.*, 90 Wn.App. 225, 230, 951 P.2d 812 (1998). In addition, greater detail on the specific design of the proposal can be required at the next phase of the process. *Glasser v. City of Seattle*, 139 Wn.App. 728, 742, 162 P.3d 1134 (2007)(Where the FEIS has indicated that additional consideration to impacts will be applied as the project design progresses this is adequate.) The FEIS gave appropriate consideration to the elements of the environment.
19. The Appellant raised other issues in its appeal that were not addressed at the hearing (*e.g.* the adequacy of notice for a portion of the proposal, cumulative impacts associated with a Seattle Public Utilities’ Combined Sewer Outflow, and the adequacy of shoreline impacts analysis). These issues have been abandoned, and are therefore dismissed.
20. On review of the entire record, the level of environmental analysis under the FEIS satisfies the rule of reason, and the SDOT Director’s determination of adequacy should therefore be affirmed.

Decision

The SDOT Director’s determination that the FEIS is adequate is **AFFIRMED**.

Entered this 31st day of January, 2018.



Ryan Vancil
Deputy 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 decision for the City of Seattle. In accordance with RCW 36.70C.040, a request for judicial review of the decision must be commenced

within twenty-one (21) days of the date the decision is issued unless a motion for reconsideration is filed, in which case a request for judicial review of the decision must be commenced within twenty-one (21) days of the date the order on the motion for reconsideration is issued.

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. Please direct all mail to: PO Box 94729, Seattle, Washington 98124-4729. Office address: 700 Fifth Avenue, Suite 4000. Telephone: (206) 684-0521.

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Department:

Goran Spearman
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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings and Decision** to each person listed below, or on the attached mailing list, in the matter of **The Ballard Coalition**, Hearing Examiner File: **W-17-004**, in the manner indicated.

Party	Method of Service
Appellant The Ballard Coalition c/o Pat Schneider Foster Pepper schnp@foster.com Josh Brower Veris Law Group PLLC josh@verislawgroup.com Leah Silverthorn leah@verislawgroup.com Danielle Granatt danielle@verislawgroup.com Megan Manion megan@verislawgroup.com Brenda Bole Brenda.bole@foster.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger
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Intervenor Cascade Bicycle Club c/o Matthew Cohen Stoel Rives matthew.cohen@stoel.com Rachel Cox rachel.cox@stoel.com Sharman Loomis sharman.loomis@stoel.com	☐ U.S. First Class Mail, postage prepaid ☐ Inter-office Mail ☒ E-mail ☐ Fax ☐ Hand Delivery ☐ Legal Messenger

Dated: January 31, 2018



Alayna Johnson
Legal Assistant

SEATTLE EX. NO. 8

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

Martin Luther King, Jr. County Labor Council
of Washington, AFL-CIO, General Teamsters
Union Local No. 174, Salmon Bay Sand &
Gravel, Co., Ballard Terminal Railroad, Ballard
Interbay Northend Manufacturing & Industrial
Center, North Seattle Industrial Association,
CSR Marine, and the Seattle Marine Business
Coalition (hereafter collectively, the "Ballard
Coalition"),

Plaintiffs/Petitioners,

v.

The City of Seattle, acting through its
Department of Transportation and Hearing
Examiner, and

The Cascade Bicycle Club,

Defendants/Respondents..

No. 18-2-04988-1SEA

ORDER GRANTING IN PART AND
DENYING IN PART BALLARD
COALITION'S CHALLENGE TO THE
ADEQUACY OF SDOT'S EIS

THIS MATTER came before this Court for hearing on December 7, 2018 on
Plaintiffs'/Petitioners' challenge to the Seattle Hearing Examiner's decision dated January 31,
2018, affirming the adequacy of the Seattle Department of Transportation's (SDOT)
Environmental Impact Statement (EIS) for SDOT's proposal to complete the "Missing Link
Project" segment of the Burke-Gilman Trail. At the hearing Plaintiffs/Petitioners were represented
by Joshua Brower of Brower Law PS and Patrick Schneider and Richard L. Settle of Foster Pepper,
PLLC; Respondent City of Seattle was represented by Assistant City Attorney Erin E. Ferguson;
and Respondent Cascade Bicycle Club was represented by Matthew Cohen and Sara Leverette of

ORDER GRANTING IN PART AND DENYING IN PART
COALITION'S EIS CHALLENGE- 1

FOSTER PEPPER PLLC
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1 Stael Rives LLP. The Court, having heard the arguments of counsel, having reviewed and
2 considered the administrative record of the proceeding below, and having reviewed and considered
3 the pleadings, briefs, declarations and affidavits, and exhibits thereto, filed herein, and as explained
4 in the Court's December 13, 2018 oral decision, the transcript of which is attached hereto and
5 incorporated into this Order, now ORDERS:

6 1. Pursuant to RCW 43.21C.090, the Court accords substantial weight to the Hearing
7 Examiner's decision that the EIS is adequate;

8 2. The EIS adequately discloses potential traffic hazards/safety impacts from the
9 Missing Link Project;

10 3. The EIS adequately discloses potential parking impacts from the Missing Link
11 Project;

12 4. The EIS does NOT adequately disclose adverse economic impacts associated with
13 the potential risks from vehicle to bicycle/pedestrian traffic conflicts; and

14 5. Specifically, the EIS discloses some economic impacts such as analysis relating to
15 real property values, and impacts to businesses from delays in delivery of products caused by
16 intersection issues. However, on the central matter of economic impacts to businesses from
17 potential traffic conflicts, the EIS and its Economic Consideration Report do not provide sufficient
18 information or analysis for proper consideration by the decision makers.

19 IT IS FURTHER ORDERED, the Plaintiffs'/Petitioners' challenge to the adequacy of
20 SDOT's EIS is DENIED in part and GRANTED in part as stated above.

21 DONE IN OPEN COURT this 21st day of December, 2018

22 
23
24 Honorable Samuel Chung
25 Samuel S. Chung
26

1
2 **PRESENTED BY:**

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4 /s/ Joshua C. Allen Brower

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ORDER GRANTING IN PART AND DENYING IN PART
COALITION'S EIS CHALLENGE- 3

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SALMON BAY / HEARING
DECEMBER 13, 2018

SPEAKER	NARRATIVE
JUDGE	All right. Good afternoon everyone. This is Judge Chung. On the matter of Martin Luther King Jr. King County Labor Council vs. City of Seattle, case number 18-2-04988-1 and let's have notice of appearances. First from the petitioner, the Coalition, please.
BROWER	Your Honor, this is Josh Brower on behalf of the Coalition
SCHNEIDER	And Pat Schneider on behalf of the Coalition.
JUDGE	Good afternoon and the City and the Bicycle Club.
FERGUSON	This is Erin Ferguson on behalf of the City of Seattle.
FEMALE	_____ on behalf of the Bicycle Club, and Richard Smith, the Executive Directors, also on the line.
JUDGE	All right. Thank you. I will read my holding... ruling into the record. I'll try to go as slow as I can. It will take a few minutes, I believe. Everyone with me so far?
VARIOUS	Yes.
JUDGE	I believe there's a media representative, is that correct?
WITSMAN	Yes, _____ here.
JUDGE	All right, thank you. And what is your name sir?
WITSMAN	Josh Witsman.
JUDGE	All right. We have you on the phone.
WITSMAN	Yeah.
JUDGE	All right. Good. This is an appeal from a decision by the Hearing Examiner for the City of Seattle, dated January 31, 2018 upholding the sufficiency of the final Environmental Impact Statement by the Seattle Department of Transportation Director. Under RCW 36.70C.040 the petitioners sought judicial review. This Court has jurisdiction and this Court held oral arguments on Friday, December 7, 2018, where I reserved my ruling until today. The Court is going to announce its ruling as follows: SEPA is essentially a procedural statute meant to ensure that environmental impacts and alternatives are properly considered by the decision makers. In Seattle, SEPA is implemented under chapters 25.05 of the Seattle Municipal Code. First, on the issue of how much deference should be given to the City's Hearing Examiner, the Coalition, the petitioners, argues that no deference should be provided to the hearing examiner and that this Court must directly review SDOT's determination. At oral argument the Coalition asserted that under <i>Glasser v. City of Seattle</i>, 139 Wn. App. 728 on page 739 of that opinion, there's a holding that the appellate court reviews the agency's decision regarding EIS adequacy, not the decision of the Hearing Examiner or the trial court. I think it's footnote 19 in that case, and that footnote refers the Klickitat County Citizens Against Imported

SPEAKER	NARRATIVE
	Waste case, 122 Wn.2d 619, which on page 633 makes the holding that appellate review is on the County's decision, not on the decision of the trial court. That case refers to the Maranatha Mining case, 59 Wn. App. 795, footnote 5 which states, "in this case we've reviewed the record before the council and do not rely on the Findings of Fact or Conclusions of Law entered by the superior court." There <u>That</u> was a case in which the City... the County Council's decision was appealed to the superior court. I agree with the respondent on this issue and hold that examiner should be given deference. I think that is in line also with RCW 43.21C.090 which <u>states</u> decisions of governmental agency must be accorded substantial weight. Now on the merits, there are basically three arguments that the Coalition is making on this appeal. First, the Coalition argues that the Final EIS is insufficient because it failed to take into account the traffic hazards created by the preferred alternate route along the Shilshole Avenue South. This is what I call traffic/safety issue. The Coalition cites numerous potential hazards which would be created by building a two-way side path bicycle lane. The Coalition cited studies from Helsinki Finland, Boulder, Colorado, and other <u>through its experts,</u> inaudible-3:07:19/ experts. Secondly, the Coalition's cites the loss of parking spaces if the preferred route is chosen. And the Coalition cites how the loss of parking spots would impact the area and the businesses. It cites how the Final EIS's data is misleading because it spreads out the loss of parking spaces to a larger area instead of a concentrated small area which would be a loss of 66% and not 11% as asserted by the Final EIS. Third, third issue for this Court, is the adverse economic impact that the Coalition argues was not fully disclosed. Unlike other SEPA actions, the City of Seattle's version of SEPA does require an economic analysis under Seattle Municipal Code 25.05.440E6. And I quote, "Analysis of following social, cultural, and economic issues shall be included in every EIS unless eliminated by the scoping process." There are of course some limits to this, but the parties agree that this section of applies. First on the safety issue, I am satisfied that the final EIS sufficiently discusses the transportation safety of the proposed trail. In my opinion, the City has exhaustively provided information about the proposed route, how it will be built, the length, the width, and all the ins and outs of the 1.4 mile Missing Link Trail. The AutoTURN programs that track the swept path of the large trucks and trailers turning into tight corners, etc., in almost all of the driveways along the route provide sufficient information to the

SPEAKER	NARRATIVE
	decisionmakers. I find that the Coalition's experts, Ms. Hershey and Bishop, did not meet their burden of showing that the two-way side paths are inherently more dangerous and the examples from Finland... Helsinki, Finland and Boulder and other studies lack a definitive conclusion finding that the proposed designs are deficient. I agree with the Hearing Examiner that the Coalition's experts on <u>these</u> issues did not identify any new significant, negative problems not disclosed by the City. Yes, some of the colored drawings and each CADs show that a wider area of conflict at intersections, driveways, but they do not overcome the burden of showing that the City did not adequately disclose the information in the EIS. Furthermore, the basis a comparison is with the current new trail status and I thought much of what the Coalition tried to do was that, was what an ideal trail would be. It is not feasible to have an elevated bicycle-only trail, and similarly the City has the right to keep within the same style of a trail along with the other 18.6 miles of Burke-Gilman. In conclusion, and most importantly, however, overall I find that the information provided by the City on this subject in this report gives the decisionmakers at the City adequate sufficient basis to make an informed decision. This is the legal decision I have to make and I find that the City on this issue of traffic and safety provided a sufficient basis. On the second issue, displacement of parking space, I also find that the City's Final EIS does contain sufficient information and a reasonably thorough discussion of the significant aspects of the probable environmental consequences. It appears to me that the City counted virtually every parking space within the area and did a thorough analysis of how the placement of the 1.4 mile trail will likely affect people who work in the area. While the preferred route chosen by the City along Shilshole that will remove <u>the</u> most number of spaces, 344, compared to other alternate routes and although the Coalition argues that how you define a sector would drastically change the loss of parking from 11 to 66% does have some merit, the issue again is whether the EIS contains sufficient information and discussions and I find that the City did. Finally, on the third issue of economic impact, however, I find that the Final EIS is insufficient under the law. It is not sufficient. The City's economic analysis is contained in a separate document called Economic Consideration Report, Administrator Record Page Nos. 2398-2461. It was marked as Tab 90 in the binder that I received and it was Exhibit A-17 before the hearing examiner. As stated before, unlike other SEPA actions, the City of Seattle requires an economic

SPEAKER	NARRATIVE
	impact analysis. The City's expert, Mr. Morgan Shook, S-H-O-O-K, testified about this at the hearing. Mr. Spencer Cohen was the Coalition's expert, I believe. There are two types of economic impacts on the proposed trail that was discussed. First was the potential delays caused by the traffic/safety concerns at the various driveways. Second was the potential impact from what the City calls "industrial vehicle involved bicycle and pedestrian conflicts." I'm satisfied that the Final EIS sufficiently discussed the impact from the delays. The EIS discusses delays in terms of how many seconds the delays may cause. The second impact, however, from the potential truck versus bicycle and pedestrians are not identified according to law. On page 2437 of the <i>Economic Discipline Report</i>, the City's expert wrote, "It is anticipated that the trail would improve safety overall for pedestrian and bicycle modes, but if the higher volume of pedestrian and bicycle traffic near industrial business and in loading and unloading zones increased the localized probability of industrial vehicle involved bicycle and pedestrian conflicts, then business operating expenditures could increase due to higher cost of insurance. However, the full cost, the full extent of any potential increases and business costs under 2040 Shilshole South alternative and how these costs compare to the 2040 no-build alternative are unknown." Whether or not this is a watered-down version as the Coalition alleges, it seems to me that this discussion on this issue is lacking. A number of business owners who will be affected testify testified that the impact from any potential accidents would be very critical, if not cause them to be out of business. I'm sure there's much more involved. However, the City's statement on this issue that there be simply increase in insurance appears to be lacking to me. The City is correct that under SEPA, the City is only required to discussed macroeconomics issues and not required to provide microeconomic information, i.e., what would happen to individual business owner or single property owner. Under <i>Kiewit Constr. Group v. Clark County</i>, 83 Wn. App. 133, an EIS that did not address specific impact of truck traffic on a bicycle trail was determined to be insufficient. It seems to me that this is the crux of this case, the potential risks associated with traffic/safety issue. What would happen if there is some terrible accident on this stretch where one-third of the one segment of the proposed 1.4 mile would be basically driveways. What are the increased costs associated with trying to deal with such risk? Some have already been identified by the businesses the witnesses, such as use of flaggers. As Mr. Cohen suggested, you do not want, you don't need to talk to all 40 or so business, but at least get some sampling of costs associated with dealing with this risk. I find that under current law, such analysis would be very commensurate with the project that is being sought. I know that my ruling today is about, is not about the wisdom of the proposed development but rather on whether the Final

SPEAKER	NARRATIVE
	EIS gives the City sufficient information to make a reasoned decision. I'm not making a finding on whether or not I like the route or not. That is left up to the wisdom of others. What I am deciding, however, is that under current SEPA law and under the Seattle Municipal Code, the current, the Final EIS is deficient on the issue of environmental impact associated with the potential economic impact associated with the potential risk from any traffic and safety issue. You can get a transcript of... I'm done with my ruling. You can get a transcript of my ruling by contacting us. I will ask the prevailing party, the Coalition to draft an order, run it by the City and the intervener and then circulate it back to me for signature. All right. That is the ruling of this Court. And I need to go off the record because I have to deal with a jury verdict in a criminal case right now. Any questions before we sign off?
BROWER	No, this is Josh Brower for the Coalition. Thank you, Your Honor.
JUDGE	All right. All right. Thank you. We're going to sign off then. All right.

12/21/2018 *approved*

 Samuel S. Chung

SEATTLE EX. NO. 9

BALLARD INDUSTRIAL

NEBAR
PIPE & FITTINGS

NEBAR
PIPE & FITTINGS

HMH
WELDING & HEADWORKS

HATTON
marine engine and
generator systems inc.

PARTS

BCX0189



BOWMAN

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DRY SAND-LIME
SANDBLASTING ABRASIVES

ATTENTION
Please Use Truck Scales

RECEIVING HOURS
Monday-Friday
8:00am to 5:00pm

EXW 10.5 H 3.5
EX 7.5 H 5.1
CUFT 3000

NO ROOF
CAR MOVERS

SAVING THE
HART'S
MAY



STIMMS

526

