

**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 Kisielius, 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."

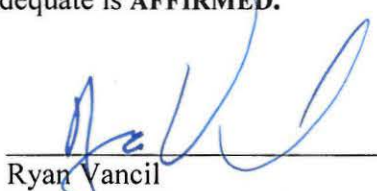
FEIS discussed and analyzed the specific impacts that may arise in the context of the proposed trail and traffic.

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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**BEFORE THE HEARING EXAMINER
CITY OF SEATTLE**

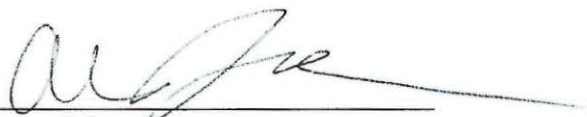
CERTIFICATE OF SERVICE

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
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Dated: January 31, 2018



 Alayna Johnson
 Legal Assistant