The Honorable Wick Dufford
Skagit County Hearing Examiner

BEFORE THE HEARING EXAMINER FOR SKAGIT COUNTY

In re the Matter of the Remand of the Application of **SKAGIT COUNTY DIKE, DRAINAGE AND IRRIGATION DISTRICT NO. 12** For a Shoreline Substantial Development Permit for **Improvements** to a portion of dike along the Skagit River.	PL-12-0191 **INTERVENOR MOTION TO RECUSE/DISQUALIFY HEARING EXAMINER**

Before I begin the motion and the brief in support I feel compelled to inform the reader of a couple of salient points: (1) I am not an attorney and have never held myself out to be an attorney. Given some of the ridiculous statements and assumptions made by the lawyers in the instant case I want to take away the issue that I am engaged in the "unauthorized practice of law". Simply put I am a layperson participant, not representing anyone other than myself in the above referenced hearing who has dedicated nearly 40 years of my life in studying all issues and gathering all information I can concerning the Skagit River. (2) On January 28, 2014 I had an ex-parte 15 second meeting with the Honorable Examiner wherein he asked me if the "issue" I had referenced in the meeting on said day involved the Cascade Mall wherein I answered yes and I wanted him to know that this subsequent Motion to Recuse was nothing personal, it was simply to preserve the issue for appeal. The Honorable Examiner said that he understood what I had to do and took no offense to me doing so. I would hope that if any of the other parties have had ex-parte contacts with the Hearing Examiner that they would be so forthcoming. (3) This motion is

made in a timely manner contrary to the opinion of the Burlington attorney. The "fatal flaw" in his thinking is that the decision made by the Examiner was rejected for further hearings by the Board of County Commissioners on September 24, 2013 thereby staying the decision and requesting the Honorable Examiner to make further decisions. It is those further decisions that I am asking the Examiner to recuse himself from making. Having stated those three points:

Comes now the **INTERVENER**, **LARRY KUNZLER**, and makes this motion for recusal based on perceived violations of the States Appearance of Fairness Doctrine due to the following:

1. **The Honorable Examiner has based a decision on the Applicants word while not having any supporting evidence.**

2. **Electronic Records required by SCC 14.06.240(8) could not be made available however the Hon. Examiner did not require that the hearing be held over or to require that all the same individuals testify, and to date has refused to make his and his assistants notes taken at the first hearing available to the public thereby keeping the public from knowing what testimony he relied upon to make his decision.**

3. **The Hon. Examiner like the City of Burlington, the Dike District, and the Skagit County Planning Department ignored crucial evidence that was submitted regarding the hydraulic impacts of the levees on upstream property owners**

4. **The Hon. Examiner failed to address the floodway issue which is crucial to any work being proposed to the levee system.**

5. **The Hon. Examiner ignored provisions of the SMA with respect to the floodway issue and improvements versus maintenance by the applicant.**

6. **The Hon. Examiner by limiting the testimony to just the first three issues identified by the county commissioners is denying citizens the right to express themselves in accordance with the last directive from the county commissioners in which they stated all matters not decided herein are expressly reserved for further proceedings.**

WASHINGTON STATE APPEARANCE OF FAIRNESS DOCTRINE

The appearance of fairness doctrine ("the Doctrine") requires that hearings and decisions appear to be fair as well as being fair in fact.[1] Ironically and some would say appropriately the Doctrine had its birth in Skagit County.[2] To state it in rule form as it applies to land-use decisions, the **appearance** of **fairness doctrine** is that, when a hearing "or other contested case proceeding" is held by a local legislative body, planning commission, **hearing examiner**, zoning adjuster, board of adjustment, or other local body in connection with an individual application for official action, the action taken as a result of such hearing is void if the conduct of the hearing or circumstances surrounding it would make it **appear** to a reasonable person who was informed of the facts that one or more of the members of the body may have acted out of improper motives.[3] To state this in layperson terms if a disinterested party looking from outside the window in would feel that the hearing was unfair then that is an issue that must be addressed. Such is I believe the instant case.

1. The Honorable Examiner has based a decision on the Applicants word while not having any supporting evidence.

At the first hearing wherein there was an inadequate recording, as required by SCC 14.06.240(8) held on Wednesday, April 24, 2013 there was testimony presented by citizens and myself that the Applicant did not have all their permits they needed to have in order to proceed with their application. A rather outraged attorney and consultant sent the Examiner comments denying that they did not have all their permits.[4] As was pointed out to the Examiner at the pre-

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[1] Carolyn M. Van Noy, The Appearance of Fairness Doctrine: A Conflict in Values, 61 Wash. L. Rev. 533, 534 (1986)
[2] Smith v. Skagit Cnty., 75 Wn.2d 715, 453 P.2d 832 (1969) holding modified by State v. Post, 118 Wn.2d 596, 826 P.2d 172 (1992)
[3] 17 Wash. Prac., Real Estate § 4.14 (2d ed.)
[4] ***See*** Exhibit 23 dated 4/29/2013.

conference meeting on January 28, 2014 no permits were ever reviewed by the Examiner or this Intervener. No permits were submitted or evidently reviewed by the Skagit County Planning Department for its staff report. The applicant never produced copies of any SEPA checklist, floodplain management permits or grading permit required before all the construction over the last 24 years could take place. Where is the cumulative impact analysis that would be required for all that fill material? The question that all this raises is how does an adjudicator (i.e. Hearing Examiner) make a rational, fair or at least appear to be fair decision without reviewing all the appropriate evidence?

REMEDY: I would be happy to withdraw all of this section of the motion for recusal if the Honorable Examiner requires that all SEPA files, floodplain management permit files and grading permit files used by Dike District 12, City of Burlington, and the Skagit County Planning Department for all levee work performed within the boundaries of Dike District 12 from the I-5 bridge upstream to Highway 20, since the 1990 flood event be made available for public review and consideration and ultimate review by the Hearing Examiner.

2. Electronic Records required by SCC 14.06.240(8) could not be made available however the Honorable Hearing Examiner did not require that the hearing be held over or to require that all the same individuals testify, and to date has refused to make his and his assistants notes taken at the first hearing available to the public thereby keeping the public from knowing what testimony he relied upon to make his decision.

Washington State case law has long held that complete recording of public testimony is necessary and when that does not happen the "record of the proceedings are inadequate."[5] Further, without a transcript of the hearing in question the hearing held would be insufficient to

[5] Byers v. Bd. of Clallam Cnty. Comm'rs, 84 Wn.2d 796, 529 P.2d 823 (1974)

affect a proper review by a court of record.[6] A full and complete record is important in all types of proceedings. However, the necessity of an adequate record is especially acute when the court is called upon to review adjudicatory proceedings.[7]

In the instant case before us the Honorable Examiner held a second hearing once the electronic failure at the first hearing was brought to his attention.[8] However, the Honorable Examiner did not require the hearing to be held over, nor require the same individuals to testify, nor upon request produce a copy of his and his legal assistant's notes that he relied upon to write his decision to be made public. This raises the question of rather are not the second hearing was for show only, meaning the Examiner's mind was already made up. This also raises the question how can the public know what the Examiner relied upon to make his decision. Here is a classic example: the Examiner states in his decision that "the levee system involved has existed for more than 100 years. This part of the Dike District No. 12 system was established in 1895".[9] This is a classic example of false and misleading testimony that was given to the examiner. The district was in fact formed more than 100 years ago however this part of the levee system that is the subject of this controversy in the instant case was not put into place until 1955. Until that time the levee system sat at its Northern terminus on Lafayette Road approximately 4,000 feet to the West.

3. The Honorable Examiner like the City of Burlington, the Dike District, and the Skagit County Planning Department ignored crucial evidence that was submitted regarding the hydraulic impacts of the levees on upstream property owners.

[6] Bennett v. Bd. of Adjustment of Benton Cnty., 23 Wn. App. 698, 597 P.2d 939 (1979)
[7] 23 Wash.App. 260, 263, 595 P.2d 58, 60
[8] Hearing Examiner Cover Letter, Re: Public Recording/Transcript of Public Hearing in re Shoreline Development, Substantial Development Application PL12-0144
[9] *See* H/E decision page 3 paragraph 10.

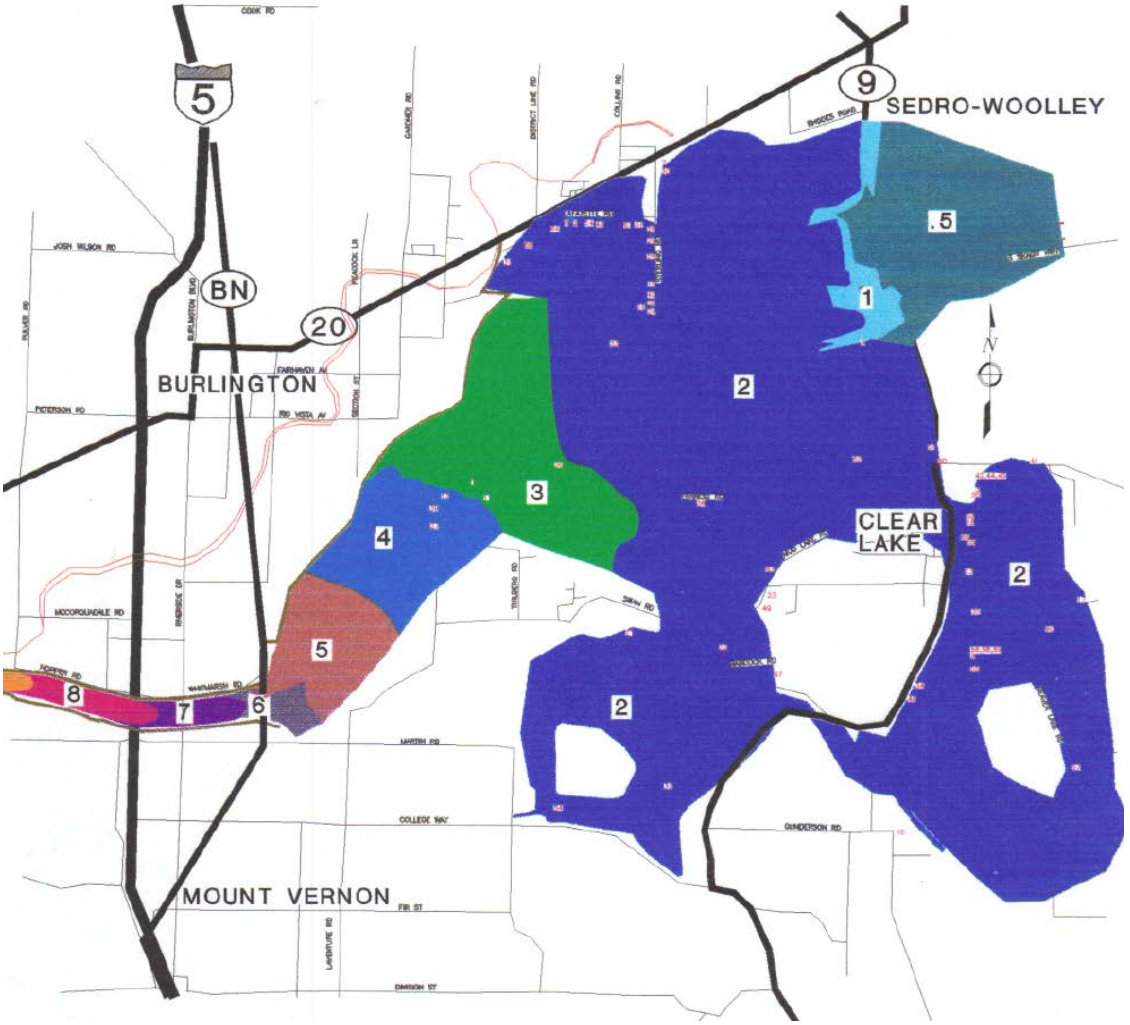
There was never a hydraulic analysis and certainly never a "risk analysis" performed on this section of the levee on its impacts to upstream property owners until 1995, which determined the impacts of the levee system on upstream property owners as a result of the 1990 flood event which according to USGS records carried 146,000 cfs at Concrete and 152,000 cfs at Mt. Vernon. This would mean that cumulatively all the "improvements" to the levees have already had an impact on any flows above 152,000 cfs at Mt. Vernon. The results of that hydraulic analysis were submitted to the city of Burlington for its draft EIS in March 2009.

Those comments contained the following paragraph:

> **COMMENT #26:** As the below diagram shows it is not the BNSF railroad bridge that is the restriction to flood conveyance as much as it is the configuration of Dike 12 and Dike 17 levees. The below diagram was provided by a hydraulic analysis **performed by nhc** of the impacts of induced flooding due to the current levee system. Even if you accept the argument that the bridge acts as an impediment to flood flows the impacts of said impediment are minuscule as compared to the levee system itself as the flood waters simply scour out the area under the bridge. The FEIS needs to identify the amount of levee setbacks planned by the City of Burlington, Mt. Vernon, Dike Districts 12 & 17 and the WSDOT.[10]

[10] *See* comment letter submitted to Burlington dated March 8, 2009.

GRAPHIC SUMMARY OF
INCREASES IN 1990 FLOOD LEVELS
DUE TO LEVEE SYSTEM



The exact same exhibit was submitted to the Hon. Hearing Examiner and the Skagit County Planning Department on April 22, 2013 with the following verbiage:

> "Below is a graphic summary prepared by Skagit County and the Corps of Engineers hydraulic consultant (**nhc**) on the impacts of the current levee system on upstream property owners. The numbers represent the amount in feet of additional water the levee system described above currently artificially stores upstream this artificial storage impacts not only did look at champs/sterling/Clearlake/Sedro Woolley communities but is responsible for

pushing floodwaters over Highway 20 the north and thus flooding the old natural channel of the Skagit River gauges slough…"[11]

At the public hearing on June 12, 2013 the above referenced exhibit was again submitted to the hearing examiner with the following verbiage:

> Finally, I'd like to submit to you what I consider; this is one of the things that Mr. Schultz in his letter to you being so outraged of my comments I submitted to you the last time. He doesn't mention this. In fact I submitted it to the City of Burlington, they don't mention it. I submitted it to Dike District 12, they don't mention it. This is the results of a hydraulic analysis performed by **nhc** on how much the levees already impact the upstream property owners. {See 1995 **Graphic Summary of Increases in 1990 Flood Levels Due to Levee System**} This is, it was entered into a court of law in Snohomish County Cause 93-2-05201-2 so it is a matter of public record. **Nhc** was paid approximately $250,000 dollars to conduct this. So if you follow the river down, Burlington in their EIS and the Dike District Commissioners want to continually blame the railroad bridge and something I have to add that was stated here earlier was that Burlington's using the January 12, 2012 **nhc** report. In that report in January 2012, Dr. Leytham did not know that the railroad bridge does not back up any water onto anybody it is the constriction of Dike 17 and Dike 12 just west of the freeway where the two come together. That's what's backing the water up as well as the current levee out there. You can see it as you go down the channel; it's already been raised 7 feet, 8 feet. Where does that fit into allowing them to raise it even more?
>
> One other last thing that was stated about they used **nhc's** report of January 12th. This is before Dr. Leytham realized that the water does not flow that goes out at Sterling, does not flow between Burlington Hill and Sterling Hill, it goes straight to Gages Slough straight out to Bayview Ridge, from Bayview Ridge it splits to the Samish and Padilla Bay. Like the young man said from

[11] ***See*** April 22, 2013 comments submitted to the hearing examiner re: Shoreline substantial development application's PL 12 – 0191.

> FEMA,[12] I would have put a floodway through there 20 years ago because that's where it belongs. So in reality when you look at this the water that's going out in Sterling and flooding the area north of Highway 20, *the Dike District is flooding their own people*.[13]

At one point during the prehearing conferences the Hon. Examiner stated words to the effect that the public does not seem to be actively following this issue. Based on the discussion above one has to ask the question what good does it do to attend public hearings or participate in public hearings if the evidence you are submitting is ignored by all the participating parties as well as the adjudicator? The hydraulic analysis performed by **nhc** was not even mentioned let alone analyzed for the upstream impacts to the property owners which is the main subject of this controversy. I would submit that to a person from outside the window looking in, it would not appear to be fair to the citizens who did participate or to the upstream property owners.

There were several more pieces of crucial evidence that were submitted to the Hon. Examiner that were evidently ignored in their entirety as did the applicant and the Skagit County Planning Department. One of those is reprinted below and should be familiar to the Hon. Examiner as it was first submitted to him in 1985 during the hearings before the pollution control hearings board regarding Gages Slough and its importance as a floodwater conveyance corridor.

[12] ***See*** Exhibit #35.

[13] ***See*** Transcript **SkagitRiverHistory.com Partial Transcript of June 12, 2013 Public Hearing Before the Skagit County Hearing Examiner, Re: Shoreline Substantial Development Permit PL12-0144, Pages 49-50.**

There has been a lot of water under the bridge so to speak since the 1985 hearings on the Cascade Mall where the current Hon. Examiner first viewed the above referenced piece of evidence. The issue at that time was should Gages Slough be designated under the states Shoreline Management Act ("SMA") by virtue of the fact that the slough was a floodwater conveyance system and a series of wetlands that needed protection under the Act. Then like now a substantial amount of evidence was submitted into the record. Evidence that was ignored by the Hon. Examiner at that time and is evidently being ignoring once again. Since the hearing in 1985 wherein the Hon. Examiner and other board members got it wrong as well as the Skagit County Planning Department, and the local Hearing Examiner at the time who was the former Director of the Planning Department, the city of Burlington has designated the Gages Slough

area under the states Shoreline management program. In fact Burlington even used the above referenced exhibit in their justification for designating the slough under the SMP.[14]

It was difficult in 1985 to understand the decision made by the Hon. Examiner at that time as it is now when previous to the mall hearings the Federal Emergency Management Agency ("FEMA") in its 1984 flood insurance study ("FIS") for the city of Burlington recognized the area as a "drainage channel".[15] In a letter subsequent to the adoption of the FIS for Burlington FEMA referred to the Gages Slough area as a "conveyance area" and "secondary drainage channel".[16] It would appear to a party standing outside the window looking in that the Hon. Examiner just accepts whatever government tells him and completely ignores the testimony of citizens who for whatever reason are opposed to whatever project is at hand which would make the hearing appear to be unfair.

4. <u>The Hon. Examiner failed to address the floodway issue which is crucial to any work being proposed to the levee system.</u>

Many letters both pre and post the 1984 FIS[17] were submitted to the Hon. Hearing Examiner and were essentially hidden from public viewing by putting all of them under one exhibit labeled "Kunzler Folder".[18] This seems a bit strange as all of the exhibits submitted by the applicant were given individual numbers and descriptions and would appear to have the effect of trying to keep the public from seeing the evidence against approval of the project. The

[14] As a sidebar I would like to point out that the hand written notes contained on the right-hand side of the exhibit came directly from the hydraulic analysis prepared for the building of the Cascade Mall. Figures that were subsequently rejected by FEMA however, that did not prevent the city of Burlington from approving the building permit for the cascade mall.

[15] ***See*** Exhibit 36.
[16] ***See*** Exhibit 35.
[17] ***See*** Exhibit 36.
[18] ***See*** Exhibit 35.

Hon. Examiner while not mentioning any part of the evidence simply states "The Examiners jurisdiction here is limited to SMA compliance under State law."[19]

Part of the multiple exhibits filed under Exhibit 35 included an October 10, 1996 **USACE MFR Re: Skagit River Levee Repairs.**[20] The author, states in part the following:

> 1) Because of the unique characteristics of the Skagit River Delta, conventional floodways were not adopted for the entire delta downstream of Sedro Woolley. In this area, for the Skagit River proper, the levees confining the channel and adjacent areas have been designated as floodways. In the vicinity of Whitmarsh Road and old the U.S. Highway 99 bridge, the most landward levees were used to establish the floodway. (Emphasis added.)

I also introduced a copy of an e-mail exchange I had with a FEMA employee regarding the floodway designation dated October 15, 2001 **E-mail RE: NFIP Policy Enforcement and Floodways**[21] some 17 years after the adoption of the FIS[22] entered into the record by Applicant. The FEMA representative states very clearly:

> " **Yes, the floodway established in 1985 is located between the landward toe of the levee so yes this means that there can be no fill or other kind of development outside of the original cross-section located within this designated floodway. (*Emphasis added*)**

And then of course there is the 1984 FIS itself that was introduced by the applicants which again states very clearly:

> For the study area downstream of Sedro Woolley, flood plain encroachment must be restricted in certain definitive areas. For the Skagit River

[19] ***See*** H/E decision page 7 paragraph 5.
[20] ***See*** TR Pg. 45 Ln's 10-19.
[21] ***See*** TR Pg46 Ln 14.
[22] ***See*** Exhibit 36.

> proper, the levees confining the channel and adjacent areas have been designated as floodways. In the vicinity of Whitmarsh Road and the old U.S. Highway 99 Bridge (Garl Street), the most landward levees were used to establish the floodway boundary. . . . Suggested measures include design of new roads and streets to be at grade in order that obstructive fills not be placed perpendicular to local flow pass, preservation or swale areas and existing drainage channels such as Gages Slough, and a minimization of development density in currently zoned agricultural areas (***Emphasis added***.)[23]

The Applicant wanted the Hon. Examiner to believe that a "compromise" was reached with FEMA yet like the SEPA checklist, the floodplain management permits, and the grading permits, no document from Washington DC, FEMA Headquarters who made the decision to designate the levees as part of the floodway, was submitted supporting the alleged "compromise". When did that compromise occur and what documentation and/or justification were there for the change other than a potential phone call from the Burlington Planner and a former FEMA employee? None was submitted into the record. As stated above the Hon. Hearing Examiner simply ignored the evidence presented to him and implies that it's not his job.[24] I would respectfully submit that the SMA is not now nor ever has been a vehicle for local governments to break the law irrespective of whether or not they are federal, state or local. And when those kinds of conflicts exist and arise in a public hearing it is indeed the Hearing Examiners responsibility to examine those issues and reach an adequate resolution. Clearly that did not happen in the instant case and would appear to a person looking from outside the window in that the hearing was unfair.

[23] ***See*** TR Pg69 Ln12. ***See also*** Exhibit 36 page 18.
[24] ***See*** decision page 17 para 5.

5. <u>The Hon. Examiner ignored provisions of the SMA with respect to the floodway issue and improvements versus maintenance by the applicant.</u>

The consultant for the applicant referenced RCW 90.058.030 when he stated "we've got these definitions and we work within those."[25] Really?? That would be the same section of the State Shoreline Management Act that states at §.030(2)(d)(i) "*Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program* ***as long as such portion includes, as a minimum, the floodway AND THE ADJACENT LAND EXTENDING LANDWARD TWO HUNDRED FEET THEREFROM***. **(*<u>Emphasis added</u>*.)** Clearly even if you accepted applicants foolish designation of where they think the floodway is, their levees fall within the 200 feet of the requirement of the State Shoreline Management Act.

The consultant also referenced WAC 173-27-040 Developments exempt from substantial development permit requirements as a definition Respondent's work within. The only section that addresses levees is §.040(2)(k) which states:

(k) Operation and maintenance of any system of dikes, ditches, drains, or other facilities existing on September 8, 1975, which were created, developed or utilized primarily as a part of an agricultural drainage or diking system; **(*<u>Emphasis added</u>*.)**

Maintenance is defined by the same WAC at §.040(2)(b) which states in part:

(b) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements. "Normal maintenance" includes those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition. "Normal repair" means to restore a development to a state comparable to its original condition, including but not limited to

[25] ***<u>See</u>*** TR Pg69 Ln16.

its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction… **(*Emphasis added*.)**

Clearly the entire project and or projects described in the Applicants **DEIS** and **FEIS** do not constitute maintenance however it does explain their infatuation with the word. The four feet of fill material placed on the riverward side of the levee along Whitmarsh Road after the 1990 flood event was not maintenance but an illegal improvement to their levee system. Just like the installation of keyways that used the material removed from the keyway areas to place on the riverward side of the levee. One such keyway was within the project area near to and adjacent to the Burlington Sewage Plant. No permits regarding said keyway were submitted during the course of the hearing and none were asked for by the Hon. Examiner. A keyway is clearly not normal maintenance or normal repair under the Act and is just as clearly an improvement that needs proper permits. The Hon. Examiner, by not requiring copies of permits for such activity appears to make decisions only on "trust me the check is in the mail" statements made by local governments. This would appear by a disinterested individual looking from outside the window in as being unfair to citizens and participants who painstakingly researched the issues and submitted evidence contrary to the Applicants.

6. The Hon. Examiner by limiting the testimony to just the first three issues identified by the county commissioners is denying citizens the right to express themselves in accordance with the last directive from the county commissioners in which they stated all matters not decided herein are expressly reserved for further proceedings .

At the very first prehearing conference dated October 23, 2013, the first words out of the Dike District attorney's mouth was that the next public hearing should be limited to the three issues labeled a., b, and c., on page 5 of the county's resolution on Dike District 12 Shoreline

permit appeal. The Hon. Examiner agreed with the Dike district attorney to limit the testimony without acknowledging paragraph number three which stated all matters not decided herein are expressly reserved for further proceedings. The question now arises is another public hearing considered a further proceedings? Any time an adjudicator limits the testimony of the general public the general public should be suspicious of that decision. Suppose a citizen wants to tell the examiner that the applicant is receiving dirt for its project from the Nookachamps community which will be used to further flood the upstream property owners. Would that testimony be allowed? Suppose an upstream property owner wants to testify that there is no such thing as 12 year certified levees? Would that be allowed? Like the Mayor of Sedro Woolley testified to suppose another homeowner comes forward and shows the Examiner that they have spent thousands of dollars razing their house and another half an inch will put water into their house again. Would that be allowed? This is one more example of why the Hon. Examiner should consider recusing himself from further proceedings. So long as any public testimony deals with the flooding issue in general there should be no restrictions on public testimony. Clearly in the instant case such a decision to limit public testimony would appear to the uninterested observer looking from outside the window in that the Hon. Examiner has made all his decisions in favor of the applicant while ignoring citizen concerns about induced flooding by the applicant.

CONCLUSION

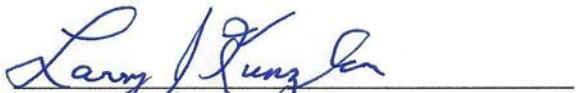
For the record, I want to restate my position that this motion is made without any malice towards the Hon. Hearing Examiner. I have known Mr. Dufford for almost 30 years and respect and admire his long career of public service. However, as any seasoned land-use lawyer would agree with the issue of appearance of fairness violations must be preserved for the record and no matter which way the Hon. Examiner decides this issue, the issue will be preserved for appeal to

the County Commissioners, the Shoreline Hearings Board, Superior Court in Thurston County, the Washington Court of Appeals and in all likelihood since the appeal before the Shoreline Hearings Board would be De Novo and constitutional rights are being violated that have not been alleged to date, the U.S. District Court for the Western District of Washington. One has to ask oneself given the amount of time and expense to get this through the process why doesn't the applicant simply wait for the GI Study to be completed? What's the rush? Could it be that this entire façade of "flood control" is actually more about flood insurance and promoting more irresponsible development in the floodplain? The applicant has stated several times that "large portions of Burlington would be taken out of the floodplain". Did the Hon. Hearing Examiner ever make a determination of what portions of Burlington would be taken out of the floodplain? Does it involve property that one of the Dike District Commissioners who works for one of the major developers in the Valley owns or has an interest in?

I realize that with the exception of number 1 above, any of the individual events discussed herein would not probably be justification for recusal however, cumulatively I think that an unbiased observer could only come to the conclusion that based on the record, the hearing process described herein has not been fair. I do thoroughly believe that the Hon. Examiner has been misled by the Applicants and not forcefully pursued the necessary evidence he should have and therefore should consider recusing himself from all further proceedings in the instant case.

Therefore I respectfully request the Hon. Examiner to consider recusing himself from any further proceedings in the instant case based on the verbiage contained herein.

Respectfully submitted this Tenth Day of March 2014;



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