BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of **THE WESTLAKE STAKEHOLDERS GROUP** IN RE SEATTLE DEPARTMENT OF TRANSPORTATION, SEPA DETERMINATION OF NON-SIGNIFICANCE (DNS), SEATTLE BICYCLE MASTER PLAN	Hearing Examiner File No. W-13-009 MOTION FOR RECUSAL/DISQUALIFICATION AND REQUEST FOR CONSIDERATION ON SHORTENED TIME

I. INTRODUCTION

Pursuant to Hearing Examiner Rule ("HER") 2.12(b), the Westlake Stakeholders Group ("Appellants") respectfully request Hearing Examiner Tanner ("Examiner Tanner") recuse herself from presiding over this case (the "Appeal"), that a different Examiner be assigned and that this motion be considered on shortened time on or before the prehearing conference presently scheduled for 10:00 AM on Wednesday, January 15, 2014.

On December 23, 2013, Appellants filed their Notice of Appeal of the December 2, 2013, State Environmental Policy Act ("SEPA") Determination of Non-Significance ("DNS") issued by the Seattle Department of Transportation ("SDOT") for the update to the Seattle Bicycle Master Plan (the "Plan"). On December 31, 2013, Appellants were notified that the Appeal had been assigned to Examiner Tanner. Appellants respectfully request Examiner Tanner recuse herself because allegations of Appearance of Fairness Doctrine ("AFD")

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

violations are currently pending against Examiner Tanner in a similar case, Hearing Examiner Cause Nos.: W-08-007; W-11-002; W-12-002/King County Superior Court Cause No.: 09-2-26586-1SEA (collectively, the "Missing Link Appeal"). Like here, the Missing Link Appeal also involves a citizen group challenge to a major bicycle project in Seattle where SDOT is both the project proponent and its own lead agency. In light of Examiner Tanner's actions in the Missing Link Appeal and that the AFD violation allegations are yet unresolved, it is inappropriate for Examiner Tanner to hear this Appeal, which is factually similar and involves similar parties and circumstances. Neither party will be prejudiced by recusal and reassignment because no action has been taken in this case other than to schedule the prehearing conference and to schedule a tentative hearing date. By contrast, if Examiner Tanner refuses to recuse herself, this matter will be tainted from the start, giving rise to an automatic appeal issue.

A. Examiner Tanner Should Recuse Herself Because The Pending Appearance of Fairness Doctrine Allegations Are Unresolved

From January through May 2009, Examiner Tanner presided over the first portion of the Missing Link Appeal wherein a citizen group (the "Citizen Group") challenged SDOT's SEPA DNS for the "Missing Link" portion of the Burke-Gilman Trail through Ballard. *See* Hearing Examiner Cause No.: W-08-007. Based on Examiner Tanner's actions in the Missing Link Appeal, the Citizen Group appealed her decision to the King County Superior Court and alleged, among other claims, AFD violations against Examiner Tanner. *See* King County Superior Court Cause No.: 09-2-26586-1SEA. To date, the King County Superior Court has not issued a Final Order (CR 54) in the Missing Link Appeal and thus the Citizen Group AFD allegations against Examiner Tanner are still pending. Final resolution of those AFD allegations will only occur once the King County Superior Court issues a Final Order (CR 54) in Cause No.: 09-2-26586-1SEA, thus making these issues ripe for review by the Division I of the Court of Appeals.[1] As

[1] The Missing Link Appeal is currently on hold in the King County Superior Court awaiting SDOT's completion of an Environmental Impact Statement ("EIS") for the Missing Link.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

explained in greater detail below, the pending AFD violations alleged against Examiner Tanner include her disregard for the Examiner's Rules of Procedure; disregard for applicable controlling law; and her apparent bias and prejudgment in SDOT's favor. Since this Appeal is so factually similar, involves similar issues of law, and again involves a citizen group challenge to an SDOT SEPA DNS for an SDOT project where SDOT is the project proponent and its own lead agency, it is likely that appearance of fairness issues will once again arise. The only way to avoid this is for Examiner Tanner to recuse herself. If she does not, these issues will immediately become an issue for appeal in this case.

B. Examiner Tanner Should Recuse Herself Because She Has a History of Bias and Partiality Against Citizen Groups Challenging SDOT Major Bicycle Projects in Seattle

Pursuant to HER 2.12(b) an examiner should recuse herself from hearing a matter in the event of any personal bias, prejudice, or other reason that would substantially affect the examiner's objectivity. Pursuant to the Appearance of Fairness Doctrine, the "public officers impressed with the duty of conducting a fair and impartial fact-finding hearing . . . must so far as practicable . . . be ***open minded, objective, impartial*** and free of entangling influences or the taint thereof." *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 869, 480 P.2d 489 (1971) (*emph. added*). "It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a ***fair hearing, a hearing not only fair in substance, but fair in appearance as well***." *Id.* (*emph. added*); *see also Raynes v. City of Leavenworth*, 118 Wn.2d 237, 245–46, 821 P.2d 1204 (1992)(An action tainted by a violation of the appearance of fairness doctrine is void.).[2]

In *Chrobuck*, the Court held that a decision of quasi-judicial body as simple as denying an opportunity for cross-examination "added to the appearance of unfairness inhering in the

[2] To demonstrate a violation of the appearance of fairness doctrine, "no actual corruption or unfairness need be shown; it is the ***appearance or reasonable suspicion*** of it that is the crux of the matter." STOEBUCK AND WEAVER, 17 WASH. PRACTICE REAL ESTATE: PROPERTY LAW §4.14, at 231 (2004)(*emph. added*).

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

proceedings." 78 Wn.2d at 870. The Court stated that the "cumulative impact" of "circumstances" can "cause an aura" of partiality and prejudgment, creating an appearance of unfairness. *Chrobuck*, 78 Wn.2d at 870. Here, Examiner Tanner's bias and prejudice against citizen groups challenging SDOT bicycle projects and her preferential treatment of SDOT and the Cascade Bicycle Club ("CBC")– the interveners in the Missing Link Appeal – was so evident and prevalent throughout the Missing Link Appeal that there is a high likelihood it will repeat here since this case is so factually and legally similar and involves nearly identical parties. Based on this, the Appellants have a reasonable and good faith belief that this bias and prejudice will occur again and they will not obtain a fair and impartial hearing unless Examiner Tanner recuses herself.

Examiner Tanner's bias against citizen groups challenging SDOT projects began at the prehearing conference in the Missing Link Appeal. This first occurred when Examiner Tanner refused to allow the Citizen Group challenging SDOT's SEPA DNS for the Missing Link to conduct any discovery thereby forcing the Citizen Group to proceed to the evidentiary hearing without any formal discovery or depositions. Examiner Tanner made this decision by granting SDOT's ***oral*** motion at the prehearing conference. This shows her bias because the Hearing Examiner's Rules clearly permit discovery and because she granted an ***oral*** motion even though the Examiner's Rules require all motions be in ***writing***. *See* HER 2.09 (Scope of discovery to be determined at the prehearing conference); *see also* HER 3.11 (Appropriate prehearing discovery, including written interrogatories, and deposition upon oral and written examination, is permitted); *see also* HER 2.16 (Requires all motions, except those made at hearings, be made in writing and upon 7-days notice, including motions to dismiss any part of an appeal). Here, the Appellants have a reasonable basis to believe they will again be rushed to hearing without discovery because Examiner Tanner has set the hearing date for March 5, 2014—just seven (7) weeks after the prehearing conference. Discovery is necessary because this matter involves

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

complex factual and legal issues related to the update to the Master Plan, which encompasses and impacts the ***entire*** City of Seattle. Even with efficient discovery, it will be difficult if not impossible to properly prepare this case for hearing in just seven (7) weeks. Because of that, the Appellants also are filing a Motion to Continue the Hearing Date. Again, the only way for Appellants to obtain a fair hearing is if they are given an impartial Examiner, given more time and permitted discovery.

Examiner Tanner's bias, prejudgment and disregard for the Examiner's own Rules of Procedure continued when she then granted SDOT's ***oral*** motion at the Missing Link Appeal prehearing conference to dismiss the issue of whether or not SDOT is required to study alternatives in its threshold determination. Again, Examiner Tanner did so without any briefing, legal support, or opportunity for written response by the Citizen Group in violation of HER 2.16, which requires such motions to be in writing and on seven (7) days notice. Examiner Tanner then used her ruling to institute a systematic prohibition throughout the entire evidentiary hearing in the Missing Link Appeal whereby she prohibited the Citizen Group from asking any questions about the sections of the SEPA rules requiring consideration of alternatives. This ruling and the systematic prohibition prejudiced the Citizen Group by limiting its ability to properly and fairly conduct the evidentiary hearing. It also is contrary to Washington law.[3] Here, the Appellants also are alleging SDOT's DNS for the Plan is flawed because SDOT failed to consider alternatives in its SEPA threshold determination. Based on Examiner Tanner's prior actions to grant oral motions and her disregard for controlling Washington law on this subject, Appellants have a well-founded fear that they will be treated similarly unless another Examiner is assigned to handle this Appeal.

[3] In *Feil v. EWGMHB*, the Washington Supreme Court stated that the lead agency must study alternatives in its SEPA threshold determination as part of its review of a bike trail project. *See Feil v. EWGMHB*, 172 Wn.2d 367, 259 P.3d 227 (2011), fn. 4.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

Examiner Tanner also made rulings contrary to long-standing Washington law, which are likely to be repeated here. During SDOT testimony at the Missing Link Appeal hearing, the Citizen Group learned for the first time that SDOT had not conducted ***any*** environmental review for an entire section of the Missing Link project and only planned to do so "later." In light of this, the Citizen Group moved to reverse the DNS based on SEPA's prohibition against piecemealing. *See* SMC 25.05.060.C.2 ("[p]roposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document.") Examiner Tanner denied the Citizen Group's motion, claiming it was ***untimely*** since the Citizen Group had not raised this issue in its Notice of Appeal even though evidence of SDOT's plan to forego conduct SEPA review for the excluded portion of the permanent route ***only first came to light*** at the hearing during SDOT's testimony and it has long been the rule in Washington that only "notice pleading" is required. The King County Superior Court reversed Examiner Tanner on this issue, thereby confirming she refused to follow controlling law. Here, the Appellants also plan to bring a piecemealing challenge to the Plan since SDOT is not preparing an EIS and instead is delaying environmental review to the "project-by-project" level. And again, based on Examiner Tanner's track record, the Appellants have a well-founded fear that she will dismiss this issue based on some perceived "procedural flaw" in their Notice of Appeal, thereby once again ignoring controlling law prohibiting piecemealing in any SEPA review.

Additionally, Examiner Tanner has a history of applying unequal evidentiary standards to citizen groups compared to SDOT in cases like the instant Appeal. In the Missing Link Appeal, Examiner Tanner denied the Citizen Group's request to submit evidence into the record that the group had obtained ***right before the hearing*** (due to SDOT's untimely response to a Public Disclosure Request). By contrast, Examiner Tanner permitted SDOT to submit evidence into the record that was ***created during the hearing***. In light of the current seven (7) week schedule

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

imposed by Examiner Tanner, it is highly likely that evidence will be being prepared right up until the hearing. Again, since this is a citizen group challenge to an SDOT project where SDOT is the project proponent and its own lead agency, the Appellants believe this unequal evidentiary treatment will occur again unless another examiner is assigned to this Appeal. There is no other way to rid this case of that possible taint other than for Examiner Tanner to recuse herself.

And last, Examiner Tanner showed a clear bias towards SDOT. In the Missing Link Appeal evidentiary hearing, Examiner Tanner, *sua sponte,* objected to and prohibited the Citizen Group from asking questions about certain topics at the Missing Link Appeal hearing, even though ***none*** of the parties had objected to the questioning. For example, without ***any*** objection from SDOT or the CBC, Examiner Tanner *sua sponte* shut down questioning of SDOT's environmental manager, claiming the questions were beyond the scope of the notice of appeal. It is inappropriate for a trier of fact like Examiner Tanner to *sua sponte* interpose ***objections***. This was borne out in one instance where SDOT's lawyer sided with the Citizen Group's lawyer, saying Examiner Tanner's objections were inappropriate. Since this case is so factually similar and involves similar parties, Appellants have a well-founded fear of similar disparate and biased treatment.

Until the Citizen Group's AFD allegations against Examiner Tanner in the Missing Link Appeal are fully and finally adjudicated and decided, she should recuse herself from presiding in another citizen group SEPA challenge to an SDOT bicycle project where SDOT is both the project proponent and its own lead agency.

II. CONCLUSION

For the reasons articulated above, Appellants respectfully request Examiner Tanner recuse herself from presiding over this case or that she be disqualified and another Examiner assigned.

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

DATED this 9th day of January, 2014.

VERIS LAW GROUP PLLC

By *__/s/ Joshua C. Allen Brower__*
Joshua C. Allen Brower WSBA No. 25092
Danielle N. Granatt, WSBA No. 44182
Attorneys for Appellants

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following persons via the methods indicated:

Jeff Weber
Seattle City Attorney's Office
PO Box 94769
Seattle, WA 98124-4769
206.727.3999 (t)
Jeff.weber@seattle.gov

☐ Overnight Delivery via Fed Ex
☒ First Class Mail via USPS
☐ Hand-Delivered via ABC Legal Messenger
☐ Facsimile
☒ E-mail

Dated at Seattle, Washington, this 10th day of January, 2014.

s/ Alison Sepavich
Alison Sepavich

4811-7428-2263, v. 3

Veris Law Group PLLC
1809 Seventh Avenue, Suite 1400
Seattle, Washington 98101
tel 206.829.9590 fax 206.829.9245