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BEFORE THE OFFICE OF THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of

**THE WESTLAKE STAKEHOLDERS
GROUP**

NO. W-13-009

IN RE SEATTLE DEPARTMENT OF
TRANSPORTATION, SEPA
DETERMINATION OF NON-
SIGNIFICANCE (DNS), SEATTLE BICYCLE
MASTER PLAN

APPELLANTS' RESPONSE IN
OPPOSITION TO CASCADE BICYCLE
CLUB'S MOTION TO INTERVENE AND
MOTION TO WAIVE NOTICE
REQUIREMENTS

The Westlake Stakeholders Group ("Appellants") opposes the intervention of the Cascade Bicycle Club ("CBC") because the CBC does not demonstrate substantial, legally cognizable interests not otherwise adequately represented by the Seattle Department of Transportation ("SDOT"); and because allowing the CBC to intervene will unduly delay the hearing process, prejudice Appellants, and introduce unnecessary hostility that will waste time and hinder the ability of Appellants to work collaboratively with SDOT towards a global resolution of the issues in this appeal.

I. The Hearing Examiner Should Not Allow the Cascade Bicycle Club to Intervene

Pursuant to the Hearing Examiner's Rules, a party who has not filed an appeal may request by motion to participate in the appeal by explaining: (1) how it is affected by or interested in the matter appealed; and (2) demonstrating a substantial interest that is not

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1 otherwise adequately represented in the appeal. HER 3.09(b). In considering the merits of the
2 CBC’s request to intervene, the Hearing Examiner must consider whether intervention will
3 unduly delay the hearing process, expand the issues beyond those stated in the appeal, or
4 prejudice the rights of the parties. HER 3.09(c). Also, a proposed intervener must demonstrate a
5 substantial interest that is not otherwise adequately represented. HER 3.09(b).

6 In *Westerman*, the Washington Supreme Court articulated the following four-part test for
7 intervention: (1) timely application for intervention; (2) an applicant claims an interest which is
8 the subject of the action; (3) the applicant is so situated that the disposition will impair or impede
9 the applicant’s ability to protect the interest; and (4) the applicant’s interest is not adequately
10 represented by the existing parties. *Westerman v. Cary*, 125 Wn.2d 277, 303, 892 P.2d 1067,
11 1081 (1994). **All four of these requirements must be met in order for a party to intervene.** *Id.*
12 Additionally, the interest that the proposed intervener seeks to protect must be one recognized by
13 law and **“be of such a direct and immediate character that the intervener will either gain or**
14 **lose by the direct legal operation and effect of the judgment.”** *Id.* (emphasis added). Where
15 the intervenor is an organization, it too must establish that it also has a “legal interest” that is not
16 otherwise being adequately protected by the original parties to the matter. *See Loveless v. Yantis*,
17 82 Wn.2d 754, 758, 513 P.2d 1023, 1026 (1973), citing *NAACP v. Button*, 371 U.S. 415, 428, 9
18 L.Ed.2d 405, 83 S. Ct. 328 (1963).

19 Explaining the “interest” requirement further, in *Spokane County v. State*, the
20 Washington Supreme Court denied a union’s motion to intervene, even though the union **legally**
21 represented a party to the case, because the union failed to prove a **direct** interest in the case not
22 otherwise already adequately protected. 136 Wn.2d 644, 650, 966 P.2d 305, 308 (1998). In
23 holding the union was not entitled to intervene, the Court stated “[t]hat PERC [i.e., an original
24 named party in the case] adequately represents the Union’s position is evidenced by the fact the

1 Union *presents no argument on the issue of PERC’s jurisdiction different from the arguments*
2 *advanced by PERC.” Id. (emphasis added).* By contrast, in *Loveless*, the Court allowed two
3 private organizations to intervene in a land use appeal because the organizations *and* their
4 member-property owners/residents all had *direct interests* since each of them individually could
5 show special damages resulting from the diminution of their property value resulting from the
6 action into which they sought to intervene. 82 Wn.2d at 758.

7 Here, the CBC cannot meet the four-part test for intervention and its motion should be
8 denied.

9 **A. The CBC Lacks a Direct, Immediate Interest In This Matter**

10 The CBC cannot meet the second element of the *Westerman* test because it does not have
11 a “direct, immediate” interest in this matter. *Westerman*, 125 Wn.2d at 303. The CBC is a non-
12 profit educational organization that “encourage[s] safer, healthier choices for everyone who
13 wants to bike; advocate[s] for better bicycling conditions; [and] offer[s] riding opportunities
14 every day of the year for every kind of rider.”¹ One of the CBC’s main functions is to sponsor
15 recreational bicycling events throughout the State of Washington, not just Seattle, including the
16 Seattle-to-Portland ride (the “STP” as it is known) and the Seattle to Vancouver, B.C, ride,
17 among others.² The CBC also engages in lobbying (“advocacy”) with local, regional and the
18 state government. In its Motion, the CBC submitted no evidence to prove how it has a *direct*
19 *and immediate* interest in this case or allege how it or any single one of its members would be
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23 ¹ <http://www.cascade.org/connect/join-renew#sthash.AsbOBC2Z.dpuf>.

24 ² <http://www.cascade.org/ride>.

1 injured if SDOT is required to prepare an Environmental Impact Statement (“EIS”) for the
2 update to the Bicycle Master Plan.³

3 Instead, the CBC simply states, without support in the form of an affidavit or declaration
4 from a member, that it “represent[s] bicycling users of the existing streets and the prospective
5 users of the completed bikeways in the Plan,” and as such, the CBC “brings the *perspective* of
6 those directly impacted by the present unsafe conditions of the existing circulation system and
7 those who would be benefited by the completed Plan.” See Motion to Intervene by CBC, at
8 4:10-15 (hereinafter, the “CBC Motion”)(*emphasis added*). The CBC and its member bicyclists
9 who use or *prospectively* may use Seattle streets have no legal interest in the City’s public right-
10 of-way. In fact, their interests are no different than any other citizen of Seattle, any citizen of
11 Washington State, or citizen of the United States of America for that matter, since anyone from
12 anywhere can come to Seattle use our streets. To intervene, the CBC must prove more than a
13 passive interest of people with a unique “*perspective*.”

14 Moreover, the CBC’s reliance on *Loveless* is misplaced because, as explained above, the
15 Court permitted intervention only because each of the organizational intervenors and their
16 constituent property owners *proved they had direct, legally cognizable ownership interests* in
17 the property subject to the land use appeal compared to the *passive “perspective”* of the CBC and
18 its members. Unlike the *Loveless* interveners, it is unclear whether the CBC has authority to
19 represent anyone in a legal capacity in this matter since it submitted no evidence to prove this.
20 The CBC should be required to identify by name and sworn declaration its members who agree it
21 can represent them legally in this matter. The CBC boasts a membership of over 15,000
22 members but it does not disclose who those people are, how many of them live in the City of
23

24 ³ The only “evidence” is a one sentence “Verification” from the CBC’s current Policy Director confirming the
25 statements in Section II of the CBC’s motion.

1 Seattle, how many of them even live in the State of Washington, or whether any of them are
2 aware the CBC purports to represent them in this appeal. CBC Motion, 3:10-15. To obtain
3 intervention, the CBC must disclose its membership list to establish how many members it
4 *actually* has and how many of them *actually* live in Seattle. Lacking any such evidence, the
5 CBC has failed to establish the second element of the *Westerman* test and intervention should be
6 denied.

7 Assuming, *arguendo*, that the CBC is permitted to intervene, the Appellants respectfully
8 request the right to obtain discovery from the CBC regarding these issues; denied discovery, the
9 Appellants will be prejudiced by being forced to spend time and money litigating against an
10 opponent who refuses to provide any transparency regarding its members or its authority to
11 participate in this matter.

12 **B. Intervention is Inappropriate Because Disposition of this Matter Will Not Impede or**
13 **Impact the CBC’s Ability to Protect Its Interests**

14 Under the third element of the *Westerman* test, the CBC must prove how it “is so situated
15 that the disposition will impair or impede the applicant’s ability to protect [its] interest.”
16 *Westerman*, 125 Wn.2d at 303. Again, it has utterly failed to provide any evidence to establish
17 this element.

18 The “interest” the CBC seeks to protect is its ability to represent its members by lobbying
19 the Seattle City government for the CBC’s desired bicycle facilities. Disposition of this appeal
20 will not “impair” or “impede” the CBC’s ability to continue lobbying the Seattle government. In
21 fact, the CBC admits that it and its members already “participated extensively” in the “public
22 process leading up to” the proposed *update* to the 2007 Master Plan. CBC Motion, 3:17-22.
23 This is an SEPA appeal of SDOT’s DNS for the *update* to the City’s Bicycle Master Plan. The
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1 City currently has a fully functional Bicycle Master Plan that was adopted in 2007.⁴ Disposition
2 of this appeal will only determine whether or not SDOT complied with SEPA’s procedural and
3 substantive requirements related to the DNS it issued for the update to 2007 Bicycle Master Plan
4 and whether SDOT is required to prepare an EIS for the update. If SDOT is ordered to prepare
5 an EIS, the CBC can and will fully participate in that process. Denying intervention will not
6 *impair or impede* the CBC’s ability to pursue its lobbying mission.

7 Again, this case is unlike the only case cited by the CBC, *Loveless*. *Loveless* involved a
8 land use appeal of a proposed plat that, if approved, would permit the construction of
9 condominiums on real property, thereby *directly* impacting the intervenors use and enjoyment of
10 their real property. *Loveless v. Yantis*, 82 Wn.2d 754, 513 P.2d 1023 (1973). By comparison,
11 the outcome will of this case will not change how the CBC’s members use the City right of way
12 today or in the future and will not impede the CBC’s ability to lobby City hall, but instead will
13 only determine whether SDOT has to prepare an EIS for the update to the 2007 Bicycle Master
14 Plan.

15 **C. SDOT Will Adequately Represent the Cascade Bicycle Club’s Interests**

16 Under the fourth element of the *Westerman* test, the CBC must prove that SDOT cannot
17 adequately protect the CBC’s interests in this case. *Westerman*, 125 Wn.2d at 303. Again, the
18 CBC failed to submit any evidence to prove this element.

19 The CBC’s motion is silent as to why CBC believes SDOT would not provide adequate
20 representation in the defense of its own DNS. Instead, the CBC simply claims its interests are
21 “not the same” as SDOT’s, CBC Motion, 4:7-10, and admits that it “seeks to intervene in
22 defense of the DNS *and raises no new issues*.” CBC Motion, 4:22-23. Defending the DNS is

23 _____
24 ⁴ <http://www.seattle.gov/transportation/bikemaster07.htm>

1 *exactly* what SDOT it doing in this appeal. By admitting that it is not raising any new issues,
2 CBC is admitting that SDOT has the same interests as the CBC. The only “different” “interest”
3 CBC has from SDOT is the CBC’s desire to lobby City government, which is not at issue here.

4 This case is exactly like the situation in the *Spokane County v. State*. In that case, the
5 Washington Supreme Court refused to grant intervention to a union that represented deputy
6 prosecutors *because the defendant, PERC, adequately represented the union’s interests and*
7 *because the union admitted that it would not raise any new issues.* *Spokane County v. State*,
8 136 Wn.2d at 651 (“PERC adequately represents the Union’s position is evidenced by the fact
9 the Union presents no argument on the issue of PERC’s jurisdiction different from the arguments
10 advanced by PERC.”). Here, the CBC has simply asserted that its “interests” are different than
11 SDOT’s while admitting it will not raise any new issues. Again, the simple fact that CBC’s
12 members have a certain “perspective” or might “benefit” from adoption of the update to the
13 Bicycle Master Plan has nothing to do with whether SDOT complied with SEPA’s substantive
14 and procedural requirements in issuing the DNS. SDOT is more than capable of defending its
15 own actions. Intervention is inappropriate.

16 **D. Allowing Cascade Bicycle Club to Intervene Would Unduly Delay the Proceedings**
17 **and Prejudice Appellants**

18 In considering a motion for intervention, the Hearing Examiner must consider whether
19 intervention will unduly delay the hearing process, expand the issues beyond those stated in the
20 appeal, or prejudice the rights of the parties. HER 3.09(c). CBC’s potential intervention in this
21 case would only add time, cost, and hostility to the proceedings without adding any new
22 arguments or issues to assist the Hearing Examiner in resolving this appeal.

23 CBC has three lawyers from three different firms/organizations representing it, all of
24 whom will only duplicate SDOT’s efforts and cause undue delay and increase the time and cost

1 to resolve this matter. If the CBC is permitted to intervene, it will double the amount of time at
2 hearing and double the cost of participating in the proceedings for the Appellants without adding
3 anything new except some inchoate “perspective.”

4 Most alarmingly, without raising any new issues or arguments, or proving why SDOT
5 cannot adequately defend its own SEPA DNS, the only things the CBC would bring to the
6 proceedings are hostility and vitriol. The CBC’s clear and vocal distaste for Appellants has
7 become personal and regrettably unprofessional. On Wednesday, January 15, the former policy
8 director for the CBC, John Mauro, sent an email to Joshua Brower, attorney for the Appellants,
9 threatening him with physical harm because of Mr. Brower’s involvement with this appeal. The
10 email stated:

11 Hi Josh- I always wondered what motivated you and kind of
12 figured it was the money. Well, I know that's true. But I always
13 suspected it was more than that and blurred my eyes to give you a
14 teeny bit of the benefit of the doubt. Now I really don't want to
15 know. I've been following the BMP EIS stuff from here in
16 Auckland. It really disgusts me, man. Stop pimping yourself out
17 to the darkside-- there's a cap on bad karma.

18 ***Until we meet next time in a dark, parking-protected greenwave
19 cycletrack alley in a city near you,***

20 John Mauro

21 A copy of Mr. Mauro’s email is attached to this motion as Exhibit A (*emphasis added*). Threats
22 of physical harm and personal attacks have no place in a SEPA appeal and only undermine the
23 Appellants’ ability to resolve this matter efficiently and civilly with SDOT. At the prehearing
24 conference, the CBC made no effort to apologize for Mr. Mauro’s comments or to distance itself
25 from his statements.⁵ The CBC’s failure to do so shows how it intends to behave in this matter,
which will only add delay and cost, thereby prejudicing the Appellants.

⁵ On January 16, Mr. Mauro sent a very tepid “apology” claiming he was just kidding.

1 It is SDOT's job to deliver a safe and reliable transportation system that complies with
2 the law—not the CBC's. The Hearing Examiner should not allow CBC to intervene in this matter
3 because its intervention would serve no purpose other than to frustrate the proceedings.

4 **II. CONCLUSION**

5 For the reasons articulated above, Appellants respectfully request the Hearing Examiner
6 deny CBC's motion to intervene in this matter.

7 DATED this 17th day of January, 2014.

8
9 VERIS LAW GROUP PLLC

10 By /s/ Joshua C. Allen Brower
11 Joshua C. Allen Brower WSBA No. 25092
12 Danielle N. Granatt, WSBA No. 44182
13 Attorneys for Appellants
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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:

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Dated at Seattle, Washington, this 17th day of January, 2014.

s/ Alison Sepavich
Alison Sepavich

4819-9722-9336, v. 3

Exhibit A

Danielle Granatt

From: Josh Brower
Sent: Wednesday, January 15, 2014 11:11 AM
To: Josh Brower; Danielle Granatt
Subject: BMP

From: John Mauro <johnmauro3@gmail.com>
Date: Tuesday, January 14, 2014 10:43 AM
To: Josh Brower <josh@verislawgroup.com>
Subject: BMP

Hi Josh- I always wondered what motivated you and kind of figured it was the money. Well, I know that's true. But I always suspected it was more than that and blurred my eyes to give you a teeny bit of the benefit of the doubt. Now I really don't want to know. I've been following the BMP EIS stuff from here in Auckland. It really disgusts me, man. Stop pimping yourself out to the darkside-- there's a cap on bad karma.

Until we meet next time in a dark, parking-protected greenwave cycletrack alley in a city near you,

John Mauro