Hon. Wick Dufford
Skagit County Hearing Examiner

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

THE CITY OF SEDRO-WOOLLEY, a Washington municipal corporation, **Appellant,** **-vs-** **DIKE, DRAINAGE & IRRIGATION DISTRICT #12, a special purpose district,** **Respondent**	**Nos. PL12-0191 (Permit)** **PL 13-0265 (Appeal)** **INTERVENOR CITY OF BURLINGTON'S FIRST MOTION IN LIMINE AND MOTION TO STRIKE**

COMES NOW Intervenor City of Burlington, by and through its attorney Scott G. Thomas, and requests the Hearing Examiner to (1) strike from Intervenor Kunzler's brief certain salacious allegations, and (2) enter an Order in Limine, to prevent any argument, questioning of witnesses by the Parties to this appeal, or irrelevant evidence concerning hydrology other than that as established by Skagit County's Shoreline Management Program as applicable to this project.

I. BACKGROUND

On June 14, 2012, Skagit County Dike, Drainage and Irrigation District No. 12 (hereinafter, "Dike 12") applied for a shoreline substantial development permit (the "permit") to improve levees along the Skagit River. Ex. 2[1]. The purpose of the

[1] Exhibits refer to those exhibits on file with the Hearing Examiner.

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improvements was for structural reinforcement of the levy system, to prevent a failure during flood events. Ex. 1, pg. 1. The application was deemed complete by Skagit County on November 13, 2012. Ex. 5. The City of Burlington and Dike 12, pursuant to WAC 197-11-944, shared SEPA lead agency status for the proposal and issued a Determination of Significance. Ex. 6. A draft environmental impact statement was prepared, and Skagit County, and Mr. Larry J. Kunzler submitted comments on the DEIS. *Id.* The final EIS was issued on July 9, 2010. *Id.* No appeal was taken of the FEIS. *See*, Hearing Examiner Notice of Decision, pg. 2, June 28, 2013.

An open record hearing was held on April 24, 2013. *Id.* The written record was held open for a week, allowing additional written comments and submissions. *Id.* Following the hearing, it was discovered that the recording equipment had failed to preserve a complete record of the hearing. *Id.* The Hearing Examiner continued the original hearing, to allow those who desired to provide additional testimony an opportunity to do so. *Id.* The subsequent hearing was held on June 12, 2013, and the recording of that subsequent hearing is complete and uncompromised. *Id.* Of the eleven individuals who testified at the initial hearing, nine testified again at the subsequent hearing. *Id.* In addition to the nine who testified originally, four persons testified at the subsequent hearing who had not testified at the original hearing; Intervenor Kunzler is one of the individuals who testified at the subsequent hearing, but not at the original hearing. *Id.*

At the conclusion of the open record hearings, the Hearing Examiner issued Findings of Fact, Conclusions of Law, and the Examiner's decision approving the shoreline substantial development permit, with certain conditions. The City of Sedro-Woolley appealed the Hearing Examiner's decision, to the Board of County

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Commissioners (the "Board"). Notice of Appeal, Case No. PL 12-0191;[2] Skagit County Resolution No. R20130278. A closed record appeal hearing was conducted by the Board of County Commissioners (the "Board") on September 10, 2013, and the Board issued its decision remanding the matter to the Hearing Examiner on September 24, 2013. In its Order of Remand, the Board directed the Hearing Examiner to consider the following issues:

a. DD12 shall present analysis of the actual effects of the levee modifications envisioned under the Shoreline Permit, applying **Corps hydrology**, comparing actual pre-project conditions and post-project conditions, taking into consideration and depicting (i) upstream impacts to the City of Sedro-Woolley and environs as well as the Nookachamps Basin, including but not limited to impacts to United General Hospital and the Sedro-Woolley wastewater treatment plant; and (ii) downstream impacts. (emphasis supplied).

b. DDI2 shall provide analysis of the pathway and volume of water that will be diverted outside the main river channel in a 1OO-year flood event before and after the Project, applying Corps hydrology.

c. In considering this Shoreline Permit, the Hearing Examiner shall analyze, consider and render specific findings that document compliance with the County's obligations under the NMFS bi-op.

On February 4, 2014, the Hearing Examiner sought clarification from the Board as to the meaning of the term "Corps hydrology" in paragraph "a" above. *See,* Letter of February 4, 2014, from Hearing Examiner to Board of Commissioners. On February 11th the Board responded, and directed that "the parties should use the most recent hydrology data set accepted by the Corps, not the Corps hydrology used for the 2010 FEIS." *See,* Letter of February 11, 2014 from Board of Commissioners to Hearing Examiner. The hydrology referred to in the Board's letter is the Final Report –

[2] Skagit County apparently assigns different case numbers to permits, and to administrative appeals of a permit. Case No. PL 12-0191 is assigned to Dike 12's shoreline permit application, and No. PL13-0265 was assigned by the County to the appeal of the shoreline permit.

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Hydrology Technical Documentation, published and adopted by the Corp of Engineers and dated August, 2013.

II. ARGUMENT

A. The Hearing Examiner Should Strike the Intervenor's Salacious Allegation, Made Without Support, that a Dike District Commissioner is Financially Motivated to Obtain Approval of the Project.

1. Applicable Law. Pursuant to Section 14.02.070 of the Skagit County Code, the Hearing Examiner is empowered to "adopt such procedural rules as are reasonably necessary to carry out the duties and responsibilities of the office." In addition, and pursuant to Section 1.01 of the Hearing Examiner's Rules of Procedure for Hearings, the Hearing Examiner is empowered to "regulate the course of hearings and the conduct of participants." The Hearing Examiner has previously done so, adopting applicable Washington Court Rules, including applicable Rules of Evidence.

Washington Civil Rule 11 provides that every party not represented by an attorney shall sign the pleading shall be signed the party. The party's signature constitutes a certification by the party that the pleading "(3) [ ] is not interposed for any improper purpose, such as to harass . . ." Washington Civil Rule 12(f) provides, in pertinent part, that "[u]pon motion made by a party . . . the court may order stricken from any pleading any . . . scandalous matter.". A "scandalous" matter is that which improperly casts a derogatory light on someone, most typically a party to the action. 2 Moore's Federal Practice § 12.37[3] at 12-97 ("'Scandalous' generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court.") While motions to strike are generally disfavored, "the disfavored character of Rule 12(f) is relaxed somewhat in the context of scandalous allegations and matter of this type often will be stricken from the pleadings in order to purge the court's files and protect the

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subject of the allegations." 5A C. Wright and A. Miller, Federal Practice and Procedure (Civil) 2d § 1382, at 714 (1990).

The striking of offensive material is particularly appropriate when the offensive material is not responsive to an argument but, rather, constitutes an inappropriate attempt to abuse process to attack an individual personally. ***See, e.g., Magill v. Appalachia Intermediate Unit 08***, 646 F. Supp. 339, 343 (W.D. Pa. 1986) (striking allegations that "reflect adversely on the moral character of an individual who is not a party to this suit" which were "unnecessary to a decision on the matters in question"); ***see also Pigford v. Veneman***, 215 F.R.D. 2, 4-5 (D.D.C. 2003) (striking unfounded accusations that opposing counsel was racist); ***Murray v. Sevier***, 156 F.R.D. 235, 258 (D. Kan. 1994) (striking allegation that defendant and his counsel "bought off" and paid "hush money" to prospective witnesses); ***Cairns v. Franklin Mint Co.,*** 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998) (striking allegation that "defendants are '[l]ike vultures feeding on the dead'").

2. Motion to Strike. In the conclusion of Intervenor Kunzler's memorandum, Intervenor queries why Dike District 12 does not simply withdraw its application for a shoreline substantial development permit, and wait until the Corps of Engineers' General Investigation Study is completed at some unknown date in the future:

> 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?*** (emphasis supplied.)

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Intervenor Kunzler's Motion to Recuse/Disqualify Hearing Examiner, page 17, lines 9 – 12. By couching his salacious allegation within his Motion to Recuse, Intervenor has used the Hearing Examiner's processes as a shield for what would otherwise be libelous and defamatory conduct. As in *Magill*, Intervenor has insinuated that a person who is not a party to these proceedings – a dike district commissioner – is improperly motivated to benefit that person's employer. The red herring raised by Intervenor Kunzler reflects adversely on the moral character of the unnamed dike district commissioner. Moreover, Intervenor Kunzler includes this lurid allegation without citing to any facts to support the allegation. The Hearing Examiner should not tolerate such outrageous behavior, and lines 11 – 12 on page 17of Intervenor's motion should be struck.

B. The Hearing Examiner Should Limit Testimony and Exhibits That Are Not Relevant to the Issues Remanded to the Hearing Examiner by the County Board of Commissioners, Including Outdated Hydrology.

1. Applicable Law. At the January 28, 2014 prehearing conference attended by the parties to these proceedings, in response to a question posed by one of the parties, the Hearing Examiner stated that the Washington Rules of Evidence would apply to the proceedings. Rule 104(a) of the Rules of Evidence directs the court, here, the Hearing Examiner, to determine preliminary questions concerning the admissibility of evidence. Given the number of exhibits that are expected to be offered by the parties, and the resulting complexity of administering a record in which proffered exhibits are offered and then denied during the hearing process, it is proper for the Hearing Examiner to determine the admissibility of certain evidence prior to hearing. Moreover, an early ruling on the admissibility of evidence allows the parties to plan for hearing with more certainty about the course of evidence.

To be admissible, proffered evidence must be relevant. ER 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact

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that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Stated otherwise, relevant evidence helps persuade the trier of fact of the existence (or non-existence) of some fact that is germane to matter at hand. On the other hand, irrelevant evidence has no appropriate bearing on the controversy.

The question before the Hearing Examiner - the controversy at hand - is whether Dike 12's proposal complies with the Skagit County Shoreline Master Program ("SMP"). More particularly, issues "a" and "b" of the Remand Order directs the Hearing Examiner to further consider whether the proposed project complies with Skagit County's Shoreline Policies as reflected in SMP § 7.16(1)(B)(1), and Skagit County's Shoreline Regulations as reflected in SMP § 7.16(2)(B)(5)(d). Section 7.16(1)(B)(1) provides as follows:

> All bank stabilization and flood protection measures should be constructed to comply with the design and location standards and guidelines of applicable agencies.

Section 7.16(2)(B)(5)(d) provides as follows:

> All works shall be designed and constructed to meet the requirements and standards of the County Engineer, State Departments of Fisheries and/or Game, Corps of Engineers where applicable, and Soil Conservation Service.

C. Evidence in the Form of Superseded Hydrology is not Relevant.

At the January 28, 2014 prehearing conference, Intervenor Kunzler indicated his intent to submit to the Hearing Examiner evidence consisting of hydrologic reports prepared in the past by the City's consultant, NHC, and perhaps other dated reports prepared by different hydrologists. However, these reports are not relevant to the issues in this case, and contravene the direction provided by the Board of County Commissioners. While the Board's direction that the hydrology adopted by the Corps of Engineers in 2013 be utilized in the current proceedings violates the vesting provisions

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of Chapter 19.27 RCW,[3] it is nonetheless clear that the Board has selected a specific hydrology to apply in determining the issues in these proceedings. The outdated and superseded hydrology that Intervenor Kunzler seeks to have admitted as evidence has no significance in these proceedings, and frustrates the Board's direction. To be clear, the facts that may arise from the superseded hydrology are not of consequence to the issues that are to be addressed in the current proceedings. Facts that are of consequence include facts that offer direct evidence of a claim or defense; also included are facts that imply an element of a claim or defense. ***State v. Rice***, 48 Wn. App. 7, 737 P.2d 726 (1987). No such facts can be found in outdated hydrology.

D. Even If Relevant, the Prejudice of Outdated Hydrology Outweighs the Evidence's Probative Value

Evidence Rule 403 provides,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger or unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Applying this rule in ***Public Utility District No. 1 of Klickitat Cnty. v. International Ins. Co.***, 124 Wn.2d 789, 881 P.2d 1020 (1994), which was a complex lawsuit arising out of the WPPSS bond default, a number of public utility districts sought to recover from excess liability insurers. One of the issues in that case was whether the insurers had actually been prejudiced by Plaintiff's noncompliance with certain requirements contained in the policies; on that issue, the insurers sought to introduce evidence of how other insurers had handled their settlements of similar claims. The trial court excluded the evidence, and the Washington Supreme Court affirmed, noting with approval that the trial judge had excluded the evidence on grounds that the other insurers had different policies with different terms, and that any reference to the other policies would

[3] See argument below in Section ."F."

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only confuse the issues in the present case. The same circumstances are present in the case at bar.

Even assuming, *arguendo*, that there is some modicum of relevancy to prior hydrology reports, the probative value of such reports is far outweighed by its prejudicial aspects. Additional information regarding the Skagit River hydraulics and hydrology continue to emerge as things such as topography, hydrologic modeling, and other factors continue to be refined. The continued evolution of the science and data is the reason that the Board of County Commissioners directed that the most recent hydrology as approved by the Corps of Engineers be utilized, and not modeling that was performed years ago. Any reference to past hydrology is outdated, of little relevance, will confuse the issues, and such evidence and should be excluded.

E. Conducting a Second Hearing in Which Additional Evidence Pertaining to Subjects Not Remanded to the Hearing Examiner is Entered Into the Record Violates Regulatory Reform.

Jurisdictions in Washington subject to the Growth Management Act must comply with the regulatory reform legislation of 1995, codified at Chapter 36.70B RCW. Local land use or environmental permits for a project are defined as "project permits." RCW 36.70B.020(4). The chapter defines "open record hearing" and "closed record appeal," requires consolidated hearings on multiple permits, and most significantly here, places a limitation of one open record hearing and one closed record appeal. RCW 36.70B.060(3).

In the case at bar, an open record hearing was conducted before the hearing examiner on April 24, 2013, and extended to June 12th in order to rectify a recording equipment failure. The hearing was closed, and the Hearing Examiner made his decision on the permit application.[4] The appeal period to appeal the Hearing

[4] We observe that in the April 24th hearing, the Hearing Examiner left the record open for an additional week to allow the submission of additional written comments. *See*, Ex 38 at pg. 48, lines 16 – 24. At the conclusion of the subsequent hearing on June 12, the Hearing Examiner did not hold the record open,

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Examiner's decision expired on July 8, 2013.[5] Skagit County Shoreline Master Program § 1301. The closed record appeal hearing before the Board took place on September 10, 2013. The Hearing Examiner's decision was appealed to the Board of County Commissioners, which conducted a closed record appeal hearing on September 10, 2013. At the conclusion of that closed record appeal hearing, the Board of County Commissioners elected to remand the case to the Hearing Examiner for consideration of three discrete issues. What the Board of County Commissioners did NOT do was to remand for an additional open record hearing, as to do so would violate Chapter 36.70B RCW. At most, the Board directed the hearing to be reopened to receive additional testimony on the three issues identified in the Remand Order by the Board. Moreover, the hearing Examiner is not empowered to *sua sponte* reopen the record after the expiration of the appeal period, or in the alternative, after a closed record appeal hearing was scheduled before the Board. *See*, Skagit County hearing Examiner Rules of Procedure for Hearings § 1.14.

The City recognizes the difficult position the Hearing Examiner has been placed as a consequence of Skagit County's remand of the matter for further deliberation. However, it is only possible to reconcile the County's remand order with RCW 36.70B.060's "one open public record hearing" requirement by strictly limiting testimony and exhibits to the issues remanded by the County, and rejecting testimony and exhibits that are irrelevant to those issues, including hydrologic reports that are in any way inconsistent with the hydrology as identified by the County in its response to the Hearing Examiner's inquiry.

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and as such the hearing closed by operation of law. We therefore respectfully disagree with the Hearing Examiner's conclusion in his memo of March 19, 2014, that the remand hearing is part of the on-going hearing process.

[5] The Skagit County Hearing Examiner's Rules of Procedure for Hearings § 1.04, does not state whether time is to be computed on a calendar basis, or other basis (i.e., counting only business days.) July 8th counts business days only.

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F. The Shoreline Substantial Development Permit Application Was Vested, and the Board of County Commissioners' Determination that the 2013 Hydrology Should Be Applied On Reconsideration is Error.

In Washington State, the vested rights doctrine "refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission." ***Noble Manor v. Pierce County***, 133 Wn.2d 269, 275 (1997). The doctrine was originally applied by the State Supreme Court and in a different manner than is applied in a majority of states, where it is invoked only when substantial development has occurred in reliance on an issued permit. ***See Hull v. Hunt***, 53 Wn.2d 125, 128-30 (1958). The rationale for the Washington courts rejection of the majority approach, and applying the doctrine upon permit application is to provide certainty and predictability in land use regulations. ***West Main Assocs. Inc. v. City of Bellevue***, 106 Wn.2d 47, 51 (1986) ("Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.") The Washington approach is, according to the courts, based on "constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property interests." ***Weyerhaeuser v. Pierce County***, 95 Wn. App. 883, 891 (1999).

Although the doctrine is statutorily applied to building permit applications, subdivision applications, and development agreements, Washington courts have applied the common law version of the vested rights doctrine to shoreline substantial development permit applications. ***Talbot v. Gray***, 11 Wn. App. 807, 811 (1974) (vested rights apply after the filing of an application for a substantial development permit under the Shoreline Management Act.)

In the case at bar, sections 7.16(1)(B)(1), and 7.16(2)(B)(5)(d) of Skagit County's Shoreline Program are at issue. Section 7.16(1)(B)(1) provides as follows:

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> All bank stabilization and flood protection measures should be constructed to comply with the design and location standards and guidelines of applicable agencies.

Section 7.16(2)(B)(5)(d) provides as follows:

> All works shall be designed and constructed to meet the requirements and standards of the County Engineer, State Departments of Fisheries and/or Game, Corps of Engineers where applicable, and Soil Conservation Service.

These two sections incorporate the requirements and standards of the Corps of Engineers. But that incorporation is limited to the regulations and standards in place as of the date of permit application. Substituting updated hydrology requirements for those in effect at the time of permit application violates Dike 12's right to develop property free of the "fluctuating policy" of legislative bodies. ***West Main Assocs. Inc. v. City of Bellevue***, 106 Wn.2d 47, 720 P.2d 782 (1986).

III. CONCLUSION

Intervenor Kunzler's memorandum includes scandalous, and irrelevant, accusations, which should be struck.

Further, the intent of the Board of County Commissioners to limit further deliberations to the issues identified in the Board's Order of Remand is clear. The Hearing Examiner should not allow the record to be contaminated through the admission of numerous, confusing and immaterial documents, or testimony that clouds the issues to be considered by the Hearing Examiner. An order limiting such testimony to recent hydrology approved by the Corps should be entered.

Dated this 20TH day of March, 2014.

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