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**	**No. PL12-0191 (Permit)** **PL 13-0265 (Appeal)** **INTERVENOR CITY OF BURLINGTON'S RESPONSE TO INTERVENOR KUNZLER'S MOTION TO RECUSE/DISQUALIFY HEARING EXAMINER**

COMES NOW Intervenor City of Burlington, by and through its attorney Scott G. Thomas, and the Office of the City Attorney, and responds to Intervenor Larry Kunzler's Motion to Recuse/Disqualify as follows.

I. INTRODUCTION

After participating in a hearing before Hearing Examiner Dufford, Intervenor Kunzler now seeks to have Hearing Examiner Dufford recuse himself, or otherwise disqualified from serving as hearing examiner in a remand proceeding. But Intervenor is unable to identify, and does not allege, any instance of actual bias on the part of Hearing Examiner Dufford. To the contrary, now that Intervenor has read Hearing Examiner Dufford's decision after the initial hearing, Intervenor is simply dissatisfied with the outcome. But under any legal theory, dissatisfaction with a decision is

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inadequate grounds for disqualification of the hearing officer. Intervenor's Motion to Recuse/Disqualify should thus be rejected, and this matter should proceed.

II. FACTS

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 improvements was for structural reinforcement of the levy system, to prevent a failure during flood events. Ex. 1, pg. 1.

An open record hearing was held before Hearing Examiner Dufford on April 24, 2013. Ex. 6. 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.

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 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.

[1] Exhibits refer to those exhibits on file with the Hearing Examiner.
[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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Subsequent to the Remand, Hearing Examiner Dufford issued a Scheduling Order.

III. ARGUMENT

A. Applicable Law – Disqualification of Hearing Examiner

Although Intervenor Kunzler's motion relies on the Appearance of Fairness Doctrine to argue for disqualification, Skagit County and the Skagit County Hearing Examiner have both adopted local rules addressing conflicts of interest which are applicable to the disqualification of a hearing examiner; by implication, the Hearing Examiner's Rules of Procedure incorporate the Second Canon of the Washington State Code of Judicial Conduct. An outline of these different rules follows.

1. The Appearance of Fairness Doctrine. As Intervenor Kunzler correctly points out, Washington courts developed the Appearance of Fairness Doctrine in ***Smith v. Skagit County***, 75 Wn.2d 715, 453 P.2d 832 (1969). An administrative adjudication violates the appearance of fairness doctrine if a reasonably prudent and disinterested observer would necessarily conclude that the parties did not receive a fair, impartial, and neutral hearing. ***Deatherage v. Examining Bd. Of Psychology***, 85 Wn. App. 434, 932 P.2d 1267 (1997), *rev'd on other grounds*, 134 Wn.2d 131, 948 P.2d 828 (1997). "Participation in the decision making process by a person who is potentially interested or biased is the evil which the appearance of fairness doctrine seeks to prevent." ***Hoquiam v. Public Employment Relations Com***, 97 Wn.2d 481, 488, 646 P.2d 129 (1982). Our State Supreme Court has recognized three categories of bias or impartiality as grounds for the disqualification of decision-makers who perform quasi-judicial functions: (1) personal interest, (2) prejudgment of issues, and (3) partiality. *See,* ***Buell v. Bremerton***, 580 Wn.2d 518, 524, 495 P.2d 1358 (1972).

The process by which a challenge may be brought alleging an appearance of fairness violation has also been defined by our Supreme Court. In ***State v. Post***, 118

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Wn.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992), the court held that a party claiming a violation of the appearance of fairness doctrine must make a threshold showing of an adjudicator's actual or potential bias. The challenging party must provide specific facts supporting the allegation of bias. ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). In particular, "[j]udicial rulings alone almost never constitute a valid showing of bias." *Id.* Because Intervenor relies exclusively on the Hearing Examiner's decision in order to bring his challenge, Intervenor has a particularly heavy burden in this matter.

2. Skagit County's Local Rule. In addition to the Appearance of Fairness Doctrine, Skagit County has adopted by ordinance a local rule addressing conflicts of interest which are applicable to the disqualification of a hearing examiner. That rule is found in Skagit County Code § 14.02.070, which provides as follows,

> 14.02.070 Office of Hearing Examiner.
>
> * * *
>
> (6) Conflict of Interest. The Hearing Examiner shall not conduct or participate in any hearing or decision in which the Hearing Examiner has a direct or indirect personal interest which might influence or *appear to influence* or interfere with the decision-making process. Any actual or potential conflict of interest shall be disclosed to the parties immediately upon discovery of such conflict.

The term "conflict of interest" is generally defined as a real or seeming incompatibility between one's private interests and one's public or fiduciary duties. BLACKS LAW DICTIONARY, 7th Ed. (West, 1999). As such, the analysis under Skagit County's rule is identical to the analysis of personal interest under the Appearance of Fairness Doctrine.

3. The Hearing Examiner's Rule of Procedure. The Skagit County Hearing Examiner's rules of procedure provide as follows,

> Any person acting as Hearing Examiner is subject to disqualification for bias, prejudice, conflict of interest, ***or any other cause for which a judge can be disqualified.***

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> (a) Whenever the Examiner believes his relationship to participants or financial interest in the subject of a hearing create the appearance that the proceedings will not be fair, the Examiner shall either: (1) voluntarily step down from the case, or (2) disclose, the relationship of interest on the record, stating a bona fide conviction that the interest or relationship will not interfere with the rendering of an impartial decision.
>
> (b) Any party or interested person may petition for the disqualification of an Examiner promptly after receipt of notice that the individual will preside or, if later, promptly upon discovering grounds for disqualification. The Examiner for whom the disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination. (emphasis supplied.)

Skagit County Hearing Examiner Rules of Procedure for Hearings § 1.03. By implication, the Hearing Examiner's Rules of Procedure incorporate the Second Canon of the Washington State Code of Judicial Conduct, discussed next below.

4. The Code of Judicial Conduct. The Code of Judicial Conduct[3] requires a judge to disqualify himself or herself from a proceeding if the judge is biased against a party, or the judge's impartiality may reasonably be questioned. ***State v. Dominguez***, 81 Wn. App. 325, 328, 914 P.2d 141 (1996) *citing In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Beginning with *State v. Post*, *supra*, the Supreme Court has characterized a judge's failure to recuse himself or herself when required to do so by the judicial canons as a violation of the Appearance of Fairness Doctrine. ***See, Tatum v. Rogers***, 170 Wn.App. 76, 94, 283 P.3d 583 (2012).[4] The Washington Court of Appeals went on to say that, "[a] party claiming bias or prejudice must support the claim; prejudice is not presumed . . . ." *Dominguez* at 328 – 29. Similarly, Mere

[3] The Washington Supreme Court adopted a new Code of Judicial Conduct, effective January 1, 2011. The cases cited herein were decided under the former Code of Judicial Conduct. Although the Code was restructured, the provisions of the revised code as applicable to the appearance of impropriety on the part of judges has identical impact to the previous version. See, Washington Courts Press Release, September 10, 2010, available at: http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=1664

[4] *Tatham* was decided under the prior version of the Code of Judicial Conduct.

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speculation is not enough. ***In re Pers. Restraint of Haynes***, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

Identical to the standard developed under the Appearance of Fairness Doctrine, a court must determine "whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral [hearing]." *Dominguez*, 81 Wn. App. at 330. The test is an objective one. ***State v. Leon***, 133 Wn. App. 810, 812, 138 P.3d 159 (2006). Further, a party who has reason to believe that a judge should be disqualified must act promptly to request recusal and "cannot wait until he has received an adverse ruling and then move for disqualification." ***State v. Carlson***, 66 Wn. App. 909, 917, 833 P.2d 463 (1992).

Applying any or all of these rules to the circumstances of this case renders the same result: no grounds exist for the hearing examiner to recuse himself, or otherwise be disqualified.

B. No Allegation that the Hearing Examiner Has a Personal Interest has been Raised.

All four applicable rules – the Appearance of Fairness Doctrine, the Skagit County's Local Rule, the Hearing Examiner's Rule of Procedure, and the Code of Judicial Conduct – prohibit the Hearing Examiner from ruling on a matter when the Hearing Examiner has a personal interest in the subject matter of the matter. A personal interest exists when someone stands to gain or lose because of a governmental decision. For example, in ***Swift v. Island County***, 87 Wn.2d. 348, 552 P.2d 175 (1976), an improper conflict arose when the chairperson of the board of county commissioners was also a stockholder and chairperson of the board of the mortgagee of the affected development. Similarly, in *Buell*, a planning commission member was disqualified because the value of his land increased due to the rezone of property next to his land. And, in ***Narrowsview Preservation Association v. Tacoma***, 84 Wn.2d 416, 526 P.2d 897 (1974), a planning commissioner involved in a rezone

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decision was employed by a bank holding a security interest in land, that doubled in value due to the rezone, while in ***Fleming v. Tacoma***, 81 Wn.2d 292, 502 P.2d 327 (1972), a city council member who was also an attorney who voted on a zoning action and was employed by the successful proponents of the zoning action was viewed as having violated the Appearance of Fairness Doctrine.

No such allegation of personal interest has been raised in the case at bar. Intervenor Kunzler has not alleged that the Hearing Examiner has a personal interest that disqualifies the Hearing Examiner, and there is nothing in the record to suggest that a personal interest exists.

C. The Intervenor Has Failed to Demonstrate that the Hearing Examiner has Pre-judged the Issues.

In accordance with the Appearance of Fairness Doctrine, adjudicators are precluded from pre-judging the issues in a matter. ***Organization to Preserve Agricultural Lands v. Adams County***, 128 Wn.2d 869, 890, 913 P.2d 793 (1996.) However, prejudgment is never presumed and must be affirmatively shown by the party asserting it. ***City of Lake Forest Park v. State of Wash. Shorelines Hearings Bd.***, 76 Wn. App. 212, 219, 884 P.2d 614 (1994). To illustrate, in ***Anderson v. Island County***, 81 Wn.2d 312, 501 P.2d 594 (1972) a councilmember deciding a quasi-judicial matter told the applicant during the hearing that he was "just wasting his time" talking. Based on this showing, the court held that the councilmember had prejudged a particular issue and had made an unalterable decision before the hearing was held.

Section 14.02.070 of the Skagit County Code does not address prejudgment of issues. The Hearing Examiner's Rules of Procedure also does not identify prejudgment of issues as a cause of disqualification, but does incorporate the Second Canon of the Washington State Code of Judicial Conduct. Rule 2.2 of the Code of Judicial Conduct provides that, "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment [1] to Rule 2.2 provides that "[t]o insure

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impartiality and fairness to all parties, a judge must be objective and open-minded." Identical to the rule of prejudgment under the appearance of fairness doctrine, bias or prejudice taking the form of prejudgment of issues is never presumed, and must be affirmatively demonstrated. ***In re Borchert***, 57 Wn.2d 719, 722, 359 P.2d 789 (1961).

In the case at bar, Intervenor Kunzler argues that the Hearing Examiner did not require the same individuals to testify at the second hearing as testified at the first hearing (when the recording equipment failure was discovered), which "raises the question" of whether or not the second hearing was for show only. Intervenor Motion to Recuse Hearing Examiner, p. 5. Intervenor Kunzler goes on to argue that the Hearing Examiner would not release the Examiner's notes of the first hearing, and therefore it is not possible to determine what evidence the Examiner relied upon to reach his decision. *Id.* But the bare argument that the Hearing Examiner prejudged the matter before him, without a showing of actual or potential bias, necessarily relies on an improper assumption.

There is nothing in the record to suggest that the Hearing Examiner had a closed mind. Intervenor Kunzler has not identified any testimony that was given at the second hearing that could be construed as anything other than duplicative of the first hearing. No testimony is called out that would alter the outcome of the Hearing Examiner's decision. There simply is no showing, let alone an adequate showing, of a closed mind on the part of the Hearing Examiner.

Moreover, the argument that an adjudicator's refusal to release the adjudicator's notes is nothing more than a red herring. A judge's notes are not public. ***Beuhler v. Small***, 115 Wn. App. 914, 919, 64 P.3d 78 (2003); see also *Cowles*, 96 Wn.2d at 587. Disclosure of such notes would intrude upon a judge's subjective thoughts and deliberations. *Id., quoting* ***State v. Panknin***, 217 Wis. 2d 200, 209 - 10, 579 N.W.2d 52 (Wis. Ct. App. 1998). The *Buehler* Court said that, "[i]n light of the strong public policy

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supporting the court's authority to control its proceedings and the inherent desirability of protecting the court's subjective thought processes, we find no common law basis to access Judge Small's personal work related computer files." *Beuhler,* 115 Wn. App. at 920.

Moreover, the cases cited by Intervenor Kunzler as support for his argument that the record was incomplete - ***Bennett v. Bd. of Adjustment of Benton Cnty***., 23 Wn. App. 698, 597 P.2d 939 (1979), and ***South Capitol Neighborhood Ass'n v. Olympia***, 23 Wn. App. 260, 595 P.2d 58 (1979) – were both decided before the State Legislature enacted the LUPA statute, Chapter 36.70C RCW. That statute specifically relieves agencies such as the county (and trial courts) of the archaic requirement that an entire verbatim transcript be made part of the administrative record. RCW 36.70C.110(2). Parties may agree to the scope of the record, and the Hearing Examiner may order the record to be shortened or summarized to avoid reproduction and transcription of portions of the record that are duplicative. This is consistent with the policies and purpose of the LUPA statute. *See* RCW 36.70C.010 ("uniform, expedited appeal procedures"). In the case at bar, and because the record was recreated through the subsequent hearing, the Hearing Examiner may order the record of the first hearing to be shortened to include those portions of the record that are available.

D. The Intervenor Has Failed to Demonstrate that the Hearing Examiner is Biased.

Under the Appearance of Fairness Doctrine, an adjudicator may be challenged for partiality that evidences a personal bias or personal prejudice signifying an attitude for or against a party. *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d at 890. However, an expressed policy preference is insufficient to demonstrate prejudice, and the ideological or policy leanings of an adjudicator are not subject to challenge. *Id.* ("trial court was within its discretion in determining that [county commissioner] was able to maintain an open mind about the merits of the proposal . . . notwithstanding his expressed policy preference.") Again, a challenger must present

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evidence of actual or potential bias to support an appearance of fairness claim. *State v. Post*, 118 Wn.2d at 619.

The Skagit County local rule, and the Hearing Examiner's rule of procedure do not address bias. However, in ***State v. Eastabrook***, 58 Wn. App. 805, 816-17, 795 P.2d 151, *rev. denied*, 115 Wn.2d 1031, 803 P.2d 325 (1990), the court equated the prohibition against an appearance of bias under the Appearance of Fairness Doctrine, with Canon 3(C) of the Code of Judicial Conduct.[5] The Code of Judicial Conduct is thus fundamentally equivalent to the Appearance of Fairness Doctrine.

In the case at bar, Intervenor Kunzler makes four arguments that the Hearing Examiner is biased: (1) the Examiner based his decision on the Applicant's word that all necessary permits needed "to proceed with their application" had been issued, without reviewing those permits; (2) the Examiner ignored evidence regarding the hydraulic impacts of the levees on upstream property owners; (3) the Examiner failed to address the floodway issue; and (4) the Examiner "ignored" provisions of the Shoreline Master program with respect to the distinction between maintenance and improvements to the levee.

1. <u>The Hearing Examiner was not required to review additional permits</u>. Intervenor Kunzler first argues that the project applicant, Dike District No. 12, did not have all required permits needed "to proceed with their application," and that as such, the Hearing Examiner could not make a fair decision without reviewing those permits. But Intervenor fails to identify any aspect of the Shoreline Management Act or Skagit

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[5] The former CJC 3(C) provided in part:

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Rule 2.3 of the revised Code of Judicial Conduct provides as follows:

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

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County's Shoreline Master Program that required permits to be issued prior to consideration of the respondent's permit application. Because no element of the Act or Skagit County's Master Program requires an applicant to submit permits that have already been issued, Intervenor apparently seeks to shift his burden of showing that the SMA or SMP has been violated to the respondents, and require respondents to prove a negative.

Moreover, to the extent Intervenor argues that Skagit County's Master Program requires additional permits to be issued prior to application (and consideration) of a Shoreline Substantial Development Permit, such a process would violate Washington's Vesting Doctrine. In ***West Main Assocs. Inc. v. City of Bellevue***, 106 Wn.2d 47 (1986), Washington's Supreme Court considered a City of Bellevue ordinance that prohibited the filing of a building permit application for any proposed project until after several additional approvals were obtained. The court held that the ordinance upset the vesting doctrine's protection of a citizen's constitutional right to develop property free of the "fluctuating policy" of legislative bodies by delaying the vesting point until well after a developer first applies for project, thus reserving for the city an almost unfettered ability to change its ordinances in response to a developer's proposals.

2. <u>The Examiner did not ignore evidence regarding the hydraulic impacts of the levees on upstream property owners</u>. Intervenor Kunzler alleges that substantial amounts of information was submitted to the Hearing Examiner regarding hydraulic impacts, but that the Hearing Examiner ignored this evidence. Intervenor Motion to Recuse/Disqualify Hearing Examiner, at pg. 5. More specifically, Intervenor alleges that "upstream impacts to property owners" was ignored. But this argument itself disregards the Hearing Examiner's Finding of Fact No. 25, wherein the Hearing Examiner found that "[t]he EIS contains a graphic that shows a base flood elevation impact from this project of 0.1 foot in the Nookachamps basin using PIE hydrology." Intervenor Kunzler

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does not explain how selecting information submitted by one party over another party's data constitutes an Appearance of Fairness violation. And although Intervenor Kunzler suggests that upstream impacts to property owners are the "main subject of this controversy," Intervenor is mistaken. The main subject of this controversy is whether Respondent's project complies with Skagit County's adopted Shoreline Management Plan. Impacts to property owners are afforded consideration in accordance with the Shoreline Management Plan's requirements (including those rules and regulations incorporated by the management plan.)

3. The Hearing Examiner had no authority to address the floodway issue. Intervenor Kunzler next argues that the Hearing Examiner failed to take into account the Skagit River's floodways, thus violating federal flood control standards. In doing so, Intervenor alleges that it is indeed the Hearing Examiner's obligation to address issues and topics that arise outside of the state Shoreline Management Act and Skagit County's Shoreline Management Plan, in order to reach an adequate resolution.

The Hearing Examiner's authority is delimited by Section 9.06 of Skagit County's Shoreline Master Program, which reads as follows:

> 9.06 Application Review - Hearing Examiner
>
> 1. The Skagit County Hearing Examiner shall consider applications for shoreline substantial development, conditional use and variance permits and shall make decisions regarding permits based upon the Skagit County Shoreline Management Master Program and the policies and procedures of the Shoreline Management Act.

The Hearing Examiner considered Intervenor's arguments made at hearing, and rejected those same arguments as being outside the ambit of the Hearing Examiner's authority. *See*, Skagit County hearing Examiner Notice of Decision, Conclusion of Law No. 5. Nowhere does Intervenor explain how the Hearing Examiner's authority has been expanded to consider his argument as to floodways.

4. The Examiner did not "ignore" provisions of the Shoreline Master program with respect to the distinction between maintenance and improvements to the levee. Although Intervenor Kunzler devotes several paragraphs to the distinction between

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"improvements" and "maintenance," the significance of this distinction is elusive. To the extent Intervenor Kunzler argues that a Substantial Development Permit is required for the project application, the Hearing Examiner has already arrived at that same conclusion. Finding of Fact No. 28 of the Hearing Examiner's decision states that,

> 28. The aspects of the project that involve maintenance of existing structures are within the statutory Shoreline Act permit exemption. But, since the instant request involves increases in the girth and height of the levee, a Substantial Development Permit is required.

To the extent that Intervenor argues that work has been performed without a Shoreline Substantial Development Permit in the past, Intervenor relies on hearsay evidence not in the record. In either event, this argument should be rejected.

G. Intervenor Failed to Promptly Petition for Disqualification.

In the case at bar, Intervenor Kunzler has sat on his rights, and failed to raise an Appearance of Fairness challenge as soon as it became known. Pursuant to RCW 42.36.080, a party seeking to raise an Appearance of Fairness challenge must do so promptly. That statute provides as follows:

> RCW 42.36.080 - Disqualification based on doctrine — Time limitation for raising challenge.
>
> Anyone seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. Where the basis is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision.

Washington courts have enforced this statutory mandate. In *Organization to Preserve Agricultural Lands*, 128 Wn.2d at 888, the court held that an appellant's failure to challenge the adequacy of an adjudicator's disclosure of ex parte communication precluded a challenge. In ***Lakeside Industries v. Thurston County***, 119 Wn. App. 886, 904, 83 P.3d 433 (2004), the court held that a failure to raise a hearing examiner's speculative pecuniary interest barred a challenge.

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Here, a challenge should have been raised, at the latest, at the time of remand. Intervenor Kunzler was aware at that time of all the pertinent facts necessary to bring such a challenge. Intervenor failed to do so, and the challenge is now barred. A party claiming an Appearance of Fairness violation cannot indulge in mere speculation, but must present specific evidence of personal or pecuniary interest. ***Lake Forest Park v. State***, 76 Wn. App. 212, __P.2d__ (1994).

IV. CONCLUSION

The arguments raised by Intervenor reflect a disagreement with the outcome of the Hearing Examiner's decision. But as noted at the outset, "[j]udicial rulings alone almost never constitute a valid showing of bias." *In re Pers. Restraint of Davis*, 152 Wn.2d at 692. No credible evidence of personal interest, prejudgment of issues, or bias has been raised. Intervenor has failed to meet his heavy burden, and his motion must be denied.

Dated this 3RD day of April, 2014.

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