EXHIBIT 5

RECEIVED 7/25/16

-copy

RECEIVED
JUL 25 2016
COMMUNITY PLANNING
AND DEVELOPMENT DEPT.

July 24, 2016

To: The City of Olympia. and its,
Hearing Examiner for the BranBar Rezone, Subdivision and Housing Project Action
Cari Hornbein, Senior Planner and SEPA Responsible Official (SP&SRO)
Tim Smith,
Steve Hall, City Manager

Re: Comment Request for Recusal of Hearing Examiner (HEX) for the BranBar Rezone and Request for Withdrawal of the "piecemealed" SEPA Determination of Nonsignificant DNS issued by SP&SRO Hornbein, with a Request for Recusal of Hornbein, for the City Staff's current ultra vires review and approval of only the single interconnected and related "Rezone" part of the entire BranBar Rezone, Subdivision and Housing Project Action.

Greetings,

For the reasons noted herein and in the attached exhibits, and as evidence of official and judicial notice known to the City Planning Dept. shows, I, Jerry Lee Dierker Jr., am a severely disabled American Air Force Veteran living on and leasing a mobile home and 1.7 acres of mostly wetland/forest and a large pond at 2826 Cooper Point Road NW, Olympia, WA 98502, a portion of the historical old "El Camino Real", "Oregon Trail" and "United States Highway 1" right of way used by the Pony Express and the early Stage Coast "Postal Carriers", located on the NorthEast Corner of 28th AVE. NW and Cooper Point Road NW just outside of the Olympia City limits in Thurston County, Washington, within the Green Cove Creek Basin Plan area in this the Green Cove Creek Basin Plan area that drains through my home, which is also shown by evidence within the City record on this case and on the Green Cove Creek Basin Plan itself, am making the above Comment and procedural Requests to protect myself, my family, my neighbors, the environment around me, and the public funds and resources of the State and local governments of this area from improper, prejudicial, unlawful, unconstitutional, and illegal misuse, misappropriation, or theft, as I have done for at least the last quarter century in this area as part of my actions taken to be a responsible citizen and asset t this my community, pursuant to my known creed of my Pennsylvania. (Id.; also do a Google search on me).

I request that the City and its HEX accept and grant the relief requested in this written Comment, etc., at this time, for the record in this case due to the lack of proper notice to affected and/ interested parties in this and other related cases, due to the recent Letter Response from Ms.Hornbein to me, and due to my disabilities, pursuant to the Americans with Disabilities Act (ADA), the doctrine of Fraudulent Concealment, the Discover Rule Doctrine and other such law.

As evidence of official and judicial notice known to the City Planning Dept. shows in a previous HEX decision, I, Jerry Lee Dierker Jr., in Dec. 2006 have been previously found by then City of Olympia HEX Thomas Bjorgen, now a State Court of Appeals Justice in Division II, to be an expert in a large number of scientific, legal, and other fields which he deemed too numerous to mention at the time, as Mr. Bjorgen also knew then from being the County's Civil Deputy Prosecutor acting as "opposing counsel" acting against me in a number of administrative and Superior Court cases in which I was the Plaintiff/Appellant.

That acknowledged expertise I have includes Federal, State and local law, geology, hydrology, chemistry, urban/rural planning, forestry, planetary ecology, physics, computer technology, software, electronics, and the list goes on so far I have never really listed it all – I was born this way.

For the purposes of this Comment/Request for Recusal,et al., I am also incorporating: 1) Ms. Hornbein's July 20, 2016 Response to Mr. Dierker Re my first Request for Withdrawal of SEPA DNS on BranBar "Rezone" I received July 22, 2016 that reflects part of my verbal comments on the BranBar "Rezone" she accepted under the Americans with Disabilities Act (ADA) and other law as I requested

in a voice-mail to her; and 2) for disqualification/impartiality/prejudice of a primary or reviewing officer, I am incorporating the portions of Port of Tacoma Attorney Carolyn Lake, lead Attorney for the Goodstein Law Group on the APA requirements.

I also join in with the other "Comments", etc., in opposition to these City actions and this proposed project which the record shows will impact where I live, but for which the City failed to give me and other known interested and/or likely to be impacted persons or land owners in this Green Cove Greek Basin who live or have property here which lie "downstream" and "downhill" from this proposal that are likely to be receive the unreviewed impacts from this proposal, who are similarly situated individuals who lives, , liberty, property, and civil and constitutional rights are being trampled by the actions of a few City Staff/Officials trying to help out of town developers do illegal and dangerous projects on undevloable land, partly so that the currently unneeded overly large numbers of City Planning Staff that resulted from the giant/improperly controlled urbanizing City development that was built up during "Boom-to Bust" of the 80's, 90's, and early 2000's can keep getting paid by the public, instead of having the same "downsizing" of City Staff as has occurred in the Building Inspectors division has happen since there is no longer such huge growth in Olympia.

Clearly, this City action is an unconstitutional, illegal and prejudicial "Spot Zoning" action, for which the City the HEX and lacks authority and legal jurisdiction to consider and approve, especially when doing so by the City Staff's illegal use of several multiple SEPA, Planning, and HEX "preliminary" reviews and approvals, a unlawful theft of public funds and public resources, that appears to be being done over and over again and again by certain City Staff in order to "milk" the public tax money, while the City provides unconstitutionally biased preferential treatment to certain out-of-town developers including even using certain other City Staff within the Planning Dept. and hiring out-side City-paid-for "City-Staff-Developer-Consultants/Contractors" to aid tsuch developers, another theft of public funds, and, thereby, such City staff are clearly not "impartial" who have repeatedly acted in such an unlawful manner while they stole public funds, etc., and they and other City Staff who have repeated acted with them in support of this City action in this and related cases, must recuse themselves from consideration of this case, and the City must find someone new to "impartially" consider this proposed City action which would attempt to provide further "vesting" to this incomplete rezoning/project application, despite the fact that the record shows the City has already unlawfully allowed "project construction actions" to occur on this BranBar site before this City "review" of BranBar was ever completed to this point.

A) I make this Request for Recusal of Hearing Examiner for the BranBar Rezone, Subdivision and Housing Project Action, for violation of the Appearance of Fairness Doctrine and other laws, due to the HEX's pecuniary interest in being paid for the HEX's conducting of multiple hearings on such City actions like this BranBar Rezone "piece", which is being and/or has been unlawfully for the City and the HEX to unlawfully and illegally make numerous preliminary approvals over each individual "piecemealed" part of the many known to be "connected actions" and projects within the Green Cove Creek Basin Plan area known to the City Planning Dept., when the HEX knows such actions are illegal under SEPA, the APA, the Growth Management Act, the Appearance of Fairness Doctrine and other laws providing for procedural due process in administrative situations like this "Spot Zoning" action which the HEX lacks authority and legal jurisdiction to consider and approve. (See AGLO Opinion 1973 #103).

The State Supreme Court has found that:

> "Spot zoning has come to mean arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification of totally different from and inconsistent with the classification of the surrounding land, and not in accordance with the comprehensive plan. Spot zoning is a zoning for private gain designed to

favor or benefit a particular individual or group and not the welfare of the community as a whole. (Citation omitted). The vice of spot zoning is its inevitable effect of granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification." (See Smith v. Skagit County, 75 Wn. 2d 715, at 743, 453 P. 2d 832 (1969); Anderson v. Island County, 81 Wn. 2d 312, at 325, 501 P. 2d 594 (1972); Pierce v. King County, 62 Wn. 2d 324, at 339 (1963).

"Spot zoning merely for the benefit of one or a few or for the disadvantage of some, still remains censurable because it is not for the **general** welfare ...". (See Anderson, at 325; also Pierce, at 339).

The "spot zoning" here benefitted only one individual property owner owning land in this area and benefits only his contractors/developers and the City Planners who are "milking" the public with such thefts of public funds unlawfully, unconstitutionally and illegal,.

This "spot zoning" was not "for the general welfare" of the greater community who are attempting by SEPA, the GMA, UGMA and other new laws to control growth and improve capital spending while protect the public.

"Because this action was not for the '**general** welfare', it was arbitrary and capricious." (Anderson, at 325).

The City's actions here in effectuates a change so inconsistent with the the Green Cove Drainage Area Plan, other previously existing comprehensive plans, and other land–uses in that area, as to be invalid. (Supra).

Such action is manifestly unreasonable, arbitrary, capricious and clearly erroneous.

CiTY'S ACTION VIOLATES APPEARANCE OF FAIRNESS DOCTRINE

The "Appearance of Fairness Doctrine" of RCW 42.36, covering land–use decisions such as this "require a sensitive balance between individual rights and the public welfare", and "the process by which such decisions are made must not only be fair but must appear to be fair to insure public confidence therein." (Fleming v. City of Tacoma, 81 Wn. 2d 292, 502 P. 2d 327 (1972), Smith v. Skagit County, supra; (Buell v. Bremerton, 80 Wn. 2d 518, at 523, 495 P. 2d 1358 (1972); Chrobuck v. Snohomish County, 78 Wn. 2d 858, 480 P. 2d 489 (1971).

In Buell, the State Supreme Court stated that the person or agency making such decisions must be "capable of hearing the weak voices as well as the strong" since "it is important not only that justice be done but that it also appears to be done...". (Buell v. Bremerton, supra).

1. The "weak voice" of those opposing this project living around this site has not been heard here or have been discounted in the County's environmental determination process for this project.

The applicant, the ERO and the Examiner have unlawfully discounted and/or disregarded the evidence and testimony of those persons living around the site.

The opponents of this project are not just some "ignorant country bumpkins" who have no knowledge of what they are talking about, as the Examiner seems to consider them when he disregards their testimony.

Though the Examiner may not know this, Appellant Dierker, an opponent of this project who has expressed concern over the stormwater runoff from this plat, is considered by the State Department of Ecology and State Department of General Adminstration to be a "lay expert" on the control of stormwater and its impacts on aquatic environments and aquatic fish life.

Mr. Dierker was the key person who prevented the degradation and possible loss of the Coho Salmon and Steelhead Trout run in Woodland Creek, from stormwater runoff from Lacey's Martin Village Shopping Center project, while he helped DOE rewrite the State Stormwater Manual in 1993 and helped the State Dept. of General Administration's contractors correct stormwater problems on the

then being constructed DOE and LI headquarters buildings in Lacey and Tumwater, as well as numerous other actions to help his community and his Federal, State, and local governmental organizations with his large expertise in a variety of fields. (Supra)

Other opponents of this project have their own expertise or just common knowledge of the area around the plat which they live in, which would benefit the County decisionmakers if they properly considered their testimony.

Clearly, the voice of the people living around the project has not been allowed to be heard.

As shown above, the public welfare of those persons living around this site from cumulative impacts and connected actions has not been taken into account by the environmental review official here.

These City officials have not corrected these failures to take into account the information of those persons living for years around this site during the SEPA or other planning in this case and other and other related/connected cases/projects/actions which should have been reviewed at the same time in the same SEPA and planning decisions, and the SEPA and Planning reviews and decisions could not be legally done in this "piecemealed" manner, a deliberate clearly erroneous and arbitrary and capricious action by the City Staff unlawfully, illegally and unconstitutionally acting here.

Clearly, not only is this decision not "fair" legally speaking under SEPA, it does not appear to be fair when only the information provided by the developer, the City or the County is taken into account by the environmental review officer, and the information from those living around the site is ignored and/or discounted as not being correct.

The Appearness of Fairness Doctrine "protects against decision makers who are actually biased or have a pecuniary interest in the proceedings", (Belcher v. Kitsap County, 808 P.2d 750 at 754 (1991), quoting Keever v. LEOFF Retirement Bd., 34 Wash. App. 873, 878, 664 P.2d 1256 (1983). Webster's Ninth New Collegiate Dictionary (1988) further defines "pecuniary" as "of or relating to money" (p.866).

Save a Valuable Environment v. City of Bothell, 576 P.2d 401 (1978), held that the Appearness of Fairness doctrine:

> "prohibits participation in at least quasi-judicial proceedings when such membership demonstrates the existence of an interest which might substantially influence the individual's judgment" (Id., p.408) [emphasis added].

In that case, the Court held that a planning commission member's membership in the Chamber of Commerce invalidated a zoning ordinance affecting a specific development, because the membership substantially influenced their judgment.

Under R.C.W. 42.36.080:

> "anyone seeking to rely on the appearness 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 is known to the individual."

While the current HEX has not yet taken any action in this case to my knowledge to become "prejudice", IF the HEX relies upon the SEPA and Planning Dept. recommendations to go forth in the procedural process to formally consider this "piecemealed" this Spot Zoning part of this project in a Public Hearing, IF the HEX does not make summary sua sponte denial of this "piecemealed" this Spot Zoning part of this project, and IF the HEX approves this "piecemealed" this Spot Zoning part of this project, the HEW thereby will have violated his oath of office and will have acted in a biased prejudicial manner, in violation of his legal authority, Oath of Office and City employment, the Appearance of Fairness Doctrine, SEPA, the Growth Management Act (GMA), the APA, and other law, without and/or in abuse of their legal authority under the law, while conducting a "theft" of public funds and resources, etc. (Supra; see also on theft of public funds Lemon v. Langley and Telford v. Thurston County, et seq, et al.).

As noted by her Response to Mr. Dierker's July 12, 2016 Request for Withdrawal of the DNS for

this project, when making the DNS for this project, Ms. Hornbein's misworded Responses show the following.

a) Ms. Hornbein's Letter to me stated that "there were deficiencies" in "the proponent's responses under Parts B and D of the Environmental Checklist", when SEPA actually requires that all related questions in the Environmental Checklist must be answered to the fullest extent possible by the applicant before any proper SEPA reare legally required by SEPA and such "deficiencies" Staff "Comments";

b) Ms. Hornbein's Letter to me stated that Ms. Hornbein was "aware of only one other development application in the Green Cove Basin, Parkside Preliminary Plat, for which a(nother) public hearing will be held on August 22, 2016" - a directly related and/or connected project and City actions which, like the full project approval and other actions by the City necessary for both of these projects, which also appears to add more "multiple" piecemealed SEPA, Planning, and HEX proceedings to be paid for over and over again by thefts from the public and/or opponents of such illegal City actions being required without any exception for indigency to pay exorbinate appeal fees to Planning and the HEX for administrative procedural due process appeals and even reconsideration, which is an unheard of "abridgment" of the People's civil and constitutional rights to petition the government for redress of grievances, which appears to also be unknown in all other administrative procedural due process venues outside of local land use planning in violation of the People's civil and constitutional rights to equal protection of the law, and appears to be unfair and in violation of such persons' civil and constitutional rights to petition the government for redress of grievances under SEPA, the APA, GMA, Appearance of Fairness Doctrine, Article I § 7 of the Washington State Constitution, and the First, Fourth Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments to the U.S. Constitution. (Id.; see also City's Appeal/Reconsideration Fees on the City's form for "Appeal of the Administrative Decision to the Hearing Examiner").

c) Ms. Hornbein's Letter to me stated that another "(m)ore detailed (SEPA) review of environmental impacts will occur at the time of the preliminary plat application", apparently a second "picemealed" SEPA DNS for this same BranBar project in direct violation of SEPA's requirement for a single SEPA review and determination for all interconnected and/or interrelated parts of a project, another set of impacts and connected actions not considered by Ms. Hornbein's SEPA review, in violation of SEPA, the APA, et seq.

d) Ms. Hornbein's Letter to me stated that "In addition, the preliminary plat will be reviewed for compliance with the city's development regulations and engineering standards which contain provisions specific to development in the Green Cove basin. Green Cove Creek Drainage BasinPlan"

e) Ms. Hornbein's Letter to me stated that her SEPA review did not review the ultimate "Cumulative impacts" of this BranBar project and the related Parkside project, by Ms. Hornbein's incorrectly and improperly claim that "cumulative impacts are typically addressed when a comprehensive plan is developed or updated, or when an environmental impact statement (EIS) is prepared", wjhich is some vague and clearly erroneous reason for Ms. Hornbein's not considering he ultimate "Cumulative impacts" of this BranBar project and the related Parkside project in the SEPA review and decision for this project.

f) Besides failing to have a complete record for review, failing to consider any related or connected impacts leading from the "connected" action of the Parkside project actions, improperly piecemealing Ms. Hornbein's SEPA review did not review the ultimate "Cumulative impacts" when SEPA the GMA, the APA, and numerous other laws require's the HEX's and Ms. Hornbein's full and complete review of a completed set of the City's SEPA and Planing records containing a full and complete disclosed copy of the Cities agency record supporting all of the City's actions necessarily leading from their SEPA and Planning actions all legal required data from the applicant, for the City's proper "hard look" consideration of the ultimate foreseeably likely adverse impacts and/or consequences of this action and all directly and/or indirectly related connected actions and their cumulative impacts during the City's

alleged SEPA environmental review of this project, like those leading from the City's Parkside Preliminary Plat action for building a large development on the land on top of the other side of the same canyon and City Park from BranBaris project site, with both using the same roadway, 20th Ave. NW, both in the Green Cove Basin Plan Area covered by the City's Comprehensive Plan comprises another illegally "piecemealed" HEX "preliminary" decision, done merely to "vest" the full Parkside project for another 3 years, as noted by the Emails between City's private/contracted Planner George Steier and Senior Planner Tim Smith and others she did not properly get nor fully consider all required environmental information under SEPA when making her SEPA decision here.

g) Clearly, while the Planning Staff and the HEX must all follow SEPA and other laws to act to properly consider whether the action is supported by complete SEPA information and a proper SEPA review in each case, to ignore or evade this legal requirement like was done here is clearly erroneous, unlawful, illegal, arbitrary and capricious and conflicts with the laws controlling the HEX's actions and decisions.

B) I also Request for Withdrawal of the "piecemealed" SEPA Determination of Nonsignificant DNS issued for "Rezone" part of the BranBar Rezone, Subdivision and Housing Project Action request being reviewed and issued by Cari Hornbein, Senior Planner and the SEPA Responsible Official the City Planning Dept. and other Staff here, when even Ms. Hornbein's July 20, 2016 Response to Mr. Dierker clearly without any consideration of the ultimate consequences of this Subdivision and Project Action, and I Request for Recusal of Cari Hornbein, Senior Planner and the SEPA Responsible Official for BranBar Rezone, Subdivision and Housing Project Action, for violation of the Appearance of Fairness Doctrine and other laws, due to her pecuniary interest in being paid for conducting of multiple SEPA reviews on each separate part of this BranBar Rezone and other such City actions connected and/or related to this BranBar Rezone "piece", which is being and/or has been unlawfully used by the City and their SEPA Responsible Official for BranBar to unlawfully and illegally make numerous preliminary SEPA and action approvals for each individual "piecemealed" part of the many known to be "connected actions" and projects within the Green Cove Creek Basin Plan area known to the City Planning Dept., when even Ms. Hornbein knows or is required to know that such actions are illegal under SEPA, the APA, the Growth Management Act, the Appearance of Fairness Doctrine and other laws providing for procedural due process in administrative situations like this improperly piecemealed DNS SEPA action by Ms. Hornbein the City's SEPA Responsible Official for BranBar "Spot Zoning" action, especially when Ms. Hornbein also lacks all legal authority and jurisdiction to consider and recommend approval without requiring an EIS, in this the Green Cove Creek Basin Plan area that drains through my home as shown by evidence within the City record on this case and on the Green Cove Creek Basin Plan itself, et seq. (See attached Ms. Hornbein's July 20, 2016 Response to Mr. Dierker, supra).

SEPA under WAC 197-11-055(2)(c) provides:

"Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action." (Id., emphasis added; see also WAC 197-11-055(1) and WAC 197-11-070).

The Supreme Court has found that consideration of the environmental factors must be done "at the earliest possible stage to allow decisions to be based upon complete disclosure of environmental consequences." (King County v Boundary Review Board, supra at 663; referring to Stempel v. Department of Water Resources, 82 Wn. 2d 109, 118, 508 P. 2d 166 (1973); Loveless v. Yantis, 82 Wn. 2d 754, 765–766, 513 P. 2d 1023 (1973).also RCW 43.21C.030 and WAC 197–11–055).

SEPA "requires an analysis of ultimate probable consequences, including those secondary and cumulative, whether social or economic. It also mandates that extrajurisdictional effects be addressed and mitigated, when possible." (See Cathcart v. Snohomish County, 96, Wn. 2d 201, at 209, 634 P. 2d 853 (1981).

The Courts have found "a duty to serve the regional welfare ... to exist when the interest at stake

is the quality of the environment." (See SAVE a Valuable Environment v. Bothell, 99 Wn. 2d 862 (1978).

The Supreme Court found:

"Where the potential exists that a zoning action will cause a serious environmental effect outside jurisdiction borders, the zoning body must serve the welfare of the entire affected community. If it does not do it acts in an arbitrary and capricious manner. The precise boundaries of the affected community cannot be determined until the potential environmental effects are understood." (See SAVE, supra, at 869).

SAVE also found that:

"municipalities are not isolated islands remote from the problems of the area in which they are located: thus an ordinance," or other decision such as noted herein, though "superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective." (Id., at 871; see also SORE v. Snohomish County, 99 Wn. 2d 363, at 368).

However, as Ms. Hornbein's letter to Mr. Dierker shows, during her SEPA review for the DNS issuesd for this proposal she did not and stated she will not act to properly consider any and all potential or likely impacts that are foreseeably likely to be leading from this proposal or its approval by the HEX, nor did she act to properly consider any evidence or law opposing the City's recommended actions here that came from the opponents to this project who live in this area, most of which like me, did not get any prior legal notice of this proposal nor the City's actions, though my home like other in the area downstream will be directly affected by the increased polluted stormwater runoff from this proposal next to the Cooper Crest project which along with other developments in this area already caused the loss of the well on this property leading from the increased polluted stormwater runoff from the Cooper Crest project, for which the City has agreed to provide this property and me with City-water at a greatly reduced rate of about $8.00 per month. (ID. See City's Water Bill and annextion agreement on this property I lease).

As noted, such stormwater discharges from housing projects into such wetlands are Federally prohibited under Section 301(a) of the Federal Water Pollution Control Act of 1972, Title 33 USCS 1311 and 1362 et seq., and are regulated and only permited by the U.S. Army Corps of Enginneers under Section 405 of the Federal Clean Water Act of 1987, Title 33 USCS section 1251, et seq? (See United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 474 US 121, 88L. Ed 2d 419 (1985); United States v. Holland, 373 F. Supp. 665, at 668-670 (1974).

The County's hand-out "Wetland ... What Wetland" prepared by the Thurston County Regional Planning Council and given out at the Planning Department confirms such Federal regulation as it states:

"All governments within Thurston County regulate uses in wetlands from the following Federal Clean Water Act definition ... (Source: EPA, 40 CFR 230.3 and [Corps of Engineers] CE, 33 CFR 328.3)". (Emphasis added).

Also, the Planning Department also must follow DOE's "Washington's Wetlands" handbook, which also confirms such Federal regulation of wetlands. (See page 12).

However, there has been no proper review any impacts to the Green Cove Basin's hydrologically interconnected wetlands and streams which drains down over 100 feet from this project site through my home and then downstream into Puget Sound, which clearly shows tha the City's SEPA Responsible Official just refuses to follow SEPA, the APA, or any law or information which might prevent this illegal City action to make numerous unlawful piecemealed SEPA, Planning, and HEX decisions to approve this project despite any opposing fact or law and without ever having a complete set of planning documents and site data for a reasonable person to properly follow the law in this case, which appears to part of the City's written and/or unwritten "institutionalized" unethical, unlawful, unconstitutional and/or illegal policy, custom, habit, procedure, and/or business practice to support

certain City Staff's acts taken in concert, collusions and/or conspiracy to continue their thefts of public tax funds and resources for their own benefits or for the benefit of some developer private purposes, a violation of my and other opponents civil and constitutional rights and a continuing and repeated system of institutionalized thefts of public funds by misrepresentation of the facts and law in this and other such matters. (See U.S. Supreme Court decision in Monel v. New York City Dept. of Social Services; see State ex rel Collier v. Yelle, 9 Wn. 2D 317, 326, 115 P.2d 273 (1941); Article 7 § 1 of the Washington State Constitution, Lemon v. Langley, citation omitted; see also AGLO Opinion of July 7, 1976 at paages 5-6, and AGLO Opinion of Feb. 16, 1979 at page 4).

The Hearing Examiner's decision on this proposal here which would "vest" it further, clearly "commits" the City "to a particular course of action", and therefore the Examiner must consider the information brought forth under SEPA, including any possible inadequacies of the new SEPA determination.

Further, for this proposal, the Hearing Examiner is seemingly acting as a "non-lead agency" reviewing the Staff Report and Recommendations of the SEPA "lead agency"and City Planning Department, prior to making his formal approval of this proposal.

The HEX is not bound nor constrained by the City's SEPA negative threshold determination (DNS) here, since under SEPA, as the HEX action inherently requires the HEX to conduct an independent review and a "hard look" at this SEPA decision, to determine whether the HEX is "dissatisfied" with the adequacy of the City's SEPA decision. (See King County v. Boundary Review Board, 122 Wn. 2d 648 at 661, Footnote 7 (1993).

The State Supreme Court specifically noted there that SEPA requires such appellate Boards and other agencies with jurisdiction to make to make an independent environmental determination on a proposed action to determine if they are "satisfied" that the lead agency's DNS is adequate. (Id.).

The State Supreme Court found there that after such HEX that is subject to SEPA requirements makes such an "independent" environmental review, if they determine they are "dissatisfied" with the lead agency's DNS, the HEX should use their authority under WAC 197–11–600(3)(a) and WAC 197–11–948 to assume lead agency status and make their own SEPA threshold determination.

Clearly, at the least, the Hearing Examiner must consider the adequacy of the new SEPA document and all available pertinent information when making his decision to approve this plat application, and he was acting in an unlawful, clearly erroneous, and arbitrary and capricious manner, in violation of SEPA and in excess of his authority when he refused to do so.

Clearly, while the Planning Staff and the HEX must all follow SEPA and other laws to act to properly consider whether the action is supported by complete SEPA information and a proper SEPA review in each case, to ignore or evade this legal requirement like was done here is clearly erroneous, unlawful, illegal, arbitrary and capricious and conflicts with the laws controlling the HEX's actions and decisions.

Clearly, the HEX must Reverse this SEPA negative threshold determination here and Remand them back for further proceedings including preparation of a Determination of Significance and preparation of a scoping document and an EIS on all part of this proposal and the Parkside and other related proposals in this area at the same time in the same SEPA determination and review, before this project could be considered by the Hearing Examiner, if this proposal was not completely barred by the Green Cove Basin Plan, the laws on no spot zoning, and numerous other laws prohibiting such approvals of such development proposals in this area.

CONCLUSION AND RELIEF REQUEST

For the reasons noted herein, it is clear that the SEPA and Planning review for this piecemealed part of this BranBar project proposal was improperly piecemealed and is unlawful for many other

reasons, the HEX hearing is premature, and thereby, I request that the HEX grant the relief I have requested herein to require the City SEPA and other Planning Staff to follow the requirements of SEPA and all other laws they are supposed to follow during such reviews, thereby denying approval of this proposal, etc.

Jerry Lee Dierker Jr.
2826 Cooper Point Rd. NW
Olympia, WA 98502
Ph. 360-866-5287

Olympia

City of Olympia | Capital of Washington State
P.O. Box 1967, Olympia, WA 98507-1967
olympiawa.gov

July 20, 2016

Mr. Jerry Dierker
2826 Cooper Point Road NW
Olympia, WA 98502

RE: Branbar Rezone Determination of Nonsignificance, File No. 15-0130

Dear Mr. Dierker,

Thank you for your phone call on July 12, 2016 regarding your request for the City to withdraw the Determination of Nonsignificance (DNS) for the Branbar rezone. If I understood your voice mail message correctly, the key reason behind your request is that the DNS was procured by misrepresentation under WAC 197-11-340(C), and that a single checklist should be prepared for all development proposals in the Green Cove basin (cumulative impacts).

The deadline for accepting comments was 5 p.m. on July 6, 2016; however, I did take your comments into consideration and have determined that the DNS was properly issued. For the most part, the proponent's responses to the questions under Parts B and D of the environmental checklist provided adequate information regarding the rezone request. Where there were deficiencies, comments were inserted by staff.

At this time, I'm aware of only one other development application in the Green Cove basin, Parkside Preliminary Plat, for which a public hearing will be held on August 22, 2016. While SEPA requires cumulative impacts to be addressed, this can be difficult when projects are evaluated individually. Cumulative impacts are typically addressed when a comprehensive plan is developed or updated, or when an environmental impact statement (EIS) is prepared (SEPA Handbook, Department of Ecology). In this case, I determined that the rezone probably would not significant adverse impacts and therefore, did not require an EIS under RCW 43.21C.030(2)(C).

More detailed review of environmental impacts will occur at the time of preliminary plat application. In addition, the preliminary plat will be reviewed for compliance with the City's development regulations and engineering standards which contain provisions specific to development in the Green Cove basin. These provisions were based on the 1998 Green Cove Creek Drainage Basin Plan, which took a comprehensive approach in addressing impacts to stormwater and habitat.

I hope this letter addresses your concerns. The public hearing for the Branbar rezone is on Monday, July 25, 2016, starting at 6:30 p.m. in the City Council Chambers at City Hall. If you are able to attend, there will be an opportunity for public testimony.

Sincerely,

Cari Hornbein, Senior Planner, AICP
SEPA Official

APPEAL OF ADMINISTRATIVE DECISION TO HEARING EXAMINER

Olympia

OFFICIAL USE ONLY		
Case #: _____	Master File #: _____	Date: _____
Received By: _____	Project Planner: _____	Related Cases: _____

APPELLANT:

Name: _____

Mailing Address: _____

City, State, Zip: _____

Telephone Number(s): _____

E-Mail Address: _____

REPRESENTATIVE OR ATTORNEY:

Name: _____

Mailing Address: _____

City, State, Zip: _____

Telephone Number(s): _____

E-Mail Address: _____

I hereby appeal the administrative (staff) decision described below for those reasons stated herein and as attached hereto, and seek the relief and remedies as stated. I understand that this appeal is not complete without payment of the required filing fee. I understand that this appeal will be considered pursuant to the authority and provisions of Olympia Municipal Code 18.75.020 and 18.75.040.

Filing Fee: $1,000.00 (plus Hearing Examiner Deposit of $500.00 when appealing an impact fee)

_____ *Initials* I understand that an impact fee appellant **is required to pay actual Hearing Examiner costs,** which may be higher or lower than any deposit amount. I hereby agree to pay any such costs.

DECISION APPEALED:

Case Name: _____ Decision Maker: _____

Case Address: _____ Date of Decision: _____

Case No.: _____

COPY OF DECISION APPEALED IS ATTACHED: ☐ **YES** ☐ **NO**

Basis of Appeal.

1. Please describe how you are or are likely to be harmed by the decision you are appealing.

2. Please describe below, or in attachments, how and why you believe the city staff erred.

3. **Remedy or Relief Sought:** If you are successful on appeal, please describe the action you wish the Hearing Examiner to take. Explain how this action would eliminate or reduce harm to you.

Have you served notice of this appeal on any other parties? ☐ **YES** ☐ **NO**

If yes, please list:

Signed: _____ _____

Signature ***Date***

GOODSTEIN
LAW GROUP
PLLC
501 S. G Street
Tacoma, WA 98402
Fax: (253) 779-4411
Tel: (253) 779-4000

Carolyn A. Lake
Attorney at Law
clake@goodsteinlaw.com

July 21, 2016

VIA EMAIL
William A. Lemp, III
(William.lemp@pdc.wa.gov)
Lead Political Finance Investigator
State of Washington
Public Disclosure Commission
PO Box 40908
Olympia, WA 98504-0908

RE: PDC Case 6626 – Request for Recusal/Motion for Disqualification
Port of Tacoma Response to Complaint

Dear Mr. Lemp:

We represent the Port of Tacoma ("Port") and submit this request for recusal /Motion for Disqualification pursuant to RCW 34.05.425 and related legal authority, cited herein. For the reasons described below, we respectfully request that Executive Director Evelyn Fielding Lopez voluntarily recuse herself from any role in the review, assessment and processing by the Public Disclosure Commission ("Commission") in PDC Case 6626, opened as a result of the Citizen Action Complaint (Complaint") filed by Arthur West with the Washington State Attorney General's Office (AG) on June 16, 2016. Alternatively, if Ms. Lopez declines to recuse, we submit this Motion for Disqualification.

The Port does not take lightly the action of filing this request and Motion. We embrace and share the PDC's commitment to transparency and impartiality, and protecting the integrity of the ballot process. ("...the people shall be assured of .... the utmost integrity, honesty and fairness in the dealings of the officials in all public transactions and decisions." RCW 42.17A.001, *Declaration of Purpose.*) Those same principles were a large motivation for the Port's ultimate action to file the Declaratory Judgment action so an impartial court could rule on the validity of the two Save Tacoma Water Initiatives. It's undisputed that a planned and now abandoned methanol plant was the incubation issue that prompted the two Save Tacoma Water ("STW") Initiative drives. See **Exhibit 1**[1], STW Initiative 6, entitled "*Stop the Methanol Plant* and **Exhibit 2**, STW Initiative 5.

[1] "Residents of Tacoma, University Place, Ruston, Fife, Milton, Kent, Covington, Bonney Lake. Lakewood. Steilacoom, Federal Way, the Muckleshoot and Puyallup Reservations and portions of Des Moines and

It was with disappointment that the Port became aware of various public comments made by the Executive Director regarding the Port and Chamber, in the context of the now abandoned methanol plant, which issue is inextricably bound with the Initiative actions at the heart of this PDC case. The tenor, substance and fact of the Executive Director's several written public comments leaves the Port with the conclusion that recusal/disqualification of the Executive Director is needed for the PDC's process in this case to be fair, free from prejudice, and have the appearance of impartiality, as the law requires and as the Port deserves. We appreciate your consideration.

I. Relief Requested:

Petitioners request that PDC Executive Director Ms. Evelyn Fielding Lopez recuse herself and or be disqualified from any action on PDC cases 6626, 6627 and 6628, and the complaint, including its initial review and the resulting determination that a formal investigation be undertaken, be transferred to an appropriate substitute reviewing officer and be freshly and independently undertaken.

II. Basis for Relief: Violation of Appearance of Fairness Doctrine, Personal Interest and or Actual Bias.

Appearance of Fairness Doctrine. Wash. Rev. Code § 34.05.425(3) provides that a presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in that chapter or for which a judge is disqualified. The appearance of fairness doctrine requires that an administrative body must be fair, free from prejudice, and have the appearance of impartiality.

The appearance of fairness doctrine provides that "[m]embers of commissions with the role of conducting fair and impartial fact-finding hearings must, as far as practical, be open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and must also give the appearance of impartiality." *Narrowsview Pres. Ass'n v. City of Tacoma*, 84 Wn.2d 416, 420, 526 P.2d 897 (1974), as quoted in *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 197 P.3d 1153, 2008.

...the appearance of fairness doctrine certainly can be used to challenge an individual's participation as an administrative decision maker. *Kittitas Turbines* at 1160.

The doctrine applies only "as far as practical" to ensure fair and objective decision making by administrative bodies. *Id.* The practicality of the appearance of fairness will largely be determined by the procedures being applied. *Narrows View*.

Auburn are dependent on fresh water from Tacoma Public Utility. The proposed methanol refinery would use the same water source. The proposed methanol refinery is estimated to use 14 to 22 million gallons of water every day (this number keeps changing) equal to what 185,000 to 291,000 residents use daily (Tacoma 2015 Population: 198,397)". Text from *STW Initiative 6 – Stop the Methanol Plant*.

Role of PDC Executive Director Requires Impartiality. WAC 390-37-010 sets forth the procedures for Commission adjudicative proceedings (enforcement hearings) in compliance cases under the commission's jurisdiction, and provide that the Commission procedures are also governed by RCW 42.17A.755, and the adjudicative proceedings provisions of chapter 34.05 RCW, the Administrative Proceedings Act. (APA). The APA contemplates that an administrative proceeding may involve both a presiding officer and a reviewing officer. The presiding officer oversees the hearing and initial order, while the reviewing officer reviews the initial order. The reviewing officer may be the agency head.

As applied to the PDC, WAC 390-37-060 codifies the role of the Executive Director as the reviewing officer.[2] The PDC Executive Director conducts the initial review of the complaint. An "initial review" is a preliminary investigation to determine whether the allegations are limited to minor or technical violations of chapter 42.17A or if there is sufficient ground indicating that a material violation of chapter 42.17A RCW may have occurred so as to warrant a formal investigation. The Executive Director is empowered to take various actions as a result of the initial review:

- return any complaint that is obviously unfounded or frivolous.
- resolve any complaint that alleges minor or technical violations
- resolve any complaint that alleges minor or technical violations of chapter 42.17A RCW, or
- initiate a formal investigation.

PDC/APA Standards for Disqualification. The APA allows for the disqualification and replacement of a reviewing officer. RCW 34.05.464(3) provides that RCW 34.05.425 and 34.05.455 apply to a reviewing officer "to the same extent that it is applicable to presiding officers." RCW 34.05.425(3) provides that a presiding officer "is

---

[2] **Enforcement procedures—Alternative responses to noncompliance—Investigation of complaints—Initiation of adjudicative proceeding.**

(1) Upon receipt of a complaint, the executive director will conduct an initial review of the complaint to determine what action will be taken. An initial review is a preliminary investigation to determine whether the allegations are limited to minor or technical violations of chapter 42.17A or if there is sufficient ground indicating that a material violation of chapter 42.17A RCW may have occurred so as to warrant a formal investigation.

(a) The executive director shall return any complaint that is obviously unfounded or frivolous. The executive director will inform the complainant why the complaint is returned.

(b) The executive director may resolve any complaint that alleges minor or technical violations of chapter 42.17A by issuing a formal written warning. If the resolution is conditioned upon the respondent resolving or maintaining compliance, specific expectations and any deadlines should be clearly explained in the written warning. A respondent's failure to meet conditions may result in a complaint being reopened.

(c) The executive director may use the complaint publication process set out in WAC 390-32-030 to resolve any complaint that alleges minor or technical violations of chapter 42.17ARCW.

(d) The director shall initiate a formal investigation whenever an initial review of a complaint indicates that a material violation of chapter 42.17A RCW may have occurred.

(e) If the executive director determines a formal investigation will require the expenditure of substantial resources, the executive director may request review and concurrence by the commission before proceeding.

subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified."

In the administrative law context, the Washington Supreme Court has recognized that at least three types of bias call for disqualification.

"These are [1] prejudgment concerning issues of fact about parties in a particular case; [2] partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy; and [3] ... an interest whereby one stands to gain or lose by a decision either way."[3]

The Supreme Court has applied the appearance of fairness doctrine "to administrative tribunals acting in a quasi-judicial capacity in two circumstances: (1) when an agency has employed procedures that created the appearance of unfairness and (2) when one or more acting members of the decision-making bodies have apparent conflicts of interest creating an appearance of unfairness or partiality." [4] The test is whether " 'a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, [would] be reasonably justified in thinking that partiality may exist[.]' " [5]

Generally, under the appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasi-judicial capacity are valid only if "a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 478, 663 P.2d 457 (1983). The doctrine is intended to avoid the evil of participation in the decision-making process by a person who is personally interested or biased. *City of Hoquiam v. Pub. Employment Relations Comm'n*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982).

The common law rules that apply to judges regarding disqualification for conflict of interest also apply to administrative tribunals.[6]

RCW 34.05.425(3) and RCW 34.05.464(3) provide that a reviewing officer may disqualify for any reason "for which a judge is disqualified." Judges are governed by the Code of Judicial Conduct (CJC), which is applied by using "an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" Canon 3(D) of the CJC provides that "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge has a personal bias or prejudice

---

[3] *Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 512, 637 P.2d 940 (1981) (alterations in original) (quoting *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)).

[4] *City of Hoquiam v. Pub. Employment Relations Comm'n*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982) (citation omitted).

[5] *Id.* (quoting *Swift v. Island County*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976)). RCW 34.05.455(1) and (2) also generally provide, subject to exceptions not pertinent here, that "a presiding officer may not communicate" with certain persons "regarding any issue in the proceeding."

[6] *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279-80, 580 P.2d 636 (1978)

concerning a party"; the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding"; or "the judge previously served as a lawyer or was a material witness in the matter in controversy."

Canon 3(A)(4) of the CJC provides generally that a judge may "neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." Similarly, RCW 34.05.455(1) and (2) generally provide, subject to exceptions not pertinent here, that "a presiding officer may not communicate" with certain persons "regarding any issue in the proceeding."

Further, Canons of Judicial Ethics (CJE) preclude a judge from hearing a case if the judge's impartiality may be reasonably questioned. CJE 3(C)(1); RCW 4.12.040.

Presumption & Burden. In the context of administrative proceedings, the appearance of fairness doctrine exists in tension with the presumption that public officials will properly perform their duties. *See Medical Disciplinary Bd. V. Johnston*, 99 Wash. 2d 466, 474-75, 663 P.2d 457 (1983) at 479.

The presumption is that public officers will properly and legally perform their duties until the contrary is shown. [7]

A judge or administrative agency is presumed not to be biased.[8] A person alleging bias must make an affirmative showing to that effect. [9] A party claiming an appearance of fairness violation is required to present specific evidence of a violation, not speculation.[10]

In order to show bias, the petitioner must make an affirmative showing of prejudice other than a general predilection toward a given result. *Medical Disciplinary Bd. V. Johnston*, 99 Wash. 2d 466, 474-75, 663 P.2d 457 (1983).

To overcome the presumption, a party invoking the appearance of fairness doctrine must come forth with evidence of actual or potential bias. *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996) (evidence that commissioner received 63 phone calls during the prior year from a waste management company insufficient to demonstrate actual or potential bias because the commissioner had other matters pending with the company unrelated to the adjudicative proceeding); *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992) (no appearance of unfairness where presentence report was prepared by an allegedly biased person because there was no evidence of the judge's actual or potential bias); *Magula v. Dep't of Labor & Indus.*, 116 Wn. App. 966, 972-73, 69 P.3d 354 (2003) (no appearance of unfairness where 6 electricians are among the 13 voting members deciding whether electrical work must be performed by electricians rather than general contractors).

---

[7] *Id.* at 489 (quoting *Rosso v. State Pers. Bd.*, 68 Wn.2d 16, 20, 411 P.2d 138 (1966)).
[8] *See id.* at 513.
[9] *Id.* at 512.
[10] *Sherman v. Moloney*, 106 Wn.2d 873, 883-84, 725 P.2d 966 (1986).

Bias has been found in situations in which the decision maker had a personal interest in the matter under consideration. *Chi., Milwaukee, St. Paul & Pac. R.R. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1976) (appearance of unfairness where an appointed member of the hearing tribunal had a pending job application with one of the parties); *Buell*, 80 Wn.2d 518 (appearance of fairness violated where planning commission member had a personal financial stake in a rezone decision); *State ex rel. Beam v. Fulwiler*, 76 Wn.2d 313, 456 P.2d 322 (1969) (commission could not adjudicate the appeal of a civil service employee where four of the five commission members had engaged in a multi-faceted and "concerted effort" to have him removed from office).

Personal Interest Violates Appearance of Fairness. Here, there is evidence that the PDC Executive Director and reviewing officer had a personal interest in the STW Initiative proceedings. The Executive Director was a frequent user of social media on the issues of the Port, the Chamber, and the planned methanol plant which spawned the STW Initiatives. See **Exhibit 3** - Facebook entries dated December 20, 2015, January 22, 2016, February 1, 2016, and Ms. Lopez's quote in TNT News article March 10, 2016.

In a comment to a TNT editorial dated February 15, 2016, Ms. Lopez voiced opposition to the Supreme Court decision in *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 WA 2d. 97 (Feb. 4, 2016), the very case upon which the Port, EDB and Chamber's legal challenge was based. **Exhibit 4.** The Facebook-based comment has since been deleted; Petitioners are seeking to retrieve it, and requests that Ms. Lopez's Facebook Activity Log be maintained for this purpose.

Ms. Lopez's comments leave no doubt that her "impartiality may be reasonably questioned". On January 22, 2016 she wrote in a Facebook comment to a TBNT article: "Tacoma, we can't let the venal and irresponsible Port and Chamber continue this nonsense -- time for the real people of Tacoma to decide what is in the best interest of Tacoma". Emphasis added.

Under the appearance of fairness doctrine, it is not necessary to show that a decision-maker's bias actually affected the outcome, only that it could have. *Buell v. City of Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972).

III. Conclusion:

Petitioner Port respectfully requests that PDC Executive Director Ms. Evelyn Fielding Lopez recuse herself, or by this Motion be disqualified from any action on PDC cases 6626, and that the Complaint in this matter, including its initial review and the resulting determination that a formal investigation be undertaken, be transferred to an appropriate substitute reviewing officer and review be freshly and independently undertaken.

Sincerely,
Goodstein Law Group PLLC
Carolyn A. Lake
Carolyn A. Lake
Enclosures: Exhibits 1-4
cc: John Wolfe, CEO, Port of Tacoma
Port of Tacoma Commissioners