

June 22, 2009

Received
JUN 22 2009
Whatcom County PDS

VIA HAND DELIVERY

David Stalheim, Director
Whatcom County SEPA Official
Planning and Development Services
5280 Northwest Drive
Bellingham, WA 98226

Re: Combined Comments on Environmental Impact Statement for Urban Growth Area Update and Draft Comprehensive Plan Amendment for Urban Growth Areas, LAMIRDS, and Rural Areas

Re: Public Utility District No. 1 of Whatcom County Policy Regarding Delivery of Water for Fire Suppression and Providing Fire Hydrants

Dear David,

This letter is submitted on behalf of Public Utility District No. 1 of Whatcom County ("PUD"). Please accept this letter for the purposes of comments for the record in response to the Draft Environmental Impact Statement ("DEIS") for the Comprehensive Plan update for the Urban Growth Areas within Whatcom County, and the pending amendments to the County's comprehensive plan addressing UGAs, Limited Areas of More Intensive Rural Development ("LAMIRDs"), and rural areas. Our firm is general counsel for the PUD.

The further purpose of this letter is to advise Whatcom County with regard to policy approach to the delivery of water for fire suppression and for the installation of fire hydrants that is evolving in light of two recent Washington State Supreme Court decisions. This policy will be formalized within the next few weeks. The discussion of the recent Supreme Court cases cannot avoid the implication of these cases on Whatcom County's obligation as a general purpose government to provide water for fire suppression and fire hydrants. In this regard, this letter will also offer solutions in the context of the PUD policy regarding these issues.

SUMMARY OF NEW SUPREME COURT CASES

As noted above, two recent Washington Supreme Court cases addressed the issues of governmental authority, obligation and liability related to the delivery of water for fire suppression purposes, and installation of fire hydrants.¹ Notably, both of these cases involved the delivery of water by a general purpose government, not by a special purpose government such as the PUD.² The potential extension of the principles and rulings from these cases to a special purpose government, such as the PUD, necessitated the re-evaluation of PUD policy regarding the delivery of water for fire suppression purposes and the installation of fire hydrants.

The *Lane* case arose because the City of Seattle was charging its customers, both existing residents and adjacent communities, for fire hydrants. The Court concluded that such a charge was not legal since the provision of fire hydrants was a general governmental function.

In the *Fisk* case, the Court addressed the issue of liability for fire that destroyed a motor home where the local fire service provider was not able to attack the fire timely due to the lack of adequate water pressure in the City's fire hydrant. The Court determined that a general purpose government providing a general governmental function without a charge, such as water for fire suppression, is not liable in such an event. The Court specifically left open the issue of whether a government (any type of government) is liable for a failed water system or inadequate water for fire suppression when such services are provided pursuant to a contract or for hire. The PUD only provides water by contract. Thus, there is potential exposure to liability for the PUD.

In summary, these cases set forth the following rulings. Issues 4 and 5 below are of key concern for the PUD:

- (1) The delivery of fire flow and installation of fire hydrants is a general governmental function.
- (2) It is the obligation of a general purpose government (a City or a County) to provide water for fire suppression. Correspondingly, but not stated in these decisions, a special purpose government does not have this obligation.
- (3) When a government (either a general purpose government or a special purpose government) contracts for the delivery of services, including water for any purpose, it is acting in its proprietary capacity, as opposed to a governmental capacity. By acting in a proprietary capacity, a government will be treated and considered as a business under the law, rather than having available to it many of the safeguards available when it is acting in its governmental capacity. Such safeguards can include immunity from suit.

¹ *Fisk v. City of Kirkland*, 164 Wn. 2d 891 (2008) and *Lane v. City of Seattle*, 164 Wn.2d 875 (2008).

² Although these cases involved Cities, the cases addressed general purpose governments. A County is also a general purpose government.

- (4) If a special purpose government is allowed to charge for fire hydrants and/or for water for fire suppression/flow purposes, an obligation is created to maintain the hydrants and the water system including maintaining the necessary water pressure for such hydrants to be utilized for fire suppression.
- (5) If a special purpose government is allowed to charge for fire hydrants and/or for water for fire suppression/flow purposes, potential liability exists if the water system fails to provide fire flow when needed, the fire hydrants fail, or if inadequate water pressure is provided.

Given the breadth of the discussion by the Court and the rulings in the *Fisk* and *Lane* decisions, the far reaching implications of those decisions on the PUD cannot be ignored.

PUD POLICY OPTIONS

The PUD administrative policy is that the PUD will no longer provide or deliver water for any future customer or new use for an existing customer for fire suppression or fire flow purposes. In this regard, the PUD will also no longer install or connect fire hydrants to its water system.

One approach to a solution based upon the recent Supreme Court decisions is for the PUD and the County to execute an Interlocal Agreement whereby the County in the exercise of its general governmental authority would contract with the PUD to provide water for fire suppression, and provide reimbursement for PUD costs in this regard, as well as indemnification benefiting the PUD.

In the future, the PUD would only provide water on a general water service basis through an industrial water contract or similar contract at a minimum flow and pressure, unrelated to fire flow requirements. Any customer that would be required to have fire suppression requirements met through applicable County Building and or Land Use codes would be required to construct all fire suppression facilities including any necessary hydrants, storage and/or pumping as part of its water system. Review for compliance with any County code requirements including sustaining and maintaining the fire suppression system would be a County obligation, presumably the County Fire Marshall's office. In this way, the PUD is not engaged in providing any water for fire suppression or any related facilities, and is merely engaged in the contracting for general water services consistent with the limitation on use set forth in the PUD's applicable water right and subject to the limitations of State water law.

These policies and limitations should be reflected in the County's Comprehensive Plan in the Capital Facilities Chapter, the Utilities Chapter, and Land Use Chapter. More specifically, the County's development regulations should be reviewed and revised, if necessary, to reflect these limitations.

DRAFT ENVIRONMENTAL IMPACT STATEMENT COMMENTS

Page 4.10-17 of the DEIS should be modified to the extent necessary to reflect PUD policy discussed below. Mitigation measures need to include, at a minimum, the review and revision as necessary of existing development regulations to assure that the land owner undertakes the obligation to install and maintain fire flow and fire protection systems. Reference to water system planning as the time to address fire flow availability is misplaced and carries with it significant risk. Water systems are not obligated to provide water for fire suppression purposes. As such, water system planning will not

address fire flow availability, unless that particular water purveyor makes a voluntary decision to undertake the responsibility and liability for providing water for fire flow and maintaining a fire flow system. The obligation to assure or provide water for fire flow purposes and a fire suppression system is a land owner obligation and duty and/or the obligation and duty of a general purpose government, such as a City or County. It is not the obligation or duty of a special purpose government, such as the PUD. The second full paragraph on page 4.10-17 needs to be substantively revised accordingly.

The comment on page 4.10-61 "A number of water systems in the County have a range of deficiencies when meeting the requirements of the County Fire Code" is particularly troublesome. This comment is in error in that it implies a duty or obligation on water systems to meet a requirement of the County Fire Code. The PUD, in the operation of its water system, has no obligation to meet any requirement of the County Fire Code; a developer will have the obligation to meet the County Fire Code, but not the purveyor of water. This material error needs to be corrected.

The "No Action Current Comprehensive Plan Alternative" section at 4.10-61 - 4.10-62 erroneously states "water distribution and fire flow requirements must also be met by water providers under the No Action Current Comprehensive Plan Alternative". This is in error as a water purveyor that is not a County or a City has no obligation or duty to provide water for fire flow purposes nor has any obligation or duty to construct a fire suppression system. Again, this is an obligation of a developer, a City, or a County. This same error repeats in every Alternative between pages 4.10-61 to 4.10-64.

The "Applicable Requirements and Commitments" section at page 4.10-65, second bullet, erroneously refers to WAC 246-293-640 as placing a requirement on water systems to provide a minimum fire flow. This provision of the WAC requires a City or County to set minimum fire flow requirements. It does not obligate a water purveyor to provide water for fire purposes. Further, neither the International Fire Code nor WCC Title 15 applies to obligate or impose a duty on a water purveyor to provide water for fire flow purposes. Again, this is an obligation of a developer, a City, or a County, not a special purpose government. This provision at page 4.10-65 must be revised accordingly. By way of comparison, the first bullet under the "Applicable Requirements and Commitments" section at page 4.10-23 related to fire and emergency services accurately places the obligation to meet County Code and Uniform Fire Code requirements on new development, not on a water purveyor.

The "Potential Mitigation Measures" section, first bullet, must be revised. Neither Whatcom County nor any State Agency has any ability or authority, except through an Interlocal Agreement, to compel or require a water purveyor to "increase the size of piping, install additional looping to increase water pressure for fire flow, and/or increase frequency of hydrant placement to meet fire flow requirements". This potential mitigation must be eliminated or revised to refer to a developer, City, or County as being responsible for providing the necessary fire protection system to meet WCC Title 15 and/or International Fire Code requirements.

Thank you for the opportunity to provide these comments on the Draft Environmental Impact Statement.

The PUD looks forward to working through these issues with the County. However, the PUD must protect and insulate itself from liability in this regard, particularly when the recent State Supreme Court cases make it clear that it is a general purpose government that has the duty and obligation to provide water for fire suppression purposes, not a special purpose government.

Sincerely,

CHMELIK SITKIN & DAVIS P.S.



Jonathan K. Sitkin

JKS/ams

cc: Commissioners
Steve Jilk
Tom Mortimer
Dan Gibson
Warner Webb