

**SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH**

605 SOUTH THIRD
MOUNT VERNON, WA 98273
PHONE (360) 336-9460
FAX (360) 336-9347

CRIMINAL DIVISION

CHIEF CRIMINAL DEPUTY
ROSEMARY KAHOLAKOLA

SENIOR CRIMINAL DEPUTIES
ERIK PEDERSEN
TRISHA D. JOHNSON
EDWIN N. NORTON

CRIMINAL DEPUTIES
TONI G. MONTGOMERY
MELISSA W. SULLIVAN
ERIN C. DYER
SLOAN G. JOHNSON
KAREN L. PINNELL

CIVIL DIVISION

CHIEF CIVIL DEPUTY
WILLIAM W. HONEA

CIVIL LITIGATOR
PAUL H. REILLY

CIVIL DEPUTIES
MELINDA B. MILLER
ARNE O. DENNY
STEPHEN R. FALLQUIST
JILL M. OLSON

FAMILY SUPPORT DIVISION
CHIEF FAMILY SUPPORT DEPUTY
KURT E. HEFFERLINE

FAMILY SUPPORT DEPUTY
GWEN L. HALLIDAY

MEMORANDUM

TO: Solid Waste System Governance Board

FROM: William Honea, Chief Civil Deputy

DATE: June 30, 2008

SUBJECT: County Rationale for Intervention in Janicki LUPA Appeal

We write to discuss some of the reasons that Governance Board members should support the County's proposed intervention in the Janicki LUPA appeal. Before doing so, we provide several suggestions as to appropriate procedures for handling and resolving disagreements within the Governance Board.

1. Procedures for Handling Disagreements Internal to Governance Board.

Questions regarding the scope of the Governance Board's authority were vigorously debated at the June 25, 2008 Governance Meeting in connection with the County's decision to intervene in the Janicki LUPA appeal. We collectively agreed, upon La Conner Mayor Hayes' helpful suggestion, that Governance Board members would engage in considered analysis and discussion of these issues prior to the next Governance Board meeting in July 2008. For that reason, our office furnished the County's viewpoint in the form of the two legal memoranda dated June 25 and 26, 2008. As the legal memoranda make clear, it is the County's view that these issues are simply not matters delegated to the Governance Board.

With this in mind, we were disappointed to learn that Sedro-Woolley Mayor Anderson and City Supervisor/Attorney Berg conducted a radio interview with KBRC's Kirk Tollefson just after the June 25 meeting in order to disseminate this disagreement to the larger public. Messrs Berg and Anderson made numerous statements and arguments that are plainly inconsistent with the interlocal agreement establishing the Governance Board.¹ In our view, their approach to discussing technical contract language is not helpful.

Inevitably, there will be disagreements between Governance Board members over the intent of the agreement establishing the Governance Board. When that occurs, the Governance Board's objective of creating a durable solid waste policy will be much better promoted by Governance Board members attempting to discuss these disagreements in good faith at Governance Board meetings and through correspondence between counsel, rather than engaging in efforts to modify the plain language of our contract by appealing to the court of public opinion.

2. Rationale for Supporting County Intervention in Janicki LUPA Appeal.

Sedro-Woolley takes the position that the Governance Board has no authority to weigh in on Sedro-Woolley's plan to site the Deluxe facility in Sedro-Woolley. Accordingly, it is not entirely clear why Sedro-Woolley claims the Governance Board should have authority over the County's decision to challenge Sedro-Woolley's plan. Simply put, these two propositions are logically inconsistent. We are happy to explain the various reasons why Governance Board members acting in their own city's best interests are probably obligated to oppose Sedro-Woolley in this matter, and, by extension, should fully support and applaud the County's proposed intervention in the Janicki LUPA appeal.

a. Sedro-Woolley's Hoped-For Revenue Will Necessarily Come At The Financial Expense of Every Other City and Town.

First, there is the question of the utility tax Sedro-Woolley hopes to obtain from the Deluxe operation,² which is necessarily a problem when considering the local government assessment the Solid Waste System will require under any set of circumstances involving privatization in order to continue funding non-revenue generating activities such as environmental clean-up, landfill closure and monitoring, etc.

The assessment model currently under discussion is the "System Fee." No utility tax is charged in the unincorporated county, while the System Fee would necessarily apply everywhere within the County's territorial limits. As you will recall from the briefing by Solid Waste Division Manager Kevin Renz at the June 25 Governance Board meeting, the System Fee is akin to a franchise fee negotiated into a solid waste handling contract with any private party seeking to handle waste generated within Skagit County. In the event of privatization, one or more System Fees negotiated with private operators would be the only meaningful source of revenue for the System, which in turn funds environmental clean-up, landfill closure and monitoring, and a host of other non-revenue generating activities that would require the imposition of higher property taxes across all jurisdictions absent the funding of these activities by the Solid Waste System.³

¹ The interview is available at <http://www.kbrcradio.com/wp-content/uploads/2008/06/solidwaste625.MP3>

² See, e.g., http://www.goskagit.com/home/article/a_look_into_recycling_and_disposal_services/

³ We agree with point made by the cities and others that Skagit County Public Works Solid Waste Division needs to do a better job of justifying and explaining the approximately \$800,000 administrative fee line item in the Solid Waste System budget. Review and approval of the System's \$10,000,000 annual budget is squarely within the scope of the Governance Board's authority. See, GBIA ¶ 13.1.6.

The amount of the System Fee authorized is the private operator's proportionate share of these non-revenue generating activities. Expressed as a percentage of a private operator's gross revenues, a properly negotiated System Fee would be at least 10%. We have made clear to Deluxe (and by extension any other private operator) that a lesser per ton rate System Fee for out-of-county waste would be on the table in the event the Governance Board authorizes a System/Operator Agreement for in-county waste, something for which there is precedent since it was negotiated into the Cimarron System/Operator Agreement at a \$2 per ton rate. Deluxe raised no objection. The point here is that everything Deluxe plans on doing in Sedro-Woolley has a clear nexus to a later-negotiated System Fee.

With the foregoing in mind, Sedro-Woolley hopes to obtain a 6% utility tax on Deluxe's gross receipts. This should probably not be viewed by the Governance Board as "new money" being brought into the community, because Sedro-Woolley is necessarily attempting at a certain level to re-direct to its own coffers a local government assessment that properly belongs to all jurisdictions participating in the Governance Board arrangement.

This is also a problem from the standpoint of the Governance Board's planning going forward. A pre-imposed utility tax would necessarily create a competitive disequilibrium under most imaginable circumstances, because an operator in Sedro-Woolley's city limits would in effect be providing largesse to the City of Sedro-Woolley in the rather significant amount of 6% of gross receipts above and beyond the local government assessment charged an operator anywhere else in the County. To the extent private competition is to exist on a level playing field, that operator (e.g., Deluxe) will obviously expect an offset against money paid to local government through a System Fee, absent which they would be operating under an across-the-board 6% competitive disadvantage.

While Sedro-Woolley may not have a refinery or a shopping mall (as Mayor Anderson frequently points out), this is not in and of itself a good reason to divert money from the rest of the countywide Solid Waste System and force other jurisdictions to raise taxes to cover the shortfall. Seen clearly, there is simply no rational basis for any Governance Board member (besides Sedro-Woolley) to support the proposed Deluxe site in Sedro-Woolley, since it will necessarily and inevitably come at their jurisdiction's financial expense. As discussed further below, Sedro-Woolley's efforts will also likely have the effect of foreclosing various options and alternatives this Governance Board should rightly have the opportunity to consider.

Based on information and documents obtained during the course of our recently-settled litigation with Deluxe, it is plainly evident that Sedro-Woolley officials guided Deluxe to the site across the street from the Sedro-Woolley High School, and have been working ever since to promote the Deluxe facility using methods that raise serious ethical and legal concerns.⁴

⁴ As just one example, see the attached email chain between Sedro-Woolley City Supervisor/City Attorney Eron Berg and Deluxe principal Steve Snell dated October 26, 2007, i.e., several months before Deluxe submitted its building permit application to the City of Sedro-Woolley. The email chain seems to reflect that Berg was working in concert with Snell, threatening Weyerhaeuser with hostile condemnation to facilitate Snell's negotiation of a potential acquisition of a portion of the Weyerhaeuser site. While Snell is a businessman and cannot be faulted for accepting whatever courtesies City officials are willing to extend, we would submit that City officials threatening hostile condemnation to drive down the price of private property for the benefit of a private third party's negotiations may well be inconsistent with applicable law and ethics. We are not intending to take further action on this, but we are turning the email chain in question over to Weyerhaeuser's legal counsel to make their own determination whether any of this caused a material diminution in the property's valuation and/or sale price.

We would submit that the desire to divert a System-wide local governmental assessment to Sedro-Woolley's coffers provides the only logical explanation thus far furnished for the extreme lengths to which Sedro-Woolley officials have gone to promote the Deluxe facility at a proposed location mere feet from the Sedro-Woolley High School, in the face of overwhelming opposition from city residents. It also provides a coherent explanation as to why Sedro-Woolley is vehemently opposing the County's intervention, even though Deluxe, the applicant, is not.

- b. Sedro-Woolley is attempting to pre-decide the decisions it contractually promised to entrust to the Solid Waste System Governance Board.

Deluxe and various other private solutions may well be a financially smart and more recycling-friendly path forward, something this Board will have opportunity to consider in the course of its work. Plainly spoken, our concern was never with privatization or Deluxe. Rather, this is about Sedro-Woolley's actions. By purporting to place a regional solid waste handling facility in its own city limits before the Governance Board deliberates or makes any policy decisions about whether and how to privatize the System, Sedro-Woolley is attempting to pre-determine the very matters all jurisdictions contractually agreed would be decided by the Governance Board.

The issues with the utility tax and the System Fee discussed above are just one example of the significant regulatory and economic problems that Sedro-Woolley is creating for this Governance Board.⁵ Designing a new solid waste policy invokes many complex regulatory, economic and legal issues, and Sedro-Woolley's simplistic approach is clearly detrimental to the common good this Governance Board is intended to promote.

The Governance Board Interlocal Agreement clearly and unambiguously provides that big-picture solid waste policies will be created collectively through the Governance Board, as opposed to the haphazard and unplanned approach that Sedro-Woolley would have us adopt, an approach that would create undesirable incentives for the first jurisdiction willing to race a building permit through their internal approval processes.

Sedro-Woolley was not obligated to sign the Governance Board Interlocal Agreement. But having done so, it is now reasonable that all other jurisdictions party to the Governance Board Interlocal Agreement insist that Sedro-Woolley honor its contractual commitments. It is directly against Governance Board members' individual interests to support the Sedro-Woolley proposal, or, by extension, to oppose the County's intervention in the Janicki LUPA appeal.

The Janickis and Deluxe both agree that the County's intervention is proper, and Sedro-Woolley is the only party to the LUPA action that is opposing the County's intervention. Please understand that the County's intervention will only occur with the permission of the Court, and, therefore, it is not at all certain that the County's application to intervene will be granted. If the Court grants intervention, we will forward the pleadings to the Governance Board as a courtesy. Also, the City of Sedro-Woolley has been posting the pleadings on their website, which you can review at www.ci.sedro-woolley.wa.us.

⁵ We would observe that open franchised access to the waste stream coupled with a System Fee is certainly not the only approach to privatization. For example, some jurisdictions contract with a private operator through RFP to operate a County-owned facility, setting rates as necessary to cover other liabilities. The Governance Board will presumably be considering these and other options in the course of its work plan.

3. Conclusion.

In 2004, Sedro-Woolley and other cities, outraged over the Cimarron project, expressly rejected the County's proposed Comprehensive Solid Waste Management Plan amendments that would have allowed multiple private transfer stations within city limits. The cities' actions set in motion an effort at the County level to create a unified policy-making body for the Solid Waste System, which you now know as the Governance Board.

This effort, done almost entirely at the cities' behest, has been extremely expensive in terms of financial and staff resources. Moreover, the County has incurred substantial costs in order to "clear the deck" of pre-existing legal impediments such as the Cimarron contract. All of this was done in the interest of presenting the Governance Board with the ability to establish the best possible long-range solid waste plan, in a considered and deliberate fashion, without any pre-existing constraints.

With the recent Deluxe / Cimarron settlement, the County has delivered exactly what the cities sought. The County has acted in reliance on the cities' expressions of their solid waste management preferences. From our perspective, it is now reasonable, having delivered the County's end of things, to expect that the cities (Sedro-Woolley included) will stay the course in the interest of the common good.

The Governance Board presents a unique opportunity for our community to develop a durable, long-range solid waste plan that minimizes rates and maximizes sustainable practices. On the other hand, the Governance Board could just as easily devolve into another forum for political gamesmanship and rancor between local governments. Whether it will prove to be the former or the latter is purely up to the Governance Board and its members.

For our part, this office stands ready to assist the Governance Board in any way requested, provided it is consistent with the interlocal agreement establishing the Governance Board.