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***ER 408 PROTECTED COMMUNICATION
PERTAINS TO SETTLEMENT DISCUSSIONS***

MEMORANDUM

TO: Tom Moser, Attorney for Appellant Janicki

FROM: William Honea, Chief Civil Deputy

DATE: August 7, 2008

SUBJECT: Sedro-Woolley Potential Liability re Settlement Proposal

The County and Janicki have proposed that the City settle the Janicki LUPA appeal by admitting that the City failed to adopt the 2004 solid waste management plan revisions that would have allowed private transfer stations such as the Deluxe proposal within city limits. See, **Exhibit A** (City Resolution No. 706-04). A copy of the August 4, 2008 settlement proposal is attached hereto as **Exhibit B**. Because the County would undertake to defend the settlement, this memorandum sets forth our analysis of the City's exposure under the proposed settlement in light of Deluxe's recent threats of litigation. A copy of Deluxe's August 5, 2008 email is attached as **Exhibit C**. This memorandum is for the County's internal use and settlement discussions, and does not constitute legal advice to the City of Sedro-Woolley or any other party.

It is our understanding that Mrs. Janicki fully supports this proposal. As a matter of procedure, if the settlement is accepted by the City, then the City would withdraw the MDNS and determine that the Deluxe proposal is not allowed in city limits. Deluxe would then be free to challenge that decision administratively, and Deluxe could theoretically challenge any resultant administrative decision through another LUPA action of its own. We believe this would be unsuccessful, for some of the reasons set forth below.

Deluxe has also threatened to sue the City for damages. Specifically, on August 5, 2008, Deluxe's attorneys sent an email threatening the City of Sedro-Woolley with litigation if the City were to settle with Janicki and the County on the terms outlined above. See, Exh. C. Deluxe's attorneys claim that the County's proposed settlement "if implemented would seriously impact the constitutional and due process rights of Delux (sic)." According to Deluxe's attorneys, "Delux (sic) would have a claim against Sedro-Woolley for significant damages including potential federal claims." *Id.*

This matter is in the midst of an administrative proceeding, and Deluxe has not yet been issued a building permit. Thus, Deluxe has no definitive property right at stake. Accordingly, in our view, the City would have no liability to Deluxe under state or federal law unless Deluxe could demonstrate that the City's actions in accepting the settlement were arbitrary and capricious. As discussed further below, we believe that is unlikely to occur.

City planning staff apparently relied on information provided by Deluxe about the applicable solid waste management plan to reach a conclusion that the Deluxe proposal is allowed in City limits. See, **Exhibits D** (SEPA Checklist) and **Exhibit E** (email from Deluxe owner Larry McCarter to City staff). Because of this, Deluxe is not likely to be successful in claiming that the City somehow misled Deluxe regarding the applicable solid waste management plan. Deluxe and its consultants appear to have misled City staff – not the other way around.

It is also perhaps important to recognize that City planning staff's review prior to the March 12, 2008 publication of the MDNS did not likely include a detailed legal analysis of the solid waste management plan in effect in the City of Sedro-Woolley, and whether that plan allowed the Deluxe proposal. Moreover, the non-attorney Hearing Examiner that heard Mrs. Janicki administrative appeal missed this complex legal issue in his own analysis.

Having now performed a detailed legal analysis, attorneys for Janicki and the County have pointed out this fatal flaw in the Deluxe application, i.e., the 1994 solid waste management plan in effect in the City of Sedro-Woolley disallows the Deluxe proposal. See, e.g., Appellant Hearing Examiner Exhibit AP1, AP4, AP10, AP11.

With the foregoing in mind, the City would be well justified in settling as proposed and withdrawing the Deluxe MDNS. Accordingly, the City's acceptance of the settlement would not, in our view, be considered arbitrary and capricious by a court because it would be clearly supported by the controlling 1994 solid waste management plan. Notwithstanding the vague and ambiguous threats from Deluxe's attorneys, it is our view that the City would have no liability for settling this matter as proposed in the County's settlement, under either federal or state law.

If the City accepts the County proposal, the County has agreed to defend the settlement from challenge by Deluxe. Generally speaking, the settlement could only be successfully challenged if Deluxe were able to convince a court that the settlement between the City, County and Janicki is arbitrary and capricious, i.e., the same thing of which Deluxe would need to convince a court in order to recover damages. Accordingly, the City and the County would be similarly motivated to defend against a challenge by Deluxe, and the City's and County's interests would be largely aligned.

For the reasons discussed below, it is our view that Deluxe would be unlikely to prevail in a challenge to the settlement the County has proposed, notwithstanding Deluxe's recent threats against the City of Sedro-Woolley. By contrast, continuing with the present litigation will presumably cost the City many more thousands of dollars in outside counsel fees. Perhaps even more problematic, continuing the litigation will perpetrate an acrimonious controversy that is causing a

great deal of strife in the community. It is also important to recognize that even if the City were to prevail in the ongoing Janicki LUPA action at the trial on the merits in October 2008 (which is, in our view, highly unlikely), there would inevitably be continued legal action for months if not years over the Deluxe proposal, legal action that would be extremely expensive for the City of Sedro-Woolley.¹

While we are not opposed to working with Deluxe toward a settlement, it is our view that the County, City and Janicki are unlikely to reach a global settlement with Deluxe at the table. The issue at hand is a relatively binary matter: Janicki and the County do not believe that Deluxe should be allowed to conduct non-recycling solid waste activities at the location in question. For its part, Deluxe seeks to handle non-recycling solid waste at the facility, and states in its August 5, 2008 email that the "decisions cannot be reconsidered simply because of the application of political pressure but are best left to be decided by the Superior Court." Exh. C. Deluxe has arranged and cancelled several meetings arranged with the County intended to discuss potential settlement. Based on Deluxe's statements and actions, it does not appear that Deluxe is interested in settling, but rather is interested in having the matter heard by Superior Court. Deluxe appears to discount the expense and acrimony to the community this litigation involves.

The settlement we propose is intended to resolve the issue within our community in a global fashion, and allow productive discourse to resume between the City, its citizens, and the County. This latter objective – the broader interests of the community – warrants the County committing legal resources toward assisting Sedro-Woolley in defending the settlement against what we believe to be meritless claims by Deluxe going forward.

As analyzed further below, it is our view that the City would have little liability under the settlement the County proposes. Deluxe says the opposite. In attempting to decide which point of view is more credible, it perhaps important to note here that the County has soundly prevailed against Deluxe in every one of the many court proceedings involving Deluxe over the last year, notwithstanding Deluxe's extensive public statements about the merits of its cause in advance of those proceedings. Simply put, nearly everything the County has predicted would likely happen in court has, in fact, happened. Since this ultimately comes down to an informed judgment call as to which point of view is closer to reality, we believe the County's track record in providing accurate and well-researched legal advice regarding Deluxe and solid waste issues speaks for itself. Conversely, we believe that Deluxe's track record also speaks for itself.

With that in mind, we turn to a discussion of the legal issues at hand.

1. Theories of Liability.

Notwithstanding Deluxe's assertion of its constitutional rights, courts do not typically respond to constitutional theories where the issue at hand can be easily decided by resort to non-constitutional, statutory law. See, *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 546 (1998) (because the case was decided on statutory grounds, constitutional issues were not reached by Washington Supreme Court, rejecting Skagit Surveyors' claim that the

¹ The building permit itself could be challenged by a LUPA action. The de facto comprehensive plan amendment that would involve could be challenged before the Western Washington Growth Management Hearings Board. Given the emotion surrounding this matter, it seems highly likely that legal challenges would continue even if the City were to prevail on this action. There would likely be controversy arising from any solid waste handling permit as well. Moreover, there would be inter-jurisdictional conflict on the Governance Board, something that is undesirable given the short time horizon in which to develop an effective regional plan. A settlement of this matter would avoid the foregoing.

Growth Management Act violates federal and state constitutions); *Isla Verde Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752-53 (2002) (“We adhere to the fundamental principle that if a case can be decided on nonconstitutional grounds, [a court] should refrain from deciding constitutional issues.”)

Our analysis that follows will focus on the relevant statutory provisions under Washington law that we believe would control any claim of damages should the City decide to accept the County’s settlement proposal. A more brief discussion of constitutional and federal law issues follows. This discussion is not intended to be exhaustive, but rather to provide an overview of the City’s potential exposure from our perspective.

2. Washington State Law.

RCW 64.40 is the principal mechanism by which a landowner can sue a city or county for damages over a permit decision. RCW 64.40.020 provides:

Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency² which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

An action is arbitrary and capricious only if it is done with blind and willful ignorance of the facts and the law:

An act is arbitrary or capricious if it is “ ‘ wilful and unreasonable action, without consideration and regard for facts or circumstances.’ ” *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999) (quoting *Teter v. Clark County*, 104 Wash.2d 227, 237, 704 P.2d 1171 (1985) (quoting *Miller v. City of Tacoma*, 61 Wash.2d 374, 390, 378 P.2d 464 (1963))). “ **Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration....** ” *Landmark Dev.*, 138 Wash.2d at 573, 980 P.2d 1234

Isla Verde Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 769-70 (bolding added).

At every level of local government, planning staff routinely relies on information submitted by the applicant in making decisions. Here, Deluxe and its consultants provided information to City staff concerning the solid waste plan; City staff seems to have reasonably relied on that information; yet that information turned out to be incorrect. See **Exhibits D & E**. Thus, it is Deluxe that is apparently at fault for providing incomplete and/or inaccurate information to City staff about the applicable solid waste plan. Moreover, it is not appear that there was a legal analysis by City staff

² See, RCW 64.40.010(1) (“Agency’ means the state of Washington, any of its political subdivisions, including any city, town, or county, and any other public body exercising regulatory authority or control over the use of real property in the state.”)

or the Hearing Examiner as to whether the City's solid waste management plan allowed the proposal.³

Now, prior to the issuance of a building permit, attorneys for Janicki and the County have pointed out the incorrect nature of the information provided by Deluxe, and have performed that detailed analysis. The County and Janicki propose to settle this dispute on that basis. The City is perfectly within its authority to change course on the basis of this information, without liability to Deluxe.

That being said, in order for the City to accept the settlement and avoid damages liability to Deluxe, it is not necessary for the City to determine that Deluxe is wrong (and the County/Janicki are right). Rather, as courts interpreting RCW 64.40 have made clear, there simply needs to be "room for two opinions." *Id.* No reasonable mind is likely to dispute that there is room for two opinions on the question of whether the solid waste management plan allows the Deluxe proposal.⁴ But unless Deluxe could demonstrate there is simply no "room for two opinions," it is our view that a court would be highly unlikely to find the settlement to be arbitrary and capricious. Thus, in our view, the City has little liability to Deluxe if it were to accept the proposed settlement.

In 2006, under the prior Prosecuting Attorney, Skagit County was found liable under RCW 64.40 in the matter of *Saben v. Skagit County*, 136 Wn. App. 869 (2006).⁵ In *Saben*, the Skagit County Planning Department interpreted county code in a manner that disallowed Applicant Saben's building permit, which Saben then administratively appealed. During the course of the administrative appeal, Saben and the County entered a settlement agreement, under which the Sabens would receive their permit. The County Board of Commissioners thereafter refused to honor the settlement agreement, citing various policy considerations such as protecting working forests and the like. Saben sued for damages under RCW 64.40 and 42 USC § 1983, prevailing in superior court, which was upheld by the Court of Appeals.⁵

In analyzing the *Saben* decision, it is critically important to recognize that the court did not rule against the County simply for "making a bad decision" or "changing its mind." Rather, damages

³ Specifically, the solid waste management plan in effect in the City of Sedro-Woolley disallows a private transfer station, as made clear by the plain language of Resolution 706-04, which rejects and refuses to adopt the very plan provisions on which Deluxe relies to support its application. See, Resolution No. 706-04 dated November 23, 2004, attached as **Exhibit A** ("The Skagit County Board of Commissioners have forwarded a revised draft of the Skagit County Comprehensive Solid Waste Management Plan to the Cities for adoption which provides for the permitting [of] multiple competing private transfer stations... The City of Sedro-Woolley hereby declines to adopt the "Final Draft" Skagit County Comprehensive Solid Waste Management Plan dated September 2004..."). The 1994 Comprehensive Solid Waste Management Plan, which allows only the Ovenell transfer station, is still in effect within the City of Sedro-Woolley. This is not something reasonably in dispute.

⁴ If there is a lack of room for two opinions, it is only because the Deluxe position is obviously wrong. Resolution 706-04 makes clear that the City rejected the exact plan provisions that would have allowed private transfer stations, notwithstanding the legally implausible explanation that the plan revisions somehow nevertheless adopted themselves.

⁵ It is also important to remember that a party successfully asserting entitlement to damages under RCW 64.40 still carries the burden of proving damages that are proximately caused by the action at issue, in accordance with applicable law governing damages. The Sabens initially claimed just short of \$500,000 in damages. The author of this memorandum handled the damages portion of the *Saben* litigation subsequent to the December 2006 appellate court decision on the issue of entitlement, settling the litigation for approximately \$80,000 in damages after several rounds of discovery questioning the extent of the Sabens' alleged damages.

were assessed against the County because the Court found that the Board of Commissioners willfully refused to honor a binding settlement agreement between the County and the Sabens:

The county reasonably interpreted its own ordinances. Then it reversed itself, reversed again, and yet again. It arrived at its final interpretation after the settlement agreement, after hiring outside counsel, and fully three months after the Sabens withdrew their appeal and complied with the Planning and Permit Center's conditions. **There was nothing illegal about the interpretation the county adopted when it made its agreement with the Sabens.** Whatever public policy the county's interpretive uncertainties may express, it cannot trump the county's obligation to honor its settlement with the Sabens.

136 Wn. App. at 877. And as the bolded text above reflects, the *Saben* court made clear that the County was on solid legal ground when it reversed its earlier position during an administrative appeal in light of new information, and then settled on that basis. That is identical to what the County now proposes the City do. The County's liability arose when the County arbitrarily refused to honor its settlement agreement with the Sabens, and not before.

In our view, the City would be perfectly within the scope of its authority in accepting the settlement proposed by the County, and the City would therefore have no liability to Deluxe.

2. Federal Law Issues.

Parties that hope to use federal law to recover damages arising from a local government land use decision typically resort to 42 USC § 1983, which allows for recovery of damages where a local governmental entity deprives a landowner of a federal right under color of state law. See, *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 117 (1992). To state a cognizable claim under § 1983, an aggrieved party must allege a violation of a federally-protected right, most typically a violation of due process or equal protection. Claims arising under 42 USC § 1983 may be asserted in either state or federal court. However, the Ninth Circuit (the federal circuit encompassing the State of Washington) has barred § 1983 claims arising under theories of substantive due process. *Macri v. King County*, 126 F.2d 1125 (9th Cir. 1997). The Washington Supreme Court, on the other hand, recognizes such claims. See, *Mission Springs Inc. v. City of Spokane*, 134 Wn.2d 947 (1998). Accordingly, § 1983 claims in the State of Washington are usually brought in state court.

In our view, Deluxe's assertion of non-specific "federal claims" seems more an effort to terrorize Sedro-Woolley officials with the unfamiliar specter of federal court litigation than any legitimate attempt to discuss the City's exposure, something perhaps best reflected by the complete absence of any legal authority or analysis in Deluxe's recent email threatening the City. See, Exh. C. In reality, the standards for asserting a constitutional claim under federal law are even more onerous than the "arbitrary and capricious" standard for challenging administrative actions under state law (as discussed in the preceding section covering RCW 64.40). See, e.g., *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 n.7 (4th Cir. 1995):

[T]o conclude that every agency decision reversed as "arbitrary and capricious" under state or federal administrative law rises to the level of a constitutional claim would distort the substantive due process doctrine. As the courts have consistently recognized, the inquiry into "arbitrariness" under the Due Process Clause is completely distinct from and far narrower than the inquiry into "arbitrariness" under state or federal administrative law ... While administrative law focuses on whether

an agency's decision was supported by record evidence and abided by statutory criteria, substantive due process inquiries into the conceivable outer limits of legitimate government power.⁶

This helps explain why most cases seeking damages for land use decisions are resolved under RCW 64.40, as opposed to federal law. Moreover, even if there were a reason to pursue a cause of action in federal court, the efficiency of federal courts means that the cost to the City's insurer of defending against a damages claim by Deluxe in federal court would not necessarily be any higher than state court litigation.

Although the complete absence of legal authority or analysis in Deluxe's August 5 email makes it difficult to directly analyze the issues, it is our view that Deluxe would be unable to successfully assert any "federal claims" against the City if the City were to settle with the County and Janicki as has been proposed.

3. Conclusion.

City staff seems to have reasonably relied on information from Deluxe and its consultants concerning the applicable solid waste management plan, concluding on that basis that the City's plan allows the Deluxe proposal. Upon further analysis, that information was incomplete at best: the City's solid waste management plan presently in effect simply does not allow the Deluxe proposal. It does not appear that City planning staff or the Hearing Examiner performed a detailed legal analysis of this issue. The County and Janicki propose to settle the litigation with the City on the basis of this issue, which cannot be considered arbitrary and capricious. It is our view that the City would have little exposure to Deluxe for damages under state or federal law if the settlement is accepted. While it seems unlikely that a settlement involving Deluxe can be reached, Skagit County will intervene in defense of the settlement in the event that Deluxe does challenge the settlement as arbitrary and capricious. This would be an outcome far preferable in our view to many more months (if not years) of expense and acrimony in the community over this issue.

⁶ Footnotes omitted.

EXHIBIT A

Resolution No. 706-04

A RESOLUTION OF THE CITY OF SEDRO-WOOLLEY DECLINING TO ADOPT THE SKAGIT COUNTY COMPREHENSIVE SOLID WASTE MANAGEMENT PLAN AS PRESENTED BY THE SKAGIT COUNTY BOARD OF COMMISSIONERS

Whereas, the City of Sedro-Woolley has participated in the formation of the Skagit County Comprehensive Solid Waste Plan through the Solid Waste Advisory Committee; and

Whereas, the City of Sedro-Woolley and other Cities in Skagit County have obligated themselves to participate financially in the payment of bonds associated with the construction of a solid waste incinerator through the operation of a County solid waste transfer facility, at the request of Skagit County, by execution of interlocal agreements dated May 17, 2004 and July 9, 1989, which obligate the City of Sedro-Woolley to designate the Skagit County solid waste system as the exclusive solid waste facility for all solid waste generated within the City of Sedro-Woolley until 2014, and

Whereas, the Sedro-Woolley City Council finds that, until the obligation bonds being funded by the Skagit County solid waste transfer station are retired, and the City of Sedro-Woolley is released from the obligations of the interlocal agreement for solid waste management with Skagit County and other Cities dated May 17, 2004, that it is in the best interests of the City of Sedro-Woolley and its residents to maintain a single County-operated solid waste transfer station to which the City has designated as the single disposal system for all solid waste generated within its boundaries, and

Whereas, the Sedro-Woolley City Council finds that once the obligations being paid by the operation of the County transfer station are retired, and the obligations of the City under that interlocal agreement dated May 17, 2004 are terminated or fulfilled, then the City will have no objection to the County permitting competing multiple private transfer stations, and

Whereas, the previous draft of the Skagit County Comprehensive Solid Waste Management Plan provided for only the County transfer station in a manner consistent with the interlocal agreement dated May 17, 2004, and

Whereas, the Skagit County Board of Commissioners have forwarded a revised draft of the Skagit County Comprehensive Solid Waste Management Plan to the Cities

for adoption which provides for the permitting competing multiple private transfer stations prior to the expiration of the City's interlocal agreement with Skagit County, in a manner that is inconsistent with the purpose of the interlocal agreement dated May 17, 2004, now therefore,

THE CITY COUNCIL OF THE CITY OF SEDRO-WOOLLEY DO HEREBY RESOLVE AS FOLLOWS:

The City of Sedro-Woolley hereby declines to adopt the "Final Draft" Skagit County Comprehensive Solid Waste Management Plan dated September 2004 as proposed by the Skagit County Board of Commissioners.

Passed and approved this 23rd day of November, 2004

CITY OF SEDRO-WOOLLEY

Sharon D. Nelson
Mayor

Attest:

Ray K. Nelson
City Clerk

Approved as to Form:

[Signature]
City Attorney

EXHIBIT B

**SKAGIT COUNTY PROSECUTING ATTORNEY
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***ER 408 PROTECTED COMMUNICATION
PERTAINS TO SETTLEMENT DISCUSSIONS***

August 4, 2008

Robert Carmichael
Zender Thurston P.S.
1700 D Street
Bellingham, WA 98227

RE: *Janicki v. Sedro-Woolley et al*, Skagit Cty Cause No. 08-2-01130-8

Dear Mr. Carmichael:

We write to propose settlement of this matter. In this letter, we discuss several of the County's main objectives, and what we understand to be the City's key interests. Our settlement proposal follows thereafter.

This settlement discussion is between the City and the County. Although we do not speak for the Appellant, it is our understanding that Mrs. Janicki would likely find the general terms we now propose to be acceptable as a basis for settlement and withdrawal of the LUPA petition.

1. Skagit County's Interests.

The county and eight other jurisdictions (including Sedro-Woolley) are parties to an interlocal agreement that establishes a process for creating and modifying a joint Comprehensive Solid Waste Management Plan (CSWMP) pursuant to RCW 70.95. Historically, the CSWMP has envisioned a single county-owned transfer station. In 2004, two county commissioners sought to revise the CSWMP to allow private transfer stations. After several cities (including Sedro-Woolley) rejected this effort, the County embarked on a lengthy and expensive process to establish a regional governance board that would afford the cities direct voting authority over major solid waste decisions, including future revisions to the CSWMP.

Solid waste has been a highly controversial issue in Skagit County for many years, spawning much acrimony and litigation. While the County expresses no preference for private over public solutions going forward, we firmly believe a comprehensive and coordinated regional approach to solid waste management will best serve all jurisdictions. With that in mind, Skagit County's principal objective is to ensure that all decisions about a regional solid waste system going forward will be made through the Governance Board.

Another consideration is the likelihood of continued acrimony in our community over the Deluxe project. Even assuming the City prevails in this LUPA appeal and Deluxe obtains a building permit from the City that is not itself appealed by a citizen group through another LUPA action (both of which are subject to substantial doubt), we believe there will necessarily be continued legal disputes and acrimony involving the City and County given that Deluxe will have no right to operate and generate revenue without various County approvals. The County seeks to avoid such a future.

Skagit County serves the entire community, urban and rural alike. The City has sought County approval of funding for infrastructure to accommodate the Deluxe proposal. With these things in mind, Skagit County has grave concerns about the location of the proposed Deluxe facility. Among other things, Skagit County is concerned about the overwhelming opposition to the Deluxe proposal; its location adjacent to one of our community's high schools, a residential neighborhood and the Skagit River's floodway; the significant transportation issues seemingly left unanswered by the MDNS; and the impact of the proposal on our ability to structure a comprehensive solid waste plan together with our city partners.¹

2. City of Sedro-Woolley's Interests.

While the County does not presume to comprehend all City interests, we are operating on an understanding that the City's interests in this matter are generally as follows, based on statements by City officials to the effect that:

- The City is neutral and impartial as to the Deluxe proposal, and the City is simply processing a building permit as a regulatory agency;
- The City is concerned that legal costs continue to mount as the City defends the Deluxe permit utilizing outside legal counsel;
- The City is concerned that withdrawing the Deluxe MDNS in settlement of the Janicki LUPA appeal could expose the City to a claim for damages by Deluxe, or, at minimum, require the City continue paying outside counsel to defend against Deluxe.

Please advise if our understanding of the City's interests is inaccurate. In furtherance of our efforts to amicably resolve this dispute, if there are any other City concerns or interests that are not identified above, it would be useful for the City to express them in a response letter.

¹ As an additional consideration, the Prosecuting Attorney is legally obligated to help "remedy inadequacies or injustice in substantive or procedural law" within his jurisdiction. RCW 36.70C.020(13).

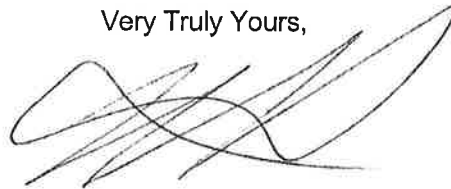
3. Settlement Proposal.

Taking into full account the City and County interests discussed above, we propose to globally resolve and settle this dispute on the following terms and conditions:

- City, County and Janicki stipulate that the Solid Waste Management Plan disallows the Deluxe proposal, and on that basis the City withdraws the Deluxe MDNS;
- Janicki withdraws its LUPA petition;
- City agrees that the location of any solid waste handling facilities will be decided by the Governance Board until the expiry of the Interlocal Agreement in 2013;²
- In the event Deluxe pursues action against the City to challenge the settlement, Skagit County agrees to intervene in defense of the settlement;³

If the City is amenable to settlement on the foregoing general terms and conditions, please indicate by your countersignature below, after which we will proceed with drafting a definitive settlement agreement. This proposal will expire at **4:00 p.m., August 7, 2008** if not prior accepted by the City's countersignature below and return delivery to the undersigned. We look forward to putting this dispute behind us, and moving forward with the City of Sedro-Woolley in genuine partnership on solid waste and other issues.

Very Truly Yours,



William Honea

ACCEPTED

Robert Carmichael
Attorney for City of Sedro-Woolley

² We would likely define this in a definitive agreement as any facilities that are not exempt from a Solid Waste Handling Permit under Skagit County Code 12.16.

³ It is Skagit County's view that the City would have no financial liability to Deluxe if this matter is settled on the terms proposed in this letter. Deluxe has no legally enforceable economic expectation that the City will issue a building permit. Deluxe's rights are vested by virtue of its complete application dated December 17, 2007, but this only means that Deluxe has a justified economic expectation the application will be processed according to the rules then in effect. This litigation involves a challenge to a City administrative decision, which may be modified prior to permit issuance so long as it is done on a basis that is not arbitrary and capricious. With that in mind, it is fully within the City's discretion to determine, on the basis of new information provided by litigants and the Court's recent ruling against the City, that the Deluxe proposal is in fact inconsistent with the solid waste management plan in effect in Sedro-Woolley, and a settlement is in the City's interests. Put another way, the City would have no more liability to Deluxe by settling than it would if the Court determines that Janicki and the County should prevail. Accordingly, the County's proposed settlement is intended to (a) help the City avoid the high litigation costs that going forward with the litigation will involve; (b) put an end to this unfortunate and acrimonious dispute; and (c) allow regional solid waste planning to proceed through the Governance Board in accordance with our interlocal agreement. It is difficult to imagine a better settlement for the City.

EXHIBIT C

Eron Berg

From: Phil Serka [pserka@adelstein.com]
Sent: Tuesday, August 05, 2008 4:03 PM
To: Eron Berg
Cc: Larry Mccarter; Steve Snell
Subject: Re Settlement offer

Dear Mr Berg, I hereby request a copy of the purported settlement offer from Skagit County and related correspondence not given to Delux but that if implemented would seriously impact the constitutional and due process rights of Delux. Apparently this purported offer was given to the Skagit Valley Herald. No agreement can be implemented without Delux being a party. My cursory review of the offer without reviewing the actual letter, is that if it were implemented, that Delux would have a claim against Sedro Wooley for significant damages including potential federal claims. However I am confident that Sedro Wooley understands that decisions on this project at this point have been objective, have been appealed and affirmed. These decisions can not be reconsidered simply because of the application of political pressure but are best left to be decided by the Superior Court. Phil Serka

EXHIBIT D

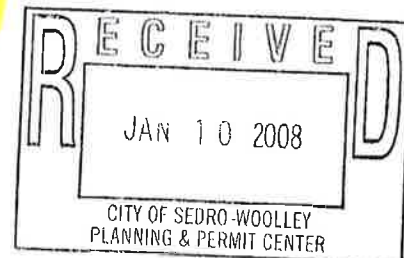
**DELUXE RECYCLING SOLID WASTE
PROCESSING FACILITY
SEDRO-WOOLLEY, WASHINGTON**

SEPA CHECKLIST

Prepared for:

**Deluxe Recycling & Disposal
4916 LaBounty Place
Ferndale, WA 98248**

November 29, 2007



Skagit Surveyors & Engineers

SURVEYING ♦ CIVIL ENGINEERING ♦ SUBDIVISIONS ♦ LAND USE PLANNING ♦ ELEVATIONS

806 Metcalf St., Sedro-Woolley, WA 98284 Phone (360) 855-2121 Fax (360) 855-1658

9. Do you know whether applications are pending for governmental approvals of other proposals directly affecting the property covered by your proposal? If yes, explain.

The applicant is currently working with Skagit County to be included as part of the County's comprehensive approach to solid waste management.

↳ COUNTY'S POSITION IS PROPOSAL DISALLOWED.

10. List any government approvals or permits that will be needed for your proposal, if known.

Site Plan/Landscaping Review—City of Sedro-Woolley

Grading Permit—City of Sedro-Woolley

Building Permit—City of Sedro-Woolley

Variance to allow building to exceed 35 feet in height—Sedro-Woolley

Stormwater General Permit for Construction and Industrial Uses—Department of Ecology

Solid Waste Handling Permit—Skagit County Health Department & Department of Ecology

Site Designation and System Operator's Agreement—Skagit County (it should be noted that this permit only applies to solid waste from Skagit County all out of County waste is not subject to these permits).

11. Give brief, complete description of your proposal, including the proposed uses and the size of the project and site. There are several questions later in this checklist that ask you to describe certain aspects of your proposal. You do not need to repeat those answers on this page.

The proposal is for the construction and operation of a solid waste handling and recycling facility. The facility would be located on a 12.84 acre portion of the former "Sedro-Woolley Lumber" sawmill site. It would process, recycle and dispose of Municipal Solid Waste for Skagit County and other areas in northwest Washington. The facility would also process construction debris (wood, asphalt, concrete, etc.) It would be open to the public and would include a free self service drop off area for recyclables.

The proposal would include a new 150' by 200' (30,000 square foot) processing facility and below grade compactor. In addition, the existing buildings on site would be used for office and shop space. Scales and a scale house would be constructed. Other activities on the site would include an area for self service recycling and storage of inert materials such as wood, concrete and metals.

The processing facility would be closed on three sides with the fourth side (southeast side) open to allow garbage trucks to unload. The building would include an automated conveyor to sort recyclable materials from other solid waste. Recyclables, such as plastic, cardboard, mixed paper, wood, sheet rock, metals, concrete and asphalt roofing would be sorted into various holding units using a combination of mechanical technology and humans. As the units fill up, the materials would be baled for sale to a recycling center or end user for recycling into useable products. Some recyclable materials would be further processed on site for direct resale. This would be primarily wood products and limited construction/demolition debris. The wood debris would be ground roughly once a month and the resulting "hog fuel" sold from the site. The list of recyclable materials would expand or shrink based on fluctuations in the materials markets and technology available to further process the materials.

The remaining solid waste would be compacted into individual waste units. The waste units would be self contained covered units that would be transported to approved landfills by semi-truck as they are filled. The processing facility would be swept daily. The use of

6. ENERGY AND NATURAL RESOURCES

- a. What kinds of energy (electric, natural gas, oil, wood stove, solar) will be used to meet the completed project's energy needs? Describe whether it will be used for heating, manufacturing, etc.

In the short-term, energy sources such as fuel and electricity would be required for construction of the proposed improvements. In the long-term, electrical energy would be consumed for lighting and operation of the materials processing and composting facilities. The heavy equipment operated at the facility will use diesel fuel. Offices would require electricity and heat.

- b. Would your project affect the potential use of solar energy by adjacent properties? If so, generally describe.

The project would not affect the potential use of solar energy by adjacent projects.

- c. What kinds of energy conservation features are included in the plans of this proposal? List other proposed measures to reduce or control energy impacts, if any:

None are proposed.

7. ENVIRONMENTAL HEALTH

- a. Are there any environmental health hazards, including exposure to toxic chemicals, risk of fire and explosion, spill, or hazardous waste, that could occur as a result of this proposal? If so, describe.

The project will result in a reduction in environmental health hazards through the provision of continued safe handling of community solid waste that meets the need for solid waste facility services required by the growth projected for the area. In addition, removing recyclable materials from the waste stream reduces the area required for landfills and reduces the impacts associated with those facilities.

Some potential exists for spills of fuel or automotive fluids from vehicles and equipment. If a spill occurs, the spill would immediately be contained and cleaned-up. The proposed facility will not manage hazardous, or dangerous wastes. However, the potential exists for toxic chemicals or hazardous wastes to be illegally brought to the facility or small quantities may be

→ what is the source of this statement?

- h. Has any part of the site been classified as an "environmentally sensitive" area? If so, specify.

No portion of the site has been identified as environmentally sensitive.

- i. Approximately how many people would reside or work in the completed project?

The facility will employ between 20 & 25 employees.

- j. Approximately how many people would the completed project displace?

There is a potential for this facility to cause a reduction in staff levels at the current Skagit County Transfer Station but there would be a net increase of employees doing very similar work.

- k. Proposed measures to avoid or reduce displacement impacts, if any:

Displaced County employees could apply for positions at this facility and because of their experience could be excellent employees.

- l. Proposed measures to ensure the proposal is compatible with existing and projected land uses and plans, if any:

The proposal is a permitted use in an industrial area.

9. HOUSING

but not allowed by solid waste plan in effect in S-W

- a. Approximately how many units would be provided, if any? Indicate whether high, middle, or low-income housing.

The proposal includes no housing.

- b. Approximately how many units, if any, would be eliminated? Indicate whether high, middle, or low-income housing.

No housing would be eliminated.

- c. Proposed measures to reduce or control housing impacts, if any:

None are proposed or necessary.

- e. Will the project use (or occur in the immediate vicinity of) water, rail, or air transportation? If so, generally describe.

The project is in the immediate vicinity of rail transportation. There are no existing plans to use rail as a means of transport but its use in the future cannot be ruled out.

- f. How many vehicular trips per day would be generated by the completed project? If known, indicate when peak volumes would occur.

A traffic study was prepared by Gibson Traffic Consultants. That study indicates that the project will generate 348 average daily trips with 45 am peak trips (35 in and 10 out) and 49 pm peak trips (12 in and 37 out).

The facility would be open from 7:30 am to 5:30 pm seven days a week.

- g. Proposed measures to reduce or control transportation impacts, if any:

The proposal would be subject to paying impact fees to the City of Sedro-Woolley.

15. PUBLIC SERVICES

- a. Would the project result in an increased need for public services (for example: fire protection, police protection, health care, schools, other)? If so, generally describe.

All new projects require some level of public services. Security will be provided on-site and will be aided by the proposed landscaping and fencing. The facility will enforce a secured/covered load policy to reduce litter from incoming loads. The demands for police services should be minimal.

The facility should not require fire protection services different from any industrial facility. The facility will train on-site personnel to handle any hazardous spills and hot loads delivered to the facility.

- b. Proposed measures to reduce or control direct impacts on public services, if any.

The current County transfer station is near or at its load out capacity for the current hours of operation. Significant improvements would be required to increase its capacity or an extension of the operating hours would be necessary. This proposal will relieve

the capacity problems at the County transfer station. The proposed project has the added benefit of recycling a significant portion of the waste stream, which is a high priority for solid waste management in Skagit County and the state of Washington.

per CSWMP;
CONSULTANT
MUST BE REVIEWED
SKAGIT

16. UTILITIES

- a. Underline utilities currently available at the site: electricity, natural gas, water, refuse service, telephone, sanitary sewer, septic system, other.

All utilities are currently available to the site.

- b. Describe the utilities that are proposed for the project, the utility providing the service, and the general construction activities on the site or in the immediate vicinity which might be needed.

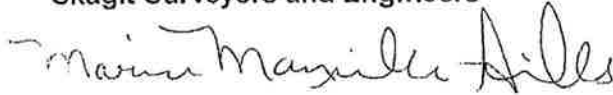
As part of the construction of the project, utilities will be extended to serve specific needs of the new processing facility.

C. SIGNATURE

The above answers are true and complete to the best of my knowledge. I understand that the lead agency is relying on them to make its decision.

Signature:

Skagit Surveyors and Engineers



Marianne Manville-Ailles, AICP
Senior Planner

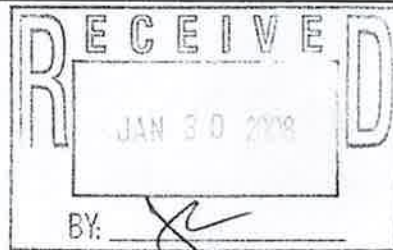
Date Submitted: November 29, 2007



PETER BROWNING, DIRECTOR
HOWARD LEIBRAND, HEALTH OFFICER

700 SOUTH SECOND STREET #301, MOUNT VERNON, WA 98273, TEL (360) 336-9380 FAX (360) 336-9401

January 30, 2008



John Coleman
City of Sedro Woolley Planning Department
720 Murdock Street
Sedro Woolley, WA 98284

Re: Deluxe Recycling and Disposal, application and SEPA comment period.
File #BP-111-07

The Skagit County Public Health Department requests to be included as a party of record for the above mentioned Deluxe Recycling and Disposal proposal for a solid waste facility. The Skagit County Public Health Department is responsible for the regulation and permitting of all solid waste facility permits in Skagit County. Additional application information and review will be required according to Chapter 173-350 WAC *Solid Waste Handling Standards*. We have reviewed the checklist and have the following general comments:

1. How does the City of Sedro Woolley Comprehensive Management Plan address the siting of essential public facilities such as the proposed solid waste transfer station?
2. How does the proposal comply with the City of Sedro Woolley , Comprehensive Management Plan?
3. How does the proposal comply with the Skagit County Comprehensive Management Plan including:
 - a. the capital facilities and essential public facilities,
 - b. the Solid Waste Management Plan, and
 - c. the collection of household hazardous waste?
4. The proposal should undergo third party programmatic review and analysis to determine how the proposal might impact the solid waste system in Skagit County.
5. The proposal needs to discuss potential impacts and mitigations for portions of the proposed facility which appear to be located within the 100 year flood plain. These include:
 - The stormwater pond,
 - An area of the facility proposed for handling and storage of wood wastes and inert wastes, and

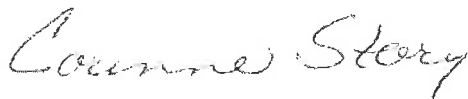
- The southern portion of the main transfer station building, including a below grade compactor.
6. Drainage which has potential contamination from the handling and storage of solid waste must be routed to the sanitary sewer for treatment. This includes the following areas:
- where solid waste is loaded and unloaded,
 - where solid waste is stored and sorted, and
 - any areas where solid waste can be transported or tracked by vehicles or other equipment.
7. The stormwater pond should only receive runoff that does not have the potential to come in contact with solid waste or leachate from solid waste. Drainage plans for the project should reflect these requirements.

Given the likely and significant adverse impacts that this proposal invokes, we believe that the City must require an environmental impact statement (EIS) consistent with state law. Thank you for considering these comments.

Sincerely,



Britt Pfaff-Dunton
Environmental Health Specialist



Corinne Story
Environmental Health Supervisor

EXHIBIT E

Eron Berg

From: Eron Berg
Sent: Tuesday, March 11, 2008 4:50 PM
To: Mike Anderson
Subject: FW: County is weak and wrong:

From: Larry Mccarter [mailto:rdslarry@mac.com]
Sent: Tuesday, March 11, 2008 12:58 PM
To: Eron Berg
Subject: County is weak and wrong:

VOETBERG 3-11-08 LETTER ATTACHED

Your city may have protested the final draft but it did not opt out. You have not created your own plan (which you would have had to have done). And not once has the county said this before. We are launching a full accounting audit by Moss Adams starting today. They are getting the phone call as I type...

RCW 70.95.080

County comprehensive solid waste management plan — Joint plans — Duties of cities.

Each county within the state, in cooperation with the various cities located within such county, shall prepare a coordinated, comprehensive solid waste management plan. Such plan may cover two or more counties.

Each city shall:

- (1) Prepare and deliver to the county auditor of the county in which it is located its plan for its own solid waste management for integration into the comprehensive county plan; or
- (2) Enter into an agreement with the county pursuant to which the city shall participate in preparing a joint city-county plan for solid waste management; or
- (3) Authorize the county to prepare a plan for the city's solid waste management for inclusion in the comprehensive county plan.

Two or more cities may prepare a plan for inclusion in the county plan. With prior notification of its home county of its intent, a city in one county may enter into an agreement with a city in an adjoining county, or with an adjoining county, or both, to prepare a joint plan for solid waste management to become part of the comprehensive plan of both counties.

After consultation with representatives of the cities and counties, the department shall establish a schedule for the development of the comprehensive plans for solid waste management. In preparing such a schedule, the department shall take into account the probable cost of such plans to the cities and counties.

Local governments shall not be required to include a hazardous waste element in their solid waste management plans.



SKAGIT COUNTY PUBLIC WORKS DEPARTMENT

1800 Continental Place, Mount Vernon, WA 98273-5625
(360) 336-9400 FAX (360) 336-9478

March 11, 2008

Steve Snell
Deluxe Recycling and Disposal LLC
% Michael B. Galletch, esq.
2200 Sixth Avenue, Suite 888
Seattle, WA 98121

Larry McCarter, Registered Agent
Deluxe Recycling and Disposal LLC
4916 Labounty Place
Ferndale, WA 98248

Dear Mr. Snell and Mr. McCarter:

We have your correspondence dated February 25, 2008, resubmitting your August 2007 application for an interim site designation and System / Operator Agreement. We also have your letter dated March 10, 2008 discussing the County's proposed moratorium. We respond to both.

As an initial matter, we need to respond to the statements in your March 10, 2008 letter that the County allegedly "made promises to Deluxe". As the County's responsible official for solid waste applications, I can say unequivocally that we have never promised Deluxe anything.

It is our understanding that SCC 12.18.020(4) applies to your application. SCC 12.18.020(4) provides that applications can be accepted and processed only after completion of "initial planning review" as well as the "SEPA review process." Sedro-Woolley has land use SEPA jurisdiction. Although the City issued a MDNS last Friday, as discussed in our prior correspondence the SEPA review process is not yet complete because the public's right to participate in the SEPA review process has not yet elapsed under Sedro-Woolley Municipal Code. See, SMC 2.88.170.B.

While the moratorium passed today by the Board of Skagit County Commissioners is not aimed specifically at your proposal, it clearly applies to your application. The moratorium is only nine months, which the Board determined to be a reasonable period to address the issues necessitating the moratorium. As was discussed today, we are scheduling a post-enactment hearing so the Board can take public testimony on this issue. We will advise as to the hearing's date and time in the near future.

More importantly, aside from the moratorium, our initial research indicates that Deluxe's proposal is fatally flawed. Deluxe claims the right to a System/Operator Agreement ("**S/OA**") for a facility within the jurisdictional limits of Sedro-Woolley, pointing to the version of the County Comprehensive Solid Waste Management Plan ("**CSWMP**") as amended in 2004. Specifically, you point to CSWMP 7.2.3, which allows the County to consider contracting for private transfer stations in addition to the County-owned transfer station.

Page Two
March 11, 2008
Letter: Steve Snell and Larry McCarter

However, the County's solid waste management plan only applies to the cities when they have affirmatively adopted and ratified it. See, RCW 70.95.080. Sedro-Woolley not only failed to adopt the CSWMP as amended in 2004 (under which the rights you claim arise), but has affirmatively rejected it.

On November 23, 2004, the City of Sedro-Woolley passed Resolution 706-04, "A Resolution of the City of Sedro-Woolley Declining to Adopt the Skagit County Solid Waste Management Plan as Presented." At the time, it was Sedro-Woolley's position that the 2004 amendments were a breach of the multi-jurisdictional solid waste interlocal agreement. We include a copy of the relevant page of the minutes from the November 23, 2004 Sedro-Woolley City Council meeting.

Because the CSWMP (as amended in 2004) is inapplicable within the City of Sedro-Woolley's jurisdictional limits, the County is unable to process an application and grant a contract under the CSWMP as amended in 2004 for the alternate transfer station you propose in Sedro-Woolley.

Identifying these kinds of planning-related problems is part of the reason that "initial planning review" and "SEPA review" must be completed before a site designation application can be processed by this office. With that in mind, we are surprised that the City of Sedro-Woolley failed to inform Deluxe or the County of its Resolution 706-04 (rejecting the County's 2004 CSWMP) during the City's initial planning and SEPA review of the Deluxe proposal. Note Resolution 706-04 specifically makes a finding that through the term of the Interlocal, it is in the best interest of Sedro-Woolley and its residents to maintain a single County-operated solid waste transfer station. In your March 10, 2008 letter, you claim that Deluxe has committed "tremendous resources" to its Sedro-Woolley proposal and will suffer "tremendous damages" unless granted a contract and site designation by the County; but if Deluxe believes it has frustrated economic expectations and business losses because it cannot operate a transfer station in the jurisdictional limits of Sedro-Woolley, it would appear that the City of Sedro-Woolley, not the County, is the appropriate place to seek redress.

In light of the foregoing, we are unable to review, process or grant a site designation and System/Operator Agreement for Deluxe's proposed site in Sedro-Woolley. In the interim, we anticipate that the cities, towns and the County will work together under a governance structure to plan for a sensible long-range solid waste future. Privatization poses intriguing possibilities, and it is our sincere hope that Deluxe will proactively participate in our community's discussion of these issues during the moratorium.

Sincerely,



JAMES E. VOETBERG, P.E.
Director / County Engineer

JEV/jjj
Enclosure: City of Sedro-Woolley Minutes 11/23/04
Resolution No.706-04
Cc: Board of Skagit County Commissioners
Gary Rowe, County Administrator
Will Honea, Chief Civil Deputy