

ADELSTEIN, SHARPE & SERKA LLP
ATTORNEYS AT LAW

STEVEN P. ADELSTEIN
PHILIP E. SHARPE, JR.
PHILIP A. SERKA
JEFFREY P. FAIRCHILD
MITCHELL G. FABER
MARIE N. GALLAGHER

direct e-mail: pserka@adelstein.com

August 13, 2008

City of Sedro Woolley
%Eron M. Berg, City Attorney
325 Metcalf Street
Sedro Woolley, WA 98284
eberg@ci.sedro-woolley.wa.us

Re: Annie Janicki vs. City of Sedro Woolley and
Deluxe Recycling and Disposal LLC vs. Skagit County
Skagit County Cause No. 08-2-01130-8

Dear Mr. Berg:

Please share this letter with the City Council in regard to their deliberations on the "Skagit County offer."

I have had an opportunity to review Skagit County's letter dated August 4 and emails directed to Bob Carmichael in regard to the County's "purported Settlement Offer." This purported offer was intentionally not delivered to Deluxe. The offer is not an "offer" as it requests that the City of Sedro Woolley Council reverse the decision on Deluxe's application for building permit to issue a Mitigated Determination of Non-Significance (MDNS) and admit that the responsible official and Hearing Examiner all made an error and that Deluxe cannot be issued a building permit to locate a solid waste facility on Industrial zoned land in Sedro Woolley. Deluxe considers this offer to be made in bad faith without proper notice to all parties. The decision to accept this offer by Sedro Woolley would be considered by Deluxe to be evidence of a conspiracy between two governmental entities to preclude Deluxe from rightfully obtaining a building permit for their recycling/solid waste facility. Sedro Woolley and Skagit County are on notice that implementation of this offer is an illegal action and that it will result in a claim for damages against Sedro Woolley and Skagit County.

The responsible official for the City of Sedro Woolley made a reasoned decision to issue an "MDNS after requiring Deluxe to expend thousands of dollars to provide a traffic study, drainage study, and other information deemed necessary in order for the City of Sedro Woolley to make an informed decision. This decision was appealed by Janicki to the Hearing Examiner. After considering argument from all parties, the Hearing Examiner affirmed City of Sedro Woolley's decision to issue an MDNS. Subsequently, Janicki has appealed that decision to Superior Court. Deluxe contends that the proposal by Skagit County to reverse this MDNS would be based only on

politics. Furthermore, Deluxe believes that Skagit County is encouraging that the City of Sedro Woolley commit an illegal act, by reversing a decision which was careful, thoughtful, and made only after obtaining required information. The City Council has no authority to issue any SEPA determination and certainly does not have the right to reverse a decision that has gone through an appeal process before the Hearing Examiner. Acceptance of this settlement offer without Deluxe's consent would be considered by Deluxe to be violation of their due process rights. In addition, an agreement by two governmental entities to implement the settlement offer without Deluxe's assent gives rise to a substantial damage claim.

1. Skagit County's Proposal is Not a Settlement but Requires that Sedro Woolley to Perform an Illegal Act.

The Sedro Woolley City Council has no authority to make any decision on SEPA and does not have the authority to overturn a decision made by a responsible official that has subsequently been appealed to the Hearing Examiner and to Court. The City Council does not have the authority within their Zoning Code to issue any environmental decision. They are not an appellate body of decisions based on SEPA.

2. Skagit County's Offer is No Offer But Would Require the City to Admit that it "Erred."

This "purported settlement" would require a commitment of Sedro Woolley to grant the relief requested by Janicki in Court without having the issues decided by a Court and without the consent of Deluxe, a party to the lawsuit. Sedro Woolley cannot accept this "offer" without Deluxe's consent.

3. Skagit County's Proposal Would Result in an Arbitrary, Thoughtless Decision.

Furthermore, the Mitigated Determination of Non-Significance decisions are made by the responsible official after carefully reviewing the Applicant's proposal, studies presented by the Applicant, and other information required by the responsible official in order to make an informed, reasoned decision. This process required a commitment by Deluxe to expend considerable funds within the application process to provide the information necessary in order for Sedro Woolley to make this decision. These decisions cannot be simply changed with a whim of an agency or simply because Skagit County request that the decision be changed. Deluxe's proposal has not changed and there is no new information regarding environmental impacts and the application that have not been disclosed and that were not considered when the responsible official made the initial decision to require an MDNS. There is no basis for the City to arbitrarily change this decision even if the Council had the authority to do so.

4. Skagit County is Raising the Same Issues that it Raised at the Hearing Examiner Level.

Skagit County is raising the same issues that have already been considered by the Staff and Hearing Examiner. Skagit County presents nothing new here. In addition, these issues are not relevant to the issue of whether or not the Mitigated Determination of Non-Significance should have been issued or not.

5. Skagit County Violates the Settlement Agreement.

Before even the ink is dried on the Settlement Agreement between Skagit County, Deluxe and Cimarron in Cause No. 08-2-00532-4, Skagit County begins a process of violating the very terms of the Agreement. The Settlement Agreement commits Skagit County to: (1) not object to Deluxe handling construction, demolition, clearing waste or recyclable materials generated inside or outside of Skagit County, and (2) Skagit County agreed to not object to Deluxe handling municipal solid waste generated outside the territorial limits of Skagit County. The proposal in Sedro Woolley does include the handling of construction demolition debris. Deluxe entered the Settlement Agreement largely based on the commitment from Skagit County that their objection to the Sedro Woolley proposal would only be limited to objecting to the MDNS in the pending LUPA case.

Lastly, Skagit County committed that they will not oppose building permits or any other permits that Deluxe may need for the Sedro Woolley facility. Skagit County's allegations that the Deluxe facility in Sedro Woolley cannot be permitted violates their prior commitment to Deluxe.

6. Sedro Woolley Proposal.

Deluxe has also reviewed the City of Sedro Woolley attempts to reach proposed settlement. I appreciate that their proposal was delivered to all required parties. My understanding is that the Sedro Woolley settlement proposal would require that Deluxe agree to not handle any municipal solid waste from any source without receiving site designation from the governing board. This settlement proposal would require Deluxe to give up rights they have most recently negotiated through a separate settlement with Skagit County with no concessions from any other party. Deluxe is not going to give up any rights they have earned through a separate settlement agreement. It is our understanding that construction/demolition debris, and out of county generated waste can be conducted at the Sedro Woolley site without obtaining governing board approval. Thus, Deluxe will not agree to an amendment of the terms of that agreement.

7. Skagit County Has Previously Offered to Support the Relocation of Deluxe's Solid Waste Proposal in Skagit County.

On one hand, Skagit County states that the site should not be permitted in Sedro Woolley but has encouraged the relocation of the proposed facility to an alternative site outside the City limits of Sedro Woolley.

8. Conclusion.

However, Deluxe is willing to explore settlement solutions with all parties but which will require an acknowledgement by all parties of the Sedro Woolley site as the recycling/solid waste facility.

Deluxe requests that the Skagit County settlement offer be soundly rejected. This offer cannot be accepted without consent of Deluxe. The Skagit County's offer is meaningless and is "grand standing" ploy simply advanced for the publicity and to place political pressure on the Council. If Skagit County were serious in settling they would have involved all parties in the process. Acceptance of the offer would result in an illegal act and will result in a significant damage claim against Sedro Woolley and Skagit County.


On the other hand, the Superior Court trial is scheduled for October 10. I concur with Council Member Dennis London's quote in the *Herald* where he states: "I do believe that everything that the City has done has been correct and legal and within the guidelines of the ordinances of Sedro Woolley and it has not done anything improper." Thus, I would encourage the Council to allow the Court to render an opinion on whether the decision to issue the MDNS should be affirmed. There is no risk to Sedro Woolley whichever decision is made by the Court. On the other hand, there will be a significant damage claim should Sedro Woolley attempt to "pull the rug out from under" Deluxe and accept Skagit County's proposal, reverse the MDNS and deny a building permit to Deluxe for its proposed facility. Please note that the Skagit County's offer is to only defend Sedro Woolley if they should commit this illegal act. Skagit County is not willing to pay the significant damages that will be required to be paid by Skagit County and Sedro Woolley to Deluxe should the City attempt to accept the "offer."

Deluxe is confident the City of Sedro Woolley will make the right decision.

City of Sedro Woolley
%Eron M. Berg, City Attorney
August 13, 2008
Page 5

Thank you for your anticipated cooperation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'P. Serka', with a long horizontal flourish extending to the right.

Philip A. Serka

PAS/sc

cc: Larry McCarter

P:\PAS-ARCHIVES\MCCARTER, LARRY\OKA\GT GARBAGE - LUPA Postcard\Berg 8-13-08.doc