

November 16, 2015

CITY COUNCIL AGENDA MEMORANDUM

SUBJECT

Request from East Bellevue Community Council (EBCC) for Council determination that its “necessary expenses” include funding to pay for appellate legal counsel to pursue appeal of trial court ruling that community councils lack statutory jurisdiction to take action on shoreline conditional use permits.

FISCAL IMPACT

The EBCC’s annual budget is approximately \$4000 as approved by the City Council. The EBCC is staffed by the Deputy City Clerk and an Assistant City Attorney. Due to the fact that both the City and Community Council have been sued by Puget Sound Energy (PSE) as a result of the EBCC’s disapproval of the City’s Ordinance granting the company permits to construct a transmission line, the City Attorney’s Office has been representing the City and an outside attorney has been retained to defend the EBCC in this litigation. The cost of retaining a separate appellate counsel to appeal an adverse trial court ruling on the scope of EBCC’s jurisdiction is estimated to be approximately \$15,000. To date, costs of the litigation have been covered within the current general fund budget.

STAFF CONTACT

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City Attorney’s Office

Charmaine Arredondo, Deputy City Clerk, 452-6466
City Clerk’s Office

POLICY CONSIDERATION

Should the City Council determine that the costs of a legal appeal of an adverse trial court ruling are “necessary expenses” of the EBCC? State law requires that the City budget and pay the necessary expenses of community municipal corporations such as EBCC. The state enabling statute is silent as to what constitutes necessary expenses, however case law does provide some guidance as to how such a determination should be made.

BACKGROUND

PSE Shoreline Conditional Use Permit

In 2012 PSE sought both a Conditional Use Permit (CUP) and Shoreline Conditional Use Permit (SCUP) to construct a 115 kV transmission line to connect two substations in east Bellevue. One of the substations and the transmission line are located within the jurisdictional boundaries of the East Bellevue Community Council and a small portion of the transmission line is additionally located within the shoreline-associated wetland buffer of Kelsey Creek under the City’s Shoreline Master Program.

Bellevue's Hearing Examiner recommended approval of both the CUP and SCUP, and the City Council passed Ordinance No. 6226 on May 4, 2015 approving both permits. The ordinance was then transmitted to EBCC for its action.

EBCC disapproved both the CUP and SCUP approved by the City Council for PSE's project. PSE subsequently filed suit against the EBCC and the City in King County Superior Court as to the CUP and the Shoreline Hearings Board as to the shoreline permit (SCUP).

PSE then filed a dispositive motion with the superior court challenging the EBCC's jurisdiction to act upon the SCUP. In early September the court issued an order finding the EBCC's attempt to exercise jurisdiction over the SCUP to be *ultra vires*, "beyond the powers" of a community council under the plain language of the state law creating and defining the powers of such municipal corporations.

Legal Framework

Community Municipal Corporations were authorized by the state legislature in 1967. The enabling legislation consists of only a few sections, one of which describes the administrative framework for community councils:

35.14.030. Community council--Employees--Office--Officers--Quorum--Meetings-- Compensation and expenses

Each community council shall be staffed by a deputy to the city clerk of the city with which the service area is consolidated or annexed and shall be provided with such other clerical and technical assistance and a properly equipped office as may be necessary to carry out its functions.

Each community council shall elect a chair and vice chair from its membership. A majority of the council shall constitute a quorum. Each action of the community municipal corporation shall be by resolution approved by vote of the majority of all the members of the community council. Meetings shall be held at such times and places as provided in the rules of the community council. Members of the community council shall receive no compensation.

The necessary expenses of the community council shall be budgeted and paid by the city.

Consistent with this statutory direction, the EBCC, which was established in 1969 upon annexation of this geographic area from King County, has been staffed on an ongoing basis by the Deputy City Clerk. Day to day legal advice has been provided by a member of the City Attorney's Office, an arrangement that worked well for a period of over 30 years. The City has generally retained outside counsel for the EBCC when litigation has ensued between the City and the Community Council. However, in December, 1989 when EBCC sought Council approval to budget for outside legal counsel and technical experts on an on-going basis the request was denied. EBCC (along with the Sammamish Community Council which is no longer in existence)

filed suit against the City, claiming that such expert costs were “necessary expenses” of the Community Council. Additionally, EBCC argued that there was an inherent conflict of interest involved for the City Attorney’s Office in providing legal advice to both legislative bodies.

In 2001 the Court of Appeals issued a decision affirming the trial court’s grant of summary judgment to the City on both issues. The court started with the principle that legislative intent is to be determined first and foremost by reviewing the “plain language and ordinary meaning” of the statute itself. In applying this rule of statutory construction regarding the scope of “necessary expenses” the appellate court held:

In this case, East Bellevue and Sammamish are essentially asking the court to interpret RCW 35.14.030 as empowering community councils to determine their own necessary expenses to be paid by the City. The plain language of the statute, however, does not support this interpretation. RCW 35.14.030 states that “[t]he necessary expenses of the community council shall be budgeted and paid by the city” (emphasis added). This language indicates the Legislature’s intent that the City—not the community councils—control funding for the community councils and thus, is empowered to determine the councils’ necessary expenses. To conclude otherwise would lead to an anomalous arrangement wherein the community councils would possess independent budgeting authority without the counterbalancing ability-or obligation-to generate revenue.

East Bellevue and Sammamish argue that allowing the City to determine their necessary expenses would enable the City to “effectively prevent the Community Councils from exercising [their] statutory authority” by refusing funding for any and all requested expenses. East Bellevue’s Opening Brief, at 25. This argument ignores the community councils’ ability to ask the courts for relief from arbitrary and capricious conduct by the City. Such available recourse addresses the community councils’ concern regarding the City’s exercise of budgetary discretion. Thus, under the statutory scheme of RCW 35.14.040, the community councils are empowered to independently assess the expenses they deem necessary for the execution of their disapproval authority and request those expenses of the City. The City, in turn, must consider the community councils’ requests and exercise its discretion carefully lest it face legal action for arbitrary and capricious decisions.

Sammamish Community Mun. Corp. v. City of Bellevue, 107 Wn.App. 686, 693-694 (2001).

In another case decided by the Court of Appeals in 2001, the court agreed with the City that community municipal corporations do not have approval/disapproval jurisdictions over all regulations and permits that affect land use. In *Sammamish Community Council v. Bellevue*, 108 Wn.App. 46 (2001) the Court ruled that Bellevue’s community councils had acted outside the scope of their jurisdictional authority in disapproving a City ordinance amending the City’s Traffic Standards Code. The Court also noted that other ordinances that would not be within the

community councils jurisdiction include “critical area ordinances, shoreline master programs, subdivision ordinances, binding site plan ordinances, shoreline management regulations and water rights regulations. *Id*, at 55, n. 2.

As the legislative body of the City with responsibility to approve the budget of the Community Council as well as the City’s own budget, the City Council should consider this budgetary request in light of the above-quoted appellate court decisions. The Council must determine whether the additional costs of an appeal are necessary to permit the community council to carry out its statutory functions. Such determination should take into account the unique facts and circumstances for requests such as the present lawsuit between PSE, the EBCC and the City. The City Attorney’s Office cannot provide this representation because it is representing the City in this appeal and has divergent interests from those of the EBCC. Council should consider the basis of the trial court’s ruling, precedent and the financial impact of the request in making its determination.

EFFECTIVE DATE

If adopted, a Resolution will be effective immediately.

OPTIONS

1. Adopt a Resolution finding that retention of an appellate attorney to pursue the legal challenge to the trial court’s ruling that EBCC lacks a jurisdiction to approve or disapprove shoreline conditional use permits is a “necessary expense” of EBCC in order to clarify with controlling authority the scope of the statutory grant of authority in RCW 35.14 for community municipal corporations over shoreline permits and regulations.
2. Adopt a Resolution finding that retention of an appellate attorney to pursue the legal challenge to the trial court’s ruling in PSE v. EBCC and Bellevue is not a “necessary expense” of EBCC because the court’s decision was based upon a finding that the enabling legislation creating community municipal corporations is clear and unambiguous and does not confer jurisdiction under RCW 35.14 to act upon shoreline permits and regulations. Additionally, a prior appellate ruling regarding the scope of community municipal corporations’ jurisdiction expressly noted that shoreline regulations are the types of land use regulations not within community council jurisdiction.

ATTACHMENT

November 3, 2015 letter from William Capron, Chair, East Bellevue Community Council