

February 16, 2016

CITY COUNCIL AGENDA MEMORANDUM

SUBJECT

Request from East Bellevue Community Council (EBCC) for Council determination that its “necessary expenses” include additional 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 and defend against appeal upholding the EBCC’s disapproval of a Conditional Use Permit. Additionally, the request seeks funding for an appeal of the Shoreline Conditional Use Permit approved by the Department of Ecology for this transmission line project. The EBCC has already filed this appeal and seeks funding to continue with proceedings before the State Shoreline Hearings Board.

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. In November 2015 Council was presented with a request by the EBCC to fund an appeal by the community council of adverse rulings by the trial court in the litigation. Council adopted Resolution No. 9015, finding that appeal could be considered a necessary expense of the community counsel and approving the expenditure of \$15,000 to fund appeal of the adverse rulings. To date, all costs of the litigation have been covered within the current general fund budget.

A second request for funding from the EBCC was received on February 5, 2016 as described above. The total amount requested at this time is \$45,000--\$15,000 additional for the Court of Appeals proceeding to defend PSE’s appeal as well as a request for \$30,000 to prosecute the EBCC’s appeal of the shoreline conditional use permit before the state Shoreline Hearings Board. The EBCC proposes to have the same attorney do the work on both cases.

STAFF CONTACT

Lori M. Riordan, City Attorney, 452-7220
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 two separate legal actions 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 legal challenges to the EBCC's disapproval. The City, as the regulatory authority that issued the permits is also a party to the litigation.

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.¹

In November, the City Council was presented with a request from the EBCC for funding of an appeal by the community council of adverse rulings by the trial court on those preliminary motions. Although the Council expressed disagreement with the community council regarding the correctness of the court's jurisdictional ruling, the request was approved by adoption of Resolution No. 9105 on the basis that an appellate court decision on the scope of a community council's authority would be helpful to the parties.

In December 2015 the trial court ruled on the final remaining issue before it—concluding that PSE had failed to show that the community council's disapproval of the CUP was unlawful. PSE then appealed that ruling and the issues raised by both parties to the appellate court were consolidated into one case. Appellate counsel for the EBCC has estimated that she will need an additional \$15,000 to defend PSE's appeal of the trial court's decision on the CUP.

Appellate counsel for the EBCC also filed an appeal of the Department of Ecology's approval of the SCUP. Such appeals are heard by the state Shoreline Hearings Board. The hearing on that matter is currently scheduled for mid-March. In the meantime, the parties have agreed to seek resolution through mediation, which is scheduled on March 2. If the matter is not resolved prior to hearing, EBCC's counsel estimates that the cost of that appeal will be approximately \$30,000.

¹ Following this ruling, the City submitted the SCUP to the state Department of Ecology for approval as required by law. That approval was issued in December 2015.

This is consistent with the request presented to Council by William Capron, Chair of the EBCC for funding of up to an additional \$45,000 for both matters.

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, this Resolution will be effective immediately.

OPTIONS

1. Resolution approving the additional expenditure of funds for appellate counsel as a "necessary expense" of the EBCC consistent with Council's prior findings of Resolution No. 9015 for representation of the EBCC on the cross-appeals filed by the parties in the Court of Appeals.
2. Resolution finding that retention of an appellate attorney to pursue the legal challenge to the Department of Ecology's approval of the SCUP is a "necessary expense" of the EBCC for the sole purpose of preserving the community council's ability to disapprove the SCUP in the event that the Court of Appeals reverses the trial court ruling and finds that community councils have statutory authority to act on such permits.

ATTACHMENT

Letter dated February 3, 2016 from William Capron, Chair, East Bellevue Community Council

February 3, 2016

RE: EAST BELLEVUE COMMUNITY COUNCIL REQUEST FOR COVERAGE OF
LEGAL EXPENSES

Dear Mayor Stokes and Members of the City Council,

Chapter 35.14 RCW authorizes the creation of community municipal corporations, such as the East Bellevue Community Council (EBCC), when unincorporated areas are annexed to cities and towns. The EBCC was established in 1969 when the Lake Hills area was annexed by the City of Bellevue. Formation of a community municipal corporation was a necessary condition for that annexation to occur, and the EBCC continues to serve its constituents over land use issues. The city has a statutory obligation to pay for “the necessary expenses” of its community councils. RCW 35.14.030. “Necessary expenses” can include legal expenses. *Sammamish Community Municipal Corp. v. City of Bellevue*, 107 Wn. App. 686 (2001).

The EBCC’s chief power is to approve or disapprove specific land use actions of the city within its service area. At issue are two permits sought by Puget Sound Energy (PSE) in conjunction with an electrical transmission project, which were disapproved by the EBCC: a shoreline conditional use permit (SCUP) and a conditional use permit (CUP). PSE appealed the EBCC’s disapprovals to the King County Superior Court. The City Council approved funding for the EBCC’s legal expenses for the superior court appeal.

Last fall, Judge William Downing of King County Superior Court ruled that the EBCC has no statutory authority to approve or disapprove SCUPs in its service area. This was at odds with the experience of the EBCC and the City, which has forwarded SCUPs to the EBCC for approval or disapproval for almost half a century in accordance with Chapter 35.14 RCW. Judge Downing then quashed the EBCC’s stay of this decision and ordered the City to transmit the SCUP to the Department of Ecology, which approved the SCUP on November 25. The City Council approved \$15,000 in necessary legal expenses for the EBCC to appeal the trial court’s order finding a lack of jurisdiction to Division I of the Court of Appeals.

Because the EBCC was unable to persuade Judge Downing to stay his decision regarding jurisdiction over the SCUP, the EBCC filed a petition for review of the Ecology decision approving the SCUP with the Shorelines Hearings Board. The filing of the petition imposed an automatic stay. Had the EBCC not filed the petition, the Ecology

decision would have become final, rendering EBCC's appeal of Judge Downing's jurisdictional decision a pointless exercise.

The Shorelines Hearings Board (SHB) has set a hearing on the EBCC's Petition for March 14-16. This fast timeline is driven by the SHB's statutory mandate to decide all cases within 180 days of filing, unless all parties waive this deadline. The standard of review in the SHB is *de novo*, meaning that the Board will consider all issues anew. The SHB rules allow for discovery, including interrogatories and depositions, and the testimony of witnesses including experts.

The EBCC's primary purpose for filing the Petition with the SHB was to secure meaningful review of Judge Downing's decision regarding its alleged lack of jurisdiction, and the EBCC desires to be careful stewards of public money. Accordingly, the EBCC sought a stay of proceedings with the SHB, seeking to spare all parties the effort and expense of a hearing until after the Court of Appeals rules on the jurisdictional question. Unfortunately, PSE refused to agree to a stay, and refused to waive the 180 day deadline for decision.

Meanwhile, on December 18 Judge Downing issued his decision on the second PSE permit at issue: the Conditional Use Permit. This time, Judge Downing upheld the EBCC's disapproval of the permit and denied PSE's appeal. PSE appealed that order to Division I of the Court of Appeals. The two appeals—EBCC's appeal of the SCUP decision and PSE's appeal of the CUP decision—have been consolidated.

At this time, the EBCC seeks additional funding for necessary legal expenses. Since the City Council's original decision regarding expenses for the Court of Appeals review, the scope of the appeal has increased significantly. Not only does the EBCC still wish to appeal Judge Downing's decision denying jurisdiction over the SCUP, but the EBCC must also defend its decision to disapprove the CUP. The EBCC requests \$15,000 (in addition to the \$15,000 already granted) for a total of \$30,000 for the consolidated appeals.

In addition, the EBCC seeks funding for the proceedings before the Shorelines Hearings Board. The EBCC's counsel has estimated up to \$30,000 to cover the proceedings before the SHB, including discovery, expert witnesses, and hearing time. As noted, the EBCC has attempted to spare all parties this expense by seeking a stay of the hearing until after the Court of Appeals issues its decision, but PSE opposed the stay.

The appeals have been filed and deadlines are quickly approaching. The EBCC requests the City Council act on this matter at its February 8, 2016 meeting so that counsel for EBCC can continue to meet deadlines in the SHB matter.

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We thank you for your careful consideration.

William Capron

Chairman, East Bellevue Community Council