

APPENDIX F

Memorandum on Special Districts

Memo:

To: Erin Nelson, Parametrix

From: Pam Bissonnette, Bissonnette Environmental Solutions LLC

Date: August 18, 2008

Subject: Illahee Creek Watershed, Kitsap County, WA

Scope of Work:

Research state statutes, such as special drainage districts or port districts, that could be used by the Illahee community to have greater local control over stormwater management and land use that impacts the Illahee Creek watershed. This scope includes a written description of how state statutes could be implemented in Illahee, the potential benefits or costs associated with special districts, and options for generating revenue to fund the district and special projects. It is estimated that this scope of work will require 20 hours of time.

Analysis:

The following Chapters of the Revised Code of Washington were researched and analyzed:

- Port Districts (RCW Chapter 53)
- Flood Control Zone Districts (RCW Chapter 86.15)
- Community Councils for Unincorporated Areas (RCW Chapter 36.105)
- Community Municipal Corporations (RCW Chapter 35.14)

These are analyzed against the stated objectives of:

- more control over stormwater in the watershed
- more control over land use in the watershed
- ability to raise revenues to cover these costs

1. Port Districts

You have stated that the Illahee Creek Watershed already is encompassed within a Port District, which was formed for the purpose of owning and maintaining a dock on a tributary inlet to Puget Sound. Since the Port District already exists, its powers were researched for applicability to the objectives the residents within the watershed wish to achieve.

Port Districts do not have specific authority for stormwater control. However, a District may

“...acquire, by purchase, construction, lease or in any other manner, and may maintain and operate other facilities for the control or elimination of ...water, or other pollution, including but not limited to, facilities for the treatment and/or disposal of industrial wastes, and may make such facilities available to others under terms, conditions and rates to be fixed and approved by the port commission. Such conditions and rates shall be sufficient to reimburse the port for all costs, including reasonable amortization of capital outlays caused by or incidental to providing such other pollution control facilities. However, no part of such costs of providing any pollution control facility to others shall be paid out of any tax revenues of the port and no port shall enter into an agreement or contract to provide...pollution control facilities if substantially similar utilities or facilities are available from another source (or sources) which is able and willing to provide such utilities or facilities on a reasonable and nondiscriminatory basis unless such other source (or sources) consents thereto.” [53.08.040(1)].

Stormwater would seem to fit the definition of “water” in this section, and is also included as a pollutant under the federal Clean Water Act and the State Waste Discharge Act. The Illahee Creek Watershed is not, however, under permit by the National Pollutant Discharge Elimination System (NPDES) due to its small size. The port commission could make a finding that despite its size, the creek is impaired and stormwater treatment or management is in the best interest of the port.

The port would not be able to use its taxing power to fund stormwater pollution control. The language above regarding the setting of rates may suggest that the port could levy utility rates for this purpose, such as a stormwater fee that are commonly levied by drainage utilities based on the amount of impervious surface on a property. In fact, section 53.08.043 specifically gives port districts all the powers relating to systems of sewerage authorized by RCW 35.76.010 and 35.67.020, which includes stormwater control.

There are two difficulties, however, with this approach. First, the next section of the statute [53.08.040(2)] states:

“In the event that a port elects to make such other pollution control facilities available to others, it shall do so by lease, lease purchase agreement, or other agreement binding such user to pay for the use of said facilities for the full term of the revenue bonds issued by the port for the acquisition of said facilities.”

This section seems to imply a part can provide pollution control for its own facilities but not necessarily for other properties, such as for an entire watershed, except by a binding agreement with each property owner. Nor does it contemplate ongoing costs for a stormwater other than capital costs which seems to contradict the foregoing section that requires that the port be reimbursed "...for all costs...including (those) incidental to providing such other pollution control facilities," and section 53.08.043 described above.

The second impediment derives from the language limiting the port's ability to engage in pollution abatement if another source, e.g. Kitsap County, is providing or could provide the service, and would require the county's concurrence for the port to engage in stormwater pollution abatement. I did not research whether Kitsap County has a countywide stormwater utility. If they have, this could create a serious impediment to the port providing these services unless the county did not use their veto power to prevent the port from providing stormwater control services.

The powers of port districts do not include land use or permitting authority.

Port Districts can levy a property tax without a public vote for up to \$ 0.45/\$ 1000 assessed valuation (AV) in the district. They can issue general obligation bonds of one quarter to three eighths of one percent of the AV in the District without a public vote, and higher with a public vote. However, as stated above these revenues and bond proceeds could not be used for pollution control facilities. The district also can issue revenue bonds based on operating revenues, for which stormwater fees would qualify.

In summary, the "pros" of the port district as a means to achieve the objectives are (1) that it already exists, (2) has the power to engage in stormwater management and charge rates, albeit there is some ambiguity in the statute on this point, and (3) can issue revenue bonds for stormwater purposes. The "cons" however, are (1) that its general taxing authority and that for issuing general obligation bonds, does not appear to allow stormwater management as a purpose, (2) the county could veto its ability to engage in stormwater management, and (3) it does not have land use authority.

2. Flood Control Zone Districts (Flood District)

A Flood District is formed by ordinance of a county for all or part of the county. It may be initiated by a county, or by petition of those within the proposed district. A petition requires signatures of 25% of the electors within a proposed district based on the vote cast in the last county general election. A Flood District is a quasi-municipal corporation, which can levy taxes, sue and be sued, own property and facilities, has the power of eminent domain, contract, etc. [See 86.15.080]. Further, it has all the powers vested in a county for flood water or stormwater control purposes under the provisions of chapters 86.12, 86.13, 36.89 and 36.94 on behalf of and within the boundary of the Flood District. These include the power to plan, construct, acquire, repair, maintain, and operate all necessary equipment, facilities, improvements, and works to control, conserve, and remove flood waters and storm waters and to otherwise carry out the purposes of the

chapter including, but not limited to, protection of the quality of water sources. Further, section 86.15.035 states:

“In addition to the authority provided in this chapter, flood control zone districts may participate in and expend revenue on cooperative watershed management actions, including watershed management partnerships under RCW 39.34.210 and other intergovernmental agreements, for purposes of water supply, water quality and water resource and habitat protection and management.”

The county legislative body is the ex officio district board of supervisors of the flood district unless the district has more than two thousand residents, in which case an election of supervisors other than the county legislative body may be held. I did not research the number of residents in the Illahee Creek Watershed to determine whether they meet the “2000 residents” test.

The county engineer is the administrator of the affairs of the district unless the county does not constitute the district board of supervisors. The treasurer for each flood district is the county treasurer.

The powers for raising revenues are quite broad and are quoted in full following.

RCW 86.15.160

Excess levies, assessments, regular levies, and charges — Local improvement districts.

For the purposes of this chapter the supervisors may authorize: □□
(1) An annual excess ad valorem tax levy within any zone or participating zones when authorized by the voters of the zone or participating zones under RCW 84.52.052 and 84.52.054; □□ (2) An assessment upon property, including state property, specially benefited by flood control improvements or storm water control improvements imposed under chapter 86.09 RCW; □□ (3) Within any zone or participating zones an annual ad valorem property tax levy of not to exceed fifty cents per thousand dollars of assessed value when the levy will not take dollar rates that other taxing districts may lawfully claim and that will not cause the combined levies to exceed the constitutional and/or statutory limitations, and the additional levy, or any portion thereof, may also be made when dollar rates of other taxing units is released therefore by agreement with the other taxing units from their authorized levies; □□ (4) A charge, under RCW 36.89.080, for the furnishing of service to those who are receiving or will receive benefits from storm water control facilities and who are contributing to an increase in surface water runoff. The rate or charge

imposed under this section shall be reduced by a minimum of ten percent for any new or remodeled commercial building that utilizes a permissive rainwater harvesting system. Rainwater harvesting systems shall be properly sized to utilize the available roof surface of the building. The jurisdiction shall consider rate reductions in excess of ten percent dependent upon the amount of rainwater harvested; □□ (5) Except as otherwise provided in RCW 90.03.525, any public entity and public property, including the state and state property, shall be liable for the charges to the same extent a private person and privately owned property is liable for the charges, and in setting these rates and charges, consideration may be made of in-kind services, such as stream improvements or donation of property; □□ (6) The creation of local improvement districts and utility local improvement districts, the issuance of improvement district bonds and warrants, and the imposition, collection, and enforcement of special assessments on all property, including any state-owned or other publicly-owned property, specially benefited from improvements in the same manner as provided for counties by chapter 36.94 RCW.

Of particular note is the junior status of the property tax levy available to the flood district. If the combined property tax in the district is at or near the constitutional or statutory limit, the district may be prevented from using its property tax levying powers other than with a public vote. However, the flood district may institute a stormwater rate to collect revenues to cover its costs.

The flood district can issue both general obligation bonds and revenue bonds. However, general obligation bonds require a public vote. Flood districts are required to have prepared and adopted a comprehensive plan of development for flood control and submitted to the Department of Ecology at least 90 days prior to beginning any of the flood control projects or improvements.

The powers of flood districts do not include land use or permitting authority. However, there may be the potential of significantly influencing county land use decisions if the comprehensive plan for flood control contains provisions for such development controls as stream buffers, land coverage limits, sensitive area protections, onsite runoff controls for flood flows and water quality, wetland protections, and/or other low impact development techniques to minimize the impact of development (and therefore the costs to the flood district) on stormwater, particularly once the comprehensive plan is approved by the Department of Ecology.

In summary, the “pros” of a flood district include (1) the full ability to engage in stormwater management including habitat protection, (2) a broad array of revenue generation and bonding capabilities, and if the Illahee Creek Watershed proposed boundary includes more than 2000 residents, the ability to form by petition and elect their own board of supervisors over which the county has no veto. The “cons” are (1) they have no authority over land use in the flood district, and (2) if their population is less than

2000 residents, the county would be the ex officio board of supervisors and the county engineer the administrator, i.e. they would still be under county control.

3. Community Councils for Unincorporated Areas

Community councils can share land use authority with a county pursuant to RCW Chapter 36.105. They can adopt a community comprehensive plan, which must be consistent with county policies and conditions. The county either approves or remands the community council's comprehensive plan with written findings specifying the inconsistencies with county policies and conditions. Once the community comprehensive plan and zoning ordinances are approved by both the community council and the county, the county is responsible for enforcement. The community council does not have quasi-judicial or permitting powers.

The community councils do not have powers to own or operate facilities, such as stormwater facilities. They have no power to raise revenues. The county provides all administrative and staff support for each community council. Unfortunately, the legislature has further limited the establishment of community councils in unincorporated areas to island counties only.

4. Community Municipal Corporations

A community municipal corporation may be organized when a city or town annexes an unincorporated area. It must have a minimum population of not less than three hundred inhabitants and ten percent of the population of the annexing city or town, or the area has a minimum population of not less than one thousand inhabitants. Like the community council discussed in (3) above, its purpose is to share land use authority with the annexing city. They can be established only at the time of annexation. I did not research the proximity of a potential Illahee Creek Watershed Flood District boundary to a city or town.

A community municipal corporation is governed by a community council composed of five members who are initially elected concurrently with the annexation election to consecutively numbered positions from qualified electors residing with the area. Thereafter they are elected to four-year terms of office.

The community council has significant authority over land use within its area. These authorities are quoted in full following.

RCW 35.14.040

**Ordinances or resolutions of city
applying to land, buildings or
structures within corporation,**

effectiveness — Zoning ordinances, resolutions or land use controls to remain in effect upon annexation or consolidation — Comprehensive plan.

The adoption, approval, enactment, amendment, granting or authorization by the city council or commission of any ordinance or resolution applying to land, buildings or structures within any community council corporation shall become effective within such community municipal corporation either on approval by the community council, or by failure of the community council to disapprove within sixty days of final enactment, with respect to the following: □□ (1) Comprehensive plan; □□ (2) Zoning ordinance; □□ (3) Conditional use permit, special exception or variance; □□ (4) Subdivision ordinance; □□ (5) Subdivision plat; □□ (6) Planned unit development. □□ Disapproval by the community council shall not affect the application of any ordinance or resolution affecting areas outside the community municipal corporation. □□ Upon annexation or consolidation, pending the effective enactment or amendment of a zoning or land use control ordinance, without disapproval of the community municipal corporation, affecting land, buildings, or structures within a community municipal corporation, the zoning ordinance, resolution or land use controls applicable to the annexed or consolidated area, prior to the annexation or consolidation, shall remain in effect within the community municipal corporation and be enforced by the city to which the area is annexed or consolidated. □□ Whenever the comprehensive plan of the city, insofar as it affects the area of the community municipal corporation has been submitted as part of an annexation proposition and approved by the voters of the area proposed for annexation pursuant to chapter 88, Laws of 1965 extraordinary session, such action shall have the same force and effect as approval by the community council of the comprehensive plan, zoning ordinance and subdivision ordinance.

[1967 c 73 § 4.]

And further:

RCW 35.14.050

Powers and duties of community municipal corporation.

In addition to powers and duties relating to approval of zoning regulations and restrictions as set forth in RCW [35.14.040](#), a community municipal corporation acting through its community council may: □□ (1) Make recommendations concerning any proposed comprehensive plan or other proposal which directly or indirectly affects the use of property or land within the service area; □□ (2) Provide a forum for consideration of the conservation, improvement or development of property or land within the service area; and □□ (3) Advise, consult, and cooperate with the legislative authority of the city on any local matters directly or indirectly affecting the service area.

[1967 c 73 § 5.]

A community council is subject to the same land use laws as a city. For example, a community council could not frustrate the purposes of the State Growth Management Act. However, because it is a separate municipal corporation it can adopt land use and development regulations that are different than the rest of the city. Examples may include development clustering incentives; stream, wetland and shoreline set-backs or buffers; limits on construction of impervious surfaces; sensitive area protections; and water quality controls.

The community council does not have powers to own or operate facilities, such as stormwater facilities. They have no power to raise revenues. The city is required to provide all administrative and staff support for each community council.

There are two such active community municipal corporations known to me: the Sammamish and the Lake Hills Community Councils within the City of Bellevue, Washington. They have been in existence for several decades. Since their formation the City of Bellevue has discouraged the creation of additional community councils with annexation. A former community municipal corporation in the City of Kirkland, the Houghton Community Council, existed until about a decade ago and then was extinguished. In my experience these community councils have a great deal of power over decisions impacting their area, including actions that initiate outside it, e.g. transportation plans, park plans, water and wastewater plans, stormwater plans, etc. They also provide a strong local forum for citizens within the community council area to participate in decisions that affect them. Should you need additional research on this structure, it can be obtained from these bodies and their host cities.

In summary, the “pros” of a community municipal corporation are: (1) that it has significant power over land use which could include protections for stormwater and the watershed, and (2) all costs are covered by the city. The “cons” however, are: (1) the

watershed area would need to be adjacent to a city or town who will accept their annexation with a community council and the watershed would need to desire to be a part of a city or town rather than stay in the county, (2) it cannot raise revenue, and (3) it cannot undertake stormwater or watershed protection projects or programs,

5. Conclusions

It would appear that the Illahee Creek watershed could achieve its stated objectives for stormwater management either through its current port authority with the concurrence of the county, or perhaps better, through the establishment of a flood district if it meets the size requirements to elect its own Board of Supervisors. But these mechanisms do not provide land use authority.

In order to obtain meaningful land use authority, the Illahee Creek watershed could request to be annexed to a willing nearby city or town, if the watershed meets the size requirements, and if the city or town agrees to the establishment of a community municipal corporation.

Conceivably, the Illahee Creek watershed could do both, i.e. establish a flood district to fund and engage in stormwater management, and form a community municipal corporation as part of an annexation to a city or town, in order to achieve significant authority over land use.

Certainly if the Illahee Creek watershed incorporated, it would separate from the county and have the full range of abilities to raise revenues and engage in both land use and stormwater control. However, because the watershed is so small with such a small tax base, I did not deem it feasible for the watershed to incorporate, since to do so would bring many other service demands required of cities, and that are currently performed by Kitsap County such as roads, fire protection and police service.

I am not an attorney and do not give legal advice. If the Illahee Creek watershed community wishes to implement any of these mechanisms, I recommend that they consult with an attorney, expert in the field of municipal and quasi-municipal corporations, as a next step. There are several excellent attorneys in this field I could recommend who could perform this service.