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Memorandum

**CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT
COMMUNICATION AND ATTORNEY WORK PRODUCT**

TO: Tim Holloran
Skagit County

FROM: Beth Kennar

DATE: September 26, 2011

RE: Pipeline Safety Information Grants to Communities

As you requested, I have investigated a citizen complaint by Sarah Spence (the “Complainant”) regarding the Planning Department’s application for and use of the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration grant received by the County.¹ In conducting my investigation, I reviewed what I believe to be the documents produced in response to various Requests for Public Records by the Complainant and others; emails from the Complainant to the Planning Commission Chair and others; and documents provided by Planning Department and Development Services Director Gary Christensen. As explained in detail below, I did not find any evidence to substantiate the complaint.

¹ The citizen also alleges that the County failed to properly account for and document the use of the grant funds. In addition, the citizen alleges that the proposed regulations constitute an unconstitutional taking of private property. These areas are beyond the scope of my investigation; however, I understand that the State Auditor has investigated the use of the grant funds and found that the County's financial accounting of the grant funds was appropriate and consistent with legal requirements.

I. Background Facts

The U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration ("PHMSA") invited local communities to apply for a Pipeline Information Grant-Technical Assistant Grant (TAG) "to obtain funding for technical assistance in the form of engineering or other scientific analysis of pipeline safety issues affecting the local community." Each application was required to include a two page project detail, which was evaluated as to "how well the proposed project is designed to improve performance and safety over time in areas such as engineering, damage prevention, land use, public education, emergency response, and community awareness." PHMSA requires that "all funds granted by PHMSA under this solicitation must be expended solely for the purpose for which the funds are granted in accordance with the approved application and budget, the regulations, the terms and conditions of the award, the applicable Federal cost principles, and the Department's assistance regulations."

The County applied for the PHMSA grant with a proposed project to "develop and process through to final adoption, amendments to the Skagit County Unified Development Code specifically addressing land use regulations in proximity of an oil or gas transmission line." (Emphasis added). In relevant part, the grant application also provides "the scope of this project would include regulation development and processing, creation of mapping products, creation and dissemination of informational materials and implementing forms as well as staff and interested party training upon adoption of new regulations." The grant application further states that "awarding Skagit County this grant would allow us to educate citizens and local government officials about pipeline safety concerns, recommended practices, assess the level of safety concerns in our community, and adopt reasonable measures to promote the health and safety of the pipelines and the community." Finally, the grant application provides that "Skagit County & Development staff would manage the project and would include stakeholders and interested citizens in all phases of the regulation development and processing. A wide spread public comment period would be noticed and public hearing(s) would be held prior to any final county action." In addition, the proposed budget included with the grant application identifies the project proposal as "development of regulations pertaining to transmission of pipeline safety."

On June 7, 2010, the Board of Commissioners submitted a letter in support of the grant application, and explained that the grant "will assist our jurisdiction in developing land use regulations pertaining to transmission pipeline safety in Skagit County."

PHMSA approved Skagit County's grant application and awarded the County a grant in the amount of \$49,667.00 on September 24, 2010. Article III of the Grant Agreement between the County and PHMSA identifies the Expected Program Output as follows:

Assist Skagit County jurisdiction in developing land use regulations pertaining to transmission pipeline safety in Skagit County since there are four major transmission pipelines within the jurisdiction.

Skagit County Senior Planner Carly Ruacho updated the Skagit County Board of Commissioners on March 8, 2011 regarding the status of the grant project, which was again characterized as a grant "to develop land use standards and procedures pertaining to transmission pipeline safety." This was followed by a presentation to the Board of County Commissioners on March 15, 2011. The presentation was attended by pipeline experts from the Pipeline Safety Trust and Municipal Research Services Corporation. Senior Planner Ruacho then scheduled a meeting with the operators of the four transmission lines in Skagit County for March 30, 2011.

Laurel Browning and Bill Wallace of the Burlington-Edison School Board were provided notice of the grant on March 23, 2011 by email. The purpose of the grant was described as "developing land use standards and procedures pertaining to transmission pipeline safety." Mr. Wallace and Ms. Browning were directed to review the video and PowerPoint presentation, which was provided to the Commissioners and was available on line.

On April 21, the Planning Department, through a third party contractor, sent an informational mailing to 3,187 individual landowners of property within 1,000 feet of one or more of the transmission lines in Skagit County.² The informational mailing advised the landowners of a May 9, 2011 Open House to discuss the Department's goal to "develop standards and procedures" pertaining to pipeline safety.

On May 17, 2011, Senior Planner Ruacho provided the Planning Commission with an explanation of the proposed code amendments. One of the rationales for the proposed regulatory amendments was "to promote communication among County government, land owners, developers, and industry representatives to seek improvements in safety measures for transmission pipelines." The proposed amendments include four areas, Consultation Zones, High Consequence Land Use Restrictions, Setbacks, and New Land Division Limitations. The purpose of the Consultation Zones was described as the following: "to improve communication between property owners and transmission pipeline operators early in the development process to provide guidance to property owners about minimizing risk through site design and construction."

Following the May 9 Open House, the County issued the Determination of Nonsignificance/Notice of Availability and Public Hearing for the Skagit County Planning Commission regarding the proposed amendments to the Skagit County

² The Complainant Sarah Spence is on this mailing list due to the location of her property relative to one of the four transmission lines.

Development Code on May 19, 2011. The proposed amendments were placed on the County Website and available at the County Planning office. The Notice advised that a public hearing on the proposal would be held on June 7, 2011, with deliberations on the matter to be held on July 19, 2011. Individuals were invited to submit their public comments until 4:30 p.m. on June 6, 2011. The Notice was published in the Skagit Valley Herald on May 19, 2011.

On May 20, 2011, Senior Planner Ruacho provided the Planning Commission with the proposed code amendment and related documents in preparation for the public hearing on June 7, 2011. On this same day, Senior Planner Ruacho also sent the proposed pipeline ordinance to the Washington State Department of Commerce for 60-day review under RCW 36.70A.106.

Following issuance of the Notice, Mr. Christensen again emailed Ms. Browning and Mr. Wallace on May 25, 2011 with notice of the proposed pipeline safety standards and advised them of the public hearing on the proposed safety standards, which was scheduled for June 7.

The Planning Commission held the pre-scheduled public meeting on June 7, 2011. The written comment period was extended to June 24, 2011, for a total of 36 days for public comment. Beginning on June 27, 2011 and for the next few weeks, the Complainant sent a series of emails to Planning Commission Chair Jason Easton and County Commissioner Sharon Dillon and others accusing the Planning Department of fraud.

On July 13, the Department provided the Planning Commission with a copy of the proposed regulation with deleted sections to respond to the citizen comments. On July 19, 2011, the Planning Commission met to deliberate on the pipeline ordinance.

Before deliberations on the ordinance began, Planning Commission Chair Jason Easton stated that he received several complaints from citizens accusing the Planning Department of misusing the grant funds; accusing the Planning Department of not fulfilling the intent of the grant; and accusing the Department of not responding to a Public Records Act request. The Planning Commission Chair provided the Planning Commission with a document drafted by the Complainant, titled "Summary of Promises Made, Conduct and Intent." The Planning Commission Chair stated that he was advised by legal counsel that it was not the Planning Commission's responsibility to investigate these allegations, but that he disagreed. He felt that the allegations clouded his ability to deliberate over the proposed amendment. The Chair further stated that he felt he had an obligation to bring these charges forwarded, and invited the Planning Commissioners to speak on this issue. One of the Planning Commissioners stated that certain of these issues were not within the purview of the Planning Commission. However, she noted that the grant application stated in nine areas that the purpose of the grant was to develop regulations. Another Planning Commissioner also spoke on the issue and stated that

these allegations gave the Planning Commission “a black eye” due to their association with the Planning Department; that “betraying public trust is a big sin”; and she felt that there was no public outreach on the proposed regulations.

Following this discussion, the Planning Commission made the following findings: “there should be a resolution to accusations from members of the public against the Department regarding grant compliance and process before the Planning Commission can recommend the proposal...this proposal could be interpreted as placing restrictions and controls on private property without compensation, which could constitute a taking...the public process was marginalized.”

II. Citizen Complaint

By emails to various individuals, the Complainant raised numerous charges against the Planning Department. I have summarized the charges and my findings below:

A. Allegation: The County obtained the grant through fraud and willful deceit, misrepresenting the purpose of the proposed project.

Not Sustained.

The Complainant alleges that the Planning Department "grossly misrepresented what they were going to do" with the grant funds by including the following in the grant proposal:

Awarding Skagit County this grant opportunity would allow us to educate citizens and local government officials about pipeline safety concerns, recommended practices, assess the level of safety concerns in our community, and adopt reasonable measures to promote the health and safety of the pipelines and the community.

According to the Complainant, this constitutes a gross misrepresentation because the proposal allegedly emphasized "public awareness" and "minimize(d) regulation writing", while the County “did not provide a lick of public awareness nor outreach.” The Complainant further alleges that in her professional opinion, “the staff representations to PHMSA constitute intentional fraud for the purpose of obtaining federal tax dollars which would never have been forthcoming if their actual intentions had been known.” Finally, the Complainant argues that PHMSA must have been misled by the County's application because "PHMSA does not fund regulation writing in a vacuum in podank rural counties."

I do not find any merit to this allegation. There is no evidence of misrepresentation by the Planning Department, much less fraud or willful deceit. The

grant application unequivocally states that the proposed project is to "develop and process through to final adoption, amendments to the Skagit County Unified Development Code specifically addressing land use regulations in proximity of an oil or gas transmission line." It is also clear that PHMSA was fully aware that the County planned to use the grant to develop regulations as evidenced by the PHMSA documents approving the grant and issuing the grant agreement. Specifically, PHMSA identifies the purpose of the grant and the scope of the approved project as follows:

Assist Skagit County jurisdiction in developing land use regulations pertaining to transmission pipeline safety in Skagit County since there are four major transmission pipelines within the jurisdiction.³

In addition, I find that the Planning Commission was fully aware throughout the process that the purpose of the grant was to "develop land use regulations."

Nor do I find merit in the allegation that the County "did not provide a lick of public awareness nor outreach." The County held a public meeting on May 9 to discuss the proposed regulations and answer any questions submitted. The County took reasonable steps to identify interested parties by notifying all property owners within 1000 feet of a pipeline in Skagit County. The notification of the public meeting was mailed 18 days before the event. In addition, the Skagit County website was updated with information regarding the proposed regulations and relevant maps, and the comment period was extended to 36 days. Such outreach efforts are more than required by law. State statute and city ordinance only require notice of the amendments be published, followed by a public hearing. RCW 36.70; Skagit County Code 14.08.070. There was no obligation to hold the May 9 meeting or issue the informational flyer.

In addition, the proposed regulations themselves encourage public awareness and participation through the consultation zones. This was explained in a staff report to the Commissioners and Planning Commission as follows: Consultation zones will "improve communication between property owners and transmission pipeline operators early in the development process to provide guidance to property owners about minimizing risk through site design and construction."

³ The Complainant quotes from the PHMSA documents to argue that the purpose of the PHMSA grant is to promote public awareness – not to develop regulations. While the Complainant may disagree with using grant funds to develop regulations, this is not her decision. It is the decision of PMSHA, and PHSMA clearly understood that it was awarding grant funds to Skagit County to "develop land use regulations pertaining to transmission pipeline safety in Skagit County since there are four major transmission pipelines within the jurisdiction."

It is clear that the Complainant would have engaged the public to actually draft the proposed regulations, whereas the Planning Department prepared the regulations with public input through the open house and comment period as well as the ongoing dialogue with the public envisioned by the regulations themselves. While the Complainant may disagree with the proposed regulations or believe additional public participation is needed, this certainly does not mean or even suggest that the County obtained the grant through fraud.

B. Allegation: The County Allegedly Misrepresented the Purpose of the Grant Was to Obtain Reasonable Regulations.

Not Sustained.

The Complainant alleges that the proposed regulations are not "reasonable" and therefore are contrary to the information submitted by the County to PHSMA to obtain the grant. As noted above, the Complainant argues that the proposed regulations constitute an illegal taking, which is beyond the scope of my review. In addition, however, the Complainant appears to argue that the proposed regulations are not "reasonable" because they were prepared with a "lack of legal research, failure to consult available resource, and use of fear over engineering and science." Specifically, the Complainant argues that the County should have adopted the Whatcom County ordinance drafted by Carl Weimer, Executive Director of the Pipeline Safety Trust. Other citizens complained about the process used to develop the proposed regulations because the proposed regulations were drafted without a threshold scientific study as to whether regulations are needed in the first place.

While the Complainant and others may disagree with the County's assessment of the need for the regulations or whether the regulations are "reasonable", this is a difference of opinion. It does not mean that the County's assessment is wrong and certainly does not indicate that the County willfully misrepresented facts in applying for and receiving the PHSMA grant. Therefore, I believe this allegation is without merit.

C. Allegation: The County Diverted Grant Funds to Cover a Budget Gap.

Not Sustained.

The Complainant alleges that the grant funds were inappropriately used to cover a budget gap. The Planning Department's use and documentation of the grant funds has been investigated by the State Auditor and is beyond the scope of my review. However, I have included it here because the Complainant also appears to allege that the Planning Department deceived PHSMA in applying for the grant by using the funds for personnel costs. To the extent such an allegation is made, it is without merit. The proposed budget for the grant that was submitted to PHMSA along with the application clearly discloses

that \$47,167 of the funds would be used to cover staff salaries and benefits while working on this project.

D. Allegation: The Planning Department Concealed Information from the Public.

Not Sustained.

The Complainant alleges that the Planning Commission failed to timely respond to her public records act request, which was submitted on June 8, 2011. The Planning Department, however, was not notified of the request until June 22, 2011. Although the request was received by the County Records Management Department on or about June 8, 2011, it was not forwarded to the Planning Department per County policy. Therefore, there is no evidence that the Planning Department was in any way involved in the delay in responding to the Public records request.

The Complainant also alleges that the Planning Department played some role in the fact that not all 3200 property owners received the mailing of the May 9, 2011 open house. I do not find merit in this allegation. There is no allegation that the addresses the Planning Department obtained are incorrect or were improperly manipulated. The Planning Department provided the addresses and flyer to a third party to complete the mailing. Therefore, any errors in the mailing were beyond the control of the Department.

E. Summary

The Complainant raised serious, even potentially criminal, charges against the Planning Department. As set forth above, I do not find any evidence to substantiate the charges. While the Complainant may disagree with the proposed regulations and the process used by the Planning Department to develop the regulations, there is no evidence the Department did anything illegal or inappropriate.

III. Concerns Regarding the Planning Commission's Response to the Complaint.

The Complainant and others raised extremely serious complaints against the Planning Department as noted above. The complaints range from fraud and willful deceit to being "morally and ethically bankrupt." According to the Complainant, "if that isn't enough for termination for cause of both Christensen and Ruacho, please tell us what is." I have concerns that the complaints were presented as "fact" rather than "allegations," thus potentially depriving the individuals of a fair and objective investigation before being found guilty of committing "illegal" and other "immoral acts." As set forth above, I found no evidence to substantiate these charges. Unfortunately, the Planning Commission gave these charges a public forum without an opportunity for an investigation. Complaints or concerns regarding County staff are outside the scope of authority and responsibility of the Planning Commission. In fact, on July 18, 2011, the

Planning Commission Chair was advised by the County Legal Department that it would be inappropriate for the Planning Commission to discuss these issues at the hearing. Nonetheless, the Planning Commission Chair chose to disregard that legal advice and invited the Planning Commissioners to speak on the allegations. I do not believe that was appropriate given the boundaries of the Planning Commission's authority. Moreover, if the purpose was to have the Planning Commission investigate the allegations, no such investigation occurred.⁴ There was no discussion regarding the basis of the allegations, and no opportunity for anyone at the Planning Department to respond to the specific accusations. Rather than create the opportunity for an investigation, inviting the Planning Commissioners to discuss and provide their opinions on the allegations during the public meeting created the inaccurate impression that the Department was guilty of the charges.⁵ I recommend the Planning Commission be provided training regarding its role and authority. Such training should include a discussion regarding the proper forum for individual Planning Commissioners to forward to the County for action any concerns they receive from citizens regarding County personnel.

⁴ I understand the desire for transparency. My concern is twofold. First, the Planning Commission does not have any authority or responsibility to review County personnel issues. Second, the Planning Commission allowed a public discussion of the merits of the charges without providing the Department with the opportunity to respond. If the Planning Commission felt it was necessary to alert the public of this issue at this time, it would have been more appropriate to simply indicate that a citizen complaint had been made regarding the grant and the Planning Commission was going to vote as to whether to continue with deliberations or stay deliberations pending a decision by the Board of Commissioners regarding the merits of the complaint.

⁵ The Planning Commission concluded its meeting by making certain "findings", which included the following: the "public process was marginalized." This "finding" does not appear to take into account the statutory framework in which the County operates. There is no dispute the Planning Department's process in this case complied with the legal requirements of RCW 36.70 and Title 14.08.070 of the Skagit County Code. If such a process "marginalizes" the public process, this appears to be a comment upon the statutory requirements themselves.

The findings of the Planning Commission also included the following: "this proposal could be interpreted as placing restrictions and controls on private property without compensation, which could constitute a taking....the public process was marginalized." I am not aware of a legal opinion being provided to the Planning Commission to substantiate the Planning Commission's finding that the regulation may be unconstitutional. Nor am I privy to any privileged communications between the County and legal regarding the constitutionality of the regulations. It is my understanding, however, that the regulations were reviewed and approved by legal counsel prior to being shared with the Board of Commissioners and the Planning Commission. Nonetheless, these legal issues are complex and I would recommend that no "findings" be made in the absence of a comprehensive legal analysis that substantiates such findings.