TOWN OF WOODWAY
COUNCIL SPECIAL MEETING AGENDA

TUESDAY, JANUARY 3, 2023
4:00 P.M.

Woodway Town Hall | 23920 113th Place W. | Woodway, WA

4:00 P.M.		Call to Order, Flag Salute, & Roll Call
4:00 P.M.	I	Point Wells Discussion
5:15 P.M.	II	General Council Discussion – Choice of Subjects
5:45 P.M.		Adjournment

All times are approximate.

**Anyone with a disability requiring special accommodations or anyone wishing to make a public comment for this meeting via video or audio connection should contact the Town Clerk's Office at Town Hall or call (206)542-4443 before 1:00 p.m. the Thursday preceding the Council Meeting. For TDD relay service, call (206)587-5500, or outside the Seattle area #1-800-833-6388.*

MEMORANDUM

TO: Town Council

FROM: Eric Faison, Town Administrator

SUBJECT: Point Wells Annexation Background and Process

DATE: January 3, 2023

CC: Mike Quinn, Mayor

Background

The Town has been planning for the annexation of its municipal urban growth area, including Point Wells, since 1999. It began as part of the process of development and adoption of the Town's first Comprehensive Plan. The planning efforts continued over the years, including a 2015 joint fiscal analysis with the City of Shoreline, the 2016 annexation of the Upper Bluff, a 2016 interlocal annexation agreement with Snohomish County, a 2019 interlocal agreement with the City of Shoreline, the 2020 adoption of a Subarea Plan and, more recently, last year's finalization of pre-annexation comprehensive planning designations, zoning, and development regulations.

In 2018, following a series of provocative actions by the City of Shoreline, the Town decided to start the process of annexing Point Wells, using the "island method" of annexation (RCW 35A.14.295). In October 2018, Council adopted a resolution providing a notice of intent to annex Point Wells. Staff submitted a Notice of Intent with the Washington State Boundary Review Board for Snohomish County a few days later.

In November 2018, pursuant to a statutory requirement, Council held public hearings on the notice of intent resolution and on an ordinance providing for annexation. The hearings were well attended. Following the hearings, Council decided to delay final action on the annexation, to enter into negotiations with the City of Shoreline on an agreement that would resolve the parties' disputes.

During mediation, the Town and Shoreline were able to reach an agreement. The agreement provided the Town with the first opportunity to annex Point Wells. In relevant part, Section A(2) of the agreement provides that, if the Town fails to file a notice of intent with the Boundary Review Board within three years after a statutorily-authorized method of annexation without the property owner's consent becomes legally available, then the Town will fully support Shoreline's efforts to annex Point Wells over the succeeding three year period. After approval of the agreement, Shoreline worked with the legislature to create a new method of annexation.

RCW 35A.14.296 came into effect on June 11, 2020. The statute provides a process through which the Town and the County can effectuate the annexation of Point Wells by mutual agreement. I should note that there is some question as to whether this statute meets the requirements of our agreement with Shoreline, especially if one of the necessary parties objects. Nevertheless, this memo outlines some of

the steps that are required by the statute if Council decides to proceed with a process that meets the June 10, 2023, deadline.

Interlocal Method of Annexation

Parties to an Interlocal Agreement

The interlocal agreement method of annexation starts, unsurprisingly, with the adoption of an interlocal agreement by the County Council and the Town Council. Two additional parties are entitled to 30 calendar days' notice of an option to participate in the agreement – the City of Shoreline and Olympic View Water & Sewer District. If they elect to participate, they become necessary parties. That means, if they do not agree with the terms of the agreement, the annexation cannot proceed.

Required Provisions

In addition to the general requirements of the Interlocal Cooperation Act (RCW 39.34.030), RCW 35A.14.296 includes only a few necessary provisions.

1. The agreement must include the boundaries of the annexation area and the effective date of the annexation.
2. The agreement must set a date for public hearing(s) on the agreement.
3. The agreement must ensure that, for a period of five years after the annexation, any parcel zoned for residential development within the annexed area will maintain a zoning designation that provides for residential development; and the area shall not have its minimum gross residential density reduced below the density allowed for by the zoning designation for that parcel prior to annexation.

Required Public Process

The public process for adoption of the interlocal agreement includes several components.

1. Each participating legislative body, either separately or jointly, must hold a public hearing before the agreement is executed.
2. Each jurisdiction must publish a notice of availability of the agreement at least once a week for four weeks before the date of the hearing in the Everett Herald.
3. Each jurisdiction must post the notice of availability of the agreement on its website for the same four-week period provided in #2 above, and the notice must describe where the public may review the agreement and the boundaries of the territory to be annexed.
4. On the date set for hearing, the public shall be afforded an opportunity to be heard.

Following the public hearing, the legislative bodies may adopt an ordinance effectuating the annexation. Upon the date fixed in the ordinance, the area annexed shall become part of the Town. Generally speaking, the annexation date is set at least 45 days following approval of the annexation by the Board, barring any appeals. Upon passage of the annexation ordinance, a certified copy shall be filed with Snohomish County.

Boundary Review Board

Annexation pursuant to the Interlocal Agreement method is subject to review and approval by the Boundary Review Board under RCW 36.93. And, as noted above, our agreement with Shoreline requires the filing of a notice of intent with the Board by June 10. Because we filed a notice of intent with the Board for the annexation of Point Wells in 2018, completing the required documentation needed to file a new notice of intent should not be complicated or time consuming.

Timeline

Working with County staff, we have identified a draft timeline based on meeting the statutory requirements and the June 10 deadline.

	Action	Date
1	Town staff meet with County staff on draft Interlocal Agreement and BRB submittal requirements.	January 26 at 3pm
2	Town staff and County staff complete a draft of Interlocal Agreement, with boundaries and effective date.	February 20
3	Town provides Shoreline & OV written notice of right to participate.	February 20
4	Finalize Interlocal Agreement.	March 31
5	Advertise public hearing (Everett Herald and each jurisdiction's website).	April 24 and May 1, 8, 15
6	Public hearing on Interlocal Agreement (jointly or separately).	May 23
7	Each jurisdiction's council/board votes on the Interlocal Agreement.	May 23
8	Town files a Notice of Intent with the BRB.	June 6

Town's Public Process

Obviously, Council will want to hear from Town residents through public meetings, before and in addition to the public hearings on the resolution.

2018 Public Process

In 2018, Mayor Nichols mailed two letters to the public concerning the Council's planned annexation of Point Wells. You can find copies of the letters on our website here:

- October 19, 2018 Letter to Residents re: Point Wells
- October 31, 2018 Letter to Residents re: Point Wells potential annexation public hearings on November 5, 2018

Council held two public hearings. During the hearings, Council heard several familiar themes. Some residents expressed support for the annexation as a way to gain control over what happens at Point

Wells. Some residents expressed concern at the prospect of additional litigation that could result from a unilateral annexation via the island method of annexation. And some residents wanted more information on the potential effects of an annexation, including on the Town's finances, voting, and the ability to maintain zoning within the Town's existing boundaries. In the end, most residents (and Shoreline) wanted the Town to negotiate an agreement that would end litigation between the cities and allow the cities to work together as a united front.

Moving forward, we suspect that the questions that we will need to address in this process will be similar to those raised in 2018. However, I would note that there are a few very important differences between 2018 and the present.

- The first is that, consistent with the feedback that we received from residents in 2018, we now have interlocal agreements and compatible development regulations with the County and Shoreline.
- The second is that, as a result of the County's review of the environmental constraints identified in BSRE's application, the County has reduced the population target at Point Wells to 271, or approximately 100 housing units.
- Third, and perhaps most importantly, on December 27, 2022, the Washington Court of Appeals ruled in favor of Snohomish County's denial of BSRE's Urban Center application. Excepting the highly unlikely acceptance and reversal of the Court of Appeals by the State Supreme Court, BSRE's project will no longer be vested under the County's Urban Center zone. A mixed-use project application will require a new application under the much more limited Urban Village zone.

Recommendation

Residents will have an opportunity to provide feedback during every Council meeting between now and May 23. They also will have the ability to comment by email, to gain information and provide feedback at the Mayor's meetings, and to have discussions in smaller group and/or neighborhood meetings.

In addition to these opportunities, staff recommends that we address the public by updating the Point Wells Q&A on our website. You can find the current Q&A here – Point Wells Q&A - 2022-06-06. We should distribute the updated information to residents in written form (including through direct mailings, our website, and the Mayor's e-Newsletter).

Staff also proposes that, during the month of April, we host two public open house meetings. These meetings will include a brief presentation of information, informational boards (with Council and staff available to answer questions), and an opportunity for residents to provide informed comments/feedback. We would suggest that the two open houses include a lunch time or early afternoon meeting, and one in the early evening on a different day during the week.

Staff is seeking guidance on next steps, including whether to proceed, how and when to engage Town residents, and what information Council will need to make a final decision in May.

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MEMORANDUM

VIA EMAIL

DATE: January 3, 2023

TO: Mayor, Council, and Administrator for Town of Woodway

FROM: Greg A. Rubstello

RE: Potential for Municipal Liability Related to the Annexation of Point Wells from Contaminated Soils, Ground Water, and Surface Water

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This memorandum discusses the potential for liability the Town of Woodway may face from the annexation of Point Wells, an area of about 62 acres, with confirmed contamination of soils, groundwater and surface water and suspected metals priority pollutants. The current property owner BSRE Point Wells, LP ("BSRE") has acknowledged in pleadings filed in Snohomish County Superior Court (Case No. 20-2-01578-31)[1] that remediation of the property to the "residential standard" is necessary and required for the proposed re-development of the site with non-industrial uses (office, residential, and retail). Litigation between BSRE and prior owner(s) over financial responsibility for remediation of the property is unresolved and an ultimate resolution may be years in the making.

The Point Wells property is no, at least currently[2], a federal superfund or brownfield site under CERCLA. Cleanup is under the regulatory authority of the Washington State Department of Ecology ("DOE") and regulated by the Washington Model Toxics Control Act, Ch. 70.105D RCW ("MTCA")

Financial Responsibility for Property Remediation and Damages to Natural Resources under MTCA

There are five ways a party can be liable under MTCA for remediation costs and for damage to the state's natural resources from the release or threatened release of hazardous substances. A political subdivision is not liable for remediation costs and/or damages associated with a MTCA covered site simply because the site is within the boundaries of the political subdivision. The five ways a party can be liable are as follows:

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[1] The current owner has sued the immediate prior owner(s) (its seller) Paramount of Washington, LLC and Paramount Petroleum Corporation("POW") seeking court orders requiring POW to remove industrial improvements on the property, remediate the property to residential standards, pay money damages resulting from the delay in performing removal and remediation obligations, give up profits from terminal operations over the past decade to fund the removal and remediation obligations, and pay money damages to BSRE for past and future release of hazardous substances on, beneath and migrating from the property under the Washington Model Toxics Control act, Ch. 70.105D RCW ("MTCA").

[2] If in the future the site was to become a federal superfund or brownfield site the Town's potential for liability due to the contamination would not change, at least under current law. See the attached article from the EPA.

(1) As the current "owner or operator of a "facility" at which "hazardous substances" were disposed of or "released" under RCW 70A.305.040(1)(a) (**current owner liability**).

(2) As a person who owned or possessed a hazardous substance at the time of disposal or release of the hazardous substances at the facility under RCW 70A.305.040(1)(b) (**past owner liability**).

(3) As a person who owned or possessed a hazardous substance and who arranged for disposal or treatment of the hazardous substances at the facility under RCW 70A.305.040(1)(c) (**arranger liability**).

(4) As a person who accepts or accepted any hazardous substances for transport to a disposal, treatment, or other facility unless such facility could legally receive such substance under RCW 70A.305.040(1)(d) (**transporter liability**).

(5) As a person who both sells a hazardous substance and is responsible for written instructions as to its use under RCW 70A.305.040(1)(e) (**seller liability**).

The Town of Woodway does and has not owned or operated the Point Wells property and has not contributed to the release or threatened release of hazardous substances at the property. The annexation of Point Wells merely brings the property into the municipal boundaries of the town of Woodway and creates no responsibility for the remediation of Point Wells or any financial liability for damages to any natural resources.

Tort liability from injury to persons or property arising out of permitting development for residential, office or retail uses.

The Town's duty to review and approve development applications arises out of statute (i.e., SEPA, GMA, Subdivisions) and ordinance (Titles 13, 14 and 14A WMC). Washington's public duty doctrine shields municipal governments from tort liability (negligence, trespass) when acting out of a responsibility owed to the general public. The doctrine applies to land use regulation and permit approvals arising out of state statute or city ordinance. Exceptions to the doctrine require either (1) proof of circumstances setting a claimant's relationship with the government entity apart from that of the general public (e.g. Specific assurances of the absence of hazardous substances) or (2) proof of affirmative malfeasance in the exercise of the regulatory authority. *Nang v. City of Seattle*, 491 P.3d 237 (July 19, 2021). The Oso landslide is an example of the latter.

The Town will require the applicant for any development of Point Wells after annexation to present proof of cleanup of the property to the appropriate standard required under federal/state law for the proposed uses and development. The Town will carry out its SEPA responsibilities with respect to any development application, which will be subject to public notice requirements, public comment, and possible appeal of any decision made by the Town's SEPA official. If necessary, conditions and/or agreements outlining the restoration requirements for development will be in place and satisfied before development may proceed.

Should evidence come up during development of the existence of hazardous substance in the soils, ground or surface water that was claimed by the applicant to have been remediated, the Town has regulatory

authority take appropriate action. The risk of development on the site is on the applicant, not the Town. Infrastructure and the expense of remediation/cleanup necessary to support development will be the responsibility of the developer/applicant, not the Town.

However, since ownership of a contaminated property can trigger cleanup liability the Town would need to exercise due diligence in its review and knowledge of site clean-up and remediation before accepting any dedication of right-of-way or park property as part of any development approval.

Conclusion.

Annexation of the Point Wells property does not expose the Town to liability for remediation of the property, or any damages to natural resources arising from the sites contaminated condition. Remediation is the responsibility of the owner/developer. Potential tort liability to third parties who may live, work, or make active use of the Point Wells property is unlikely due to 1) the public duty doctrine, 2) the responsibilities of the current and past owners under MTCA, and 3) the regulatory requirements for development established by state statute and town ordinance.

Caveat: Annexation would bring the Town into the crosshairs of parties looking to seek potentially liable parties in lawsuits to share remediation expenses or seeking to recover damages for losses they may suffer from contamination at Point Wells whether or not they would be successful on the merits in a lawsuit. The Town may be successful in a lawsuit naming it as a party, but the expenses of defense and the time and effort put into the defense, are still a potential problem.

GAR:

EPA Brownfields Grants, CERCLA Liability, and All Appropriate Inquiries

The U. S. Environmental Protection Agency's (EPA) Brownfields Program provides grant funds for brownfields assessments, cleanup and capitalization of revolving loan funds. Eligible entities for Brownfield Grants include states, tribes, local governments, regional governments, quasi-governmental entities, and nonprofit organizations.[1]

To be eligible for an EPA Brownfields Grant to address contamination at brownfield properties, eligible entities must demonstrate that they are not liable under CERCLA for contamination at the site or that they do not have to meet the requirements for asserting an affirmative defense to CERCLA liability.

Who can be found liable for contamination at a brownfield site?

Under CERCLA, state and local governments, nonprofit organizations, and other entities can be found to be liable by virtue of property ownership or by virtue of their actions with respect to a site. For sites with a release or threatened release of hazardous substances, potentially responsible parties include any person or party that:

- Owns or operates the property.
- Formerly owned or operated the property at the time of the disposal of hazardous substances.
- Arranged for hazardous substances to be disposed of at the site or transported to the site for disposal.
- Transported hazardous substances to the site.

What is CERCLA?

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, persons can be held strictly liable for cleaning up hazardous substances at properties they either currently own or operate, or owned or operated in the past. Strict liability under CERCLA means that liability for environmental contamination can be assigned based solely on property ownership.

- The 2002 Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments) amended CERCLA to provide liability protections for certain landowners and potential property owners. These liability protections apply to certain property owners if they comply with specific provisions in the statute, including conducting All Appropriate Inquiries (AAI) for present and past use of the property. The 2018 Brownfields Utilization, Investment and Local Development (BUILD) Act further amended CERCLA by, in part, clarifying the liability protections for state or local governments, for parties with tenancy or leasehold interests, and for Alaska Native villages and Native Corporations.

[1] 501(c)(3) organizations may apply for Brownfields Assessment, Cleanup, and Revolving Loan Fund Grants. Other nonprofit organizations may only apply for Brownfields Cleanup Grants. More information is available in most recent EPA Brownfields Cleanup Grant Guidelines.

Eastern Manufacturer Brewer, Maine, prior to cleanup

Eastern Manufacturer Brewer, Maine, after cleanup

Do I need to be concerned about CERCLA liability if I am applying for a Brownfields Grant?

Yes. Brownfield Grant recipients are prohibited from using grant money to pay response costs at a brownfield site for which the recipient is potentially liable under CERCLA.

All Brownfield Grant applicants who may be potentially liable at the site for which they are seeking funds must demonstrate that they are not liable for the contamination that will be addressed by the grant, subgrant or loan.

Cleanup Grant applicants, in particular, must note this prohibition. Cleanup Grant applicants are required to own a site to receive brownfields funding to address contamination at the property. Cleanup Grant applicants must demonstrate they meet one of the liability protections because owners of contaminated property may be liable under CERCLA.

Brownfield Grant applicants should note that CERCLA employs a "strict liability" scheme—that means it is without regard to fault. A person who owns a property that has had a release of hazardous substances can be held liable by virtue of ownership, regardless of intent.

Some grant applicants who do not own the property for which they are seeking funding, or who are not seeking site-specific grant funds, may not have to demonstrate that they qualify for liability protection.

Please contact your EPA Regional Brownfields Program representative if you are not sure whether you need to demonstrate liability protection to be eligible for a grant.

What are the different ways I can demonstrate that I am not liable under CERCLA?

CERCLA provides several ways for eligible entities to demonstrate that they are not liable for the contamination at the site.

Exemptions to CERCLA liability:

The CERCLA statute exempts certain entities from liability when properties are acquired under specific circumstances and when the entity did not cause or contribute to the contamination. Exempt entities include the following:

- Units of state or local government that acquire ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquired title by virtue of its function as sovereign, per CERCLA Section 101(20)(D).
- Alaska Native villages and Native Corporations that acquired property via a conveyance from the U.S. government under the Alaska Native Claims Settlement Act, per CERCLA Section 101(20)(E).
- CERCLA provides an exemption for eligible entities (such as a state or local government) that acquired property prior to January 11, 2002 from meeting the requirements for asserting an affirmative defense to CERCLA liability, per CERCLA Sections 104(k)(2)(C) and 104(k)(3)(E), provided that the eligible entity has not caused or contributed to a release or threatened release of a hazardous substance at the property.

Indian tribes are not considered to be liable under CERCLA.

CERCLA liability protections available to landowners:

CERCLA provides protection from liability for certain parties, provided they comply with specific criteria. Parties who may claim liability protection under CERCLA include the following:

- Innocent landowners (ILOs), per CERCLA Section 101(35)(A) and 107(b)(3).
- Contiguous property owners (CPOs), per CERCLA Section 107(q).
- Bona fide prospective purchasers (BFPPs), per CERCLA Sections 101(40) and 107(r).
- Government entities that acquire property through an involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation, per CERCLA Section 101(35)(A)(ii).

To be eligible for liability protection under CERCLA as an ILO, CPO, or BFPP, prospective property owners must:

- Conduct AAI in compliance with the Code of Federal Regulations (CFR), per 40 CFR Part 312, before acquiring the property.
- Not be affiliated with any person who is potentially liable through any familial relationship or any contractual, corporate or financial relationship (other than a relationship created by the instruments by which title to the property is conveyed or financed or by a contract for the sale of goods or services).[2]
- Comply with all continuing obligations after acquiring the property, per CERCLA Sections 101(40)(B) (BFPP), 107(q)(A) (CPO), and 101(35)(A) and (B) (ILO) (see next section, "What are continuing obligations?").

Note: Property acquisition includes properties acquired as gifts or through zero-price transactions.

What are continuing obligations?

After acquiring a property, to maintain liability protections, landowners must comply with "continuing obligations" during their property ownership. To comply, landowners must:

- Demonstrate that no disposal of hazardous substances occurred at the facility after acquisition (for BFPPs and ILOs).
- Comply with land use restrictions and not impede the effectiveness or integrity of institutional controls.

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[2] The innocent landowner provision does not contain similar "no affiliation" language. In order to meet the statutory criteria of the innocent landowner liability protection, however, a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship. The term "contractual relationship" for the purpose of the innocent landowner liability protection is defined in CERCLA § 101(35)(A).

- Take "reasonable steps" to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to earlier releases.
- Provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration.
- Comply with any request for information and administrative subpoenas (for BFPPs and CPOs).
- Provide all legally required notices with respect to the discovery or release of any hazardous substance (for BFPPs and CPOs).

What are "All Appropriate Inquiries"?

AAI is the process of evaluating a property's environmental conditions, which may be relevant to assessing potential liability for any contamination, per CERCLA Section 101(35)(B).

EPA recognizes two ASTM International Standards as compliant with AAI requirements: ASTM E1527-13 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and E2247-16 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property."

When must AAI be conducted?

Some aspects of AAI must be conducted or updated within one year before the date of acquisition of a property and other aspects within 180 days before the date of acquisition.

Certain aspects or provisions of AAI (i.e., interviews of current and past owners, review of government records, on-site visual inspection and searches for environmental cleanup liens) must be conducted or updated within 180 days before acquiring ownership of a property.

Who can perform AAI?

The individual who supervises or conducts the AAI and signs the final required report must meet the definition of an "environmental professional" defined in the AAI final rule, 40 CFR Section 312.10.

A person who does not qualify as an environmental professional can assist in the conduct of the AAI if he or she is under the responsible charge of a person meeting the definition.

Further information

For more information about brownfield grants and AAI, visit the EPA Brownfields website at **http://www.epa.gov/brownfields**.
For more information about CERCLA's liability protections, please visit EPA's Cleanup Enforcement website at **https://www.epa.gov/enforcement/addressing-liability-concerns-support-cleanup-and-reuse-contaminated-lands**.

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