



City Council Study Session Minutes – January 24, 2011

At 7:30 p.m. Mayor Maxwell called the regularly scheduled Anacortes City Council study session of January 24, 2011 to order. Nick Petrish, Erica Pickett, Brad Adams, Cynthia Richardson and Brian Geer were present. Kevin McKeown and Bill Turner were excused.

Mayor Maxwell offered congratulations to community resident Pavao Franulovich who was celebrating his 104th birthday.

Washington Cities Insurance Authority (WCIA) – Presentation on Risk Management, Liability Insurance, Claim Management and Services WCIA Provides

At the invitation of City Council, Lisa Roberts, Risk Services Manager from WCIA, presented to council and audience a packet of information about WCIA and the services it provides as well as copies of the WCIA 2009 Annual Report. Ms. Roberts explained that WCIA is a self-insurance pool made up of 149 members which are all Washington cities or related regional interlocal agencies. She provided a chart showing the breakdown of member cities by class and by form of government. However, she said, WCIA doesn't rate or assess premiums based on city classification but rather based on worker hours. Ms. Roberts said the pool was created in 1981 when the insurance crisis made it impossible for many cities to get insurance and made it exorbitantly expensive even for those who could. The State Legislature changed the law to allow cities to pool resources and self-insure. What is now WCIA grew from nine cities in Puget Sound to 149 statewide today. She said WCIA is not a major corporation and not a commercial insurance company but a small group of 19 employees located in Tukwila and has no competing interests other than to serve cities.

The Board of Directors includes one member from each city (Emily Schuh represents Anacortes) so members directly control the policies of WCIA. The full board elects officers and an executive committee and a committee system provides input from membership. Ms. Roberts outlined what each of the committees focuses on (Long Range Planning, Budget, Loss Control, and Investment). She added that WCIA is financially stable, has a 98% confidence level, is the strongest and oldest insurance pool in the state and has always had successful audits from State Auditor. WCIA intentionally maintains high reserves to allow it to rely minimally on the insurance market; it currently has a 12% reliance on insurance (\$20M in excess insurance). However, WCIA's goal is to provide professional risk management services and stable risk financing programs that respond to member needs so it doesn't have to rely on the insurance market.

Ms. Roberts said that unlike a commercial insurance company, WCIA looks for coverage, not for exclusion. If an insured city has liability, WCIA generally pays the claim. However, also unlike commercial insurance companies, if a claim is invalid WCIA litigates to defend the city rather than settling in order to set good case law. She provided some examples of cases WCIA defended. Ms. Roberts said WCIA also differs from insurance companies in its philosophy on educational outreach and training, with an emphasis on risk management. She said WCIA budgets \$450K for training, including co-sponsoring training with other state agencies.

Ms. Roberts explained that each member's premiums reflect actual losses, potential losses, and a percentage of pool services. A professional actuary develops these. However, cities have some control over the assessment by controlling losses. Ms. Roberts reviewed the WCIA staff list provided in the information packet.

Ms. Roberts the explained the WCIA Compact with the membership that defines member responsibilities. She said failure to meet compact requirements can result in an additional assessment. Members must pay assessments on time to ensure resources can be invested timely, attend at least one full board meeting each year, keep a delegate appointed, report claims in a timely manner, make sure city attorneys attend WCIA training, and complete an annual

review and audit. This is when WCIA staff visit the city to review losses, coverages, and property schedules and to administer the audit. The audit topic varies each year; in 2009 the topic was land use, in 2010 it was employment, and in 2011 it will be premises liability and public disclosure. WCIA reviews each city's responses to the audit questionnaire and makes sure they are acting appropriately. Some things are mandatory (required by law). WCIA gives cities a year to come into compliance with mandatory items. The auditor also makes recommendations for best practices. Aside from the audit, three mandatory trainings are also a Compact element. Ms. Roberts gave some examples of training and described co-sponsored and reimbursable trainings. She said WCIA emphasizes training as a means of managing risk.

Ms. Roberts then described the voluntary pre-defense program which started in 1989 and has been wildly popular. It does not affect a city's loss history. If a city has a potential claim, WCIA will assign an attorney to help make sure the city is going down the right path. It doesn't cost cities anything and saves WCIA money in the long run. She said most potential claims addressed this way don't turn into claims. She said a similar program called the Consultation Program assists cities with more general questions not related to specific potential claims, often reviewing policies, etc. Again, this is done by a qualified attorney and is free of charge to the city.

Ms. Roberts then addressed land use losses. She included a chart depicting total WCIA land use losses from 2003 to 2008 (excluding the City of Burien \$13.9M Westmark loss which threw off the scale of the graph). She observed that land use losses have been fairly large.

Ms. Roberts said WCIA classifies cities based on employee hours. Anacortes is one of 19 cities in Actuarial Group 3 with 200,000-400,000 employee hours annually. It has belonged to WCIA since 1985. She provided a chart showing the severity and frequency of Anacortes losses by type for the period 2005-2009 and comparing Anacortes to other Group 3 cities. In that five years Anacortes filed 93 claims and WCIA spent a total of nearly \$435K on those. Ms. Roberts clarified that this includes all amounts paid by WCIA, including both claims and legal fees. She concluded that overall Anacortes is a good risk, better than average in Group 3, particularly for auto liability, personnel and public safety claims. Ms. Roberts noted that land use losses are difficult and expensive to defend even if a city or council has done nothing wrong and prevails in the end. Ms. Roberts discussed loss severity vs. loss frequency and said frequency affects a city's assessment more than a single expensive claim. Mayor Maxell pointed out that cities that don't own their own water system won't have losses in that area. Mrs. Richardson asked what falls in the category of Errors & Omissions. Ms. Roberts said that is mostly development and review and land use. Ms. Roberts said WCIA spent over \$100K to pay on and/or defend such claims against Anacortes during 2005-2009. Ms. Roberts said that looking at frequency rather than severity, the number of claims filed against Anacortes was pretty much average for Group 3 cities--a few more claims in land use and public works, fewer in police. She then presented a graph showing WCIA's cost per worker hour for Group 3 cities during 2005-2009 and showed Anacortes was the fifth lowest at \$0.25 per worker hour. Ms. Roberts reminded that a city's statistics can be skewed by even a single large claim. She reviewed the 2003 Westmark case discussed earlier in which the City Council of Burien was found to be arbitrary and capricious by the appeals court.

Addressing Council's question about how many WCIA cities use a hearing examiner, Ms. Roberts said close to 90% of members use some form of hearing examiner system. She said WCIA's recommendation is that cities take their councils out of the picture altogether and have appeals of hearing examiner decisions go to Superior Court. She cited the example of City of Auburn which was sued in seven different land use issues and lost them all before finally deciding to switch to a hearing examiner and devoting its council's time to code development. Mr. Petrish objected that the discussion of the hearing examiner issue was out of order. Mayor Maxwell reminded that Council was hearing this informational presentation in its legislative function and that Ms. Roberts was present to answer questions councilmembers had posed about insurance and hearing examiners and to provide an industry perspective.

Ms. Roberts continued that there are 281 cities in Washington state and 104 of them are insured by WCIA. She said she could not answer the question of how many total land use claims have been made to WCIA but in the last ten years since the GMA losses over \$500K have totaled \$28.5M. She called it an area of large exposure. When asked if the city's premiums would decrease if it implemented only some of WCIA's recommendations Ms. Roberts said no, hearing examiners are a WCIA recommendation only, not a mandatory part of the Compact. However, she said, if a city's losses increase its assessment will increase. Asked if WCIA can refuse to cover a city for a land use case if that city doesn't use a hearing examiner, Ms. Roberts said no, that doesn't make a city uninsurable. She noted that most commercial insurers don't cover land use at all or only cover decisions that were made with legal counsel. She said WCIA doesn't do that, it provides both defense and pre-defense support for land use decisions, but she said the growing losses have caused the WCIA Board of Directors to discuss what changes might have to be made including possibly raising deductibles or limiting coverage depending on how a city handles land use decisions. In response to a question from the mayor, Ms. Roberts said some pools now consider decisions found by the courts to be "arbitrary and capricious" to be non-insurable events but WCIA does not at this point; it still hopes that education and recommendations to manage risk can help it avoid taking that step.

Mrs. Richardson asked if WCIA can assist cities in reviewing development code language and removing inconsistent language to help make decisions more defensible. Ms. Roberts said yes and added that Planning Director Ryan Larsen has used that service on a number of occasions. She continued that city councils have a big job in their legislative role and that in any quasi-judicial role they have to be completely impartial. She said that land use is an increasingly technical body of law, it is increasingly challenged, and judges rule strictly on the city's code. Ms. Roberts urged councilmembers to spend their time and energy to make the code tight and strong so it stands up to challenges in court.

Mr. Petrish thanked Ms. Roberts for her presentation and asked if WCIA has attorneys on staff and if not, who they use. Ms. Roberts said WCIA has no attorneys on staff but rather selects a panel of defense attorneys in each area of law, by region, who are experts in their fields and know the judges in their region. She said WCIA's own corporate counsel, Mark Bucklin, sits in on WCIA executive meetings. Mr. Petrish asked who provides pre-defense attorney review. Ms. Roberts said WCIA typically works with a city's own attorney to select a WCIA panel attorney from that region. Mr. Petrish asked who WCIA uses as its excess carrier. Ms. Roberts clarified that WCIA covers the first \$4M, the next million is covered by Governmental Entity Mutual, and the re-insurance contract covers amounts above that up to \$20M. Mr. Petrish asked if any WCIA insureds have been sued in excess of the coverage limits and if so when does the excess coverage carrier become involved. Ms. Roberts said that any time a matter approaches the \$4M limit WCIA notifies the excess carrier. She said WCIA has total control over the decision of whether or not to cover a claim.

Mr. Adams asked if WCIA's audit recommendations are customized for the size and nature of each city. Ms. Roberts said WCIA doesn't have standardized recommendations, they make recommendations for each city based on its responses to the annual audit questionnaire. When WCIA looked at the answers to the land use questionnaire in 2009, it made the recommendation to use a hearing examiner as the most professional way to deal with land use exposure based on experience with many insureds.

Mrs. Richardson asked for a summary of kinds of things the city has coverage for and the kinds of things individual councilmembers can be sued for personally. Ms. Roberts reminded that anyone can be sued for anything, no one can control that. She said when acting in their legislative role, councilmembers have broad immunity. When acting in their quasi-judicial role, they have judicial immunity. WCIA provides defense services regardless of whether councilmembers are sued personally or collectively because they are named insureds. However, they aren't covered when acting outside their scope of duties as councilmembers or when acting as private citizens.

Planning Commissioner Lin Folsom asked if the rumor that the State Legislature is going to make hearing examiners obligatory is true. Ms. Roberts said she has seen the model bill but WCIA is not sponsoring it nor is Anacortes. Ms. Folsom asked if WCIA has ever made a hearing examiner mandatory for an insured city. Ms. Roberts said no. Ms. Folsom asked what would be the criteria for WCIA to require a city to have one. Ms. Roberts said at this point, WCIA would never do that, the hearing examiner system is only recommended. However, cities that don't use a hearing examiner may one day have to take other steps to make sure their decisions are defensible so that WCIA doesn't have to stop insuring land use cases altogether. She added that some members have been ejected from the pool because their losses were so great and they wouldn't take steps to minimize them.

Mayor Maxwell recalled that there used to be two insurance groups for cities but they suffered some severe exposure and are no longer viable. Ms. Roberts said there are three surviving pools in Washington but CIW recently received a cease and desist order due to severe underfunding of claims reserves and AWC is a smaller pool with smaller limits.

Curt Oppel, Board of Adjustment member, asked some clarifying questions about the graph of how many cities of each class are insured by WCIA. He established that the graph had nothing to do with which cities use a hearing examiner. Referring to the chart of Anacortes loss severity, Mr. Oppel asked if Anacortes was average for development review claims. Ms. Roberts said yes, among Group 3 cities. She reiterated that Anacortes is doing a good job thus far but the loss picture could change with a single case. Mayor Maxwell noted that a city can be sued by anyone for anything regardless of whether it is at fault.

Mrs. Pickett thanked Ms. Roberts for her excellent presentation and emphasized that in many cases there is no way to recover legal defense costs: a city and its insurer can spend hundreds of thousands even if it has done nothing wrong and eventually prevails in the courts.

There being no further business, at approximately 8:52 p.m. Mayor Maxwell adjourned the regularly scheduled Anacortes City Council study session of January 24, 2011.