

BALANCING THE IMPORTANT GOALS OF TRANSPARENCY AND STEWARDSHIP OF PUBLIC ASSETS

WPPA Guidance for Discussion of Pricing for Lease and Sale Transactions in Executive Session RCW 42.30.110(1)(c) Published December 1, 2017

Introduction

Port districts and other local governments have always tried to balance a desire for complete transparency with a need to be good stewards of public assets. When leasing or selling public assets this includes receiving the best return possible for the public. The Washington State Supreme Court decided a recent case¹ where the Court provided guidance on achieving this balance when a port commission meets in executive session to set the price of a lease or a property sale. In this decision, the Court instructed local governments on how to strike a balance between transparency and obtaining the best financial terms for the lease or sale of a public asset.

The purpose of this Guidance Document is to suggest some best practices which will allow port districts to better apply the Courts guidance in achieving that balance

Background

RCW 42.30.110(1)(c) allows local government governing bodies (including port commissions) to hold executive sessions to "*consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price.*"

It has long been the practice of port commissions and other local governments, citing this statute, to hold executive sessions to discuss real estate leases and sales. In these executive sessions the proposed transaction was fully reviewed so that the commissioners could discuss their individual views and concerns about the minimum price for which property would be leased or sold.

In this decision, which applies to all local governments, the Court held that price (lease rate or a sale price) cannot be discussed in an executive session unless the factors that affect the price were first discussed in open public meeting. In other words, the Supreme Court created a two-step process for discussions of price in executive session. *First*, the factors that may affect price must be discussed in an open public meeting. This is how the staff must now provide the information to the commission. *Second*, in executive session the commission can then, using those factors, consider the price for the lease or sale. This remains the way that individual commissioners will provide direction to the staff concerning those factors and how they may impact the price.

¹ Riverkeepers v. Port of Vancouver USA, March 2017.

A port commission must retain its commitment to transparency by exploring the factors that affect the price of a lease in an open public meeting. Then, to quote the Court: *“Once the relevant factors [affecting a lease] have been discussed in public session, then, armed with this knowledge, the governing body may enter executive session; there the governing body can apply this knowledge to set a new minimum price.”*²

This decision means that port staff will have an increased responsibility to provide information to the commission in a regular meeting regarding factors that may affect the price of the lease or sale. It is a good practice for staff to provide this analysis in a written document. Again, only the factors that affect price need to be presented. A detailed discussion of how these factors can be used to set a specific price can be held in executive session.

Guidance

The WPPA staff - aided by port district staff and port attorneys from around the state - have discussed various recommendations to help port districts fully and faithfully abide by the Court’s direction while still, to the maximum extent possible, remaining good stewards of public assets.

One important caveat; this is the best judgment of the WPPA based upon review and discussion of the Court’s decision. The guidance presented herein is, we think, well-reasoned and will be helpful. However, each set of facts is unique and must be evaluated as such.

Guidance No. 1 – Accept this Change in Practice as an Opportunity to Provide More Transparency.

Port districts throughout the state have always tried to be both transparent and good stewards of public resources. This has frequently been described as achieving the appropriate balance between “mission” and “margin.” These two goals can sometimes clash when a port district is trying to maximize the return on a public asset during property lease or sale negotiations. This decision provides guidance on the appropriate balance.

While some may consider ways to “work around” the Court’s ruling, the better approach is to understand that the ruling helps governments to understand the appropriate method to set the minimum price for the lease or sale of public assets.

Guidance No. 2 – Develop and Maintain Good Comprehensive Scheme of Harbor Improvements (“CSHI”).

This decision places increased importance on a good port comprehensive plan that guides staff in the commission’s strategic direction. The more direction provided in the CSHI, the better the goals of transparency and asset protection are served. The public will be provided with an opportunity for input during CSHI adoption and/or modification.

² Importantly, the rule remains that the commission cannot vote in executive session.

Armed with a well-developed CSHI, staff will better able to respond meaningfully to lease proposals or provide prospective tenants with the commission's direction on leasing or sale or port property. Without a well-developed CSHI, there will need to be more discussion in an open meeting of factors that affect an individual lease price proposal or sale proposal.

This decision may result in increased strategic guidance from the commission in the CSHI, resulting in staff using that guidance to bring more fully-formed lease proposals to the commission.

Guidance No. 3 – Revisit the Delegation of Powers to Address this Issue.

There may also be a need to change the delegation of powers resolution to provide guidance on how far an executive director and staff can go before bringing the transaction to the port commission in an open public meeting. For example, will the executive director be empowered to negotiate lease terms in conformity with adopted "lease revenue guidelines," or will an executive director be empowered to approve certain types or lengths of leases?

Guidance No. 4 - Develop Procedures to Keep the Commission Informed About New Transactions.

The Court's decision was based upon the Open Public Meetings Act ("OPMA") and a factual pattern where there was a publicly known potential tenant. The Court did not consider a situation where a prospective tenant is considering a transaction with a port district and does not want to have its name publicly released until the proposed transaction has better developed.

Here, again the port commission should discuss a methodology that will apply to future new transaction. The methodology should strike the appropriate balance between the two important goals of transparency and good stewardship of public assets.

For example, it is well recognized that an executive director provides written information to commissioners on a wide variety of matters. This communication is frequently in the form of a pre-decisional memorandum where opinions are discussed, and recommendations made. Of course, the commissioners may not discuss this information with each other except in an open public meeting or properly called executive session. Port commissions should consider when pre-decisional memorandums are appropriate and desired in a lease or sale transaction especially for a tenant that is new to the port district and may not yet agree to the public release of information.

Guidance No. 5 – Educate Potential Tenants Early About the Requirements of Doing Business with a Port District.

Many port districts have procedures in place to educate prospective tenants about the Public Records Act and the port districts' mission to provide access to public records. Tenants seem to understand and accept this fundamental difference when dealing with a government agency. Likewise, port districts should develop a guidance document that informs perspective tenants about the Open Public Meetings Act.

Guidance No. 6 – Develop a Standard Checklist of Lease or Sale Terms that May Affect Price.

It is recognized that there are a wide variety of factors that may affect price and that the list of factors may vary greatly from port district to port district. For example, one port may be focused on encouraging job growth, a second port may be interested in maximizing lease revenue and a third port district may be interested in encouraging the development of a particular industry.

A checklist developed by staff can be used to make sure all applicable factors are discussed in an open public meeting. Of course, not all factors on the checklist may apply to each proposed transaction and the checklist does not need to assign a weight or price to any factor. However, the checklist will make sure all relevant factors are discussed. The checklist can be revised as directed by the commission or multiple checklists could be created for various port development areas (airport or marine trade areas).

Guidance No. 7 – Keep this New Procedure in Perspective.

There are additional elements of the Open Public Meetings Act which allow for executive sessions which have not been affected by this decision.

For example, there is a different exemption that applies to a government's purchase or leasing of real estate. That exemption found at RCW 42.30.110(1)(b) and is worded in a much broader fashion to consider "the *selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price.*" Instead of focusing on one factor, price, the purchase statute focuses on the broader issue of "site selection."

Another example, is the application of the litigation exemption of the OPMA, which applies when a public discussion is likely to result in an adverse legal or financial consequence to the government.

Guidance No. 8 – Measure the Impacts – Positive and Negative.

The Supreme Court has provided a new template to balance transparency and stewardship of public assets. As noted, port districts should embrace and follow the guidance. However, in doing so, ports should document the results on transparency and stewardship of public assets. Ultimately, the Legislature makes the final decision.

The impact of the Court's decision, either negative or positive, cannot be known for some time and only then if careful documentation is undertaken. If the result is that transparency and stewardship fall out of balance, it will be up to the Legislature to determine if a statutory change is appropriate.

Guidance No. 9 – Consult with the Port's General Counsel on This Decision.

The WPPA has consulted executive directors and port attorneys concerning this guidance. However, ultimately each port district must apply this decision and the other provisions of the

Open Public Meetings Act to real and unique factual circumstances. Therefore, when it comes to these legal issues consult the port district's lawyer.

Conclusion

Port districts are limited purpose municipal governments. As such, they undertake missions assigned by the Legislature within rules and limitations set by the Legislature. The Court's decision provided context and explanation to one of those rules. As always, port districts will act in good faith to implement the Court's decision.

DRAFT