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EXECUTIVE SESSION GUIDANCE FOR PORT DISTRICTS

SETTING MINIMUM PRICES FOR A LEASE

THE OPEN PUBLIC MEETINGS ACT

THE OPMA requires "...all meetings of the governing body of a public agency shall be open and public...except as otherwise provided in this chapter." [RCW 42.30.110]

- ▶ The first exemption to this requirement permits a government body to meet in executive session:
 - ▶ "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."

THE OPEN PUBLIC MEETINGS ACT

- ▶ The State Supreme Court decided in a 2017 case how narrowly to read this real estate exemption. The Court reviewed the legislative history of the exemption and noted:
 - ▶ "the legislature plainly sought to limit discussion in executive sessions to the negotiation's backstop amount, that is, "how high or how low" the price might go, while nonetheless requiring that "[a]ll other aspects" of a sale or lease be discussed in public."

THE OPEN PUBLIC MEETINGS ACT

The court went on to explain in more detail:

- ▶ "...a government entity may enter into executive session to discuss the minimum acceptable value to sell or lease property, but not to discuss all factors comprising that value. To the extent that various factors directly alter the lowest acceptable value, the governing body may discuss how these factors impact the minimum price; but general discussion of the contextual factors themselves must still occur at an open public meeting."

THE OPEN PUBLIC MEETINGS ACT

The court went on to explain in more detail:

- ▶ "To the extent that various factors directly alter the lowest acceptable value, the governing body may discuss how these factors impact the minimum price. This limited scope does not permit a general discussion of the contextual factors themselves [in an executive session]; any such general discussion must occur at an open public meeting.
- ▶ Once the relevant factors have been discussed in public session, the governing body, armed with this knowledge, may enter in executive session; there, the governing body can apply this knowledge to set a new minimum price."

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- ▶ Port Commissioners will need to ensure that the port has procedures in place that allow the Commission to discuss, in an open meeting, factors that affect price prior to discussing a specific price, or minimum price, in executive session.

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- ▶ This need places more responsibility on port staff to explain real estate factors, and to allow the Commission to discuss these factors in an open meeting.
 - ▶ Commissions should consider adopting general checklists or outlines that factors that affect lease price.
 - ▶ Because most port districts manage diverse assets, these documents could be tailored to different port assets, such as airports, marine terminals, industrial properties, etc.
 - ▶ Commissions should review their Delegation of Authority resolution to ensure that it allows the port director to negotiate leases using lease revenue guidelines.

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- ▶ This can include basic parameters such as lease maximum term or annual lease revenue amounts.
- ▶ Factors which commonly affect price include the lease term, the credit-worthiness of the lessee, the number and type of jobs created, wages and compensation for employees, consistency with port vision, likelihood of future growth and likelihood of positive ancillary influences.
- ▶ There will be others, which port staff can provide and which the commission should discuss.

XYZ

- ▶ **Not all Real Estate decisions are covered by this case.**
 - ▶ A government that is purchasing or leasing real estate is covered by a different, broader section of the law [RCW 42.30.110(1)(b)].
 - ▶ The Open Public Meetings Act also contains a general litigation exemption which applies when a public discussion is likely to result in an adverse legal or financial consequence to the government.
 - ▶ The port attorney can advise a commission on the full breadth of these additional allowances for an executive session.



QUESTIONS?

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