

COMMISSION AGENDA

Meeting: 02/23/18

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TO: Port Commission

FROM: John Wolfe, Chief Executive Officer
Legal Counsel: Carolyn Lake, Goodstein Law Group PLLC

SUBJECT: **Port Authority & Possibilities - Briefing**

A. Introduction.

As the NWSA evolves to an independent entity, the Port of Tacoma contemplates its own future. This Memo outlines the range of a port's authorized activities and future possibilities.

B. Port Districts Ares Special Purpose Municipal Corporations

Port districts are created by law as "limited purpose" municipal corporations. This distinguishes them from "general purpose" municipal corporations like the City of Tacoma, which possesses general governmental authority in all matters of local concern, including "police power".

Port districts are created for special purposes, and their powers, though extensive, are limited to those areas of jurisdiction expressly granted to them by the legislature.

Consequently, like fire protection, water, sewer, and similar districts, they are often referred to as "special purpose" districts, "limited purpose" municipal corporations, or, sometimes, "quasi" municipal corporations. On the other hand, because of their unique and relatively broad spectrum of powers, port districts in this state bear a closer resemblance to "general purpose" municipal corporations than do other types of districts.

C. Port District Authorized Activities

The legislature has described the basic purposes of port districts as follows:

Port districts are hereby authorized to be established in the various counties of the state for the purposes of acquisition, construction, maintenance, operation, development, and regulation within the district of **harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, and other commercial transportation, transfer, handling, storage, and terminal facilities, and industrial improvements.** RCW 53.04.010.

Additional and incidental powers are set forth in numerous statutes, mainly in Title 53 of the Revised Code of Washington, and particularly in RCW Chapter 53.08, but also in other RCW titles and chapters such as chapter 14.08 RCW relating to airports, chapter 39.84 RCW relating to industrial revenue bonds (implementing Amendment XXXII, Washington

State Constitution) and possibly other incidental provisions. Some of those powers have been added in relatively recent times, mainly to facilitate trade promotion and industrial and economic development. Some significant powers also have been added by the legislature by constitutional amendments, mainly to **facilitate trade promotion and industrial development.**

Some port district powers resembling county and city governmental powers are eminent domain, the power to levy taxes and special local improvement assessments, to adopt and enforce regulations relating to moorage and toll facilities, and to cooperate with counties and cities in applying general police and traffic regulations to port properties and operations.

Ports are expressly granted the powers for:

- ⊙ RCW 53.08.245 **Economic development programs**¹
- ⊙ RCW 53.08.250 **Participation in world fairs or expositions**
- ⊙ RCW 53.08.255 **Tourism promotion**²
- ⊙ RCW 53.08.260 **Park & Recreation**³
- ⊙ RCW 53.08.030 **Operation of foreign trade zones**⁴.

¹ ***RCW 53.08.245- Economic development programs authorized—Job training and education.***

(1) It shall be in the public purpose for all port districts to engage in economic development programs. In addition, port districts may contract with nonprofit corporations in furtherance of this and other acts relating to economic development.

(2)(a) Economic development programs may include those programs for **job training and placement, pre-apprenticeship training or educational programs associated with port tenants, customers, and local economic development related to port activities** that are sponsored by a port, operated by a nonprofit entity and are in existence on June 10, 2010.

(b) As a contract condition, a sponsoring port must require any nonprofit entity that operates programs such as those described in (a) of this subsection to submit annually quantitative information on program outcomes including: The number of workers trained, recruited, and placed in jobs; the types of jobs and range of compensation; the number and types of businesses that are served; and any other tangible benefits realized by the port, the workers, businesses, and the public.

² ***RCW 53.08.255 - Tourism promotion and tourism-related facilities authorized.***

(1) Any port district in this state, acting through its commission, has power to expend moneys and **conduct promotion of resources and facilities** in the district or general area by advertising, publicizing, or otherwise distributing information to **attract visitors and encourage tourist expansion.**

(2)(a) Any port district is authorized either individually or jointly with any other municipality, or person, or any combination thereof, to **acquire and to operate tourism-related facilities.**

(b) When exercising the authority granted under (a) of this subsection, a port district may exercise any of the powers granted to a municipality under RCW 67.28.120, 67.28.130 through 67.28.170, and 67.28.220, but may not exercise powers granted to municipalities under RCW 67.28.180 and 67.28.181 or other powers granted to municipalities under chapter 67.28 RCW. The definitions contained in RCW 67.28.080 apply to the exercise of authority by a port district under (a) of this subsection, and for that purpose the term "municipality" includes a port district.

(c) **Port districts may not use this section as the authority for the exercise of the power of eminent domain.**

³ ***RCW 53.08.260 Park and recreation facilities.***

A port district may construct, improve, maintain, and operate **public park and recreation facilities when such facilities are necessary to more fully utilize boat landings, harbors, wharves and piers, air, land, and water passenger** and transfer terminals, waterways, and other port facilities authorized by law pursuant to the port's comprehensive plan of harbor improvements and industrial development.

⁴ ***RCW 53.08.030 - Operation of foreign trade zones.***

A district may apply to the United States for permission to establish, operate, and maintain foreign trade zones: (1) Within the district; and (2) on property adjacent to but outside the district if the property is beyond

- ⊙ RCW 53.08.040 -Sewer and water utilities—Providing pollution control facilities.⁵
- ⊙ RCW 53.08.290 - Intermodal movement of interstate and foreign cargo—(with restrictions) ⁶
- ⊙ RCW 53.08.295 Operate Passenger-carrying vessels ⁷
- ⊙ RWC 53.29.020 - Power to establish trade centers & Facilities ⁸

the boundaries of any existing foreign trade zone grantee and is not currently designated as a foreign trade zone: PROVIDED, That nothing herein shall be construed to prevent such zones from being operated and financed by a private corporation(s) on behalf of such district acting as zone sponsor: PROVIDED FURTHER, That when the money so raised is to be used exclusively for the purpose of acquiring land for sites and constructing warehouses, storage plants, and other facilities to be constructed within the zone for use in the operation and maintenance of the zones, the district may contract indebtedness and issue general bonds therefor in an amount, in addition to the three-fourths of one percent hereinafter fixed, of one percent of the value of the taxable property in the district, as the term "value of the taxable property" is defined in RCW 39.36.015, such additional indebtedness only to be incurred with the assent of three-fifths of the voters of the district voting thereon.

⁵ RCW 53.08.040 - Improvement of lands for industrial and commercial purposes—Providing sewer and water utilities—Providing pollution control facilities.

A district may also acquire, construct, install, improve, and operate sewer and water utilities to serve its own property and other property owners under terms, conditions, and rates to be fixed and approved by the port commission. A district may also acquire, by purchase, construction, lease, or in any other manner, and may maintain and operate other facilities for the control or elimination of air, water, or other pollution, including, but not limited to, facilities for the treatment and/or disposal of industrial wastes, and may make such facilities available to others under terms, conditions and rates to be fixed and approved by the port commission.

⁶ RCW 53.08.290 - Intermodal movement of interstate and foreign cargo—Restrictions.

In addition to the other powers under this chapter, a port district, in connection with the operation of facilities and improvements of the district, may perform all necessary activities related to the intermodal movement of interstate and foreign cargo: PROVIDED, That nothing contained herein shall authorize a port district to engage in the transportation of commodities by motor vehicle for compensation outside the boundaries of the port district. A port district may, by itself or in conjunction with public or private entities, acquire, construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities inside or outside the port district: PROVIDED, That such authority may only be exercised outside the boundaries of the port district if such extraterritorial rail services, equipment, or facilities are found, by resolution of the commission of the port district exercising such authority, to be reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system; however, if such extraterritorial rail services, equipment, or facilities are in or are to be located in one or more other port districts, the commission of such other port district or districts must consent by resolution to the proposed plan of the originating port district which consent shall not be unreasonably withheld: PROVIDED FURTHER, That no port district shall engage in the manufacture of railcars for use off port property.

⁷ RCW 53.08.295 Passenger-carrying vessels.

A port district may acquire, lease, construct, purchase, maintain, and operate passenger-carrying vessels on Puget Sound, interstate navigable rivers of the state, and intrastate waters of adjoining states. Service provided shall be under terms, conditions, and rates to be fixed and approved by the port commission. Operation of such vessels shall be subject to applicable state and federal laws pertaining to such service.

⁸ RCW 53.29.020 - Power to establish trade centers—Facilities authorized.

In addition to all other powers granted to port districts, any such district, the Washington public ports association, or the federation of Washington ports as described in RCW 53.06.070 may acquire, as provided for other port properties in RCW 53.08.010, construct, develop, operate and maintain all land or other property interests, buildings, structures or other improvements, and may participate in transactions necessary to provide, electronically or otherwise, facilities or to exercise powers or purposes of a trade center including but not limited to the following electronic or physical facilities:

(1) A facility consisting of one or more structures, improvements and areas for the centralized accommodation of public and private agencies, persons and facilities in order to afford improved service to

- ◎ RCW 53.31.030 Export trading companies⁹
- ◎ RCW 53.34.010 - Toll bridges, tunnels authorized¹⁰

waterborne and airborne import and export trade and commerce;

(2) Facilities for the promotion of such import and export trade and commerce, inspection, testing, display and appraisal facilities, foreign trade zones, terminal and transportation facilities, office meeting rooms, auditoriums, libraries, language translation services, storage, warehouse, marketing and exhibition facilities, facilities for federal, state, county and other municipal and governmental agencies providing services relating to the foregoing and including, but not being limited to, customs houses and customs stores, and other incidental facilities and accommodations.

⁹ ***RCW 53.31.030 Export trading companies—Authorized—Adoption of business plan.***

(1) Public port districts, formed under chapter 53.04 RCW are authorized to establish export trading companies and a company so formed may contract with other public ports, financial institutions, freight forwarders, and public or private concerns within or outside the state to carry out the purposes of this chapter. A port district may participate financially in only one export trading company.

(2) A port district proposing to establish an export trading company shall adopt a business plan with safeguards and limitations to ensure that any private benefit to be realized from the use of funds of the export trading company are incidental to the purposes of this chapter. The business plan shall be adopted only after public hearing and shall be reviewed at least once every two years. Amendments to the plan shall be adopted only after public hearing. The business plan shall include:

- (a) A description of export promotion activities to be conducted during the period of the plan;
- (b) A proposed budget of operations which shall include an itemized list of estimated revenues and expenditures;

(c) A description of the safeguards and limitations which ensure that the export trading company will best be used to enhance international trade and produce public benefit in the form of employment, capital investment, and tax revenues;

(d) A description of private competitors which may be capable of providing the functions in the business plan; and

- (e) Such other matters as may be determined by the port district.

(3) A port district, for the purpose of establishing or promoting an export trading company under this chapter, may provide financial assistance to the export trading company. A port district may not provide such assistance or services for more than five years or in an amount greater than five hundred thousand dollars.

¹⁰ ***RCW 53.34.010 - Toll bridges, tunnels authorized—Highway approaches—Tolls proposed.***

In addition to all other powers granted to port districts, any such district may, with the consent of the department of transportation, acquire by condemnation, purchase, lease, or gift, and may construct, reconstruct, maintain, operate, furnish, equip, improve, better, add to, extend, and lease to others in whole or in part and sell in whole or in part any one or more of the following port projects, within or without or partially within and partially without the corporate limits of the district whenever the commission of the district determines that any one or more of such projects are necessary for or convenient to the movement of commercial freight and passenger traffic a part of which traffic moves to, from, or through the territory of the district:

- (1) Toll bridges;
- (2) Tunnels under or upon the beds of any river, stream, or other body of water, or through mountain ranges.

In connection with the acquisition or construction of any one or more of such projects the port districts may, with the consent of the state department of transportation, further acquire or construct, maintain, operate, or improve limited or unlimited access highway approaches of such length as the commission of such district deems advisable to provide means of interconnection of the facilities with public highways and of ingress and egress to any such project, including plazas and toll booths, and to construct and maintain under, along, over, or across any such project telephone, telegraph, or electric transmission wires and cables, fuel lines, gas transmission lines or mains, water transmission lines or mains, and other mechanical equipment not inconsistent with the appropriate use of the project, all for the purpose of obtaining revenues for the payment of the cost of the project.

Consistent with RCW 47.56.850, any toll, including any change in an existing toll rate, proposed under this section must first be reviewed and approved by the tolling authority designated in RCW 47.56.850 if the toll, or change in toll rate, would have a significant impact, as determined by the tolling authority, on the

Creative Industrial Property Acquisition

In addition, state Port statutes provide for ports' creative acquisition of industrial properties.

Chapter 53.25 RCW – Development of Marginal lands

Ports are expressly authorized to develop "marginal lands"¹¹ by "public acquisition at fair prices of adequate areas", to allow "the redevelopment of the areas suffering from such conditions under proper supervision, with appropriate planning, and continuing land use".

These statutes anticipate that Ports can improve economic development by acquiring and aggregating unproductive areas which may have been subdivided into small parcels, held in divided and widely scattered ownerships, frequently under defective titles, and in many such instances the private assembly of the land areas for redevelopment is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of lack of the legal power and excessive costs.

RCW 53.25.040, 050 - Creation of Industrial Development Districts (IDDs)

Adopted in the 1950(s) when the spirit of public revitalization was strong, a series of state IDD statutes set up a process for Ports to exercise additional creative, industrial economic development. A Port may create an Industrial Development District, and establish its boundaries. The Port may then acquire and develop tax-stressed properties within the IDD boundary in two ways:

- (1) Any properties within the IDD boundary which the County has acquired by tax foreclosure may be transferred (without any up-front costs) to the Port. The Port may then develop the lands for industrial purposes¹², and

operation of any state facility.

11 RCW 53.25.030 "Marginal lands" defined.

"Marginal lands" is defined and characterized by any one or more of the following described conditions:

- (1) An economic dislocation, deterioration, or disuse resulting from faulty planning.
- (2) The subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.
- (3) The laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions.
- (4) The existence of inadequate streets, open spaces, and utilities.
- (5) The existence of lots or other areas which are subject to being submerged by water.
- (6) By a prevalence of depreciated values, impaired investments, and social and economic maladjustment to such an extent that the capacity to pay taxes is reduced and tax receipts are inadequate for the cost of public services rendered.
- (7) In some parts of marginal lands, a growing or total lack of proper utilization of areas, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to the public health, safety and welfare.
- (8) In other parts of marginal lands, a loss of population and reduction of proper utilization of the area, resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere.
- (9) Property of an assessed valuation of insufficient amount to permit the establishment of a local improvement district for the construction and installation of streets, walks, sewers, water and other utilities.
- (10) Lands within an industrial area which are not devoted to industrial use but which are necessary to industrial development within the industrial area.

12 RCW 53.25.050 Tax title lands may be conveyed to district.

(2) Alternatively, any private property owner may also deed land to the Port directly subject to delinquent general taxes thereon. When the Port accepts ownership, the County shall cancel the taxes.¹³

There are two means of addressing the Port's expenses in developing the land and potential ownership of these IDD lands. Either:

(1) When the lands are sold or leased, the Port first pays itself back the expenses incurred by it in managing and developing the lands, and any balance is paid to the county, which shall distribute it the same as general taxes collected in that year,¹⁴ or

(2) Upon agreement by the County Council, the Port can pay the County back the amount of the delinquent taxes against the land at the time the county acquired it by tax foreclosure, or the amount of the delinquent taxes against it when it was conveyed to the district by the private owner, and own the land outright.¹⁵

D. Limitations on Port District Powers

As creatures of the state, in general, municipal corporations can exercise only powers that are delegated to them by law either expressly, or by implication from the terms of a particular statute. Usually their powers are narrowly construed, and doubts are resolved against the existence of a questionable power.

As the Washington State Supreme Court said in one typical case: "If the power is not expressly granted or fairly implied, the power must be denied." *Griggs v. The Port of Tacoma*, 150 Wn. 402, 408, 273 P. 521 (1928).

Any lands in an industrial development district acquired by the county by tax foreclosure, may, if the county commissioners deem the lands chiefly valuable for industrial development purposes, be conveyed to the port district. The lands shall be held in trust by the port district and may be managed, developed, leased, or sold by it as provided in this chapter....

13 RCW 53.25.060 - Private lands may be conveyed to district—Cancellation of taxes.

With the approval of the county commissioners, any lands in an industrial development district, owned privately, which the port commission deems valuable for industrial development purposes, may be deeded to and accepted by the port district, subject to delinquent general taxes thereon. When the commission has recorded the deed and notified the county commissioners thereof, the county commissioners shall order all taxes assessed against the lands canceled and the county treasurer shall record the cancellation, and remove the lands from the tax rolls. Thereafter the lands shall be held in trust, managed, developed, leased, and sold by the district, and the proceeds therefrom disposed of in the same manner as hereinabove provided.

14 See RCW 53.25.050 Tax title lands may be conveyed to district:

....From the proceeds of the sale or lease of the lands, the district shall first reimburse itself for any expense incurred by it in managing and developing the lands and any balance shall be paid to the county, which shall distribute it the same as general taxes collected in that year.

15 RCW 53.25.070 Discharge of trust.

With the approval of the county commissioners, a port district may free any lands acquired by it pursuant to this chapter from the trust imposed upon it herein, by paying to the county the amount of the delinquent taxes against the land at the time the county acquired it by tax foreclosure, or the amount of the delinquent taxes against it when it was conveyed to the district by the private owner.

That principal, called the "Dillon Rule", is a rule of statutory construction of municipal powers described in the writings of John J. Dillon, a jurist and leading authority on the subject, in 1890. The principal still prevails, but is sometimes modified by statute.

E. General Principles Governing Port District Action

Each proposal for port district action must be evaluated on a case by case basis. In making the evaluation, the port commission and staff should consider the following general principles. For port action to be valid, the answer to 1 or 2 must be "yes", AND the answer to both 3 and 4 must be "no".

1. Is the action covered by an express grant of authority?
2. Is the action fairly implied by, or incidental to, an express grant of authority? For example, a port has implied power to construct a detention facility to temporarily confine persons arrested on port property pending transfer to a nearby jail, which supports a port's security and protection operations and is implied from the port's express power to own and operate its own facilities. However, a port does not have authority to construct a jail facility on its property to house persons arrested or convicted of crimes in neighboring cities.
3. Does the proposed action involve a gift of public funds? The courts apply a two-part test to determine whether an expenditure constitutes a gift of public funds:
 - i. Are the funds being expended to carry out a fundamental purpose of government? If the answer to this question is yes, then there has been no gift of public funds.
 - ii. If the answer to the first question is no, then the courts will look to the consideration received by the governmental entity for the expenditure of public funds and the donative intent of the governmental entity in order to determine whether there has been a gift.
4. Does the proposed action involve a lending of public credit?

F. Gifts of Public Funds Prohibited

In addition, as a public entity, **a port district may not make a gift of its public funds, or lend its public credit.** See Washington Constitution Article VIII, section 7.

The prohibition against any gift of public funds or lending of public credit is absolute, without regard to the purpose of the gift or lending of credit.

If a Port strays into activity outside its express or implied authority as granted by the legislature, any Port monies or use of public resources in that activity are prohibited as a gift of public funds.

G. Grey Areas Involving non-Profits, Charities & Sponsorship

The largest area where the Port's activities may become murky is dealing with non – profit, charitable organizations and or sponsorships. This is because although Ports are expressly charged with “economic development”, that term or the scope of allowed activities within that general title are not always clearly defined.

In the absence of a statutory definition it will be given its ordinary meaning. “Economic” is broadly defined as “of or relating to the development, production, and management of material wealth, as of a country, household, or business enterprise”. “Development” means the act of aiding in the growth of something. Webster's II New College Dictionary (1995); AGO 2001 No. 5 (September 4, 2001).

There is no “bright line” test for evaluating proposals for economic development. Each proposal must be evaluated on a case by case basis.

This grey area led to a 1965 challenge of the Port of Seattle's action to expended funds for “promotional hosting” – the “hosting” of shippers, influential businesspersons, and other private individuals in connection with promotional activities of the Port. On appeal, the court held that the expenditure of funds was an impermissible gift and without valid legal consideration, since the guests did not receive their meals or drinks pursuant to any contract with the port, and they incurred no corresponding legal obligation of any kind. The court stated that:

“Since the expenditure of port funds for promotional hosting is without consideration, the meals, drinks, etc. are given to prospective customers. The fact that they are given for a legitimate purpose does not change their nature as gifts.”

The court further cautioned that: “If Art. VIII, sec. 7, is too restrictive in its terms, that is a matter for the citizens of this state to correct through the amendatory process. It is not for this court to engraft an exception where none is expressed in the constitutional provision, no matter how desirable or expedient such an exception might seem.” *State v. Port of Seattle*, 65 Wn.2d 801, 804, 399 P.2d 623 (1965).

In response to this case, the Washington Constitution was amended in the following year (1966) to expressly **allow the expenditure of public funds for trade promotion and promotional hosting**. Constitution Article VIII, Section 8 (Amendment 45). This clarified the port's grant of unique powers to host and undertake promotional activities.

Questions remain where these promotional activities (which are allowed) cross the line to be a gift of public funds (not allowed). Therefore, in making the evaluation of whether the activity, event or sponsorship is allowed or prohibited, the Commission and staff should consider the governing principles for Port action:

1. Is the action covered by an express grant of authority? (For example - economic development, promotional, tourism?) If so, allowed. Examples could be sponsorship of maritime festival, sponsorship of air show, etc

2. Is the action fairly implied by, or incidental to, an express grant of authority? Can you justify that the activity is related to economic development, promotional, tourism? If so, allowed.

3. Does the proposed action involve a gift of public funds (prohibited)? Or- alternatively, can a case be made that the Port received consideration - something

of value in return? Example: Sponsorship of maritime event where Port is given prominent advertisement or promotion. (Allowed).

4. Does the proposed action involve a lending of public credit? (Prohibited).

Ultimately, all activity, events or sponsorship should be tied to accomplishing one of the Port purpose expressly listed in the Port statutes (RCW 53).