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Inside this Issue

LEGISLATIVE BILLS OF INTEREST

The following bills may be of interest to our fire service readers in Washington State. They are all being followed by the Washington Fire Commissioners Association.

ESHB 1056

This bill pertains to virtual meetings and the online posting of agendas. It would allow a public agency to hold board meetings remotely, or with limited in-person attendance, after a declared emergency. The bill does require the public to be allowed to listen in real time to those meetings held remotely or virtually. The bill exempts special purpose districts with 400 million dollars or less of taxable property within the district and those with a population of less than 3,000. The district must confirm to the State Auditor's Office that posting notice and maintaining a web site (otherwise required) would cost more than .1 percent of its budget.

HB 1159

This bill would allow a board of fire commissioners to be expanded from 5 to 7 commissioners with a majority vote of the registered voters of the district. Currently, RCW 52.14.020 allows for 7 commissioners for districts with a budget of ten million dollars or more. Therefore, this bill would make the needed technical corrections to allow board expansion by voter approval.

HB 1180

While HB 1180 would allow public testimony at all governing body meetings and allow for pre-meeting submission of written testimony, this bill appears to be dead right now.

SHB 1329

However, this bill, which is alive and in the Rules Committee as of this writing, also relates to public meeting comments and recording. It would require remote access to board meetings. It would also require online posting of the recordings of such meetings, either by video or audio. It would mandate acceptance of public comment prior to any final action on a matter of substance. Smaller jurisdictions, again, would be exempted. WFCA opposes this bill as it anticipates litigation and audit problems for any size of jurisdiction. An amendment has been proposed that would eliminate any mandates, and instead encourage that each agenda include public comment periods, which we believe almost all of our clients already do at some point in their governing board meetings.

SSB 5155

This bill would require prejudgment interest on tort claims to begin on the date when the cause of action accrued, as opposed to the date when a verdict is rendered. WFCA opposes this bill, stating that it may negatively impact insurance rates or result in excessive interest awards when litigation is delayed for any reason. This law would seem to create unknown and incalculable contingent liabilities for agencies, assuming that these may be claims on which no notice whatsoever has been provided to the agency that the claim even exists. While the current state of the law on prejudgment interest on tort claims in Washington is not crystal clear, it appears to us that this bill would create a more favorable rule for plaintiffs suing public agencies than currently exists under Washington common law (case law) for plaintiffs suing private parties. We see no good public policy reason for this distinction.

SHB 1128

During a recent webinar sponsored by WFCA, regarding bills filed during this legislative session, a question was asked about the impact on fire districts—and particularly their property tax revenues—caused by SHB 1128 if adopted.

This bill creates "housing benefit districts" that can be established by cities or counties in Washington to achieve the goal of affordable housing. The cause of concern stems mainly from Sections 11 and 12. (Incidentally, these districts may levy a tax of up to $1.00 per thousand of assessed valuation.)

Section 12 of the bill would amend RCW 84.52.043—the pro-rationing statute that provides the aggregate of all junior taxing district levy rates in any area may not exceed $5.90, or else "pro-rationing" must occur (by reducing or eliminating levies in an order of priority until the $5.90 limit is not exceeded by the putative levy).

In recent years, various levies have been placed by the legislature (through effective lobbying) "outside" of the $5.90 limit, which means they do not get counted by the county assessor in calculating whether the limit would be exceeded by the aggregate putative levies of all of the junior taxing districts in an area of the city or county. For example, in a recent session flood control districts were added to the levies placed

outside the $5.90. In the fire service arena, EMS levies provided for in RCW 84.52.069 have long been totally outside the $5.90 limit. They just do not count toward that limit. Moreover, fire districts and RFAs have been allowed for several years now to provide by resolution for placing up to 25 cents of fire levy outside of the $5.90 limit, pursuant to RCW 84.52.125. What Section 12 does is provide the same measure of protection for the housing benefit district levy, if created, in whatever amount (rate) is levied. There would be no reason for the district not to place their levy rate outside of the $5.90 limit.

This has no direct impact on fire districts or RFAs, with respect to the $5.90 limitation, as it does not increase their likelihood of pro-rationing under this particular statute.

But what about the other pro-rationing statute, which is RCW 84.52.050? This statute limits the aggregate of all tax levies on any property (including the state levy, that of the senior taxing districts –cities and counties—and the junior taxing districts) to one percent of true and fair value. There are very few exceptions to this law, which essentially limits the aggregate levies to $10.00 per thousand. Ports and PUDs are excluded by law. And of course the limit of $10.00 does not apply to excess levies approved at an election by the voters of the taxing district.

In Section 11 of this bill, the legislature would rank the levy of the housing benefit district in exactly the same layer of protection (at the seventh level to be cut) as the final 20 cents of an EMS levy under RCW 84.52.069. That is a very high level of protection. Only one type of levy rates more protection—the first 30 cents of the EMS levy!

This would seem to create a possibility of pro-rationing under RCW 84.52.050 for fire districts and RFAs, especially in an area where there is a hospital district, and maybe a library district, and park district, just to name a few possible examples.

Here are the layers of tax levies that would be cut (we liken it to the peeling of an onion) before these affordable housing levies are cut to stay under the $10.00 per thousand limit on the aggregate rates:

First cut: Flood control zone districts' levies protected under RCW 84.52.816;

Second: County levies under RCW 84.52.140 (this only applies to King County and relates to transit);

Third: The 25 cents of "protected outside the $5.90" (see above, under RCW 84.52.125) money in the fire district and RFA levy rates; [not a very good priority—third cut!]

Fourth: the up to 50 cent levy for small counties (90,000 souls or less) to use for criminal justice;

Fifth: ferry district levies under RCW 36.54.130;

Sixth: the protected portion of metro parks levies under RCW 84.52.120 (voters can protect up to 25 cents from the $5.90 limit);

Seventh: the new housing benefit district has this relatively protective layer, sharing it with conservation futures and other affordable housing; and

Eighth and final cut: The remaining thirty cents of the EMS levy that allows up to fifty

cents (thank heavens this has a high level of protection).

Thus, there are scenarios perhaps in some counties where the levy protection of RCW 84.52.125 (from the $5.90) would be lost to pro-rationing under RCW 84.52.050—the $10.00 per thousand statute. For example, in a high tax county with a hefty levy for roads and general county government as well, if there were a hospital district (could be 50 cents), a library district (could be 50 cents), a fire district (could be $1.50), one can readily imagine a problem with the $10.00 limit if one of the new housing benefit districts were created and decided to levy the full $1.00 per thousand. We can imagine scenarios where first the 25 cents protected under RCW 84.52.125 would be eliminated and maybe even the EMS levy would be capped at 30 cents. The devil is in the details, so of course this all depends on the exact levies proposed by the state and the county.

I believe there may be reason for concern, but right now there is nothing that can be done except to ask the legislature to consider the implications for existing municipal corporations before this bill is signed into law.

HB 1034

This bill relates to park and recreation district levies. It would remove such levies from the $5.90 limitation, much like the EMS levies are today. It does not impact the taxing authority of fire districts, RFAs, or the EMS levies. Theoretically, however, it could impact the "protected" 25 cents of a fire district or RFA, allowed under RCW 84.52.125 (see above discussion). This bill has made it the House Rules Committee.

SPECIAL RELATIONSHIP RULES REVISITED

On February 8, 2021, Division One of the Court of Appeals decided what may be an important medical negligence case, *Konicke v. King County Hospital District No. 2*,[1] that may indirectly impact the jurisprudence surrounding the "public duty" doctrine in Washington.

As our readers may remember, municipal corporations have a duty that runs to the general public but not necessarily to any one member of the public, so as to create liability for negligence, for example. That "public duty" doctrine has protected municipal entities from liability in many cases, but there are at least four recognized exceptions in our case law. One of the four exceptions occurs when the plaintiff can claim and prove that they enjoyed some sort of "special relationship" with the public entity.

The *Konicke* court analyzed a "special relationship" exception in a somewhat similar area of the law, but never mentioned the public duty doctrine and its "special relationship" exception.

The facts are chilling. Zachary Konicke killed his own mother. Zachary ended his marriage in 2015 and returned to Washington where his parents, Michael and Victoria, and his brother Alex resided. During 2015 Zachary's behavior became odd. He attacked his mother once in 2015. In 2016, he lived with his brother. One

[1] https://www.courts.wa.gov/opinions/pdf/804634.pdf

day he shaved off all of his body hair and doused himself in gasoline, saying he could light himself on fire to prove it would not hurt him. And early the next morning when the bizarre and paranoid behavior continued, Alex called the police. An ambulance transported Zachary to the ER at a facility operated by King County Public Hospital District No. 2 (Evergreen Health Medical Center).

Zachary was evaluated but released within a few hours. He was never evaluated by a mental health professional for involuntary commitment. Alex felt he could not deal with it any longer, so Zachary was brought to his parents' house. The next day he killed his mother and attacked his father.

The father—Michael—filed suit against the hospital district for gross negligence. The trial court dismissed his claim but Michael appealed. His complaint alleged that there was a "special relationship" between the hospital and Zachary. The Court of Appeals found that there was no such relationship because their relationship was not "definite, established and continuing". In other words, the contact between Zachary and the hospital was limited to that one contact at the ER.

The Restatement of Torts, Section 315 and some Washington cases explain the "special relationship" exception. First, the court noted that in the absence of a patient/physician relationship there is no medical malpractice cause of action. (In other words, Michael is not Zachary.) The duty is owed to the patient by the medical provider, not to their parents.

However, Section 315 of the Restatement deals with a different duty owed to a nonpatient victim, but based on the relationship of the professional and the patient. This can then become a medical negligence claim (as opposed to a malpractice claim). Generally, a person is not obligated to prevent one person from causing harm to a third person. However, an exception exists when a special relation exists between the actor and a third person imposing a duty upon the actor to control the third person's conduct. RESTATEMENT, Section 315.

Under Washington case law, this is where the test comes in about the "established and continuing" relationship. Our Supreme Court has found, for example, that this test is met by a psychiatrist who has treated a patient in either inpatient or outpatient situations. In this case, however, Michael had to concede that the hospital did not have the requisite "definite, established, and continuing relationship" with Zachary so there could be no liability. The hospital did not have a duty to protect Michael and Victoria from Zachary. One wonders if it would have been different if the claim was not based on a single visit, but on a series of such visits to the ER, followed by the violent conduct.

Although this case is not an example of a public duty doctrine case (it was presented and analyzed by the court only as a medical negligence case) or an attempted application of the "special relationship" exception to that doctrine, it seems that the facts and the terminology might lend themselves to a similar result in an analogous situation.

Suppose the defendants were the fire district or RFA, and its EMTs or paramedics. Suppose further that the insane assailant was a "frequent flyer" so that the medical personnel were quite familiar with their patient. What is the extent of the fire department's duty? Does the public duty doctrine apply? Does the special relationship

exception apply so as to obviate application of the doctrine? As to third party victims, it may well be that the case does have some direct application independent of the public duty doctrine. We suggest that fire departments handle mental health patients very carefully, especially if the department is familiar with the patient based on past bizarre behavior.

UNDER THE OPMA, SHOULD YOU DO THIS?

Quite often, we have to remind our clients that just because you *can* do something, does not mean that you *should.* We have been asked this question many times before: Can a quorum of commissioners talk to each other about setting a date for a special meeting or placing a matter on the agenda, without that constituting "action" under the OPMA?

The answer to this question is yes, in a strictly legal sense. However, such an action could easily *appear* to be an OPMA violation to a third party (i.e. a *taxpayer*). Merely agreeing to hold a special meeting, **without discussing the *reason* for that meeting,** is arguably not really a "discussion" of government business.

However, it would likely *appear* to a third party that a commissioner could not talk to another commissioner about placing an item on the agenda or arranging a date for a special meeting **without discussing the *reasons* for that**.

Consequently, it is our counsel that if a commissioner feels that a matter should be placed on a meeting agenda or a special meeting should take place, this should be addressed solely to the District Secretary, the Chief Executive Officer of the agency, or the Chair of a five-member (or more) Board. Otherwise, one commissioner speaking to another commissioner (on a three-member Board), about placing a matter on the agenda, creates the *appearance* of an OPMA violation. Just because you *can* do something, does not mean that you *should*.