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Inside this Issue

COMPLICATIONS WITH CHARGING TRIBES FOR SERVICES

Based on issues our clients are encountering with Native American Tribes' (hereinafter "Tribes") willingness to pay proposed dollar amounts for fire protection services, we believed this article to be necessary. Today we discuss how a fire department might address a Tribe within its jurisdiction that refuses to pay a fair amount of money for services. Although this article may seem controversial, it is based on the law.

Under Washington law, a Tribe *may* choose to waive its sovereign immunity and enter into a contract with a fire district or regional fire authority. *See* RCW 52.30.080. This means that Tribes are not required by law to enter into fire protection contracts, as are various municipal corporations under RCW 52.30.020. Many of our clients have executed contracts with Tribes under the above law.

However, certain Tribes within the boundaries of certain fire departments have insisted that they will no longer pay for services performed by those departments, *or* that the Tribe will pay substantially less than what the fire department deems a reasonable amount. The question becomes: How will the department assess charges to the Tribe in lieu of a contract, or get the Tribe to the negotiating table?

To begin, when a property owner resides within a fire protection jurisdiction, that property owner is

not residing on "unprotected lands" under RCW 52.12.160. A fire department generally[1] may not invoice a property owner for a response to a fire that is *not* on "unprotected lands." If a property owner *is* residing on *unprotected* lands, then the circumstances change:

> (3) *In the absence of a written contractual agreement*, a fire protection service agency may initiate firefighting services on *unprotected land* outside its fire protection jurisdiction in the following instances: (a) Service was *specifically requested* by a landowner or other fire service protection agency; (b) service could reasonably be believed to prevent the spread of a fire *onto lands protected by the agency*; *or* (c) service could reasonably be believed to substantially mitigate the risk of harm to life or property by preventing the spread of a fire *onto other unprotected lands*.
>
> (4)(a) The property owner or owners *shall* reimburse an agency initiating firefighting services on unprotected land outside its fire protection jurisdiction for *actual costs* that are incurred that are proportionate to the fire itself. Cost recovery is based upon the Washington fire chiefs standardized fire service fee schedule.

RCW 52.12.160 (3)-(4) (emphasis added).

If the Tribe at issue has property within your fire department's boundaries *or another fire protection jurisdiction*, of course, that Tribe is *not* residing on "unprotected land." Consequently, if the Tribe and your department do not have a contract under such circumstances, an invoice for services would be met with a swift no, and that negative response would have a basis in law.

However, if the Tribe within your boundaries refuses to enter into a fire-protection contract on just terms, consider your options:

1. **Give notice that you are terminating services to the Tribe.** This option may generate controversy, especially if your agency has provided services to the Tribe in the past. However, "a duty owed to all is a duty owed to none,"[2] and a fire department is not obligated to serve property owners that (a) do not pay property taxes to the department and (b) do not have a fire-protection contract in place.

At most, a Tribe that fails to enter into a contract with your department could argue the "legislative intent" exception[3] to the public duty doctrine to establish a duty of care to the Tribe. However, there is no law guaranteeing that a particular level of service shall be provided by a fire department at any given time to a Tribe that fails to enter into a contract. And again, the department *may* enter into a contract with the Tribe under RCW 52.30.080.

[1] We are not speaking in this article about the ability of a fire department to respond to a *hazardous materials incident* and subsequently collect the "extraordinary costs" from the person that caused that response.

[2] This phrase is reference to a doctrine of liability protection afforded to public agencies, which is called the "public duty doctrine." See the following link to *Firehouse Lawyer* articles on the public-duty doctrine: https://firehouselawyer.com/NewsletterResults.aspx?Topic=Civil+Actions&Subtopic=Public+Duty+Doctrine

[3] Under the legislative intent exception, the duty of care to a specific class of persons "must be created by a statute." *Smith v. State*, 135 Wn. App. 259, 281, 144 P.3d 331 (2006).

2. Withdraw the Tribe from your jurisdiction, by resolution and public hearing(s)

This option is not discussed often. Under Washington law, a fire district or regional fire authority may withdraw territory within its jurisdiction. *See* RCW 52.08.011.[4] In other words, a fire agency may *remove* territory within its jurisdiction.

Prior to certain property being withdrawn (removed) from your jurisdiction, a statutory process must be followed:

1. As per RCW 57.28.035, the Board must pass a resolution[5] that (a) sets forth the boundaries of the area it desires to remove and (b) sets a date for a public hearing on the removal;

2. Next, as per RCW 57.28.050, the Board shall hold a public hearing on a *petition for withdrawal*, and after said hearing, the Board shall set forth, by resolution, "findings of fact" that speak to the following questions:

   (a) Would the withdrawal of such territory be of benefit to *that territory*?
   (b) Would such withdrawal be conducive to the general welfare of the balance of *the fire department*?

3. Then, as per RCW 57.28.060, the Board shall forward (1) the petition for withdrawal and (2) the resolution with findings of fact to the county legislative authority;

4. Next, pursuant to RCW 57.28.070-080 the county legislative authority will hold a *second public hearing* and make findings of fact on the same questions under #2 above, and if those findings are "the same" as those of the fire department Board, then the territory will officially be deemed withdrawn by resolution of the county legislative authority.[6]

If your agency desires the removal of Tribal territory from your jurisdiction, we counsel that the above method be used, rather than that set forth under RCW 52.04.056.[7] That is because 056 applies under a very narrow set of facts (pro-rationing under RCW 84.52.010) that are not applicable here.

3. Try Harder (the option we recommend)

Again, Tribes are sovereign entities that do not pay property taxes (as per RCW 84.36.010) and are not *required by law* to enter into fire protection contracts. Consequently, your agency would be hard-pressed to invoice the Tribe for services rendered when those Tribes possess properties that are *not* located on "unprotected land."

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[4] "Territory within a fire protection district may be withdrawn from the district in the same manner provided by law for withdrawal of territory from water-sewer districts, as provided by chapter 57.28 RCW."

[5] There are other methods for accomplishing withdrawal, but herein, we are only discussing the resolution method. Withdrawals of territory are subject to **boundary review board review**. *See* RCW 57.28.001.

[6] If the findings of the county legislative authority are *not* the same, the petition for withdrawal will be deemed denied and a special election must be called on the withdrawal. *See* RCW 57.28.090.

[7] https://app.leg.wa.gov/RCW/default.aspx?cite=52.04.056

However, your agency may use the above laws as leverage for negotiation, and as always, agreeing is easier to accomplish than disagreeing.[8]

IMPORTANT OPMA CASE ON CONSENSUS

In early September 2020, Division One of the Court of Appeals of Washington decided what may turn out to be a very important case interpreting the Open Public Meetings Act. In *Egan v. City of Seattle, No.*79920-7-1, the Court of Appeals reversed a summary judgment in favor of the City of Seattle and remanded the matter for a trial.

Plaintiff Arthur West challenged the dismissal of his complaint alleging that the Seattle City Council violated the OPMA when they repealed the Employee Hour Tax (EHT). His argument was grounded upon the serial communications by text, telephone, and emails between council members that took place over a four-day period in June 2018. At that time, responding to a groundswell of opposition to this tax on employers, and the probability of a referendum to repeal the tax, several council members began to reconsider and think about potential repeal legislation. Poll results showed strong opposition to the EHT so four council members participated in a June 8th conference call. A quorum of the Seattle City Council requires five members to hold a lawful meeting.

At that time, Mayor Jenny Durkan was out of town at a Conference of Mayors in Boston. But on June 10, 2018, the Mayor's staff texted or called most of the council members to ascertain if they might support repeal legislation. The Deputy Mayor shared with one council member that the Mayor would likely support repeal legislation. Various other calls and text messages were exchanged over that weekend, so that basically all council members were apprised that perhaps repeal legislation would be proposed.

The Mayor's Communications Director, while returning from Boston, drafted a press release that would have essentially announced the intent to introduce repeal legislation. However, the press release added, "…this bill has the support of a majority of the City Council." Although there was testimony that the release was just a draft and the drafter did not actually know if the "majority" language was accurate, eventually the press release was issued without material changes.

Before the actual executive session there were clearly more conversations and texts, obviously aimed at determining if a majority of the council would support repeal. One legislative aide for one council member even created a "tally sheet" purporting to show support or opposition to the repeal legislation.

Before the final press release was issued the council consulted legal counsel. Although there was a privilege claim and a privilege log was prepared, it is evident that the lawyers recommended deletion of the language stating that "this bill has the support of a majority of the City Council" because that was the only difference between draft and final press release.

Although the city council members denied that any formal polling took place, the lawyers probably knew that even a straw poll or informal vote on a matter before the council could be a violation of the OPMA.

[8] https://firehouselawyer.com/Newsletters/April2017FINAL.pdf

Arthur West alleged that the communications between council members over that four-day period constituted "collective intent to transact official business" outside of a lawful open meeting. The Court said that, to prove the violation occurred, West had to show (1) a majority of the council "met" (2) with the collective intent to transact official business, and (3) during the "meeting" the members took "action" (remember that "discussion" is "action") such as discussing or deliberating about repealing the EHT.

Now for the law. In *Wood v. Battle Ground School District*, 107 Wn. App. 550, 564-65, 27 P.3d 1208 (2001) Division Two of the Court of Appeals held that an exchange of emails between public officials can be a meeting. Also, in *Wood* the Court noted that Washington's OPMA is modeled to a great degree on California's law. Of course, if there is not a quorum involved it is not a meeting of the legislative body.

Later in the *Citizens Alliance* case, the Supreme Court held that a series of phone calls and emails can also constitute a meeting. But in that case, the Court could not find that a majority or a quorum actually communicated. There was no evidence that a fourth board member knew of the email exchange and then no evidence that two of the three knew of a phone call with that fourth board member either. Therefore, lack of collective intent was found. Interestingly, the court in *Egan* never mentioned *Miller v. Tacoma*, in which the Court of Appeals held that a straw poll taken in executive session is also a violation of the OPMA.

Ultimately, the Court of Appeals held in this case involving Arthur West that when seven council members allegedly "signed on" to a draft press release stating that the EHT repeal bill had the support of the City Council, that is sufficient evidence to withstand a summary judgment motion. In other words, there is a genuine issue of material fact, which could be outcome-determinative in the case at trial, about whether the Council majority basically "pre-decided" the matter before the open meeting even began. And of course, actions taken in violation of the OPMA are *null and void. See* RCW 42.30.060.

California case law seems to suggest that "quorum-seeking conduct" in advance of public vote violates the OPMA. Of course, that is why straw polls or informal votes in executive session or in telephone conferences have been held to violate the law. In any event, there was enough evidence here to avoid summary judgment and require a trial to determine if the City Council violated the OPMA with their pre-meeting discussions, especially about the press release.

While the City Council members signed declarations stating that they only were agreeing to consider the repeal legislation, some of the evidence suggests that there was a lot of pre-decisional conduct, such as vote tallies and discussions of intent, so as to create an issue for trial.