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Inside this Issue

FIRE COMMISSIONER COMPENSATION INCREASE

Effective January 1, 2024, commissioner compensation will be $161.00 per day (or portion thereof), with a new annual compensation limit of $15,456.00. Pursuant to RCW 52.14.010 the limits are adjusted every five years, based upon the consumer price index. The daily and annual amounts were increased in 2013 by 8.66%, in 2019 by 12.68%, and this time by 26.16% so that shows the CPI (inflation!) has been increasing faster in later years.

MORE ON TAX INCREMENT FINANCING

We continue to be fascinated with the tax increment financing law set out in chapter 39.114 RCW. At least two or three of our long-time clients (fire districts) are dealing with city proposals to implement tax increment areas (TIAs) within the city and fire district boundaries.

And we suspect that there will be more to come in the near future. Our first impression is that these TIAs have a detrimental impact on fire districts and other taxing districts, because taxes assessed upon the increased value of the developed properties within the TIA are all to be "allocated" and distributed (diverted) to the TIA-sponsoring jurisdiction instead of the fire district. This diversion of property taxes will continue until the end of the term of the TIA, which can be as long as 25 years from and after the effective date of the TIA, or when the financial outlay of the sponsoring jurisdiction is fully reimbursed. (The whole point of tax increment financing is to

allow the sponsoring city or port district to recoup funds expended on public improvements or infrastructure in underdeveloped parts of the city or port district—or county.)

The article this month is intended to address the idea—included at length in a few consultant's studies we have seen—that the law allows some sort of "bump" or increase in the actual property tax levy of a fire district that includes a TIA. Some consultants have even concluded that increased property tax revenues to a fire district or hospital district, derived from the increased value of properties within the TIA, will be sufficient to offset the losses derived from the diversion of taxes allocated and distributed to the sponsoring jurisdiction instead of the fire district.

Given the avowed purpose of tax increment financing (to divert the taxes to the sponsor, as set forth at RCW 39.114.050[1]) we have serious doubts about such a conclusion. We still see the TIAs as causing a large revenue loss[2] to any taxing district that includes a TIA so long as the diversion continues, even after this month, when we had occasion to review the Department of Revenue's (DOR) Special Notice[3] on tax increment financing.

[1] https://app.leg.wa.gov/RCW/default.aspx?cite=39.114.050

[2] See our article related to this revenue loss and the statutory implications of that:

https://www.firehouselawyer.com/Newsletters/October2023FINAL.pdf

[3] See the DOR special notice here:

https://dor.wa.gov/sites/default/files/2022-07/sn_22_LegislativeChangesTaxIncrementFinancing.pdf

Having reviewed the DOR special notice, I really do not see any need to revisit what I wrote last month in the *Firehouse Lawyer* about TIAs.[4] I still think the sponsoring jurisdiction gets all of the property tax revenue generated by new construction, improvements to property, and the other elements mentioned in RCW 84.55.010 as not being included in the calculation of the limit factor increase, year over year. New construction is not somehow "subtracted" from "increment value"—it is part of the increment value, for tax-allocation purposes.

However, there is one part of RCW 84.55.010 (as amended) that has been brought to my attention. In that statute, which essentially governs how the county assessor will calculate the property tax levy payable in the following year, the legislature provided the method of applying the "limit factor." For our purposes, because it is typical, we will assume that the limit factor is 101%. So, to illustrate how RCW 84.55.010 works, you take last year's levy and add 1%. However, you do not add any increase "due to (e) of" RCW 84.55.010 (1). So what is that increase in value referred to in RCW 84.55.010(1)(e)?

That subsection deals with "Any increase in the assessed value of real property, as that term is defined in RCW 39.114.010, within an increment area…provided that such increase is not included elsewhere under this section." So what are they talking about here? Elsewhere in RCW 84.55.010 are several other sources of increased value to be placed on the tax rolls in the year they occur and

[4] See that article here:

https://firehouselawyer.com/Newsletters/NovemberDecember2023FINAL.pdf

all of those are taxed at the rate currently in effect for the most recent year. (Note that the rate for the current levy year is not known yet, for the following collection year, so last year's rates are applied to all of these new elements.) These other sources of added value are:

- New construction-RCW 84.55.010(1)(a);
- Increases in AV due to construction of wind turbine, solar, biomass, and geothermal facilities-RCW 84.55.010(1)(b)
- Improvements to property-RCW 84.55.010(1)(c) and
- Increase in value of state-assessed property-RCW 84.55.010 (1)(d).

So what is the point of (1)(e)? Clearly, the legislature wanted those "other" increases in AV in a TIA to <u>not</u> be treated the same way as those increases due to the sources of value set out in (a) through (d) above. (1) (e) seems to imply that the increase in property value due to new construction within a TIA is not added to the levy calculation in the same way as other increases set forth in (a)-(d).

However, because of the very broad definition of "increment value" set out in RCW 39.114.010, we still maintain that the sponsoring jurisdiction gets all of the taxes generated in the TIA from all of the sources referred to above—(a) through (e). Apparently, the DOR agrees with me in that proposition. However, their analysis is that the value mentioned in (1)(e) does not get added to the assessed value for purposes of establishing the highest lawful levy since 1985, which is a part of the limit factor calculation mentioned above.

I am not certain what effect that will actually have on the fire district, hospital district or regional fire authority unlucky enough to have to deal with a TIA in their jurisdiction. There are too many variables, in my opinion, that go into predicting the effects on property tax revenue, for anyone to conclude that some offsetting property tax revenue will mitigate or cancel out the diversion of the taxes during the duration of the TIA.

Just to make sure our readers are clear on what the (1) (e) value might actually be in a real situation, let us review what the assessor will be doing in a TIA experiencing some new construction that obviously is facilitated by the public improvements whose financing the sponsor wants to accomplish through this statutory scheme. The assessor might conclude that there is new construction valued at, for example, $50 million dollars, together with some other value added but traceable to one or more of the other elements set out in RCW 84.55.010(1) (a) through (d).

But further suppose that the assessor uses the computer (as they do annually) to adjust the value of *the land itself* underlying these new buildings in an upward direction of $30 million. (After all, the land value of the improved property has to be more than the raw land value of entirely undeveloped property!) We suspect that this is the very increase that (1)(e) is referring to.

We think the upshot of that interpretation is that the (1)(e) increase in value is not added to the levy calculation but the value added to the rolls by new construction and the other elements <u>is</u> added to the total AV of the fire district. In other words, the fire district (or other junior district) does not get the tax revenues during the TIA's existence,

but they do get the value added to their total AV, with the exception of the increase in value from (1)(e).

Now, many of our readers are familiar with what we call "rate compression," but let me explain that concept again. Rate compression occurs whenever your AV (year over year) increases more than 1% or any other limit factor in place. Since the tax revenue can only increase about 1% (plus NC&I of course) from one year to the next, and since property values for commercial and residential properties advance (typically) significantly above that, the rate of the levy must go down. We call that rate compression. It is a necessary result of the mathematical equation.

I mention that because now we have this new issue in a TIA. Now we will have—in district including a TIA—the added factor that the AV will be increasing, theoretically, even more due to the developments in the TIA, so the levy rate will compress even faster. It is my prediction that this will lead to more lid lift elections, and that they will occur sooner than before. Moreover, more of these lid lifts will be multi-year lid lifts for up to six years and perhaps with a limit factor of up to 6% instead of 1%. So how can these consultants make any reliable predictions of increased revenues to the junior taxing districts attributable to these TIA's when there are so many unknowns? They can't. We submit that this idea of a "bump" or revenue increase traceable to a TIA is pie in the sky—wishful thinking.

Navigating the Digital Era: The *Lindke v. Freed* Case and the First Amendment

In the important case of *Lindke v. Freed*,[5] which has not been ruled upon (stay tuned), the United States Supreme Court is grappling with a crucial question of our digital era: When does a public official's social media activity, conducted on his/her otherwise private social media page, fall under the purview of the First Amendment? This case highlights the blurred lines between personal and official capacities in the age of social media.

Petitioner's Argument: A Broad Scope of "Public Official"

The petitioner, the person that was blocked from the respondent's allegedly private social media page for disagreeing with the respondent about a political issue, argues[6] for an expansive interpretation of a "public official" under the First Amendment. They contend that actions taken by an individual in an official capacity should include activities on personal social media pages, especially when they pertain to public matters. This stance suggests that the digital footprints of public officials, even on personal accounts, should not escape First Amendment scrutiny.

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[5] See the link to the case information page for *Lindke v. Freed:*

https://www.scotusblog.com/case-files/cases/lindke-v-freed/

[6] See the petitioner's brief:

https://www.supremecourt.gov/DocketPDF/22/22-611/269701/20230623142340274_22-611%20--%20FINAL%20Pet%20Merits%20Brief%20camera%20ready%20rtf.pdf

Respondent's Counter: Protecting Private Speech

In contrast, the respondent, a city manager, emphasizes[7] the necessity of safeguarding the private speech of public officials. They argue for a distinction between statements made in the course of official duties and personal expressions on social media. The respondent's stance underscores the complexities in delineating between personal and public realms in online platforms, especially when these two spheres often intertwine.

Justices' Focus: The Social Media Conundrum

Having reviewed the transcript[8] of the oral arguments in this case, we think the Supreme Court Justices' questions and concerns reveal their efforts to untangle this complex issue. They delved into various scenarios, questioning the transition of a social media account from personal to official use, the implications of blocking individuals on such platforms, and the potential chilling effect on free speech for public officials. The Justices grappled with the practicalities of differentiating between private and official actions on social media, reflecting the nuanced nature of this modern dilemma.

Implications for Public Agencies

This case carries significant implications for public agencies and their governing officials. It underscores the importance of clearly defining the scope of official duties in the digital space. Public agencies, often active on social media for community engagement, must navigate these waters carefully, balancing transparency with the personal rights of their officials, without themselves violating the First Amendment.

Conclusion

Lindke v. Freed presents a pivotal moment in understanding the intersection of the First Amendment with the digital expressions of public officials—who happen to be commenting on their otherwise private social-media pages.[9] It reminds us of the ongoing need to adapt our legal frameworks to the evolving landscape of digital communication, a task that requires thoughtful deliberation and careful policy-making. We will keep our readers apprised of how the Supreme Court rules in this case, which we expect to occur in June of 2024.

The Central Puget Sound Regional Transit Authority Case: A Lesson in Eminent Domain and Just Compensation

Fire districts and regional fire authorities are authorized by law to use the power of eminent domain. *See* RCW 52.12.021. In a notable court

[7] See the respondent's brief:

https://www.supremecourt.gov/DocketPDF/22/22-611/274907/20230808164032379_22-611_Brief%20of%20Respondent.pdf

[8] See the transcript of oral arguments in this case:

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-611_1b8e.pdf

[9] Of course, this is without taking into consideration the proliferation of "deep fakes" created by those abusing AI, which permit the impersonation of real people without their consent, by use of AI:

https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd

case involving the Central Puget Sound Regional Transit Authority (Sound Transit) and LMRK PROPCO 3 LLC (Landmark),[10] the legal process surrounding eminent domain and the determination of just compensation was put under the spotlight. This case offers a unique perspective on how courts can handle eminent domain cases without the necessity of a full trial, focusing instead on stipulated agreements and equitable fund distribution.

Stipulated Judgment and Efficient Resolution

The case centered around Sound Transit's condemnation of property owned by Marymoor. In May 2020, the parties entered into a "Stipulated Judgment and Decree of Appropriation," setting $16.65 million as the full and just compensation for the condemned property. This agreement was pivotal, as it established the compensation amount without needing a trial, demonstrating the efficiency of stipulated judgments in eminent domain cases.

Waiver of Trial and Focus on Fund Allocation

Furthering this approach, Landmark and other involved parties agreed in July 2020 to waive their right to a separate trial. They affirmed the total condemnation value of $16.65 million, shifting the focus to the allocation of the reserved $2 million. This move underscored the parties' preference for a negotiated settlement over a prolonged trial process.

Post-Trial Motions and Absence of Evidentiary Hearing

Interestingly, the parties agreed that the allocation of the remaining funds would be determined through post-trial motions, bypassing the need for an evidentiary hearing. Although an evidentiary hearing was initially set to determine the fund allocation, it never took place, and the parties did not reschedule. This decision further streamlined the process and focused on the distribution of the agreed-upon compensation.

Court's Role in Equitable Distribution

In handling the disbursement of the remaining funds, the court utilized its discretion to distribute the funds based on the appraised values of the parties' respective leasehold interests. This approach aligned with the parties' agreement and the established total compensation amount, showcasing the court's ability to facilitate equitable solutions in eminent domain cases.

Implications for Fire Districts and Public Agencies

For fire districts and public agencies, this case highlights the potential for stipulated agreements to expediently resolve eminent domain issues. It demonstrates that when parties can agree on just compensation, the need for a full trial can be circumvented, leading to quicker and potentially more amicable resolutions.

The *Landmark* case serves as a precedent for handling eminent domain disputes efficiently and equitably. It illustrates the value of stipulated agreements and the court's discretion in fund allocation, offering a roadmap for authorized public agencies in similar situations.

NEW WASHINGTON MINIMUM WAGE

Effective January 1, 2024 the minimum wage in Washington shall be $16.28 per hour. The salary

[10] https://www.courts.wa.gov/opinions/pdf/844661.pdf

threshold for application of the overtime exemption has been reset to $67,724.80 per year.

BE CAREFUL ABOUT CANNABIS USE

Public employers who do pre-employment screens for use of cannabis must be mindful of the new RCW 49.44.240,[11] which also took effect January 1, 2024. This law prohibits an employer from making hiring decisions based on a positive test for non-psychoactive cannabinoids. Since existing drug tests cannot really tell the difference between psychoactive and non-psychoactive cannabinoids, it seems any positive test would be pretty useless, given this statute. I guess what the legislature is trying to tell us is that past use of marijuana cannot be used negatively in the hiring process.

This statute does not prohibit such testing if an employee has an accident while on duty. It does not prohibit testing if the employer has reasonable suspicion of drug use causing impairment at work. The law has no application to testing or screening applicants for employment as to other types of drugs, as it only applies to cannabis. Of course, federal laws sometimes allow pre-hiring drug tests such as the laws pertaining to airlines, other transportation jobs, employees in the nuclear power industry, and other "safety sensitive" positions. We would argue that firefighter is a safety sensitive position.

RCW 39.08 BONDS

A recent case decided by Division 1 of the Court of Appeals contained a good discussion of the importance of RCW 39.08, which requires contractors to obtain bonds when doing public work for government agencies. The act, which the court referred to as the Little Miller Act, provides security for those who furnish labor and materials for such contractual works, especially because in such public works contractors and materials providers cannot place liens upon the property (although they may make claims against any required retainage). Even subcontractors may make claims against such bonds. Courts do not favor the abandonment or waiver of such rights of contractors, the court said. Such rights may only be waived by a very explicit written waiver in a subcontract, for example.

In this case on appeal, however, in *Powercom, Inc. v. Valley Electric,* No. 85120-9-1,[12] the Court of Appeals found that the waiver of claim was sufficiently explicit so no claim could be made.

AND SPEAKING OF LIEN CLAIMS

Similarly, in a case decided January 11, 2024, the Washington Supreme Court explicitly held that a contract claim for labor performed on real property does not require a prelien notice at all. In *Velazquez Framing LLC v. Cascadia Homes, Inc.,* No. 101591-7,[13] in an *en banc* decision, the high Court held that, while a prelien notice is required under RCW 60.04.031(1) for professional services, materials or equipment liens, there is no such prelien notice requirement for **labor only**. Generally, if a lien claimant fails to notify the property owner before filing the lien, under this statute, the claimant has no right to foreclose.

[11] https://app.leg.wa.gov/RCW/default.aspx?cite=49.44.240

[12] https://www.courts.wa.gov/opinions/pdf/851209.pdf

[13] https://www.courts.wa.gov/opinions/pdf/1015917.pdf

But the Court noted that this statute rather conspicuously does not mention the provision of labor, but only requires such a prelien notice if the claim is for "professional services, materials or equipment."

For that reason, after applying common rules of statutory interpretation, the Court reversed the Court of Appeals, which had affirmed the trial court's dismissal of the lien foreclosure case, and remanded the case to the trial court for further proceedings. This is an important case in its clarification of what is required of such labor claimants.