FIREHOUSE LAWYER

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Surplus Property -- How to Dispose of it

Frequently, I am asked questions by clients concerning the disposal of surplus property (both personal and real property) particularly about required statutory procedures. Having researched this issue several times in the past few years, I considered using this as a question in the Sector Boss column. Instead, I decided to write a full blown article on the subject, dealing with the frequently asked questions.

The most striking thing about this issue is that fire protection districts in the State of Washington have no statutory guidance in Title 52, the primary title in which fire district laws are codified. There simply is no statute on the subject in that title. My research indicates that there are specific statutes on the disposal of surplus property in the titles of the Revised Code of Washington pertaining to cities, school districts, park districts, public hospital districts, port districts, colleges, and even diking, drainage or sewerage improvement or flood control districts, but not fire districts.

The only applicable statute to fire districts is RCW 39.33.020, in the chapter applicable to intergovernmental disposition of property. We will not discuss the intricacies of the statutory procedure set forth in RCW 39.33.020 and related statutes, because it only applies to surplus property with an estimated value of more than $50,000.00 **and** it only applies to intergovernmental transfers and not sales or auctions to the general public or private citizens.

Therefore, in the absence of specific applicable statutes, what are the rules? Clearly, the general and specific powers statutes applicable to fire protection districts in Washington give ample authority to manage, buy, sell, and dispose of both personal and real property owned by fire districts. So there is ample power to deal with property, but no statutes providing any procedures on how to deal with surplus property.

Over the last 12 to 15 years, I have developed a set of recommendations customarily given to special purpose districts, including fire districts, whenever they seek to dispose of surplus personal or real property. I have developed my guidelines based upon actual fact questions presented by clients, and by using the other applicable statutes alluded to above, by analogy. By reading those statutes one can glean several basic concepts of accountability, fairness, and protection of the public funds that are inherent in those statutes. Those have become "guidelines" that I follow in most cases.

In a sense, we can deal with this issue as a list of frequently asked questions. The first

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frequently asked question is how a district should proceed to designate the property and

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officially declare it surplus. Usually, it is recommended that the Board of Commissioners of the District have a resolution prepared listing the property, item by item, and in the resolution formally declare or find that the property is surplus to the needs of the district. That is "Step One".

A sample resolution can be provided by the Firehouse Lawyer upon request, but will not be included here. The most important characteristic of that resolution, other than the formal declaration of "surplus", is a specific identifiable list of the items. The purpose of specificity is to make it clear exactly what items have been surplused, because one never knows what may come of that property. It is not uncommon for members of the department -- either volunteers or paid employees -- to purchase that property either at public auction or in a privately negotiated sale. It is also not uncommon for such property to be indelibly marked with the name and number of the district. Therefore, one can readily imagine the possible embarrassment to the district if some piece of district property is found in the possession of a member without adequate proof that the member has properly acquired it through a surplus property process. The implication of theft, or possession of stolen property need not be discussed herein.

Thus, if the property is described in a very specific manner in the resolution or an attached list of property, there can be no doubt because there is an adequate "paper trail" of documentation showing exactly what items have been surplused.

A second frequently asked question is whether there needs to be competitive bidding (or in effect an auction) for surplus personal property. There is no such requirement, and it is perfectly legal to conduct a privately negotiated sale as to this surplus property, with other governmental agencies, private companies, citizens, or even members of the department. However, basic fairness and a responsibility to protect the funds of the district mandate caution in this regard. While the property may have been declared surplus to the needs of the district, it is clearly not property with no value. If it were, there would be no one interested in acquring it at public auction or private sale. While the property may be of minimal value, certainly an approach that is beyond question is to conduct a public auction with the sale of each item going for cash or other legal tender to the highest bidder. Obviously, having stated that there is no requirement to hold such an auction, it follows logically that there are no statutory advertising requirements for the auction or described procedures to follow.

A third frequently asked question concerns any special procedures for sale of real property. Obviously, if the land includes improvements or structures, or is of significant size, the value may well be estimated at more than $50,000.00 and therefore RCW 39.33 may apply if the disposition is planned to another government agency. Assuming it does not apply, however, we may still be dealing with a significant asset of the fire department, that for some reason is deemed surplus. Due to changing needs or demographic patterns, it is possible that land once acquired for a possible fire station may be surplus. It is even possible, although this author has not seen it yet, that a developed fire station worth a great deal of money could be surplus to the changing needs of the fire department because it is too close to another station operated by another jurisdiction, or otherwise. Under the current statutory vacuum, there are no guidelines on how to dispose of that surplus real property, regardless of its high value.

We recommend strongly that, at least with real property of

significant value, there always be

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at least one real estate appraisal by a qualified and certified appraiser experienced in dealing with municipal property. We look for certifications such as MAI, which means the appraiser is a member of the Master Appraisal Institute, or one of the other recognized certifications. Certainly, more than residential appraisal background is needed, and the appraiser should be experienced and certainly more than a real estate agent. Since a full blown commercial appraisal with appropriate comparables can be quite expensive, this is neither recommended nor necessary when the cost of the appraisal exceeds the value of the property or is anywhere close to it. Frankly, it seems to be not cost effective to have a full blown appraisal done when the property value is estimated to be $10,000.00 or less.

My recommendations on good procedures to follow with respect to the sale of unnecessary or real property are drawn by analogy from the statutes applicable to water-sewer districts. Those statutes authorize the sale of unnecessary real property (and personal property) with detailed procedures. If the property is determined to be unnecessary, the board gives notice of intention to sell by advertising in a newspaper of general circulation. The notice describes the property and states the time and place of the auction or the offer for private sale and other terms of the sale. A notice of intention is not required to sell personal property of less than $2,500.00 in value. This means that the statute does apply to real property even if it is worth less than $2,500.00.

A related statute provides that there shall be no private sale of real property where the appraised value exceeds the sum of $2,500.00. That statute goes on to provide that the real property cannot be sold for less than 90% of the value established by written appraisal, and states that the appraisal is to be done by three "disinterested real estate brokers". Thereafter, if no 90% sale may be obtained after 120 days of offer, the board may pass a resolution stating those facts and then may sell the property at the highest obtainable price, at public auction.

This statutory scheme suggests some good concepts, but also has some strictures that may unduly tie the hands of the district or the commissioners. Since we are applying it by analogy, we can choose those aspects of the statutory scheme that seem to be in the best interest of the district. First, the idea of professionals appraising the property is a good one. Second, the idea of a public auction, as opposed to a privately negotiated sale, is somewhat "cleaner" and less subject to criticism than the private sale method. There may be circumstances in which the district might want to avoid a private sale to avoid any appearance of collusion. Finally, the idea of notice to the public certainly "widens the net" of possible buyers that might pay good money for purchase of the surplus property.

While ordinarily we would not recommend appraisal of personal property, there might be some instances where, due to the high value of the item, or other unique circumstances, an appraisal might be called for. Ordinarily, however, I restrict my recommendation as to appraisals to real property.

In conclusion, while there are no truly applicable statutes for the vast majority of surplus property situations for fire districts in Washington, there are some recommended guidelines to ensure that the district gets maximum value for the surplus property, while ensuring fairness, openness in government, and avoidance of criticism. Any further questions about recommended procedures should be directed to the Firehouse Lawyer by email, or should be directed to the attorney for the fire protection district.

Surplus Property -- How to Dispose of it (continued)

This article is aimed at fire districts in the State of Washington, but some of the concepts discussed herein might be recommended guidelines to any municipality which finds itself in the position of not having governing statutes directing them to act in a specific way of disposing of surplus property.

Independent Contractor or Employee -- Be Careful

While I was speaking to a relatively new client recently, the chief happened to mention that the district had hired a mechanic on an independent contractor basis. Further inquiry by me led to my conclusion that the district may have assumed wrongly that the person could qualify as an independent contractor and not be required to be deemed an employee.

The Washington State Department of Employment Security, the Labor and Industries Department, and probably others (including the Internal Revenue Service) often take a strong interest in whether a worker is truly an employee, rather than an independent contractor, whether designated as such in a written contract or not. In the last ten years in Washington, several employers have been required to make back payments of the employer's share of unemployment or worker's compensation payments due to an improper designation of an employee as an independent contractor.

There are various factors or criteria that the State departments review to ascertain whether an independent contractor is really an employee. The basic test is one of the degree of control exercised by the employer over the employee. If an employee has little independent discretion in performing their tasks and has direct or indirect supervision over how they perform their job, that is sufficient control for them to be deemed an employee. The reviewing agencies will look at other factors, such as whether or not the independent contractor has other places in which they perform the same services, whether they maintain an independent office, whether they maintain a different corporate identity, and similar factors. However, even though the "independent contractor" may have a separate business license, that is certainly not determinative. Even though they have their own tools, that is not determinative. Many employees in various occupations, such as auto mechanic, are expected as a term or condition of employment to provide some or all of their own tools. That does not make them independent contractors.

Thus, if a district hires a maintenance mechanic to work on vehicles, even if the job is part time, probably the degree of control over that person's work would be too great to maintain independent contractor status, regardless of a written contract so providing.

Promotional Testing Practices for Supervisors

In technical report number 2, dated August 18, 1998, the human resources firm of SHL Landy Jacobs, Inc., provides the results of a benchmarking study they have done. The Firehouse Lawyer has obtained a copy of its excellent report from the above-named company and will make it available to clients or other requesters. This report on promotional testing practices pertaining to supervisors was based on a benchmark survey of 74 departments, including 27 fire departments, 41 police departments and 6 corrections

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departments. It appears that most of the fire departments were rather large municipal departments, but the promotional practices followed by them might be quite instructive to small or medium size departments. Feel free to contact the Firehouse Lawyer for information about this excellent technical report.

Sector Boss

An arcane and archaic term in the fire service, a sector boss, was the guy who was called upon when the chips were down, to put out the fire. In other words, the sector boss has all the answers. (You have to admit, it is much more exciting than "Q&A Column".)

Disclaimer

The purpose of this feature is to allow readers to submit short questions which lend themselves to general answers, on various legal issues. More detailed questions would require a formal legal opinion and are beyond the scope of the Q&A column. By giving answers in the Q&A column, the Firehouse Lawyer does not purport to give legal advice and disclaims any attorney/client relationship with the reader. Detailed legal opinions require a greater explanation of the facts, possible legal research and a more thorough discussion of the issue. Readers are therefore urged to contact their legal counsel for legal opinions.

Q: At our operations meeting, we had an interesting discussion regarding the "two in two out" rule. Given the requirement that the rapid intervention team be "immediately available for rescue", is it appropriate to stage the RIT team two floors below the fire floor in a high-rise building? It makes little practical sense to have them standing outside in the parking lot, 10 floors below a fire operation. Any thoughts?

Chief Jay Gunsauls
Bellingham Fire Department

A: Actually, WAC 296-305-05001(11) is the applicable regulation in the vertical standards. It states that once additional crews are on the scene and assigned, the incident shall no longer be considered in the initial stage. At this point, the incident commander shall evaluate the situation and risks to operating crews. "First and primary consideration shall be given to providing a rapid intervention team(s) commensurately with the needs of the situation." While the reference here is to a "rapid" intervention team, the regulation implies some flexibility, as it states that providing the team is done commensurately with the needs of the situation -- which implies a sliding scale rather than a fixed rule.

The section continues as follows:

"(a) A rapid intervention team shall consist of at least two members and shall be available for the rescue of a member or a crew if the need arises."

Thus, as you can see, that provision does not really say that the RIT team has to be "immediately available". On the other hand, the whole idea is for the team's intervention to be "rapid", so I suppose immediately available is implied in subsection (a). The rest of subsection 11 provides that the team shall be fully equipped with appropriate gear and specialized equipment. It also provides that the composition and structure of the team must be flexible based on the type of incident and the size and complexity of the operation. As I see it, this entire regulation, therefore, provides a good deal of flexibility as to the details of providing a rapid intervention team.

As to the specific fact situation presented, it is

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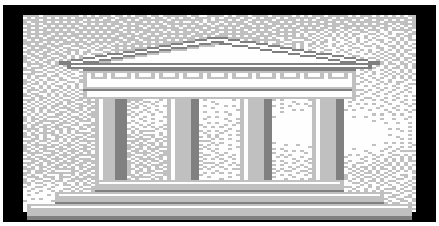
questionable whether there is compliance. Staging a rapid intervention team in the parking lot outside of a high-rise building when the fire is confined to a floor 10 stories above that, might not meet the intent of the rule. If it is feasible and safe to stage the team at a floor, for example, two stories below the fire, then it seems the intent of the rule would be satisfied by doing it that way rather than staging on the ground level. Indeed, the rule of thumb that I would recommend for incident commanders or fire chiefs would be that the RIT staging area should be absolutely as close to the fire ground emergency scene as possible, taking into consideration the efficiency of the staging area and safety of the RIT. It would make no sense to put the Rapid Intervention Team in a hazardous area or so close to an uncontrolled fire that they are themselves in jeopardy, and in possible need of an intervention team to save them. In effect, it is a balancing act. The flexibility of the regulation seems to be consistent with that balancing approach.

Safety:

In 1997 I developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to fire departments throughout the state, subject to payment of $50.00 to defray reasonable copying and mailing costs.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) were completed, to comply with the "vertical standards". Cost $100.

The October 29, 1998, Seminar at Gig Harbor Fire Department is focusing on the vertical standards. I will be discussing how to use my safety checklist, the forms and the operating instructions, which have now been sold to departments all over the State of Washington. Tickets are $75.00 at the door.



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