

NO.

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MASON COUNTY SUPERIOR COURT CASE NO. 05-2-01083-9

IN RE: THE PORT OF TAHUYA

A Washington Port District.

MOTION FOR DISCRETIONARY REVIEW

Susan Rae Sampson
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A. Identity of Petitioner. Brad Carey asks this court to accept review of the decision or part of the decision designated in Part B of this motion.

B. Decision. The Petitioner seeks review of the order of the Mason County Superior Court determining solvency of the Port of Tahuya, heard on May 24, 2006, signed June 19, 2006, and denial of the motion for partial reconsideration that occurred on September 25, 2006.

The order declared the Port of Tahuya to be solvent and ordered its dissolution, discharged Port of Tahuya Commissioners, and ordered cash assets to be deposited into the registry of the Mason County Superior Court. The order of solvency is prejudicial to petitioner, because his claim (including a lawsuit) against the Port has not been resolved. With an order of solvency and dissolution, the Port loses its authority to levy assessments to pay its debts.

C. Issues Presented for Review. Did the Court err in entering a finding of solvency pursuant to RCW 53.48.040, where (a) no factual record supports a finding of solvency; and (b) claims and a lawsuit for failure to disclose public documents are pending?

D. Statement of the Case. At the direction of the Commissioners of the Port of Tahuya, counsel for the Port of Tahuya filed a petition for dissolution of the Port late in 2005. The process for dissolving a port is detailed at Ch. 53.48 RCW. The process is not well known, because it has been used only rarely and few cases interpret it. However, the procedure is not difficult. It is clearly spelled out and must be done in sequence.

RCW 53.48.020. The Port Commissioners petition the Superior Court for an order of dissolution.

RCW 53.48.030. The Court arranges notice of, and conducts, a public hearing within 30 days.

RCW 53.48.040. After hearing, the Court either dissolves the Port, or declines to do so. It may dissolve only upon a first essential finding, that the proposed dissolution is in the best interest of all concerned.

RCW 53.48.040. If the Court makes the second essential finding, that the Port is solvent, then its assets must be sold. After payment of costs, the Port's money is transferred to the County for the benefit of the local school district.

RCW 53.48.060, RCW 53.48.080. If the Port is not solvent, another hearing is scheduled on retiring the Port's debt. A levy may be required.

RCW 53.48.090 After debt is settled, the insolvent port may be dissolved.

RCW 53.48.140; RCW 53.46.040 If a port has no active commissioners, the county Commissioners assume the roles of port commissioners.

Unfortunately, the process in this case has not followed the statute and has been badly botched, to the unfair detriment of the petitioners. Rather, the Port has been deemed solvent and dissolved while 18 claims and a lawsuit are pending. The chronology of relevant events is as follows:

January 9, 2006, Hon. James Sawyer II convened a hearing after which he announced that the best interest of all was that the Port be dissolved, and required a number of events necessary to wind up the business of the Port to occur

over the next 120, days prior to dissolution. He signed an order to that effect on January 23, 2006. Among other details, the order established a new claim-filing period that would expire on May 9, 2006; required the Port to respond to existing and new requests for public disclosure; and required that documents be organized and prepared for archiving. Notably, neither his oral ruling nor his order mentioned solvency. (Appendix A, verbatim transcript of January 9 hearing; Appendix B, order of January 23, 2006).

April 17, 2006. During the ensuing months, Petitioner Brad Carey, who was also a newly-elected port commissioner and newly-appointed secretary of the commission at the time, became frustrated at the Port's denying him access to its records. He brought a motion to compel compliance with the January 23, 2006 order. (Appendix C, motion and declaration of Carey in support of motion to compel compliance.)

May 1, 2006. The matter was transferred to Judge Toni Sheldon. She ordered that Mr. Carey have access to the public documents, and ordered a hearing be set for May 24, 2006, "At which time an order of dissolution shall be entered in the case." Judge Sheldon's order reflects prejudgment of the case; no evidence had yet been taken regarding the solvency of the Port. (Appendix D, order of May 1, 2006).

May 8, 2006. One day in advance of the claims-filing deadline, Petitioners filed a lawsuit for failure to disclose public records. Mason County Superior Court Case No. 06-2-00432-2.

May 24, 2006. Judge Sheldon presided over a hearing to dissolve the Port at which the parties argued about a finding of solvency. No evidence was taken and no value given to the May 8, 2006 lawsuit.

June 19, 2006. Judge Sheldon stated that she felt "blindsided" by the issue of solvency. She felt the January order "implied" solvency and she "assumed" solvency. (Appendix E, verbatim transcript). She signed an order finding solvency, interlineating on an order proposed by the Port's counsel, "By the agreed findings entered 1-23-2006 from the 1-9-06 hearing, the Port of Tahuya was found to be solvent." (Appendix F, order including finding of solvency). Notably, the order dated January 23, 2006, does not contain a finding of solvency. Rather, that issue was left for later proceedings.

June 28, 2006. Petitioner filed a motion for reconsideration on the issue of solvency. (Exhibit G)

September 25, 2006. Petitioner's motion for reconsideration was denied. Judge Sheldon relied upon a declaration filed by the Port's expert, George Fox, stating that if the Port's attorney thought the pending claims and lawsuit were without merit, then it need not be considered in making a finding of solvency. (Exhibit H, Declaration of Fox; Exhibit , Minute Entry denying reconsideration).

The present motion for discretionary review followed within 30 days, and therefore is timely.

Judge Sheldon's finding of solvency was premature, given the pendency of a public disclosure suit and unresolved claims. By finding solvency, she could dissolve the Port, and by dissolving the Port, she could deprive the Port of its authority to levy assessments to pay its bills. Its liability includes liability to petitioner in the

public disclosure lawsuit that is pending. That suit is no trivial matter. Petitioner Carey had to move the court to gain access to port records, even though he was a port commissioner. As an example reflected in the declaration of Carey cited above, records were trucked to the office of port counsel and were inaccessible to any person while a fellow commissioner was on vacation. That is a clear violation of the Public Records Act, Ch. 42.56 RCW. That gives rise to the Port's liability, and until the magnitude of that liability is assessed, no rational finding of solvency can be made. In fairness to petitioner, as a creditor of the Port, the Port cannot be deemed solvent and dissolved until the petitioner's claim is settled or paid.

E. Why Review Should be Accepted. The Court should accept review pursuant to RAP 2.3(b)(2) because the Superior Court committed probable error and its decision substantially alters the status quo of the parties. The dissolution of ports is governed by Ch. 53.48, RCW, et. seq. Only after the Port's indebtedness has been settled or paid may a court determine that the best interests of all persons concerned would be served by the dissolution. RCW 53.48.090. Only upon that finding may a court enter an order dissolving the Port. However, in this case, Judge Sheldon said that she relied upon the court's prior "finding" of January 23, 2006, to order that the Port was solvent. In fact, no such finding had been made. To date, no evidence has ever been presented to the court to support a finding of the Port's solvency or insolvency. To the contrary, the January order, contemplating the transfer of the Port's only real property, resulted in financial detriment the Port, and could only raise questions of solvency following transfer. Expressly, the order does not find solvency, and by requiring settlement of claims and suit prior to dissolution and by setting a claims filing period, it implies that a

finding of solvency or insolvency will follow. The finding of solvency that was entered on June 19, 2006, in the face of a pending lawsuit, defies reason. The court committed probable error in making a premature finding that the Port was solvent.

The Petitioner is directly affected by the dissolution because his lawsuit against the Port involves numerous and flagrant violations of the Public Records Act, Ch. 42.56 RCW. Each violation is subject to a mandatory civil penalty of at least five dollars per day, and up to \$100 dollars per day that each delinquency continues, plus costs including reasonable attorneys' fees and expenses. RCW 42.56.550(4). If the Port is solvent and therefore dissolved, it loses its ability to assess taxes to pay the liability to petitioner.

Petitioner Carey should be afforded due process, including the opportunity to have his claims fully adjudicated, with penalties to be assessed against a port that has been found to be solvent in a manner that undermines the Port's ability to pay its claims. That alters the status quo of the parties involved. Ultimately, the petitioner does not oppose the dissolution of the Port. However, in seeking reconsideration of the finding of the Port's solvency and its dissolution, the petitioner is seeking to protect his right to collect damages that the Port has caused him.

F. Conclusion. The Mason County Superior Court committed probable error by making a finding of solvency in the absence of the presentation of any competent evidence as to the Port's assets and liabilities, in the face of the Port's giving away its real property, and in the light of 18 unresolved claims and a public disclosure lawsuit pending against the Port.

The Court's decision substantially alters the status quo of the parties by depriving the Port of its authority to issue levies to pay its bills, and by placing the Port's assets out of the reach of citizens pursuing monetary remedies for violation of their statutory rights to pursue full, complete disclosure of public records.

RESPECTFULLY SUBMITTED this 9th day of November, 2006.

Susan Rae Sampson, Inc., P.S.



Susan Rae Sampson, WSBA #5732
Attorney for Petitioners

CERTIFICATE OF DELIVERY

I certify under penalty of perjury under the laws of the state of Washington that on the 9th day of November, 2006, I caused a true copy of this Motion for Discretionary Review to be hand delivered to:

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DATED AT Renton, WA, this 9th day of November, 2006.


MEREDITH M. KLEIN