NO. 35521-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE: THE PORT OF TAHUYA

A Washington Port District.

PETITIONER'S REPLY BRIEF

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1. <u>There has never been a finding of solvency in this Port District dissolution. Indeed, it was agreed that solvency would not be determined until all claims were resolved</u>.

RCW 53.48.040 states:

> After said hearing the court shall enter its order dissolving or refusing to dissolve said district. A finding that the best interests of all persons concerned will be served by the proposed dissolution shall be essential to an order of dissolution. If the court find that such district is solvent, the court shall order the sale of such assets, other than cash, by the sheriff of the county in which the board is situated, in the manner provided by law for the sale of property on execution.

If the Port District is found to be solvent, its debts shall be paid, with any surplus paid to the local school district. RCW 43.48.050. If the Port District is found to be insolvent, there shall be a second hearing, to "determine ways and means of retiring the established indebtedness of the district and paying all costs and expenses of proceedings hereunder. Such ways and means may include the levy of assessments against the property in the district as provided in RCW 53.48.080." RCW 53.48.060.

The Port's attorney advances grossly misleading arguments to support its claim that the Court can enter an order of solvency without any evidence whatsoever being presented on the issue of the value of the assets and extent of liabilities of the Port. Each of these arguments must fail:

- The Port argues that Petitioner Carey did not introduce evidence of insolvency at the January 9, 2006 hearing.[1] This is blatantly false as counsel is aware, and intentionally misleads this Court. The Order that arose out of the January 9, 2006 hearing was an *agreed* order. It arose out of discussions between Robert Goodstein, the Port's counsel, and Petitioner Carey after Carey submitted his response to the Petition for Dissolution (attached hereto as Exhibit A).

Carey's response objects to the dissolution of the Port on several grounds, because he did not want the Port dissolved haphazardly, without meeting its obligations under the Public Records Act, or its duty to pay its creditors (of which he was one). Carey's response also objects to dissolution on the grounds that **"No analysis was ever done in public for determining solvency."** The response further recognizes that the Petition for Dissolution likely arose out of violations of the Washington Open Public Meetings Act, RCW Ch. 42.30. The Port of Tahuya was BAD GOVERNMENT, non-responsive to its constituents, and disregarded basic tenets of Washington municipal law.

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[1] Part of the problem is that the January 9, 2006 hearing was conducted by Mason County Superior Court Judge Sawyer, but the May 24, 2006 hearing, and the June 19, 2006 order, was entered by Judge Sheldon <u>without</u> the benefit of the Verbatim Report of Proceedings of the January 9, 2006 hearing. Judge Sheldon even stated she felt "blindsided" by the issues in this case because she was not the judge at the January 9, 2006 hearing.

In any event, as can be seen by the Verbatim Report of Proceedings of the January 9, 2006 hearing,[2] agreement was reached that a number of actions would be taken ***before*** the Port was dissolved, not only the transfer of Menard Landing Park, but *also* the resolution of the records requests (some of which were from Petitioner Carey), resolution of claims,[3] assembly and marshalling of the Port's assets, and organization of the Port's documents. This Agreement is found at (unnumbered) pages 4-5 of the Verbatim Report of Proceedings, where the Port's counsel, Mr. Goodstein, stated:

> And in addition, Mr. Carey has filed an order requiring systematic winding up prior to dissolution in which he asks certain tasks be accomplished. We believe that these are tasks that would be accomplished in the ordinary court of a wind up anyway. The difference here is that what Mr. Carey had asked for, as I understand it, is that the wind up occur prior to the dissolution. I believe we're accomplishing that task by having the Court indicate that it will dissolve the Port **upon the completion of those tasks** that he has called out. Those tasks include taking action on open claims, **completing action on open lawsuits**, gathering and archiving public documents consistent with rules of the State Archivist, **responding to pending requests for public disclosure**,

[2] Exhibit A to Petitioner's Motion.

[3] Petitioner Carey's claim is not the only claim against the Port that is unresolved. See attached Exhibit B, where former Port Commissioners Olson and Gilbert seek reimbursement of fees and indemnification, and where they state "the total amount of may claim may not be ascertained for a period of two to three years. Accordingly, I am requesting either that the dissolution of the Port be delayed until this lawsuit is resolved or that a reserve account be established to pay my attorneys' fees and costs upon the ultimate resolution of that lawsuit in my favor."

> closing out of any leases, and gathering and properly archiving or terminating existing policies of insurance.
>
> . . .
>
> So what we're looking for from the Court, your Honor, I think in sum and substance is an order indicating that the – the Port will be dissolved. And further directing that **the agreed upon activities take place during the wind up period which will occur before the Court formally enters an order.** [emphasis supplied].

Robert Goodstein, January 9, 2006.

Because of the outstanding and unliquidated claims, NO finding of solvency was made at the January 9, 2006 hearing. Indeed, these outstanding and unliquidated claims to this day have not been resolved.

The Port's counsel has twisted the January 9, 2006 agreed order, to try to cause dissolution *before* the necessary winding up actions of the Port are completed, including determination of the extent of the claims (and including responses to records requests, as is the subject of the separate pending lawsuit). This is directly contrary to counsel's words *to the Court* on January 9, 2006. Supra.

The Port intentionally misrepresents to this Court that solvency was not raised by Petitioner Carey. The Port knows of Exhibit A and the language objecting to the lack of a finding of solvency. This is a sham on this Court, unfortunately accepted by Judge Sheldon in her finding of

"implied solvency," a sham which should be remedied by this Court of Appeals.

Of course the Port [and Petitioner Carey] did not introduce evidence of solvency at the January 9, 2006 hearing. There was an agreement that solvency would *not be determined until* the extent of all claims against the Port were known. RCW 53.48.040 places the burden on the Port to have it declared solvent or insolvent.

No finding of solvency or insolvency has ever been made by the Superior Court. *See* Verbatim Report of Proceedings attached as Exhibit A to Petitioner's Motion. A finding neither way does not equate to a finding of solvency.

- The Port argues that Carey did not demand a hearing on insolvency at the January 9, 2006 hearing. Of course he did not, because it was expressly agreed that the issue of solvency (and the order of dissolution) was to be determined *after* resolution of the claims against the Port. *See* Goodstein's words at the January 9, 2006 hearing, supra. There was no waiver of the unequivocal legislative directive that the Court make a finding of solvency or insolvency prior to dissolution. RCW 53.48.040.

- The Port argues the Petition is evidence of Solvency. The Port again ignores the clear statutory directive of RCW 53.48.040 that the

Court must "find that such district is solvent." Further, the Petition itself asks for a finding of solvency [§7.7], a finding that has *never* been made.

- The Port argues that except for the Menard Landing park issue, the Court would have immediately dissolved the Port at the January 9, 2006 hearing. This is wrong, and misleading. *See* Goodstein's words at the January 9, 2006 hearing, supra. Dissolution can not happen without a finding of solvency. No evidence whatsoever has been presented to the Court on the assets and liabilities of the Port. There is nothing before the Court upon which it could base a finding of solvency or insolvency. This is because all claims are not yet liquidated. There are pending lawsuits that could increase the liabilities of the Port well above its assets. It was agreed that both solvency and dissolution was left to be resolved after the claims were known, and was not to be decided at the January 9, 2006 hearing.

- The Port alleges that the only reason for the delay of entry of an order of Dissolution was to allow the transfer of Menard Landing. Again, this is a false and misleading statement by Port's counsel, directly contrary to the Verbatim Report of that hearing. *See* Goodstein's words at the January 9, 2006 hearing, supra.

The January 9, 2006 Order itself also required a new claims period; the consideration of pending claims (which are still pending!); the Port

addressing outstanding records requests (which are still outstanding!); closing out of leases; collection and marshalling of assets; and the assembly, organization and preparation for archiving of the Port's record. These are actions needed to be taken before solvency is even ripe for decision. Clearly the Court was not ready to address the issue of solvency on January 9, 2006.

Indeed, this is supported by the wording of the January 9, 2006 Order. The Order delays entry of an Order of Dissolution 120 days (to allow winding up actions to occur, which incidentally have not yet been completed!). The Order does not say an order of solvency shall be entered in 120 days. It is silent altogether on the issue of solvency. If Judge Sawyer had intended upon ruling on solvency at the January 9, 2006 hearing, he would have done so in the Order (he did not even do so orally, as can be determined by a review of the Verbatim Report of Proceedings).

- The Port argues the declarations of Christian and Smith establish solvency. These declarations merely make conclusory allegations that the Port is solvent [§6.3], and do not take into account the pending lawsuit and other claims against the Port [§4.8], or even detail the assets and liabilities of the Port. A declaration may not be based upon conclusory allegations, speculative statements or argumentative assertions. *See, e.g.*, Las v. Yellow Front Stores, Inc., 66 Wash.App. 196, 198 (1992).

The declarations are self-serving and ignore the potential liabilities of the Port. Further, Christian's declaration is inconsistent with other declarations he has filed with the Court. See Respondent's Exhibit Q [Page 14 of 15], where Christian states:

> "It is not understood at this time what if any liability the Port has for the current or any future law suits. Perhaps the court could help with an understanding of this liability."

- The Port argues that the January 9, 2006 order contains an "implied" ruling of solvency. This argument misstates the agreement as seen in the Verbatim Report of Proceedings of the January 9, 2006 hearing. *See* Goodstein's words at the January 9, 2006 hearing, supra. The Port's counsel misrepresented to Judge Sheldon at the May 24, 2006 hearing that solvency had been determined, and failed to even mention Petitioner Carey's challenge to solvency (Exhibit A). Further, if the Court had wanted to rule on solvency, it would have expressly done so in its Order. But of course it could not do so because there was NO evidence of assets or liabilities submitted to the Court on January 9, 2006, NO evidence of the extent of the claims against the Port, and thus nothing upon which the Superior Court could base a finding of solvency *or* insolvency.

This was Judge Sheldon's mistake when she entered her June 19, 2006 Order, based upon the May 24, 2006 hearing [this is the Order from

which appeal is sought]. She "implied" solvency from the January 9, 2006 hearing, without there being any evidence whatsoever of assets or liabilities of the Port being presented at that hearing![4] Judge Sheldon should have heard evidence of the Port's assets and liabilities before she entered her June 19, 2006 Order.

- The Port argues that Christian's and Smith's letters[5] to the Court enable the Court to make a finding of solvency. These letters were sent to the Court after the May 24 hearing, and no rebuttal has been possible. The letters are in essence biased recommendations of former Port Commissioners as to how the Court should handle the dissolution [this Court can see the dangers and confusions that have arisen in these proceedings by the mixing of the legislative and judicial branches of the government. The Mason County Superior Court is now running the day to day affairs of the Port of Tahuya!]. Again, the letters contain mere conclusory allegations that "The Port of Tahuya as of May 31, 2006 is solvent." [Page 3 of 15]. It sets forth biased arguments as to the merits of claims that will ultimately be decided by the Court. It addresses the Public Records claim of Petitioner Carey, saying "This matter will be settled as part of the suit if it moves forward." [Page 10 of 15]. These letters do not

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[4] She did so without benefit of the Verbatim Report of Proceedings of the January 9, 2006 hearing.
[5] Exhibits Q and R.

substitute for the Court's statutory mandate to determine the solvency of the Port based upon evidence of assets and liabilities of the Port. RCW 53.48.040.

Indeed, Christian states in his letter:

> "It is not understood at this time what if any liability the Port has for the current or any future law suits. Perhaps the court could help with an understanding of this liability."

Respondent's Exhibit Q [Page 14 of 15]. With such confusion reigning, and no evidence of assets or liabilities, how could this Court make a finding of solvency or insolvency? This answer is it has not, and has not complied with its obligations under RCW 53.48.040.

2. Accountant Fox' claim that the Port can ignore the claims of Petitioner Carey in determining solvency is nonsensical.

Accountant Fox proposes a sham solution that can be summarized as *allowing the fox to determine the fate of the chicken*. He suggests that if the Port's attorney claims there is no merit to Petitioner Carey's public disclosure lawsuit, it can simply be ignored! But the Port's attorney has obvious conflicts of interest, not only is he hired to argue the Port's side, but this attorney was the person who advised the Port in the production (or lack thereof) of the records! The Fox declaration lacks credibility and shows naiveté towards what was happening with respect to the records requests.

Solvency is defined as:

> "Present ability of debtor to pay out of his estate all his debts. Excess of assets over liabilities. . . . 'Solvency' within Bankruptcy Act presupposes ability to make ultimate payment of obligations then owed from assets then owned."

Black's Law Dictionary, 5th ed.

In light of the lack of pertinent reported cases under RCW Ch. 53.48, it is incumbent upon the Court to review the plain wording of the statute, and make a ruling consistent therewith. Berrocal v. Fernandez, 155 Wash.2d 585, 599 (2005). Strained meanings and absurd results in interpreting statutes should be avoided. State v. Neher, 112 Wn.2d 347, 351 (1989). When interpreting statutes, courts are not required to abandon their common sense. Allison v. Housing Authority, 118 Wn.2d 79, 86 (1991) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). A court must "give meaning to every word the legislature includes in a statute, and we must avoid rendering any language superfluous." Fernandez, 155 Wash.2d at 599-600.

We know from this statutory scheme, the Superior Court *must* make a finding of solvency or insolvency. RCW 53.48.040. Of course, this was never done, "impliedly" or otherwise. *See* Goodstein's words at the January 9, 2006 hearing, supra.

But why must such a finding be made? So the Court can decide how it pays its creditors, and how it distributes its assets. RCW 53.48.050 and .060. It either pays all of its debts, or comes up with a plan on how to do so which may include a "levy of assessments against the property in the district." RCW 53.48.060.

If the Court were to distribute the Port's assets *before* all claims are known and resolved, it would be left with the unenviable task of having to recover the assets from the party to whom payment was made, if the subsequent claims proved to exceed the assets of the Port. It is possible, even likely, that any distributions of Port assets may be unrecoverable. This is precisely what Petitioner Carey is seeking to avoid in this matter.

After all claims are liquidated, it should be easy to enter a claim of solvency *or* insolvency, and proceed under either RCW 53.48.050 or .060.

This Court can thus see that by proceeding under the plan suggested by accountant Fox, i.e., ignoring claims that the opposing counsel deems without merit, simply does not work.[6] If the claims are subsequently deemed to be meritorious, those creditors[7] would be greatly prejudiced by likely nonpayment.

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[6] Perhaps this works in the corporate world in auditing financial statements, but not where there is an ongoing liquidation of a Port in the midst of litigation.
[7] Petitioner Carey does not hold the only unliquidated claim in this matter.

Indeed, this was recognized by the Port's own attorney, who advised the Court on April 27, 2006 as to the outstanding claims:

> "Clearly, the Court's Order [of January 9, 2006] simply establishes May 9, 2006 as the claims bar date. In addition, claims received on that date would necessarily have to be resolved after that date, and other matters may also be resolved after that date. . . . In all likelihood, they will have to be resolved by the Court in evidentiary hearings, as contemplated by the Court's January 9, 2006 Order, and by the Court's April 10, 2006 order concerning the claim and lawsuit by former commissioner Cynthia Olsen."

Port's Memorandum of Opposition, page 3-4, attached as Exhibit H to the Port's Response to Motion for Discretionary Review.

3. This is not the time or place to try the Carey PDA lawsuit. That should be done at the Superior Court level.

The Port argues that the Carey lawsuit under the Public Disclosure Act is without merit. Such argument is consistent with the Port's efforts to resolve issues without there being a hearing on the issue. **This is how the Port treated the solvency issue.** The Carey lawsuit should be determined at trial, under it's separate cause no. Until such time, this Court should know:

- Petitioner Carey and others made a total of 72 records requests under RCW Ch. 42.17 (since recodified under RCW Ch. 42.56). The vast majority of these records requests were ignored. The ones that were not ignored were only partially met.

- This is the second lawsuit filed by Petitioner Carey against the Port of Tahuya under the Public Records Act. The first lawsuit, tried in 2003, resulted in the Port being penalized for failure to produce public records, and being compelled to pay Petitioner's attorneys fees, costs, and

a daily penalty for not completely filling Petitioner' PRA request for 208 days beyond what is required by the Public Records Act.

- Despite a Port resolution directing that public records be provided within *one day* of request, public records were at times stored at the offices of its counsel for *weeks at a time*, with direction that no one was to have access to the public records. This is a blatant violation of RCW 42.56 regarding the requirement of reasonable access of the public to the records and writings of the agency.

- The Port has conceded that it failed to comply with RCW 42.17.260 (now RCW 42.56.070) in maintaining an index of its public records. When it asked Petitioner to prepare such an index, it refused to pay for his costs in so producing the index. The Port also violated the law by failing to provide in writing, as approved by its Commission, the reasons as to why such index was not practical for the POT to produce and maintain.

- Where the Port states in its brief that documents were produced in January, 2006, in reality 35,000 un-indexed documents were made available for a period of a few hours (on a federal holiday, which violates RCW 42.17.280. This is further not consistent with the intent of the statute, which is to be liberally construed in favor of the taxpayer. Public Animal Welfare Society v. The University of Washington, 125 Wn.2d 243, 251 (1994)(RCW Ch. 42.17 "is a strongly worded mandate for broad disclosure of public records"). Further, the date and time the records were supposedly made available, and how they were supposedly made available was not in compliance with the law.

- The Court *must* impose a statutory penalty of between $5 and $100 for each day that a records request is not met. RCW 42.17.340 (now RCW 42.56.550). Statutory penalties are required regardless of the reason for the violation. Daines v. Spokane County, 111 Wn.App. 342 (2002). A principal factor in setting the amount of the penalty is the agencies bad faith. Yousoufarian v. Office of Ron Sims, 114 Wash.App. 836 (2003). Because of the prior violation, Commissioner Christian's admission that he destroyed public documents, the intentional refusal to allow access to public records, the storage of records at counsel's office for weeks at a time, the penalties in this instance should be well in excess of $5 per day.

- If reasonable penalties are assessed, they should total well in excess of $100,000. In addition, the Port will be responsible to reimburse Petitioner Carey for his attorneys fees and costs, RCW 42.17.340 (now RCW 42.56.550), and presumably for its own costs of defense.

If the Port is so certain that this claim is not meritorious, it should file a summary judgment motion. It has not done so, and Petitioner/Plaintiff Carey will seek maximum relief in the case.

4. Allowing the Port to distribute its assets without a finding of solvency or insolvency would substantially impair the status quo, and limit the freedom of Petitioner Carey to Act.

If this Port were to distribute its assets without a finding of solvency or insolvency, at the conclusion of the Carey PDA lawsuit, there would be no funds with which to pay the anticipated statutory penalty, or reimburse Petitioner Carey for his attorneys' fees and costs.

Petitioner Carey would be left with the Court attempting to recover its distributions, an unenviable and very possibly fruitless endeavor. Even if a levy of taxes is not assessed pursuant to RCW 53.48.080, Petitioner Carey would presumably be entitled to a pro rata share of any assets of the Port, shared with other creditors of the Port. But if the assets are already disbursed, Petitioner Carey would be left with nothing!

5. Conclusion.

In summary, this Court should accept review of the Superior Court's Order of June 19, 2006, issuing an order of "implied" solvency pursuant to RCW 53.48.040, without there being evidence of such solvency. Upon ruling on the appeal, this Court should remand these proceedings to the Mason County Superior Court with instructions to conduct a hearing on the solvency of the Port of Tahuya after resolution of all claims against the Port (including without limitation the claims of Petitioner Carey).

DATED this _____ day of January, 2007.

Respectfully Submitted,

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By______________________________
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