

MEMORANDUM

TO: SAM GIBBONEY DATE: MARCH 11, 2022
FROM:
CC: PETER RUFFATTO *PMR*
RICHARD DAVIS III
RE: POTENTIAL CONFLICT OF INTEREST - INVESTIGATION, RESEARCH, AND
RECOMMENDATIONS

I. INTRODUCTION

We were asked to investigate and research an asserted violation (and/or a potential future violation) of the Code of Ethics for Municipal Officers Act (the "Ethics Act") in connection with a real estate transaction to which the Port of Olympia (the "Port") is a party. On January 7, 2022, Carla Wulfsberg lodged a complaint alleging that Amy Evans, a newly elected Port Commissioner, had a conflict of interest based on her work as a real estate broker in the transaction involving Panattoni,¹ a commercial real estate company.

In response to the complaint, the Commission authorized the Port's Executive Director and Legal Counsel to retain an independent investigator to research any conflict of interest regarding Commissioner Evans. The Commission also requested recommendations for identifying future conflicts and the steps the Commission should take when an individual Commissioner may have a conflict of interest regarding an upcoming Port issue.

We provide the following analysis of the complaint. In doing so, nothing in this memorandum implies or assumes that Commissioner Evans has at any time acted in her own personal interest or intends to do so in the future. Based on the analysis below and the facts as we understand them, there has been no violation of the Ethics Act. However, we provide a detailed discussion of the law and various means by which the Port Commission can avoid future violations in connection with the Panattoni Project and generally.

II. SUMMARY OF RELEVANT FACTS

A. Option Agreement and Brokerage Agreement

On July 13, 2020, the Port entered into a lease option agreement (the "Option Agreement") with Panattoni to develop 200 acres of Port property and approximately 2.5 million square feet of commercial/industrial space over several years (the "Panattoni Project"). For purposes of this memorandum, selected provisions of the Option Agreement are paraphrased here:

¹ The legal entity is SSECC PDC, LLC, a Delaware limited liability company.

- Option Agreement term: The Option Agreement term continues for ten years to July 13, 2030 (Section 2.1)
- Converting optioned property to leased property: Panattoni may identify portions of the optioned property for construction of improvements ("Phase Parcel"). Delivery of a proposed phased plan ("Phase Plan") for approval will constitute notice of Panattoni's exercise of the option to lease the identified parcel. (Section 4)
- Approval by Commission: The Phase Plan may be subject to approval by the Port Commission, and approval is subject to the Port's reasonable discretion and authority, but approval may not be unreasonably withheld. (Section 4.4)
- Phased Parcel becomes leased property: Following approval of Phase Plan, the Port will complete the closing process so that the Phase Parcel shall be included in a ground lease, thereby removing the parcel from the optioned property. (Section 4.5)
- Right of First Refusal: If Port owned property adjacent to the optioned property becomes available for development during the option term, Panattoni will have the right to add such property to the Option Agreement. (Section 21)
- Broker Commission: The Option Agreement provides that no real estate commission shall be payable in connection with execution of the Option Agreement, the exercise of the option, or any ground lease, except the commission payable to Kidder Mathews for its representation of the Port which will be paid by the Port per a separate agreement. (Section 25)

Based on these provisions, the Option Agreement envisions that future Port Commission approval may be required. For example, the Port Commission may be required to exercise some discretion in approving or disapproving a ground lease that contains a site plan for a specific portion of the 200 acre property.² Given the long-term nature of the Option Agreement, a variety of matters may arise that require Commission consideration and approval, under or in connection with the agreement with Panattoni. The Option Agreement has been amended three times to date based on information we have received. Moreover, contractual approvals that occur administratively would likely be considered as approvals made under the supervision of the Port Commission, as discussed below.

The separate agreement between the Port and Kidder Mathews³, referenced in Section 25 of the Option Agreement was executed on May 7, 2021 (the "Brokerage Agreement"). The Brokerage Agreement provides that in the event the Option Agreement is consummated, the Port shall pay to Kidder Mathews, a brokerage commission, calculated in accordance with the following schedule:

The commission on a Net Lease transaction shall be paid on the total Base Rent (exclusive of real estate tax and operating expense payments and real estate tax and operating expense "stops") according to the following schedule:

² Conceivably, a Phased Plan may be presented to the Commission for approval though we understand that such plans could be approved administratively.

³ Two business entities using the name "Kidder Mathews" are registered with the Washington Secretary of State to conduct real estate business: Kidder Mathews Inc. (UBI 602 969 667) and Kidder Mathews of California, Inc. (UBI 603 402 064).

C. The Complaint

On January 7, 2022, Ms. Wulfsberg alleged a conflict of interest in connection with Commissioner Evans' involvement in the Panattoni Project based on her relationship with Kidder Mathews (the "Complaint," attached as **Exhibit A**). The Complaint asserts the following:

1. RCW 42.23.030: Commissioner Evans involvement in the Panattoni Project raises conflict of interest issues under RCW 42.23.030, which prohibits municipal officers from being beneficially interested in contracts made under the supervision of such officer or accepting any compensation or reward in connection with such contract from any other person beneficially interested in the contract. The Complaint asserts that none of the exceptions in the statute appear to apply because Commissioner Evans' herself identified the conflict. The Complaint indicates that in some circumstances, a commissioner may continue in office when there is only a "remote" interest in conflict with a commissioner's duties.

2. RCW 42.23.070: Without providing facts, the Complaint cites to Ethics Act prohibitions that preclude an officer from: (a) using their position to secure special privileges or exemptions for themselves; (b) giving or receiving any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law; (c) accepting employment or engaging in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position; and (4) disclosing confidential information gained by reason of the officer's position or using such information for his or her personal gain or benefit.

3. Investigation, Determination, and Enforcement: The Complaint states the Port Commission has a duty to conduct a public investigation and issue public findings as to whether Commissioner Evans has a conflict of interest in connection with the Panattoni Project. Further, the Complaint asserts that the Commission must decide whether Commissioner Evans should be permitted to participate in any Port business while her "self-admitted conflict of interest" might have implications for her ability to serve, based on the provisions of RCW 42.23.050 which operates to void contracts made in violation of the statute.

The Port received additional e-mail complaints, and members of the public expressed concerns regarding the matter at a Port Commission meeting in January 2022. The Port Commission, in accordance with Resolution 2021-03 regarding Governance & Conduct for Port Commissioners ("Code of Governance"), authorized the review contained herein.

III. QUESTIONS AND SHORT ANSWERS

Question No. 1: *Has there been a violation of RCW 42.23.030?*

No. To determine that a violation of RCW 42.23.030 has occurred, three elements must be shown: (1) the person involved in the formation of a contract was a municipal officer; (2) the officer had a beneficial interest in the contract (meaning the contract at issue conferred a

financial benefit, directly or indirectly, to the officer); and (3) the contract was made by, through, or under the supervision of the officer.

Here, the first and third elements are lacking because at the time the Option Agreement and Brokerage Agreement were approved and executed, Amy Evans was not a Port Commissioner. She was not, therefore, a municipal officer at the time of contract formation. It was only after she took office on January 1, 2022, that she became a municipal officer.

Further, the contracts at issue were not made under her supervision for the same reason-she had not yet assumed office. As stated by one court interpreting RCW 42.23.030, "it would be an oddity for an elected official automatically to be placed in violation of the ethics code merely by being sworn into office."

Finally, Commissioner Evans waived her financial interest in the contracts prior to assuming office. Due to the waiver, a court would likely conclude that her interest in the contracts at issue is a remote interest because she holds less than 1% of the shares of the company. As noted below, the statute allows for municipal officers to have a remote interest in contracts made under their supervision so long as the municipal officer follows certain required steps prior to approval of the contract. However, we note there is some risk in Commissioner Evans and the Port Commission taking the position that the "remote interest" of RCW 42.23.040 will apply going forward. This risk is discussed in the next section.

Question No. 2: In the event there is future Port action approving or modifying elements of the Option Agreement, does Commissioner Evans' status as an independent contractor and shareholder of Kidder Mathews raise issues under RCW 42.23?

Yes. The potential for future contract approvals in connection with the Panattoni Project implicates RCW 42.23 in light of Commissioner Evans' status as a shareholder of Kidder Mathews. Based on the facts, none of the exceptions outlined in RCW 42.23.030 apply. However, the statute arguably provides a pathway to address the issue because Commissioner Evans will maintain only a "remote interest" in the Option Agreement and Brokerage Agreement.⁶

The Option Agreement envisions future approvals in connection with the Panattoni Project. Phased Plans and ground leases are subject to Port approval, including Port Commission approval. Approval of Phased Plans will result in formation of ground leases that will in turn result in increased broker commissions paid to Kidder Mathews. Looking ahead, the anticipated ground leases and any modifications to the Option Agreement will be made, arguably, under the supervision of Commissioner Evans as a municipal officer.

Given the waiver of any interest in broker commissions, the financial interest in the Option Agreement and the Brokerage Agreement is limited to Commissioner Evans' interest as a

⁶ Conceivably, Commissioner Evans could attempt to eliminate even a remote interest in the Option Agreement and the Brokerage Agreement by waiving her right to dividends as a shareholder. This approach would not eliminate the financial gain realized through capital appreciation in the company, however. For this reason, this approach is not recommended.

shareholder of Kidder Mathews. We note that the option of waiving financial interests in contracts is not expressly recognized as a means of avoiding the prohibition in RCW 42.23. Nor has this remedy been recognized as an option under case law. There is some risk that a court would conclude that Commissioner Evans, as an agent of Kidder Mathews that is compensated generally based on commissions, cannot avail herself of the remote interest provisions of RCW 42.23.040 because RCW 42.23.040 recognizes a remote interest of employees and agents "where the compensation of such employee or agent consists entirely of fixed wages or salary." Commissioner Evans is not paid based on a fixed wage or salary.

Accordingly, the waiver would become a key defense if a third-party brings an Ethics Act challenge. In our opinion, the waiver eliminates any financial interest as an "agent" of Kidder Mathews and allows Commissioner Evans to take the position that she is no longer beneficially interested in the Option Agreement or the Brokerage Agreement, except for her interest as a shareholder. The "remote interest" approach described here addresses the underlying intent of the Ethics Act by providing for transparency and eliminating influence over personal financial interests in contracts supervised by an elected official. The waiver should be memorialized to make clear that Commissioner Evans will receive no compensation as a broker for Kidder Mathews under contracts with the Port for the duration of her term of office.

Regarding the shareholder interest, RCW 42.23.070 provides that "a municipal officer is not interested in a contract, within the meaning of RCW 42.23.030, if the officer has only a remote interest in the contract." One category of "remote interest" is when the municipal officer is a "holder of less than one percent of the shares of a corporation or cooperative which is a contracting party." Commissioner Evans holds less than 1% of the shares of Kidder Mathews.

If Commissioner Evans and the Port Commission take the position that the only interest involved is one that is remote, i.e., as a shareholder holding less than one percent of the shares, then Commissioner Evans and the Port must follow statutory procedures prior to contract formation. Any contract approvals regarding the Option Agreement (or other Port contracts with Kidder Mathews) will require compliance with the statute's "remote interest" provisions. Commissioner Evans will be required to disclose the interest to the Port Commission at a public meeting and ensure that the interest is noted in the official minutes of the Port Commission prior to formation of the contract. If the Port Commission authorizes, approves, or ratifies the contract in good faith by a vote, it must do so without counting the vote of Commissioner Evans. Additionally, Commissioner Evans must avoid influencing or attempting to influence any other Commissioners or Port staff in the decision regarding the contract.

Question No. 3: *More generally, how can the Commission avoid Ethics Act violations?*

The Port Commission and Port staff should take the following steps to ensure compliance with the Ethics Act:

(a) Periodically conduct training sessions to ensure awareness of the prohibitions, procedures, and penalties contained in the Ethics Act and the guidelines contained in the Ports' Code of Governance.

(b) Spot potential Ethics Act issues early and discuss ways to ensure compliance with Port General Counsel.

(c) When working through Ethics Act questions, recognize the determination will require a close examination of the facts, and the analysis may be nuanced.

(d) Consider updating the Code of Governance to include specific provisions related to beneficial interests in contracts.

(e) Recognize that if the Port anticipates formation of contraction in which a municipal officer has a beneficial interest, and the contract will be made by, through, or under the supervision of such officer, recusal from voting is not a valid remedy unless an exception applies, or the interest is considered remote.

(f) If the contract falls within one of the exceptions to RCW 42.23.030, follow the statutory procedures prior to formation of the contract.

(g) If the contract falls within one of the "remote interest" provisions of RCW 42.23.040, follow the statutory procedures prior to formation of the contract. For contracts that are approved administratively based on the delegation of authority, the Port should either: 1) have each contract approved by the Port Commission; or 2) have the Port Commission adopt a resolution that recites the provisions of RCW 42.23.040, recognizes the disclosure of the remote interest, and authorizes continued administrative approval of the contracts.

(h) Continue following the "Violations and Enforcement" provision of the Code of Governance.

IV. DISCUSSION

A. The Prohibition Against Beneficial Interests in Municipal Contracts, Generally

We provide the following detailed discussion of the Ethics Act so that the Complaint against Commissioner Evans can be analyzed under applicable State law and to provide an outline for compliance going forward.

1. RCW42.23.030 -Interest in Contracts.

Under the Ethics Act, "no municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein" (RCW 42.23.030.)⁷

⁷ "Municipal officer" is defined to "include all elected and appointed officers of a municipality" "Contract" is defined to "include any contract, sale, lease or purchase" and "contracting party" is defined to include any person, partnership, association, cooperative, corporation, or other business entity which is a party to a contract with a municipality." RCW 42.23.020.

2. The elements of an Ethics Act violation under RCW 42.23.030.

a. Is a municipal officer involved?

The first element of a violation under RCW 42.23.030 is that a municipal officer must be involved. Even a lower-level employee of an organization can be considered a municipal officer under the Ethics Act if they have sufficient contractual authority.⁸ A port commissioner is clearly a municipal officer under the statute.⁹

b. Does the decision involve a contract that confers a financial interest?

The second element required to find a violation under RCW 42.23.030 is that a contract confers a financial interest to the municipal officer. Decisions may appear, at first glance, to involve a contract that confers a beneficial interest, but do not, either because a contract is not involved or because the contract does not confer a financial interest.

In the case of *In re Recall of Olsen*, 154 Wn.2d 606 (2005), a commissioner of a port district cast the deciding vote to have the port retain counsel to represent the commissioners in Open Public Meetings Act litigation and to indemnify them against claims. The court found that the decision to retain counsel and to provide indemnification did not involve a contract, and the decision was therefore not subject to RCW 42.23.030.

In *Barry v. Johns*, a court applying the Ethics Act to city councilmembers concluded that the act seeks only to regulate a municipal officer's financial interests in contracts, not non-pecuniary interests.¹⁰ In *Barry*, the councilmembers approved an agreement that limited the liability of councilmembers in their role in a city-sponsored non-profit organization. The court explained its rationale as follows:

Although the code does not define a beneficial interest, its list of the types of beneficial interests that are not prohibited by the code is instructive. These exceptions include contracts for utility services, publication of legal notices required by law and employment contracts for school bus drivers and other school district employees. See RCW 42.23.030(1)-(10). Because the exceptions to the general rule prohibiting a municipal officer from having a beneficial interest in certain municipal contracts all involve business transactions or employment matters, we conclude the Legislature intended the term beneficial interest under the general rule to encompass the same thing. We conclude, therefore, that RCW 42.23.030 applies only to municipal contracts involving business transactions employment matters and other financial interests and cannot be read to apply to the contract here, which conferred no financial benefit on Johns or Cordova.¹¹

⁸ See, *Valley Environmental Laboratory LLC v. Yakima County, et al*, 139 Wn. App. 239 (2007).

⁹ Op. Atty. Gen. 1963-64, No. 63.

¹⁰ *Barry v. Johns*, 82 Wash. App. 865, 920 P.2d 222 (1996).

¹¹ *Barry v. Johns*, 82 Wash. App. 865, 868, 920 P.2d 222, 223 (1996) (emphasis added). We cite to *Barry* for the principle enunciated by the court, though it seems that protection from liability does, arguably, involve a financial interest.

c. Was the contract made under the supervision of the municipal officer?

The third element involves determining whether the contract was made by, through, or under the supervision of the municipal officer. The court in *Citizens for Des Moines v. Petersen* addressed an arrangement in which individual towing transactions initiated by police officers resulted in nearly all impounded vehicles being towed by "Pete's Towing." A recently elected councilmember was the president, majority shareholder, and a salaried employee of the parent company of Pete's Towing. The *Petersen* Court found the absence of a contract and reasoned that even if a contract existed, it was not made under the supervision of the councilmember.¹²

The *Petersen* Court explained the councilmember's lack of supervisory authority over the towing decisions:

Des Moines is a noncharter code city with a council-manager form of government. The seven-member city council appoints the city manager, who in turns (sic) appoints the chief of police and other department heads. . . . Although the manager reports to the city council, the city manager is the sole person vested with authority to supervise the administrative affairs of the city. . . . And RCW 35A.13.120 expressly provides that "*neither the council nor any committee or member thereof shall give orders to any subordinate of the city manager, either publicly or privately.*" Thus, we reject the premise that Councilman Petersen could, if he wanted, supervise the decision of an officer on the beat with respect to which towing company to call on any given occasion.¹³

The Washington State Supreme Court concluded in similar fashion stating that "[t]he term 'supervision' as used in RCW 42.20.010 and RCW 42.23.030 contemplates a degree of direction and control."¹⁴

Importantly to our analysis here, the *Petersen* court noted that the fact that an elected official's business dealings and municipal role could, in the future, trigger the prohibitions in RCW 42.23.230 does not disqualify the elected official. The court noted, "it would be an oddity for an elected official automatically to be placed in violation of the ethics code merely by being sworn into office." The *Petersen* court suggested that a municipal government may be able to develop a policy to avoid a conflict of interest, stating as follows:

¹² *Citizens for Des Moines, Inc. v. Petersen*, 125 Wash. App. 760, 767, 106 P.3d 290, 294 (2005), as corrected (Oct. 13, 2005) (citations omitted). Likewise, the court in *In re Recall Petition of Olsen*, 154 Wash. 2d 606, 116 P.3d 378 (2005) found no violation because "RCW 42.23.030 applies only to a vote to authorize a contract."

¹³ *Id.* at 769 (emphasis in original).

¹⁴ *Id.* 245.

Were no such remedy available, soon it would be difficult to find capable people willing to run for public office, particularly in small towns where virtually every proprietor in the village may at least occasionally do business with the town.¹⁵

In *City of Raymond v. Runyon* the court stated that Washington courts have strictly enforced the statutory bar against contracts in which public officials have beneficial interests. In *Runyon*, the court stated that "any contract in which an official has an interest is void as to the official's interest, and an official who willfully violates the statute is subject to removal from office. Good faith on the official's part does not mitigate the effect of the statute upon the contract."¹⁶

Runyon was a commissioner of a non-charter code city with a commission form of government. Under the commissioner structure, executive and administrative powers were distributed among three commissioners. One served as the mayor, the second as the financial officer, and the third (Runyon) served as the superintendent of public works. Runyan owned a gravel pit that sold gravel to certain contractors who in turn did business with the city.

The *Runyon* court found that despite well-intentioned attempts to avoid a prohibited conflict of interest, the commissioner violated the Ethics Act because the City's contract for the sewer extension (for which Runyon supplied gravel as a subcontractor) was entered into after Runyon began serving his term. According to the court, [t]hat Runyon did not vote on this contract [did] not shield him from statutory violation." Further, "even though Runyon had no pre-arrangements with the contractor on this specific contract, it was reasonable to anticipate that [the primary contractor] would again buy rock from Runyon under the new contract because the contract specified rock of the type supplied by Runyon; [the primary contractor] had purchased rock from Runyon in the past under similar contracts; and Runyon owns one of only two rock quarries in the area."

The *Runyon* court also took issue with change orders to the contract executed after the commissioner took office. The fact that Runyon delegated the duty to approve and sign change orders to the City engineer did not remove his responsibility, because the City engineer reported directly to Runyon under her job description. The *Runyon* court explained as follows:

Under RCW 42.23.030, modifications or changes to existing city contracts that require acceptance and consideration are considered contracts made through or under the supervision of the respective municipal officer. The change orders at issue were made through or under Runyon's supervision 17

Importantly, the contracts between the City and the prime contractor that predated Runyon's time in office did not violate the Ethics Act.¹⁸

¹⁵ *Citizens for Des Moines, Inc. v. Petersen*, 125 Wash. App. 760, 772, 106 P.3d 290, 296 (2005), as corrected (Oct. 13, 2005).

¹⁶ *City of Raymond v. Runyon*, 93 Wash. App. 127, 134, 967 P.2d 19, 23 (1998).

¹¹ *Id.*

¹⁸ *Id.*

- d. Assuming a municipal officer is beneficially interested in a contract, is recusal from voting a remedy?

In our opinion, recusal from voting is not an option when an exception does not apply and the interest is not "remote." Exceptions and remote interests are discussed below. Although no court case has addressed the issue with full analysis, the conservative view is that the blanket prohibition contained in RCW 42.23.030 and the statutory framework which allows for recusal or other remedies in the context of exceptions and remote interest means that recusal is not a remedy under the blanket prohibition. In *Runyon*, the court found that the fact that Runyon "did not vote on [the] contract [did] not shield him from statutory violation."¹⁹

3. RCW 42.23.030 - Exceptions.

RCW 42.23.030 provides for exceptions and states that the prohibition does not apply in several specific situations. However, even when a contract falls within an exception, certain limitations and requirements apply. Based on the facts, none of the exceptions apply to the contracts involved in the Panattoni Project, but we note the exceptions for future reference. Selected statutory exceptions that could arise in a port district include the following:

- The furnishing of electrical, water or other utility services by the port, where authorized under statute, at the same rates and on the same terms as are available to the public generally;
- The designation of public depositaries for port funds;
- The publication of legal notices required by law to be published by a port, upon competitive bidding or at rates not higher than prescribed by law for members of the general public;
- The employment of any person by a port for unskilled day labor at wages not exceeding \$1,000.00 in any calendar month;
- The letting of any other contract in which the total amount received under the contract or contracts by a port municipal officer or the officer's business does not exceed \$1,500.00 in any calendar month. However, this exception does not apply to: (a) a sale or lease by the municipality as the seller or lessor; or (b) contracts for legal services, except for reimbursement of expenditures. The municipality must maintain a list of all contracts that are awarded under this exception, and the list must be made available for public inspection and copying; and

¹⁹ An analysis of RCW 42.23.030, published by the Municipal Research and Services Center on February 22, 2022, reached the same conclusion. The link to the MRSC analysis is provided here: <https://mrsc.org/Home/Stay-Informed/MRSC-Insight/February-2022/Resolving-Financial-Conflicts-of-Interest.aspx>.

- The leasing by a port district as lessor of port district property to a port municipal officer or to a contracting party in which a port municipal officer may be beneficially interested, if in addition to all other legal requirements, a board of three disinterested appraisers and the superior court in the county where the property is situated finds that all terms and conditions of such lease are fair to the port district and are in the public interest. The appraisers must be appointed from members of the American Institute of Real Estate Appraisers by the presiding judge of the superior court.²⁰

Even when a specific exception allows for the contract, the statute precludes the municipal officer from voting on the contract, requires disclosure of the interest to the governing body before contract formation, and the interest must be noted in the official minutes of the municipality before contract formation.

4. RCW 42.23.040 - Remote Interests.

Chapter 42.23 RCW provides that a municipal officer does not have an interest in a contract if the interest is "remote." But, if a municipal officer has a remote interest, certain requirements apply. RCW 42.23.040 provides the following:

A municipal officer is not interested in a contract, within the meaning of RCW 42.23.030, if the officer has only a remote interest in the contract and the extent of the interest is disclosed to the governing body of the municipality of which the officer is an officer and noted in the official minutes or similar records of the municipality prior to the formation of the contract, and thereafter the governing body authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer having the remote interest. As used in this section "remote interest" means:

- (1) That of a nonsalaried officer of a nonprofit corporation;
- (2) That of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salary;
- (3) That of a landlord or tenant of a contracting party; or
- (4) That of a holder of less than one percent of the shares of a corporation or cooperative which is a contracting party.

To take advantage of the "remote interest" provisions, the municipal officer must fall within one of the categories stated above and must avoid any attempt "to influence any other officer of the municipality of which he or she is an officer to enter into the contract."

²⁰ This exception is specific to port districts. The other exceptions listed apply to municipal entities generally.

5. Remedy for Violation - Contracts are Void and Penalties are Assessed Against the Municipal Officer.

As provided by RCW 42.23.050, any contract made in violation of the statute "is void and the performance thereof, in full or in part, by a contracting party shall not be the basis of any claim against the municipality." Further the officer that violates the statute "is liable to the municipality of which he or she is an officer for a penalty in the amount of five hundred dollars, in addition to such other civil or criminal liability or penalty as may otherwise be imposed upon the officer by law." Finally, "the violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office."

B. Application of RCW 43.23.030 to Commissioner Evans' Involvement in the Panattoni Project

1. Asserted Violation Based on Contracts Approved and Executed Prior to Commissioner Evans Taking Office.

Commissioner Evans was not a municipal officer at the time the Option Agreement and Brokerage Agreement were formed. Accordingly, the first element of a violation is lacking.

The second element of a violation of RCW 42.23.030, a beneficial interest in the contracts, has been minimized due to the waiver. Under the case law, Commissioner Evans' beneficial interest is now limited to her interest as a shareholder, which is discussed below in connection with future action.

The second element of a violation of RCW 42.23.030, some degree of direction and control over contract formation, has not been met because the Port Commission has taken no action on the Option Agreement or the Brokerage Agreement since January 1, 2022, the date that Commissioner Evans commenced her term as a commissioner. Both the Option Agreement and the Brokerage Agreement were executed and in place when Commissioner Evans took office.

A violation of RCW 42.23.030 occurs when the contract at issue was made by, through, or under the supervision of the municipal officer. The *Petersen* and *Runyon* cases explain that no such supervision occurs when an elected official takes office after the contract is executed. It would be an "oddity" for Commissioner Evans to be "placed in violation of the ethics code merely by being sworn into office."²¹ Accordingly, there has been no violation of RCW 42.23.030 based on the facts as currently presented.

2. Potential Violation Based on Contractual Approvals in the Future.

Looking ahead, we anticipate that some condition, element, and/or amendment of the Option Agreement, such as approval of a ground lease (or Phased Plan), will likely come before the Port Commission for consideration, approval, or other action. Moreover, we anticipate that the Commission's ensuing action may very well impact whether, and to what extent, Kidder Matthews will receive brokerage commission fees. Accordingly, Commissioner Evan's role as

²¹ *Citizens for Des Moines, Inc. v. Petersen*.

an independent contractor and shareholder of Kidder Matthews, combined with her policy and decision-making role as Port Commissioner, requires consideration of future contract related approvals.

Commissioner Evans and the Port Commission can mitigate the risk of a violation by ensuring Commissioner Evans does not receive any commission-based financial benefit from the Option Agreement and/or the Brokerage Agreement and by following the "remote interest" provisions set forth above. After Commissioner Evans' waiver of her commission, she remains financially interested in the Option Agreement and Brokerage Agreement through her status as a shareholder. However, her interest as a shareholder will then qualify as a remote interest because the percentage of shares owned is less than 1%. (RCW 42.23.040(4))

It is important to note that there is no legal authority that outlines a precise pathway for a municipal officer to waive some or all of the financial benefits that would otherwise flow to the officer and thereby avoid a violation of RCW 42.23.030. However, the statutory framework, the cases construing the statute, and the spirit of the statute support this approach.

Under *Barry v. Johns*, application of RCW 42.23.030 pertains to the financial benefits conferred by a contract and not to contracts "which conferred no financial benefit" to a municipal officer.²² Though courts apply the prohibition in RCW 42.23.030 strictly, both the statute and the courts have recognized a legislative intent that combines ethical duties with the need to allow for a wide group of citizens to hold elective office. When the statute was revised in 1961, legislature provided this statement of purpose:

It is the purpose and intent of this chapter to revise and make uniform the laws of this state concerning the transaction of business by municipal officers, as defined in chapter 268, Laws of 1961, in conflict with the proper performance of their duties in the public interest; and to promote the efficiency of local government by prohibiting certain instances and areas of conflict while at the same time sanctioning, under sufficient controls, certain other instances and areas of conflict wherein the private interest of the municipal officer is deemed to be only remote, to the end that, without sacrificing necessary public responsibility and enforceability in areas of significant and clearly conflicting interests, the selection of municipal officers may be made from a wider group of responsible citizens of the communities which they are called upon to serve.²³

The court in *Petersen* also noted the need to provide for remedies to ensure that local governments can find capable people willing to run for public office.

Following the remote interest pathway, future contractual approvals related to the Option Agreement or the Brokerage Agreement would be addressed by following RCW 42.23.040 which includes the following provisions: (a) the extent of the interest must be disclosed to the Port Commission in an open session of a Commission Meeting; (b) the interest must be noted in the official minutes of the Port Commission prior to the formation of the contract; and (c) if the Port Commission authorizes, approves, or ratifies the contract, it must do so without counting

²² *Barry v. Johns*, 82 Wash. App. 865, 868, 920 P.2d 222, 223 (1996) (emphasis added).

²³ RCW 42.23.010.

the vote of Commissioner Evans. Commissioner Evans must adhere to the final limitation provided by RCW 42.23.040, i.e., she must avoid influencing or attempting to influence any other Commissioners or Port staff in the decision.

Regarding future contracts between the Port and Kidder Mathews that would otherwise be approved administratively, the Port has three options. As discussed in more detail in the next section, Port contracts that are approved administratively (and are not considered by the Port Commission) are nevertheless made under the supervision of the Port Commission.

One, the no risk option going forward would be to utilize the services of a different real estate broker.

A second option would be for all future contracts between the Port and Kidder Mathews to be brought before the Port Commission individually to be approved by the Port Commission, following the required steps of RCW 42.23.040.

A third option would be for the Port Commission to adopt a resolution, following official disclosure of the remote interest by Commissioner Evans and a notation in the minutes. The resolution would recite the provisions of RCW 42.23.040, recognize the disclosure by Commissioner Evans, and authorize continued administrative approval of brokerage agreements so long as they are consistent with the duly adopted delegation of authority.

We make a note regarding concerns that may be raised by parties that conduct business with Kidder Mathews, and, separately, conduct business with the Port. For example, a property owner may lease commercial space to various tenants including the Port. The property owner may use Kidder Mathews as its commercial real estate broker when it negotiates with tenants other than the Port. In this example, there is no contract between the Port and Kidder Mathews. Rather, the contractual relationship is between the property owner and Kidder Mathews. Accordingly, Ethics Act issues are not raised in this example.

3. In the Absence of an Exception or Remote Interest. Can a Commissioner be Insulated from the Prohibition by Recusal or Some Other Means?

As discussed above, the potential conflict raised by the Complaint likely can be addressed under the "remote interest" provision so long as Commissioner Evans' holdings account for less than 1% of the shares of Kidder Mathews. Remote interest provisions aside, a port district confronted with the blanket prohibition contained in RCW 42.23.030 may attempt to fashion a remedy that addresses the manner in which contracts are approved. This could take the form of recusal from voting or by delegating the approval and execution of such contracts to port administration. Unless the contractual interest falls within an exception or is a remote interest, neither approach is a viable option in our view.

Based on a conservative reading of the statute, the remedy of recusal from voting is not an option because the statute does not afford this remedy.

The remedy of approving contracts administratively is not likely an option due to the governance structure of port districts. In our opinion, there would be risk in the Port Commission taking the

position that contracts approved administratively insulate the commissioners from having direction and control over port contracts. Through Port of Olympia Commission Resolution 2019-07, the Port has delegated to the Executive Director certain administrative authority to approve and sign real property agreements and broker agreements, but within specific parameters.

In delegating authority regarding real estate contracts with limitations, it has exercised direction and control over real property transactions, including broker agreements. RCW 53.12.270 provides authority to the Commission to delegate certain administrative powers and duties, but the ultimate direction and control resides with the Commission.²⁴ Accordingly, though the Brokerage Agreement was approved and executed administratively, it is likely that a court would find such agreements to be made under the supervision of the Port Commissioners.²⁵

C. Prohibited Uses of Public Office

Beyond contract interests, RCW 42.23.070 sets forth general ethical guidelines for port districts and prohibits municipal officers of port districts from taking four types of action while in office. Specifically, municipal officers may not:

1. Use their position to secure special privileges or exemptions for themselves or others;
2. Give, receive, or agree to receive, directly or indirectly, any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer;
3. Accept employment or engage in business or professional activity that they might reasonably expect would require or induce them by reason of their official position to disclose confidential information acquired by reason of their official position; or
4. Disclose confidential information gained by reason of their position, nor may they otherwise use such information for their personal gain or benefit.

A recall petition case illustrates how an allegation may proceed under RCW 42.23.070(1) which prohibits the use of an elected position to secure special privileges or exemptions for themselves or others. In the matter of *In re Recall of Burnham*, a town resident sought the

²⁴ See *Runyon*, discussed above, for the analogous situation involving a City commissioner.

²⁵ A court would not likely view Port Commission supervision and control of contracts as it did in the *Petersen* case. *Petersen* involved a code city form of government that provides distinct statutory lines of authority between legislative and administrative functions. Port Commission authority over contracts fall more readily within the reasoning of *Runyon*, which involved a form of government in which the Commissioner retained supervisory authority over contracts. "In *Runyon*, the public works commissioner had the ultimate responsibility for public works contracts and could not insulate himself from conflicts of interest by delegating responsibility to an underling," as explained by *Citizens for Des Moines v. Petersen*. Similarly, Port Commission supervision and control over contracts is distinguishable from the independent administration of contracts found in *City of Seattle v. State*, 100 Wash. 2d 232, 246, 668 P.2d 1266, 1273 (1983).

recall of the mayor for his use of a parking lot owned by the town to park personal business vehicles, i.e., a special privilege was alleged. The court concluded that the evidence of a special privilege was insubstantial because the right to park on the town-owned lots was held in common by local residents (no one was excluded) and he did not make himself the recipient of a gift of public funds because he did not receive any property.²⁶

We also highlight the case of *Hubbard v. Spokane City*,²⁷ in which the court emphasized that RCW 42.23.070(1) extends beyond the bar against a municipal official seeking to secure special privileges for themselves-the statute prohibits a municipal official from seeking such privileges for *others* as well.

Here, the Complaint cites no facts to support a violation of the "special privilege" or other provisions of RCW 42.23.070. Nor has the review conducted by this office identified any facts that suggest a violation of such prohibitions.

D. DUTIES OF THE COMMISSION AFTER RECEIVING AN ETHICS ACT COMPLAINT- ENFORCEMENT MECHANISMS

The Complaint alleges the Ethics Act itself imposes a duty on the Port Commission to conduct a public investigation and issue public findings regarding the alleged violation. The Complaint also asserts the Port Commission must decide whether Commissioner Evans will be permitted to participate in any "Port business."

As noted above, there is a pathway to minimize the risk that Commissioner Evans' participation in real estate matters that involve contractual interests of Kidder Matthews will be found in violation of RCW 42.23.

Moreover, the Ethics Act does not expressly require a Commission, to impose on its own accord, substantive restrictions on a duly elected Commissioner. The Complaint's citation to language in RCW 42.23.060 regarding the "minimum standards to be enforced by municipalities" is in reference to charter provisions of city and county governments. In this context, it is also important to note that Port districts likely have an implied duty to enforce the Ethics Act as it applies to municipal officers that are not elected officials.

We have identified the following pathways for Ethics Act enforcement under State law: (1) the Washington State Auditor will receive complaints and may refer findings to the State Attorney General; (2) a municipal entity *may* seek a declaratory judgment from a court to determine whether a violation has occurred as the city did in the *Runyon* case; and (3) a private person may seek a declaratory judgment from a court and/or may file a petition for recall on the basis of an alleged violation.

Here, the Port Commission acted in accordance with its Code of Governance in retaining an outside investigation and review of the matter. The Port's Code of Governance identifies the

²⁶ *In re Recall of Burnham*, 194 Wash. 2d 68, 81, 448 P.3d 747, 754 (2019).

²⁷ 146 Wash. 2d 699, 50 P.3d 602 (2002), overruled on other grounds by *Rose v. Anderson Hay & Grain Co.*, 184 Wash. 2d 268, 358 P.3d 1139 (2015).

following potential actions in the event it determines an allegation is well founded: (a) further Commission discussion; (b) verbal warning; (c) written warning; (d) letter of censure; and/or (e) removal from leadership positions.

We have found the allegation to be unfounded based on the facts presented to date.

If a private person challenges Commissioner Evans' actions under the Ethics Act, an issue arises as to whether the Port must fund the defense costs. In our opinion, responsibility for defense costs will depend on whether the challenge implicates Port interests or whether it implicates the personal interests of Commissioner Evans. For example, Commissioner Evans would likely be responsible for the costs of defending a recall petition. If a lawsuit sought to void Port contracts, then the Port would likely have the option of funding defense costs.

E. GENERAL RECOMMENDATIONS TO ENSURE COMPLIANCE WITH ETHICAL STANDARDS

The Port's Code of Governance is well developed and provides appropriate guidance with respect to Ethics Act provisions, including the prohibitions against securing special privileges or exemptions; using an elected office for personal gain or profit; disclosure of confidential information; and acceptance of employment or engaging in business that a Port Commissioner might reasonably expect would require or induce the disclosure of confidential information. The Code of Governance references RCW 42.23 but does not contain specific provisions related to beneficial interests in contracts.

Moving forward, the Port Commission and Port staff should take the following steps to ensure compliance with the Ethics Act:

- (a) Periodically conduct training sessions to ensure awareness of the prohibitions, procedures, and penalties contained in the Ethics Act.
- (b) Spot potential Ethics Act issues early and discuss ways to address them with Port General Counsel.
- (c) When working through Ethics Act questions, recognize that the determination will require a close examination of the facts and the analysis may be nuanced.
- (d) Consider updating the Code of Governance to include specific provisions related to beneficial interests in contracts.
- (e) Recognize that if the Port anticipates formation of contraction in which a municipal officer has a beneficial interest and the contract will be made by, through, or under the supervision of such officer, recusal from voting is not a valid remedy unless an exception applies, or the interest is considered remote.
- (f) If the contract falls within one of the exceptions to RCW 42.23.030, follow the statutory procedures prior to formation of the contract.

(g) If the contract falls within one of the "remote interest" provisions of RCW 42.23.040, follow the statutory procedures prior to formation of the contract. For contracts that are approved administratively based on the delegation of authority, the Port should either: 1) have each contract approved by the Port Commission; or 2) have the Port Commission adopt a resolution that recites the provisions of RCW 42.23.040, recognizes the disclosure of the remote interest, and authorizes continued administrative approval of the contracts.

(h) Continue following the "Violations and Enforcement" provision of the Code of Governance.

Federal law provides an additional conflict of interest standard that would apply to a port district's procurement of a contract that is supported by an award of federal funds. (2 C.F.R. § 200.318). We have advised port districts to adopt the following procurement policy provision to address this requirement:

No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract.

The officers, employees, and agents of the Port may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. Disciplinary action will be taken against any employee, up to and including termination, for any violation of these ethics standards.

We trust that the analysis and recommendations set forth above will provide useful guidance.

EXHIBIT A

Date: January 7, 2022

Olympia Port Commissioners:

Amy Evans was elected to the Port Commission in November 2021. In advance of election, Evans acknowledged she has an actual or perceived conflict of interest with respect to a Port Commission lease with Panattoni (SSECC PDC, LLC, a Delaware limited liability company). Evans wrote to The Olympian newspaper (Att. I) and stated in a letter published on October 24, 2021, "I believed the perceived or actual conflict of interest was minimal [.]"

Washington law does not permit self-identified "minimal" actual or perceived conflicts of interest; the existence of a conflict of interest is not judged by the size; and in this case there is evidence that Evans is due some or all of a real estate commission of approximately \$1.57 million (Att. 2).

Evans's acknowledged conflict of interest stems from her relationship to Kidder Mathews (a real estate broker that has represented Panattoni in lease negotiations with the Port of Olympia). As a real estate agent or broker (who is also an attorney with ethical obligations) in the employ of Kidder Mathews, and as a port commissioner, Evans is not permitted to "be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein." RCW 42.23.030. None of the exceptions in RCW 42.23.030 appear to apply to Evans's conflict of interest as she herself has identified that conflict.

In some circumstances a port district may let a commissioner keep the office and act as a commissioner when there is only a "remote" interest in conflict with a commissioner's duties. RCW 42.23.010; RCW 42.23.040. It is up to the sitting commissioners to make a determination whether Evans's conflict of interest is remote because in RCW 42.23.010 the legislature stated that if a commissioner's conflict of interest is one "wherein the private interest of the municipal officer is deemed to be only remote" the commissioner may serve and participate in district business related to the remote interest. (*Italics added.*) Deem is an active verb and so the only way Evan's conflict of interest could be remote is if the sitting commissioners find that Evans's conflict is remote consistent with statute. See RCW 42.23.040(1)-(4) including especially "None of the provisions of this section are applicable to any officer interested in a contract, even if the officer's interest is only remote, if the officer influences or attempts to influence any other officer of the municipality of which he or she is an officer to enter into the contract."

The Port Commission has the responsibility to determine remoteness or the lack of remoteness, and thus also has the obligation to investigate and evaluate prior to reaching a conclusion on remoteness. See RCW 42.23.060 ("The provisions of this chapter shall be considered as minimum standards to be enforced by municipalities.") A failure by the sitting commissioners to investigate and evaluate fully the circumstances pertaining to a conclusion on remoteness would be both malfeasance and nonfeasance.

One indication of remoteness is compensation by fixed wage or salary. RCW 42.23.040(2). Agents and brokers traditionally are compensated through commissions. In the event Kidder Mathews now or in the future should switch Evans's compensation (from commission to fixed wage, salary, bonus, or other compensation) it would be reasonable to conclude that it is the duty of the Commission to determine if the switch is for the purpose of evasion of the conflict-of-interest prohibitions of law, and it would be reasonable to place the burden on Evans to demonstrate that such a switch was not done to evade applicable prohibitions.

RCW 42.23.060 ("The provisions of this chapter shall be considered as minimum standards to be enforced by municipalities") supports the conclusion that such an examination behind mere surface appearances is the duty of the Commission; anything less than an examination would, again, be both malfeasance and nonfeasance.

RCW 42.23.070 lists prohibitions that apply to all port commissioners without regard to any actual or apparent conflict of interest. Prohibited acts include:

- (1) No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.
- (2) No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law.

(3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.

(4) No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit.

If Kidder Mathews has an interest in present or future leases - including modifications or renegotiations during the 30-year length of the lease between the Port of Olympia and Panattoni - then Evans has an interest based on her relationship to Kidder Mathews.

It is up to the Port Commission under RCW 42.23.060 ("The provisions of this chapter shall be considered as minimum standards to be enforced by municipalities") to make an investigation into and public findings that demonstrate Evans can fulfill the duties of commissioner without engaging in any of the four prohibited behaviors set out by the legislature.

Violations of chapter 42.23 RCW can have substantial consequences for the violator and for the Port:

Any contract made in violation of the provisions of this chapter is void and the performance thereof, in full or in part, by a contracting party shall not be the basis of any claim against the municipality. Any officer violating the provisions of this chapter is liable to the municipality of which he or she is an officer for a penalty in the amount of five hundred dollars, in addition to such other civil or criminal liability or penalty as may otherwise be imposed upon the officer by law.

In addition to all other penalties, civil or criminal, the violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office.

(RCW 42.23.050)

While forfeiture of her office might be a blow to Evans, there is a real risk that the Port (and therefore Thurston County residents), might suffer financially in the event that her participation in any contract - not just a lease in which Kidder Matthews has an interest - is determined to be void under RCW 42.23.050 because she is in violation of any part of chapter 42.23 RCW.

In effect, the examination by the Port Commission of the conflict of interest to which Evans has admitted is also a test for the two sitting commissioners. The sitting commissioners have a duty to conduct a public investigation of Evan 's self-admitted conflict of interest and test her conflict and the duties she will assume as commissioner against all the requirements and prohibitions of chapter 42.30 RCW. The first issue to be examined and decided by the sitting commissioners is whether Evans should be permitted to participate in any Port business while her self-admitted conflict of interest might have implications for her ability to serve, and while the validity of contracts made with her participation before the application of chapter 42.23 RCW is determined, especially the application of RCW 42.23.050.

Sincerely,

Carla Wulfsberg
709 N 7th Avenue SW
Tumwater, WA 98512

Cc: Martha (Sam) Gibboney, Executive Director, Port of Olympia; Rudy Rudolph, Acting Executive Director, Port of Olympia; Jon Tunheim, Prosecuting Attorney for Thurston County; Editor, The Olympian

Attachment I : Amy Evans's letter to the editor, The Olympian, October 24, 2021

Attachment 2: Panattoni pro forma, data from Port of Olympia real estate staff, July 13, 2020

Attachment. I: Amy Evans's Letter to The Olympian addressing her conflict of interest

Port candidate Evans addresses conflict of interest, 24 Oct. 2021

My name is Amy Evans. I am running for Port Commissioner. A few weeks ago, there was a Letter to the Editor stating I have been paid \$1.57 million dollars for my work leasing Port real estate to Panattoni. (Public records confirm I have been paid \$0.00.) Last weekend, The Olympian Editorial Board did not endorse my campaign based on my work leasing one Port property. With the major terms already agreed upon and my work completed prior to taking office, I believed the perceived or actual conflict of interest was minimal, but concern remained.

To eliminate this concern, I am foregoing any monetary compensation for my work leasing this parcel to Panattoni. Our campaign limited campaign contributions to \$250 per person per election, because we believe in taking the money out of politics. Over 200 individuals/organizations have contributed to our grassroots campaign, including diverse and bipartisan stakeholders like ILWU Local 47 Longshoremen and many private business owners. I am committed to serving ALL of Thurston County.

I am hopeful foregoing my fee for the work I have done further evidences this commitment. As we continue to look at the work we do with an equity lens, I think it is important to recognize, my privilege is what allows me to complete work without pay. If we intend to build diverse leadership groups, I hope we will hold space for those who may have contributed to one of the Port's business lines previously and do not have this privilege. With collaboration, more is possible.

Amy Evans, Olympia

(<https://www.theolympian.com/opinion/letters-to-the-editor/article255190882.html>)

Attachment 2: Panattoni pro forma, with Kidder-Mathews real estate commission calculation

| Year | Lease/option revenue | Cumulative | | | Lease Rate/psf | annual | annual | annual | fully develope | Cumulative Revenue |
|---------------|----------------------|----------------|----------------|-------------------|----------------|-----------------------|----------------------|---------------------|----------------|--------------------|
| | | Leased acreage | Leased acreage | Leased Land Value | | Lease revenue | HCPcost | Other Port costs | Net Revenue | |
| 2020 | \$ 0 | 0 | | | \$ 0.48 | \$ | \$ | \$ 80,000 | \$ {80,000} | \$ (80,000) |
| 2021 | \$ 0 | 0 | | | \$ 0.48 | \$ | \$ | \$ 60,000 | \$ {60,000} | \$ {140,000} |
| 2022 | \$ 100,000 | 0 | | | \$ 0.48 | \$ | \$ | \$ 60,000 | \$ 40,000 | \$ {100,000} |
| 2023 | \$ 354,916 | 20 | 20 | \$ 5,227,200 | \$ 0.48 | \$ | \$ 148,131 | \$ 120,000 | \$ 86,785 | \$ (13,215) |
| 2024 | \$ 354,916 | 20 | 40 | \$ 10,454,400 | \$ 0.48 | \$ | \$ 296,262 | \$ 120,000 | \$ {61,346} | \$ (74,560) |
| 2025 | \$ 351,309 | 20 | 60 | \$ 17,249,760 | \$ 0.53 | \$ 459,994 | \$ 444,394 | \$ 120,000 | \$ 246,909 | \$ 172,348 |
| 2026 | \$ 351,309 | 20 | 80 | \$ 22,999,680 | \$ 0.53 | \$ 919,987 | \$ 592,525 | \$ 120,000 | \$ 558,771 | \$ 731,120 |
| 2027 | \$ | 20 | 100 | \$ 28,749,600 | \$ 0.53 | \$ 1,379,981 | \$ 740,657 | \$ 120,000 | \$ 519,324 | \$ 1,250,443 |
| 2028 | \$ | 20 | 120 | \$ 34,499,520 | \$ 0.53 | \$ 1,839,974 | \$ 888,788 | \$ 120,000 | \$ 831,186 | \$ 2,081,630 |
| 2029 | \$ | 20 | 140 | \$ 40,249,440 | \$ 0.53 | \$ 2,299,968 | \$ 1,036,920 | \$ 120,000 | \$ 1,143,048 | \$ 3,224,678 |
| 2030 | \$ - | 20 | 160 | \$ 50,599,296 | \$ 0.58 | \$ 3,035,958 | \$ 1,185,051 | \$ 120,000 | \$ 1,730,907 | \$ 4,955,585 |
| 2031 | \$ | 20 | 180 | \$ 56,924,208 | \$ 0.58 | \$ 3,541,951 | \$ 1,333,182 | \$ 120,000 | \$ 2,088,769 | \$ 7,044,353 |
| 2032 | \$ | 0 | 180 | \$ 56,924,208 | \$ 0.58 | \$ 4,047,944 | \$ 1,333,182 | \$ 60,000 | \$ 2,654,762 | \$ 9,699,115 |
| 2033 | \$ | 0 | 180 | \$ 56,924,208 | \$ 0.58 | \$ 4,553,937 | \$ 1,333,182 | \$ 60,000 | \$ 3,160,755 | \$ 12,859,870 |
| 2034 | \$ | 0 | 180 | \$ 56,924,208 | \$ 0.58 | \$ 4,553,937 | \$ 1,333,182 | \$ 60,000 | \$ 3,160,755 | \$ 16,020,624 |
| 2035 | \$ | 0 | 180 | \$ 62,616,629 | \$ 0.64 | \$ 5,009,330 | \$ 1,333,182 | \$ 60,000 | \$ 3,616,148 | \$ 19,636,773 |
| 2036 | \$ | 0 | 180 | \$ 62,616,629 | \$ 0.64 | \$ 5,009,330 | \$ 1,333,182 | \$ 60,000 | \$ 3,616,148 | \$ 23,252,921 |
| 2037 | \$ | 0 | 180 | \$ 62,616,629 | \$ 0.64 | \$ 5,009,330 | \$ 1,333,182 | \$ 65,000 | \$ 3,611,148 | \$ 26,864,069 |
| 2038 | \$ | 0 | 180 | \$ 62,616,629 | \$ 0.64 | \$ 5,009,330 | \$ 1,333,182 | \$ 65,000 | \$ 3,611,148 | \$ 30,475,218 |
| 2039 | \$ | 0 | 180 | \$ 62,616,629 | \$ 0.64 | \$ 5,009,330 | \$ 1,333,182 | \$ 65,000 | \$ 3,611,148 | \$ 34,086,366 |
| 2040 | \$ | 0 | 180 | \$ 72,007,947 | \$ 0.73 | \$ 5,760,636 | \$ 1,333,182 | \$ 65,000 | \$ 4,362,454 | \$ 38,448,820 |
| 2041 | \$ | 0 | 180 | \$ 72,007,947 | \$ 0.73 | \$ 5,760,636 | \$ 1,333,182 | \$ 65,000 | \$ 4,362,454 | \$ 42,811,273 |
| 2042 | \$ | 0 | 180 | \$ 72,007,947 | \$ 0.73 | \$ 5,760,636 | \$ 1,333,182 | \$ 75,000 | \$ 4,352,454 | \$ 47,163,727 |
| 2043 | \$ | 0 | 180 | \$ 72,007,947 | \$ 0.73 | \$ 5,760,636 | \$ 1,333,182 | \$ 75,000 | \$ 4,352,454 | \$ 51,516,181 |
| 2044 | \$ | 0 | 180 | \$ 72,007,947 | \$ 0.73 | \$ 5,760,636 | \$ 1,333,182 | \$ 75,000 | \$ 4,352,454 | \$ 55,868,635 |
| 2045 | \$ | 0 | 180 | \$ 79,201,881 | \$ 0.81 | \$ 6,336,150 | \$ 1,333,182 | \$ 75,000 | \$ 4,927,968 | \$ 60,796,603 |
| 2046 | \$ | 0 | 180 | \$ 79,201,881 | \$ 0.81 | \$ 6,336,150 | \$ 1,333,182 | \$ 75,000 | \$ 4,927,968 | \$ 65,724,572 |
| 2047 | \$ | 0 | 180 | \$ 79,201,881 | \$ 0.81 | \$ 6,336,150 | \$ 1,333,182 | \$ 85,000 | \$ 4,917,968 | \$ 70,642,540 |
| 2048 | \$ | 0 | 180 | \$ 79,201,881 | \$ 0.81 | \$ 6,336,150 | \$ 1,333,182 | \$ 85,000 | \$ 4,917,968 | \$ 75,560,509 |
| 2049 | \$ | 0 | 180 | \$ 79,201,881 | \$ 0.81 | \$ 6,336,150 | \$ 1,333,182 | \$ 85,000 | \$ 4,917,968 | \$ 80,478,477 |
| totals | \$ 1,512,451 | 180 | | | | \$ 112,164,212 | \$ 30,663,186 | \$ 2,535,000 | | |

1. HCP completed by end of 2022
2. Leases are made at rate of 20 acres per year, starting in 2023
3. There are 20 acres residual, Panattoni is not able to lease
4. This pro forma looks out 30 years
5. 2-year construction delay before lease revenue
6. Assumes FMV adjustment of 15% at year 20
7. HCP Cost bonded over 20 years at 4%

| |
|---|
| Real Estate Commission (Kidder Mathews) |
| 3% of the \$6.00/psf valuation |
| 0.18 commision per sf |
| 8,712,008.00 sf |
| \$1,568,161 Real estate commission |