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April 15, 2016
Memo Re: RCW 36.32.210
SMC

FACTUAL BACKGROUND

An email from Glen Morgan was received by the Prosecuting Attorney on Wednesday, April 13, 2016, alleging the Douglas County Commissioners committed violations of criminal law under RCW 36.32.210 for failure to file a statement of annual inventory of capitalized assets for years 2011 through 2015.

The following factual background is based upon records of the County Auditor, as well as information obtained from the Auditor and the Clerk of the Board of County Commissioners.

1. On March 22, 2016, the Board of County Commissioners filed with the County Auditor a statement verified by oath regarding an inventory of the capitalized assets of Douglas County for year 2011, 2012, 2013, 2014 and 2015.
2. The Clerk of the Board maintained the inventory of capitalized assets on a current basis during years 2011, 2012, 2013, 2014 and 2015.
3. The county's inventory of capitalized assets has at all times been available for public inspection and copying at the office of the Board of County Commissioners.
4. The Clerk of the Board neglected to prepare and present to the Board of County Commissioners a statement under oath for filing with the County Auditor until March 22, 2016.
5. The Washington State Auditor conducts audits of Douglas County annually and has, in the past, audited the county's inventory of capital assets.

LEGISLATIVE BACKGROUND

RCW 36.32.210(1) provides:

Each board of county commissioners of the several counties of the state of Washington shall, on the first Monday of March of each year, file with the auditor of the county a statement verified by oath showing for the twelve months period ending December 31st of the preceding year

This subsection of RCW 36.32.210 was amended in in 1995 to change the filing obligation from "[e]ach county commissioner" to "[e]ach board of county commissioners." Laws of 1995, ch. 194, sec. 5. The change was made to modernize the statute by eliminating "archaic language and references to record-keeping

techniques no longer practiced.” Final Bill Report, SSB 5183, 1995. The prior language in RCW 36.32.210(1) reflected the prior county commissioner schema under which each commissioner had direct responsibility for a “road district” within the county and the responsibility to maintain an inventory of “all tools, machinery, equipment and appliances belonging to the district of such commissioner used or intended to be used in any public work.” Accordingly, the prior language required “each commissioner” to file an inventory for his or her road district.

The amendment of RCW 36.32.210 was not accompanied by amendments to RCW 36.32.215, .220, .225 and .230. In 2003, these statutes were repealed as part of a technical bill and the repealed statutory language was transferred to RCW 36.32.210 as new subsections (2), (3), (4) and (5). Laws of 2003, ch. 53, sec. 204.

- (2) Inventories shall be filed with the county auditor as a public record and shall be open to the inspection of the public.
- (3) Any county commissioner failing to file such statement or willfully making any false or incorrect statement therein or aiding or abetting in the making of any false or incorrect statement is guilty of a gross misdemeanor.
- (4) It is the duty of the prosecuting attorney of each county to within three days from the calling to his or her attention of any violation to institute proceedings against such offending official and in addition thereto to prosecute appropriate action to remove such commissioner from office.
- (5) Any taxpayer of such county is hereby authorized to institute the action in conjunction with or independent of the action of the prosecuting attorney.

RCW 36.32.210(2), (3), (4) and (5).

ANALYSIS

RCW 36.32.210(3) imposes criminal liability upon a county commissioner for “failing to file such statement.” The Board of County Commissioners filed the inventory statements on March 22, 2016. RCW 36.32.210(3) does not impose criminal liability for *late filing* of the statement. The Legislature could have expressly included late filing as grounds for criminal liability in RCW 36.32.210(3), but it did not do so. In order to impose criminal liability for a failure to file the statement, the phrase “failing to file” must necessarily be expanded by implication. The expansion of criminal liability beyond the express language of the statute raises significant constitutional substantive due process issues and calls into serious question the enforceability of subsections (3) under these circumstances.

There is no evidence that a county commissioner *failed to file* a statement verified by oath showing an inventory of capitalized assets for years 2011 through 2015.

The filing of a statement verified by oath showing an annual inventory of capitalized assets under RCW 36.32.210(1) is an action by the Board of County Commissioners.

Actions require affirmative concurrence of two commissioners when the Board consists of three members. No individual commissioner can, acting alone, comply with RCW 36.32.210(1). RCW 36.32.210 subsections (3) and (4) address the individual acts or omissions of individual commissioners. These subsections address a county structure no longer used or applicable, under which each commissioner could, acting as the commissioner of a specific road district, file an inventory of his or her district's assets.

Imposing individual criminal liability upon a county commissioner for official acts not taken by the Board raises significant constitutional substantive due process issues and calls into serious question the enforceability of subsections (3) and (4), especially under circumstances when the act or omission is not willful.

There are additional grounds supporting a decision not to prosecute. RCW 9.94A.411(1) provides:

A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

Under these circumstances, the violation of RCW 36.32.210, assuming it applies and is enforceable, constitutes a *de minimis* or technical violation. The inventory of capitalized assets was always maintained on a current basis and available for public inspection and copying. There was no intentional violation of RCW 36.32.210. There is no public interest or deterrent value served by prosecution. Prosecution would result in decreased respect for the law under these circumstances. RCW 9.94A.411(1)(c).

Further, the complainant appears to have caused this matter to be brought to the attention of the Prosecuting Attorney based upon political motives during an election season. The complainant has published commentary regarding the matter now referred to the Prosecuting Attorney within which the name of declared candidate Kyle Steinburg is referenced as an alternative candidate for the office of Douglas County Commissioner. The political process is a more appropriate venue to achieve political goals. RCW 9.94A.411(g).

CONCLUSION

Based upon the foregoing, the Prosecuting Attorney declines to prosecute the Douglas County Commissioners for the alleged violation of RCW 36.32.210(3).



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