



IF YOU BUILD IT...

Permitting issues ports face when developing land

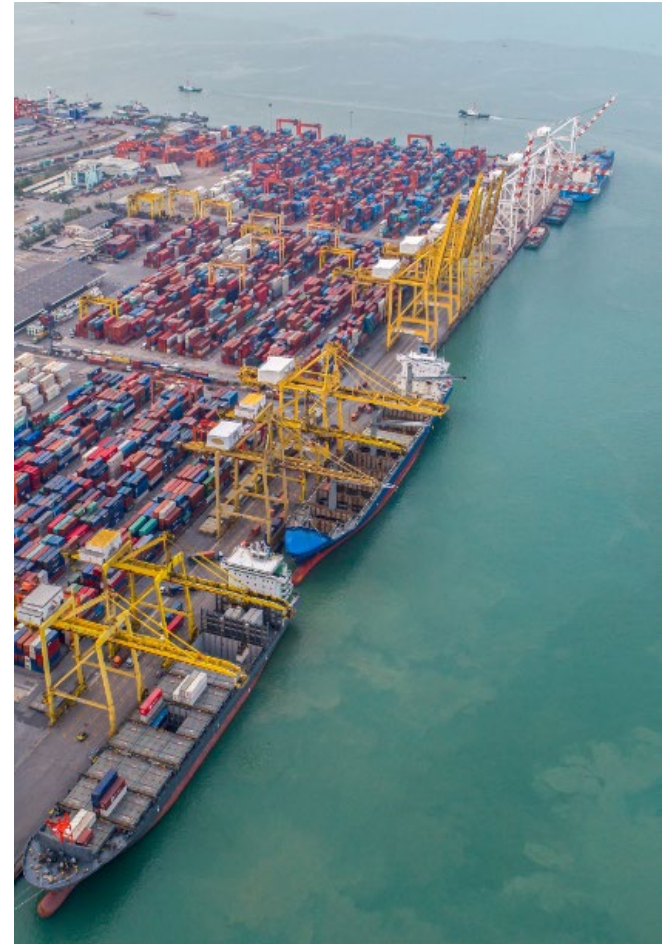
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WHAT ARE WE TALKING ABOUT TODAY?

- Different development strategies for Port-owned properties, in anticipation of sale
- Development strategy is informed by commercial/financial considerations
- But there are significant differences in Port responsibility, burden and risk from a permitting perspective

PORTS ARE IN THE REAL ESTATE BUSINESS

- Ports have broad powers to pursue “economic development,” to lease or sell property, and to improve lands for industrial and commercial purposes.
- Virtually all ports have an industrial and commercial real estate portfolio – with more than half employing full-time real estate managers.



HOW TO UTILIZE UNDEVELOPED LAND

- **Raw Land - Port leases or sells land as-is**
 - A port sells land for future commercial or industrial development without putting any work into it beforehand. Lowest cost basis.
- **Curb line down - Port prepares land for development before sale**
 - In an effort to make undeveloped land more attractive to potential-buyers, a port prepares it for future development. This could include wetland fill, grading, and infrastructure improvements. Potentially high cost basis.
- **Curb line up - Port develops project then leases or sells**
 - A port develops a turnkey commercial or industrial project with the intent to sell. Costs and risks vary depending on future market for final project.

SALE OF UNDEVELOPED LAND – PROS AND CONS

- **Less regulatory burden/risk on Port than if Port undertakes some aspect of property development before sale**
- **Property may be less desirable to potential buyers**
 - Developer/purchaser concerns regarding cost and ability to obtain permits
 - Developer/purchaser concerns regarding cost of mitigation



SALE OF UNDEVELOPED LAND – FEDERAL ISSUES

- **Very unlikely to trigger federal permitting/review**
- **Areas of uncertainty for purchasers**
 - Wetland/water delineations
 - CERCLA liability allocation
- **Other considerations**
 - Ability to use Port-generated advanced mitigation credits by purchaser
 - Credits from the advance mitigation can only be used by the permittee that developed the advance site; cannot be sold or transferred to another entity *unless* the site is certified as a mitigation bank
 - Ability/requirement to transfer existing permits with the sale of land
 - E.g. USACE permits: “If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.”

SALE OF UNDEVELOPED LAND – STATE ISSUES

- **Sale may be SEPA-exempt:**

- SEPA review of a sale of property is only required if it is part of a detailed proposal for future development, part of a larger non-project action, or the port takes other actions that commit it to development. *Marino Property Co. v. Port of Seattle*, 88 Wn.2d 822 (1977).
- WAC 197-11-800(5): SEPA exemption for sale, transfer, or lease of publicly owned property, if the property is not subject to a specifically designated and authorized public use and used by the public for that purpose

- **Areas of uncertainty for purchasers**

- Shoreline and sea-level rise issues, wetland delineations, cultural resources

SALE OF UNDEVELOPED LAND – LOCAL ISSUES

- **Local Jurisdiction**

- Does the parcel's zoning limit uses – e.g., retail or residential development
- Are there interlocal agreements or development agreements, and do they address non-port developers?
- Does the port have ongoing authority over future development of the property?

PORT PREPARES LAND FOR DEVELOPMENT – PROS AND CONS

• Pros

- Land may be more appealing for buyers/developers due to reduced uncertainty related to cost and complexity of permitting
- Utilization of advanced mitigation/Port specific mitigation sites

• Cons

- Time, effort, expense of permitting
- Defense of permits on appeal
- Enforcement/compliance risk

PORT PREPARES LAND FOR DEVELOPMENT – STATE AND FEDERAL ISSUES

- **Apply for and obtain federal and state permits for property preparation**
 - E.g. CWA 404 permit for wetland fill, CWA 401 water quality certification, CSWGP
- **State and federal permits typically require that there be a “project” before wetland/water impacts will be authorized**
- **State and federal permits typically consider all phases of development at the same time**
- **Closing out permits**
 - CWA 404 permits: Compliance risk if Port completes the wetland fill, but abandons the underlying project (33 C.F.R. part 325, Appendix A)
 - CSWGP: To cease ongoing monitoring obligations, achieve final stabilization after land preparation even if further construction is contemplated

PORT PREPARES LAND FOR DEVELOPMENT – SEPA ISSUES

- **Phased development means:**

- Vulnerability to piecemeal review allegations.
- Higher costs from multiple rounds of SEPA review.
- Additional appeal opportunities for opponents.

WAC 197-11-060(b)

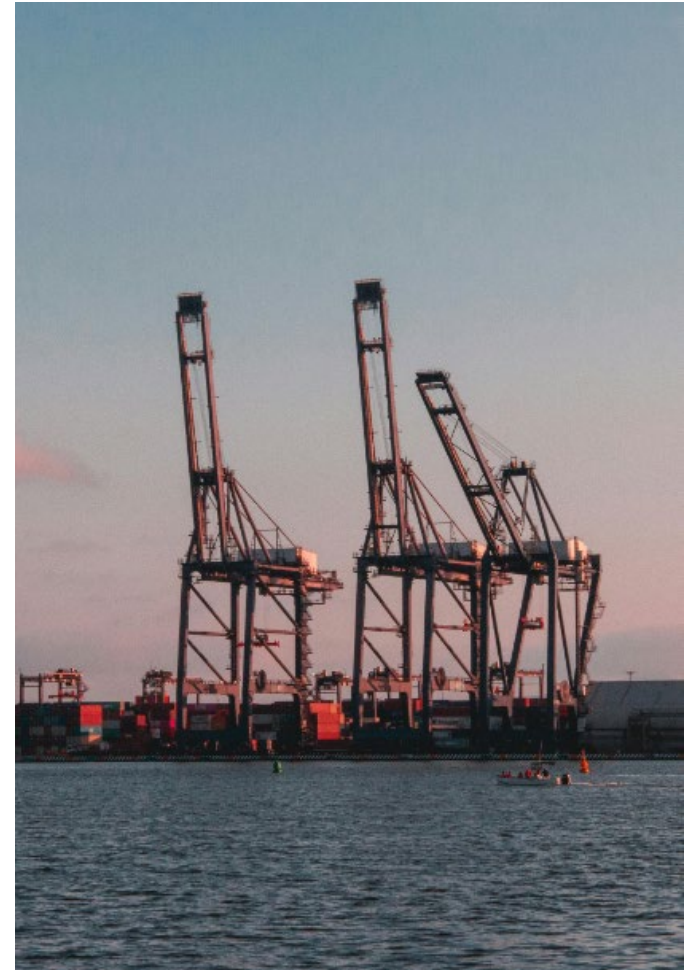
Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:

- (i) **Cannot or will not proceed** unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
- (ii) Are **interdependent parts of a larger proposal** and depend on the larger proposal as their justification or for their implementation.

PORT PREPARES LAND FOR DEVELOPMENT – LOCAL ISSUES

- **Local Jurisdiction**

- What level of detail and certainty is required to pursue initial site work?
- Mitigation and credits may not carry over to future phases.
- Do permit conditions run with the land or the permittee?



PORT PREPARES LAND FOR DEVELOPMENT – VESTED RIGHTS

- With multiple phases of development and long development timelines, applicable rules may change between phases.
- State law and courts limit when and what a developer vests to.
 - Unless local codes give additional vested rights, developers only have the right to have building permit applications (RCW 19.27.095), and subdivision applications (RCW 58.17.033) processed under the rules as they existed at the time of application.
 - Building permits and subdivision applications can only vest to “land use control ordinances” which does not include state or federal environmental regulations like NPDES permit requirements. *Snohomish County v. PSCHB*, 187 Wn. 2d 346 (2016).
 - Development agreements (RCW 36.70B.180) are a more flexible tool to obtain vested rights.

PORT DEVELOPED PROJECTS

- **Port authority**

- Can the Port build the proposed project?
- Is the proposal consistent with long-range planning policies?
- Is the proposal allowed in the zone and consistent with adjacent uses?
- Does the Port have permitting authority through an interlocal agreement?

- **Port responsibility**

- Anticipating needs/uses of future tenants/purchasers
- Project design and engineering
- Site studies to support SEPA review
- Applying for permits
- Defending permits
- Permit compliance and mitigation

LOOKING TO THE FUTURE – PROJECT CHANGES



- Tenants or buyers could modify the project to better fit their use
 - Permit modifications – could completely reopen approvals to appeal
 - Supplemental SEPA and/or NEPA Review
 - Permit transfers – some actions may be restricted to “owners,” or jurisdictions put restrictions on permit

FOR MORE INFORMATION

JENNA MANDELL-RICE

PARTNER

JRM@VNF.COM

CLARA PARK

PARTNER

CPARK@VNF.COM