



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

January 31, 2017

Representative Caddy McKeown
900 Court Street NE H476
Salem OR 97301

Re: Authority of ports to operate shipyards

Dear Representative McKeown:

You asked whether, under current law, a port is authorized to own and operate a shipyard in direct competition with a local private enterprise. The answer is probably yes, although our conclusion is not free from doubt.

Ports are governed by, and derive their powers from, ORS chapter 777. Nothing in that chapter explicitly authorizes the ownership and operation of a shipyard. However, ORS 777.258, a catchall provision, broadly authorizes a port to, in relevant part, "do such other acts and things . . . as tend to promote the maritime shipping . . . and commercial interests of the port," even if not explicitly authorized by other law. There is no textual limitation on the scope of maritime shipping or commercial interests contemplated by this section, and we think a court would be likely to find that the operation of a shipyard advances a port's maritime and commercial interests.

The authority granted by ORS 777.258, however, is not unlimited. Courts have held that a port's authority may only be exercised to carry out "a legitimate Port activity or purpose authorized by law." *Harrison v. Port of Cascade Locks*, 27 Or. App. 377, 381 (1976) (stating in dicta that explicit statutory authorization to build cableways would not legitimize port's construction of a ski lift). After a remand and second appeal of *Harrison*, the Oregon Court of Appeals held that building and operating a recreational tramway was not a legitimate port activity and was thus outside of a port's authority, even though ports are explicitly authorized to build tramways. 37 Or. App. 391, 394-395 (1978).

Despite this limitation, we think it is likely that a court would determine that the operation of a shipyard is permissible. Although the *Harrison* court did not provide detailed guidance on the parameters of "legitimate" port activities, it noted that the "primary function" of a port is to "aid[] the movement of goods and services in commerce." *Id.* at 395. Operating a facility to service, repair and build ships can easily be argued to be in aid of the movement of goods in commerce. We also think it is relevant that Oregon ports appear to have operated shipyards for many decades. If ports have historically operated shipyards, a court would be more likely to find that shipbuilding and ship repair are legitimate port functions.

We caution, however, that there is little case law or other authority on this issue, and we cannot be certain how a court would rule.

Finally, nothing in chapter 777 explicitly or implicitly prohibits a port from competing with private enterprise. In fact, ports are explicitly authorized to engage in activities that are almost certain to compete with private enterprise, such as operating watercraft "for the transportation of all kinds of merchandise, freight and commercial or recreation passengers," constructing industrial buildings for sale or lease to private entities and operating "sports, recreation, convention and trade show facilities." ORS 777.195 (1), ORS 777.250 (1), ORS 777.250 (3).

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Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink, appearing to read "David Fang-Yen", with a long horizontal flourish extending to the right.

By
David Fang-Yen
Deputy Legislative Counsel