

# KNOWING THE WATERS 2015

## The Legal Perspective for New Port Commissioners

Washington Public Ports Association



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- Overview of the port's legal structure and powers
- The legal role of the commission, the commissioners and the Executive Director
- Perspective on what the port's attorney should provide to the commission (and should not do)
- Highlight the legal stuff you should know
- Some non-legal thoughts on successful commissions

# Evolution of Port Powers

- Port's first authorized in 1911
  - Originally “transportation based” governments
    - System of harbor improvements
    - Rail and water transfer and terminal facilities
- Port powers have evolved to meet changing economic times
  - Now an economic development agency
    - Improvements for “commercial purposes”

# Mixed Use Developments

Very popular

Residential is acceptable as  
part of a “commercial purposes”  
project



# Local Improvement Districts

(RCW 53.08.050)

Install improvements

Issue local improvement bonds

Levy assessments over a 10 year period





## Studies, Investigations and Surveys

(RCW 53.08.160)

All port property

Industrial development in the port district

But, no port property can be developed by the port for agriculture or a dairy farm



# Economic Development

(RCW 53.08.245)

Engage in “economic development programs”

Contract with nonprofits for economic development

Programs for training



## Tourism Promotion and Tourism Related Facilities

(RCW 53.08.255)

Expend monies and conduct promotion of resources and facilities in the district or general area by advertising, publicizing, or otherwise distributing information to attract visitors and encourage tourist expansion





## **Park and Recreation Facilities**

(RCW 53.08.270)

Related to port facilities

Approved by local county or city



## Industrial Development Districts

(Chapter RCW 53.25)

Create a geographic district defined by “marginal lands”

Acquire the property by purchase, condemnation or from the county

Plan and redevelop the property

Sell the property

## But Ports are Still “Special Purpose Municipal Governments” (with Extremely Broad Powers)

- The legislature has decided what the port can and cannot do. (Title 53 RCW)
  - Very broad powers subject to future definition by projects undertaken by ports.
  - If there is a project there usually is a power
  - Ultimately this is an analysis of the statutes and the appetite of the commission to define the bounds
    - The State Auditor will review that “business decision”

- It may be a “great idea” but there needs to be at least “arguable” legislative authority
  - Lawyers can help with this discussion:
    - to identify the legal support for the idea
    - let the commission know where it is “in the envelope”
    - help with building the case
  - Ultimately, this becomes a “business decision” for the port and the commission

## Be Thoughtful of Actions That May Not Exactly Match The Port Statutes

- Construct a swimming pool
- Operate an ice arena
- Donate money to charities
- Provide free space for “good causes”
- Collect residential garbage
- Provide preferential local contracting opportunities
- Provide discounted moorage to “locals”
- Build parks unrelated to the port facilities

# Bringing The “New Idea” To Life

- Ask your port staff “how can we get this done?”
  - Executive Director
    - Senior management with operational interest
  - Port Attorney
- Be prepared to articulate the “public good” in a public meeting
- Consider a public hearing to link the “public good” to the port’s statutory authority

# The Legal Role of The Commission and The Commissioners

- The commission (not individual commissioners) has the legal authority and the legal responsibility to operate the port
  - Elect a president and secretary
  - Adopt rules governing the transaction of business – this includes the commission meetings
  - Appoint an Executive Director
  - Set the budgets
  - Annually appoint the Port Auditor and Port Attorney
  - Approve every action or delegate some authority by resolution to the Executive Director (RCW 53.12.270)

# The Individual Commissioner's Authority

- Must act together as a unit to govern the affairs of the port
  - No authority to act alone *unless* the authority is delegated by the commission
  - The commission should discuss this amongst themselves
    - Meeting with the Executive Director
    - Seeking information from staff
    - Speaking for the port





# The Executive Director

- The commission's principal employee
  - Accountable to the commission for everything
  - Performance reviewed annually by the commission
  - Part of the commission strategic team
  - The commission's interface to the port senior staff and employees
  - Fair and honest provider of information to all commissioners
  - Follows commission direction

# Other Direct Reports

- Port Auditor
  - Certifies all payments
  - Reports waste, fraud and abuse to the commission
- Port Attorney
  - Represents the commission but works with staff at the direction of the commission – the attorney works to get to a legal “Yes”
  - Speaks honestly and plainly to the commission
  - Is an honest broker of information
  - Reports illegal conduct to the commission
  - Understands that a “commission action is correct”

# Delegation of Powers - Resolution to the Executive Director (RCW 53.12.270)

- Allows the commission to avoid the minutia and focus on the “big issues”
  - Commission time is limited
  - Adopt by resolution
  - Recommend an annual staff review
  - Recommend annual approval by the commission
  - When in doubt – “Send it to the commission”

# The Role of the Port Attorney

- Works directly for and at the pleasure of the commission – the whole commission
  - Provides legal advice to the commission and staff
    - Helps select and manage special counsel
  - Is solution driven – “How can we get this done?”
  - Provides a “risk analysis” to the commission
  - Knows the difference between legal advice and business advice and lets you know
  - Understands that the commission decisions are by definition “correct”
  - Tends to be the “paid paranoid”

- Traits of a good port attorney
  - Is a fair and honest provider of information
  - Is not the “extra” commissioner or advocate
  - Provides the best legal advise possible even if its unpopular
  - Does not play favorites
- Honestly, what does the port attorney think about the substance of the issues?
  - Really not much – because we are process people

# RCW 42.30 – The Open Public Meetings Act

- All “actions” of the commissioners must occur in a meeting open to the public
  - Deliberations, discussions, taking testimony, voting, approving, considering, touring and virtually anything else
  - A meeting occurs when a majority of the commission meets to discuss business
    - 2:2:1 or 1:1:1 briefings are not meetings
    - Exchange of emails can be meetings
- All new commissioners must undergo training

- Regularly Scheduled Meetings
  - Time and place set annually
  - Not limited to agenda
  - Business or work/study
- Special Meetings
  - Called on 24 hours notice
  - Limited to agenda items
  - Includes a tour or offsite meeting
- Executive Sessions
  - Part of either a Regular or Special Meeting



- Executive Sessions are narrowly limited
  - Real estate transaction discussions
  - Litigation
  - Some personnel issues
  - Labor negotiations (not really)
- Purpose (generally) and duration announced in advance and duration can be extended
- What is said in Executive Session should stay in Executive Session (RCW 42.23.070(4))

# Commission Meetings in the 21<sup>st</sup> Century

- Commissioner - remote participation - allowed
  - No specific statute but generally accepted - provided:
    - All of the commissioners can hear each other
    - The public can hear all commissioners
  - Technology has made this much easier
- Streaming video or broadcast of commission meetings
  - Increasingly popular but it changes the meeting

# Thoughts On The Open Public Meeting

- Public comment is not legally required
  - If you do – avoid a public debate
  - Always be respectful to the public - always
  - Consider a time limit
- The commission decorum and tone sets the port's culture
  - Approach to each other
  - Approach to the staff
  - Political bank account

- Public hearings are sometimes required and are otherwise useful
  - Establish the basis for a decision especially one involving port authority
    - Tourism
    - Economic development
  - Focuses public attention

## RCW 42.56 – Public Records Act

- “Public Records” are virtually all port documents or electronic records *kept, owned or used* by the port and includes:
  - Emails to and from commissioners concerning port issues
    - Consider limiting port communication to a port provided device or copying port email address on all communications
  - Blog posts, tweets and Facebook posts

- All public records must be preserved
  - Retention policy (hard copy and electronic data in its “native format”)
- Confluence of Public Records Act, litigation practice and technology has rapidly changed the landscape for public records
  - Expanding definition of “public records” by the Courts
  - Expanded use of public records requests in litigation
  - Cheap and good search software

- Emails are a public record
  - Apply the “Local Newspaper” test
    - “Would I mind if this email was printed in our local paper?”
  - Avoid
    - Jokes, especially off-color jokes
    - Colloquial speech
- Think not once, but twice, before you push the “send” button
- Port should adopt a retention policy and stick to it

- Exemptions from public disclosure
  - Most “personal” information in personnel files
  - Attorney-client material
    - Merely copying the attorney is not enough
  - Pre-decisional memorandums where opinions expressed or policies formulated
    - Deliberative process exemption
    - Facts must be disclosed
    - Only until the decision is made



# Thoughts On The Public Records Act

- Consider:
  - Port-owned computers for each commissioner - used only for port business
  - Email address through the port server
  - Allows the port to maintain the public records
- Web pages, tweets, blogs, cell phone records, and cell phone photos are all public records
- New technology has lead to a proliferation of public records requests
  - Attorneys and project opponents

- Think of the Public Records Act responses as what the port does, as opposed to an interference with normal business
  - An opportunity for great customer service
  - Consider building into budget of each department by considering staff time
  - Consider building into each project budget with technology to provide access

What if the Harbor Master said:

“You know, it would be a lot easier for me and my staff to do our job if we didn’t have all these boaters leasing slips in the marina. We could keep everything clean and tidy and we wouldn’t have to answer all those pesky questions.”

Now think about when someone says:

“This Public Records Act request is really a pain. It is interfering with my job here at the port. That citizen is really making my life miserable. I could get a lot more done if I was not bothered with these requests.”

# RCW 42.23 Code of Ethics for Municipal Employees

- Commissioner interest in contracts prohibited
  - Direct or indirect interests included
    - Temporal analysis
    - The issue can be raised a lot by the public
  - Exception for “remote interests” listed in the statute
    - No participation
- Disclosure of confidential information for personal gain prohibited (think Executive Session)

# Thoughts On The Ethics Act

- For “appearance” issues consider:
  - Disclosure of even a perception of a conflict
  - Seeking attorney advice on the record
  - Recusal on the record for “appearance” issues

## RCW 53.19 – Personal Service Contracts

- Added to port laws (no other governments in response to Port of Seattle audit on contracting procedures for third runway)
  - All consultants but not lawyers
  - Separate statute for architects, engineers, surveyors and landscape architects (RCW 39.80)
  - Commission must adopt a policy regarding management of Personal Service Contracts
  - Typically a competitive solicitation

## Other Issues to Consider

- Public funds, public staff and public services
- Sexual harassment
- Perception of abuse of office



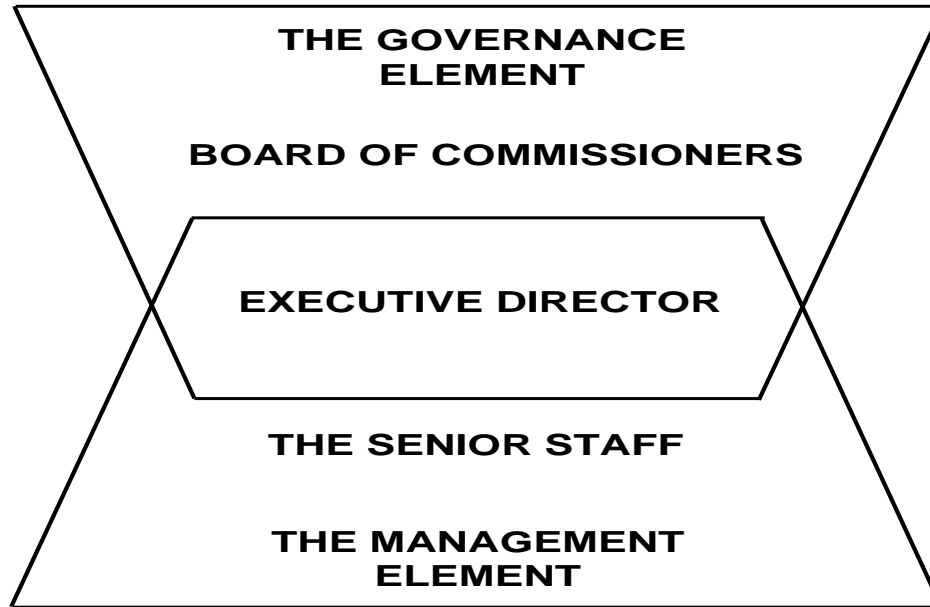
# Public Funds and Public Stuff

- Each port commissioner is the “steward” of public assets and public funds
  - The public cares now more than ever
  - The public is watching and they have cell phone cameras and video
  - Misuse of port assets or funds is the fast track to a bad event
- RCW 42.24.080 requires payment only after services rendered or goods received
  - Must be certified by Port Auditor

# Sexual Harassment

- Quid Pro Quo
- Hostile work environment
  - Viewed from the eyes of the victim
  - Jokes, posters, comments, innuendo, flirting, staring and anything else that would make someone feel uncomfortable
    - Men, women, straight and gay

# **SOME NON-LEGAL THOUGHTS ON SUCCESSFUL COMMISSIONS**



# Commissioners' Time – A Precious Resource

## A Very Limited Resource

**1 – 5 Hours  
Per Month**

**5 – 10 Hours  
Per Month**

**10 – 15 Hours  
Per Month**

**Over 15 Hours  
Per Month**

# Governance – I Know it When I See it

- “Governance is a lot harder than management,” but it is what the commissioner is elected to do
  - The big decisions need to be made
  - The big decisions don’t go away
  - There are no guidelines
  - There are no measures of success, at least today
  - Consider the legacy of commissioners past



# The Role of an Individual Commissioner in Governance

- Govern slowly and deliberately – almost nothing is that urgent
- Be a leader – not a spectator or a critic
- Realize your responsibility – you are key to the success of the organization
- Watch what you say – the public and the employees are listening
- Set philosophy, policy and tone
  - Tone is the most important thing



- Create a team approach – it's your team
- Educate your other commissioners
- Do not freelance
- You cannot and will not make everyone happy
- Protect and enhance the port's political bank account – “how will this read in the morning paper?”
- If it was easy everyone would do it – give the other commissioners some slack

# Preserving the Port's Political Capital - You Will Need It

- “Political capital” is the positive impression your community members have about the port which is deposited in the port’s political bank account
- Preserve the political capital for:
  - Capital facilities bonding
  - The “benefit of the doubt”
  - Gaining support for port projects or initiatives
- Do not spend political capital:
  - Bad commission meetings
  - Sexual harassment and other bad employment practices

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