

KNOWING THE WATERS 2013

**“The Legal Perspective
for Port Commissioners
and Senior Staff”**

**Washington Public Ports Association
New Commissioner Seminar**

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Tacoma, Washington**



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ATTORNEYS AT LAW

- Overview of the Port's legal structure
- 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



OVERVIEW OF THE PORT'S LEGAL STRUCTURE



The Port is a “Special Purpose Municipal Government”

- The legislature decides what the Port can and cannot do (Chapter 53, RCW)
- It may be a great idea, but there needs to be at least “arguable” legislative authority
 - Ultimately, this becomes a “business decision”
 - The State Auditor will review that “business decision”



- Be careful of actions that do not 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



- Be careful to also comply with other applicable laws
 - Local laws
 - Zoning
 - Shoreline Management
 - Other State laws
 - State Environmental Policy Act (SEPA)
 - Model Toxics Control Act (MTCA)
 - Public bidding statutes
 - Storm water permit compliance



- Federal statutes and regulations
 - Clean Water Act
 - Federal Maritime Commission regulations for marine terminal operators
 - FAA regulations for commercial service airports



THE LEGAL ROLE OF THE COMMISSION, THE INDIVIDUAL COMMISSIONERS AND THE EXECUTIVE DIRECTOR



The Commission

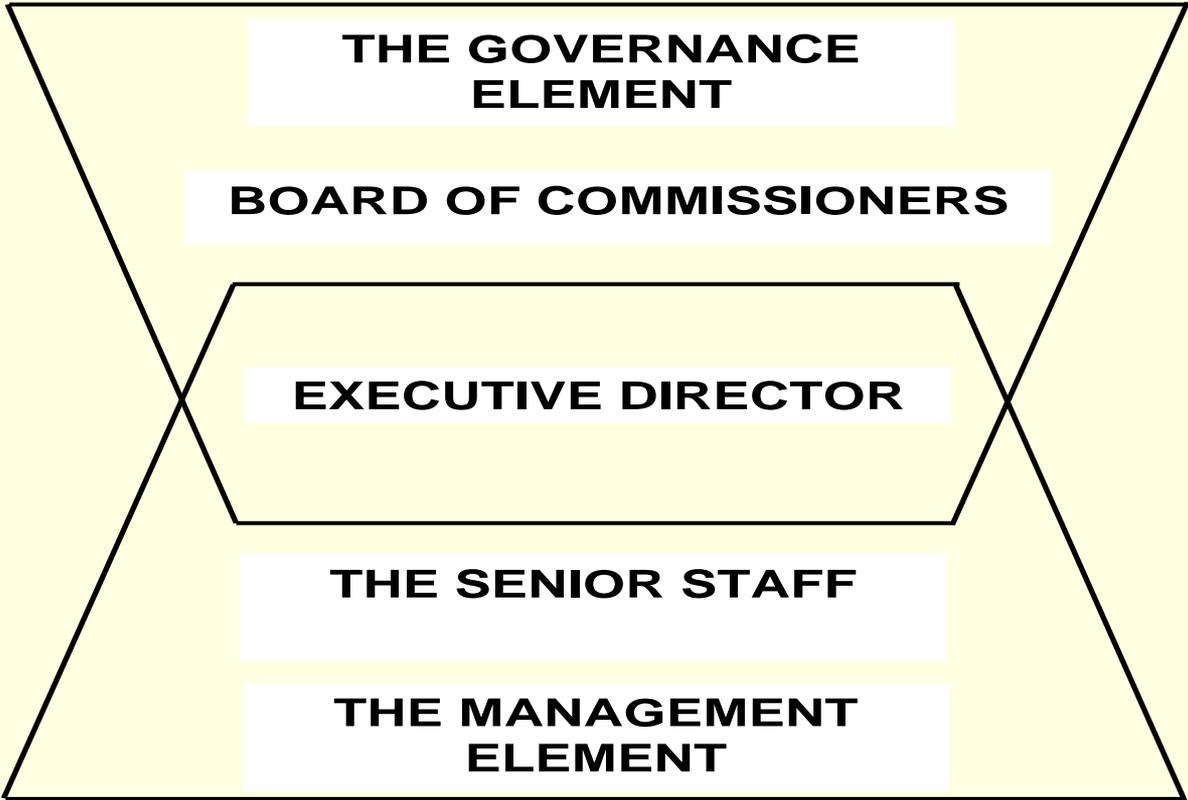
- The Commission (not individual Commissioners) has the legal authority and the legal responsibility to operate the Port (RCW 53.12.010)
 - Elect a president and secretary (RCW 53.12.245)
 - Adopt rules governing the transaction of business
 - Appoint an Executive Director
 - Set the budgets
 - Appoint 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 Commissioners

- Must act together as a unit to govern the affairs of the District
 - No authority to act alone *unless* the authority is delegated by the Board
- Defended and indemnified by the Port so long as a court determines that the Commissioner was acting in “good faith” (RCW 53.08.208)





The Executive Director

- The Commission's principal employee
 - Accountable to the Commission for everything “the staff does or fails to do”
 - 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
 - Follows Commission direction
 - Hires, fires and manages the staff



Other Direct Reports

- Port Auditor
 - Certifies all payments
 - Reports waste, fraud and abuse to the Commission
- Port Attorney
 - Works with staff at the direction of the Commission
 - Reports illegal conduct to the Commission
 - Holds Commission communication confidential



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”
 - Adopt by resolution
 - Recommend an annual staff review
 - Recommend annual approval by the Commission
 - When in doubt – “Send it to the Commission”

**PERSPECTIVE ON WHAT THE
PORT'S ATTORNEY SHOULD
PROVIDE TO THE COMMISSION
(AND SHOULD NOT DO)**



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 and helps with special counsel
 - Be solution driven
 - 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”



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- Traits of a good Port lawyer
 - Is a fair and honest provider of information
 - Is not the “extra” Commissioner
 - Provides the best legal advice possible, even if it is unpopular
 - Does not play favorites



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- Honestly, what does the Port lawyer think about the substance of issues or litigation
 - Not much – it is a process question
 - If asked about the substance, the very best business advice is in the form of a “have you considered” question



LEGAL BASICS YOU SHOULD KNOW



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
 - Telephonic participation is allowed
 - 2:2:1 or 1:1:1 briefings are not meetings
- Exchange of emails can be meetings



- The *Wood v. Battle Ground School District*, 107 Wn. App. 550 (2001) case gives four examples of what could be a “serial meeting”:
 - Series of telephone calls between individual members and attorney to develop collective commitment or promise on public business violated the OPMA
 - Successive meetings between executive and individual members violates OPMA
 - Use of serial electronic communication by a quorum of a governing body to deliberate toward or to make a decisions violates the OPMA
 - “Telephone trees” where members of the governing body repeatedly phone (or e-mail) each other to form a collective decision, are inappropriate under the OPMA

“Commissioners I have provided the information in this email to all of you to make sure you have the same information. Please note that it is a violation of the Open Public Meetings Act for Commissioners to exchange thoughts and discuss Port business using emails. Therefore please do not “Reply All” to this email. You can send your views to me. Your views can be discussed with the other Commissioners in a public meeting.”



- Regularly scheduled meetings
 - 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- Why They Need Your Attention

- An Executive Session is a part of a regular or special meeting of a governing body that is closed to the public. Think of Executive Session as exceptions to the requirement that all meetings must be open to the public.
- They can only be held for specified purposes and only during a regular or special meeting
- What can be discussed:
 - Consideration of real estate for lease, purchase or sale



- Receiving and evaluating complaints or charges brought against a public officer or employee
 - Make sure the Commission has the authority to address the personnel matter at issue
 - The employee has the right to a public hearing
- Evaluating the qualifications of an applicant for public employment or to review the performance of a public employee
 - Salary must be set in public

- Discussing with legal counsel litigation or potential litigation when the governing body is or is likely to become a party
 - This is an area of abuse – Potential litigation means litigation has been threatened, the Commission reasonably believes may be commenced, or legal risks of a specific practice.
- **A governing body MUST NOT take final action in an Executive Session!**
- The “sense of the Commission” is okay

Calling Executive Sessions

- The presiding officer must announce the Executive Session to those attending the meeting by stating:
 - The time when it will end
 - The purpose – Be precise
 - Real estate for sale
 - Personnel evaluation
 - Qualifications of an applicant
 - Potential litigation



Practical Advice on Executive Sessions

- Executive Sessions should be the exception and not the rule
- Only Port employees and consultants should attend an Executive Session—no third parties
- Limit attendance on each topic
- Prepare an agenda and stick to it
- What is said in Executive Session should stay in Executive Session – RCW 42.23.070(4)
- Careful about having Executive Sessions precede every meeting as a standard event



- Public hearings are sometimes required and are otherwise useful
 - Establish the basis for a decision especially one involving Port authority
 - Tourism experts
 - Economic development experts
 - Focuses public attention
 - Required for budgets and Comprehensive Schemes of Harbor Improvement

The Open Public Meeting – A Few Practical Tips

- Establish a Commission meeting culture by design and not by default
 - No single decision is more important than the Port and the functioning of the Port Commission
- Manage public comment
 - It is not the forum for a “debate with the public”
 - It is not “public question hour”



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- Lead the staff at the Commission meetings
 - Is not the time to play “stump the staff”
 - Praise in public and criticize (if you must) carefully in public



RCW 42.56 – Public Records Act

- “Public Records” are virtually all Port documents or electronic records *kept, owned or used* by the Port
 - Includes emails sent to Commissioners and stored on a Commissioner’s personal computer
 - May include consultant’s notes and records
 - Available for public inspection at no fee
 - Available for public copying at a fee
- All public records must be preserved
 - Retention policy (hard copy and electronic data)



■ Exemptions

- 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



E-mails are Public Records

- Emails are a public record
- Apply the “Local Newspaper” test:
 - “Would I mind if this e-mail 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
- The Port should adopt a retention policy and stick to that policy



Public Records Decisions Regarding Electronic Mail and Technology

- Washington State Supreme Court - *O'Neill v. City of Shoreline*, 170 Wn.2d 138 (2010):
 - Metadata associated with public records is subject to disclosure under the PRA.
 - This was a case of first impression for our State Supreme Court. Metadata is “data about data” and includes information such as the address fields in e-mails, file types, file creation and modification dates, and the author of modifications.
 - In *O'Neill*, the City’s Deputy Mayor forwarded an e-mail from her city account to her personal account, stripping out the address fields in an effort to protect the identity of the person who sent her the e-mail.
 - The Supreme Court held (in a 5-4 ruling) that the metadata related to the e-mail was subject to disclosure. Note here, that the case was sent back for instructions for the city to search the Deputy Mayor’s home computer.



Thoughts on the Public Records Act

- Strongly recommend:
 - 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
 - Lawyers 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 these questions.”

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- 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.”



The Bottom Line for Public Records Act and the Open Meetings Act

- Each Port has a “political bank account” – don’t spend it on dumb stuff
- The Commission must set the culture that it wants for open meetings and the culture of public service for making public records available
- If the “culture” is not established by design it will be established by default
- **AT THE END OF THE DAY, THE OPEN MEETINGS ACT AND THE PUBLIC RECORDS ACT REQUIRE A “CULTURE OF COMPLIANCE”**



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; and
 - 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



RCW 53.20 – Comprehensive Scheme of Harbor Improvements

- The Port must adopt or modify a CSHI before expending funds to improve its property
 - Needed before Port property is surplus and sold
 - Requires a public hearing after notice published once a week for two consecutive weeks
- Recommend that it be amended each year with the adoption of the capital budget
 - Same public hearing and notice as budget



Public Funds

- 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

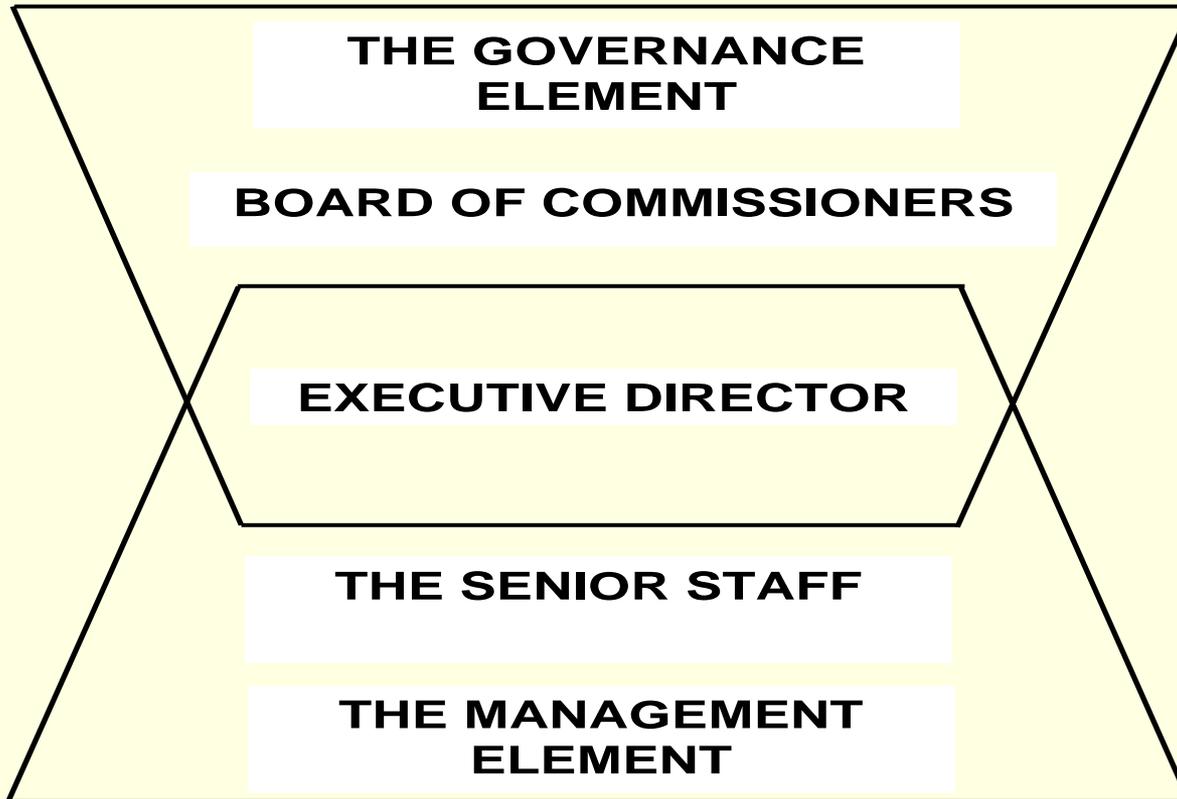


Sexual Harassment

- 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**

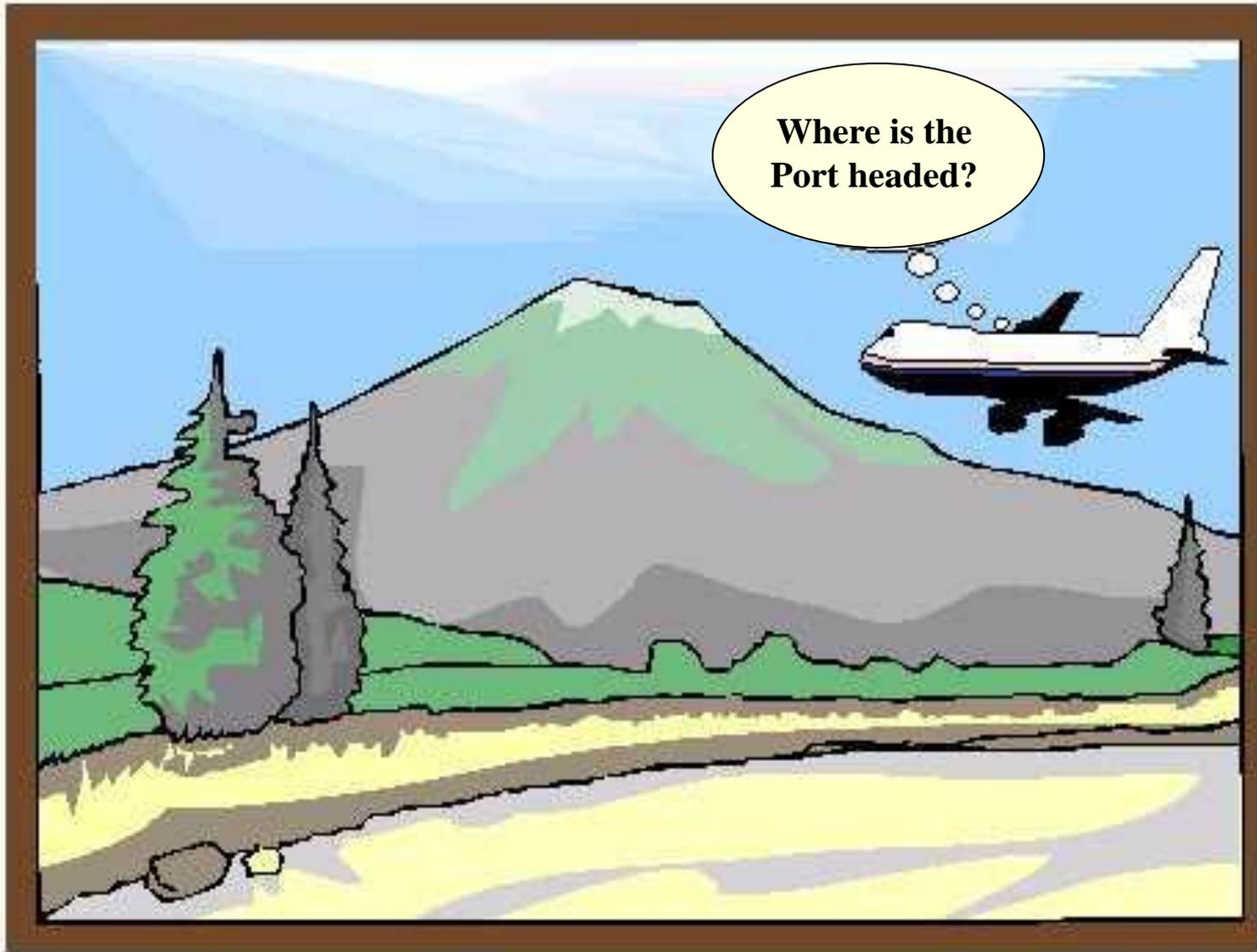
**10 – 15 Hours
Per Month**

**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

- Figure out why you are a Commissioner – why are you here?
- Do no harm
- Be informed – read the materials provided by the staff
- Leave things in better shape than when you arrived
- Govern a problem before you manage a problem



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- 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 staff are listening
 - If it was easy everyone would do it – give the other Commissioners some slack

The Role of the Commission in Governance

- Set philosophy, policy and culture
 - Culture is the most important thing
- Govern a problem before you manage a problem
- Let your Executive Director manage the staff and hold the Executive Director accountable
 - Do not engage staff in management/political discussions
 - Do engage the staff in technical discussions



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- Create a team approach – it's your team
 - Educate your other Commissioners
 - Do not freelance
 - Protect and enhance the Port's political bank account – “how will this read in the morning paper?”



Preserving the Port's Political Capital – The Port Will Need It

- “Political capital” is the positive impression your community members have about the Port
- Preserve the political capital for:
 - Capital facilities bonding
 - The “benefit of the doubt”
 - Defending Port actions
- Do not spend political capital:
 - Bad Commission meetings
 - Politicized staff
 - Sexual harassment and other bad employment practices



QUESTIONS?

