



KNOWING THE WATERS 2019

The Legal Perspective for New Port Commissioners

Washington Public Ports Association

**Les Reardanz
Frank Chmelik**

Agenda

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



Evolution of Port Powers 1911-2018

- 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”



Traditional Port Activities

RCW 53.08.020 1911

- Acquisition and operation of:
 - Sea walls
 - Jetties
 - Wharves
 - Docks
 - Rail, water and motor transfer facilities
- Improvements related to industrial and manufacturing activities



Many Ports Formed in Early 20th Century

- Port of Seattle 1911
- Port of Grays Harbor 1911
- Port of Vancouver 1912
- Port of Kennewick 1915
- Port of Everett 1918
- Port of Tacoma 1918
- Port of Bellingham 1920



Studies, Investigations and Surveys

RCW 53.08.160 - 1947

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



Industrial Development Districts

Chapter RCW 53.25 1955

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



Park and Recreation Facilities

RCW 53.08.270 - 1965

Related to port facilities

Approved by local county or city



Tourism Promotion and Tourism Related Facilities

RCW 53.08.255 - 1984

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



Economic Development

RCW 53.08.245 – 1985

Engage in “economic development programs”

Contract with nonprofits for economic development

Programs for training



Wholesale Telecommunications

RCW 53.08.380 – 2000

Provide wholesale
telecommunications in rural port
districts



Cooperative Watershed Management

RCW 53.08.420 2003

Expend funds for water supply,
water quality, water resources,
habitat protection

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 and get to “yes”:
 - to identify the legal support for the idea
 - let the commission know where it is “in the envelope”
 - help with building the case
 - to identify the potential risk/risk mitigation
 - 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
- Provide a homeless shelter or low income housing

Bringing The “New Idea” To Life

- Very important commissioner skill
- 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 Role of The Commission and The Commissioners

The Individual Commissioner's Authority

- Nada, nothing, none
- Must act together as a unit to govern the affairs of the port
 - No authority to act alone *unless* the authority is expressly 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 Commissions' Authority

- RCW 53.12.010

“The powers of the port district shall be exercised through a port commission consisting of three or, when permitted by this title, five members.”

- The Port Commission Has All The Authority

The commission (not individual commissioners) has the legal authority and the legal responsibility to operate the port

- Powers Include:
 - Elect a president and secretary (RCW 53.12.245)
 - Adopt rules governing the transaction of business – this includes the commission meetings (RCW 53.12.245)

The Commissions' Authority (continued)

- 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)



Staff Support For The Commission

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

The Executive Director (continued)

- Delegation of Powers Resolution (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 Port Auditor

- Works directly for the Port Commission
- Usually also serves as the Port's CFO
- Serves as “lifeguard at the pool”
 - Should feel comfortable with raising issues
 - Should be included early in project discussions



Port Attorneys

CHMELIK SITKIN & DAVIS P.S.
ATTORNEYS AT LAW

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
 - Represents the “port”
 - 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”

The Port Attorney (continued)

- 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 advice possible even if its unpopular
 - Does not play favorites
- Serves as a “lifeguard at the pool”
- Honestly, what does the port attorney think about the substance of the issues?
 - Really not much – because we are process people





Legal Stuff 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
- 2:2:1 or 1:1:1 briefings are not meetings
- Exchange of emails can be a “serial” meetings (watch “reply all”)
- 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

RCW 42.30 – The Open Public Meetings Act (continued)

- Executive Sessions are narrowly limited
 - Respect the “special trust” of the Executive Session
- Topics
 - Real estate transaction discussion – but now limited by Supreme Court ruling in *Riverkeepers v. Port of Vancouver* (the “Oil Wars”)
 - Discuss issues concerning price in public and then the actual effect on price in Executive Session
 - Litigation
 - Some personnel issues – most importantly review the performance of a public employee
 - Labor negotiations (not really)

RCW 42.30 – The Open Public Meetings Act (continued)

- Purpose (generally) and duration announced in advance but duration can be extended
 - Beginning or end of meeting?
 - Action contemplated? Do I really need to wait?
- What is said in Executive Session should stay in Executive Session (RCW 42.23.070(4))

RCW 42.30 – The Open Public Meetings Act (continued)

- 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
 - Big screen TV and meeting software
- Streaming video or broadcast of commission meetings
 - Increasingly popular but it changes the meeting
 - Commissioners and public “political theatre”

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
 - Best practice is to impose and enforce a “soft” time limit
- The commission decorum and tone sets the port’s culture
 - Approach to each other
 - Approach to the staff
 - Political bank account

Thoughts On The Open Public Meeting (continued)

- Create a plan for discussion of controversial issues
 - What information do we need from staff or others
 - What is the timeline for discussion and voting
- 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

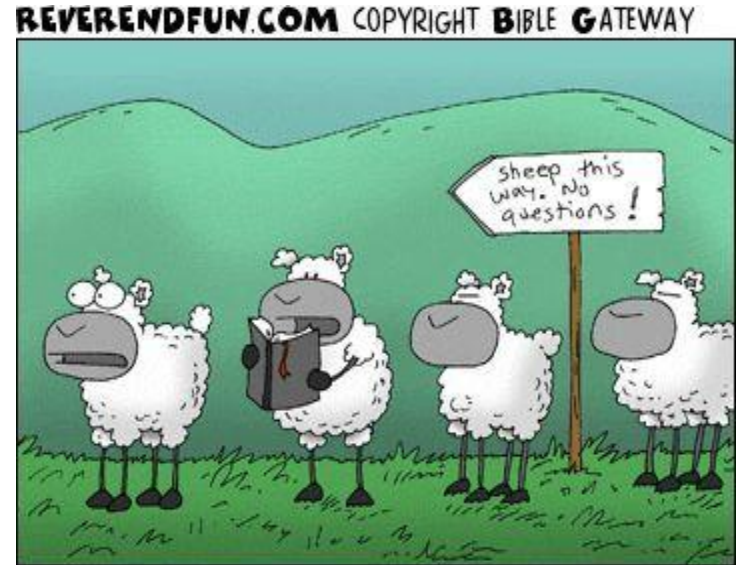
Thoughts On The Open Public Meeting (continued)

- Controversial Issue with Large Attendance (“cooking in a hot kitchen”)



Thoughts On The Open Public Meeting (continued)

- Plan ahead on how the meeting will unfold
 - How will we conduct this meeting
- Introduce the issue and note that the Commission's job is to listen and then decide
- Get a large enough room
- Reference a "community standard"
- Thank everyone



(See Acts 8:32)

02-10-2012

HERE IT IS, "LED LIKE A SHEEP TO THE SLAUGHTER" ... WHAT THE HECK IS THAT SUPPOSED TO MEAN?

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
 - Best practice is limiting port communication to a port provided device or copying port email address on all communications
 - Blog posts, tweets and Facebook posts, cell phone records, and cell phone photos are all public records

RCW 42.56 – Public Records Act (continued)

- 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



RCW 42.56 – Public Records Act (continued)

- 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



RCW 42.56 – Public Records Act (continued)

- 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
- New technology has lead to a proliferation of public records requests
 - Attorneys and project opponents



Perspective on Public Records

- 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.”



Perspective on Public Records

- 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



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)



RCW 42.23 Code of Ethics for Municipal Employees (continued)

- Appearance Matters!
 - The Port’s “political bank account”
- 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



Other Issues to Consider

- Public funds, public stuff 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



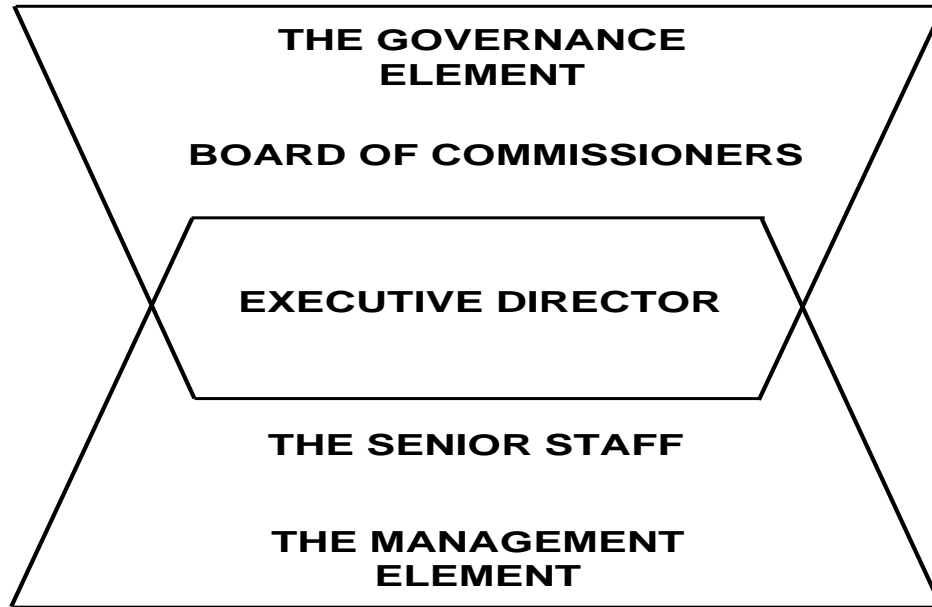
Sexual Harassment – Now More Than Ever

- 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
(All time including meetings)**

**1 – 10 Hours
Per Month**

**10-20 Hours
Per Month**

**20-30 Hours
Per Month**

**Over 30 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
- Commissioners are paid for their judgment and vision – not for their time
- Stay focused on the strategy and vision

