

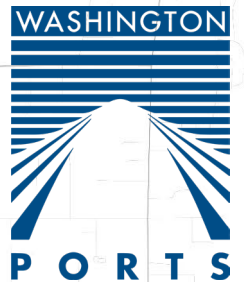
Washington Public Ports Association

Knowing the Waters

Practical Legal Perspective for
Port Commissioners

Tim Schermetzler, CSD Attorneys at Law

Eric ffitch, WPPA



Roadmap

- Tips on what the Port's attorney should provide to the Commission
- Overview of the Port's legal structure
- Highlight the legal stuff you should know



The Port: “Special Purpose Municipal Government”

- The legislature decides what the Port can and cannot do
- 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 and help with building the case
 - Ultimately, this becomes a “business decision”
 - The State Auditor will review that “business decision”



The Commission

- 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
 - 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



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
- Executive Director
 - The principal and the only employee supervised by the Commission



Why an Auditor when there is a CFO?

- It's the law - RCW 42.24.080

*All claims presented against any county, city, district or **other municipal corporation** or political subdivision by persons furnishing materials, rendering services or performing labor, or for any other contractual purpose, **shall be audited**, before payment, **by an auditing officer** elected or **appointed** pursuant to statute or, in the absence of statute, an appropriate charter provision, ordinance or **resolution of the municipal corporation** or political subdivision.*

- Usually, the Port's CFO is also appointed the Auditor
- Direct report to the Port Commission
 - Responsible for financial controls that protect the Port
- RCW 43.09. 185 reports to SAO



Port Attorney

- Represents the Port District
 - Attorney client privilege flows to the port district and can only be waived by the port district
- Appointed by and serves at the pleasure of the Commission
 - Provides legal advice, typically through the executive director, but ultimately to the Port Commission
- The view of port attorneys
 - Solution driven
 - Involve us early
 - 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”
 - Provides legal advice in writing
 - Should help develop standard documents (leases, personal service contract, public works contracts)



Port Attorney

- The view of executive directors
 - Close relationship with executive director
 - Communication with commissioners
 - Managing the legal budget
- Communication with the Port Attorney
 - Best and usually through executive director
 - Questions and answers to all commissioners and executive director
 - Avoid serial meetings

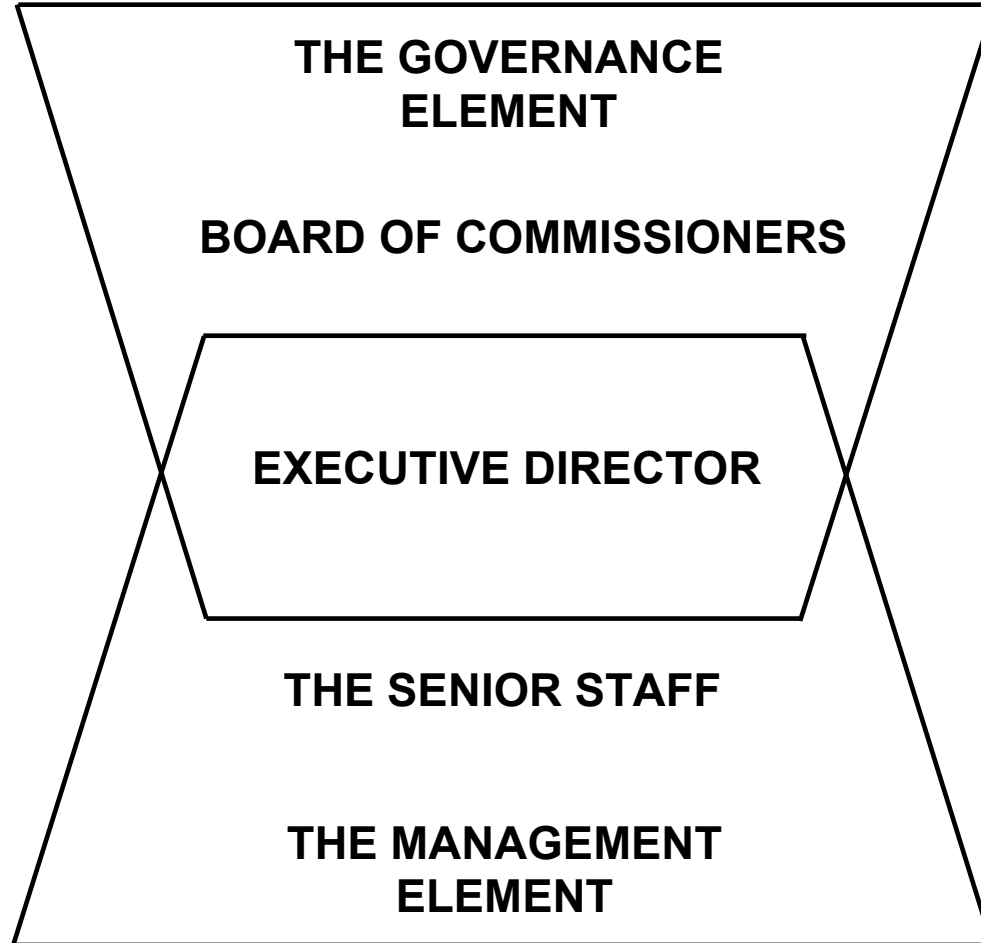


The Executive Director

- The Commission's principal employee
 - Accountable to the Commission
 - Performance reviewed annually by the Commission
 - Part of the Commission's strategic team
 - The Commission's interface to the Port employees
- The Executive Directors' Perspective
 - The keys to maintain a great working relationship with your ED?
 - Information flow?
 - Communication with your ED?
 - The role of staff and the ED at Commission meetings?



Governance vs Management



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” (*Just because you may does not mean you must*)



Why Delegate?

Commissioners are a Precious and limited Resource

1 – 5 Hours
Per Month

5 – 10 Hours
Per Month

10 – 15 Hours
Per Month

15+ Hours
Per Month




And a Very Valuable Asset

- Commissioners have very limited time - it is an expensive and precious resource of the Port that should not be squandered and cannot be increased
- The Commissioner role should be focused on governance

governance

A thin black vertical line with an upward-pointing arrowhead at the top, positioned to the right of the word "governance".

management

A thin black vertical line with a downward-pointing arrowhead at the bottom, positioned to the right of the word "management".

And it Makes for Smooth Operations

- Allows the Port to respond quickly to customer and tenant needs
- Efficiency of Port operations between commission meetings
- Uniformity of Port administration over time and over changes in commission
- Allows for “budget based” governance by the commission



But the Correct Balance is Critical

- The Commission is ultimately responsible for the Port
- Too little delegation and the Commission is bogged down
- Too much delegation and the Commission may lose touch with day-to-day operations



Budget and Delegation

- “Best Practice” is a delegation based upon a budget and the delegated powers are tied to the budget.
 - Percentage of revenue vs. specific dollar limits
 - Actions within budget line items
 - Actions consistent with an overall budget



What is Typically Delegated? Budget-Based Delegation

- Express authority as a percentage of budget or by budget line item
- Management of staff – hiring, firing and reorganizing
 - Wages and benefits within overall budgetary guidelines
- Standard lease of a certain term and meeting commission directed financial guidelines
- Settlement of claims for and against the Port of a certain dollar volume or percentage of revenue
- Public work change orders within a budget
- Contract approval for consultants with a certain dollar volume or percentage of revenue
- Purchasing equipment and supplies of a certain dollar volume or percentage of revenue



What is Typically Delegated? Budget-Based Delegation

- Management of lawyers and litigation
 - Hire experts and special counsel
- Interface with insurance defense counsel
- Settlement of small claims
 - Again, budget based
- Concurrence of lawyer



The Delegation is an Active Document

- Should be reviewed annually by staff for effectiveness
- Changes to delegation to accomplish goal of allowing Commission to govern
- Should be presented to Commission annually for review and approval
- First meeting of the year along with other ministerial tasks
- Concepts in delegation should not be part of an employment agreement for the Executive Director



Chp. 42.30 RCW - 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



Chp. 42.30 RCW - Open Public Meetings Act

- Executive sessions are narrowly limited
 - Real estate transaction discussions
 - Litigation
 - Some personnel issues
 - Labor negotiations (not really – RCW 42.13.140(4))
- What is said in Executive Session should stay in Executive Session



Thoughts on Conduct of Public Meetings

- Oral Public comment is not required
 - Must provide an opportunity at or before meeting for public comment on a final action (may be accepting written comments) RCW 42.30.240
 - 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 - “stump the staff”
- Plan for contentious issues
 - Size the room
 - Consider the process



Thoughts on Conduct of Public Meetings

- 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



Chp. 42.56 RCW - Public Records Act

- Public Records” are virtually all Port documents or electronic records *kept, owned or used* by the Port
 - Includes “blogs” and other posts
 - Includes emails sent to Commissioners and stored on a Commissioner’s personal computer
 - Send to the port email address
 - Use a port device



Emails are Public Records

- Electronic mail is 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



Why the PRA is an Important Function of Government

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.”



Why the PRA is an Important Function of Government

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.”

Consider building into budget of each department by considering staff time



Chp. 42.23 RCW – Code of Ethics for Municipal Officers

- 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
 - Exception for Port Leasing – RCW 42.23.030(7)

The leasing by a port district as lessor of port district property to a municipal officer or to a contracting party in which a municipal officer may be beneficially interested, if in addition to all other legal requirements, a board of three disinterested appraisers and the superior court in the county where the property is situated finds that all terms and conditions of such lease are fair to the port district and are in the public interest. The appraisers must be appointed from members of the American Institute of Real Estate Appraisers by the presiding judge of the superior court;

- 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



Chp. 53.19 RCW – 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 (Chp. 39.80 RCW)
 - Commission must adopt a policy regarding management of Personal Service Contracts
 - Typically, a competitive solicitation



Other Issues to Consider

- Public Funds
- Sexual Harassment
- Decorum and appearance to the public
- The “Political Bank Account”



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



Decorum and Appearance to the Public

- Consider how Commissioners engage with one another (adopted rules of procedure) and accomplish the business of the Port
- How we treat one another reflects / models how we want the public to engage with the Port (Commission and Staff)
- Orderly meetings gets at the question of “does government work?”



The Port's “Political Bank Account”

- The “political bank account” is the sum of all the good work by the Commission and the staff – top to bottom. It is the general reputation within the community about the Port
 - Good decisions increase the bank account balance
 - Good customer service increases the bank account balance
 - The reverse is too true – bad decisions and service depletes the “political bank account”



Questions

Tim Schermetzler
tschermetzler@csdlaw.com
360-671-1769

