

## PORTS GATHER IN TACOMA FOR SUCCESSFUL ANNUAL MEETING

Over two hundred and forty WPPA members and Associate Members convened in Tacoma two weeks ago for a successful annual meeting. The attendance levels were higher than is typical, and the attendees heard from a variety of opinion-leaders and business and government officials.

The WPPA membership began the conference in various committee meetings, discussing policy issues that affect Washington's ports. These included a case study of a social media campaign, and break-out sessions on economic development topics.

The official meeting kickoff began at lunch on Wednesday November 16th, with an address by Alaska Airlines Senior VP Andrew Harrison, who presented a lively talk on the aviation industry and Alaska Air's plans for this region. Further presentations later that day focused on the jobs study being commissioned by WPPA, and on the details of the now probably defunct Trans-Pacific Partnership.

Thursday's program began with a presentation on the WPPA legislative program, the marine cargo forecast, and a panel on rural economic development. The luncheon keynote was presented by newly-appointed Washington Secretary of



Andrew Harrison



Roger Millar

Transportation Roger Millar. He provided an overview of programs relevant to ports, and pledged continued collaboration between his department and WPPA's members. The day continued with port reports from the Northwest Seaport Alliance, and the Ports of Sunnyside, Ilwaco and Chinook.

Friday morning's awards breakfast was a meeting highlight, with Outstanding Service Awards going to Marilyn O'Conner, Port of Friday Harbor; Gordon Walgren, Port of Bremerton; and Todd Coleman, Port of Vancouver. Life Member Awards were presented to Larry Crocket, Port of Port Townsend; Mark Urdahl, Port of Chelan Co.; Jim Kuntz, Port of Walla; and Ginger Eagle, WPPA Staff. "This was one our best meetings ever" said WPPA President Troy McClelland. "There was really a lot of energy and collaboration."

## KNOWING THE WATERS

By Frank Chmelik of Chmelik Sitkin & Davis P.S. - WPPA Counsel



This month's column focuses on commonly asked leasing issues. These questions come up from time-to-time and are worthy of a brief discussion.

**Standard lease forms.** The best practice is for a port to have a set of "standard" lease forms. Ports typically insist on the use of their forms. The advantage of using a standard form lease cannot be overstated. Issues such as periodic rent increases, liability, insurance, use restrictions, and assignability can be clearly stated.

A port will be well served when its staff understands the terms of the standard lease both in terms of negotiation and minimization of legal fees.

**The limits on a port's statutory leasing authority.** While RCW 53.08.080 provides great latitude, there are limits. Article 8 section 7 of the Washington State Constitution

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## PORT SPOTLIGHT

### NW SEAPORT ALLIANCE HONORED WITH PORT OF THE YEAR

One full year after formalizing their commercial seaport partnership, the Ports of Seattle and Tacoma were jointly honored by the WPPA with Port of the Year honors for creation of the Northwest Seaport Alliance (NWSA).

The groundbreaking partnership was formed to jointly manage the marine cargo investment and business in both the Seattle and Tacoma harbors. This decision was made in the face of intense and un-paralleled competition within the cargo shipping industry, and declining market share in the trans-Pacific trade.

Tangible results followed quickly, with the two seaports working together to approve \$141 million in improvements to facilities in Tacoma's South Harbor. These investments are designed to accommodate the 18,000 TEU container vessels that the shipping industry is evolving towards.

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NW Seaport Alliance accepting award from President Troy McClelland (with award recipients, Connie Bacon, Port of Tacoma and John Creighton, Port of Seattle)

## KNOWING THE WATERS

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prohibits gifting of public funds. This has been interrupted in a leasing context of providing a below market rent with the intent to donate to the tenant. This issue should always be evaluated when leasing to a "worthy" cause or a non-profit. Any decision to provide a less than fair market value rent should be clearly justified in terms of port powers (for example - economic development or tourism) on the public record to remove any future claim that the port commission was seeking to benefit a worthy non-profit by gifting public funds with a reduced rent.

**Lease assignment clauses.** Under Washington case law the phrase "not unreasonably withheld" with regards to assignments means that absent a very compelling reason the landlord must assign the lease. Therefore, if this language is included expect very little ability to deny an assignment. Remember to include a transfer of a controlling interest in a corporate or limited liability company tenant as an "assignment." A more restrictive clause may say that the port may "deny assignment in its sole discretion" or it may outright prohibit assignment.

**Controlling port property - the relationship between the "use clause" and the "assignment clause."** Ports typically limit the use of a parcel to a defined use (for example "storage of logs for export"). The best practice is to avoid broad uses such as "all uses allowed by zoning." This is particularly true for long term leases where zoning may change over time. The corollary

to the use restriction is the assignment provision. If the use is narrowly drafted (say for example "storage of logs for export") then the assignment clause can be generous in allowing the tenant to assign the lease to another party because no matter who the tenant is, the property can only be put to that approved use (here "storing logs for export"). If the use provision is broad (for example "anything permitted by zoning") then consider limiting or prohibiting assignment because a new owner may completely change the use or seek a zoning change to a use not desired by the port. For example, a tenant involved in "storing logs for export" could assign a lease with an "anything permitted by zoning" use provision to a new tenant interested in building a waterfront restaurant. This may be incompatible with other tenants and the port may not be able to stop this assignment or change in use. So, in theory, the more restrictive the use provision the more liberal the assignment clause can be worded. The best practice is to have a restrictive use provision to keep control of the port's property particularly for long term leases coupled with a standard assignment clause that says the port will not unreasonably withhold consent. Then, if a new tenant wants to change the use the issue can be fully considered.

**Risk of loss and liability.** Perhaps the most important "standard clauses" related to risk of loss and liability for someone injured on port property. Typically, landlords (not just ports) do not accept any liability for the tenant's property on the leasehold. The tenant handles damage to the tenant's property

with insurance. Also, typically the tenant buys liability insurance naming the port as an "additional" or "also" insured for claims for property damage or personal injury brought by someone on the leasehold. Make sure that the port has a procedure to actually get the certificates of insurance and check those against the requirements of the lease. Finally, it is important that a tenant acknowledge that they have conducted a complete inspection of the property prior to leasing. If the port is aware of any defects that could lead to personal injury either repair the defect or fully disclose its existence in the lease. This will prevent a later claim from a tenant employee or visitor that the port is liable for the injury.

**Court or arbitration?** Ports frequently ask about which venue is better. The lawyers typically give the classic answer "it depends" and it does. If the court in the port's county can hear lease disputes in a timely manner, then I recommend the court system because the law favors landlords. If the court system in the port's county is backed up then consider arbitration where an arbitrator is appointed to issue a binding decision. Keep in mind that arbitrators are more prone, in my opinion, to try a "split the baby" and give each side something.

These are a few of the more common questions. There are many more and the leasing area is constantly evolving. As always, please contact your port counsel with any legal questions regarding this topic. And, if you have a particular topic for a *Knowing the Waters* please email me at [fchmelik@chmelik.com](mailto:fchmelik@chmelik.com).

## PORT SPOTLIGHT

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In conjunction with these investments, the two ports have also convened broad-based coalition efforts with marine terminal operators, railroads, trucking companies, shipping lines, cargo owners and labor to improve operations. They have also stepped up efforts with the cities of Seattle and Tacoma to plan for and improve key freight access corridors.

One recent success was the seamless transition from Tacoma to Seattle of a trio of shipping lines who needed better facilities for refrigerated cargo. In past years competition between the two ports could have led to prolonged negotiations and lower lease rates. Instead, the NWSA worked together to keep the customers, and their jobs, in the region.

"We remain committed to creating the jobs and economic opportunities so valuable to this region and Washington state," said John Wolfe, CEO of the Northwest Seaport Alliance.

## EMPLOYMENT OPPORTUNITIES

**Business Development Assistant**  
Port of Port Angeles

**Spray Manager**  
Port of Sunnyside

**Executive Director**  
Port of St. Helens, Oregon

**Finance Manager**  
Port of St. Helens, Oregon

**Marina Office Assistant**  
Port of Bremerton

**Port Attorney**  
Port of Walla Walla

**Director, Engineering**  
Port of Tacoma

**Senior Real Estate Manager**  
Port of Tacoma

**Assistant Director, Facilities**  
Port of Tacoma

**Records Officer/  
Administrative Assistant**  
Port of Longview

**Communications Associate**  
Port of Longview

**Director**  
Washington Maritime Federation

If you would like information on any of these positions, visit [www.washingtonports.org/employmentopportunities/](http://www.washingtonports.org/employmentopportunities/)