

KNOWING THE WATERS

Practical Legal Perspective for New Port Commissioners

The Panel

- Dan Stahl, Executive Director, Port of Longview
- Jim Rothlin, Executive Director, Port of Bremerton
- Tim Schermetzler, CSD Attorneys at Law – WPPA General Counsel
- Frank Chmelik, CSD Attorneys at Law – WPPA General Counsel



Purpose

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



The Port is a “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 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
 - 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.



The 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)



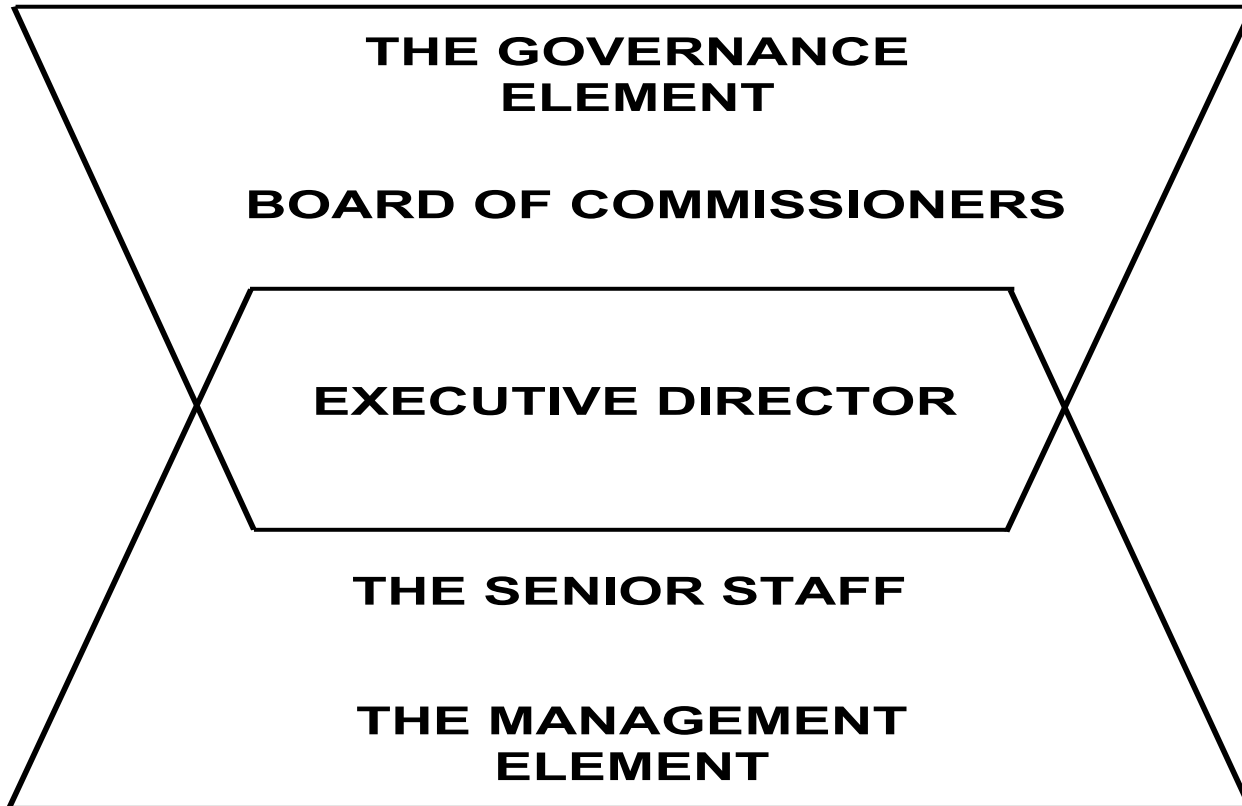
The Port Attorney

- 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?



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”

Why Delegate – Commissioners are a Precious Resource

A Very 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



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.

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

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

Thoughts on Conduct of Public Meetings

- Public comment is not 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 - “stump the staff”
- Plan for contentious issues
 - Size the room
 - Consider the process

- 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
 - 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

E-mails 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

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.”

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

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

Other Issues to Consider

- Public Funds
- Sexual Harassment
- 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

The Port “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

QUESTIONS?

