

Leasing Practices and Policies for Port Commissioners: Trends, Directions and Reminders

Port of Port Townsend - Commission Public Workshop
February 28, 2018

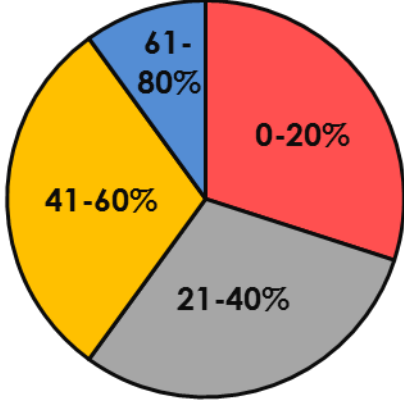
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All Ports surveyed at a WPPA seminar have some revenue from real estate

DO YOU HAVE PORT REVENUE FROM REAL ESTATE?



WHAT PERCENT OF TOTAL EARNED REVENUE IS FROM REAL ESTATE?



The Purpose

▶ Topics

▶ The Role of the Commission

- ▶ Determining Mission vs. Margin
- ▶ Understanding the Commissions Role in the Deal
- ▶ Avoiding Commission “Blinking”
- ▶ Leasing
- ▶ The Open Public Meetings & Public Records Act
- ▶ Issues of concern
- ▶ But why?
 - ▶ Effectiveness of Commission and the Port
 - ▶ Purposeful “culture setting”
 - ▶ Protect the Port’s “political bank account”

▶ Basic Leasing 101 - What the Commissioner Ought to Know

▶ Ethical issues update

The Commission's Role in Leasing

Governance, Strategic Thinking and
Policy

Governance Role in Leasing

- ▶ Elements of governance
 - ▶ In leasing (as in all things) set tone and culture of the Port
 - ▶ Clear and respected delegation to Executive Director -POPT Res. 673-18
 - ▶ The ED works for the Commission
 - ▶ The Commission is not the judge between staff and tenants
 - ▶ Clear leasing policy - POPT Resolution 351-01
 - ▶ Avoid freelancing and the “command performance syndrome”
 - ▶ Do not negotiate the leases and discuss the terms
 - ▶ Do visit tenants and focus on understanding their business
 - ▶ In all leasing decisions, act as a strategic Commission and not as a tactical Commissioner

Governance - Putting Commission Time to Work

A Very Limited Resource

**1–5 Hours
Per Month**

**5–10 Hours
Per Month**

**10–15 Hours
Per Month**

**Over 15 Hours
Per Month**

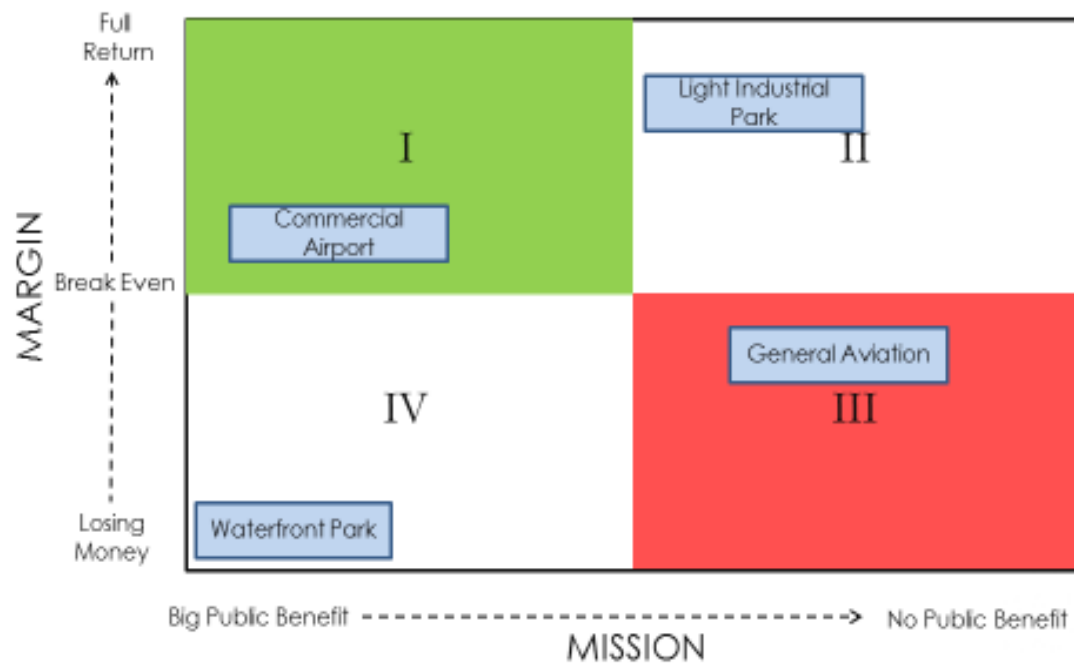


The “WHY” - The First and Most Important Step - A Commission Discussion

Leasing 101 For Commissioners

- ▶ **“WHY”** is your Port leasing property (including moorage)?
 - ▶ Revenue for Port other operations
 - ▶ The “ROR”
 - ▶ Job creation or preservation
 - ▶ Economic jump start for your Port district
 - ▶ ??????
- ▶ This issue has been described as “mission vs. margin”
 - ▶ There is no right answer
- ▶ But the question must be asked

Plotting Port Programs & Services



After consideration of all factors, **why** does the Port of Port Townsend rent space in its marinas and lease land?

“HOW” - will the Commission
strategically guide leasing

Leasing 101 For Commissioners

- ▶ Has the Commission determined the appropriate product mix and the right amount of available product?
 - ▶ Raw land
 - ▶ Development ready land
 - ▶ Spec buildings
 - ▶ Marine infrastructure
 - ▶ Airport hangers
 - ▶ Is there a long term goal of obtaining suitable inventory?
- ▶ Important Commission strategic decision
 - ▶ Over what period of time?

- ▶ **“HOW”** will the Port accomplish its leasing goals - Commission adopted policies - the BIG THREE
 - ▶ Delegation of Powers to the ED
 - ▶ When does a real estate matter come before the Commission?
 - ▶ Executive sessions and final approvals
 - ▶ Rate of Return Leasing Policy
 - ▶ This is the Port’s “yardstick” policy
 - ▶ If not, then why not?
 - ▶ Marina Pricing Policy
 - ▶ Subsidized public benefit or money making opportunity?
 - ▶ Break even replacement formulas
 - ▶ Market rate
 - ▶ Tax payer subsidized

- ▶ Other or Special Pricing Policies
 - ▶ Marine Trades Tenants
 - ▶ Wooden Boat Tenants
 - ▶ Commercial Fisherman Moorage Rates
 - ▶ Incubator Business Rates
 - ▶ Job Preservation or Enhancement Rates
 - ▶ Recession Rental Rates
 - ▶ Quality = Lease Term Policy
- ▶ The goal is to avoid “Blinking”

- ▶ Has the Commission identified its appetite for risk?
 - ▶ “Public private partnerships”
 - ▶ Euphemism for “risk sharing”
 - ▶ Ground lease of raw land?
 - ▶ Infrastructure?
 - ▶ Build it and they will come?
 - ▶ Brownfield redevelopment



▶ Has the Commission applied the basic financial concepts?

▶ Highest & Best Use

HBU

▶ Net Operating Income

NOI

▶ Capitalization Rate

Cap Rate

▶ Net Present Value

NPV

▶ Rate of Return

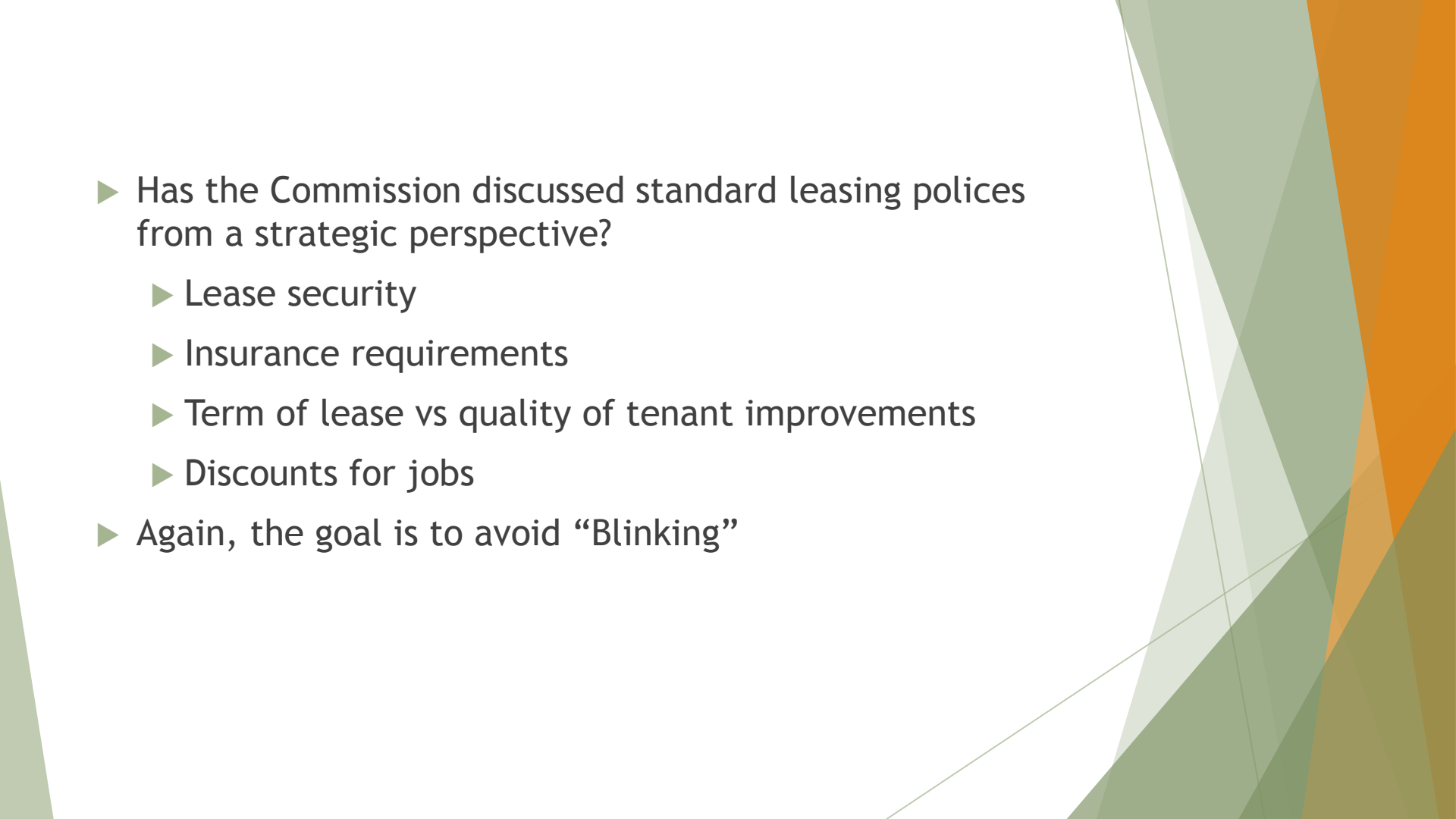
ROR


▶ Return on Equity

ROE

▶ Commercial Mortgage
Backed Securities

CMBS

- 
- ▶ Has the Commission discussed standard leasing policies from a strategic perspective?
 - ▶ Lease security
 - ▶ Insurance requirements
 - ▶ Term of lease vs quality of tenant improvements
 - ▶ Discounts for jobs
 - ▶ Again, the goal is to avoid “Blinking”



The “WHAT” - Staff
implementing the commission
direction

Leasing 101 For Commissioners

Big Concepts in Leasing and Marina Tenant Documentation

- ▶ Leases in Washington are a property right
 - ▶ The “law abhors a forfeiture” of a property right (especially when a government is involved)
- ▶ A Port is held to the same (or higher standard) as any landlord
- ▶ Draft the lease correctly now because the next time it will be reviewed is when there is an issue (accident, default, environmental spill)
 - ▶ Today, insurance is critical
- ▶ The Commission must rely on staff to “get this right”
- ▶ Most lease breaches are uninsured

- ▶ Adopt Standard lease documents
 - ▶ Different leases for airports, marina tenants, raw land and commercial buildings
 - ▶ Used all the time and subject to negotiation
 - ▶ Port staff should understand these documents and each provision
- ▶ Consents to assignment
 - ▶ Security for financing
- ▶ “Road Test” the lease
 - ▶ Conduct a periodic review with legal counsel
- ▶ Remember, the Landlord and Tenant are not equal



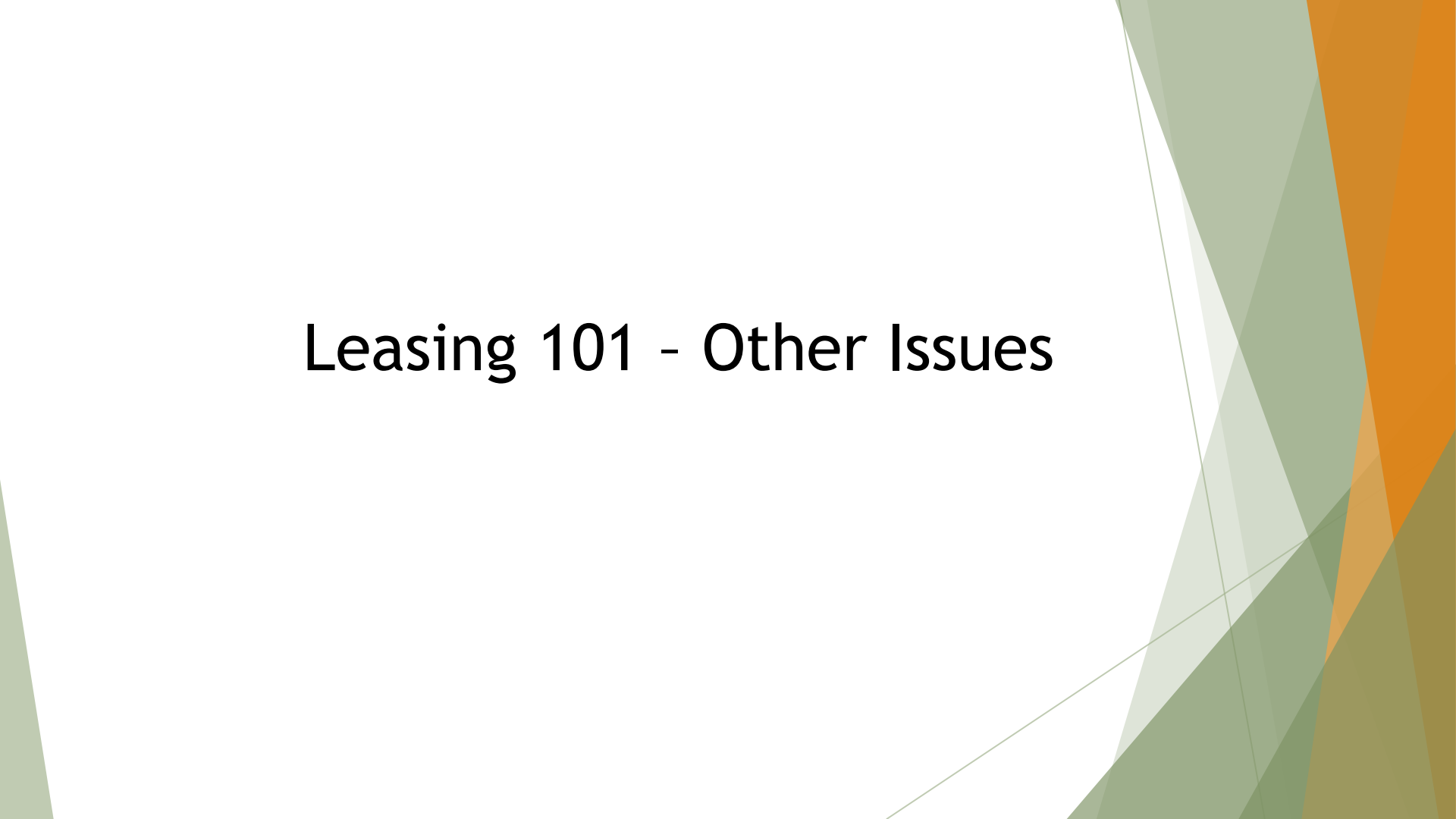
- ▶ Understand the “business risk” provisions of the Port’s lease
 - ▶ Use provision and its inverse relation to assignment provisions
 - ▶ No Port responsibility for tenant property
 - ▶ Port “representations and warranties”
 - ▶ Insurance provisions and “also insured” status
 - ▶ Indemnifications and hold harmless provisions
 - ▶ Title 51 and USL&H waivers
 - ▶ Environmental provisions
 - ▶ Representations on condition of the leasehold
 - ▶ “No lights out” provisions

**THE BIG
ISSUE**

- ▶ Maintenance issues
- ▶ Default and cure issues
- ▶ Any provision where the Port has to be “reasonable”
- ▶ The integration clause (“entire agreement”)
- ▶ Lease security
 - ▶ Commission decision as to length or personal guaranties
- ▶ Consents for assignments for loans
 - ▶ Ability of lender to change the rules
 - ▶ Commercial Mortgage Backed Securities (“CMBS”)
- ▶ Shared facilities can be problematic
 - ▶ Port must reserve the right to decide **on** “cooperation”

**THE BIG
ISSUE**

Leasing 101 - Other Issues

The background of the slide features abstract, overlapping geometric shapes in shades of green and orange. The shapes are layered, creating a sense of depth and movement. The colors range from light, muted greens to vibrant oranges and browns. The overall aesthetic is modern and professional.

- ▶ Understand the “environmental status” of the Port’s property
 - ▶ Inventory of land and buildings
 - ▶ Land condition
 - ▶ Former industrial property (“Brownfield”) or new raw land (“Greenfield”)
 - ▶ Building condition
 - ▶ Asbestos or air quality
 - ▶ Docks, piers and marine facilities
 - ▶ Flood plain determinations



- ▶ Article VII, Section 7 - Prohibition against “gifting of public funds”
 - ▶ Donative intent is required
 - ▶ Auditor will look at below market deals especially with a nonprofit
 - ▶ Justify below market deals in an open public meeting
 - ▶ Condition of property
 - ▶ Economic development (jobs) or tourism promotion
 - ▶ Provide expert opinions at the meeting



- ▶ True and Full Value

- ▶ Transfer between governments must be for “true and full value”

- ▶ RCW 43.09.210

- ▶ A “flexible concept of value”

- ▶ Depending on the circumstances of the transaction

- ▶ Value may take the form of considerations other than money

- ▶ Always include in the agreement and justify in a public meeting

- ▶ **Contract rent and Washington State leasehold excise tax**
 - ▶ A “leasehold interest” occurs where there is “right to possession and use of publicly owned real or personal property”
 - ▶ Does not matter what it is called
 - ▶ Does not include a “license” or “concession” which is permission to enter onto land without conferring any rights on the land
 - ▶ “Contract rent” is the totality of what is paid for the lease
 - ▶ Always require tenant pay “all applicable Washington State leasehold excise tax”
 - ▶ WAC 458-29A-100

- ▶ Buildings and Improvements on the Port's property - Public Work Laws
 - ▶ Tenants can build buildings or improve lease space if allowed in the lease
 - ▶ Not a public work unless:
 - ▶ Rent credit provided in exchange for the building
 - ▶ Or, lease length does not match life of the improvement and lease requires improvement
 - ▶ Port construction or construction at the cost of the Port (including a rent credit) is a public work and must be undertaken pursuant to public works laws
- ▶ Careful language on disposition of improvements at the end of a lease
- ▶ Careful language on lease modification - only in writing



- ▶ Ports can participate in economic development
 - ▶ RCW 53.08.245
- ▶ Develop a “Real Estate Broker Compensation Policy”
 - ▶ Registered prospects ahead of time
 - ▶ Percentage of rent payment to the agent
- ▶ Develop a promotional hosting policy for real estate agents
 - ▶ RCW 53.36.140



Leasing 101 - Public Records, Open Public Meetings and Ethical Issues

Public Records Act

- ▶ Most Lease Documents Are Public Records
 - ▶ Internal drafts are likely protected (RCW 42.56.280)
 - ▶ All other documents, emails, blogs
 - ▶ Apply the *Port Townsend Leader* test
 - ▶ But, drafts sent to tenants are probably not protected
 - ▶ One could argue this is a preliminary draft but, this is weak
 - ▶ Final leases are “public records”

- ▶ Advise all counterparties of the Public Records Act and Open Public Meetings Act
 - ▶ All documents, emails and other information from and to the prospective tenant are public records
 - ▶ Financial records are likely public but it is the cost of leasing public property
 - ▶ The lease will likely be approved in an open public meeting

- ▶ Recent trends in the Public Records Act are cause for concern
 - ▶ Move towards requiring inspection of personal computers
- ▶ Recent trends in Court rules are cause for concern
 - ▶ Requirements to preserve all data including home computers, cell phones, text messages and social media
- ▶ Recent trends in technology are cause for concern
 - ▶ Ability to search massive amounts of data quickly
- ▶ Combined together the Public Records Act, court rules and technology are yielding a perfect storm

Open Public Meetings Act

- ▶ All commission decisions on leases must occur in an open public meeting
 - ▶ Executive session to discuss price of the lease (RCW 42.30.110(c))
 - ▶ Riverkeepers v. Port of Vancouver USA
 - ▶ RCW 42.30.110(1)(c) limited to price
 - ▶ Supreme Court says:
 - ▶ Must discuss factors that bear on price publicly first
 - ▶ Then executive session to discuss the actual impact
 - ▶ WPPA producing a guidance document
 - ▶ Tenant or prospective tenant cannot be in an executive session

- ▶ Misuse of the executive session
 - ▶ While we are here let's talk about
 - ▶ The WPPA has repeatedly beat back efforts to have executive sessions recorded
 - ▶ 2011 Legislative session (mandatory)
 - ▶ 2013 Legislative session (permissive)
- ▶ Disclosing executive session discussions or other confidential information violates the law

Leasing - Ethical Issues

- ▶ Code of Ethics for Municipal Officers - RCW 42.23
 - ▶ Very narrow application - contract interests
 - ▶ “disclosure and recusal” is not an option
 - ▶ Exemptions
 - ▶ Doing business of no more than \$1,500 per month
 - ▶ Leasing to a Port Commissioner where the lease has been approved by a board of three disinterested appraisers and the superior court as fair to the Port

- ▶ Remote interests
 - ▶ Non-salaried officer of a nonprofit corporation
 - ▶ The employee of a contracting party where compensation is a fixed salary or wages
 - ▶ Must “disclose and recuse”
- ▶ No disclosure of confidential information “for personal gain”
 - ▶ Executive session material
- ▶ No special privilege or gifts
 - ▶ De minimis value gifts but ?

- ▶ 95%+ of the time, it is unthinking actions
 - ▶ Commissioners and senior staff do not recognize the issue or do not think about it
 - ▶ It never was my intent . . .
 - ▶ “I have known the tenant for years . . . I was trying to help”
 - ▶ Good intentions but bad public agency process
- ▶ The conduct of the Commissioners and senior staff set the cultural tone of the Port
 - ▶ The staff and now the public are watching all the time
 - ▶ If you haven't noticed - the social standards have changed
 - ▶ If you don't know - discrimination lawsuit, hostile work environment lawsuits and mistreatment of employees lawsuits are a growth industry

- ▶ Ethical issues grow big, quickly and get expensive very quickly
 - ▶ Usually nobody spots the issue until it's too late
 - ▶ Usually the gain is disproportionate to the risk
 - ▶ Ethical issues are often “perception based”
 - ▶ Everything is now an “ethical issue”
- ▶ Ethical issues really hurt personally and hurt the Port
 - ▶ People today stand ready with vitriolic attacks
- ▶ Ethical issues damage the Port’s “political bank account”

- ▶ What this Commission can do
 - ▶ Review the Port's and Commission's ethical culture yearly and publically
 - ▶ Agenda item "How are we doing?"
 - ▶ Purposefully extend ethics to all facets of the Port's operation
 - ▶ Business Dealings
 - ▶ Tenants
 - ▶ Employees
 - ▶ Commissioners
 - ▶ Customers

Personnel Investigations for Misconduct

- ▶ If there is an allegation (any form of misconduct) there will be an investigation
 - ▶ All Commissioners and most employees respond with “how could they even think that about me”
 - ▶ The management usually doesn’t!
- ▶ An investigation serves to protect the Commissioner or the employee
 - ▶ Allows the Port to defend itself and the Commissioner or employee
- ▶ Report to insurance company
 - ▶ Necessary step to provide insurance coverage



QUESTIONS?