No. 90500-2

BEFORE THE WASHINGTON STATE SUPREME COURT

COURT OF APPEALS NO. 70606-3-I

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation,

Petitioner/Appellant,

v.

SAN JUAN COUNTY, a Washington municipal corporation and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council,

Respondents.

AMENDED PETITION FOR REVIEW

Dennis D. Reynolds
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
Counsel for Petitioner/Appellant

Michele L. Earl-Hubbard
ALLIED LAW GROUP LLC
6351 Seaview Avenue NW
Seattle, WA 98107
(206) 801-7510 Phone
(206) 428-7169 Fax
Counsel for Petitioner/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. IDENTITY OF PETITIONER

Petitioner Citizens Alliance for Property Rights Legal Fund ("CAPR") is a Washington non-profit corporation. CAPR is the plaintiff in the trial court and the appellant in the Court of Appeals. Its members participate in the public process involving enactment of new laws in San Juan County ("the County"), including a new Critical Areas Ordinance.

II. COURT OF APPEALS DECISION FOR WHICH REVIEW IS SOUGHT

Pursuant to RAP 13.4, Petitioner seeks review of the opinion decision of the Washington Court of Appeals, Division I dated April 28, 2014 (**Appendix A-1**), affirming the trial court's Order of Summary Judgment. A Motion to Publish the referenced decision (**Appendix A-2**) was granted by the Washington Court of Appeals, Division I, by order dated June 10, 2014 (**Appendix A-3**).

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Open Public Meetings Act ("OPMA") applies to Subcommittee meetings composed of at least three members of the San Juan County Council where such subcommittees are comprised of three of six San Juan County Councilmembers and where at least one subcommittee meeting was attended by four County Council members.

B. Whether the OPMA applies to meetings of Subcommittees where a quorum of the subcommittee is present.

C. Whether the OPMA applies to meetings of Subcommittees where information, reports and policies concerning legislation or other matters to come before the Council as a whole are reviewed, discussed and narrowed down prior to presentation to the Council for "final action."

D. Whether the OPMA applies to meetings of Subcommittees that took action directly and on behalf of the San Juan County Council without (a) notice to the public of the meetings, and/or (b) allowance of the public to attend the meetings, and where the Council accepted the work of the Subcommittees without disclosure of the fact or substance of such work to the public.

E. Whether the Court of Appeals erred in upholding the Trial Court's Summary Judgment Order of Dismissal where there are genuine issues of material fact regarding the creation, purpose and actions of the Subcommittees

F. Whether Petitioner is entitled to attorney fees as the prevailing party under the OPMA if this Court accepts review and reverses the Court of Appeals.

IV. STATEMENT OF THE CASE

San Juan County has asserted that it is immune from the OPMA unless a quorum of the six-member County Council is physically present at and participating in a meeting. The Court of Appeals affirmed.[1] This proposition is contrary to the unambiguous terms of the Act, which apply to subcommittees of a governing body—regardless how many persons sit on the subcommittee—when action is taken on behalf of the governing body.[2] If allowed to stand, the Court of Appeals' ruling upholding the County's interpretation thwarts the goal of the Act to increase confidence in government decision-making by permitting the public to observe each of the steps employed by their elected officials when making important policy decisions. *See Eugster v. City of Spokane,* 128 Wn. App.1, 7, 114 P.3d 1200 (2005).

---

[1] *See* Opinion, p.1, p.7.
[2] RCW 42.30.010; RCW 42.30.020(1)(2). *See infra*, p.4.

This case presents an issue of first impression on a matter of major public importance: when does a committee act on behalf of a larger governing body for purposes of requiring open meetings? The outcome will affect the public's ability to observe the development of policies in every county, city, school district, etc., throughout the state.

A. Overview and Purpose of the Open Public Meetings Act

The Washington State Legislature passed the OPMA, RCW 42.30, in 1971 as part of a nationwide effort to make government affairs more accessible. The Act is intended to "unlock" the doors of government policy and law-making to the public, and increase public trust in the decisions of elected officials, among other goals.[3]

The OPMA mandates "[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided ...." RCW 42.30.030. Governing bodies must provide notice of meetings or special meetings. RCW 42.30.070; RCW 42.30.080. They must prepare and make available for inspection minutes of all regular and special meetings. RCW 42.30.030. The purpose of the OPMA is remedial and "shall be liberally construed." RCW 42.30.910.

The OPMA addresses critical matters of open government and has daily application to the activities of local policy-makers:

---

[3] *See Town of Palm Beach v. Gradison*, 296 So.2d 473, 475 (Fla. 1974). Washington's law is modeled on "sunshine" laws of California and Florida. Decisions from those jurisdictions provide guidance in interpreting Washington law. *E.g., Anaya v. Graham*, 89 Wn. App. 588, 592, 950 P.2d 16 (1998).

> Codified in chapter 42.30 RCW, the Act applies to all city and town councils, to all county councils and boards of county commissioners, and to the governing bodies of special purpose districts, ***as well as to many subordinate city, county, and special purpose district commissions, boards, and committees. It requires, basically, that all "meetings" of such bodies be open to the public and that all "action" taken by such bodies be done at meetings that are open to the public***. The terms "meetings" and "action" are defined broadly in the Act and, consequently, ***the Act can have daily significance for cities, counties, and special purpose districts even when no formal meetings are being conducted.***[4]

(Emphasis added). The Act applies to meetings of committees and subcommittees when acting on their own accord and/or on behalf of the Council. *See* RCW 42.30.010; RCW 42.30.020(1), (2). It encompasses "action" – including deliberations. RCW 42.30.020(3).[5]

San Juan County is a Home Rule county and subject to the OPMA. At the time the Petitioner's lawsuit was filed, the County was governed by a six-member Council. It created a number of Council subcommittees which met outside of the public's eye to deliberate on public policy matters in order to streamline proceedings before the Council as a whole.

---

[4] The Open Public Meetings Act: How it Applies to Washington Cities, Counties and Special Purposes Districts, Municipal Research Services of Washington, Report No. 60 (revised June 2014) at p.1. **(Appendix A-4)**

[5] A *prima facie* case of an OPMA violation is established when (1) a governing body of a public agency – a "subagency" of a public agency or "committee thereof," created or acting on behalf of the governing body (2) holds a private meeting without notice, (3) in which "action" or "final action" occurred. *Eugster v. City of Spokane,* 110 Wn. App. 212, 222, 39 P.3d 380 (2002) ("*Eugster I*"); *Feature Realty Inc. v. Spokane*, 331 F.3d 1082, 1088 (9th Cir. 2003)(an OPMA violation occurs if "action" or "final action" is taken and the meeting must be open to the public unless an exception applies). A public official's knowledge of an OPMA violation is only necessary for assessment of a civil penalty, which is not an issue in this matter. *See* RCW 42.30.120(1).

The Subcommittees included: General Governance, Budget, Solid Waste and the "Critical Areas Implementation Team."[6]

B. Creation and Purpose of the CAO Subcommittee

In late 2009- early 2010, the CAO Subcommittee was created by San Juan County to meet and discuss issues related to the adoption of a new Critical Areas Ordinance ("CAO")[7] and shoreline management plan ("SMP").[8] According to the County in its Answer to the Amicus Curiae Brief of Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government filed with the Court of Appeals, the CAO Subcommittee was required to meet and give direction to the County Administrator because, by charter, the full County Council was precluded from doing so. *See* County Answer to Amicus Curiae Brief, p.2.[9] The process was set up so that the CAO Subcommittee had to act on behalf of the full Council.

The CAO Subcommittee officially included three Council members (Fralick, Miller and Pratt). A quorum of the Subcommittee was present at each of its meetings.[10] The Council and especially Council members Fralick and Pratt were motivated to adopt a new CAO prior to

---

[6] In their rulings, the lower court and the Court of Appeals ignored all the Subcommittees except the CAO Subcommittee. Because the County did not brief issues related to any subcommittee other than the CAO Subcommittee, it waived such arguments. *E.g., Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987); *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).
[7] CP 254, 286, 289 (Palmer Decl. Ex. B Fralick Dep. 7:16–24; Palmer Decl. Ex. A Pratt Dep. 22:18–23; 74:1–9)
[8] CP 353, 515-18 (Palmer Decl. Ex. C Miller Dep. 77:2–4; Palmer Decl. Ex. X).
[9] **Appendix A-5**.
[10] CP 300, 421-22 (Palmer Decl. Ex. D Hale Dep. 97:9–98:20; Palmer Decl. Ex. C Miller Dep. 16:13–18).

leaving office by the end of 2012.[11] The meetings of the CAO Subcommittee were not open to the public.[12]

The Subcommittees were created to parse out work from the Council in order to help it make certain public policy decisions more quickly. *See* allegations, Amended Complaint, ¶ 10, admitted by the County in its Answer.[13] *See* Amended Complaint, ¶ 15, and Answer "... some subcommittee meetings have not been noticed or open to the public."[14] *See* admission to allegations of Amended Complaint, ¶ 41.[15] *See* admissions to ¶¶ 70-71 of the Amended Complaint.[16]

C. CAO Subcommittee Meetings Took Place Without Notice and Their Members Took Action.

The CAO Subcommittee met approximately once per week since its creation. It held at least twenty-five physical meetings.[17] Each of those private meetings were held at irregular times, often in private conference rooms that do not promote public access.[18] The meetings were called by Council members on the CAO Subcommittee or by staff, not the County Executive.[19] Minutes of the meetings were not recorded.

---

[11] CP 348-349 (Palmer Decl. Ex. C Miller Dep. 67:24–68:9).
[12] **Appendix A-1**, at p. 2; CP 500 (Palmer Decl. at Ex. U); CP 333 (Palmer Decl., Ex. C at p. 49:11–15).
[13] **Appendix A-6**, Amended Complaint; **Appendix A-7**, Defendant's Answer.
[14] **Appendix A-6**, Amended Complaint.
[15] *Id.*
[16] *Id.*; *see also* CP 294-297 (Palmer Decl. Ex. B at p.13:13–16:5); CP 449-457 (Gaylord Memorandum at 13:21-14:7)..
[17] CP 94-186; CP 244 (Palmer Decl. ¶ 59 citing to CP 694 – 696); *see also* CP 187-236; CP 771-75 (Decl. of Lisa Brown).
[18] CP 298, 447. (Palmer Decl. Ex.D Hale Dep. 162:16–21; Palmer Decl. Ex.B Fralick Dep. 20:10–25).
[19] CP 290-91, 362-63, 388, 391, (Palmer Decl. Ex.D Hale Dep. 43:14–20; 46:8–16; Palmer Decl. Ex.B Fralick Dep. 8:22–9:2; Palmer Decl. Ex.C Miller Dep. 96:14–97:4).

The CAO Subcommittee did the "pick and shovel work" for the Council, as stated by Councilmember Hale.[20] The CAO Subcommittee discussed major policy issues regarding adoption of a new CAO – including Best Available Science, wetland amendments, alternative wetland buffer approach, alternative water quality buffer sizing procedure, impacts to critical areas, reasonable use exceptions, "hot button issues," "key issues," mitigation requirements, risk analysis, site specific buffers, and Best Management Practices.[21]

The CAO Subcommittee reached a consensus on and narrowed down scientific data, policy materials, and took input from a wide variety of sources to further the drafting of the CAO. The CAO Subcommittee

---

[20] CP 304-05, 436, 550-57 (Palmer Decl. Ex.D Hale Dep. 86:7–19; Palmer Decl. Ex.B Fralick Dep. 21:1–6).

[21] CP 438 (Palmer Decl. Ex. D Hale Dep.104:16–20); CP 534 – 536 (Palmer Decl. Ex. AC); *See* CP 365 – 366 (Palmer Decl. Ex. C Miller Dep.107:1–12); CP 290-91, 298-300, 284-85, 323, 497-98 (Palmer Decl. Ex. B Fralick Dep. 8:22–9:7; 20:3–9; 21:7–22:2; Palmer Decl. Ex. A Pratt Dep. 72:2–73:8; Palmer Decl. Ex. C Miller Dep. 25:10–25; Palmer Decl. Ex. T);.CP 272-74, 466-71 (Palmer Decl. Ex. A Pratt Dep. 51:16–53:19; Palmer Decl. Ex. J); CP 398-400, 256, 279-83, 321, 354, 478-79, 480-82, 491-93, 515-18 (Palmer Decl. Ex. D Hale Dep. 63:17–65:9; Palmer Decl. Ex. A Pratt Dep. 24:3–5; 64:24–67:17; 67:25–68:20; Palmer Decl. Ex. C Miller Dep. 20:9–19; 79:16–20. *See* Palmer Decl. Exs. R, N, O and X); CP 187 – 236 (Peterson Decl. Ex. B); CP 416, 439, 270-71, 361, 462-63, 501-03, 561-62 (Palmer Decl. Ex. D Hale Dep. 87:4–12; 148:2–10; Palmer Decl. Ex. A Pratt Dep. 49:14–50:11; Palmer Decl. Ex. C Miller Dep. 94:8–21; Palmer Decl. Exs. H, V, and AJ); CP 434, 336-38, 548-49, 501-03 (Palmer Decl. Ex. D Hale Dep. 129:6–21; Palmer Decl. Ex. C Miller Dep. 52:5–54:17; Palmer Decl. Exs. AG, and V); CP 430-31, 542-44 (Palmer Decl. Ex. D Hale Dep. 108:9–109:14; Palmer Decl. Ex. AE); CP 437-38, 558-60 (Palmer Decl. Ex. D Hale Dep. 145:16–146:1; Palmer Decl. Ex. AI; CP 440, 563-64 (Palmer Decl. Ex. D Hale Dep. 151:16–17. *See* Palmer Decl. Ex. AK; CP 268-70, 460-61, 329-30, 487-90 (Palmer Decl. Ex. A Pratt Dep. 47:6–49:3; Palmer Decl. Ex. G. Palmer Decl. Ex. C Miller Dep. 35:16–36:3; Palmer Decl. Ex. Q); CP 256 (Palmer Decl. Ex. A Pratt Dep. 24:14–23); CP 277-78, 476-77 (Palmer Decl. Ex. A Pratt Dep. 62:16–63:8. Palmer Decl. Ex. M); CP 256, 344-46, 504-14 (Palmer Decl. Ex. A Pratt Dep. 24:9–13; Palmer Decl. Ex. C Miller Dep. 63:3–65:19; Palmer Decl. Ex. W); CP 403-04, 491-93 (Palmer Decl. Ex. D Hale Dep. 68:6–69:12; Palmer Decl. Ex. R).

needed their legal advisor present because it discussed more than just scheduling issues and did not go into Executive Session.[22]

The Council accepted the work of the CAO Subcommittee. It did not state it was unauthorized to do so. Because it did not start the deliberation process anew, the Council enjoyed the benefits of work that was completed in meetings that were not open to the public. The County never disclosed the substance of the Subcommittee's secret work, including all options and strategies discussed by the CAO Subcommittee.

When asked by the County to analyze the legality of these secret subcommittee meetings, its elected Prosecuting Attorney Randy Gaylord urged compliance with the OPMA.[23] Mr. Gaylord also cautioned against the fact that, given the four-member requirement for positive action at the Council level and the fact that it consists of only six members, a negative vote of three council members also can prevent or "block" a proposal before the Council, acting as a "negative quorum."[24]

> One unintended consequence of the subcommittee approach that should be considered is that it has the ability to create imbalances and voting blocks on the Council that has the effect of weakening the influence of those who are not members of a subcommittee. If a Council member does not have the chance to influence policy at the formative

---

[22] CP 385-86, 390, 393-94, 324-25, 304-09, 487-90 (Palmer Decl. Ex. D Hale Dep. 40:19–41:7; 45:8–23; 55:25–56:21; Palmer Decl. Ex. C Miller Dep. 27:9–28:17. Palmer Decl. Ex. B Fralick Dep. 30:18–34:14; Palmer Decl. Ex. Q).

[23] On April 26, 2012, the Prosecuting Attorney's office submitted a memorandum to the Council and the Charter Review Commission regarding Meetings of Three Members of San Juan County Council. **Appendix A-8**, at p.2.

[24] *Id.*; *see also* CP 441-45, 329-30, 358, 487-90, 526, 563-67 (Palmer Decl. Ex. D Hale Dep. 152:18–153:8; 153:16–156:16; Palmer Decl. Ex. C Miller Dep. 44:2–17; 46:2–16; 88:7–23; Palmer Decl. Exs. Q, Z, AK, and AL).

> stage, the die may be cast before they even get to speak. This is the downside of the subcommittee system composed of three members when it only takes one more member to make a decision.

Gaylord Memorandum, April 26, 2012, p.4.[25]

In December, 2012, the County adopted Ordinance Nos. 26-2012, 27-2012, 28-2012, and 29-2012 ("the New CAO"). The three members of the CAO Subcommittee voted as a block to approve the new CAO in the form and content developed throughout the numerous secret meetings.[26]

D. Petitioner's Complaint and Court Decisions

On October 15, 2012, CAPR filed a timely Complaint for Violations of the Open Public Meetings Act, RCW 42.30 and for Injunction to Restrain Violations of State Law.[27] The County admitted that subcommittee meetings took place without advance notice and not open to the public, for the purpose of "bringing forward and discussing, ideas and policies prior to meetings of the entire Council."[28] However, it took the position that the OPMA did not apply to subcommittee meetings where such meetings did not include a quorum of the Council as a whole, and moved for summary judgment on February 10, 2013.[29]

The County did not support its motion with any declarations or evidence. When CAPR submitted its response brief supported by a declaration of counsel attaching County witness deposition testimony

---

[25] **Appendix A-8.**
[26] CP 679-90 (Palmer Decl. Exs. BD; BE; BF; BG.
[27] CP 22-43.
[28] CP 62-71.
[29] **Appendix A-1**, at pp. 3-4.

excerpts, the County attempted to disavow statements made concerning the CAO update and its timing via a motion to strike.[30]

The County then filed self-serving, contradictory declarations of Councilmembers to "clarify" their deposition testimony in support of its reply brief, raising new arguments and presenting new "facts" for the first time to the effect that the full Council did not "create" the CAO Subcommittee and it did not act on its behalf.[31] Although CAPR moved to strike such declarations,[32] the Trial Court denied the motion on its determination that the declarations were "not inconsistent" with deposition testimony. The County did not refute the fact that four Council members were present at at least one of the challenged subcommittee meetings.

The "evidence" presented by the County established that genuine issues of material fact preclude summary judgment. In particular, the question of whether a "meeting" at which "action" took place is a genuine issue of material fact, which precludes summary judgment.[33]

The Trial Court ruled in favor of the County and summarily dismissed all of CAPR's claims as a matter of law.[34] CAPR filed timely a

---

[30] CP 756-758.
[31] CP 759-768.
[32] CP 776-785.
[33] *Wood v. Battleground School Dist.*, 107 Wn. App.550, 566, 27 P.3d 1208 (2001); *Eugster 1*, 110 Wn. App. at 222-24.
[34] Because summary dismissal is disfavored, a court is required to resolve all reasonable inferences against the moving party and may only grant the motion if reasonable persons could reach but one conclusion. *Wood*, 107 Wn. App. at 566; *Eugster 1*, 110 Wn. App. at 222-24; *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). The Trial Court gave the ***moving party*** the benefit of the doubt that none of the committees took "action," and that they did not "act on behalf" of the Council; it also effectively ruled that the Council did not create the committees.

Motion for Reconsideration pursuant to CR 59(a), on the basis that substantial justice had not been done, and because the Court committed numerous errors of law. The Trial Court denied the Motion for Reconsideration. CAPR filed an appeal to the Washington Court of Appeals, Division I.

The Court of Appeals upheld the trial court's ruling. It ignored evidence that four of six Council members (Pratt, Fralick, Peterson, and Miller) held a series of telephone and email exchanges on November 14, 2011, in which they discussed the wetland process for the CAO update.[35] Such serial conversations constitute a "meeting" under the OPMA. The Court of Appeals determined that it was mere "passive receipt" of emails and not a "meeting" under the OPMA, notwithstanding that the facts must be taken in a light most favorable to the non-moving party, CAPR.[36]

The Court of Appeals' ruling was essentially a rubber-stamp approval of the Trial Court's decision. It summarily ruled that a "gathering" that includes three Council members does not constitute a meeting for OPMA purposes, regardless of whether "action" is taken.[37] This is contrary to case law, and the plain guidance in an Attorney General Opinion cited by the County states: ***"[A] 'committee thereof' includes***

---

[35] CP 483 – 486 (Palmer Decl. Ex. P). The County's citation to Exhibit P in subsequent pleadings, *e.g.* CP 876 – 879 (Appendix A to County Response to Motion for Reconsideration), acts as a concession that the evidence was submitted and the issue raised.

[36] **Appendix A-1**, at pp.7-8; *see also* CP 239, (Palmer Declaration ¶17); CP 895 – 896 (Plaintiff's Amended Motion for Reconsideration at 8-9);CP 183 – 186 (Appendix A-4 to CAPR Response to Summary Judgment); CP 483 – 486 (Palmer Decl. Ex. P).

[37] **Appendix A-1**, at p.7.

committees composed solely of a minority of the members of the governing body ...." Wash AGO 1986 No. 16, p.4 (emphasis added).[38] As stated in the earliest Attorney General Office's Guidance on the OPMA, in AGO 1971 No. 33, where a committee has been created, it is within the definition of "public agency," and subject to the OPMA. The Trial Court's decision **confirms that the Subcommittees were created by the Council**.[39] Although apparently *dicta* in light of the County's position that the OPMA does not apply to subcommittees, the Court of Appeals is flat wrong when it states that "CAPR submitted no admissible evidence that the Council created the CAO Team."[40]

The Court ignored evidence of the purpose and creation of the CAO Subcommittee (*see infra*, pp.5-6) and determined that it was not a "governing body" under the Act, again failing to take the evidence in a light most favorable to the non-moving party which showed that – regardless of how it came into existence, the CAO Subcommittee did act on behalf of the Council as a whole.[41]

The Court ruled that only where the County Council has specifically authorized the subcommittee to act on its behalf are the

---

[38] The AGO also notes at p. 4 that "a committee is a body of persons." This definition would apply equally to any group, be it called a committee or some other name such as board or council.... ***There is nothing in the definition that restricts the composition of the group to members of the governing body...***" (emphasis added).

[39] CP 816-828.

[40] **Appendix A-1**, at p. 14.

[41] **Appendix A-1** at pp.9-15; *c.f.*, CP 691-95 (Palmer Decl. Ex. BH, "Informal" Attorney General of Washington Opinion signed by Timothy Ford and dated March 21, 2008 (***concluding that how a committee is created is less important to the OPMA than what the committee actually does***)).

deliberations of the subcommittee subject to the OPMA.[42] It quoted legislative history via testimony of Representative Hine,[43] but failed to refer to his testimony regarding meetings of subcommittees that are subject to the OPMA where – ***even if not specifically authorized*** – policy, testimony or comments are made on the behalf of the governing body. House Journal, 48th Legislature (1983) at 1294.

RCW 42.30.020(2) does not say that a committee must have any particular authority of its own to constitute a "governing body" for open meeting purposes. On the contrary, the statute defines a governing body as a "policy or rule-making body...*or* any committee thereof..." RCW 42.30.020(2) (emphasis added). Thus, only the parent governing body must have policymaking or rulemaking authority for the CAO Subcommittee to fall under the OPMA. *Id.*

The trial court and the Court of Appeals relied on outdated interpretations of an older version of the statute.[44] Prior to July 1983, the "governing body" definition was limited to a "board, commission, committee, council, or other policy or rule-making body of a public agency."[45] The old definition "was not designed to cover groups which meet to collect information and make recommendations, but have no authority to make final decisions."[46] After the definition expanded to

---

[42] **Appendix A-1** at pp. 9-15.
[43] *Id.*
[44] CP 823.
[45] *Refai v. Central Washington University*, 49 Wn.App. 1, 11, 742 P.2d 137 (Div. 3 1987), citing Laws of 1982, 1st Ex. Sess., ch. 43, §10, p.1307.
[46] *Refai*, 49 Wn.App. at 14.

include any committee which acts on behalf of a governing body, a stronger case could be made that advisory groups must meet openly.[47] A committee can act on behalf of a governing body even if without authority to directly adopt policies.

V. GROUNDS FOR RELIEF AND LEGAL ARGUMENT

A. Summary

The Supreme Court should accept review under RAP 13.4(b)(4) because the petition involves issues of substantial public interest: whether the OPMA applies to subcommittees and, if it does, what constitutes action under the Act and/or acting on behalf of a governing body. The Court of Appeals conceded as much when it granted the Washington State Association of Municipal Attorney's Motion to Publish, which states:

> The opinion is of general public interest and importance to all municipalities subject to the OPMA because it clarifies the difference between taking "action" under RCW 42.30.020(3), and "acting on behalf" of the governing body.

Motion, p.4.[48]

The ruling contravenes the purposes of the Act and condones government secrecy when addressing Growth Management Act ("GMA") and Shoreline Management Act ("SMA") planning and decision-making,

---

[47] *Id.*; *see also Clark v. City of Lakewood*, 259 F.3d 996, 1013 (9th Cir. 2001) (the definition of "governing body" is no longer limited to groups that make policy or rules).

[48] **Appendix A-2**. The Court of Appeals opinion states that no Washington court has directly addressed the issue of when a committee is acting on behalf of a governing body. **Appendix A-1**, at p. 11; *see also* Attorney General's Open Government Internet Manual, Ch. 3, which notes that "[t]here has been relatively little litigation regarding [the OPMA's] interpretation." **Appendix A-9**.

among other matters. The GMA and SMA matters are required to be dealt with in an open fashion with full public participation.[49]

Every municipality in this state is required by law to regularly update its Critical Areas Ordinance. *See* RCW 36.70A.130. In addition, municipalities must update their shoreline master programs. *See* RCW 90.58.080. These mandatory tasks are complex, daunting, and require significant public participation. Under the Court of Appeals ruling, any governing body can create a subcommittee to do the "pick and shovel" work in private, which is directly contrary to the transparency and broad public participation polices of the GMA, SMA and OPMA.

The Supreme Court should also accept review under RAP 13.4(b)(l) and (b)(2) because the decision of the Court of Appeals is in conflict with case law established by the Supreme Court and the Court of Appeals.

As recognized by one of numerous courts with respect to the reasons behind open public meetings:

> ***During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be***

[49] The GMA is a law which imposes a high standard of public participation, RCW 36.70A.130, as is the SMA. RCW 90.58.130.

heard at all deliberations wherein decisions affecting the public are being made.

-Division I Court of Appeals[50]

The lower court and the Court of Appeals decisions sustain the exact opposite of consistent interpretations of the OPMA policies enunciated by other courts, including Division I, as to its broad purpose and application.

B. The Petition Involves Issues of First Impression and Substantial Public Interest: Open Government and Meaningful Public Participation

Issues concerning compliance with the OPMA are of substantial public interest and are likely to recur.[51] The Court of Appeals failed to provide effective guidance to public officers concerning the foundational requirements of the OPMA that are so vital to the public trust in this State.

The OPMA's purpose is to increase public trust in government by letting the "sun shine in" and opening all deliberative meetings to the public. This very foundation has been rocked by the narrow ruling of the Court of Appeals which discarded application of the OPMA to subcommittees and impermissibly carved out exceptions to the Act to approve the exclusion of the public from full participation in all aspects of

---

[50] *Wood v. Battleground School Dist.*, 107 Wn. App.550, 562 n.3, 27 P.3d 1208 (2001) (quoting *Bd. of Pub. Instruction v. Doran*, 224 So.2d 693, 699 (Fla.1969)).

[51] This Court should note that the County's CAO ordinance was held noncompliant in numerous respects by the Western Washington Growth Management Hearings Board. *Friends of the San Juans, et. al., v. San Juan County,* WWGMHB No. 13-2-0012c (Final Decision and Order Sept. 6, 2013). Because the County will need to repromulgate the law, whether or not its processes violated the law is a matter that must be correctly resolved for San Juan County. A decision from this Court will provide proper guidance for all other public agencies and municipalities subject to the OPMA and may assure citizens of the state that public participation requirements will, in fact, be honored.

the development of the County's CAO. A ruling from this Court declaring the secret subcommittee meetings that occurred in San Juan County to be contrary to law will restore the public's faith in the openness of legislative processes and will provide necessary guidance to all other state agencies and municipalities state-wide.

The OPMA has broad application. *See infra*, footnote 4, Municipal Research Service Report No. 60. The OPMA must apply to a subcommittee that is working on a key piece of County legislation, including basic policy choices as to the scope of regulation (including alternatives) to present as the preferred draft to the County Council as a whole that will later consider and adopt a final form of the law. Otherwise, various public participation/due process requirements and the purpose of the OPMA to achieve open, transparent government will be rendered meaningless. The matters under consideration by the CAO Subcommittee and Council dealt with a subject of significant public importance – GMA and SMA decision-making.

This Court should confirm that the numerous meetings the CAO subcommittee held in secret where ideas were formulated, approaches discarded, etc. cannot be fixed or cured simply by a properly noticed meeting of the Council as a whole. Because so many meetings took place over a long period of time, and given the purpose of the CAO subcommittee to parse the work down, none of the prior deliberations were brought to light such that the fundamental policy of the OPMA is

achieved. Pro forma "rubberstamped" action does not satisfy the requirements of the OPMA. *E.g, OPAL v. Adams County*, 128 Wn.2d 869, 883, 913 P.2d 793 (1996). The process cannot be cured.[52]

The County's position throughout this lawsuit has been, "don't look at what actually happened, but only at what we tell you happened," *e.g.*, the 23 meetings of the CAO Subcommittee were "mere gatherings" whereat nothing of substance occurred. If that is the standard under the OPMA, any government action is beyond purview. The role of the courts is to stand between government and its citizens and apply the law and public policy to the actual facts, not argument of legal counsel. Here, this did not happen.

The County states that, due to the citizen initiated amendments to the County Charter adopted in the fall of 2012, secret committee meeting composed of two or new three-member council will not happen again. But CAPR's concern is with what did happen. The six-member council allowed, if not condoned, secret meetings. When the Prosecuting Attorney said, "stop it," the Councilmembers comprising the CAO Implementation Team did not open the meetings or re-start the deliberative process, but instead, simply ceased convening the subcommittee meetings. The County did not start over with the process

[52]There is an important distinction between those actions cured by subsequent open and public discussion and subsequent open action that was only summary in nature. Under *OPAL*, 128 Wn.2d 869, the public's "right to know" will not be satisfied by a *pro forma* or rubberstamped action by a commission or council. The subsequent action must not only be in an open, public meeting, but the agency must also permit public discussion and involve active discussion by the elected officials on the pending action.

for enacting a new CAO to make it transparent, but decided to roll the dice, adopt the new CAO just before the new Council came into office, and then characterized its attorney's guidance as "conservative" and "advisory only."

Government must suffer the consequences of violating the law, just as other parties to litigation. A declaration should be entered that the OPMA was violated by the County; following such a ruling, CAPR should be awarded its reasonable attorney fees and costs under the Act.

C. The Court of Appeals' Decision is Inconsistent with Decisions of the Supreme Court and Court of Appeals.

By narrowly construing the OPMA to allow behind-the-scenes work on important legislation, the Court of Appeals' decision undermines the broad public purpose of the Act and is inconsistent with precedent in this State. *See Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999); *Equitable Shipyards, Inc. v. State,* 93 Wn.2d 465, 482, 611 P.2d 396 (1980); *Eugster v. City of Spokane,* 128 Wn. App. 1, 7, 114 P.3d 1200 (2005); *Cathcart v. Andersen,* 85 Wn.2d 102, 107, 530 P.2d 313 (1975), *rev. denied,* 156 Wn.2d 1014 (2006); *Eugster v. City of Spokane*, 110 Wn. App. 212, 223-25, 39 P.3d 380 (2002); *Organization to Preserve Agr. Lands v. Adams County,* 128 Wn.2d 869, 883 n. 2, 913 P.2d 793 (1996).

VI. CONCLUSION

This Court should accept review of the decision of the Washington Court of Appeals, Division I. Upon review, this Court should reverse the

Court of Appeals, declare that the OPMA applies to the subcommittees in question, and award CAPR its reasonable attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 10th day of July, 2014.

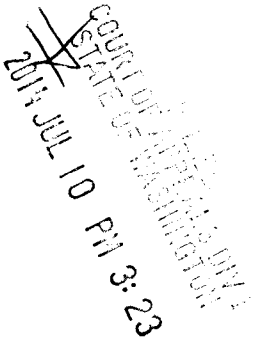
By /Michele Earl-Hubbard/ per telephone authorization

Dennis D. Reynolds, WSBA #04762
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
E-mail: dennis@ddrlaw.com
Counsel for Petitioner/Appellant

By /Michele Earl-Hubbard/

Michele L. Earl-Hubbard
ALLIED LAW GROUP LLC
6351 Seaview Avenue NW
Seattle, WA 98107
(206) 443-0200 Phone
(206) 428-7169 Fax
Counsel for Petitioner/Appellant

CERTIFICATE OF SERVICE



I hereby certify that on this 10th day of July, 2014, I caused the original and one copy of AMENDED PETITION FOR REVIEW to be hand delivered to:

Clerk of Court
Court of Appeals, Division I
600 University Street
Seattle, WA 98101-4170
(206) 389-2613, fax

I further certify that on this 10th day of July, 2014, I caused a copy of the document to which this certificate is attached to be delivered this date, in the manner indicated, to the parties listed below:

Randall K. Gaylord, Pros. Attorney (WSBA #16080) Amy S. Vira, Deputy Pros. Attorney (WSBA #34197) San Juan County Prosecutors Office 350 Court Street / P.O. Box 760 Friday Harbor, WA 98250-0760 (360) 378-4101, tel / (360) 378-3180, fax randallg@sanjuanco.com amyv@sanjuanco.com, elizabethh@sanjuanco.com *Attorneys for Defendants*	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ❑ *Express Mail, Next Day* ❑ *Email*
Katherine George, WSBA #36288 Harrison-Benis LLP 2101 Fourth Avenue, #1900 Seattle, WA 98121 (425) 802-1052, cell kgeorge@hbslegal.com *Attorneys for Amicus Curiae Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government*	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ❑ *Express Mail, Next Day* ❑ *Email*

Daniel B. Heid, WSBA #8217, Auburn City Attorney Steven L. Gross, WSBA #24658, Ass't City Attorney 25 West Main Street Auburn, WA 98001-4998 (253) 931-3030, tel dheid@auburnwa.gov; sgross@auburnwa.gov *Attorneys for Washington State Association of Municipal Attorneys*	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ❑ *First Class Mail* ❑ *Express Mail, Next Day* ❑ *Email*

Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 10th day of July, 2014.

~~Karen L. Hall~~
~~Legal Assistant~~ Michele Earl-Hubbard

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation, Appellant, v. SAN JUAN COUNTY, a Washington municipal corporation and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council

---

APPENDIX to CAPR Petition for Review

A-1	Opinion Decision of the Washington Court of Appeals, Division I dated April 28, 2014, affirming the trial court's Order of Summary Judgment
A-2	Motion by the Washington State Association of Municipal Attorneys to Publish Opinion, dated May 14, 2014
A-3	Order Granting Motion to Publish, entered June 10, 2014
A-4	THE OPEN PUBLIC MEETINGS ACT: HOW IT APPLIES TO WASHINGTON CITIES, COUNTIES AND SPECIAL PURPOSES DISTRICTS, Municipal Research Services of Washington, Report No. 60 (revised June 2014)
A-5	Respondent San Juan County's Answer to Amicus Brief, April 3, 2014
A-6	Amended Complaint for Violations of the Open Public Meetings Act, RCW 42.30, and for Injunction to Restrain Violations of State Law, filed November 2, 2012
A-7	Defendant's Answer to Amended Complaint, filed December 21, 2012
A-8	April 26, 2012 formal memorandum from the San Juan County Prosecuting Attorney's office to the County Council and to the Charter Review Commission. CP 237-696, Ex. E.
A-9	Attorney General's Open Government Internet Manual, Chapter 3: Open Public Meetings Act – General and Procedural Provisions

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, A Washington non-profit corporation, Appellant, v. SAN JUAN COUNTY, a Washington and the SAN JUAN COUNTY CRITICAL AREA ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council, Respondents.	No. 70606-3-I DIVISION ONE UNPUBLISHED OPINION FILED: April 28, 2014

SPEARMAN, C.J. — The central issue in this case is whether members of the San Juan County Council (the Council) violated the Open Public Meetings Act (OPMA) by attending a series of closed meetings as part of a working group known as the San Juan County Critical Area Ordinance/Shoreline Master Program Implementation Committee (CAO Team).[1] Citizens Alliance for Property Rights Legal Fund (CAPR) appeals the trial court's summary judgment dismissal of its lawsuit against San Juan County (the County) and the CAO subcommittee,

[1] This group is referred to by several different names in the record, including CAO/SMP Implementation Committee, CAO/SMP Implementation Team, CAO Facilitation Group, and Pete's Implementation Team. For simplicity, it is referred to herein as the "CAO Team."

arguing that the trial court misinterpreted and misapplied several key provisions of OPMA and erroneously ruled that there were no genuine issues of material fact. Finding no error, we affirm.

FACTS

In 2010, San Juan County began the process of updating its Critical Area Ordinances pursuant to the Growth Management Act, chapter 36.70A RCW. The CAO Team, which included members of the County executive staff as well as three of San Juan County's six councilmembers, was formed to facilitate and coordinate the County's efforts in this regard. The CAO Team did not open its meetings to the public.

In April 2012, San Juan County Prosecuting Attorney Randall Gaylord issued a memorandum advising the Council that "no meetings of three council members should occur without complying with the notice and other requirements of the Open Public Meetings laws." Clerk's Papers (CP) at 452. Gaylord acknowledged that the law in this regard is uncertain, but opined that "[e]ven if the law is not clear, the better approach is to err on the side of following the Open Public Meetings Act." CP at 452. The Council members followed Gaylord's advice and immediately discontinued this practice.[2]

Ten months later, the Council adopted four critical areas ordinances. Prior to adoption, the Council held approximately 75 public meetings to discuss the

[2] In November 2012, the voters of the County changed the Council from a six to a three member governing body, effective May 2013.

critical areas ordinance and provide opportunity for public comment. More than 30 of these meetings occurred after the CAO Team stopped meeting in April 2012.

In October 2012, CAPR filed a complaint against the County, the CAO Team, and Councilmembers Richard Fralick, Patty Miller, and Lovel Pratt, alleging that the CAO Team meetings violated the OPMA. CAPR requested (1) nullification of all actions taken in violation of OPMA; (2) civil penalties against each member that committed knowing violations of OPMA; (2) an award of costs and attorney fees; and (4) injunctions enjoining future violations of OPMA and the Growth Management Act. In an Amended Complaint filed in November 2012, CAPR non-suited its Growth Management Act injunction action, dismissed its claim against the individual Council members, and waived civil penalties.

The County moved for summary judgment, arguing that CAPR lacked sufficient evidence to support its case. CAPR submitted voluminous evidence in response.[3] In a letter decision, the trial court concluded that CAPR had failed to show that there was an issue of material fact regarding whether the CAO Team meetings violated the OPMA, and granted summary judgment to the County. The

[3] CAPR argues that the trial court should have treated the County's summary judgment motion as a motion for judgment on the pleadings under CR 12(c) because the County only attacked allegations in CAPR's complaint and failed to submit affidavits or identify portions of the record which demonstrate the absence of a genuine issue of material fact. This argument lacks merit. Even assuming for the sake of argument that the County's motion was functionally a motion for judgment on the pleadings, it was converted to a motion for summary judgment when CAPR submitted evidence in response. CR 12(c); P.E. Systems, LLC v. CPI Corp., 176 Wn.2d 198, 206, 289 P.3d 638 (2012). We also note that both parties had a reasonable opportunity to present materials relevant to a summary judgment motion within the CR 56(c) time for response.

trial court also denied CAPR's subsequent motion for reconsideration.[4] CAPR appeals.[5]

DISCUSSION

This court reviews an appeal from summary judgment de novo. Bostains v. Food Express, Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts and reasonable inferences are construed in the light most favorable to the nonmoving party. Shoulberg v. Public Utility Dist. No. 1 of Jefferson Cy., 169 Wn.App. 173, 177, 280 P.3d 491 (2012), rev. denied, 175 Wn.2d 1024 (2012).

"[A] party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case." Guile v. Ballard Community Hosp., 70 Wn. App. 18, 21, 851 P.2d 689 (1993). "After the moving party meets its initial burden to show an absence of

---

[4] CAPR contends that the trial court erred in dismissing CAPR's complaint in its entirety, including its claims against the San Juan County Council's Budget Subcommittee, General Governance Subcommittee, and Solid Waste Subcommittee, because the County's motion for summary judgment only sought dismissal of allegations against the CAO Team. This argument lacks merit. CAPR's allegations and arguments focused solely on the CAO Team. CAPR made some passing references to the other subcommittees in its amended complaint and response to the County's motion for summary judgment, but did not name those subcommittees as defendants, include them in its claim for relief, or provide evidence and argument in support of its assertion that they violated OPMA.

[5] Allied Daily Newspapers of Washington, Washington Newspapers Publishers Association, and Washington Coalition for Open Government also filed an amicus brief.

material fact, the inquiry shifts to the party with the burden of proof at trial. . . ." West v. Thurston Cy., 169 Wn.App. 862, 866, 282 P.3d 1150 (2012) rev. denied, 176 Wn.2d 1012 (2013), citing Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff." Young, 112 Wn.2d at 225. "If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." Young, 112 Wn.2d at 225, quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Email exchange

"[T]he OPMA is a comprehensive statute, the purpose of which is to ensure that governmental actions take place in public." Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1086 (9th Cir. 2003). OPMA contains a strongly worded statement of purpose: "The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly." RCW 42.30.010. The statute mandates liberal construction to further its policies and purpose. RCW 42.30.910.

To enforce OPMA's civil penalty provision, plaintiffs must show (1) that a member of a governing body (2) attended a meeting of that body (3) where action was taken in violation of OPMA and (4) the member had knowledge that the meeting violated OPMA. Wood v. Battle Ground Sch. Dist., 107 Wn. App. 500, 558, 27 P.3d 1208 (2001). Where, as here, plaintiffs are not seeking to enforce the civil penalties provision, the fourth factor is inapplicable.[6]

OPMA provides that "[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030. A "governing body" is "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). A "public agency" is "[a]ny county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington." See RCW 42.30.020(1)(a). "Meeting" is defined as "meetings at

[6] There is some confusion in the case law regarding the proper standard to avoid summary judgment dismissal of an OPMA claim that does not involve civil penalties. In Eugster v. City of Spokane, 110 Wn. App. 212, 222, 39 P.3d 380 (2002), Division Three cited Wood in stating that "[to] defeat summary judgment dismissal of an OPMA claim, the plaintiff must submit evidence showing "(1) that a 'member' of a governing body (2) attended a 'meeting' of that body (3) where 'action' was taken in violation of the OPMA, and (4) that the member had 'knowledge' that the meeting violated OPMA." Wood, 107 Wn. App. at 558. However, the Wood court was specifically addressing a request to impose civil penalties under RCW 42.30.120(1), which requires a showing that the member knowingly violated OPMA. The other three remedies available under OPMA do not require proof of knowledge. See RCW 42.30.060(1) (nullification of action); RCW 42.30.120(2) (attorney fee award); RCW 42.30.130 (injunction). Thus, it is not appropriate to graft a knowledge requirement onto the test for overcoming summary judgment where civil penalties are not at issue.

which action is taken." See RCW 42.30.020(4). "Action" means "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." See RCW 42.30.020(3).

Clearly, the Council is the "governing body" of a "public agency." However, under Washington case law, a gathering that includes less than a majority of the governing body does not violate OPMA. Wood, 107 Wn. App. at 564, citing In re Recall of Beasley, 128 Wn.2d 419, 427, 27 P.3d 878 (1996) and In re Recall of Roberts, 115 Wn.2d 551, 554, 799 P.2d 734 (1990). At all times relevant to this case, the Council had six members. Therefore, a gathering that includes three councilmembers does not constitute a "meeting" of the Council for OPMA purposes, regardless of whether "action" is taken.

CAPR contends that on November 14, 2011, four of six councilmembers held a "meeting" in violation of OPMA by participating in an email and telephone exchange in which they discussed CAO Team matters. The trial court properly rejected this argument, both on the merits and because CAPR first advanced the argument in its motion for reconsideration. "[T]he OPMA does not require the contemporaneous physical presence of [members of the governing body] in order to constitute a meeting." Eugster, 110 Wn. App. at 224. An exchange of emails can constitute a "meeting" for OPMA purposes. Wood, 107 Wn. App. at 564. However, "the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'" Wood, 107 Wn. App. at 564. Viewed in the light most

favorable to CAPR, the record shows that at most three councilmembers (Richard Fralick, Lovel Pratt, and Rich Peterson) participated in the active discussion of issues by phone or email. The fourth councilmember, Patty Miller, received a copy of the email, but there is no evidence that she responded or actively participated in the discussion.

CAPR also vaguely asserts that four Council members were present at other "meetings of the subcommittees" but fails to back up this claim with argument or citations to the record. We need not consider it. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(5).

Negative Quorum

CAPR argues that this court should create a new rule and hold that a "meeting" occurs for the purposes of OPMA when the number of members present is sufficient to block action when the matter discussed comes up for a vote before the governing body, thereby constituting a "negative quorum." In support, CAPR cites a Wisconsin case, State ex rel. Newspapers, Inc. v. Showers, 135 Wis.2d 77, 398 N.W.2d 154 (1987). In Showers, four members of an eleven member body met to discuss budget measures. Showers, 135 Wis.2d at 80. Passing the budget measure required a two-thirds vote, meaning that eight out of eleven members had to approve the change. Id. The Wisconsin Supreme Court held that Wisconsin's Open Meeting Law applied because four members could block the parent body's course of action regarding the proposal discussed at the meeting by voting together. Id. at 80. Prior to May 2013, the Council had

six members, with at least four votes necessary to pass ordinances. Therefore, applying the reasoning of Showers, CAPR contends that a gathering of three councilmembers constitutes a "negative quorum" to which OPMA requirements should apply.

No Washington cases directly address the reasoning of the Showers case. San Juan County Prosecutor Randall Gaylord cited Showers in his April 2012 memorandum advising the Council that OPMA requirements should be followed when three of six councilmembers gather to discuss County business. Given the OPMA's mandate for liberal construction, this argument is not frivolous. Nevertheless, we decline to follow Showers. As an out-of-state case, it is not binding on this court. Moreover, it would carve out a significant exception to well-established Washington precedent holding that OPMA does not apply where a majority of the governing body is not present. See Beasley, 128 Wn.2d at 427 (in recall action, no meeting of majority of school board); Roberts, 115 Wn.2d at 554 (in recall action, no meeting of majority of town councilmembers). We also note that, effective May 2013, San Juan County voters reduced the size of the Council from six members to three, thereby eliminating the possibility that the negative quorum issue could arise again in San Juan County.

Governing Body

CAPR next argues that it does not matter if a majority of the Council was not present at CAO Team meetings, because the CAO Team itself was a "governing body" subject to OPMA requirements. The term "governing body"

includes "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency," as well as "any committee thereof when the committee acts of behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). According to CAPR, the CAO Team was a "governing body" because it was a "committee" of the Council that "acted on behalf of" the Council.[7] Therefore, CAPR contends that a "meeting" occurred for OPMA's purposes each time the CAO Team met and "acted on behalf of" the Council, regardless of how many councilmembers were present.

The OPMA does not define the phrase "acts on behalf of."[8] OPMA defines "action" as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3). Applying common law principles of agency, amici argue that a committee "acts on behalf of" a governing body when it takes "action" as defined in RCW 42.30.020(3) on behalf of the principal and under the principal's control. CAPR and amici thus argue that the CAO Team "acted on

[7] Because CAPR did not allege that the CAO Team ever conducted hearings or took testimony or public comment, that portion of RCW 42.30.020(2) is not at issue.

[8] OPMA as originally passed in 1971 did not contain this phrase. The previous definition of "governing body" was "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency." Former RCW 42.30.020 (1971). The statute was amended in 1983 to add the phrase "or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(3).

behalf of" the Council because it took "action" by conducting ordinance-related deliberations, discussions, considerations, and other business subject to the Council's control.

There is no Washington case law directly addressing the circumstances under which a committee "acts on behalf of" a governing body.[9] However, a 1986 Attorney General Opinion (AGO)[10] specifically analyzed this question. The AGO stated that there are two possible interpretations of the phrase "acts on behalf of." First, "a committee might act on behalf of the governing body whenever it performs a specified function in the interest of the governing body." AGO at 5. Under this broad definition, a committee would be subject to the OPMA whenever it meets and takes "action," just as governing bodies do. This is the interpretation CAPR and amici urge us to adopt. Second, "a committee might act on behalf of the governing body only when it exerts power or influence or produces an effect as the representative of the governing body." Id. Under this narrower definition, "a committee acts on behalf of the governing body only when it exercises actual or de facto decision making authority for the governing body." Id. This is the interpretation the County urges us to adopt.

---

[9] In Clark v. City of Lakewood, 259 F.3d 996, 1013 (9th Cir. 2001), the Ninth Circuit held that OPMA applied to a task force that took public testimony, held hearings, and acted on behalf of the governing body. The court concluded that these activities placed it "squarely within the ambit of RCW 42.30.020(2) without addressing the circumstances under which a committee "acts on behalf of" a governing body.

[10] AGO 1986 No. 16.

The AGO acknowledged that the statutory mandate for liberal construction supports the broad definition, but nevertheless concluded that "the narrower construction correctly reflects the intent of the legislature." Id. First, the AGO noted that the phrase "when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment" would be superfluous if all committees were subject to the OPMA. The AGO observed that if the legislature intended a broad interpretation of the phrase "acts on behalf of," it would have used the word "action" instead of "acts" and added the words "or any committee thereof" to the definition of "governing body," thereby subjecting a committee to the OPMA on the same basis as the governing body itself – when "action" is taken. Id. at 6. Second, the AGO carefully examined the legislative history of the 1983 amendments to the definition of "governing body," which suggest that the Legislature did not intend OPMA to apply to committees that "do nothing more than deliberate the making of policy or rules." AGO at 6.

> Mr. Isaacson: "What are the requirements with respect to giving formal notice?"
>
> Ms. Hine: "It's the intent of the legislation, we believe, subject to the deliberations of the governing body, that this apply only to deliberations of the governing body or subcommittees which the governing body specifically authorizes to act on its behalf, or which policy, testimony, or comments are made in its behalf. In other words, it's when making policy or rules, not for general comments or any kind of informal type meeting they may have. Those would not require the official formal notice. AGO at 7.

Thus, based on the narrower definition, the AGO concluded that "a committee acts on behalf of the governing body when it exercises actual or de facto decision making authority for the governing body. This is in contrast to the situation where the committee simple provides advice or information to the governing body." AGO at 7. Advisory committees would not be subject to OPMA. Id. at 8. We find the AGO persuasive, and adopt its reasoning.

CAPR and amici argue that the trial court erred in relying on Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 82 P.3d 1199 (2004) and concluding that the CAO Team could not have "acted on behalf of" the Council because there is no evidence it had policy or rule making authority. In Loeffelholz, the plaintiff argued that election workers were a "governing body" because the county canvassing board delegated its authority to them. The court, citing Refai v. Central Washington Univ., 49 Wn. App. 1, 13, 742 P.2d 137 (1987), held that the election workers could not be a "governing body" unless they had "policy-making or rule-making authority." Loeffelholz, 119 Wn. App. at 704. According to CAPR and amici, Loeffelholz is incorrect because Refai was based on the old definition of "governing body," which was limited to a "board, commission, committee, council, or other policy or rule-making body of a public agency. . . ." Former RCW 42.30.020(2) (1983). The Refai court acknowledged in dicta that a "stronger case" can be made for advisory bodies to be subject to OPMA under the new definition of "governing body." Id. at 14, n.5. To the extent that a committee might exercise de facto decision making authority without being formally designated as

a policy or rule-making body, this argument does not lack merit. Ultimately, however, it is irrelevant, because the trial court correctly relied on the 1986 AGO and concluded there is no evidence that the CAO Committee exercised actual or de facto decision making authority.

First, CAPR submitted no admissible evidence that the Council created the CAO Team or delegated its decision making authority[11]. CAPR claims that the County's public participation plan proves that the Council created the CAO Team. This is incorrect. The plan merely includes a list of individuals responsible for establishing the CAO Team, including the County administrator, the County prosecutor, three members of the Council, and several other individuals. CAPR also points to the testimony of San Juan County Planning Coordinator Shireene Hale, who testified that the Council "would have created it." CP at 380. But the trial court properly granted the County's motion to strike this statement as hearsay, as there was no showing that she had personal knowledge to testify to this belief. Furthermore, Council member Lovel Pratt testified that the County Administrator created the CAO Team, and five Council Members submitted

[11] CAPR's assertion that the trial court "determined that the Council created the CAO Subcommittee" is plainly incorrect. Appellant's Reply Brief at 10. The trial court simply stated that it "can further assume, for the sake of argument, and without deciding, that the committee was established by the county council, as opposed to the county administrator. In point of fact, there appears to be no competent evidence in the record to indicate that the committee was established by the county council. . . ." CP at 818. The trial court then stated that its decision would be the same regardless of whether the council or the county administrator created the team.

declarations stating that they took no action to create the Team or to delegate authority to the Team.[12]

The trial court further concluded that even assuming for the sake of argument that the County could direct the CAO Team to act on its behalf, there is no evidence in the record indicating that it did so. CAPR contends that it did, pointing to County Prosecutor Randall Gaylord's memo, in which he stated that "[d]uring the course of committee meetings, ideas and policies are brought forward, discussed, narrowed and discarded and approaches are formulated for making presentations of subcommittee work to the entire Council." CP at 453. CAPR also cites County planner Shireene Hale's statement that "this group was trying to take care of some of the behind the scenes details so that the Council – the full Council could focus on making policy decisions and having substantive discussions and giving the staff direction on what they wanted to see." CP at 409. Even viewed in the light most favorable to CAPR, these statements do not provide evidence that the CAO Team exercised actual or de facto decision making authority. Rather, they describe an advisory or information role.

[12] CAPR contends that the trial court erred in granting the County's motion to strike Hale's statement and denying its motion to strike the declarations of the County Council members. We disagree. The County properly requested that the Court strike all inadmissible hearsay from CAPR's declarations, and Hale's statement was clearly hearsay. CAPR's assertion that the County's motion to strike was not timely is particularly unconvincing, where the record shows that CAPR requested and was granted a motion to shorten time in order to file its own motion to strike, and the court considered the County's motion to strike at the same time. VRP (4/19/2013) at 3-4. The trial court also properly denied CAPR's motion to strike the Council members' statements, as they did not conflict with previous testimony.

In sum, we adopt the reasoning of the 1986 AGO and hold that a committee "acts on behalf of" a governing body when it exercises actual or de facto decision making authority. Because CAPR submitted no evidence that a majority of the Council attended CAO Team gatherings or that the CAO Team exercised actual or de facto decision making authority, no "meeting" occurred for OPMA purposes, and summary judgment was appropriate. Because CAPR is not the prevailing party, it is not entitled to an award of attorney fees.

Affirmed.

Spearman, C.J.

WE CONCUR:

Verellen, J.

Leach, J.

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-2

No. 70606-3-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation;

Petitioner,

v.

SAN JUAN COUNTY, a Washington political subdivision and the SAN JUAN COUNTY CRITICAL AREA ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council;

Respondents.

MOTION BY THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS TO PUBLISH OPINION

Daniel B. Heid, WSBA #8217
Auburn City Attorney

Steven L. Gross WSBA #24658
Assistant City Attorney

25 West Main Street
Auburn, Washington 98001-4998
Tel: 253-931-3030
For Washington State Association
of Municipal Attorneys

MOTION FOR PUBLICATION OF COURT OPINION

Pursuant to RAP 12.3(e), Applicant Washington State Association of Municipal Attorneys ("WSAMA") respectfully moves this Court to publish in its entirety the unpublished decision filed in this matter on April 28, 2014. *See Citizens Alliance for Property Rights Legal Fund v. San Juan County and San Juan County Critical Area Ordinance/Shoreline Ordinance Master Program Implementation Committee*, No. 70606-3-I (April 28, 2014) ("Opinion"). The Court should change the unpublished status of its Opinion because it clarifies what could be construed as conflicting guidance from the courts and the Attorney General's office regarding when a committee "acts on behalf of" a governing body for purposes of Washington's Open Public Meetings Act ("OPMA"), as set forth in Chapter 42.30 of the Revised Code of Washington)("RCW").

APPLICANT'S INTEREST

WSAMA is an organization with membership comprised of attorneys for most of the cities and towns in the State of Washington. Washington has 281 cities and towns, ranging from Seattle, at over half a million citizens, to Krupp, with a population of about 60. All of these municipalities are responsible for conducting their meetings in compliance with the OPMA. As such, any of these various cities and towns may find itself in the same

position as San Juan County when determining how to organize committees, task forces and working groups, and how to conduct meetings thereof.

APPLICANT'S REASON FOR BELIEVING THAT PUBLICATION IS NECESSARY

This Court's Opinion highlights the potential for municipalities and citizens to misconstrue the requirements of the OPMA as it relates to committees. As this Court notes, until this case, there was "...no Washington case directly addressing the circumstances under which a committee 'acts on behalf of' a governing body." *Opinion,* Page 11. Publishing the Opinion will provide valuable clear guidance on this question.

THE DECISION DOES NOT DETERMINE AN UNSETTLED QUESTION OF LAW

WSAMA agrees with San Juan County that the OPMA is clear on this issue.

THE DECISION CLARIFIES AN ESTABLISHED PRINCIPLE OF LAW

As the Court notes in its Opinion, no Washington court has directly addressed the issue of when a committee is acting on behalf of a governing body. The Opinion's discussion illustrates both that the law could be misconstrued and the importance of the 1986 Attorney General's Opinion on this subject. *Clark v. Lakewood*, 259 F.3d 996, 1013 (9th Cir. 2001) provides

an incomplete explanation of the law. In that case, the court assumed (without analysis) that the committee was acting on behalf of the governing body. Similarly, *Refai v. Central Washington Univ.*, 49 Wn.App. 1, 742 P.2d 137 (1987) left questions unanswered because the statute had changed. The court noted in dicta that an advisory committee could be subject to the OPMA under the (then) new definition of a governing body. Publishing the Opinion will clarify for municipalities and members of the public how to frame the argument about formal delegation of decision-making authority and de facto decision-making authority.

THE DECISION IS OF GENERAL PUBLIC INTEREST AND IMPORTANCE

The Opinion is of general public interest and importance to all municipalities subject to the OPMA because it clarifies the difference between taking "action" under RCW 42.30.020(3), and "acting on behalf" of the governing body. This is a critical distinction. It is vital that local governments understand when committees, task forces, and working groups are merely acting in an advisory capacity and are not "acting on behalf" of the governing body. It is important that the general public understand that their elected and appointed representatives can, should, and do conduct the public's business in a transparent and open manner. However, when those representatives are not acting on behalf of, or exercising the delegated

authority of, the governing body on a particular issue, the purpose of the OPMA is not subverted if fewer than a quorum of those representatives gather information or have a discussion about an issue.

THE DECISION DOES NOT CONFLICT WITH A PRIOR OPINION OF THE COURT OF APPEALS.

While the Opinion discusses *Loeffelholz v. Clean*, 119 Wn.App. 665, 82 P.2d 1199 (2004) and *Refai, supra*, it does not conflict with those, or any other, prior opinions.

CONCLUSION

For the foregoing reasons, WSAMA respectfully requests that the Court publish the entirety of its April 28, 2014 unpublished Opinion.

Respectfully submitted this 14 day of May, 2014.

Attorneys for Amicus, Washington State Association of Municipal Attorneys

Daniel B. Heid, WSBA #8217
Auburn City Attorney

Steven L. Gross, WSBA #24658
Assistant City Attorney

25 West Main Street
Auburn, Washington 98001-4998
Tel: 253-931-3030

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation; Petitioner, v. SAN JUAN COUNTY, a Washington political subdivision and the SAN JUAN COUNTY CRITICAL AREA ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council; Respondents.	No. 89648-8 CERTIFICATE OF SERVICE OF MOTION OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

I, Megan B. Stockdale, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date set forth, below I served via U.S. Mail, postage paid, a true and correct copy of the Motion to Publish submitted by the Washington State Association of Municipal Attorneys, concerning the above entitled matter to:

Dennis D. Reynolds
Attorney at Law
200 Winslow Way West, Ste 380
Bainbridge Island, WA 98110

Michele L. Earl-Hubbard
Attorney at Law
PO Box 33744
Seattle, WA 98133

Katherine George
Harrison-Benis LLP
2101 Fourth Avenue, Suite 1900
Seattle, WA 98121

Amy S. Vira
San Juan County Prosecutors Office
P. O. Box 760
Friday Harbor, WA 98250

Signed this 14 day of May, 2014.

Signature

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-3

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, A Washington non-profit corporation, Appellant, v. SAN JUAN COUNTY, a Washington and the SAN JUAN COUNTY CRITICAL AREA ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council, Respondents.	No. 70606-3-I ORDER GRANTING MOTION TO PUBLISH

Washington State Association of Municipal Attorneys filed a motion to publish the unpublished opinion filed in the above mater on April 28, 2014. The court called for an answer to the motion. Answers to the motion to publish was filed by the appellants, by Allied Daily Newspapers of Washington, and Washington Coalition for Open Government.

A majority of the panel has determined that the motion to publish should be granted. Now, therefore, it is hereby

ORDERED that the motion to publish the opinion is granted.

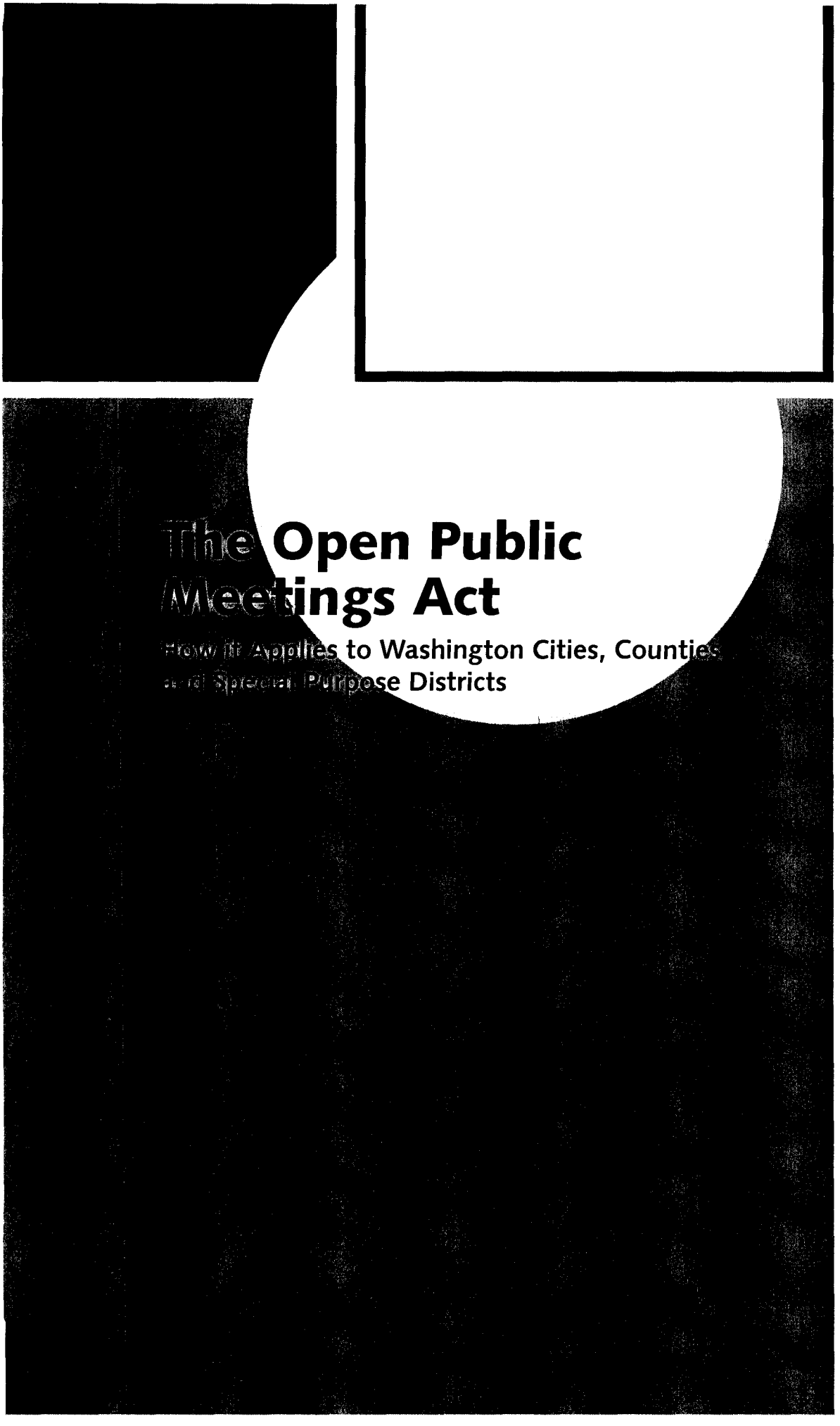
DATED this 10th day of June, 2014

Spearman C.J.
Presiding Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUN 10 PM 3:27

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-4



The Open Public Meetings Act

How it Applies to Washington Cities, Counties and Special Purpose Districts

REPORT NUMBER 60 Revised

June 2014

MRSC

The Open Public Meetings Act

MRSC
2601 4th Avenue, Suite 800
Seattle, WA 98121-1280
(206) 625-1300
(800) 933-6772

www.MRSC.org

Report Number 60 *Revised June 2014*

MRSC

Contents

Foreword

This is the second revision of our original September 1997 publication on the Open Public Meetings Act. Issues involving public meetings of governing bodies of cities, towns, counties, and special purpose districts continue to figure prominently in inquiries to MRSC legal consultants. This publication is intended for use by city, town, county, and special purpose district officials and is intended to provide general guidance in understanding the policies and principles underlying this important law.

Special acknowledgment is given to Bob Meinig, Legal Consultant, who prepared this publication. Thanks are also due to Pam James, Legal Consultant, for her editing, and to Holly Stewart, Desktop Publishing Specialist, for designing the publication.

Introduction

In 1971, the state legislature enacted the Open Public Meetings Act (the "Act") to make the conduct of government more accessible and open to the public. The Act begins with a strongly worded statement of purpose:[1]

> *The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.*
>
> *The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.*[2]

Codified in chapter 42.30 RCW, the Act applies to all city and town councils,[3] to all county councils and boards of county commissioners, and to the governing bodies of special purpose districts, as well as to many subordinate city, county, and special purpose district commissions, boards, and committees. It requires, basically, that all "meetings" of such bodies be open to the public and that all "action" taken by such bodies be done at meetings that are open to the public. The terms "meetings" and "action" are defined broadly in the Act and, consequently, the Act can have daily significance for cities, counties, and special purpose districts even when no formal meetings are being conducted.

---

[1]RCW 42.30.010

[2]Throughout this publication, indented quotations in italics are statutory language.

[3]For convenience, the term "city council" will in this publication also refer to town councils and to city commissions under the commission form of government. There is currently only one city in the state, Shelton, that is governed by the commission form of government.

This publication comprehensively reviews the Act as it applies to Washington cities, towns, counties, and special purpose districts.[4] It also provides answers to selected questions that have been asked of MRSC staff concerning application of the Act. However, we find that new questions constantly arise concerning the Act. So, if you have questions that are not addressed by this publication, do not hesitate to contact your legal counsel or MRSC legal staff.

[4]There is no single uniform definition of a special purpose district in state law. In general, a special purpose district is any unit of local government other than a city, town, or county that is authorized by law to perform a single function or a limited number of functions, such as water-sewer districts, irrigation districts, fire districts, school districts, port districts, hospital districts, park and recreation districts, transportation districts, diking and drainage districts, flood control districts, weed districts, mosquito control districts, metropolitan municipal corporations, etc.

Who Is Subject to the Act?

The basic mandate of the Open Public Meetings Act is as follows:

> *All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.*[5]

The Act applies to "meetings" of a "governing body" of a "public agency." A "public agency" includes a city, county, and special purpose district.[6] A "governing body" is defined in the Act as follows:

> *"Governing body" means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.*

The legislative bodies of cities and counties[7] clearly are governing bodies under this definition, as are the boards or commissions that govern special purpose districts. However, they are not the only governing bodies to which the Act applies. The Act also applies to any "subagency" of a city, county, or special purpose district,[8] because the definition of "public agency" includes:

> *Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies.*[9]

Under this definition, the subagency must be created by some legislative act of the governing body, such as an ordinance or resolution. A group established by a mayor to advise him or her

---

[5]RCW 42.30.030.

[6]RCW 42.30.020(1)(b).

[7]The legislative bodies of cities are the city councils or city commissions, and the legislative bodies of counties are the boards of county commissioners or county councils.

[8]Most special purpose district governing bodies do not have the authority to create such subagencies.

[9]RCW 42.30.020(1)(c).

could not, for example, be a subagency, because a mayor does not act legislatively. However, a legislative act alone does not create a subagency. According to the attorney general's office, a board or a commission or other body is not a subagency governed by the Act

> unless it possesses some aspect of policy or rulemaking authority. In other words, its "advice," while not binding upon the agency with which it relates . . . , must nevertheless be legally a necessary antecedent to that agency's action.[10]

If a board or commission (or whatever it may be termed) established by legislative action is merely advisory and its advice is not necessary for the city, county, or district to act, the Act generally does not apply to it.

Given the above definitions, the following are governing bodies within city and county government that *are subject* to the Act:

- City council or commission
- County council or board of commissioners
- Planning commission
- Civil service commission
- Board of adjustment

Other boards or commissions will need to be evaluated individually to determine whether the Act applies to them. For example, the definition of a subagency identifies library boards, but, in some cities (particularly those without their own libraries), library boards function as purely advisory bodies, without any policymaking or rulemaking authority. That type of a library board would not be subject to the Act. In cities where library boards function under statutory authority[11] and possess policymaking and rulemaking authority, those boards must follow the requirements of the Act.

Most special purpose districts have only one "governing body" under the meaning of that term in the Act.

In some circumstances, the Act applies to a committee of a governing body. As a practical matter, city or county legislative bodies are usually the only governing bodies with committees to which the Act may apply. A committee of a city or county legislative body will be subject to the Act in the following circumstances:

---

[10]AGO 1971 No. 33, at 9. The attorney general's office bases its conclusion on this issue on the language "or other policy or rulemaking body of a public agency" in the definition of "governing body" in RCW 42.30.020(2), quoted above. See also AGLO 1972 No. 48.

[11]RCW 27.12.210.

- when it acts on behalf of the legislative body[12]
- when it conducts hearings, or
- when it takes testimony or public comment.

When a committee is not doing any of the above, it is not subject to the Act.[13]

Keep in mind that it is usually good public policy to open the meetings of city, county, and special district governing bodies to the public, even if it is uncertain or doubtful that the Act applies to them. Secrecy is rarely warranted, and the Act's procedural requirements are not onerous. This approach would be consistent with the Act's basic intent that the actions of governmental bodies "be taken openly and that their deliberations be conducted openly."[14]

Further Questions

May four councilmembers-elect of a seven-member council meet before taking their oaths of office without procedurally complying with the Act?

Yes. Councilmembers-elect are not yet members of the governing body and cannot take "action" within the meaning of the Act, and so they are not subject to the Act.[15]

Must a committee of the governing body be composed solely of members of the governing body for it to be subject to the Act under the circumstances identified in RCW 42.30.020(2)?

This statute defines a "governing body" to include a "*committee thereof* when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." (Emphasis added.) Does a "committee thereof" include only members of the governing body? This question has not been addressed by the courts. However, the attorney general's office has opined that a "committee thereof" may include individuals who are not members of the governing body when they are appointed by the governing body.[16]

---

[12]According to the attorney general's office, a committee acts on behalf of the governing body "when it exercises actual or de facto decisionmaking power." AGO 1986 No. 16, at 12. However, in an informal letter to the Central Kitsap School District Board, dated March 21, 2008, the open government ombudsman for the attorney general's office takes a more expansive view than this prior formal opinion regarding when a committee is subject to the Act.

[13]While the definition of "governing body" speaks of "when" a committee acts so as to come within that definition, the courts have not been clear about whether a committee is subject to the Act for all of its meetings when it is only at some that it is acting in that manner. See *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001).

[14]RCW 42.30.010.

[15]*Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 561 (2001).

[16]AGO 1986 No. 16.

What Is a "Meeting"?

There must be a "meeting" of a governing body for the Act to apply. Sometimes it is very clear that a "meeting" is being held that must be open to the public, but other times it isn't. To determine whether a governing body is having a "meeting" that must be open, it is necessary to look at the Act's definitions. The Act defines "meeting" as follows: "'Meeting' means meetings at which action is taken."[17] "Action," as referred to in that definition of "meeting," is defined as follows:

> *"Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.*[18]

Since a governing body can transact business when a quorum (majority) of its members are present,[19] it is conducting a meeting subject to the requirements of the Open Public Meetings Act whenever a majority of its members meet together and deal in any way with city, county, or special purpose district business, as the case may be. This includes simply discussing some matter having to do with agency business. Because members of a governing body may discuss the business of that body by telephone or e-mail, it is not necessary that the members be in the physical presence of each other for there to be a meeting subject to the Act.[20] See the "Further Questions" at the end of this section. Also, it is not necessary that a governing body take "final action"[21] for a meeting subject to the Act to occur.

---

[17]RCW 42.30.020(4).

[18]RCW 42.30.020(3).

[19]See, e.g., RCW 35A.12.120; 35.23.270; 35.27.280; 36.32.010.

[20]*Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 562 (2001).

[21]RCW 42.30.020(3) defines "final action" as "a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance."

Note that it does not matter if the meeting is called a "workshop," a "study session," or a "retreat"; it is still a meeting subject to the Open Public Meetings Act if a quorum is addressing the business of the city, county, or special purpose district. If a governing body just meets socially or travels together, it is not having a meeting subject to the Act as long as the members do not discuss agency business or otherwise take "action."[22]

Further Questions

If a majority or more of the members of a governing body discuss city, county, or district business by telephone or e-mail, are they having a meeting subject to the Act?

Since the members of a governing body can discuss city, county, or district business together by telephone or by e-mail so as to be taking "action" within the above definition, the governing body can conduct a meeting subject to the Act even when the members are not in the physical presence of one another[23] This type of meeting could take many forms, such as a conference call among a majority or more of the governing body, a telephone "tree" involving a series of telephone calls, or an exchange of e-mails. Since the public could not, as a practical matter, attend this type of "meeting," it would be held in violation of the Act.[24]

Given the increasingly prevalent use of e-mail and the nature of that technology, members of city councils, boards of county commissioners, and special district governing bodies must be careful when communicating with each other by e-mail so as not to violate the Act. However, such bodies will not be considered to be holding a meeting if one member e-mails the other members merely for the purpose of providing relevant information to them. As long as the other members only "passively receive" the information and a discussion regarding that information is not then commenced by e-mail amongst a quorum, there is no Open Public Meetings Act issue.[25]

May one or more members of a governing body "attend" a meeting by telephone?

Although no courts in this state have addressed this question, it probably would be permissible for a member of a governing body to "attend" a meeting by telephone, with the permission of the body, *if* that member's voice could be heard by all present, including

---

[22]RCW 42.30.070; *In re Recall of Roberts*, 115 Wn.2d 551, 554 (1990).

[23]*Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 562-63 (2001).

[24]Though, at least one local government in this state has held an online meeting of its governing body, providing notice under the Act and giving the public the opportunity to "attend."

[25]*Id.* at 564-65.

the public, and if that member could hear all that is stated at the meeting. Some sort of speaker phone equipment would be necessary for this to occur. If a governing body decides to allow participation by telephone, it is advisable to authorize such in its rules, including under what circumstances it will be allowed.

May a quorum of a city or county legislative body attend, as members of the audience, a citizens' group meeting?

Yes, provided that the members attending the meeting do not discuss, as a group, city or county or district business, as the case may be, or otherwise take "action" within the meaning of the Act.[26] That possibility could in most circumstances be avoided by not sitting as a group.

May an entire county council attend a private dinner in honor of the out-going county official without complying with the Open Public Meetings Act?

Again, the issue comes down to whether the council will be dealing with county business. It can be argued that honoring the county official is itself county business. On the other hand, it could be argued that honoring an individual who is leaving county employment does not involve the functioning of the county. This is a gray area where caution should be exercised.

Must the public be allowed to attend the annual city council retreat?

Yes. A retreat attended by a quorum of the council where issues of city business are addressed constitutes a meeting.

[26]See AGO 2006 No. 6.

What Procedural Requirements Apply to Meetings?

The Act establishes some basic procedural requirements that apply to all meetings of a governing body, whether they are regular or special meetings. *All meetings of a governing body are, under the Open Public Meetings Act, either regular or special meetings.* It does not matter if it is called a "study session" or a "workshop" or a "retreat," it is either a regular or special meeting.

What is a regular meeting?

A regular meeting is one that is held according to a schedule adopted by ordinance, resolution, order, or rule, as may be appropriate for the governing body.[27]

What is a special meeting?

A special meeting is any meeting that is not a regular meeting. In other words, special meetings are not held according to a fixed schedule. Under the Act, special meetings have specific notice requirements, as discussed below. Also, governing bodies may be subject to specific limitations about what may be done at a special meeting.[28]

What procedural requirements apply to all meetings of a governing body?

The following requirements and prohibitions apply to both regular and special meetings of a governing body:

---

[27]See RCW 42.30.060, .070, .080. Also, state law, though not the Open Public Meetings Act, may require the governing body of a city, county, or special district to meet with a certain regularity, such as monthly. For example, second class and code city councils, town councils, and the board of directors of any school district must meet at least once a month. RCW 35.23.181; RCW 35.27.270; RCW 35A.12.110; RCW 28A.343.380.

[28]For example, second class city councils may not pass an ordinance or approve a contract or a bill for the payment of money at a special meeting. RCW 35.23.181. Town councils may not pass a resolution or order for the payment of money at a special meeting. RCW 35.27.270. Many special purpose districts are subject to requirements that certain actions can be taken only at a regular meeting, i.e., not at a special meeting. See, e.g., RCW 54.16.100 (appointment and removal of public utility district manager); RCW 85.05.410 (setting compensation of board of diking district commissioners). The councils of first class and code cities and county legislative bodies have no specific limitations on actions that may be taken at a special meeting, other than those imposed by the Open Public Meetings Act.

- All meetings must be open to the public.[29]
- A member of the public may not be required as a condition of attendance to register his or her name or other information, or complete a questionnaire, or be required to fulfill any other condition to be allowed to attend.[30]

- The governing body may require the removal of members of the public who disrupt the orderly conduct of a meeting. If order cannot be restored by removal of individuals, the governing body may order the meeting room cleared and may continue in session or it may adjourn and reconvene the meeting at another location, subject to the limitations in RCW 42.30.050.[31]

- Votes may not be taken by secret ballot.[32]

- Meetings may be adjourned or continued subject to the procedures in RCW 42.30.090, as discussed below.

- The governing body may meet in executive (closed) session, but only for one of the reasons specified in and in accordance with the procedures identified in RCW 42.30.110.[33] See discussion on executive sessions.

Although the Act gives the public the right to attend meetings, the public has no statutory right to speak at meetings. However, as a practical and policy matter, city, county, and special district governing bodies generally provide the public some opportunity to speak at meetings.

The Open Public Meetings Act does not require that a city or county legislative body or special district governing body hold its meetings within the city or in a particular place in the county or district. However, other statutes provide that the councils of code cities, second class cities, and towns may take final actions on ordinances and resolutions only at a meeting within the city or

---

[29]RCW 42.30.030.

[30]RCW 42.30.040.

[31]That statute provides in relevant part as follows

> In such a session, final disposition may be taken only on matters appearing on the agenda. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the governing body from establishing a procedure for readmitting an individual or individuals not responsible for disturbing the orderly conduct of the meeting.

[32]RCW 42.30.060(2). Any vote taken by secret ballot is null and void.

[33]But, see footnote 44.

town.[34] Also, county legislative bodies must hold their regular meetings at the county seat,[35] but may hold special meetings in the county outside of the county seat if there are agenda items that "are of unique interest or concern" to the residents of the area of the county in which the meetings are held.[36] Some special purpose district governing bodies, such as first class school district boards of directors,[37] are specifically required to hold their regular meetings within the district, while others, such as irrigation districts,[38] are specifically required to hold meetings in the county where the district is located. Where the statutes are silent as to where meetings must be held for a particular type of district, they should be held, if possible, within the district or, at the very least, within the county in which the district is located.

What procedural requirements apply specifically to regular meetings?

- The date and time of regular meetings must be established by ordinance, resolution, order, or rule, as may be required for the particular governing body.[39]

- If the regular meeting date falls on a holiday, the meeting must be held on the next business day.[40]

- The meeting agenda must be made available online at least 24 hours in advance of the regular meeting.[41] This requirement does not apply if the city, county, or district does not have a website or if it employs fewer than 10 full-time equivalent employees.

---

[34]RCW 35.23.181; 35.27.270; 35A.12.110. Although meetings need not necessarily be held within a city, when a governing body decides to hold one outside the city, it should not site the meeting at a place so far from the city as to effectively prevent the public from attending.

[35]RCW 36.32.080.

[36]RCW 36.32.090.

[37]RCW 28A.330.070.

[38]RCW 87.03.115.

[39]The Act does not directly address designating (in the ordinance, resolution, order, or rule designating the date and time of regular meetings) the place at which regular meetings will be held. RCW 42.30.070. However, the statutes governing the particular classes of cities, except those governing first class cities, require designation of the site of regular council meetings. RCW 35A.12.110; 35.23.181; 35.27.270. The county statutes and those relating to special purpose districts do not address designating the site of regular meetings. However, counties, first class cities, and special purpose districts should, of course, also designate the site of regular meetings along with the designation of the date and time of those meetings.

[40]RCW 42.30.070.

[41]Laws of 2014, ch. 61, § 2. This requirement does not mean that the agenda cannot be modified after it is posted online. Also, a failure to comply with this requirement with respect to a meeting will not invalidate an otherwise legal action taken at the meeting.

What procedural requirements apply specifically to special meetings?

The procedural requirements that apply to special meetings deal primarily with the notice that must be provided. These requirements, contained in RCW 42.30.080, are as follows:

- A special meeting may be called by the presiding officer or by a majority of the members of the governing body.[42]

- Written notice must be delivered personally, by mail, by fax, or by e-mail at least 24 hours before the time of the special meeting to:

    - each member of the governing body, and to

    - each local newspaper of general circulation and each local radio or television station that has on file with the governing body a written request to be notified of that special meeting or of all special meetings.[43]

- Notice of the special meeting must be provided to the public as follows:

    - "prominently displayed" at the main entrance of the agency's principal location, and at the meeting site if the meeting will not held at the agency's principal location; and

    - posted on the agency's web site. Web site posting is not required if the agency:

        - does not have a web site;
        - has fewer than 10 full-time equivalent employees; or
        - does not employ personnel whose job it is to maintain or update the web site.

---

[42]There is a conflict between the provision in RCW 42.30.080 authorizing a majority of the members of a governing body to call a special meeting and the provision for code cities in RCW 35A.12.110 authorizing three members of the city council to call a special meeting. This conflict occurs only with respect to a code city with a seven-member council, because three members is less than a majority. Since RCW 42.30.140 provides that the provisions of the Act will control in case of a conflict between it and another statute, four members of a seven-member code city council, not three, are needed to call a special meeting.

[43]Note also that statutes relating to each class of city require that cities

> *establish a procedure for notifying the public of upcoming hearings and the preliminary agenda for the forthcoming council meeting. Such procedure may include, but not be limited to, written notification to the city's official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, or such other processes as the city determines will satisfy the intent of this requirement.*

RCW 35A.12.160; 35.22.288; 35.23.221; 35.27.300. There are no similar statutes that apply to counties or special purpose districts. Nevertheless, we recommend that counties and special districts establish like procedures for notifying the public.

- The notice must specify:
    - the time and place of the special meeting, and
    - the business to be transacted at the special meeting.
- The governing body may take final action *only* concerning matters identified in the notice of the meeting.[44]
- Written notice to a member or members of the governing body is not required when:
    - a member files at or prior to the meeting a written waiver of notice or provides a waiver by telegram, fax, or e-mail; or
    - the member is present at the meeting at the time it convenes.
- Special meeting notice requirements may be dispensed with when a special meeting is called to deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage, when the time requirements of the notice would make notice impractical and increase the likelihood of such injury or damage.[45] An emergency meeting must, nevertheless, be open to the public.[46]

What procedural requirements apply to adjournments of regular or special meetings?

A regular or special meeting may be adjourned to a specified time and place, where it will be continued. There are a number of circumstances under which a meeting might be adjourned. A meeting may be adjourned and continued to a later date because the governing body did not complete its business. The Act, in RCW 42.30.090, addresses two other circumstances under which a meeting may be adjourned and continued at a later date:

- When the governing body does not achieve a quorum. In that circumstance, less than a quorum may adjourn a meeting to a specified time and place; or
- When all members are absent from a *regular meeting* or an *adjourned regular meeting*. In that instance, the clerk of the governing body may adjourn the meeting to a stated time and place, with notice provided as required for a special meeting, unless notice is waived as provided for special meetings. However, the resulting meeting is still considered a regular meeting.

---

[44]This does not prevent a governing body from discussing or otherwise taking less than final action with respect to a matter not identified in the notice.

[45]The type of emergency contemplated here is a severe one that "involves or threatens physical damage" and requires urgent or immediate action. *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 140, 144-45 (1975).

[46]*Teaford v. Howard*, 104 Wn.2d 580, 593 (1985)

Notice of an adjourned meeting is to be provided as follows:

- An order or notice of adjournment, specifying the time and place of the meeting to be continued, must be "conspicuously posted" immediately following adjournment on or near the door of the place where the meeting was held.

- Notice of a regular meeting adjourned by the clerk when all members of the governing body are absent must be provided in the same manner as for special meetings.

- If the notice or order of an adjourned meeting fails to state the hour at which the adjourned meeting is to be held, it must be held at the hour specified for regular meetings by ordinance, resolution, or other rule.

If the governing body is holding a hearing, the hearing may be continued at a later date by following the same procedures for adjournment of meetings.[47]

Further Questions

Must a city, county, or special purpose district provide published notice of a special meeting?

No, not under the Open Public Meetings Act. While notice must be provided to media that have on file a request to be notified of special meetings, this is not equivalent to a publishing requirement. Of course, if the governing body has adopted a requirement of published notice for special meetings, that requirement must be followed.

May notice to the media of a special meeting be provided by fax or e-mail?

Yes. Legislation passed in 2005 amended RCW 42.30.080 to allow notice by fax or e-mail.

May a governing body prohibit a member of the public from tape recording or videotaping a meeting?

No, there is no legal basis for prohibiting the audio or videotaping of a meeting, unless the taping disrupts the meeting. If the governing body enacted such a rule, it essentially would be conditioning attendance at a meeting on not recording the meeting. This would be contrary to RCW 42.30.040, which prohibits a governing body from imposing any

[47]RCW 42.30.100.

condition on attending a public meeting.[48]

How can a majority of the governing body agree outside of a formal meeting to call a special meeting without violating the Act?

Since a majority of the governing body, under RCW 42.30.080, may call a special meeting "at any time," it would indeed be an anomaly if, in calling for that meeting, the majority would be considered to have violated the Act. In our opinion, the only way to give effect to this statutory provision is to allow a majority to communicate as a group in some way (e.g., by phone, e-mail, in person, or through the clerk's office) to decide whether to have a special meeting, when to have it, and what matters it will deal with. The members could not discuss anything else, such as the substance of the matters to be discussed at the special meeting.

[48]See AGO 1998 No. 15.

When May a Governing Body Hold an Executive Session?

What is an executive session?

"Executive session" is not expressly defined in the Open Public Meetings Act, but the term is commonly understood to mean that part of a regular or special meeting of a governing body that is closed to the public. A governing body may hold an executive session only for specified purposes, which are identified in RCW 42.30.110(1)(a)-(o),[49] and only during a regular or special meeting. Nothing, however, prevents a governing body from holding a meeting, which complies with the Act's procedural requirements, for the sole purpose of having an executive session.

A governing body should always follow the basic rule that it may not take final action in an executive session. However, there may be circumstances, as discussed below, where the governing body will need to reach a consensus concerning the matter being considered in closed session. Nevertheless, as discussed below, recent case law casts doubt on the authority of a governing body to reach a consensus regarding *any* matter in executive session.

Who may attend an executive session?

Attendance at an executive session need not be limited to the members of the governing body. Persons other than the members of the governing body may attend the executive session at the invitation of that body.[50] Those invited should have some relationship to the matter being addressed in the closed session, or they should be attending to otherwise provide assistance to the governing body. For example, staff of the governing body or of the governmental entity may

[49]There is at least one statute outside of the Open Public Meetings Act that authorizes an executive session for a purpose not identified in RCW 42.30.110(1)(a)-(o). RCW 70.44.062 authorizes the board of commissioners of a public hospital district to meet in executive session "concerning the granting, denial, revocation, restriction, or other consideration of the status of the clinical or staff privileges of a physician or other health care provider" or "to review the report or the activities of a quality improvement committee."

[50]When the governing body is meeting in executive session to discuss litigation or potential litigation, legal counsel *must* be present and take part in the discussion. RCW 42.30.110(1)(i).

be needed to present information or to take notes or minutes. However, minutes are not required to be taken at an executive session.[51]

What procedures must be followed to hold an executive session?

Before a governing body may convene in executive session, the presiding officer must publicly announce the executive session to those attending the meeting by stating two things:

- the purpose of the executive session, and
- the time when the executive session will end.

The announced purpose of the executive session must be one of the statutorily-identified purposes for which an executive session may be held. The announcement must contain enough detail to identify the purpose as falling within one of those identified in RCW 42.30.110(1).

If the executive session is not over at the stated time, it may be extended only if the presiding officer announces to the public at the meeting place that it will be extended to a stated time. If the governing body concludes the executive session *before* the time that was stated it would conclude, it should not reconvene in open session until the time stated. Otherwise, the public may, in effect, be excluded from that part of the open meeting that occurs between the close of the executive session and the time that was announced for the conclusion of the executive session.

What are the allowed purposes for holding an executive session?

An executive session may be held only for one or more of the purposes identified in RCW 42.30.110(1). The purposes addressed below are those which have practical application to cities, counties, and special purpose districts. A governing body of a city, county, or special district may meet in executive session for the following reasons:

- *To consider matters affecting national security;*

  Until the events of September 11, 2001, this provision had little, if any, practical application to cities, counties, or special districts. However, since the events of September 11, 2001, it has become clear that local security issues may in some instances have national security implications. So, discussions by city, county, or district governing bodies of security matters relating to possible terrorist activity should come within the ambit of this executive session provision. This would include discussions of vulnerability or response assessments relating to criminal terrorist activity.

[51]See RCW 42.32.030.

- *To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;*[52]

  This provision has two elements:

  - the governing body must be considering either purchasing or leasing real property; and

  - public knowledge of the governing body's consideration would likely cause an increase in the price of the real property.

  The consideration of the purchase of real property under this provision can involve condemnation of the property, including the amount of compensation to be offered for the property.[53]

  Since this provision recognizes that the process of purchasing or leasing real property or selecting real property to purchase or lease may justify an executive session, it implies that the governing body may need to reach some consensus in closed session as to the price to be offered or the particular property to be selected.[54] However, the state supreme court has emphasized that "only the action explicitly specified by [an] exception may take place in executive session."[55] Taken literally, this limitation would preclude a governing body in executive session from actually selecting a piece of property to acquire or setting a price at which it would be willing to purchase property, because such action would be beyond mere "consideration." Yet, the purpose of allowing this type of consideration in an executive session would be seemingly defeated by requiring a vote in open session to select the property or to decide how much to pay for it, where public knowledge of these matters would likely increase its price. While this issue awaits judicial or legislative resolution, city and county legislative bodies and special district governing bodies should exercise caution.

---

[52]RCW 42.30.110(1)(b).

[53]*Port of Seattle v. Rio*, 16 Wn. App. 718, 724 (1977).

[54]See *Port of Seattle v. Rio*, 16 Wn. App. at 723-25.

[55]*Miller v. Tacoma*, 138 Wn.2d 318, 327 (1999). See also, *Feature Realty, Inc. v. Spokane*, 331 F.3d 1082 (9th Cir. 2003).

- *To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;*[56]

  This subsection, the reverse of the previous one, also has two elements:

  - the governing body must be considering the minimum price at which real property belonging to the city or county will be offered for sale or lease; and
  - public knowledge of the governing body's consideration will likely cause a decrease in the price of the property.

  The requirement here of taking final action selling or leasing the property in open session may seem unnecessary, since all final actions must be taken in a meeting open to the public. However, its probable purpose is to indicate that, although the decision to sell or lease the property must be made in open session, the governing body may decide in executive session the minimum price at which it will do so. However, see the discussion regarding the previous provision for meeting in executive session and taking any action in executive session that is not expressly authorized.

  If there would be no likelihood of a change in price if these real property matters are considered in open session, then a governing body should not meet in executive session to consider them.

- *To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;*[57]

  This subsection indicates that when a city, county, or special district and a contractor performing a publicly bid contract are negotiating over contract performance, the governing body may "review" those negotiations in executive session if public knowledge of the review would likely cause an increase in contract costs. MRSC is not aware of an executive session being held under this provision. It is not clear what circumstances would result in a governing body meeting in executive session under this provision.

---

[56]RCW 42.30.110(1)(c).

[57]RCW 42.30.110(1)(d).

- *To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;*[58]

  For purposes of meeting in executive session under this provision, a "charge" or "complaint" must have been brought against a city, county, or special district officer or employee. The complaint or charge could come from within the city, county, or district or from the public, and it need not be a formal charge or complaint. The bringing of the complaint or charge triggers the opportunity of the officer or employee to request that the discussion be held in open session.[59]

  As a general rule, city governing bodies that are subject to the Act do not deal with individual personnel matters.[60] For example, the city council should not be involved in individual personnel decisions, as these are within the purview of the administrative branch under the authority of the mayor or city manager.[61] This provision for holding an executive session should not be used as a justification for becoming involved in personnel matters which a governing body may have no authority to address.

- *To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;*[62]

  There are two different purposes under this provision for which a governing body may meet in executive session. For both purposes, the references to "public employment" and to "public employee" include within their scope public offices and

---

[58]RCW 42.30.110(1)(f).

[59]Another possible interpretation of this provision is that the officer or employee subject to the complaint or charge may request that the complaint or charge be heard by the governing body in open session, *in addition to* rather than instead of a discussion of the complaint or charge in executive session. This provision, however, has not been addressed by the courts.

[60]A civil service commission is an obvious exception. It, however, addresses personnel actions taken against a covered officer or employee, and it does so in the context of a formal hearing. Another exception is where the governing body may be considering a complaint against one of its members. Also, when a city council has confirmation authority over a mayoral appointment, it may discuss the appointment that is subject to confirmation in executive session.

[61]An exception is where the council, in a council-manager city, may be considering a complaint or charge against the city manager.

[62]RCW 42.30.110(1)(g).

public officials. This means that a governing body may evaluate in executive sessions persons who apply for appointive office positions, such as city manager, as well as those who apply for employee positions.[63]

The first purpose involves evaluating the qualifications of applicants for public employment. This could include personal interviews with an applicant, discussions concerning an applicant's qualifications for a position, and discussions concerning salaries, wages, and other conditions of employment personal to the applicant.

This authority to "evaluate" applicants in closed session allows a governing body to discuss the qualifications of applicants, not to choose which one to hire (to the extent the governing body has any hiring authority). Although this subsection expressly mandates that "final action hiring" an applicant for employment be taken in open session, this does not mean that a governing body may take preliminary votes in executive session that eliminate candidates from consideration.[64]

The second part of this provision concerns reviewing the performance of a public employee. Typically this is done where the governing body is considering a promotion or a salary or wage increase for an individual employee or where it may be considering disciplinary action.[65]

The result of a governing body's closed session review of the performance of an employee may be that the body will take some action either beneficial or adverse to the officer or employee. That action, whether raising a salary of or disciplining an officer or employee, must be made in open session.

Any discussion involving salaries, wages, or conditions of employment to be "generally applied" in the city, county, or district must take place in open session. However, discussions that involve collective bargaining negotiations or strategies are not subject to the Open Public Meetings Act and may be held in closed session without being subject to the procedural requirements for an executive session.[66]

---

[63]The courts have, for various purposes, distinguished between a public "office" and a public "employment." See, e.g., *Oceanographic Comm'n v. O'Brien*, 74 Wn.2d 904, 910-12 (1968); *State ex rel. Hamblen v. Yelle*, 29 Wn.2d 68, 79-80 (1947); *State ex rel. Brown v. Blew*, 20 Wn.2d 47, 50-52 (1944). A test used to distinguish between the two is set out in *Blew*, 20 Wn.2d at 51.

[64]*Miller v. Tacoma*, 138 Wn.2d 318, 329-31 (1999).

[65]In general, a city council has little or no authority regarding discipline of public officers or employees. An exception would be a city manager over which the council has removal authority. RCW 35A.13.130; 35.18.120.

[66]See RCW 42.30.140(4).

- *To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;*[67]

  This provision applies to a city, county, or district governing body only when it is filling a vacant elective position. Under this provision, the governing body may meet in executive session to evaluate the qualifications of applicants for the vacant position. However, any interviews with the candidates must be held in open session. As with all other appointments, the vote to fill the position must also be in open session.

- *To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.*

  This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present.[68]

  For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6[69] *or RCW 5.60.060(2)(a)*[70] *concerning:*

  (A) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;

  (B) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or

  (C) Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency;

---

[67]RCW 42.30.110(1)(h).

[68]RCW 42.30.110(1)(i).

[69]RPC 1.6 is part of the Rules of Professional Conduct for attorneys, and it deals specifically with client confidentiality, generally prohibiting disclosure of client confidences except in certain specific situations.

[70]RCW 5.60.060(2)(a) provides that an attorney may not be compelled to be a witness at trial and reveal client confidences.

Three basic requirements must be met before this provision can be used by a governing body to meet in closed session:[71]

- The attorney or special legal counsel representing the city, county, or special district must attend the executive session to discuss the enforcement action or the litigation or potential litigation;

- The discussion with legal counsel must concern either an enforcement action or litigation or potential litigation to which the city, county, district, a governing body, or one of its members is or is likely to become a party; and

- Public knowledge of the discussion would likely result in adverse legal or financial consequence to the city, county, or district.

The potential litigation issue. Until this section was amended in 2001 to define "potential litigation," the scope of this provision was unclear and subject to a range of interpretations. The 2001 legislature expanded the meaning of that term to authorize governing bodies to discuss in executive session the legal risks of a proposed or existing practice or action, when discussing those risks in open session would likely have an adverse effect on the agency's financial or legal position. This allows a governing body to freely consider the legal implications of a proposed decision or an existing practice without the attendant concern that some future litigation position might be jeopardized.

The probability of adverse consequence to the city or county. It is probable that public knowledge of most governing body discussions of existing litigation would result in adverse legal or financial consequence to the city, county, or district. Knowledge by one party of the communications between the opposing party and its attorney concerning a lawsuit will almost certainly give the former an advantage over the latter. The same probably can be said of most discussions that qualify as involving potential litigation.

The state supreme court has held that a governing body is not required to determine beforehand whether public knowledge of the discussion with legal counsel would likely have adverse consequences; it is sufficient if the agency, from an objective standard, should know that the discussion is not benign and that public knowledge of it will likely result in adverse consequences.[72]

---

[71]This provision for holding an executive session is based on the legislative recognition that the attorney-client privilege between a public agency governing body and its legal counsel can co-exist with the Open Public Meetings Act. See *Final Legislative Report, Forty-Ninth Legislature, 1985 Regular and 1st Special Sessions*, at 270-71; see also *Recall of Lakewood City Council*, 144 Wn.2d 583, 586-87 (2001); *Port of Seattle v. Rio*, 16 Wn. App.718, 724-25 (1977); AGO 1971 No. 33, at 20-23. However, that privilege is not necessarily as broad as it may be between a private party and legal counsel.

[72]*Recall of Lakewood City Council*, 144 Wn.2d 583, 586-87 (2001).

Again, no final action in executive session. The purpose of this executive session provision is to allow the governing body to discuss litigation or enforcement matters with legal counsel; the governing body is not authorized to take final action regarding such matters in an executive session. And, recent case law emphasizes that, in order for any action to take place legally in executive session, authority must be "explicitly specified" in an exemption under RCW 42.30.110(1), though that case law did not address this exemption.[73] The only action that is specifically authorized in this exemption is discussion.

However, since a basic purpose of shielding these discussions from public view is to protect the secrecy of strategic moves concerning litigation, the scope of a governing body's authority in executive session should be interpreted to afford that protection. So, for example, while this provision does not authorize a governing body to approve a settlement agreement in executive session, it should provide authority for that body to authorize its legal counsel to settle a case for no higher than a certain amount. An interpretation supporting the council's authority to take such action appears warranted, *but* such an interpretation may not be supported by the strict language in recent case law.

Further Questions

May an executive session be called to discuss "personnel matters"?

No, this would not be a legally sufficient reason to hold an executive session. The purpose for holding an executive session must be within those specifically identified in RCW 42.30.110(1). Although there are personnel issues that may be addressed in an executive session under this statute, such as complaints or charges against an employee or an employee's performance, "personnel matters" is too broad a purpose and could include purposes not authorized by the statute.

May a city council meet in executive session to ask the mayor to resign?

No. Although the council could meet in executive session to discuss complaints or charges against the mayor, the council should take the action of asking for the mayor's resignation in open session. (Of course, a mayor is not legally bound by the council's wishes.)

---

[73] *Miller v. Tacoma*, 138 Wn.2d 318, 327 (1999). See also, *Feature Realty, Inc. v. Spokane*, 331 F.3d 1082 (9th Cir. 2003).

May the board of a special purpose district meet in executive session at a special meeting if the notice of the special meeting did not identify that an executive session would be held?

Yes. The prohibition in RCW 42.30.080 on taking final disposition on any matter not identified in the special meeting notice does not apply to holding an executive session, because that does not involve final disposition on any matter. The board is already prohibited from taking final action in an executive session. Nevertheless, from a policy standpoint, the notice should identify the executive session if the board knows at the time of giving the notice that it will be meeting in executive session at the special meeting.

If three members of a seven-member city council interview candidates for a council vacancy, must those interviews be open to the public?

Yes. Although they do not represent a quorum of the council, the three councilmembers would be acting on behalf of the entire council in conducting these interviews. As such, they would be considered a "governing body" subject to the Act. Since interviews by a governing body of candidates for appointment to elective office must occur in an open meeting (RCW 42.30.110(1)(h)), this three-member committee may not meet in executive session for the purpose of interviewing the candidates.

What Meetings Are Exempt from the Act?

RCW 42.30.140 sets out four situations where a governing body may meet and not be subject to any requirements of the Open Public Meetings Act. That statute provides that the Act does not apply to:

- *The proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation, or profession or to any disciplinary proceedings involving a member of such business, occupation, or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary;*

  This provision, for the most part, has little, if any, application to any city, county, or special district governing body. One type of proceeding where it has been used is where a city provides for a hearing before revoking a business license.[74]

- *That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group;*

  This exception applies when a governing body is acting in a quasi-judicial capacity.[75] Typically, a city or county governing body is acting in a quasi-judicial capacity in certain land use actions such as site-specific rezones, conditional use applications, variances, and preliminary plat applications. Other examples include the civil service commission when it is considering an appeal of a disciplinary decision and the LEOFF disability board when it is considering an application for disability benefits.

---

[74]See *Cohen v. Everett City Council*, 85 Wn.2d 385, 386 (1975).

[75]The courts have employed a four-part test to determine whether a matter qualifies under the quasi-judicial action exemption from the Open Public Meetings Act (RCW 42.30.140(2)): (1) whether the action is one a court could have been charged to determine; (2) whether it is one historically performed by courts; (3) whether it involves the application of existing law to past or present facts for purposes of enforcing or declaring liability; and (4) whether it resembles the ordinary business of courts more than that of legislators or administrators. *Raynes v. Leavenworth*, 118 Wn.2d 237, 244 (1992). See also, RCW 42.36.010 (definition of quasi-judicial land use actions, for purposes of the appearance of fairness doctrine); *The Appearance of Fairness Doctrine in Washington State*, MRSC Report No. 32 (January 1995), at 6-8 (discussion of quasi-judicial land use actions).

However, where a public hearing is required for a quasi-judicial matter, only the deliberations by the body considering the matter can be in closed session.

- *Matters governed by chapter 34.05 RCW, the Administrative Procedures Act;*

  This exception has no application to cities, counties, or special purpose districts.

- *Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress.*

  The language of this exception is basically self-explanatory.[76] However, the term "professional negotiations" must be interpreted in the context of collective bargaining; it should not be interpreted to apply generally to negotiations for professional services.

Further Questions

Does the Open Public Meetings Act require that a civil service commission hearing regarding a police officer's appeal of disciplinary action be open to the public?

No, because such a hearing would fall under the exception from the Act in RCW 42.30.140(2) for quasi-judicial matters. However, since RCW 41.12.090 requires that such a hearing be public, the Act's exemption does not apply. The commission may nevertheless deliberate in private.

Must the city council give any notice under the Act when it is meeting to discuss the strategy to be taken during collective bargaining with an employee union?

No. Under RCW 42.30.140(4), this meeting is exempt from the Open Public Meetings Act. The council may therefore meet without notifying anyone. Of course, each of the councilmembers should be notified.

---

[76]City, county, and special district governing bodies should be aware that this exemption from the Act does not protect from public disclosure documents that are introduced at such a meeting. *ACLU of WA v. City of Seattle*, 121 Wn. App. 544 (2004).

What Are the Penalties for Violating the Act?

The only avenue provided by the Open Public Meetings Act to enforce its provisions or to impose a penalty for a violation of its provisions is by an action in superior court. "Any person" may bring that action in superior court. If a superior court determines that a violation has occurred, liability may be imposed as follows:

- *Individual liability.* Members of a governing body who attend a meeting where action is taken in violation of the Act are subject to a $100 penalty *if* they attend with knowledge that the meeting is in violation of the Act.[77] Violation of the Act is not a criminal offense. The penalty is assessed by the superior court, and any person may bring an action to enforce the penalty.

  Also, a knowing or intentional violation of the Act may provide a legal basis for recall of an elected member of a governing body, although recall is not a penalty under the Act.[78]

- *City, county, or district liability.* The city, county, or district is liable for all costs, including reasonable attorney fees.[79]

  However, if a court determines by written findings that an action for violation of the Act was "frivolous and advanced without reasonable cause," a city, county, or district *may* be awarded reasonable expenses and attorney fees.[80]

In addition to the above, any person may bring an action by mandamus or injunction to stop violations of the Act or to prevent threatened violations.[81]

Actions in violation of the Act are null and void. Any ordinance, resolution, rule, regulation, order, or directive that is adopted at a meeting that does not comply with the Act, and any secret

---

[77]RCW 42.30.120(1).

[78]See *Recall of Lakewood City Council*, 144 Wn.2d 583, 586 (2001); *In re Recall of Kast*, 144 Wn.2d 807, 817 (2001).

[79]RCW 42.30.120(2).

[80]*Id.*

[81]RCW 42.30.130.

vote taken, is null and void.[82] This does not, however, mean that a subsequent action that complies with the Act is also invalidated.[83] But, where action taken in open session merely ratifies an action taken in violation of the Act, the ratification is also null and void.[84]

---

[82]RCW 42.30.060.

[83]*OPAL v. Adams County*, 128 Wn.2d 869, 883 (1996); *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001); see also, AGO 1971 No. 33 at 40.

[84]*Clark v. City of Lakewood*, 259 F.3d at __, n. 10; see, *Miller v. Tacoma*, 138 Wn.2d at 329-31.

What Training is Required by the Act?

The 2014 Legislature enacted a requirement that all members of governing bodies, state and local, receive training on the requirements of the Open Public Meetings Act.[85] The training must be completed within 90 days after a governing body member takes the oath of office or otherwise assumes the duties of the position. The training must be repeated at intervals of no longer than four years, as long as an individual is a member of the governing body. This legislation does not specify the training that must be received, other than it is to be on the requirements of the OPMA and that it may be completed remotely.[86] No penalty is provided for the failure of a member of a governing body to receive the required training.

[85]Laws of 2014, ch. 66, § 2.

[86]For more information on this training requirement, see the Attorney General's 2014 Open Government Trainings Act Guidance, at http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Open_Government/Open_Government_Training/QandA-Re-ESB-5964.pdf.

Selected Cases and Attorney General Opinions

AGO 1971 No. 33 – This AGO contains a comprehensive overview of the scope of the Open Public Meetings Act, as it was enacted in 1971. Although parts of the Act have been amended since 1971, much of it remains the same.

RCW 42.30.010 – Legislative Declaration (Purpose of Act)

- *Cathcart v. Anderson*, 85 Wn.2d 102 (1975).
- *Equitable Shipyards v. State*, 93 Wn.2d 465 (1980).

RCW 42.30.020 – Definitions

- *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120 (2011).
- *Eugster v. City of Spokane*, 110 Wn. App. 212, *review denied*, 147 Wn.2d 1021 (2002).
- *Wood v. Battle Ground School District*, 107 Wn. App. 550 (2001).
- *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001).
- *Miller v. City of Tacoma*, 138 Wn.2d 318 (1999).
- *Improvement Alliance v. Snohomish Cy.*, 61 Wn. App. 64 (1991).
- *Refai v. Central Wash. Univ.*, 49 Wn. App. 1 (1987), *review denied*, 110 Wn.2d 1006 (1988).
- *Estey v. Dempsey*, 104 Wn.2d 597 (1984).
- AGO 2010 No. 9.
- AGO 2006 No. 6.
- AGO 1986 No. 16 – Applicability of Open Public Meetings Act to a committee of the governing body.

RCW 42.30.030 – Meetings Declared Open and Public.

- AGO 1992 No. 21.

RCW 42.30.040 – Conditions to Attendance Not to be Required.

- AGO 1998 No. 15.

RCW 42.30.060 – Actions in Violation of Act Are Null and Void.

- Eugster v. City of Spokane, 128 Wn. App. 1 (2005).
- *Eugster v. City of Spokane*, 110 Wn. App. 212, *review denied*, 147 Wn.2d 1021 (2002).
- *Recall of Lakewood City Council*, 144 Wn.2d 583 (2001).
- *OPAL v. Adams County*, 128 Wn.2d 869 (1996).
- *Snohomish County Improv. Alliance v. Snohomish County*, 61 Wn. App. 64 (1991).
- *Henry v. Oakville*, 30 Wn. App. 240 (1981).
- *Slaughter v. Fire District*, 50 Wn. App. 733 (1988).
- *Mead School Dist. v. Mead Education Assoc.*, 85 Wn.2d 140 (1975).

RCW 42.30.070 – Time and Places for Meetings – Emergencies

- *In re Recall of Roberts*, 115 Wn.2d 551 (1990).
- *Teaford v. Howard*, 104 Wn.2d 580 (1985)
- *Mead School Dist. v. Mead Education Assoc.*, 85 Wn.2d 140 (1975).
- AGO 1992 No. 21.

RCW 42.30.080 – Special Meetings

- *Estey v. Dempsey*, 104 Wn.2d 597 (1985).
- *Dorsten v. Port of Skagit County*, 32 Wn. App. 785 (1982).
- *Kirk v. Fire Protection Dist.*, 95 Wn.2d 769 (1981).

RCW 42.30.110 – Executive Sessions

- *Recall of Lakewood City Council*, 144 Wn.2d 583 (2001).
- *Miller v. City of Tacoma*, 138 Wn.2d 318 (1999).

- *Port of Seattle v. Rio*, 16 Wn. App. 718 (1977).
- *Feature Realty, Inc. v. Spokane*, 331 F.3d 1082 (9th Cir. 2003).

RCW 42.30.120 – Violations - Personal Liability - Penalty - Attorney Fees and Costs

- *Eugster v. City of Spokane*, 110 Wn. App. 212, *review denied*, 147 Wn.2d 1021 (2002).
- *Wood v. Battle Ground School District*, 107 Wn. App. 550 (2001).
- *Protect the Peninsula's Future v. Clallam Cy.*, 66 Wn. App. 671 (1992).
- *Cathcart v. Anderson*, 10 Wn. App. 429 (1974).

RCW 42.30.130 – Violations - Mandamus or Injunction

- *Protect the Peninsula's Future v. Clallam Cy.*, 66 Wn. App. 671 (1992).
- *Lopp v. Peninsula School Dist.*, 90 Wn.2d 754 (1978).

RCW 42.30.140 – Chapter Controlling - Application (Exceptions)

- *ACLU of WA v. City of Seattle*, 121 Wn. App. 544 (2004).
- *Protect the Peninsula's Future v. Clallam Cy.*, 66 Wn. App. 671 (1992).
- *Pierce v. Lake Stevens School Dist.*, 84 Wn.2d 772 (1974).

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-5

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NO. 70606-3-I

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation,

Appellant,

v.

SAN JUAN COUNTY a Washington municipal corporation, and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council,

Respondents.

RESPONDENT SAN JUAN COUNTY'S ANSWER TO AMICUS BRIEF

Amy S. Vira, WSBA No. 34197
San Juan County Deputy Prosecuting Attorney
350 Court Street, 1st Floor
P. O. Box 760
Friday Harbor, WA 98250
360-378-4101
Attorney for Respondent San Juan County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

Statutes

Attorney General Opinions

I. INTRODUCTION

The issue before the Court in this case is whether Petitioner Citizens Alliance for Property Rights Legal Fund (CAPR) met its burden of establishing a violation of the Open Public Meetings Act. Amicus misconstrues the superior court's ruling in an attempt to lead the Court toward its own policy making agenda. The Court should not be so led. The facts of this case not only fail to establish any violation of the OPMA, but they likewise fail to present any novel issues of law or policy-level interpretations of the OPMA.

Amicus' interpretation of the phrase "acts on behalf of" in RCW 42.30.030 misrepresents the decision from Superior Court Judge Alan Hancock and fails to acknowledge that CAPR presented *no evidence* of an OPMA violation by either the San Juan County Council or by a "committee thereof." Similarly, Amicus' position on the award of attorney's fees completely overlooks the purpose of the cost shifting provision of RCW 42.30.120(2).

II. BACKGROUND

At all times relevant to this appeal, the legislative body of San Juan County was a six member County Council. Pursuant to the San Juan County Charter in effect at the time, a majority of the Council constituted a quorum

and action of the Council required the affirmative vote of four members. Charter, Section 2.40(3).

In 2010, a team of County executive staff and up to three Council members began gathering to facilitate and coordinate the County's effort to update its critical area regulations under the Growth Management Act. CP 255, 290, 320, 381. This team gathered periodically to discuss scheduling, sequence of consideration related to the critical areas regulations and methods of presenting scientific reports to the full Council. CP 256, 309, 392. This type of coordination was necessary because the County Charter at the time stated that individual members of the County Council were prohibited from giving orders to any employee under the County Administrator. The Charter did not require that a minority of the six-member County Council be subject to the open public meeting laws when meeting with the Administrator, and in any case, the record is completely devoid of any evidence that the Team engaged in any activity other than coordination of the regulation update. Indeed CAPR failed to allege or show to the trial court a specific action taken in violation of the OPMA, much less when and by whom the alleged action was taken. In the absence of even one of the required elements of an OPMA violation, CAPR's claim fails.

The record before the Court shows that the County followed Washington State law, and the critical area ordinances were passed in accordance with the requirements of the OPMA. Following cautionary advice from the Prosecuting Attorney, Council members stopped attending Team meetings in April 2012. CP 263-64, 291, 334-35. Between April 2012 and the passage of the ordinances on December 3, 2012, the County Council conducted over thirty public meetings on the ordinances. CP 774-75.

Before this lawsuit was filed, in July 2012, the San Juan County Charter Review Commission proposed, and in November the voters approved, three propositions amending the County Charter: Proposition 1 reduced the size of the County Council from six members to three members; Proposition 2 eliminated the County Administrator as a separate branch of the County government; and Proposition 3 directed that all subcommittee meetings of the County Council be subject to the OPMA. CP 733-741. These three amendments to the charter eliminated any need for injunctive relief in the event CAPR had presented evidence of a violation of the OPMA. This is because (1) without the restriction on Council member contact with staff, there is no longer the need for a coordination team, (2) even if there were the need for such a team, with only three Council members any gathering of two or more Council members would be subject

to the OPMA, and (3) Proposition 3 provides that all subcommittee meetings be subject to the OPMA regardless of the number of Council members on the committee.

Despite the changes to the County Charter and with full knowledge of the extensive public process between April 2012 and December 2012 on the critical area ordinances, CAPR filed an amended complaint in this matter on November 2, 2012 (CP 022) and conducted extensive discovery, including two lengthy sets of interrogatories and depositions of County staff and Council members. Following this exhaustive discovery and after submitting hundreds of pages of deposition transcripts and exhibits to the Superior Court, CAPR's Amended Complaint was dismissed on the County's motion for summary judgment in May 2013. CP 187-695, 816-28. Superior Court Judge Alan Hancock found that there was *no evidence* in the record to indicate that the Team had authority to act on behalf of the Council and *no evidence* to indicate that the Team did in fact act on behalf of the Council. CP 823.

Contrary to Amicus' assertions, the trial court did not misapply the law to the facts of this case, rather CAPR failed to present evidence to support its case. The record demonstrates that the notion of secret meetings and rubber stamped regulations is pure fiction.

III. ARGUMENT

Judge Hancock correctly applied Washington law to the facts of this case. Amicus attempts to frame the issue before the Court as turning on the meaning of the phrase "acts on behalf of" contained in the definition of "governing body" (RCW 42.30.020(2)) yet Amicus' argument offers nothing new; This is the same argument made to the trial court. Judge Hancock's interpretation of the OPMA and application of the phrase "acts on behalf of" is consistent with the advice of the Attorney General. Wash AGO 1986 No. 16. As Judge Hancock ruled, CAPR "produced a great deal of evidence, but none of it showed that the defendants had violated the OPMA." CP 925.

Amicus' negative quorum argument while interesting as general policy guidance is not useful in establishing a violation of the OPMA. This Court is constrained by the Legislature and Washington case law that clearly states that only meetings of a majority of the governing body are subject to the Act. Accordingly, this argument should not be considered. Similarly, the issue of attorney's fees is not properly before the Court and in any event should be rejected because CAPR has not obtained any relief under the OPMA.

A. The OPMA and Washington Case Law are Clear.

Amicus asserts that all committee meetings must be open. Amicus brief, p 3. That is not correct. The language of the OPMA is clear. The Legislature states in RCW 42.30.030 that all meetings of the *governing body* shall be open and public. RCW 42.30.020(2) defines governing body as,

> the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings or takes testimony or public comment.

The San Juan County Council is the policy or rule making body of San Juan County. Under the above definition the County Council is a governing body, but not every committee is a governing body, only committees that "act on behalf of" the Council, conduct hearings or take testimony or public comment.

Here again, the trial court found that the record was "devoid of any evidence that [the Council directed the Team to act on its behalf]." The trial court's finding does not read additional requirements into the OPMA. Amicus argues that the Council need not have delegated authority to the committee nor must the committee have policymaking authority for it to act on behalf of the Council, yet Amicus does not discuss nor provide any authority for what is required to qualify as acting on behalf of the Council.

Instead Amicus applies the same circular logic the trial court rejected and asserts that a committee acts "on behalf of" the council when it takes "action". CP 824. Action is broadly defined by RCW 42.30.020(3), in relevant part, as the "transaction of official business of a public agency by the *governing body...*" It stretches the canons of statutory interpretation to assert that "a committee 'acts on behalf of' a council when it takes 'action' subject to the to the council's control." Amicus brief, p 4.

The best authority on construing the phrase "acts on behalf of" is the 1986 Attorney General Opinion discussed in detail in the County's Response brief. Response brief, pp 16-19. This Opinion has been used by government agencies for almost thirty years. CAPR's claim fails because CAPR did not present evidence establishing that the Team exercised any actual or decision making authority on behalf of the County Council. *See* Wash AGO 1986 No. 16, 5. The Court should decline Amicus' invitation to make substantive policy changes to the OPMA through this case. As in Wood v. Battleground School District, it is for the legislature, not the judiciary to determine legislative questions. 107 Wn. App. 550, 561, 27 P.3d 1208 (2001).

This is also true for Amicus' negative quorum argument. Such fundamental policy changes are properly left to the legislature and are not appropriately brought in this forum. Washington case law is clear that for

a meeting to occur under the OPMA a majority or quorum of the governing body is required. Wood v. Battleground School District, 107 Wn. App. At 564; Eugster v. City of Spokane, 118 Wn. App. 383, 424, 76 P.3d 741 (2003); Eugster v. City of Spokane, 128 Wn. App. 1, 3, 114 P.2d 1200 (2005).

B. Attorney's Fees are Not Appropriately Before this Court.

The Amicus discussion on attorney's fees is misplaced and premature. The trial court did not award attorney's fees. There was no motion for costs (including attorney's fees) made to the trial court, and there was no assignment of error as to the trial court's (in)action on costs. Taking this subject up on appeal would be contrary to the well-established principle that the appeals court does not consider an issue that was not raised at the trial court. New Meadows Holding Co. v. Washington Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984); *see also* RAP 2.5(a) and RAP 10.3.

Amicus asks that this Court adopt a standard for attorney's fees which would award attorney's fees for "any proven violation"-- even if the violation was cured before the lawsuit was filed and even if the relief sought was later abandoned. This approach is contrary to cases which require that a "prevailing party" is one who has been afforded some relief by the court. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 145, 937 P.2d 154 (1997)

amended, 943 P.2d 1358 (1997) ("A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff"); Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 603, 121 S. Ct.1835 (2001) ("This view that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases").

To guard against lawsuits prosecuted solely for attorney's fees the term "prevailing party" has been construed to mean that the lawsuit must lead to an alteration in the legal relationship of the parties. In Buckhannon, the United States Supreme Court explained that "our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties." Id. at 605 (emphasis in the original). Buckhannon is useful because cases construing the "prevailing party" language in the civil rights arena, 42 USC §1988, share the same legislative policy objective as the OPMA.[1]

[1] The approach of Amicus would open the agency's purse to attorneys who would mine local agencies for OPMA violation up until the statute of limitations has passed. Under the Amicus approach, attorney's fees could be sought by multiple parties in separate actions for the same violation. This would not accomplish the intent of the fee shifting provision.

The County acknowledges that a proven violation is the first step in a cost award. But the Court must also identify the relief to be awarded and deny costs when the lawsuit was not a contributing factor in providing that relief.

Here, CAPR has not prevailed and cannot prevail on any remaining request for relief. As Amicus recognizes, CAPR abandoned its request for prospective injunctive relief and voluntarily dismissed the individual Council members so the personal penalty is not possible and attorney's fees incident to that action cannot be awarded. Amicus brief p. 15 citing CP 44-46, 828. Although Amicus contends that recovery of costs and attorney's fees is a form of relief, a lawsuit prosecuted solely for the purpose of recovery attorney's fees – as this lawsuit appears to be – is not a form of relief, nor does it contribute toward private enforcement of the provisions of the OPMA.

This leaves for consideration only the OPMA relief of invalidation of specific "action" taken at certain meetings declared to be contrary to the OPMA. The statute that authorizes the remedy of invalidation is specifically limited to those "actions" to adopt an ordinance, resolution, rule, regulation, order or directive. RCW 42.30.060(1) states:

> No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is

> fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.

The use of the limiting language of "this subsection" effectively modifies the phrase "any action" and limits it to the "actions" described in the first sentence. This means that only those actions described in the first sentence – adoption of ordinances, resolutions, rules, regulations, orders or directives – are subject to nullification. The statute does not provide for nullification of "discussion" as a relief possible under the OPMA. And, as a practical matter, such relief would be impossible to accomplish. Indeed if discussion occurred outside of a public meeting by a majority of the governing body, the appropriate remedy would be the personal penalty.

Additionally, action taken in violation of the OPMA can be cured, thereby negating the violation. Organization to Preserve Agric. Lands (OPAL) v. Adams County, 128 Wn.2d 869, 881–84, 913 P.2d 793 (1996). OPAL is directly on point. In OPAL two commissioners discussed a proposal to issue an unclassified use permit (UUP) for a solid waste landfill and recycling facility and agreed how they would vote at the subsequent public meeting. Id. The Washington Supreme Court was "particularly persuaded" by a Florida case which held invalidation of a formal action was not required by the Florida open meetings act merely because there had been

prior informal discussions. Id. at 884 (Citing Tolar v. School Bd. of Liberty County, 398 So.2d 427, 428 (Fla.1981). Referring to Tolar, the OPAL Court stated:

> In so holding, the [Florida] court distinguished the case before it, in which the opposing party was given a full opportunity to express his views in a public meeting, from cases in which formal action is merely summary approval of decisions made in numerous and detailed secret meetings. Given the extensive opportunity for input by opposing parties in this case, we agree with the trial court that *invalidation of the UUP decision is not warranted merely because two of the commissioners discussed in private who should make the motion to issue the UUP.*

Opal, 128 Wn.2d at 884, 913 P.2d 793 (internal citations omitted) (emphasis added). *Compare,* Miller v. City of Tacoma, 138 Wn. 2d 318, 329, 979 P.2d 429 (1999) (preliminary voting of entire governing body in an executive session invalid). Notably, no costs or fees were awarded in *OPAL.*

The CAPR lawsuit played no role in altering the legal actions of the San Juan County Council. The record shows that the gatherings of less than a majority of Council members that CAPR is concerned about ended months before this lawsuit was filed. The gatherings ended not in response to the litigation or even the threat of litigation but rather in response to the written advice of the Prosecuting Attorney in April 2012. CP 263-64, 291, 334-35. No gatherings of three members of the County Council occurred

after the distribution of the memorandum of the Prosecuting Attorney. Id. There are now even more specific provisions in the County Charter that prohibit private meetings of subcommittees of the governing body. In November the voters overwhelmingly approved an amendment to the San Juan County Charter that all committee meetings of the County Council "shall be open to the public except where an executive session is authorized as provided in RCW 42.30.110 or a meeting is closed pursuant to RCW 42.30.140" San Juan County Charter Section 2.80.

Moreover, the reduction of the size of the County Council from six member to three members effectively eliminated the possibility of three members gathering and thereby triggering a "negative quorum" rule. This lawsuit did not even arguably serve as a catalyst for an alteration of the legal relationship caused by the charter amendments because the measures were finalized and approved to be placed on the ballot in August 2012, long before this lawsuit was commenced.

A close reading of two decisions demonstrates that costs have not been awarded on appeal when a lawsuit is unnecessary to accomplish relief sought under the OPMA. In Cathcart v Andersen, 10 Wn. App. 429, 437, 517 P.2d 980 (1974) costs were not taxed when an injunction was deemed "unnecessary". In Protect the Peninsula's Future v. Clallam County, 66 Wn. App. 671, 678, 833 P.2d 406 (1992) the award of attorney's fees was

limited to the fees chargeable for time spent before any settlement was reached with the county. Both of these cases demonstrate that some legal relief must result before costs and attorney's fees are awarded.

Based upon the foregoing analysis it is unnecessary to rule whether there must be proof that the violation of the OPMA occurred "knowingly" to recover fees. Certainly, under the OPMA, individual members of a governing body are subject to civil penalties only if they attend a meeting *knowing* that it was in violation of the OPMA. RCW 42.30.120(1). *See also* Miller v. City of Tacoma, 138 Wn.2d at 331 (civil penalties under RCW 42.30.120 inappropriate because city council members believed they were acting within the law). Amicus' argument regarding attorney's fees should be disregarded.

IV. CONCLUSION

For the reasons described above, the County respectfully requests the Court affirm the superior court's order granting summary judgment in favor of San Juan County.

Respectfully submitted this 3rd day of April 2014.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

By: _____
Amy S. Vira, WSBA #34197
Deputy Prosecuting Attorney
Attorney for San Juan County

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation, Appellant, v. SAN JUAN COUNTY a Washington municipal corporation, and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council, Respondent.	NO. 70606-3-I CERTIFICATE OF SERVICE

Elizabeth W. Halsey declares and states:

That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on April 3, 2014, I caused to be delivered in the manner indicated below a true and correct

copy of RESPONDENT SAN JUAN COUNTY'S ANSWER TO AMICUS BRIEF in the above-entitled cause to:

Dennis D. Reynolds
Attorney at Law
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110

By First-Class Mail

Michele L. Earl-Hubbard
Attorney at Law
PO Box 33744
Seattle, WA 98133

By First-Class Mail

I make the foregoing statement under penalty of perjury of the laws of the state of Washington.

Dated this 3rd day of April, 2013, at Friday Harbor, Washington.

Elizabeth W. Halsey
Legal Assistant
San Juan County Prosecutor's Office
350 Court Street
Friday Harbor, WA 98250
(360)378-4101

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-6

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SAN JUAN COUNTY

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation,

Plaintiff,

v.

SAN JUAN COUNTY, a Washington municipal corporation and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM COMMITTEE, a subcommittee of the San Juan County Council, and its Members, RICHARD FRALICK, PATTY MILLER and LOVEL PRATT,

Defendants.

No. 12-2-05218-3

AMENDED COMPLAINT FOR VIOLATIONS OF THE OPEN PUBLIC MEETINGS ACT, RCW 42.30 AND FOR INJUNCTION TO RESTRAIN VIOLATIONS OF STATE LAW

Plaintiff alleges the following as its claims against the Defendants:

I. PARTIES TO THIS ACTION

1. Plaintiff Citizens Alliance for Property Rights Legal Fund ("CAPR") is a Washington non-profit corporation. Its members actively participate in the public process involving enactment of new laws in San Juan County, including consideration of a new San Juan County Critical Areas Ordinance, and other County business.

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

2. Defendant, San Juan County is a Washington municipal corporation, located in Friday Harbor, Washington.

3. Defendant San Juan County Critical Areas Ordinance/Shoreline Master Program ("CAO/SMP") Committee is a subcommittee of the San Juan County Council (the "Council"), created by the Council. The Committee is separate and distinct from a citizen Critical Areas Ordinance review committee. As used herein, the terms "committee" or "subcommittee" mean any meeting held where less than four but more than two San Juan County Council members met to discuss the Critical Areas Ordinance or other official County business.

4. Richard Fralick, Patty Miller and Lovel Pratt are members of the County Council and the Committee. They are sued in their official capacity.

5. All acts alleged herein occurred in San Juan County, Washington. This court has jurisdiction under RCW 2.08.010 *et seq.*, RCW 42.30 and RCW 7.40, Injunctions. Venue is proper under RCW 4.12 RCW.

II. FACTS RELEVANT TO CLAIMS

6. Article XI, § 4 of the Washington Constitution provides the option for counties to adopt "home rule" charters to provide their own form of government that may be different from the commission form prescribed by state law. San Juan County successfully adopted a home rule charter in 2005.

7. In San Juan County, the County Administrator is appointed and the following are elected officials (all non-partisan): Six-member Council, Prosecuting Attorney/Coroner, Assessor, Auditor, Clerk, Sheriff and Treasurer. In this form, the County Council has the

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

policy-making, legislative, and budget-adoption functions. The council delegates all or a portion of its administrative authority to an appointed professional administrator with the specific intent of enhancing administrative coordination and control functions. As an appointed official, the County Administrator serves at the pleasure of the Council.

8. The San Juan County Council is a six-member elected governing body, charged with policy and legislative rule-making for the County.

9. San Juan County Charter Section 2.40 requires a four-member (supermajority) quorum and a voting rule that requires the affirmative vote of four members for positive action. Given the four-member requirement for positive action and the fact that the Council consists of only six members, a negative vote of three council members can prevent or "block" a proposal before the Council, acting as a "negative quorum."

10. On information and belief, the San Juan County Council has been meeting as a group of the whole and also in subcommittees to discuss specific topics within the last two years. Many of the subcommittee meetings are on an "ad hoc" basis. In addition, meetings of the following identified subcommittees have occurred: general governance subcommittee, budget subcommittee, critical areas ordinance and solid waste subcommittee. According to the San Juan County Prosecuting Attorney, the purpose of the subcommittee meetings includes bringing forward, discussing, narrowing and discarding ideas and policies prior to meetings of the entire Council. Subcommittees and subgroups make recommendations following subcommittee meetings to the full Council.

11. On information and belief, the Council created the CAO/SMP Committee in order to meet and discuss issues related to the adoption of a critical areas ordinance ("CAO")

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

and shoreline management plan ("SMP") update. The Committee consisted of three Council members (Councilmembers Richard Fralick, Patty Miller and Lovel Pratt) until approximately April 26, 2012. The Committee dealt with and controlled the County's CAO Implementation Team comprised of staff and retained consultants, among others.

12. On information and belief, the Committee met approximately once per month (or more) since its creation. The Committee meetings were held without notice, at irregular times, often in private conference rooms that do not promote public access. Local media and citizens were excluded from attending Committee meetings. Minutes of the meetings were not recorded.

13. A committee made up of three of the six Council members has the ability to influence decision making by conspiring to block a majority vote. Three Council members can, in a committee meeting, determine the outcome of a proposal, whether that potential be the affirmative power to pass, or the negative power to defeat. Accordingly, three member committees engage in "action" on behalf of the whole Council simply by meeting.

14. In a December 2011 email from the San Juan County Prosecuting Attorney's office to the County Council, the Prosecuting Attorney, Randall Gaylord, analyzed the practice of subcommittee meetings, as it had evolved from 2006. Mr. Gaylord advised that, while he believed there was "no problem" with the Council assigning work to three member committees, three council members have the power to form "voting blocks" in these committee meetings, which can have the effect of "weakening the influence of those who do not attend the meeting." The email observes:

> One unintended consequence of the subcommittee approach that should be considered is that it has the ability to create

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

> imbalances and voting blocks on the Council that has the effect of weakening the influence of those who are not members of a subcommittee. If a Council member does not have the chance to influence policy at the formative stage, the die may be cast before they even get to speak. This is the downside of the subcommittee system composed of three members when it only takes one more member to make a decision.

15. The committee meetings were neither noticed nor open to the public, including the meetings of the CAO/SMP Committee, in violation of the Open Public Meetings Act ("OPMA"), Chapter 42.30 RCW. Even though three members alone could not, on their own, pass any legislation, the meetings were required to be open to the public following properly issued notice, as required by state law. As noted in the Prosecuting Attorney's December 2011 email, three members of a subcommittee could block any measure before the Council.

16. Here, the County has been studying issues related to proposed ordinances in committee meetings, calling in outside contractors and staff, and deliberating on provisions of proposed ordinances outside of the view of the public. Such actions results in coercive power of committee members over other County Council members who do not share the same information base as those participating in such subcommittee meetings

17. Further, a three member entity, where any two are interacting on official business issues, becomes a "meeting" under the OPMA. These committees engaged in "action" as defined under the OPMA, including the Committee.

18. Individual Council members that participated in three-person committee or "sub-committee" meetings knew, or should have known, that their actions were in violation of the OPMA.

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

19. On April 26, 2012, the San Juan County Prosecuting Attorney's office submitted a formal memorandum to the County Council and to the Charter Review Commission regarding Meetings of Three Members of San Juan County Council. Based on the Prosecuting Attorney's review of attorney general opinions, reported case law in Washington State and decisions of the supreme court of Wisconsin, a state with laws similar to Washington, he confirmed that the OPMA does apply to "subcommittee" meetings and non-social gatherings when there are three members of the County Council present. Page 2 of the eight-page memorandum states, in relevant part:

> The policy reasons for open government are very strong. Even if the law is not clear, the better approach is to err on the side of following the Open Public Meetings Act.
>
> With an appropriate respect for caution and to protect the public interest and assure the validity of actions by the Council, we advise that no meetings of three council members should occur without complying with the notice and other requirements of the Open Public Meetings laws.

20. Between the time of the December 2011 email and the April 26, 2012 memorandum, the San Juan County Office of Prosecuting Attorney reviewed and suggested revisions to a proposed ordinance which would amend the rules of procedure to provide that committees of the County Council comply with the Open Public Meetings Act.

21. On information and belief, while meetings of the CAO/SMP Committee over the past two years were underway, the County attempted to change such meetings into "Executive Session" meetings without compliance with the requirements of the OPMA. Such "executive sessions" were not held during a properly noticed regular or special meeting. The "executive sessions" were not for any of the narrowly defined statutory purposes of executive

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

sessions under RCW 42.30.110. Neither the Council nor the Committee publicly announced the purpose for excluding the public or the time after which the executive session would be concluded. The "executive session" meetings were not reconvened in open session thereafter.

22. On information and belief, at least since October 2010, the CAO/SMP Committee has met regularly in private and has performed substantive public business, yet did not fulfill the public notice and publication requirements or the public access requirements of the OPMA.

23. Likewise, regularly since October 2010, two of the three Committee members, by discussing matters pertaining to the subcommittee business, have taken "action" within the meaning of the OPMA in meetings that were neither noticed nor open to the public as required by the OPMA.

24. On January 16, 2011, Councilmember Pratt sent an email to Councilmember Patty Miller, Councilmember Richard Fralick, Prosecutor Gaylord, County Administrator Pete Rose, and Planner Shireen Hale to schedule a meeting of the CAO/SMP Committee meeting on January 20, 2011, prior to the Council's meeting on January 25, 2011. The purpose of the meeting was to clarify "the process we are in the midst of with regard to the CAO update." The email stated, "I think there may be some confusion between the SMP update and the current discussions about the public participation plan for that – and the CAO update and the identification of BAS." It further acknowledged that there would be an opportunity to comment on the Council agendas, "but this meeting would also give us an opportunity to review plans for those joint meeting days."

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

25. The Committee did not provide advance notice of the January 20, 2011, meeting or allow for public attendance.

26. The Committee did not prepare minutes of the January 20 meeting.

27. The agenda for the subcommittee meeting included discussions relating to the Shoreline Master Program, Inventory and Characterization Report and a recommendation to the Council and Planning Commission on how to proceed, review of the SMP process, clarification of SMP requirements, revisions to the SMP calendar, and materials needed for the February 2012 joint meeting with the Planning Commission on the Critical Areas Ordinance ("CAO").

28. The Committee did not provide advance notice of the January 23, 2012, meeting or allow for public attendance.

29. The Committee did not prepare minutes of its January 23, 2012 meeting.

30. Correspondence indicates that "action" occurred at the January 23, 2012 meeting, within the meaning of the OPMA.

31. On September 19, 2012 community members decided to hold a meeting concerning the effect of action taken by the Council on a local business. Three Council members (Rich Peterson, Lovel Pratt and Howie Rosenfeld) expressed a desire to attend this meeting. This meeting first was noticed as a Special County Council meeting at on September 18, 2012, on the County website:

> Sep 19, 2012 - Wednesday - 7:00 PM until 9:00 PM.
> Location: Mullis Community Senior Center, 589 Nash Street, Friday Harbor. Description: NOTICE IS HEREBY GIVEN that a quorum of the San Juan County Council will attend a Special Meeting on Wednesday, September 19, 2012 at the Mullis Community Senior Center, 589 Nash Street, Friday

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

> Harbor beginning at 7:00 PM. Special Meeting Agenda item: the effect of Ordinance 15-2012 (18.30 Amendments) on Consignment Treasures. For more information please contact the Clerk of the County Council at (360) 370-7472.

32. The day of the meeting itself, September 19, 2012, the notice was changed on the County website as follows:

> NOTICE IS HEREBY GIVEN that members of the San Juan County Council representing Districts 1, 2 and 3 will attend a community meeting not sponsored by the County on Wednesday, September 19, 2012 at the Mullis Community Senior Center, 589 Nash Street, Friday Harbor beginning at 7:00 PM. Special Meeting Agenda item: the effect of Ordinance 15-2012 (18.30 Amendments) on Consignment Treasures. For more information please contact the Clerk of the County Council at (360) 370-7472.

33. The revised notice, published the day of the meeting, did not provide the required 24-hour notice under the OMPA.

34. Upon information and belief, the County proceeded to hold the September 19, 2012 subcommittee meeting under advice that the council members could attend in compliance with the OMPA, provided that: (1) they sit apart and decline to have a conversation about County business, or (2) announce in advance with a notice that the council members would be present and state the topic of discussion. The County chose the latter option.

35. Prior to the meeting, Prosecuting Attorney Randall Gaylord sent an email to local attorney Alexandra Gavora in response to her questions concerning potential violations of the OPMA and improper notice of the September 19, 2012 meeting. He stated, in relevant part:

> You are correct that the County Council cannot "guarantee" that the meeting will be conducted in way that reflects "good governance" under the Open Public Meetings Act. It is possible

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

that people will be excluded, that voice or video recordings will be prohibited or that people will be required to "sign in" as a condition of attendance, all of which is not allowed at a public meeting of the County Council.

36. At the beginning of the September 19, 2012 meeting, Ms. Gavora reiterated her concerns that the presence of the three members in conjunction with the improper notice violated the OPMA. Councilmember Peterson acknowledged that the County had had trouble complying with the OPMA and that they were "working on it." Council members Pratt and Rosenfeld continued to attend but did not speak publicly.

37. As of October 12, 2012, no minutes for this meeting have been adopted or recorded for this meeting.

38. The agenda for the September 19, 2012 meeting included: the effect of Ordinance 15-2012 (18.30 Amendments) on Consignment Treasures.

39. The discussion at the meeting of September 19, 2012 was wide ranging and covered a broad range of issues pertaining to land use issues generally, including, but not limited to issues related to the CAO.

40. Other emails to the Committee from Staff indicate that the Committee over a period of time dealt with Best Available Science, sizing of buffers, conduct of public hearings relating to the CAO, buffer alternatives and reductions, and other matters relating to the form and content of the CAO.

41. For the meetings referenced in Paragraph 40, *infra*, the Committee did not provide advance notice, allow for public attendance, or prepare minutes of the meetings.

42. All of the events described in ¶10 through ¶41 above occurred outside of a public meeting that complied with the OPMA.

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

43. Since October 2010, both formal and ad hoc subcommittees (collectively the "various Subcommittees"), in addition to the CAO/SMP Committee, have been meeting in San Juan County and taking action under the OMPA, prior to which the meetings were not advertised, nor the public provided advance notice of its meetings.

44. The various committees did not keep minutes of their meetings.

45. The various committee meetings were not held as public meetings pursuant to the Open Public Meetings Act (OPMA), RCW 42.30.

46. The various committees, as committees of the Council, were subject to the OPMA.

47. Three members of the Council, meeting as a subcommittee, can take "action" pursuant to the OPMA because they may cast a negative vote to block proposed action by the Council as a whole.

48. The various committee meetings attended or participated in by three members of the Council constituted meetings of the Council itself.

49. The various subcommittee meetings of three members of the Council were required to comply with the OPMA.

50. All of the events described in ¶43 through ¶49 above occurred outside of a public meeting that complied with the OPMA.

III. CAUSES OF ACTION

A. The Meetings Held Without Notice or Minutes and Closed to the Public Violate the Open Public Meetings Act.

51. The Open Public Meetings Act ("OPMA") mandates that "All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030.

"Public agency" is defined as:

> (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;
>
> (b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;
>
> (c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;
>
> (d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

RCW 42.30.020(1).

52. Defendant San Juan County is a "public agency" under the OPMA.

53. Defendant CAO/SMP Committee is a "public agency" and/or "subagency" under the OPMA.

54. "Governing body" means "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2).

55. The County Council is a "governing body" of San Juan County for purposes of the OPMA.

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

56. The CAO/SMP Committee is a "governing body" of San Juan County for purposes of the OPMA.

57. The various committees are governing bodies of San Juan County for purposes of the OPMA.

58. A "meeting" means all occasions at which "action" is taken. RCW 42.30.020(4).

59. "Action" is defined as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. 'Final action' means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance." RCW 42.30.020(3).

60. The CAO/SMP Committee is a multi-member committee of the County Council engaged in "action" on behalf of the Council.

61. The various committees each engaged in "action."

62. The CAO/SMP Committee discussed, considered, reviewed, and evaluated scientific data, policy materials, and took input from a wide variety sources in effort to further the drafting of County ordinances.

63. The various committees discussed, considered, reviewed, and evaluated scientific data, policy materials, and took input from a wide variety sources in effort to further the drafting of County ordinances.

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

64. The CAO/SMP Committee took final action by reaching a consensus on and narrowing down scientific data, policy materials, and took input from a wide variety sources in effort to further the drafting of County ordinances.

65. The various committees took final action by reaching a consensus on and narrowing down scientific data, policy materials, and took input from a wide variety sources in effort to further the drafting of County ordinances.

66. Governing bodies must provide notice of meetings.

67. Special Meetings – those held outside of the regular published schedule for the agency – must be published at least 24 hours in advance of the Special Meeting and must state the date, time and location of the Meeting.

68. Governing bodies must prepare and make available for inspection minutes of all regular and special meetings.

69. RCW 42.30.060 states:

> (1) No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.
>
> (2) No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter.

70. The CAO/SMP Committee did not provide notice of its meetings, allow for public attendance, or prepare minutes of its meetings.

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

71. The various committees did not provide notice of its meetings, allow for public attendance, or prepare minutes of its meetings.

72. The CAO/SMP Committees took action and final action at meetings which failed to comply with the OPMA.

73. The various committees took action and final action at meetings which failed to comply with the OPMA.

B. The County's Continuing Failure to Comply With the Growth Management Act Must be Enjoined.

1. Continuing Failure to Comply with GMA Public Participation Requirements.

74. The Growth Management Act ("GMA"), Chapter 36.70A RCW requires specific public participation procedures (RCW 36.70A.140) and includes citizen participation and coordination as one of the goals of the Act (RCW 36.70A.020(11)). Specifically, "[t]he procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments." RCW 36.70A.140.

75. San Juan County Code section 18.90.020 states: "All proposed amendments to this code and proposed amendments to the official maps and/or Comprehensive Plan shall be handled according to the procedures established in Chapters 36.70 and 36.70A RCW, RCW 36.32.120, the County Charter, and the County code. This process will ensure formal public notice and public hearings, evaluation, and recommendations from the planning department's professional, technical perspective and from the planning commission's knowledgeable lay perspective. Final action is reserved for the County council."

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

76. When considering adoption of proposed legislation, each amendment or change requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. "No other interpretation of [the statute] makes sense given the importance the GMA places on public participation." *1000 Friends of Washington and Neighborhood Alliance of Spokane v. Spokane County*, EWGMHB No. 01-1-0018 (2001).

77. For the same reasons the County's failure to provide adequate public notice and an opportunity to comment on the actions taken by the CAO/SMP Committee violates the OPMA, such actions violate the public participation requirements of the GMA and the San Juan County Code.

78. Plaintiff and other members of the public have a clear legal right, protected by the GMA and the San Juan County Code, to have an opportunity to meaningfully participate in the legislative decision-making associated with proposed development regulations, comprehensive plan amendments and amendments to maps.

79. The County's continuing failure to properly notice meetings of the CAO/SMP Committee at which action has been taken on its proposed CAO and SMP amendments results in Plaintiffs' well-grounded fear of immediate invasion of such right.

80. Depriving Plaintiff and other members of the public from the opportunity to participate in a public process prior to adopting a CAO and SMP amendments will result in actual and substantial injury to Plaintiffs.

81. RCW 7.40.020 states in part:

> When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

> in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court

82. Plaintiff lacks a plain, complete, speedy and adequate remedy at law. This is because: (1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature. 15 Lewis H. Orland Karl B. Tegland, *Washington Practice: Trial Practice, Civil* § 646, at 468-69 (1996). The Washington Supreme Court has recognized that "'[f]ailure to comply with procedural requirements of itself establishes sufficient injury to confer standing.'" *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council,* 129 Wn.2d 787, 794, 920 P.2d 581 (1996) (quoting 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § .4, at 433 (2d ed.1984)).

83. "Where an agency refuses to provide a procedure required by statute or the Constitution, the United States Supreme Court 'routinely grants standing to a party' despite the fact that 'any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative.'" *Trades Council,* 129 Wn.2d at 794.

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

2. Continuing Failure to Comply with Best Available Science Requirements.

84. Under the GMA, all critical areas must be designated and their functions and values protected using the best available scientific information. This is known as best available science or BAS. RCW 36.70A.172(1).

85. In adopting a critical areas ordinance, counties and cities are required to use the best available science ("BAS") that is applicable locally. WAC 365-195-905(2). BAS must be consistent with criteria set out in WAC 365-195-900 through 365-195-925.

86. San Juan County has failed to ensure that its "expert," Dr. Paul Adamus is qualified under WAC 365-195-905(4). WAC 365-195-905(4) states, "Where pertinent scientific information implicates multiple scientific disciplines, counties and cities are encouraged to consult a team of qualified scientific experts representing the various disciplines to ensure the identification and inclusion of the best available science."

87. Dr. Paul Adamus is not a qualified expert per WAC 365-195-905(4). He has admitted this fact before the County Planning Commission. A fundamental basis for Dr. Adamus' buffer methodology is reliance on the statistical analysis of the Mayer paper (Mayer, et al., 2007). When asked about the statistical analysis of Mayer in front of the Planning Commission, Adamus declined to answer and stated that he was not a statistician.

88. When the County was presented with the professional opinion of a qualified expert (Dr. Tim Verslcycke of Gradient Corp and Woods Hole Oceanographic Institute, report dated 9/5/2012), the Council ignored it and continued to rely on Dr. Adamus' opinions, contrary to WAC 365-195-905(4).

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

89. The County has failed to ensure that the "science" relied upon by Dr. Adamus meets the BAS requirements of the GMA for the proposed CAO. Importantly, the County has failed to review whether Dr. Adamus' studies and theories which are not based on evidence collected locally, nor validated by qualified experts in pertinent fields, is even applicable in San Juan County. WAC 365-195-905(3).

90. WAC 365-195-905(5)(a)(1) requires that a synthesis must be peer-reviewed in order to be considered Best Available Science. The synthesis of Dr. Adamus, relied upon by the County, has not been peer reviewed and fails the BAS minimum requirements for a valid scientific process. A peer review is described by WAC 365-195-905(5)(a) as, "The information has been critically reviewed by other persons who are qualified scientific experts in that scientific discipline. The criticism of the peer reviewers has been addressed by the proponents of the information. Publication in a refereed scientific journal usually indicates that the information has been appropriately peer-reviewed."

91. The County continues to rely both on inapplicable data, and data that has been interpreted erroneously by Dr. Adamus and County staff in developing its CAO, in violation of the BAS requirements of the GMA.

92. Plaintiff and other members of the public have attempted to participate in the "public" process associated with the proposed CAO, but the CAO/SMP Committee meetings have been conducted without notice, opportunity to comment, and not followed by minutes of the meetings. Upon information and belief, both positive and negative decisions regarding BAS have been reached during the subcommittee meetings, and then presented to the Council as a whole. These meetings are continuing.

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

93. Plaintiff lacks a plain, complete, speedy and adequate remedy at law to remedy the continuing violations of the BAS requirements of the GMA. This is because: (1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature. 15 Lewis H. Orland Karl B. Tegland, *Washington Practice: Trial Practice, Civil* § 646, at 468-69 (1996).

V. RELIEF REQUESTED

1. Plaintiff Citizens Alliance for Property Rights Legal Fund requests that the Court enter judgment on its OPMA cause-of-action against the Defendant San Juan County, as follows:

a. For the Court to declare any and all decisions made by the County in violation of the OPMA to be null and void pursuant to RCW 42.30.060.

b. For the Court to declare any and all decisions made by the CAO/SMP Committee in violation of the OPMA to be null and void pursuant to RCW 42.30.060.

c. For the Court to assess a civil penalty of $100.00 against each individual member of the Council and/or the CAO/SMP Committee for each knowing violation of the Open Public Meetings Act;

d. For Plaintiff's costs and attorney's fees as allowed by RCW 42.30.120; and

e. For a preliminary and permanent injunction enjoining future violations of the Open Public Meetings Act.

2. For a preliminary injunction during the pendency of this matter enjoining Defendant, its committees or subcommittees, officers, employees, agent and contractors and

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

those acting in concert with Defendant from engaging in future violations of the public participation and/or BAS requirements of the Growth Management Act.

3. A permanent injunction enjoining violations of the Growth Management Act process requirements set out herein.

4. A preliminary and permanent injunction enjoining implementation or enforcement of any ordinance adopted in violation of the OPMA and/or Growth Management Act procedural requirements.

5. For the Court to require Defendant to take corrective action as the Court determines is appropriate.

5. For their costs and statutory attorney fees on the Growth Management Act process claim.

6. For such other and further relief as the Court may deem just and equitable.

DATED this 1 day of November, 2012.

DENNIS D. REYNOLDS LAW OFFICE

By _____
Dennis D. Reynolds, WSBA #04762
Attorneys for Plaintiff

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

Amy S. Vira, WSBA #34197 Deputy Prosecuting Attorney San Juan County Prosecutors Office 350 Court Street / P.O. Box 760 Friday Harbor, WA 98250-0760 (360) 378-4101, tel / (360) 378-3180, fax amyv@sanjuanco.com, email *Attorneys for San Juan County*	☐ *Legal Messenger* ☐ *Hand Delivered* ☐ *Facsimile* ☑ *First Class Mail* ☐ *Express Mail, Next Day* ☑ *Email*

DATED at Bainbridge Island, Washington, this 1st day of November, 2012.

Christy A. Reynolds

Christy A. Reynolds
Legal Assistant

DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777
(206) 780-6865 (Facsimile)

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-7

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SAN JUAN COUNTY**

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation,

Plaintiff,

v.

SAN JUAN COUNTY, a Washington municipal corporation and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council, and its Members, RICHARD FRALICK, PATTY MILLER and LOVEL PRATT,

Defendants.

No. 12-2-05218-3

ANSWER TO PLAINTIFF'S AMENDED COMPLAINT FOR VIOLATIONS OF THE OPEN PUBLIC MEETINGS ACT, RCW 42.30 AND FOR INJUNCTION TO RESTRAIN VIOLATIONS OF STATE LAW

COMES NOW Defendant San Juan County, by and through its attorney of record, Amy S. Vira, and in answer to Plaintiff's Amended Complaint for Violations of the Open Public Meetings Act, RCW 42.30 and for Injunction to Restrain Violations of State Law admits, denies and alleges as follows:

//

//

//

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

I. PARTIES TO THIS ACTION

1. Defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of Plaintiff's Amended Complaint and therefore denies the same.

2. Admit that San Juan County is a subdivision of the state of Washington and that for some purposes it is considered a "municipal corporation".

3. Admit that the term "committee" is defined by Plaintiff. Deny remaining allegations contained in paragraph 3 of Plaintiff's Amended Complaint.

4. Admit Richard Fralick, Patty Miller and Lovel Pratt are members of the County Council. Deny that they are members of the "Committee".

5. Admit that all acts as alleged occurred in San Juan County. Deny the remainder of the paragraph 5 of Plaintiff's Amended Complaint.

II. FACTS RELEVANT TO CLAIMS

6. Article XI, §4 of the Washington Constitution speaks for itself, no answer is required. Admit the citizens of San Juan County adopted a "home rule" charter in 2005.

7. The San Juan County Charter speaks for itself. Admit the County Charter divided legislative and administrative duties between the County Council and the Administrator according to its terms. The remainder of paragraph 7 of Plaintiff's Amended Complaint requires reference to the Charter which speaks for itself.

8. Admit.

9. The San Juan County Charter speaks for itself, no answer is required. Deny the second sentence of paragraph 9 of Plaintiff's Amended Complaint as the term "negative quorum" is not defined.

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

10. Admit that the San Juan County Council has met as a group of the whole and also in subcommittees to discuss specific topics within the last two years. Defendant is without knowledge sufficient to form a belief as to what is meant by "ad hoc" basis and therefore denies the second sentence of paragraph 10 of Plaintiff's Amended Complaint. Admit that meetings of the general governance subcommittee, budget subcommittee and solid waste subcommittee have occurred. Admit the purpose of those subcommittees includes bringing forward and discussing, ideas and policies prior to meetings of the entire Council. Admit that subcommittees and subgroups make recommendations following meetings to the full Council. Deny that meetings of a critical areas ordinance subcommittee have occurred.

11. Deny.

12. Deny the existence of a CAO subcommittee. Admit the CAO Facilitation/Implementation Team met from time to time without advance notice or preparation of minutes. Deny public attendance was not allowed.

13. The first and second sentence of paragraph 13 of Plaintiff's Amended Complaint are speculative and therefore do not require an answer. Deny that three council member committees engage in "action" on behalf of the whole Council simply by meeting.

14. The December 2011 email speaks for itself, no answer is required.

15. Admit that some subcommittee meetings have not been noticed nor open to the public. Deny the existence of a CAO subcommittee. Deny that a violation of the Open Public Meeting Act has occurred.

16. Deny.

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

17. The first sentence of paragraph 17 of Plaintiff's Amended Complaint appears to be drawing a legal conclusion; no answer is required. Defendant denies the second sentence of paragraph 17 of Plaintiff's Amended Complaint. Deny the existence of a CAO subcommittee.

18. Deny.

19. The April 26, 2012, memorandum speaks for itself, no answer is required.

20. Defendant is without knowledge sufficient to form a belief as to what "proposed ordinance" is referred to and therefore denies the same. Admit that the Prosecuting Attorney worked with the County Council on the Council's Rules of Procedure in the early months of 2012.

21. Deny.

22. Deny.

23. Deny.

24. The January 16, 2011, email speaks for itself, no answer is required.

25. Deny the existence of a CAO subcommittee. Admit no notice was provided for a CAO Facilitation/Implementation Team meeting on January 20, 2011. Deny remainder of paragraph 25 of Plaintiff's Amended Complaint.

26. Deny the existence of a CAO subcommittee. Admit no minutes were prepared for a January 20, 2011 meeting of the CAO Facilitation/Implementation Team.

27. Deny.

28. Deny existence of CAO subcommittee. Admit no notice was provided for a CAO Facilitation/Implementation Team meeting on January 23, 2012. Deny remainder of paragraph 28 of Plaintiff's Amended Complaint.

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

29. Deny existence of CAO subcommittee. Admit no minutes were prepared for the January 23, 2012 meeting of the CAO Facilitation/Implementation Team. Deny remainder of paragraph 29 of Plaintiff's Amended Complaint.

30. Deny.

31. Defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 31 of Plaintiff's Amended Complaint and therefore denies the same. Admit Rich Peterson, Lovel Pratt and Howie Rosenfeld wanted to attend a community meeting on September 19, 2012. The notice speaks for itself, no answer is required.

32. The September 19, 2012, notice speaks for itself, no answer is required.

33. Deny.

34. Deny the County held a subcommittee meeting on September 19, 2012.

35. The email speaks for itself, no answer is required.

36. Defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 36 of Plaintiff's Amended Complaint and therefore denies the same. Deny the second sentence of paragraph 36 of Plaintiff's Amended Complaint. Admit third sentence of paragraph 36 of Plaintiff's Amended Complaint.

37. Deny the County held a September 19, 2012 subcommittee meeting which required the preparation of minutes. Admit no minutes were adopted or recorded.

38. Deny the County held a September 19, 2012, subcommittee meeting.

39. Deny the County held a September 19, 2012, subcommittee meeting. Defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of Plaintiff's Amended Complaint and therefore denies the same.

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

40. Deny.

41. Deny the existence of a CAO subcommittee. Admit the CAO Facilitation/Implementation Team met from time to time without advance notice or preparation of minutes. Deny public attendance was not allowed.

42. Deny.

43. Deny.

44. Defendant is without knowledge sufficient to form a belief as to which meetings of which subcommittees are referred to in paragraph 44 of Plaintiff's Amended Complaint, and therefore denies the same.

45. Defendant is without knowledge sufficient to form a belief as to which meetings of which subcommittees are referred to in paragraph 45 of Plaintiff's Amended Complaint, and therefore denies the same.

46. Defendant is without knowledge sufficient to form a belief as to which meetings of which subcommittees are referred to in paragraph 46 of Plaintiff's Amended Complaint, and therefore denies the same.

47. Deny that the Open Public Meetings Act or any Washington Court decisions address "a negative vote to block proposed action".

48. Deny that a meeting of less than a quorum of the County Council is a meeting of the County Council itself.

49. Deny.

50. Deny.

III. CAUSES OF ACTION

51. The Open Public Meetings Act speaks for itself, no answer is required.

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

52. Admit.

53. Deny.

54. RCW 42.30.020(2) speaks for itself, no answer is required.

55. Admit.

56. Deny.

57. Deny.

58. RCW 42.30.020(4) speaks for itself, no answer is required.

59. RCW 42.30.020(3) speaks for itself, no answer is required.

60. Deny.

61. Defendant is without sufficient information to determine what the phrase "various committees" includes and therefore denies the same. Assuming the "various committees" includes only the general governance subcommittee, the budget subcommittee and the solid waste subcommittee as is inferred in Plaintiff's Response to Defendant's CR12(e) Motion, pg. 6, Defendant denies those subcommittees engaged in "action" as defined by the OPMA.

62. Deny.

63. Defendant is without sufficient information to determine what the phrase "various committees" includes and therefore denies the same. Assuming the "various committees" includes only the general governance subcommittee, the budget subcommittee and the solid waste subcommittee as is inferred in Plaintiff's Response to Defendant's CR12(e) Motion, pg. 6, Defendant admits those subcommittees discussed, considered and reviewed policy material and took input from various sources. The remainder of paragraph 63 of Plaintiff's Amended Complaint is denied.

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

64. Deny.

65. Defendant is without sufficient information to determine what the phrase "various committees" includes and therefore denies the same. Assuming the "various committees" includes only the general governance subcommittee, the budget subcommittee and the solid waste subcommittee as is inferred in Plaintiff's Response to Defendant's CR12(e) Motion, pg. 6, Defendant denies those subcommittees took final action. Defendant admits those subcommittees discussed, considered and reviewed policy material and took input from various sources. The remainder of paragraph 65 of Plaintiff's Amended Complaint is denied.

66. The Open Public Meetings Act speaks for itself, no answer is required.

67. The Open Public Meetings Act speaks for itself, no answer is required.

68. The Open Public Meetings Act speaks for itself, no answer is required.

69. RCW 42.30.060 speaks for itself, no answer is required.

70. Deny the existence of a CAO subcommittee. Admit the CAO Facilitation/Implementation Team met from time to time without advance notice or preparation of minutes. Deny public attendance was not allowed.

71. Defendant is without knowledge sufficient to form a belief as to which meetings of which subcommittees are referred to in paragraph 71 of Plaintiff's Amended Complaint, and therefore denies the same. Assuming the "various committees" includes only the general governance subcommittee, the budget subcommittee and the solid waste subcommittee as is inferred in Plaintiff's Response to Defendant's CR12(e) Motion, pg. 6, Defendant admits those subcommittees met from time to time without advance notice or preparation of minutes. The remainder of paragraph 71 of Plaintiff's Amended Complaint is denied.

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

72. Deny.

73. Defendant is without knowledge sufficient to form a belief as to which meetings of which subcommittees are referred to in paragraph 73 of Plaintiff's Amended Complaint, and therefore denies the same. Assuming the "various committees" includes only the general governance subcommittee, the budget subcommittee and the solid waste subcommittee as is inferred in Plaintiff's Response to Defendant's CR12(e) Motion, pg. 6, Defendant denies those subcommittees took action or final action or failed to comply with the OPMA.

74. The second cause of action in Plaintiff's Amended Complaint has been dismissed. No answer is required for paragraphs 74 through 93 of Plaintiff's Amended Complaint.

VI. AFFIRMATIVE DEFENSE

1. Plaintiff failed to state a claim upon which relief can be granted.

2. Plaintiff failed to exhaust administrative remedies.

3. Plaintiff's claims are barred for lack of jurisdiction.

4. Plaintiff lacks standing to bring these claims.

5. Defendant is entitled to qualified immunity and, in the alternative, that Defendant's actions manifested a reasonable exercise of judgment and discretion by public officials who were authorized to exercise governmental authority that was entrusted to them by law. Therefore, Defendant's alleged actions are neither tortious nor actionable.

6. Plaintiff's claims are moot and/or not ripe for adjudication.

7. Plaintiff's claims are barred because no judiciable controversy exists.

8. Defendants, each of them, have at all times material hereto acted in good faith with the belief that individually and collectively they complied with all applicable laws.

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

9. Defendant reserves the right to amend its answer and affirmative defenses in the future, as new information is acquired.

V. DEFENDANT'S PRAYER FOR RELIEF

WHEREFORE, having fully answered Plaintiff's First Amended Complaint, Plaintiff prays for relief as follows:

a. That the same be dismissed with prejudice;

b. For Plaintiff's costs and attorney's fees as allowed by law;

c. For such other and further relief as the Court deems just and equitable.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

Date: December 21, 2012
Friday Harbor, Washington

By: _____
Amy S. Vira, WSBA #34197
Deputy Prosecuting Attorney
Attorney for San Juan County

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SAN JUAN COUNTY

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation,

Plaintiff,

v.

SAN JUAN COUNTY, a Washington municipal corporation and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council, and its Members, RICHARD FRALICK, PATTY MILLER and LOVEL PRATT,

Defendants.

No. 12-2-05218-3

DECLARATION OF SERVICE

Elizabeth Watson Halsey declares and states:

That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on December 21, 2012, I caused to be delivered in the manner indicated below a true and correct copy of San Juan County's Answer to Plaintiff's Amended Complaint for Violations of the Open Public Meetings Act, RCW 42.30 and for Injunction to Restrain Violations of State Law in the above entitled cause to:

//

//

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

Dennis D. Reynolds
Attorney at Law
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110

☐ Hand Delivery
☒ By First-Class Mail
☐ Fax
☐ Email

I make the foregoing statement under penalty of perjury of the laws of the state of Washington.

Dated December 21, 2012, at Friday Harbor, Washington.

Elizabeth Watson Halsey

SAN JUAN COUNTY
PROSECUTING ATTORNEY
350 COURT STREET • P.O. BOX 760
FRIDAY HARBOR WA 98250
TEL (360)378-4101 • FAX (360) 378-3180

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-8

Randall K. Gaylord
SAN JUAN COUNTY PROSECUTING ATTORNEY
350 Court Street • P.O. Box 760 • Friday Harbor, WA 98250
(360) 378-4101 (tel) • (360) 378-3180 (fax)

Victim Services
Sandra L. Burt, MSW
Elizabeth Pillow

Deputies
Charles Z. Silverman
Jonathan W. Cain
Kim M. McClay
Gwendolyn L. Halliday
Amy S. Vira

MEMORANDUM

April 26, 2012

TO: County Council
AND TO: Charter Review Commission

C: Pete Rose, County Administrator

FROM: Randall K. Gaylord
(Sent without signature to avoid delay)

RE: Meetings of Three Members of San Juan County Council

QUESTION PRESENTED

Under what circumstances is a subcommittee meeting of two or three members of the County Council subject to the Open Public Meetings Act?

SHORT ANSWER

The Home Rule Charter of San Juan County established a six-member council[1] with a majority (four-member) quorum rule and a voting rule that requires the affirmative vote of four members, (a majority and 2/3 supermajority) for positive action.[2] By operation of these rules, a negative vote of three members can prevent or "block" action.

Based upon case law and attorney general opinions, we have previously advised that a gathering of three council members to discuss County business is not subject to the Open Public

[1] San Juan County Charter Section 2.10 states: The Legislative Body shall consist of six (6) members nominated and voted on by district.

[2] San Juan County Charter Section 2.40(3) states: A majority of the Legislative Body shall constitute a quorum at all meetings. Unless otherwise provided, action of the Legislative Body shall require the affirmative vote of four (4) members.

EXHIBIT
LOVELL PRAH
1-3-13
3

Meetings Act because it is not a "meeting," because there is no quorum of the governing body. We reexamined the attorney general opinions and decisions in this state and also reviewed the decision of the supreme court of Wisconsin, a state with laws similar to Washington. We now advise that the Open Public Meetings Act does apply to subcommittee meetings and other gatherings (except social events) when there are three members of the County Council present.

While an argument can be made that a subcommittee is only required to give notice only for meetings when it will be receiving information from others, or public comment, or when the committee has been assigned decision making authority, we believe that under the unique circumstances of the San Juan County Council, it is appropriate and prudent for all meetings of council committees conduct their business in the open and with the notice required of the Open Public Meetings Act.

We recognize that this is an area of the law where there is some uncertainty because of the lack of court decisions in Washington State on this precise topic and because of the uniqueness of the supermajority voting requirement in San Juan County. Nonetheless, the Attorney General has expressed caution in the area of meetings of a committee of less than a majority and said, "It would be prudent for such committees to conduct all their business in open meetings. (Open Government Internet Manual, Chapter 3, Section 3.3) We agree. The policy reasons for open government are very strong. Even if the law is not clear, the better approach is to err on the side of following the Open Public Meetings Act.

With an appropriate respect for caution and to protect the public interest and assure the validity of actions by the Council, we advise that no meetings of three council members should occur without complying with the notice and other requirements of the Open Public Meetings laws.

This memorandum is limited to the meetings of committees of members of the County Council only and should not be applied to meetings by other committees or groups. All prior written and verbal advice on this subject is superseded by this memorandum.

DISCUSSION

A. Basic Rule

The Open Public Meetings Act ("OPMA"), enacted in 1971, requires that "[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030. The purpose of the OPMA is to permit the public to observe all steps in the making of governmental decisions. *Cathcart v. Andersen*, 85 Wn. 2d 102 (1975).

The following definitions from RCW.30.020 are applicable:

(2) "Governing body" means the multimember board, commission, committee,

> council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.
>
> (3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.
>
> (4) "Meeting" means meetings at which action is taken.
>
> (Emphasis added).

B. Factual Background

The County Council meets as a group of the whole and also breaks up into subgroups or subcommittees to discuss specific topics. Most of these subcommittees are "ad hoc," although the general governance subcommittee, budget subcommittee, critical areas ordinance implementation team and solid waste subcommittee have been meeting for two years or more. During the course of committee meetings, ideas and policies are brought forward, discussed, narrowed and discarded and approaches are formulated for making presentations of subcommittee work to the entire Council.

The participants are usually two or three members of the Council, never four, the County Administrator and other staff, other elected officials and invited guests. Sometimes the invited guests are allowed to participate in the meeting. Typically, no notice of a subcommittee meeting is given. Some subcommittee meetings are held in locations that promote public access, such as the council chambers. Other subcommittee meetings are held in small conference rooms. In the past, local media and citizens have at times been excluded from attending subcommittee sessions. A short summary of past work at the meetings is often given during regular agenda time at the meetings of the County Council, which may include announcements made about plans for future meetings. From time-to-time, there have been objections to the subcommittee meetings from both people excluded from the meeting and other Council members because of lack of notice or the inability to attend the meetings.

In December 2011 this office sent an email to the County Council which outlined the evolution by the Council from work sessions and workshops of the entire Council to the use of subcommittees and meetings of up to three members of the Council to arrive at recommendations on a wide range of topics. The Prosecuting Attorney wrote:

> During the period 2006 through 2009, there was one prominent subcommittee, the general government subcommittee, which regularly met in a meeting open to the public in the council chambers. Since this time,

> subcommittees of three council members have been created, and these subcommittees often meet in private rooms at irregular times, and without notice to the public. These subcommittees gather information for purposes of making a recommendation to the full Council and are not charged with taking public testimony on behalf of the Council. As a legal matter, I see no problem with the Council assigning work to three member subcommittees. This approach is justified by AGO 1986 No. 16 as explained here by MRSC:
>
> ***When is a committee of the governing body subject to the Open Public Meetings Act?***
>
> A meeting of a committee of a governing body is subject to the Open Public Meetings Act when it acts on behalf of the governing body, conducts hearings, or takes testimony or public comment. RCW 42.30.020(2). A committee acts on behalf of the governing body when it exercises actual or *de facto* decision-making power. AGO 1986 No. 16. So, for example, if a committee is merely gathering information that will result in a recommendation to the full governing body, it most likely is not subject to the Open Public Meetings Act because it is not exercising actual or de facto decision-making authority in these circumstances.

In the December 2011 email, we also observed that three members have the power to form "voting blocks" which can have the effect of "weakening the influence of those who do not attend the meeting."

> One unintended consequence of the subcommittee approach that should be considered is that it has the ability to create imbalances and voting blocks on the Council that has the effect of weakening the influence of those who are not members of a subcommittee. If a Council member does not have the chance to influence policy at the formative stage, the die may be cast before they even get to speak. This is the downside of the subcommittee system composed of three members when it only takes one more member to make a decision.[3]

We have recently reexamined our advice from December and observed the stronger influence of subcommittees in the past four months. We have also reviewed the following materials from Washington State:

[3] Since this advice was given, our office has reviewed and suggested revisions to a proposed ordinance which would amend the rules of procedure to provide that subcommittees of the County Council comply with the Open Public Meetings Act. We urge adoption of amended rules of procedure and a policy that Council subcommittees must comply with the Open Public Meetings Act.

Chapter 3 Open Public Meetings Act – General and Procedural Provisions by the Washington Attorney General;
Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (CLEAN), 119 Wn. App. 665, 701-703 (2004);
Washington Attorney General Opinion 1986 No. 16; and
An Overview of Washington's Open Public Meetings Act (2010) by Michele Earl Hubbard and David M Norman of Allied Law Group.

C. Washington Case Law

The decision in *CLEAN* states the general rule: "If a body or committee lacks a quorum, the OPMA does not apply." 119, Wn. App. 665, 707 (fn 108), *citing, Wood v. Battle Ground* School District, 107 Wn. App. 550 (2001) (email message to quorum of five members of the school board was a "meeting"); *In Re Recall of Beasley*, 128 Wn. 2d 419 (1996) (in recall action, no meeting of majority of school board); *In re Roberts*, 115 Wn. 2d 551 (1990) (in recall action no meeting of majority of Town Council members). In each of these Washington cases, there was no evidence of a "meeting" occurring because there was no assembly of a majority of the governing body or committee.

While this law provides the general rule, it does not answer the precise question of when a subcommittee of the council will be subject to the open public meetings act. Upon closer examination, a simple rule based upon whether a majority of the governing body is present is not enough. The final analysis must consider other factors as discussed below.

D. The 1986 Attorney General Opinion

In 1986 AGO No. 16, the attorney general examined the legislative history of the definition of "governing body" in the Open Public Meetings Act and the circumstances when a committee of a governing body is required to comply with the provisions of the Open Public Meetings Act.

"Governing body" means the multimember board, commission, committee, council or other policy or rule making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearing or takes testimony or public comment.

The 1986 Attorney General Opinion begins with the holding that the phrase "a committee thereof" in the definition of Governing Body includes committees "composed solely of a minority of the members of the governing body." This means that the term "governing body" is not strictly defined by reference to gatherings of a majority of its members. A group of three council members can be subject to the act under certain circumstances.

In this analysis, the Attorney General focused on the definition of "act or action" on behalf of the "governing body". The Attorney General concluded in 1986 AGO No. 16, that "a committee acts on behalf of the governing body when it exercises actual or *de facto* decision-

making authority for the governing body. This is in contrast to the situation where the committee simply provides advice or information to the governing body. In our opinion such advisory committees do not act on behalf of the governing body and are therefore not subject to the act."(Pages 8)

The 1986 Attorney General Opinion explained that whether a committee acts on behalf of the governing body must be examined on the facts of each case. In reaching its conclusion, the 1986 Attorney General opinion adopted a functional, rather than numerical approach based on the number of committee members present. Under this approach, the question of whether notice under the OPMA is required depends on the type of activity to be conducted. [4] In *Clark v. City of Lakewood*, 259 F.2d 996 (9th Cir 2001) the Ninth Circuit held that a committee violated the Act when it failed to provide notice of all its meetings and, at some meetings, it took public testimony, held hearings and acted on behalf of the governing body. Based upon this approach, whenever a subcommittee receives public comment from others, those meetings are clearly subject to the Open Public Meetings Act.

We are aware of upcoming subcommittee meetings in which it is proposed that people who may be affected by action of the county council will be invited to participate in the meeting. Such a meeting clearly falls within the category of meetings that require public notice.

But there is another reason why *every* meeting of three council members is subject to the Open Public Meetings Act. San Juan County has a unique Charter with an even number of Council members and a voting requirement for four affirmative votes to take action. This two-thirds voting requirement means that three members can block any proposal before the Council. Due to the unique circumstance of the San Juan County Home Rule Charter, when three Council members assemble they have the potential to exercise "negative" decision making by forming a block and if they do so outside of a public meeting, it is done in a way that is not obvious and not known to the public. Whether intentional or just a normal part of the decision making process, when this occurs, the committee may exercise *de facto* decision making authority. This precise situation is what was discussed by the Wisconsin Supreme Court in the *Showers* case.

E. Wisconsin Supreme Court Decisions in *State ex. Rel Newspapers, Inc. v. Showers*

The assembly of a minority block of governing board members when taking up a matter requiring a supermajority for passage is discussed by the Wisconsin Supreme Court in *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W. 2d 154 (1987). There the Wisconsin Supreme Court rejected a strictly numbers approach to defining a meeting and held that the analogous provisions of the Wisconsin Open Public Meetings laws apply any time that there "is the potential of a group to determine the outcome of a proposal, whether that potential be the affirmative power to pass, or the negative power to defeat." *Id.* at 101-102. This conclusion is very similar to the "*de facto* decision making" approach taken in the 1986 Attorney

[4] Indeed the 1986 Attorney General opinion assumes at the outset that when there is a majority of a governing body in a subcommittee, then the "subcommittee" would have to be considered the governing body itself, under the Act, and would then be subject to all of the notification and meeting requirements of the act. (Page 3).

General Opinion.

In *Showers,* 4 members out of an 11-member body met to work out a compromise on a budget change. The budget change required a two-thirds vote of the parent body (i.e., a vote of eight members) to pass. The court held that the meeting was subject to the open public meetings act because four members could determine the outcome by voting as a block against the budget change and, therefore, constituted a "negative quorum." This concept thus applies to any gathering of members such that if they acted in concert, they could block passage of an item or prevent a course of action.

After analyzing the statues in the state of Wisconsin the court summarized its reasoning as follows:

> From this, we conclude that the trigger [of the Wisconsin Open Public Meetings Law] is twofold. First, there must be a purpose to engage in governmental business, be it discussion, decision or information gathering. Second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed.
>
> ...
>
> We turn now to applying secs. 19.81-87, Stats., and our interpretation of that law, to the facts of this case. It is conceded that the purpose of the meeting of the four Commissioners was to discuss the pending capital budget. It was therefore a meeting "for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Section 19.82(2). It is conceded that passage of that proposal required a two-thirds vote. It is conceded that four members were sufficient to defeat any proposal regarding the capital budget. Because the convening of these four members was for the purpose of exercising the responsibility, authority, power or duties of the body, i.e. the discussion of the capital budget, and because these four members had the potential to determine the outcome of any proposal regarding the capital budget, we hold that this meeting was subject in all respects to Wisconsin's Open Meeting Law.
>
> The Commissioners argue that because they were from two opposite factions (two of them represented the city and two represented the suburbs), they were not, in fact, a "negative quorum." Their argument rests on the premise that these two factions would not in reality ever join together, and therefore would never be in a position to determine the outcome by voting together to defeat the proposal. We reject this argument in total. Whether a group of divergent forces would ever join together is simply not the issue. The fact is that there is always the potential, no matter how divergent the forces, to join together. The Open Meeting Law is concerned with the potential to determine the outcome, not with the likelihood that an alliance may or may not be formed. The legislature knew, as do these Commissioners, that politics makes strange bedfellows. Today's enemy may

> become tomorrow's ally. Shifting agendas and shifting alliances can and often do lead to unpredictable results and unlikely alliances. When a group of governmental officials gather to engage in formal or informal government business and that group has the potential to determine the outcome of the proposal or proposals being discussed, the public, absent an exception found within the law has the right to know-fully-the deliberations of that group. The public is entitled to no less.
>
> *Id.* at 101-103.

The *Showers'* decision is especially relevant because under the facts presented there were only 4 members of an 11-member body, less than a quorum and less than one-half of the governing body. Hence, there was no presumption that a meeting occurred. Under the Wisconsin rule, the group was small enough to not pass that measure, but it was large enough to defeat a measure proposed by others who are not members of the group.[5] In this respect, the Wisconsin rule is very similar to the "*de facto*" decision making rule of the 1986 Attorney General opinion. And, for that reason, we believe it is the right rule to apply to subcommittee meetings of three council members in San Juan County.

CONCLUSION

Subcommittee meetings of the County Council are not subject to simple rule that is based upon whether a majority of the County Council is present. For the reasons stated above, meetings of three members of the County Council may continue provided they comply with the Open Public Meetings Act. In the future, meetings should take place in a location that allows the public to attend and observe. The notice requirements for special or regular meetings will need to be followed. This advice pertains to all meetings of three council members.

Committees of two Council members are not subject to a blanket rule because two members do not have the ability to defeat a measure pending before the full Council When examining whether meetings of two council members are subject to the Open Public Meetings Act, the advice provided in the 1986 Attorney General Opinion should be followed. Meetings where the two members will be receiving information from others, or public comment, or when the committee has been assigned decision making authority will also be subject to the Open Public Meetings Act.

[5] The Wisconsin statutes include a presumption that governmental business is undertaken when the governing body assembled "one-half or more" of its membership. The court said that this presumption indicates "a clear recognition of the intent to reach the power to block." *Id.* at 101.

CAPR Legal Fund PETITION FOR REVIEW

APPENDIX A-9

Chapter 3
OPEN PUBLIC MEETINGS ACT – GENERAL AND PROCEDURAL PROVISIONS

Last revised: January 2007 - Currently under review; updates forthcoming

3.1 Introduction and Other Resources

The Open Public Meetings Act ("OPMA"), chapter 42.30 RCW was passed by the legislature in 1971 as a part of a nationwide effort to make government affairs more accessible and, in theory, more responsive. It was modeled on a California law known as the "Brown Act" and a similar Florida statute. *See* Cal. Governmental Code 54950-61 and 11120 *et seq.*; Fla. Stat. 286.011 *et seq.*

122

While the Washington legislature has clarified some of its provisions, the OPMA is substantially unchanged. There has been relatively little litigation regarding its interpretation, with the result that many gray areas exist. Soon after its passage, the Attorney General issued a comprehensive opinion which continues to be a useful resource. *See*1971 Att'y Gen. Op. No. 33. Other resources on the OPMA are Chapter 21, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) (available for purchase) and the Municipal Research Service Center's OPMA Frequently Asked Questions

Together with the Public Records Act, chapter 42.56 RCW, the legislature has created important and powerful tools enabling the public to inform themselves about their government.

3.2 Interpretation of the OPMA

As with all laws, the courts will attempt to interpret the OPMA to accomplish the legislature's intent. The OPMA declares its purpose in a very strongly worded statement.

Statutory Provisions: The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to

know. The people insist on remaining informed so that they may retain control over the instruments they have created. RCW 42.30.010.

The purposes of [the OPMA] are hereby declared remedial and shall be liberally construed. RCW 42.30.910.

Exceptions to the openness requirements of the OPMA (such as the grounds for executive sessions) are narrowly construed. *Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999).

3.3 What Entities Are Subject To The Act

A. "Public Agency"

The Open Public Meetings Act requires, in essence, that meetings of the governing body of a "public agency" are open to the public. RCW 42.30.030 link
Statutory Provision: "Public agency" means: (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature; (b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington; (c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies; (d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency. RCW 42.30.020.

The OPMA does not apply to an entity simply because it receives public funds (such as grants or contracts). Instead, the Attorney General has suggested a four-part test to be used in determining whether an entity is a "public agency" and subject to the OPMA: "(1) whether the organization performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the organization was created by the government." 1991 Att'y Gen. Op. No. 5.

B. "Governing Body"

Statutory provision: "Governing body" means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment. RCW 42.30.020 (2).

Because the OPMA is directed to meetings of governing bodies, it does not apply to the activity of an agency which is governed by an individual. In *Salmon for All v.*

Department of Fisheries, 118 Wn.2d 270, 821 P.2d 1211 (1992), the court held that the Department of Fisheries was not subject to the OPMA because it was governed by an individual, the Director. Many state agencies are governed by individuals and, therefore, not subject to the OPMA such as Labor and Industries, Licensing, Social and Health Services, State Patrol, Employment Security, etc.

In 1983, the legislature amended the definition of governing body to include "any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." Laws of 1983, ch. 155, §1. Since the definition uses the language, "a committee thereof," the implication is that some member of the governing body must be included in the committee.

Because a committee of a governing body is typically created by some sort of legislative act of the governing body, a committee may appear to be similar to a subagency, which is also created by legislative act. The difference under the OPMA between a "committee" and a "subagency" is that a committee does not possess policy or rule-making authority. This distinction between whether an entity is a subagency or a committee can be important as to the notice requirements for their meetings. All meetings of the governing body of a subagency are subject to the notice requirements of the OPMA; however, as discussed below, a dispute exists as to whether a committee is similarly required to give notice for all of its meetings when it is only at some of its meetings that it is acting so as to come within the definition of "governing body."

Although it may be clear when a committee is conducting hearings or taking public testimony or comment, it is not clear from the language of the OPMA when a committee "acts on behalf" of the governing body. A 1986 attorney general opinion concludes that a committee acts on behalf of the governing body "when it exercises actual or de facto decision-making authority for the governing body." 1986 Att'y Gen. Op. No. 16. That opinion, citing the legislative history of the OPMA and its amendments, distinguished when a committee is exercising such authority from when it is simply providing advice or information to the governing body. Using that rationale, the question of whether notice under the OPMA is required would depend on the kind of activity to be conducted. However, in *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001), the Ninth Circuit Court of Appeals found that a committee took public testimony and comment, held hearings, and acted on behalf of the governing body and therefore violated the Act when it failed to provide notice of all of its meetings. The court, however, did not analyze the committee's activity at each of the meetings, but simply concluded that all the meetings required the statutory notice.

While an argument can be made that a committee may be required to give notice only for those meetings when it will be taking testimony or public comment or exercising decision-making authority for the governing body, it would be prudent for such committees to conduct all their business in open meetings.

***Case example**: The seven-member city council is considering the purchase of public art. The council agrees that public input would assist the selection process. Some councilmembers believe that the creation of an arts commission that would adopt policies for the city's acquisition of public art would "get politics out of the world of*

art." Other councilmembers express concern that an arts commission will control too much of the process without significant council input. Three resolutions are drafted for council consideration:

The first establishes a city arts commission and details the method of selecting the members, including three city councilmembers and two citizen members, who would serve specific terms. The commission is directed to establish policies for the selection and placement of public art in the city. Its recommended policies will be subject to city council approval. It is directed to obtain public input before the adoption of the recommended policies. As funding becomes available, it will make recommendations to the city council regarding the purchase of works of public art and their location in the city.

The second resolution establishes a public arts committee of the city council consisting of three members of the council. Five interested citizens will be asked to participate in its determination of worthy projects. The citizens would serve at the pleasure of the council. The public arts committee is directed to develop a list of citizens who have expressed interest in public art and to hold hearings seeking public comment regarding any recommendations that the committee might make to the full city council.

The third resolution recognizes the existence of a citizen's committee known as "Public Art Now!" that was formed by a councilmember. The committee would be authorized to use city's meeting rooms. The council would welcome the committee's advice regarding the selection and placement of public art and its recommendations would be considered at any public hearing when the council decided to purchase works of art.

What would be the consequences under the OPMA of the adoption of each resolution?

***Resolution:** The city arts commission is probably a "subagency" under the OPMA. It has been created by legislative act and its governing body is directed to develop policy for the city. As such, all of its meetings would be subject to the Act's requirements.*

The public arts committee is probably a "committee" of the governing body, the city council. It is not a separate entity. Since it will be obtaining public input, at least some of its meetings would be subject to the Act. However, it is advisable that it hold all its meetings in open session.

"Public Art Now" is not subject to the OPMA. The city council did not establish it or grant it any authority.

3.4 Meetings

A. What Is A "Meeting"

Statutory provisions: "Meeting" means meetings at which action is taken. RCW 42.30.020(4).

No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void. RCW 42.30.060(1).

It shall not be a violation of the requirements of this chapter for a majority of the members of a governing body to travel together or gather for purposes other than a regular meeting or a special meeting as these terms are used in this chapter: PROVIDED, That they take no action as defined in this chapter. RCW 42.30.070.

A meeting occurs whenever the governing body of a public agency takes "action" (the meaning of "action" is discussed below). If the required notice has not been given, the action taken is null and void, that is, as if it had never occurred. The OPMA expressly permits the members of the governing body to travel together or engage in other activity, such as attending social functions, so long as they do not take action.

An email exchange among members of a governing body in which an "action" takes place can be a "meeting" under the OPMA. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 564, 27 P.3d 1208 (2001). (Whether a quorum is required is addressed below.) Since an email exchange among members of a governing body is not open to the public, such an exchange in which an "action" took place would violate the OPMA.

It is generally agreed that an agency may conduct its meeting where one of the members of the governing body attends by telephone and a speaker phone is available at the official location of the meeting so as to afford the public the opportunity to hear the member's input. This should occur only when a member is unable to travel to the meeting site and would not include "telephone trees" where the members repeatedly call each other to form a majority decision.

A quorum of members of a governing body may attend a meeting of another organization's provided that the body takes no "action" (defined below). 2006 Att'y Gen. Op. No. 6. For example, a majority of a city council could attend a meeting of a regional chamber of commerce or a county commission meeting provided that the council members did not discuss city business or do anything else that constitutes an "action."

B. What Is "Action"

Statutory provision: "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations,

reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance. RCW 42.30.020(3).

It is important to realize that the OPMA provides that a meeting occurs whenever there is action, including the discussion, deliberation or evaluation that may lead to a final decision. That is, it is the "action" (discussion, etc.) that determines whether a "meeting" has taken place, not whether a "meeting" in the everyday sense of the term (such a gathering of people at City Hall) has taken place. *Eugster v. Spokane*, 110 Wn. App. 212, 225, 39 P.3d 380, *review denied*, 147 Wn.2d 1021 (2002).

The notice requirements of the OPMA are not limited to meetings at which a final official vote is taken, which is intended to authorize or memorialize the policy of the governing body. *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992), *review denied*, 121 Wn.2d 1011 (1993). That is "final action" under the OPMA and is important for deciding what decisions can be made during an executive session. "Final action" refers to the final vote by the governing body on the matter. One court held that a decision by fire district commissioners to terminate a fire chief was not final action because it was not a decision upon a motion, proposal, resolution, order or ordinance. *Slaughter v. Snohomish County Fire Protection Dist. No. 20*, 50 Wn. App. 733, 750 P.2d 656, *review denied*, 110 Wn.2d 1031 (1988). However, in 1989 the legislature amended the statute to require such action to be taken in an open public meeting. *See* RCW 42.30.110 (1)(g).

A meeting occurs if a quorum (that is, a majority) of the members of the governing body were to discuss or consider, for instance, the budget, personnel, or land use issues no matter where that discussion or consideration might occur. What about if less than a quorum is present? Several cases hold that the OPMA is only triggered by a quorum of the governing body, so the "action" of less than a quorum is not subject to the OPMA. *See, e.g., Eugster v. City of Spokane*, 128 Wn. App. 1, 8, 114 P.3d 1200 (2005). Others argue that the legislative history of the OPMA indicates that the statute formerly required a quorum for an "action" but was amended to apply to an action with less than a quorum. Laws of 1985, ch. 366, § 1(3).

The OPMA does not allow for "study sessions", "retreats", or similar efforts to discuss agency issues without the required notice. Notice must be given just as if a formally scheduled meeting was to be held. In one case, the court held that it was not "action" for members of the governing body to individually review material in advance of a meeting at which a public contract was awarded. *Equitable Shipyards, Inc. v. State of Wash.*, 93 Wn.2d 465, 611 P.2d 396 (1980).

Case example: *The five member School Board attend the annual convention of the State School Association. Over dinner, three members discuss some of the ideas presented during the convention, but refrain from any conversation about how they might apply them to the school district. All five travel together to and from the convention and the only discussion is over whether they are lost.*

Resolution: *No violation occurred but the board members must be careful. The example is offered to highlight the level of awareness members of a governing body must have. It is not unusual for such situations to arise. For instance, the dinner discussion was between a majority of the members so a discussion about school district business would have been "action" and, without the required notice, would be in violation of the OPMA.*

C. Secret Votes Prohibited

Statutory provision: No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter. RCW 42.30.060(2).

"Secret" votes are prohibited and any votes taken in violation of the OPMA are null and void. Presumably, the members of the governing body are required to publicly announce their vote at the time it is taken, and that vote would be recorded in the minutes of the meeting for future reference.

D. Kinds of Meetings Not Covered by the OPMA

The OPMA excludes from its coverage:

> **(1) The proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation, or profession or to any disciplinary proceedings involving a member of such business, occupation, or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary; or**
>
> **(2) That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group; or**
>
> **(3) Matters governed by chapter 34.05 RCW, the Administrative Procedure Act; or**
>
> **(4)(a) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress. RCW 42.30.140.**

The OPMA provides that certain activities that would otherwise be meetings are exempt from its notice requirements. When an agency engages in those activities, it is

not required to comply with the OPMA, although other public notice requirements may apply. *Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 868 P.2d 861 (1994). Generally, this provision applies to activities that already require public notice, such as quasi-judicial matters or hearings governed by the Administrative Procedure Act (chapter 34.05 RCW). Quasi-judicial matters are those where the governing body is required to determine the rights of individuals based on legal principles. The court has held that a decision by a school board to not renew teacher's contracts is quasi-judicial in nature and can properly be discussed outside of public view. *Pierce v. Lake Stevens School Dist. No. 4*, 84 Wn.2d 772, 529 P.2d 810 (1974).

The courts have employed a four-part test to determine whether administrative action is quasi-judicial: (1) Whether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators. *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992), *review denied*, 121 Wn.2d 1011 (1993); *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220, *review denied*, 98 Wn.2d 1008 (1982).

> ***Case example:*** *During a break in the regular meeting, the Council gets together in the chambers to decide what they should do with regard to the union's latest offer. They authorize the negotiator to accept the offer on wages if the union will accept the seniority amendments. When they return to the meeting, nothing is said about the discussion or decision.*
>
> ***Resolution:*** *The Act specifically exempts the discussion and decision about the collective bargaining strategy or position from its requirements. Since it was exempt, the discussion could have occurred at any time or place. It was unnecessary to announce the fact that the discussion took place.*

The OPMA is not a basis for withholding public records. *See Am. Civil Liberties Union v. City of Seattle*, 121 Wn. App. 544, 555, 89 P.3d 295 (2004). Therefore, even though collective bargaining matters can be discussed in a closed session, this is not a basis for withholding public records relating to that topic.

E. Who May Attend Public Meetings and Recording Meetings, and Disorderly Conduct at Meetings

Statutory provision: A member of the public shall not be required, as a condition to attendance at a meeting of a governing body, to register his name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his attendance. RCW 42.30.040.

The OPMA provides that any member of the public may attend the meetings of the governing body of a public agency. The agency may not require people to sign in, complete questionnaires or establish other conditions to attendance. For instance, an agency could not limit attendance to those persons subject to its jurisdiction. The OPMA does not address whether an agency is required to hold its meeting at a location

that would permit every person to attend. However, it seems clear that the courts would discourage any attempt to deliberately schedule a meeting at a location that was too small to permit full attendance or that was locked. RCW 42.30.050.

A person may record a meeting (audio or video) provided that it does not disrupt the meeting. 1998 Att'y Gen. Op. No.15. A stationary audio or video recording device would not disrupt the meeting.

Statutory provision: In the event that any meeting is interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are interrupting the meeting, the members of the governing body conducting the meeting may order the meeting room cleared and continue in session or may adjourn the meeting and reconvene at another location selected by majority vote of the members. In such a session, final disposition may be taken only on matters appearing on the agenda. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the governing body from establishing a procedure for readmitting an individual or individuals not responsible for disturbing the orderly conduct of the meeting.RCW 42.30.050.

If those in attendance are disruptive and make further conduct of the meeting unfeasible, those creating the disruption may be removed. *In re Recall of Kast*, 144 W.2d 807, 817, 31 P.3d. 677 (2001). Or the meeting may be adjourned to another place; however, members of the media are entitled to attend the adjourned meeting and the governing body is limited to act only on those matters on the agenda.

> ***Case example:*** *The Board schedules a special meeting to discuss a controversial policy question. It becomes obvious that the regular meeting room is too small for all of those trying to attend the meeting. The Board announces that the meeting will be adjourned to an auditorium in the same building. The chair announces that those who wish to speak should sign in on the sheet on the table. She states that given the available time, speakers will be limited to 10 minutes each. At one point, the meeting is adjourned to remove an apparently intoxicated person who had been interrupting the comments of speakers.*
>
> ***Resolution:*** *While the OPMA allows the public to attend all meetings, it does not allow for the possibility of insufficient space. Presumably, if a nearby location is available, the governing body should move there to allow attendance. The chair can require those who wish to speak (but not all attendees) to sign in. The sign-in requirement for speaking does not restrict attendance, only participation. Since the OPMA does not require the governing body to allow public participation, the time for each speaker can also be limited. The governing body can maintain order by removing those who are disruptive.*

G. Right to Speak at Meetings

The OPMA does not require a governing body to allow everyone to speak at a public meeting. A governing body has significant authority to limit the time of speakers to a uniform amount (such as three minutes) or to not allow anyone to speak. Other laws might require the governing body to allow the public to speak at a public meeting, but the OPMA does not.

F. Minutes of Meetings

Under a statute outside the OPMA, RCW 42.32.010, agencies must maintain minutes of their meetings and make them available upon request. The law does not specify the format or content of the required minutes. In order to satisfy the need to memorialize certain actions such as the adoption of a budget, the minutes should, at a minimum, recite the significant actions of the agency. Many agencies maintain audio recordings of the open portions of their public meetings (that is, the portions not conducted in executive session).

3.5 Required Notice of Public Meetings

The notice requirements of the OPMA are divided into notice of regular meetings (such as the third Tuesday of every month) and special meetings (meeting to address special occurrences).

A. Regular Meetings

Statutory provisions: State agencies which hold regular meetings shall file with the code reviser a schedule of the time and place of such meetings on or before January of each year for publication in the Washington state register. Notice of any change from such meeting schedule shall be published in the state register for distribution at least twenty days prior to the rescheduled meeting date. For the purposes of this section "regular" meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or rule. RCW 42.30.075.

The governing body of a public agency shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body. Unless otherwise provided for in the act under which the public agency was formed, meetings of the governing body need not be held within the boundaries of the territory over which the public agency exercises jurisdiction. If at any time any regular meeting falls on a holiday, such regular meeting shall be held on the next business day. RCW 42.30.070.

The OPMA requires agencies to identify the time and place they will hold their regular meetings, that is, "recurring meetings held in accordance with a periodic schedule declared by statute or rule." State agencies subject to the OPMA must publish their schedule in the Washington State Register, while local agencies (such as cities and counties) must adopt the schedule "by ordinance, resolution, bylaws, or by whatever

other rule is required for the conduct of business by that body." Although an agency is not required to meet inside the boundaries of its jurisdiction, there is general agreement that agencies should not schedule meetings at locations that effectively exclude the public. Other statutes may require certain entities to hold their meetings at particular locations, such as RCW 36.32.080, which requires a board of county commissioners to hold regular meetings at the county seat.

The OPMA does not require an agency to notify the public of anything other than the time and place that it will hold its regular meetings. That is, the OPMA does not require an agency to provide an agenda of a regular meeting. *Hartman v. Washington State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975); *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220 (1982), *review denied*, 98 Wn.2d 1008 (1982). However, other laws may require additional notice or an agenda in specific circumstances. *See, e.g.*, RCW 35.23.221, RCW 35A.12.160. No agenda or other description of the business to be transacted is required by the OPMA for regular meetings.

B. Special Meetings

Statutory provision: A special meeting may be called at any time by the presiding officer of the governing body of a public agency or by a majority of the members of the governing body by delivering written notice personally, by mail, by fax, or by electronic mail to each member of the governing body; and to each local newspaper of general circulation and to each local radio or television station which has on file with the governing body a written request to be notified of such special meeting or of all special meetings. Such notice must be delivered personally, by mail, by fax, or by electronic mail at least twenty-four hours before the time of such meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted. Final disposition shall not be taken on any other matter at such meetings by the governing body. Such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the governing body a written waiver of notice. Such waiver may be given by telegram, by fax, or electronic mail. Such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. The notices provided in this section may be dispensed with in the event a special meeting is called to deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage, when time requirements of such notice would make notice impractical and increase the likelihood of such injury or damage. RCW 42.30.080.

Whenever an agency has a meeting at a time other than a scheduled regular meeting, it is conducting a "special meeting." For each special meeting, the OPMA requires at least 24 hours' written notice to the members of the governing body and media representatives who have filed a written request for notices of special meetings. Notice by fax or e-mail is allowed. The OPMA does not provide any guidance as to whether

the media's written request for notice must be renewed; it is advisable, however, to periodically renew such requests to insure that they contain the proper contact information for the notice and have not been misplaced or inadvertently overlooked due to changes in agency personnel.

The notice of a special meeting must specify the time and place of the meeting and "the business to be transacted," which would normally be an agenda. At a special meeting, final disposition by the agency is limited to the matters identified as the business to be conducted in the notice. There is disagreement as to whether the governing body could discuss, but not finally dispose of, matters not included in the notice of the special meeting.

A member of the governing body may waive the required notice by filing a written waiver or simply appearing at the special meeting. *Estey v. Dempsey*, 104 Wn.2d 597, 707 P.2d 1338 (1985). The failure to provide notice to a member of the governing body can only be asserted by the person who should have received the notice, not by any person affected by action at the meeting. *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 630 P.2d 930 (1981.

> ***Case example:*** *The superintendent of the school district announced her retirement. The five-member school board passed a motion at its regular meeting to direct the staff to announce the vacancy, seek applicants, screen them and select the three most qualified candidates for presentation to the board for their final selection. The three candidates were identified together with a description of their qualifications. The letter was released to the public and the local newspaper. Controversy arose over which of the candidates was most qualified.*
>
> *At the next regular meeting, the board decided to schedule a special meeting the following week to consider the three candidates, receive public comment and select the new superintendent. No particular agenda was created. The newspaper published the various points of view and the stories described the time and place of the special meeting. The entire board attended the special meeting. No other notice was given.*
>
> ***Resolution:*** *The notice of the meeting was sufficient, unless the media had filed a written request for notice of special meetings. The only notice required of a special meeting is to the members of the governing body and only the members of the governing body may raise the lack of that notice. Here, the members of the governing body all attended the meeting, waiving any objection to the lack of notice. The media is only entitled to notice if the written request is filed.*

C. No Other Notices Required

It is notable that the above regular and special meetings notice requirements are the only meeting notice requirements in the OPMA. With the exception of the media's request for notice of a special meeting, there is no requirement to provide notice to the local media of regular or special meetings, unless the required written request for

notice has been filed. Nor are agencies required to publish information through the media or to post notice at public locations. However, local jurisdictions may adopt additional notice requirements according to their own rules of procedure, or other laws may require notice.

D. No Notice Is Required For Emergency Meetings

The OPMA provides that no notice is required for an emergency meeting such as when the jurisdiction has suffered a natural disaster or similar emergency:

Statutory provision: If, by reason of fire, flood, earthquake, or other emergency, there is a need for expedited action by a governing body to meet the emergency, the presiding officer of the governing body may provide for a meeting site other than the regular meeting site and the notice requirements of this chapter shall be suspended during such emergency. RCW 42.30.070.

The courts have found that the agency must be confronted with a true emergency that requires immediate action, such as a natural disaster. It has been held that a strike by teachers did not justify an "emergency" meeting by the school board. *Mead School Dist. No. 354 v. Mead Education Ass'n*, 85 Wn.2d. 140, 530 P.2d 302 (1975). It is advisable for the agency to provide special-meeting notice of the emergency meeting if possible.

3.6 Remedies For Violations

There are both public-relations and legal consequences from an OPMA violation. The loss of credibility suffered by an agency as a result of a judicial finding of an OPMA violation—or even the mere filing of an OPMA suit—may be the most severe consequence. Once damaged, that credibility can be very difficult to regain and can negatively affect every other action of the agency in the public's eyes. Most agencies are governed by elected officials, and actual or perceived attempts to hold secret meetings are not popular with voters.

The legal consequences can be severe. First, any action taken in violation of the OPMA is void.

Statutory Provision: (1) No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void. (2) No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter. RCW 42.30.060.

If an agency violates the OPMA and its action is null and void, it must retrace its steps by taking the action in accordance with the OPMA, which usually means re-discussing and re-voting on the matter in an open meeting. *See Henry v. Town of Oakville*, 30 Wn. App. 240, 246, 633 P.2d 892 (1981), *review denied*, 96 Wn.2d 1027 (1982); *Feature Realty v. City of Spokane*, 331 F.3d 1082, 1091 (9th Cir. 2003) (agency re-tracing of steps must be done in public). If a person seeks to void an election based upon a violation of the OPMA, the lawsuit must be initiated as soon as possible or the court may bar that relief based on the delay in filing. *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 585 P.2d 801 (1978).

Second, the OPMA provides for financial penalties.

Statutory provision: (1) Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars. The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person. A violation of this chapter does not constitute a crime and assessment of the civil penalty by a judge shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense. (2) Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency who prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause. RCW 42.30.120.

A member of the governing body is personally liable for the $100 penalty only if he or she is aware that the meeting is in violation of the OPMA. *Eugster v. Spokane*, 110 Wn. App. 212, 226, 39 P.3d 380 (2002). The court must award attorney fees to a successful party. If the court finds that the lawsuit against the agency is frivolous, which is a very difficult burden for the agency to prove, the agency may recover its attorney fees and expenses. The only statutory remedy is an action filed in superior court. No agency has the authority to sanction violations or to issue regulations interpreting the "gray areas" of the OPMA.

Attorney General's Open Government Internet Deskbook (Public Records and Open Meetings)