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

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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: _____
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IN THE COURT OF APPEALS
DIVISION I
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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:

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By First-Class Mail

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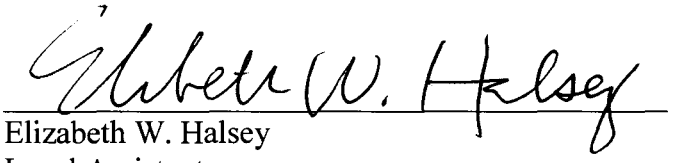
By First-Class Mail

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.



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April 3, 2014

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Re: *Citizen's Alliance for Property Rights Legal Fund, et al. v. San Juan County, 70606-3-I*

Dear Richard D. Johnson:

Enclosed herewith are an original, copy and one first page of each of the following documents:

1. Respondent San Juan County's Answer to Amicus Brief
2. Certificate of Service

Please file the originals, conform the face copies and return in the self-addressed, stamped envelope enclosed.

Please contact our office if you have any questions.

Sincerely,

Elizabeth W. Halsey

Elizabeth W. Halsey
Legal Assistant

/eh

Enclosures