70606-3

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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,

Respondent.

BRIEF OF RESPONDENT SAN JUAN COUNTY

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I. INTRODUCTION

This appeal concerns the Open Public Meetings Act and whether an informal working group in San Juan County, called the Critical Areas Ordinance Implementation Team ("the Team"), violated the Act. By late 2010, the Team included members of the County administration and three of San Juan County's ("the County") six Council members. The Team's purpose was to facilitate and coordinate the County's efforts in amending the County's critical areas ordinances. The three Council members stopped attending Team meetings after April 26, 2012, on advice of the San Juan County Prosecutor. Thereafter, the full County Council held over 20 public meetings and hearings between May and December 2012 before adopting the four ordinances on December 3, 2012.

Washington law is clear that the OPMA is not violated when less than a quorum of the governing body is present. Although CAPR frequently asserts that four members of the County Council met, this assertion is not supported by the evidence. It did not happen. Furthermore, the Team did not take action on behalf of the County Council which is a required element of an OPMA claim.

Appellant Citizens Alliance for Property Rights Legal Fund ("CAPR") is using the OPMA to challenge the County's critical areas ordinances and recover attorneys fees, arguing that Team meetings before

April 2012 invalidate the Council's later actions in adopting the critical areas ordinances. CAPR sued the County in San Juan County Superior Court. Superior Court Judge Alan R. Hancock dismissed the lawsuit on summary judgment. In his 13-page letter ruling, Judge Hancock concluded that the Team did not act "on behalf of" the County Council and was not subject to the Act.

> There is no evidence in the record of the present case to indicate that the committee or team had any such authority. There is no evidence to indicate that the committee or team acted on behalf of the council. Therefore, it could not, as a matter of law, be characterized as a governing body, a prerequisite to an OPMA violation.

CP 823.

CAPR has appealed that ruling, alleging that "the Trial Court essentially blessed the County's secret meetings, losing itself in fragments of statutory language..." Opening Brief at 2. Because Judge Hancock appropriately found that CAPR had failed to provide evidence of a violation, Respondent San Juan County respectfully requests the Court uphold the trial court's summary judgment and dismiss this appeal.

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II. RESTATEMENT OF ISSUES RELATED TO APPELLANT'S ASSIGNMENT OF ERROR

Appellant CAPR's Appeal Presents Two Issues:

1. Did members of the San Juan County Council violate the Open Public Meetings Act by attending meetings in which three of the six Council members were present?
2. Was summary judgment properly granted because CAPR failed to present sufficient evidence to establish the elements of a claim?

III. STATEMENT OF THE CASE

The San Juan County Critical Area Ordinance Team, composed of three or fewer County Council members and members of the County executive staff, began gathering in 2010 to facilitate and coordinate the County's efforts to update its development regulations for critical areas under the Growth Management Act. CP 255, 290, 320, 381.

The County Council did not create the Team nor did it authorize the Team to make any decision or act for the Council. San Juan County's six County Council members all filed declarations that: 1) the Team was not brought into being by the County Council, and 2) the Team was not authorized to act on behalf of the County Council or to exercise the Council's actual or *de facto* decision making authority. CP 761-70, 1006-07.

The three Council members who attended Team meetings stopped doing so in April 2012. CP 263-64, 291, ln 16-19, 334-35. Six months before CAPR filed suit, in April 2012, Prosecuting Attorney Randall K. Gaylord advised the County Council, in a memorandum on subcommittee meetings and the OPMA, that three or more Council members should not attend the same informal meeting. CP 451-58. As is often the case with advice provided by the Prosecuting Attorney to his clients, Mr. Gaylord advised the Council as to the best practices stating, "it is appropriate and prudent for such committees to conduct all their business in open meetings." *Id.* Mr. Gaylord goes on to say,

> [t]he 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.

Id. Thereafter, the County Council followed Mr. Gaylord's advice and discontinued the practice of holding gatherings of three Council members without notice. CP 263-64, 291, ln 16-19, 334-35. Mr. Gaylord recognized that subcommittee's compliance with the OPMA was "prudent," but he did not say that failure to comply was "unlawful." CP 451-58. Further, as stated by Judge Hancock, "to the extent [Mr. Gaylord's memorandum] can be read as an opinion, [of unlawful activity] it is incorrect." CP 822.

CAPR filed a complaint for violations of the OPMA on October 16, 2012 (CP 1-21) and an amended complaint on November 2, 2012. CP 22-43

In mid-December 2012, the County Council concluded the long process of revising its critical areas regulations and adopted four ordinances. CP 681-91. The full County Council conducted over 75 public meetings to discuss one or more of the four critical areas ordinances. CP 771-75. Over 20 of those Council meetings occurred after Mr. Gaylord's April 2012 memorandum. *Id.* There is no dispute that the meetings after April 2012 were properly held and provided CAPR and its members numerous opportunities for public comment and to observe the process by which the County Council revised the ordinances in response to public comments. CP 771-75.

After filing suit, CAPR conducted extensive discovery, serving the County with voluminous interrogatories and requests for production and deposing three Council members and a County planner. On February 11, 2013, the County filed a motion for summary judgment requesting dismissal of the case. CP 72. Due to court scheduling matters, CAPR was given over seven weeks to respond to the County's motion. CP 94. The County timely filed a Reply and a hearing was held before the Honorable

Alan R. Hancock on April 19, 2013, ten weeks after the County's motion was filed.

On May 9, 2013, Judge Hancock issued a letter decision granting the County's motion for summary judgment. CP 816-28 (attached as Appendix A). Judge Hancock considered the facts in the light most favorable to CAPR, specifically assuming for the sake of argument, that, (1) the Team discussed, considered, reviewed and evaluated matters related to the proposed critical areas ordinance (CP 817-18); (2) the Team was established by the County Council (CP 817); and (3) the County Council could have directed the Team to act on its behalf (CP 823). Judge Hancock next concluded that CAPR failed to produce any evidence indicating that the majority of the Council was present at any of the meetings. CP 818. Judge Hancock also considered whether the Team, as a committee of the County Council, "acted on behalf of" the County Council in violation of the OPMA and found the record "devoid of any evidence that it did so." CP 823. Finally, Judge Hancock turned to CAPR's requested relief, and found "no basis for injunctive relief in this case." CP 825.

CAPR moved for reconsideration, presenting additional evidence and asserting for the first time that four members of the County Council – not members of any identified committee – met in violation of the OPMA

during a combination of telephone and email exchanges. CP 888-902. The issue was thoroughly briefed by both parties and on June 13, 2013, Judge Hancock issued a nine-page letter decision denying CAPR's motion. CP 924-32 (Attached as Appendix B).

In his June 13, 2013 decision, Judge Hancock found that CAPR had not shown any basis for reconsideration under CR 59. CP 924. Nonetheless, Judge Hancock again addressed each of CAPR's arguments concluding that "[t]here is no genuine issue of material fact, and the county is entitled to a judgment dismissing CAPR's amended complaint with prejudice." CP 932.

CAPR has now appealed Judge Hancock's decision granting the County's motion for summary judgment. As noted by Judge Hancock, CAPR is asking the Court to "ignore the plain terms of the OPMA and case law that supports the court's analysis in all respects." CP 927.

IV. STANDARD OF REVIEW

A. Summary Judgment

Standard of review is *de novo*. San Juan County moved for summary judgment and pointed out to the trial court that CAPR lacks sufficient evidence to support its case. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 21-22, 851 P.2d 689 (1993). "The County's motion was not a motion for judgment on the pleadings," said Judge Hancock:

> CAPR mischaracterizes the county's motion for summary judgment of dismissal as a motion for judgment on the pleadings. **The county's motion was not a motion for judgment on the pleadings**. The county clearly and unambiguously moved for summary judgment of CAPR's complaint in its entirely. In doing so, the county invoked the well established principles of Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989) and its progeny. (see, e.g., West v. Thurston County, 169 Wn. App. 862, __ P.3d __(2012).) The county argued that CAPR could not produce any facts showing that any violation of the Open Public Meetings Act had occurred, thereby meeting its obligation of showing an absence of material fact. The burden then shifted to CAPR to produce competent evidence to support its case. **It produced a great deal of evidence, but none of it showed that the defendants had violated the OPMA.** CAPR was not entitled to rely on mere allegations contained in its unverified amended complaint. West, supra, at 866.

CP 925 (emphasis added).

The Court in *Young v. Key Pharmaceuticals, Inc.*, held that once the defendant makes an initial showing that the elements of a claim cannot be met, the inquiry shifts to the party with the burden of proof at trial. 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "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." *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

Here, the County easily showed that a majority or quorum of a governing body of the County did not meet, that the Team did not "act on behalf of" the County Council and, in any case, that no action was taken. Having done so, the burden shifted to CAPR to make a showing sufficient to establish every element essential to its case. Contrary to CAPR's assertions, it cannot rely on the allegations *in its unverified complaint* but must set forth specific facts showing that there is a genuine issue for trial. *Young* at 225-26. CAPR failed to do so.

CAPR was unable to present to the court dates of meetings, the identity of a majority of Council members present and the action taken on behalf of the entire County Council. Despite filing hundreds of pages of deposition testimony and exhibits, CAPR did not identify the type of specific facts necessary to support its claims. CAPR cannot rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. Four Council Members Never Attended a Team Meeting.

CAPR repeatedly asserts that four Council members attended Team meetings. The Court should decline to consider "facts" recited in CAPR's brief that are not supported by the record. RAP 10.3(a)(5);

Sherry v. Financial Indem. Co., 160 Wn.2d 611, 160 P.3d 31 (2007). Passing treatment of an issue or lack of reasoned argument is insufficient to allow for meaningful review. *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) (reversed on other grounds, *State v. Stubbs*, 170 Wn. 2d 117, 240 P.3d 143 (2010)). Similarly, CAPR's arguments cannot be considered as evidence. *Norton's Cafeteria v. Ocean Acc. & Guarantee Corp.*, 137 Wash 299, 303, 242 P. 37 (1926). The Court should likewise disregard those legal arguments that are not supported by legal citation or reasoned argument. *State v. Stubbs*, 144 Wn. App at 652.

Nine times CAPR writes that four Council members were "present at" or "attended" meetings. Opening Brief pp. 3, 5, 11, 12, 16, 24, 33, 34, 39. These statements are not supported by the record because it did not happen. CAPR's Opening Brief at page 11, footnote 19 cites to 92 pages of materials submitted in CAPR's response to summary judgment, but not one page shows that four Council members attended a meeting. Similarly, footnote 28 of the Opening Brief states, "the evidence shows that some of the subcommittee meetings at issue in the case were attended by four Council members." Yet, the citation to the clerk's papers in support of this statement reflect the following exchange from Councilwoman Miller's deposition testimony:

> Q. I understand that though we have these terms called a subcommittee. It was at least a group that had three County Council members on it; is that correct?
>
> A. A CAO Implementation Team had three County Council members, yes.
>
> Q. And typically a subcommittee of the Council has three Council members on it, has it not?
>
> A. That is correct.

CP. 349-50. The above excerpt does not supports CAPR's assertion that subcommittee meetings were attended by four Council members; in fact, Councilmember Miller's statements contradict it.

This lack of candor calls into question every statement in CAPR's Opening Brief. Accordingly, the court should instead rely upon the uncontested facts identified by Judge Hancock.

V. ARGUMENT

A. Summary of Argument

After reviewing all the evidence in the record in the light most favorable to CAPR, Judge Hancock correctly determined that CAPR could not establish the elements of an OPMA claim.

To avoid summary judgment CAPR must produce evidence showing (1) members of a governing body, (2) held a meeting of that body, (3) where that body took action in violation of the OPMA, and (4) the members of that body had knowledge that the meeting violated the

statute. *Eugster v. City of Spokane*, 118 Wn. App. 383, 424, 76 P.3d 741 (2003). The first three elements must be shown to prevail on an OPMA claim. *Id.*

CAPR failed to show these three elements: (1) a quorum of the County Council met in violation of the OPMA, or (2) the CAO Team or other subcommittee acted on behalf of the San Juan County Council or (3) the CAO Team or other subcommittee took "action." Without evidence to support any one of these elements, CAPR's claim was properly dismissed.

CAPR confuses the term "action" as defined by RCW 42.30.020(3) and the phrase "act on behalf of" which is stated as a prerequisite for committees to be "governing bodies" under RCW 42.30.020(2). By doing so, CAPR attempts to apply the same elements of an OPMA claim to subcommittees as would be applied to the San Juan County Council. This is incorrect.

B. A Majority or Quorum of the County Council Was Not Present at Any Meeting.

1. <u>There was no gathering with four Council members present.</u>

A meeting with less than a majority of the governing body does not violate the OPMA. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 564, 27 P.3d 1208 (2001) *Eugster v. City of Spokane*, 128 Wn. App.

1, 3, 114 P.2d 1200 (2005). Additionally, the participants of the meeting must collectively intend to meet to transact the governing body's official business. *Id.* at 565. CAPR asserts that three members of the six-member County Council met at various times in violation to the OPMA. Three members of the San Juan County Council do not make a majority or a quorum of the six-member Council. CAPR's references to four members attending meetings is not shown in the record and should be disregarded by the Court.

2. The email exchange

In its motion for reconsideration, CAPR alleged for the first time that "four of the six Council members (Pratt, Fralick, Peterson, and Miller) held a series of telephone and email exchanges in which they discussed the wetland process for the critical areas ordinance update."[1] CP 895. Judge Hancock appropriately criticized CAPR for failing to raise this issue in summary judgment.

> This issue was never raised by CAPR in connection with the county's motion for summary judgment. It was therefore, waived, and need not be considered by the court. In light of the fact that CAPR never previously raised the issue, it is particularly troubling for CAPR to assert that the court "missed" this issue. Amended Motion, page 5. Obviously, the court did not miss the issue. CAPR never raised the issue! The court is under no obligation to search out issues that a party declines to raise.

[1] A copy of the email exchange (CP 877-79) is attached as Appendix C.

CP 928. Nevertheless, Judge Hancock addressed the merits of CAPR's allegations and found that the email exchange was never a meeting.

> The exchange involved nothing more than a short email exchange between two council members, Peterson and Fralick. There is reference to a telephone call from Councilmember Pratt to Mr. Fralick. Councilmember Miller was nothing more than a passive recipient of emails from Mr. Fralick.

Id. Judge Hancock concludes his analysis of this issue by finding,

> [t]he record also does not support CAPR's characterization that the three council members "discussed the wetland process for the critical areas ordinance update.". Rather, as Councilmember Fralick testified in his deposition, the emails had to do with a scheduling or timing issue. [CP 871-75]

CP 929 (internal citations omitted). Judge Hancock properly ruled "[t]here was no violation of the OPMA in connection with these emails and telephone conversation." *Id.*

The email chain at issue started on November 14, 2011, when County Planner Shireene Hale sent an email to the Planning Commission about the critical areas ordinances. CP 877-79. The County Council was not copied on the email. *Id.* That same day, Councilmember Rich Peterson received a copy of the email; how he received the copy is not shown. *Id.* Mr. Peterson forwarded Ms. Hale's email to two Councilmembers: Patty Miller and Richard Fralick, noting that he had a question. *Id.* Later that

day, Richard Fralick responded to Rich Peterson's question and copied Patty Miller. *Id.* Mr. Fralick also stated that Councilmember Lovel Pratt called him regarding other matters and that he mentioned Ms. Hale's email to Ms. Pratt. *Id.* Mr. Fralick further informed Mr. Peterson that he was not aware of the content of Ms. Hale's email until it was forwarded to him. *Id.* The rest of the email chain contains an email from Mr. Fralick to former County Administrator Pete Rose, and an email from Mr. Fralick to Patty Miller regarding a different matter. *Id.*

CAPR has not said when a "meeting" allegedly occurred; nor has CAPR indicated what "action" was taken by the County Council in this email exchange. The mere use or passive receipt of email by Councilmember Miller does not automatically constitute a "meeting." *Wood*, 107 Wn. App. at 564. Members of a governing body must collectively intend to meet to transact the governing body's official business and must communicate about issues that may or will come before the governing body for a vote. *Id.* at 565. In the November 14, 2011 email chain, the third Council member – Patty Miller – was nothing more than a passive recipient of the email, and there is no evidence that the fourth Council member – Lovel Pratt – even knew about the fact of the email. CAPR's presentation of this email chain does not establish the necessary elements for its OPMA claim.

C. A Subcommittee is Not a "Governing Body" If It Does Not "Act on Behalf of" the County Council.

The San Juan County Council is the legislative body of San Juan County. CP 726 (San Juan County Charter, Section 2.10). It is the policy and rule-making body of the County and falls squarely within the definition of "governing body" under RCW 42.30.020(2). The Team, however, is not a policy- or rule-making body of San Juan County. Consequently, the Team could only violate the OPMA if it acted "on behalf of" the County Council. The second part of RCW 42.30.020(2) applies the Act to, "any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." Thus, to establish that the Team violated the OPMA, CAPR had to show that the Team was a "committee of the Council" and was "acting on behalf of" the Council when the alleged violations occurred.[2]

Not all committees fall under the Act. When it adopted the OPMA, the legislature "demonstrated that they did not intend that all committee meetings be subject to the act." Wash AGO 1986 No. 16, p. 11 (Attached as Appendix D). In the 1986 Opinion, the Attorney General analyzed whether a subcommittee of a governing body, composed of members of

[2] Because CAPR has not alleged that the Team ever conducted hearings or took public testimony or public comment, that portion of RCW 42.30.020(2) is not addressed.

the governing body, is subject to the OPMA. *Id.* The formal Opinion remains the leading authority on the subject. Although not binding, formal Attorney General Opinions are persuasive authority and "entitled to great weight." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 309, 268 P.3d 892 (2011). Additionally, RCW 42.30.210 provides that the attorney general's office may provide information, technical assistance, and training on the provisions of the OPMA.

A 1983 amendment to the OPMA added the language "or any committee thereof when the committee acts on behalf of the governing body conducts hearings, or takes testimony or public comment" to the definition of "governing body." Wash AGO 1986 No 16. The Opinion concludes that "committees thereof" included all committees "created by the governing body pursuant to its executive authority..." *Id.* at 3.

The Attorney General Opinion next analyzes the phrase "acts on behalf of" and concludes that "a committee acts on behalf of the governing body when it exercises actual or *de facto* decisionmaking authority for the governing body." *Id.* at 5. The Opinion reasons that the words "conducts hearings or takes testimony or public comment" would be superfluous if all committee meetings were subject to the Act. *Id.* The legislative history of the amendment supports this conclusion. Specifically, while discussing the bill proposing the 1983 amendment

during the legislative session, in response to a point of inquiry from Representative Isaacson, Representative Hine described the scope of the 1983 amendment as follows:

> Mr. Isaacson: "Representative Hine, would formal notices be required when preliminary discussions were being held by members of the city council and city staff?"
> Ms. Hine: "Representative Isaacson, I believe that is not the intent of this legislation."
> Mr. Isaacson: "Would the bill apply to the meeting of a budget committee consisting of less than a majority of the governing body, discussing the budget with a department head?"
> Ms. Hine: "No, Representative Isaacson."
> 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 the 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."

Id. at 7 (Emphasis added) (citing House Journal, 48th Legislature (1983), at 1294). The Attorney General Opinion concludes that,

> [a] committee acts on behalf of the governing body when it exercises actual or de facto decisionmaking 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.

Id. at 7.

Here, the record does not support CAPR's claim that subcommittees of the County Council are "governing bodies." There is no evidence that the San Juan County Council created a group to act on its behalf, or that such a group exercised actual or *de facto* decision-making authority for the Council.

Paraphrasing Representative Hine, the County Council did not "specifically authorize" the Team to "act on its behalf." Under the County Charter, the power to act was reserved to the six member County Council by ordinance or resolution. CP 726-27 (San Juan County Charter). No "official action" has been shown by a majority of the County Council. In fact, the only evidence before the Court shows that such authority was not granted and was reserved to the full County Council. CP 761-70, 1006-07. Accordingly, CAPR failed to establish a mandatory element of its claim.

D. The Subcommittees Did Not Take "Action."

Finally, even if CAPR had shown the Team was a committee of the County Council and acted on behalf of the County Council, CAPR did not demonstrate that "action" was taken in violation of the OPMA. Despite hours of depositions and extensive written interrogatories, no such evidence of "action" appeared.

"Action" requires the "transaction of official business" of the governing body. Wash AGO 2006 No 6. (Attached as Appendix E). "The governing body members must communicate about issues that may or will come before the [governing body] for a vote; in other words, the members must take 'action' as the OPMA defines it." *Wood*, at 565. This does not include receiving information about upcoming issues or communicating among themselves about matters unrelated to the governing body's business via email. *Id.*

Viewing the facts in the light most favorable to CAPR, there were discussions among three Council members on the topics of the critical areas ordinances, the scheduling and sequence of consideration and methods of presenting scientific reports to the full Council. CP 256, 309, 392. Discussions alone by a minority of a County Council has never served as the basis for violation of the OPMA and for good reason; such limited action was not intended to be subject to the Act. As Representative Hines explained, "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." Wash AGO 1986 No 16, p 7. The three members never took action on the business of the full Council.

E. Judge Hancock Properly Dismissed CAPR's Entire Complaint

1. The County moved for summary judgment of CAPR's entire Complaint.

Judge Hancock found that the County "moved for summary judgment of dismissal of CAPR's complaint in its entirety." CP 925. Judge Hancock went on to state,

> CAPR's allegations relating to the budget subcommittee, the general governance subcommittee, and the solid waste subcommittee are without merit. CAPR never sued these entities or the members thereof, and never produced any evidence showing that these subcommittees had violated the OPMA. Summary judgment of dismissal of CAPR's complaint in its entirety was appropriate.

CP 925. Judge Hancock then reiterated, "*CAPR produced no evidence that the budget subcommittee, the general governance subcommittee, or the solid waste subcommittee violated the OPMA.*" CP 926 (emphasis in original).

CAPR does not identify the date of alleged meetings, who was present at the meetings, or what action was taken. Given the procedural posture of the case, the fact that only the CAO subcommittee is a named party, and the limited relief requested in CAPR's claim for relief, Judge Hancock appropriately granted the County's motion for summary judgment and dismissed the case in its entirety.

2. Judge Hancock properly found no basis for injunctive relief and that CAPR failed to establish an action or decision made in violation of the OPMA.

CAPR's Amended Complaint requests the Court to declare null and void any and all decisions made in violation of the OPMA, and enjoin future violations. CP 42-43. As a preliminary matter, CAPR failed to identify any decisions made in violation of the OPMA, thus there was nothing for Judge Hancock to declare null and void. Indeed, Judge Hancock observed:

> The OPMA itself makes it clear that the remedy for a violation of the OPMA is to declare that "[a]ny action taken at meetings failing to comply with the provisions of this subsection shall be null and void." RCW 42.30.060(1). So at best, even if CAPR had shown that there were meetings held in violation of the OPMA, which it has not, the remedy would be to declare any actions taken at such meetings null and void, not anything that occurred in compliance with the law thereafter.
>
> There is no indication that there were votes or other official action taken at any such gatherings, as the term "action" is normally understood. The court is mindful of the fact that "action" is defined under the Act to include discussions, considerations, reviews, and the like, but as a practical matter, it would be pointless to declare any such matters null and void.

CP 827.

Similarly, Judge Hancock denied CAPR's request for injunctive relief. The County ended unnoticed gatherings of the Team in April 2012,

six months before this lawsuit was filed and eight months before the adoption of the Critical Areas Ordinances. CP 771-75. In November 2012, voters adopted charter amendment Proposition 3, ensuring that all future gatherings of three Council members comply with the OPMA. CP 741. Finally, the voters further adopted charter amendment Proposition 1, reducing the total number of Council members to three (CP 737); and in doing so created a bright line rule so that even administrative decisions will occur in the public's view. The request for injunctive relief and invalidation in CAPR's Amended Complaint simply did not make sense and was properly denied.

3. Invalidation of the critical areas ordinances is not appropriate.

CAPR's Opening Brief requests attorney's fees and costs and entry of a declaration invalidating the four critical areas ordinances adopted in December 2012. Opening Brief at 48. Judge Hancock ruled that,

> all Washington cases which have dealt with the issue have held that meetings held in violation of the OPMA, leading up to the passage of an ordinance or other action of the governing body at a meeting properly conducted under the OPMA, do not invalidate the action taken at a proper meeting.

CP 825. The appropriate relief for a violation of the OPMA is to declare null and void any "action" taken at the noncompliant meeting. RCW 42.30.060. As noted by Judge Hancock,

> after April 26, 2012, the council held hundreds of hours of open public meetings on the proposed ordinance. Numerous members of the public gave testimony, the issues were considered by the council, the council deliberated, and the council ultimately took final action.

CP 826; See also, CP 771-75 (Declaration of Lisa Brown attaching public meeting schedule of County Council).

Under well-established Washington case law, if the final action taken by the governing body complies with the OPMA, the action is valid even if earlier action did not comply. *Organization to Preserve Agricultural Lands (OPAL) v. Adams County*, 128 Wn.2d 869, 883, 913 P.2d 793 (1996). Thus, even had CAPR been successful in its claims that the Team violated the OPMA, the remedy would be to declare invalid only the action taken by the Team which violated the Act.

In *OPAL* the court held a violation of the OPMA can be cured, and subsequent actions taken in compliance with the OPMA are not invalidated. 128 Wn.2d at 883. In the *OPAL* case, two members of the three-member Adams County Board of Commissioners discussed a proposal over the phone before the public meeting. *Id.* at 881. The *OPAL* court upheld the trial court's determination that no violation of the OPMA occurred and went on to uphold the trial court's determination that communication between the commissioners was irrelevant because the final vote occurred in a proper, open public meeting, stating:

> [g]iven the extensive opportunity for input by opposing parties in this case, we agree with the trial court that invalidation of the [permit approved by the Commission at an open public meeting] is not warranted merely because two of the commissioners discussed in private who should make the motion to issue the [permit].

Id. at 883-884.

Similarly, in the 2003 decision of *Eugster v. City of Spokane*, the court stated,

> [e]ven assuming an OPMA violation, Mr. Eugster's attempts to invalidate the ordinance on this ground fails because the enactment of the ordinance itself did not violate the statute. As a general rule, meetings held in violation of OPMA will not invalidate a later final action taken in compliance with the statute. Here, unquestionably the City Council adopted the ordinance in a public meeting after listening to a great deal of public comment, both for and against the project ... Accordingly, even if the challenged meetings violated OPMA, such violations will not nullify the property enacted ordinance.

118 Wn. App. 383, 423, 76 P.3d 741 (2003) (internal citations omitted; emphasis added).

The record in this case shows that any alleged violation of the OPMA in the passing of the critical areas ordinances was cured by the public meetings held after April 26, 2012. CP 771-75. The San Juan County Council held hundreds of hours of open public meetings before it adopted these ordinances. *Id.*

The record shows that the process for adoption of the critical areas ordinances met all of the requirements of the OPMA. CAPR has provided no support for its assertion that the critical areas ordinances should be declared invalid. There is no basis for CAPR's requested relief, and thus also no basis for attorney's fees pursuant to RCW 42.30.120(2).

VI. CONCLUSION

For the reasons described above, the County respectfully requests that the Court affirm Judge Hancock's Order on Motions and Granting the Summary Judgment in favor of the County and the Order Denying CAPR's Motion and Amended Motion for Reconsideration of the Summary Judgment Decision.

Respectfully submitted this 25th day of November 2013.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

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

Appendix A

Judge Hancock's May 9, 2013 letter decision
CP 816-828

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR ISLAND COUNTY

Law & Justice Facility, 101 NE 6th St, PO Box 5000, Coupeville WA 98239-5000
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ALAN R. HANCOCK
Judge
VICKIE I. CHURCHILL
Judge
BROOKE POWELL
Court Administrator
ANDREW SOMERS
Assistant Court Administrator

May 9. 2013

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Citizens Alliance for Property Rights Alliance v. San Juan County, et al.
San Juan County Cause No. 12-2-05218-3
Court's Decision on San Juan County's Motion to Dismiss

Dear Counsel:

Background

Plaintiff Citizens Alliance for Property Rights Legal Fund (CAPR) sued San Juan County, three San Juan County council members, Richard Fralick, Patty Miller, and Lovel Pratt, and what it calls the San Juan County Critical Areas Ordinance (CAO)/Shoreline Master Program (SMP) Implementation Committee. It also refers to the committee as the CAO implementation committee or subcommittee. CAPR refers to this as a committee or subcommittee of the San Juan County Council.

Among other things, CAPR sought in its complaint (1) a declaration that the Open Public Meetings Act (OPMA), chapter 42.30 RCW, was violated and that any and all decisions made by the CAO/SMP committee in violation of the OPMA are null and void, (2) the assessment of a civil penalty of $100 against each person who knowingly violated the OPMA, (3) costs and attorney fees, (4) an injunction enjoining future violations of the OPMA, and (5) an injunction enjoining implementation or enforcement of any ordinance adopted in violation of the OPMA.

There were other allegations in the complaint pertaining Growth Management Act issues, but CAPR took a voluntary nonsuit concerning these claims.

CAPR's amended complaint alleges that this committee or subcommittee, or the Critical Areas Ordinance Implementation Team, as the county defendants (hereinafter referred to as the county) call it, met at various times and discussed the proposed critical areas ordinance or ordinances and other official business. The complaint further alleges that the committee studied issues related to proposed ordinances, called outside contractors and staff, and deliberated on provisions of the proposed ordinance.

The county has admitted that three council members met from time to time for the purpose of facilitating and coordinating the county's efforts to adopt updated development regulations for critical areas as required by the Growth Management Act, but denies that a quorum or majority of the council was ever present at these meetings or gatherings.

The county has moved for summary judgment of dismissal of CAPR's complaint. The court held a hearing on the motion on April 19, 2013. At the hearing, CAPR orally took a nonsuit as to its request for the assessment of civil penalties against the three council members. The court had not received Plaintiff's Sur-Reply in Opposition to Defendants' Motion for Summary Judgment prior to the hearing, so the court took the matter under advisement. After a thorough review of the record and the briefs and arguments of counsel, the court is now prepared to rule on the motion for summary judgment.

Summary Judgment Standards

As a general proposition, CR 56(c) provides that summary judgment should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.

In the case of Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989), the Washington Supreme Court adopted the standard of Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed. 2d 265, 106 S. Ct. 2548 (1986), to the effect that 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. Thus, a defendant moving for summary judgment has a choice of either attempting to establish through affidavits that no material factual issue exists or, alternatively, the defendant can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of his or her case. If a defendant chooses the latter alternative, the requirement of setting forth specific facts does not apply. This is because a failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. One among several cases holding this is Guile v. Ballard Community Hospital, 70 Wn. App. 18, 851 P.2d 689 (1993).

In the present case, the county chose the latter alternative, as it had the right to do.

To avoid any uncertainty about the basis for the court's decision in this case, the court will assume for the sake of argument, and without deciding, that the CAO

implementation committee or team discussed, considered, reviewed and evaluated matters related to the proposed critical areas ordinance. However, it is undisputed that the committee took no final action, as that term is defined in RCW 42.30.020(3), at any time.

The court 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, as opposed to the county administrator. Councilmembers Stephens, Fralick, Miller, Pratt, and Rosenfeld have all stated under oath that they never took any action as a council member by motion, resolution or ordinance to bring the CAO implementation team into being.

CAPR relies on the testimony of Deputy Director of Community Development and Planning Shireene Hale to establish that the committee or team was a council committee. She testified that the council "would have created it." There was no showing that she had personal knowledge to testify to this fact, and no indication that she was not relying on hearsay. Thus, this testimony was incompetent, and the county's motion to strike is granted to this extent.

It is also interesting to note that CAPR has not produced any actual resolution or other official action by the council creating the committee or team. CAPR cites to other parts of the record in this case and argues that they show that the committee or team was established by the council. But a close review of these parts of the record do not show this. (For example, CAPR cites to a statement by Councilmember Jamie Stephens at a special meeting of the council on January 31, 2012, for the proposition that the committee or subcommittee was a committee of the council, but Councilmember Stephens did not say this.) In any event, the court's decision in this case would be the same regardless of whether the council or the county administrator created the committee or team.

The OPMA was not violated when less than a majority or quorum of the council was present at any meeting

CAPR has failed to produce any evidence indicating that a majority of the council, that is, four members of the six-person council, was present at any of the meetings of the committee, or otherwise, except as part of properly noticed open public meetings. Thus, the primary issue on summary judgment is narrow and straightforward: Did members of the San Juan County Council violate the OPMA by attending meetings in which three of the six members were present?

The OPMA is set forth in chapter 42.30 RCW. RCW 42.30.030 provides: "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."

RCW 42.30.060(1) provides:

"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 42.30.120(2) provides, in pertinent part:

"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 attorneys' fees, incurred in connection with such legal action."

RCW 42.30.130 provides:

"Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body."

RCW 42.30.910 provides:

"The purposes of this chapter are hereby declared remedial and shall be liberally construed."

In order to overcome summary dismissal of an OPMA claim, the plaintiff must produce evidence showing (1) members of a governing body (2) held a meeting of that body (3) where that body took action in violation of the OPMA, and (4) the members of that body had knowledge that the meeting violated the statute. Eugster v. City of Spokane, 118 Wn. App. 383, 424, 76 P.3d 741(2003) (Eugster 2), wherein the court cited to Eugster v. City of Spokane, 110 Wn. App. 212, 39 P.3d 380 (2002) (Eugster 1).

The court in Eugster 2 also held that a "meeting," as that term is defined in RCW 42.30.020(4), takes place when a *majority* of the governing body meets and takes "action," as that term is defined in RCW 42.30.020(3). Eugster 2 cites Eugster 1 as well as the case of Wood v. Battle Ground Sch. Dist., 107 Wn App. 550, 27 P.3d 1208 (2001) in support of this proposition. The court in Eugster 2 stated:

"Mr. Eugster's declarations and exhibits do not raise a reasonable inference that a majority of the city council held meetings and took action in knowing violation of OPMA at the alleged meetings." (118 Wn. App. at 424.)

There are several other Washington cases that hold that in order for the OPMA to be violated, a majority of the governing body must be present at the alleged meeting, or to put it another way, there must be a quorum of the governing body present, such that there is an ability of the governing body to transact official business. Among these cases are Eugster v. City of Spokane, 128 Wn App. 1, 114 P.3d 1200 (2005) (Eugster 3),

Loefferholz v. C.L.E.A.N., 119 Wn. App. 665, 82 P.3d 1199 (2004), and In re Recall of Beasley, 128 Wn.2d 419, 908 P.2d 878 (1996).

CAPR presents various arguments to the effect that where three members of the council meet, a meeting under the OPMA takes place, such that it must noticed and open to the public in order to comply with the OPMA.

CAPR cites prosecuting attorney Randall K. Gaylord's April 26, 2012, memorandum to the council and charter review commission, in which Mr. Gaylord advised that the OPMA does apply to subcommittee meetings and other gatherings (except social events) when there are three members of the council present. He stated that it was appropriate and prudent for all council committees to conduct their business with the notice required under the OPMA, and further stated:

"With an appropriate respect for caution and to protect the public interest and assure the validity of actions of 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."

In an opinion issued in December of 2011, Mr. Gaylord had advised that a gathering of three council members to discuss county business is not subject to the OPMA because it is not a meeting, as that term is defined in the act, because there is no quorum of the governing body. The primary reason that Mr. Gaylord changed his advice in this regard was the holding in the case of State ex rel. Newspapers, Inc. v. Showers, 135 Wis.2d 77, 398 N.W.2d 154 (1987).

In the Showers case, which for obvious reasons CAPR relies on, the Wisconsin Supreme Court held that provisions of the Wisconsin Open Public Meetings laws (somewhat, but not entirely, analogous to Washington's laws) apply any time that there "is a 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."

In the Showers case, four members of an 11-member body met to work out a compromise on a budget change. The budget change required a 2/3rds majority of the 11-member body to pass, thus 8 of the 11 members of the body had to approve the change. The court held that the meeting of the four members was subject to Wisconsin's 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."

Mr. Gaylord applied the Showers analysis to the composition of the San Juan County Council, which consists of six members. Thus, 3 of the 6 members could prevent any particular action from garnering the necessary 4 votes for passage. He advised that to assure the validity of actions of the council, meetings of three council members should only occur if there is compliance with the notice and other requirements of the OPMA.

Mr. Gaylord's advice, whether it was correct or not, had the salutary effect of ensuring that all future gatherings of the committee occurred after compliance with the OPMA. The critical areas ordinance itself was passed only after numerous public hearings, all of which were properly noticed under the OPMA. (See Declaration of Lisa Brown, filed April 18, 2013.)

Under the former San Juan County charter, ordinances and other actions of the council could only pass with at least four votes. The chances of a so-called negative quorum actually creating a paralysis of inaction in government are slim, particularly where the council is required under various state laws, such as the Growth Management Act, to pass legislation of one kind or another to comply with the law. And at no time could a so-called negative quorum actually pass anything.

But there is a more fundamental reason why this court should not follow Showers. Not only is it not binding precedent, as an out-of-state case, but it is also contrary to all of the Washington cases that have considered the issue of what constitutes a meeting under the OPMA. CAPR has not cited any other case that adopts the Showers reasoning.

As noted previously, numerous Washington cases have held that for purposes of the OPMA, a meeting occurs only if a majority or a quorum of the governing body is present. The attendance of fewer that a majority or a quorum of the governing body at a gathering has never been held to constitute a meeting.

It is particularly notable that the first and third of the Eugster cases all dealt with actions of members of the Spokane City Council. The Spokane City Council is ordinarily a 7-member body. But at the time of the proceedings in question in these cases, it was a six-member body because one of the council positions was vacant. So the situation in that sense was identical to the present case involving the six-member San Juan County Council.

In both Eugster 1 and Eugster 3, the court dealt with a city councilmember's claim that four council members violated the OPMA by agreeing on a selection process to fill a vacant council position in a nonpublic forum.

In Eugster 1, the court held that there were genuine issues of material fact, precluding summary judgment of dismissal for the city, as to whether a meeting took place within the meaning of the OPMA and whether the participants had knowledge that the meeting violated the Act. The case was remanded to the trial court for further proceedings. The court made it clear that if less than a majority of the council (in that case three council members) attended the alleged meeting, then no meeting occurred and the OPMA was not violated.

In Eugster 3, the second appeal of the case after the remand to the trial court, the court held that the record did not show that a violation of the OPMA occurred because only three council members attended a meeting to discuss the selection process to fill the vacant council position. The court again cited the rule that no meeting takes place, and

the OPMA does not apply, if the governing body of the public agency lacks a quorum. 128 Wn. App. at 8.

In Eugster 2, the court considered, among other things, a challenge to an ordinance pledging to loan parking meter revenue to a public development authority to cover parking garage expense shortfalls. The plaintiffs sought to have the ordinance invalidated under the OPMA. The plaintiffs alleged that meetings in violation of the OPMA occurred before the council's official consideration of the ordinance, and therefore the ordinance itself should be invalidated.

The court rejected this argument, holding, in keeping with prior cases, that meetings held in violation of the OPMA will not invalidate a later final action taken in compliance with the Act. The court further held that no meetings in violation of the OPMA occurred because there was no showing that a majority of the governing body had met. Thus, again, the court cited the rule that a meeting takes place for purposes of the OPMA only when a majority of the governing body meets and takes action.

As previously noted, CAPR relies on the reasoning of the Wisconsin case of State ex rel. Newspapers, Inc. v. Showers in support of its position that gatherings attended by three members of the council constitute meetings under the OPMA. The fact is, however, that the holding of this case is directly contrary to numerous Washington cases that have considered this issue. The court is bound by the law of precedent to follow Washington case law.

CAPR notes that the Washington cases do not appear to address the reasoning of the Showers case, and that may be correct. But that is not determinative. The court must follow the holdings of Washington appellate cases, and they all hold that there is no meeting under the OPMA when less than a majority or quorum of the governing body gathers. These decisions all involved the determination of a legal matter that was pivotal to a judicial decision (that is, they were holdings), and they all involved factual situations in which it was alleged that a gathering of fewer than a majority or quorum of a governing body constituted a meeting under the OPMA. In the first and third Eugster cases, the factual situation was one in which three members of a de facto six-member council met. The court held in all of theses cases that there was no meeting under the OPMA.

Turning to other matters, it is not entirely clear that Mr. Gaylord's April 26, 2012, memorandum was an opinion, as opposed to the providing of advice to council members. To the extent that it can be read as an opinion, it is incorrect.

But to the extent that Mr. Gaylord was offering conservative advice that there should be compliance with the OPMA whenever there are gatherings of three council members, then in a general sense he should be commended. This advice offered a pathway under which no one could argue that there was noncompliance with the OPMA, and under which the public would be able to know about, and attend, such meetings, in keeping

with the salutary purposes of the OPMA, even where strict compliance was not required. And the record in this case shows that his advice was followed thereafter.

The CAO/SMP committee or team did not act on behalf of the council

Besides the fact that no more than three council members ever attended any of the committee gatherings, there is another reason why no "meetings" for purposes of the OPMA occurred. RCW 42.30.060(1), which is the basis for CAPR's claim in this case, provides that "[n]o 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" of which public notice has been given. The term "governing body" includes the multi-member board or council itself, and also "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).

Clearly, the council itself never did anything at any of the meetings of the CAO/SMP implementation committee or team. So the only way in which CAPR could prevail in this regard is if the committee or team acted on behalf of the council, conducted hearings, or took testimony or public comment. The committee or team never conducted hearings or took testimony or public comment. So the only remaining question is whether it acted "on behalf of" the council.

The first thing to notice about this matter is that the council had no authority under the county charter to delegate its authority to a committee, so as a matter of law, it could not have directed the committee or team to act on its behalf.

But even assuming, for the sake of argument, that it could direct the committee or team to act on its behalf, the record in this case is devoid of any evidence that it did so. As the court indicated in the Loeffelholz v. C.L.E.A.N. case, the alleged governing body, which consisted of seasonal workers performing certain tasks on behalf of a county canvassing board, could not constitute a governing body unless it had policy-making or rule-making authority, and nothing in the record in that case indicated that it did.

The same is true in the present case. There is no evidence in the record of the present case to indicate that the committee or team had any such authority. There is no evidence to indicate that the committee or team acted on behalf of the council. Therefore, it could not, as a matter of law, be characterized as a governing body, a prerequisite to an OPMA violation. Eugster 2, 118 Wn. App. at 424.

An opinion of the Attorney General, AGO 1986 No. 16, also makes this point by stating 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." Page 7. The legislative history of the 1983 amendment to the OPMA also supports this conclusion, as evidenced by the discussion between Representatives

Isaacson and Hine on the floor of the state House of Representatives cited by the county at pages 14 and 15 of its reply brief.

CAPR appears to confuse the term "action" with the phrase "acts on behalf of the governing body" in the definitions in RCW 42.30.020. RCW 42.30.020(3) defines the term "action" as "the transaction of the official business of a public agency by a governing body," and as previously noted, there can be no governing body unless there is a majority or quorum thereof.

As also previously noted, a committee acts on behalf of a governing body when it exercises actual or de facto decision-making authority for the governing body. AGO 1986 No. 16, page 7. Apart from the fact that there is no *factual* evidence that the CAO/SMP committee or team acted on behalf of the council (the county's governing body), and that it had no *legal* authority to do so, it is also fallacious to argue, as CAPR seems to do, that the committee or team *acted* on behalf of the council because it engaged in *action*. This argument is invalid because of its circularity.

Under fundamental principles of logic, the conclusion of an argument cannot also be one of the argument's premises. In this case, CAPR appears to be arguing that since "action" by a *governing body* includes discussions, considerations, reviews, and the like under the definition of "action," and under the definition of "governing body" a committee is a governing body when it acts on behalf of the governing body, the CAO/SMP implementation committee or team must *be* a governing body because it *is* a governing body in the sense that it engaged in discussions, considerations, and the like. So, in effect, the CA has used the definition of action by a governing body as a premise of its argument that the committee or team acted on behalf of the governing body. In other words, to put it more bluntly, the committee or team is a governing body because it is a governing body. This is fallacious circular reasoning.

The court is mindful of the fact that CAPR also argues that the committee or team constitutes a "public agency" for purposes of the OPMA. This is clearly wrong. As it might apply in the present case, "public agency" is defined in the OPMA as "[a]ny county, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington" or "[a]ny 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." RCW 42.30.020(1)(b) and (c).

There is no possible reading of the statute that could support the concept that the CAO committee or team is a public agency. San Juan County is the applicable public agency in the present case. There is no evidence whatsoever that the committee or team was "created by or pursuant to statute, ordinance, or other legislative act." (In passing, the court notes that CAPR refers to San Juan County as a municipal corporation of the State of Washington. It is not. San Juan County is a political subdivision of the State of Washington.) is this correct?

Regardlesss of whether there were violations of the OPMA by the CAO/SMP implementation committee or team, there is no basis for injunctive relief in this case

Turning to another aspect of the case, CAPR takes the position that the county should be enjoined from implementing or enforcing the critical areas ordinance ultimately passed by the council because of the alleged OPMA violations relating to the gatherings attended by three members of the council. There is no support for this position. (While CAPR states that this issue may not be before the court at this time, it is. The county has moved for summary judgment of dismissal of CAPR's complaint, and its complaint includes a request for this relief. Thus, if there is no legal or factual basis for this relief, the county's motion should be granted.)

All of the Washington cases which have dealt with this issue have held that meetings held in violation of the OPMA, leading up to the passage of an ordinance or other action of a governing body at a meeting properly conducted under the OPMA, do not invalidate the action taken at a proper meeting. One such case is Eugster 2, as the court noted previously. 118 Wn. App. at 423.

Another such case where this issue was squarely presented was OPAL v. Adams County, 128 Wn.2d 869, 913 P.2d 793 (1996). In that case, two members of a three-member board of county commissioners met in violation of the OPMA prior to the board's decision, at a properly noticed meeting, to grant a land use permit. The court upheld the trial court's decision that the prior meeting was irrelevant because the final vote occurred in a proper open public meeting.

CAPR cites the cases of Eugster 1, Feature Realty Inc. v. City of Spokane, 331 F.3d 1082 (9th Cir. 2003), and Clark v. City of Lakewood, 259 F.3d 996 (9th Cir. 2001) in support of its statement that "the great weight of courts have concluded that subsequent action should be invalidated when the prior OPMA violations substantially tainted the subsequent ratification." Plaintiff's Sur-Reply, pp. 10-11. These cases do not stand for this proposition—quite the contrary.

In both Eugster 1 and Feature Realty Inc., the courts specifically acknowledged the rule that a later properly ratified ordinance remedied prior procedural OPMA defects, citing Henry v. Town of Oakville, 30 Wn. App. 240, 246, 633 P.2d 892 (1981). The court has already analyzed the Eugster 1 case herein.

In the Feature Realty Inc. case, the primary issue was whether a settlement agreement entered into by the Spokane City Council and a property developer violated the OPMA. The settlement agreement was approved at an executive session of the council, but never adopted by the council at an open public meeting. However, the council later took actions at open public meetings which, in effect, presupposed the validity of the agreement. The court acknowledged the Henry v. Town of Oakville rule, but held that it did not apply under the circumstances before the court because the council did not actually "retrace its steps and remedy the defects by reenactment with the proper

formalities" required under Washington law. (See Henry v. Town of Oakville, supra, at 246.)

In the case of Clark v. City of Lakewood, the court considered the constitutionality of the city's adult cabaret ordinance, as well as the issue of whether the ordinance was enacted in violation of the OPMA. Regarding the OPMA issue, the Lakewood City Council authorized its planning advisory board to form the so-called Lakewood Adult Entertainment Task Force to analyze all aspects of adult entertainment in the city. The task force conducted meetings, but closed the majority of them to the public. The task force prepared a report to the planning advisory board setting forth its findings, conclusions and draft adult cabaret ordinance. The board considered this and other material and recommended to the city council that the ordinance be passed. The city council considered the task force's report and passed the ordinance.

Among other things, the plaintiff contended that the task force was a "governing body of a public agency" under the OPMA definition, and that its closed meetings violated the OPMA. The court agreed, and found that the action taken by the task force in closed meetings was null and void. However, *the court ruled that since the city council's actual passage of the ordinance occurred at a public meeting, it was not null and void under the OPMA.* The court did rule that since the task force's actions at closed meetings potentially undercut the evidentiary foundation for the ordinance, the case should be remanded to the trial court to determine what specific actions of the task force were null and void and what effect, if any, that may have on the constitutionality of the ordinance. The point is that the court did not find that the passage of the ordinance in an open public meeting violated the OPMA. The problem to be examined by the trial court on remand was whether actions taken by the task force, voided for violation of the OPMA, undermined the evidentiary foundation necessary to comply with constitutional principles.

CAPR has cited no case holding that a meeting or meetings in violation of the OPMA, occurring prior to an action taken in compliance with the OPMA, invalidates the action taken in compliance with the OPMA.

In the present case, after the receipt of Mr. Gaylord's memorandum of April 26, 2012, all meetings leading up to the passage of the critical areas ordinance were conducted in compliance with the OPMA. As the county points out, after April 26, 2012, the council held hundreds of hours of open public meetings on the proposed ordinance. Numerous members of the public gave testimony, the issues were considered by the council, the council deliberated, and the council ultimately took final action. Members of CAPR and all other members of the public had every opportunity to make their statements at the public hearings and submit written comments. There is nothing in the case law or in the OPMA itself that would permit the court to invalidate the ordinance under these circumstances.

The OPMA itself makes it clear that the remedy for a violation of the OPMA is to declare that "[a]ny action taken at meetings failing to comply with the provisions of this

subsection shall be null and void." RCW 42.30.060(1). So at best, even if CAPR had shown that there were meetings held in violation of the OPMA, which it has not, the remedy would be to declare any actions taken at such meetings null and void, not anything that occurred in compliance with the law thereafter.

There is no indication that there were votes or other official action taken at any such gatherings, as the term "action" is normally understood. The court is mindful of the fact that "action" is defined under the Act to include discussions, considerations, reviews, and the like, but as a practical matter, it would be pointless to declare any such matters null and void.

If a statute is clear on its face, its meaning is to be ascertained from the language of the statute alone. American Continental Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). In this case, the OPMA is clear on its face. It states that any action taken at meetings failing to comply with the provisions of the act shall be null and void. It does not state that any action taken at meetings held in compliance with the act (even assuming, for the sake of argument, that such meetings occurred after other meetings held in violation of the act) are void. It would be an illegitimate exercise of judicial power for this court to recognize a statutory remedy where the statute itself does not provide for such a remedy.

The court next turns to the issue of whether, under any circumstances of the present case, CAPR would be entitled to an injunction enjoining future violations of the OPMA. There clearly would be no legal basis to do so.

First of all, as noted previously, there were no gatherings of the CAO/SMP implementation committee or team without the required OPMA public notice after Mr. Gaylord issued his memorandum opinion on April 26, 2012. The council members followed his advice, and there is no basis under the record of the present case to think that they would not continue to do so.

Secondly, in order to grant an injunction, the court has to find, among other things, that the plaintiff has shown that he or she has a well-grounded fear of immediate invasion of a clear legal or equitable right. Washington Federation of State Employees, Council 28, AFL-CIO v. State, 99 Wn.2d 878, 665 P.2d 1337 (1983). Even assuming that CAPR had shown a violation of a clear legal or equitable right, which it has not, it would not be possible to show a well-grounded fear of immediate invasion of that right because the six-member council is passing out of existence.

Under the new county charter amendments adopted in 2012, the size of the council was reduced from six to three members, the county administrator was eliminated as a separate branch of government, and most importantly as it relates to the present case, all subcommittee meetings of the council are subject to the OPMA.

The citizens of San Juan County have exercised their right under the charter to change it. Some of what CAPR was seeking in this case has now come to pass by way of legislative

changes in the charter. Even if CAPR had shown that there were violations of the OPMA, which it has not, there would be no purpose to be served by an injunction enjoining the council from future violations of the OPMA.

While CAPR has withdrawn its request for civil penalties against the defendant council members, the court notes that in order to prove a claim for civil penalties under the OPMA, the plaintiff must prove, among other things, that the members of a governing body had knowledge that the meeting alleged to be in violation of the OPMA did, in fact, violate the OPMA. In the present case, there is no evidence that the three council members who attended the committee or team gatherings knew that they acted in violation of the OPMA.

On the contrary, Mr. Gaylord had opined in December of 2011 that meetings attended by less that a majority of council members did not violate the OPMA. He then advised in the April 26, 2012, memorandum that such meetings should not occur, and thereafter they didn't. The council members followed the prosecuting attorney's advice. So even assuming for the sake of argument that the CAO/SMO implementation committee or team meetings violated the OPMA, which they didn't, there is no evidence that the council members knew that the meetings violated the OPMA.

Conclusion

In summary, there is no genuine issue of material fact on the issues raised in CAPR's complaint. The county defendants are entitled to a judgment of dismissal of CAPR's lawsuit as a matter of law. The court will entertain a judgment and order to this effect. All of the documents presented by the parties on this motion should be listed in the judgment and order granting summary judgment. The court has reviewed all of these documents.

In view of the court's decision, the court finds it unnecessary to address the county's motion to strike portions of declarations offered by the plaintiff, with the exception of Shireene Hale's deposition testimony that "the Council would have created" the implementation committee or team. Declaration Robert H. Palmer III in Opposition to Defendants' Motion for Summary Judgment, Exhibit D, page 34. The court will entertain an order striking this portion of Ms. Hale's testimony. Even assuming that all of this evidence were admissible, the court's decision would not change.

Very truly yours,

Alan R. Hancock

Alan R. Hancock, Judge

Copy: File, San Juan County Cause No. 12-2-05218-3

Appendix B

Judge Hancock's June 13, 2013 letter decision
CP 924-933

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR ISLAND COUNTY

Law & Justice Facility, 101 NE 6th St, PO Box 5000, Coupeville WA 98239-5000
Phone: (360) 679-7361 Fax: (360) 679-7383

ALAN R. HANCOCK
Judge
VICKIE I. CHURCHILL
Judge
BROOKE POWELL
Court Administrator
ANDREW SOMERS
Assistant Court Administrator

June 13, 2013

Dennis D. Reynolds, Esq.
Robert H. Palmer III, Esq.
Dennis D. Reynolds Law Office
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110

Amy S. Vira
Deputy Prosecuting Attorney
P.O. Box 760
Friday Harbor, WA 98250

Re: Citizens Alliance for Property Rights Legal Fund v. San Juan County, et al.
San Juan County Cause No. 12-2-05218-3
Court's decision on CAPR's motion for reconsideration

Dear Counsel:

Plaintiff's Motion for Reconsideration of Summary Judgment Decision and Amended Motion for Reconsideration of Summary Judgment Decision have been filed. The court assumes that the amended motion takes the place of the original motion, and that CAPR would like the court to address the amended motion. There appear to be no substantive differences between the motion and the amended motion. The court's analysis herein applies to both motions, if for some reason CAPR intends that the court address both motions.

The court directed that the motion be heard without oral argument pursuant to CR 59(e)(3) and set a briefing schedule. The court has now received the briefs of the parties, has again reviewed the record, and is prepared to rule on the motion.

CAPR has not shown any basis for reconsideration under CR 59.

CAPR has moved for reconsideration under CR 59, alleging that the court's decision granting summary judgment of dismissal of CAPR's complaint was contrary to law and that substantial justice has not been done. CR 59(a)(7), (9). CAPR reiterates the arguments that it made in response to the motion for summary judgment and adds a new

argument. While it is questionable whether CAPR should be permitted to merely reargue the motion for summary judgment and add a new argument not raised previously, the court will address the motion.

The court's decision to grant summary judgment dismissing CAPR's complaint in its entirety was proper under the law. Indeed, no other result would have been proper under the law. While CAPR's new argument that a "meeting" for purposes of the OPMA occurred by means of emails between two council members and telephone conversation between two council members was never raised previously, and is therefore untimely, the court nevertheless addresses it below. It is without merit. The motion for reconsideration should be denied.

The county and the county defendants (hereinafter "the county") moved for summary judgment of dismissal of CAPR's complaint in its entirety. The county did not move for judgment on the pleadings.

CAPR mischaracterizes the county's motion for summary judgment of dismissal as a motion for judgment on the pleadings. The county's motion was not a motion for judgment on the pleadings. The county clearly and unambiguously moved for summary judgment of CAPR's complaint in its entirety. In doing so, the county invoked the well-established principles of Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989) and its progeny. (See, e.g., West v. Thurston County, 169 Wn. App. 862, __ P.3d. __ (2012).) The county argued that CAPR could not produce any facts showing that any violation of the Open Public Meetings Act had occurred, thereby meeting its obligation of showing an absence of material fact. The burden then shifted to CAPR to produce competent evidence to support its case. It produced a great deal of evidence, but none of it showed that the defendants had violated the OPMA. CAPR was not entitled to rely on mere allegations contained in its unverified amended complaint. West, supra, at 866. The court properly granted the county's motion for summary judgment of dismissal.

CAPR states in its reply in support of its motion for reconsideration that the court "considered the County's motion as one for judgment on the pleadings by ruling that, regardless of whether the facts are taken as true, the Plaintiff would not be entitled to relief." Reply, page 5. The court did no such thing. The court simply indicated, in certain respects, that it would assume, *for the sake of argument, and without deciding,* that certain facts were true, so as to avoid any allegation that the court had not taken into account certain issues raised by CAPR. Even assuming such facts to be true, CAPR was still not entitled to relief.

CAPR's allegations relating to the budget subcommittee, the general governance subcommittee, and the solid waste subcommittee are without merit. CAPR never sued these entities or the members thereof, and never produced any evidence showing that these subcommittees had violated the OPMA. Summary judgment of dismissal of CAPR's complaint in its entirety was appropriate.

CAPR alleges that the county's motion only sought dismissal of the allegations relating to the CAO/SMP implementation committee, and that it never challenged the allegations relating to the budget subcommittee, the general governance subcommittee, or the solid waste subcommittee. Again, that is not the case at all. The county sought summary judgment of dismissal of CAPR's complaint in its entirety.

While CAPR made some passing references to these subcommittees in its response to the county's motion for summary judgment, its focus was on the CAO/SMP committee and the passage of the county's critical areas ordinance. In any event, *CAPR produced no evidence that the budget subcommittee, the general governance subcommittee, or the solid waste subcommittee violated the OPMA.*

As the county correctly points out, the claim for relief in CAPR's amended complaint makes no reference to any actions of the budget subcommittee, the general governance subcommittee, or the solid waste subcommittee. *CAPR did not even sue these subcommittees or their members.* It only sued San Juan County and "the San Juan County Critical Areas Ordinance/Shoreline Master Program Committee" and its members.

While, in its amended complaint, CAPR requests that the court 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" (italics added), it does not request that any decisions made by these subcommittees or the members thereof be declared null and void. Rather, it requests that the court 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." It also seeks injunctive relief, but there is no reference to any specific committee or subcommittee except the CAO/SMP Committee.

Moreover, even if CAPR had sued the budget subcommittee, the general governance subcommittee, and the solid waste subcommittee, which it has not, and even if CAPR had produced evidence that these subcommittees violated the OPMA, which it has not, it would be pointless to enter any injunctive relief with regard to these subcommittees. CAPR has produced no evidence that any decisions were made by these subcommittees. RCW 42.30.060(1) provides:

"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." (Italics added.)

Setting aside any issue of whether the three subcommittees referenced by CAPR in its motion for reconsideration could even be characterized as "governing bodies" for purposes of the OPMA (which they could not), there would be nothing to enjoin, since there is no evidence that any actual decisions were made by any of these subcommittees.

The CAO/SMP committee was not a "governing body" of San Juan County, and therefore is not subject to the OPMA. The committee did not act on behalf of the San Juan County Council, conduct any hearings, or take any testimony or public comment.

CAPR argues that the court's decision on summary judgment was "contrary to the recognition of the Court in Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.), 119 Wn. App. 665, 701, 82 P.3d 1199 (2004), that when a quorum of a committee meets, it is subject to the Act." (Amended Motion, page 2.)

The court's decision was not contrary to Loeffelholz, but rather fully consistent with it. The court first analyzed the issue of whether the San Juan County Council itself could be said to have met when only three members of the council were present for any gatherings of the CAO/SMP committee, and determined that it could not, as Loeffelholz and numerous other Washington cases hold. Letter Decision, pages 3-8.

The court further analyzed the issue of whether the CAO/SMP committee could be characterized as a governing body, such that the OPMA would apply to it. Since there was no evidence that the committee had acted on behalf of the council, no evidence that it had conducted any hearings, and no evidence that it had taken testimony or public comment, the court concluded that it could not be characterized as a "governing body" of San Juan County. RCW 42.30.020(2). Accordingly, the court concluded that gatherings of the committee were not subject to the OPMA. Letter Decision, pages 8-9.

CAPR states that "[t]he language of the OPMA unambiguously applies its terms to committees," citing the legislative declaration in RCW 42.30.010. Amended Motion, page 2. But the acts of committees of public agencies are subject to the OPMA only if they are "created by or pursuant to statute, other than courts and the legislature." RCW 42.30.020(1)(a). As previously noted, a committee is characterized as a governing body only if the committee "acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). (It also goes without saying that the committee could in no way be characterized as a "policy or rule-making body of San Juan County, so, again, it could not be characterized as a governing body of San Juan County under RCW 42.30.020(2).)

Even when liberally construing the provisions of the OPMA, CAPR has shown no right to relief.

CAPR accuses the court of failing to liberally construe the OPMA, and has the effrontery to claim that "[t]he Court's holding amends the Act by judicial fiat, an action that violates the doctrine of separation of powers." Amended Motion, page 4.

Such a statement is not only unsupported by any plausible argument, but is also singularly ironic. It is actually CAPR that is asking the court to ignore the plain terms of the OPMA and case law that supports the court's analysis in all respects. The court is

well mindful of the fact that OPMA is remedial, and that it must be liberally construed. RCW 42.30.910. At the same time, the court is not empowered to ignore the plain terms of the statute, as the court pointed out in its decision. Letter Decision, page 12.

CAPR's new allegation that a series of emails in November of 2011 constituted a "meeting" for purposes of the OPMA is without merit.

In its motion for reconsideration, CAPR alleges, for the first time, that "four of the six Council members (Pratt, Fralick, Peterson, and Miller) held a series of telephone and email exchanges in which they discussed the wetland process for the critical areas ordinance update." Amended Motion, page 8. CAPR alleges that this "establishes a prima facie OPMA case, precluding summary judgment in favor of San Juan County." Amended Motion, pages 8-9.

This issue was never raised by CAPR in connection with the county's motion for summary judgment. It was therefore, waived, and need not be considered by the court. In light of the fact that CAPR never previously raised this issue, it is particularly troubling for CAPR to assert that the court "missed" this issue. Amended Motion, page 5. Obviously, the court did not miss the issue. CAPR never raised the issue! The court is under no obligation to search out issues that a party declines to raise.

Nevertheless, since CAPR has now raised this issue, the court will address it. The evidence cited by CAPR with regard to this allegation is set forth in Exhibit P to the declaration of Robert H. Palmer II in opposition to the county's motion for summary judgment. As the county correctly points out, the exchange involved nothing more than a short email exchange between two council members, Peterson and Fralick. There is reference to a telephone call from Councilmember Pratt to Mr. Fralick. Councilmember Miller was nothing more than the passive recipient of emails from Mr. Fralick.

CAPR cites Wood v. Battle Ground School District, 107 Wn. App. 550, 27 P.3d 1208 (2001) in support of its claim that this exchange constituted a "meeting" for purposes of the OPMA, but its reliance on this case is misplaced. In Wood, the court stated:

"Thus, in light of the OPMA's broad definition of 'meeting' and its broad purposes, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a "meeting." In doing so, we also recognize the need for balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. Thus, we emphasize that the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'

"The OPMA is not violated if less than a majority of the governing body meet. *See In re Recall of Beasley,* 128 Wn.2d 419, 427, 908 P.2d 878 (1996) (citing *In re Recall of Roberts*, 115 Wn.2d 551, 554, 799 P.2d 734 (1990)). And the participants must collectively intend to meet to transact the governing body's official business. *See* 1971 Op. Atty. Gen. No. 33, at 19 (social function can be a meeting if it is scheduled or

designed to discuss official business); *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 853 P.2d 496, 503, 20 Cal. Rptr. 2d 330 (1993) (Brown Act applies to collective action, not the passive receipt of e-mail by members absent a concerted plan to engage in collective plan to engage in collective deliberation). Finally, the governing body members must communicate about issues that may or will come before the Board for a vote; in other words, the members must take 'action' as the OPMA defines it.

"Thus, the OPMA is not implicated when members receive information about upcoming issues or communicate amongst themselves about matters unrelated to the governing body's business via e-mail. . . ." 107 Wn. App. at 564-65.

In the present situation, CAPR has shown nothing more than the fact that two council members had a brief email exchange in which they exchanged information about a matter. One of these council members had a telephone conversation with another council member. As previously noted, the other council member was nothing more than a passive recipient of two emails from Councilmember Fralick.

Notably absent from CAPR's argument about this issue is any showing that a *majority* of the council members collectively intended to meet to transact the council's official business, that they engaged in a concerted plan to engage in collective deliberation, or that they communicated about issues that would come before the council for vote. Even construing the evidence in a light most favorable to CAPR, at most only three of the council members (i.e., a minority of the council) actually communicated anything at all. (Again, Councilmember Miller was nothing more than a recipient of emails. There is no indication that she communicated anything to the other council members.)

The record also does not support CAPR's characterization that the three council members "discussed the wetland process for the critical areas ordinance update." Amended Motion, page 8. Rather, as Councilmember Fralick testified in his deposition, the emails had to do with a scheduling or timing issue. Deposition of Richard Fralick, pages 43-46; Exhibit A to county's Response to Plaintiff's Motion for Reconsideration of Summary Judgment Decision. (It is interesting to note that CAPR did not include this excerpt of Mr. Fralick's deposition in its response to the county's motion for summary judgment. See Exhibit B to Robert H. Palmer III's declaration in opposition to the county's motion for summary judgment.)

There was no violation of the OPMA in connection with these emails and telephone conversation.

There is no evidence that the CAO/SMP committee was created by the San Juan County Council, and even if it was, there is no evidence showing that it acted on behalf of the council.

In its decision granting the county's motion for summary judgment, the court assumed, for the sake of argument only, that the CAO/SMP committee was created by the San Juan County Council. The court could make this assumption because CAPR presented no

evidence showing that the committee acted on behalf of the council, conducted hearings, or took testimony or public comment. Therefore, as the court explained, the committee could not be considered a "governing body" under RCW 42.30.020(2), and the OPMA did not apply to its activities. (CAPR's claim, at pages 11 and 13 of its reply in support of its motion for reconsideration, that the court made a *ruling* that the CAO/SMP committee was created by the council, is simply false.)

Since CAPR again raises the issue of whether the committee was created by the council in its motion for reconsideration, however, the court reiterates that CAPR has presented no evidence showing that the committee was created by the council. Five of the six council members swore under oath that the council had not done so, and the other member of the council was unable to be reached for a declaration.

not right

CAPR cited the deposition testimony of Deputy Director of Community Development and Planning Shireene Hale that the council "would have created" the committee. The court struck this testimony on the county's motion because there was no showing that it was made on the personal knowledge of Ms. Hale.

Besides Ms. Hale's incompetent testimony, CAPR cites the public participation plan referred to and attached to Resolution 32-2011, a resolution updating the critical areas review schedule and public participation plan and replacing Resolution 26-2010. (Resolution 32-2011 is attached to CAPR's sur-reply in opposition to the county's motion for summary judgment.) However, this public participation plan does not show that the council created the CAO/SMP committee (or CAO/SMP Update Implementation Team, as it is referred to in the public participation plan).

Rather, the public participation plan indicates that the responsible parties for establishing the committee or team are ten individuals, including the county administrator (P.Rose), the county prosecutor (R. Gaylord), three individual members of the county council (R. Fralick, L. Pratt, and P. Miller), Ms. Hale, and four other individuals. This is in marked contrast to other tasks listed in the public participation plan; the responsible parties for several other such tasks include, in several instances, the county council itself, not individual members of the county council. Thus, it appears that the council itself was not responsible for establishing the CAO/SMP committee, but rather various individuals. It does not follow from the fact that the council made *reference* to this committee that it *established* the committee.

<u>There is no basis for injunctive relief in this case.</u>

As the court noted in its decision granting the county's motion for summary judgment, the CAO/SMP committee ceased functioning pursuant to Prosecuting Attorney Randall K. Gaylord's advice in his memorandum issued April 26, 2012. Thereafter, the San Juan County Council conducted hundreds of hours of open public meetings in compliance with the OPMA on the proposed county critical areas ordinance and ultimately passed the ordinance. Members of CAPR and all other members of the public had every opportunity to give their statements at the public hearings and submit written comments. Contrary to

CAPR's bald assertion, there is no evidence in this case to suggest that the council somehow "rubberstamped" the work of the committee.

Even assuming, purely for the sake of argument, that the committee had met in violation of the OPMA, all Washington cases that have considered the issue have held that meetings held in violation of the OPMA, leading up to the passage of an ordinance or other action of a governing body at a meeting properly conducted under the OPMA, do not invalidate the action taken at a proper meeting. Among these cases are Henry v. Oakville, 30 Wn. App. 240, 246, 633 P.2d 892 (1981), OPAL v. Adams County, 128 Wn.2d 869, 883, 913 P.2d 793 (1996), Eugster v. City of Spokane, 110 Wn. App. 212, 228-29, 39 P.3d 380 (2002) (Eugster 1), and Eugster v. City of Spokane, 118 Wn. App. 383, 423, 76 P.3d 741 (2003) (Eugster 2). The Ninth Circuit Court of Appeals is in accord. Clark v. City of Lakewood, 259 F.3d 996 (9th Cir. 2001); Feature Realty Inc. v. City of Spokane, 331 F.3d 1082 (9th Cir. 2003). Thus, since the county's critical areas ordinance was passed after hearings properly conducted under the OPMA, there is no basis for an injunction enjoining its implementation or enforcement, even if the gatherings of the CAO/SMP committee had been improperly conducted.

CAPR cites a 1974 Florida case, Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974), in support of its position. In that case, the town council of the Town of Palm Beach undertook to update and revise town zoning ordinances. According to a majority of the court, the council decided upon and chose a citizens' planning commission or planning advisory committee to assist in the process. In a 4-2 decision, the majority ruled that "the nature of the committee and its function reached the status of a board or commission that to act must comply with the sunshine law." 296 So.2d at 475. The commission or committee held meetings that were not open to the public. The comprehensive zoning plan ultimately approved by the town council was in essentially the same form as that which had been produced by consultants and the planning advisory committee.

The court acknowledged that "full public meetings and hearings of the zoning commission and of the Town Council were conducted and proper procedure followed." Id. Nevertheless, the court held that the zoning ordinance "was rendered invalid because of the non-public activities of the citizens planning committee." Id., at 478.

In a strong dissent, the dissenters noted that the zoning ordinance was ultimately adopted by the zoning commission and the town council following public meetings and discussion, and was therefore carried out "in the sunshine." Id., at 479.

Town of Palm Beach v. Gradison is an out-of-state case, and therefore not binding on this court. Moreover, it is distinguishable on its facts from the present case, and its reasoning is seriously flawed, as the dissent shows. The majority decision is inconsistent with the applicable provisions of Florida's "sunshine law." To apply the reasoning of this case to the present case would fly in the face of the plain terms of Washington's OPMA (most particularly RCW 42.30.060(1), last sentence) and the numerous cases that have

construed it. The court does not recognize Town of Palm Beach v. Gradison as persuasive authority, and will not follow it.

To the extent that CAPR is seeking general injunctive relief enjoining future violations of the OPMA, there is no basis for any such relief. The record in this case shows that the county and the other defendants did not violate the OPMA in any respect. Even if the record did show violations of the OPMA, there would be no basis for enjoining future violations of the OPMA. This is because the county has followed Mr. Gaylord's advice that when at least three council members meet, there should be compliance with the notice provisions of the OPMA.

Furthermore, the citizens of San Juan County have passed charter amendments providing, among other things, that the county council is reduced from six members to three, and that all subcommittee meetings of the council are subject to the OPMA. The court has no reason to believe that the county and its officials will not follow the law.

The declaration of Alexandra Gavora in support of the motion for reconsideration is not a basis for reconsideration.

CAPR submitted the Declaration of Alexandra Gavora in Support of Plaintiff's Motion for Reconsideration of Summary Judgment Decision and attachments thereto along with the original motion for reconsideration. CAPR made no argument in its briefing based on this declaration, so it is unclear what the purpose of this declaration was. As factual evidence, it is untimely. Nevertheless, the court has reviewed and considered it.

There is nothing in this declaration that provides a basis for reconsidering the court's decision on the county's motion for summary judgment.

Conclusion

The court adheres to its decision granting the county's motion for summary judgment of dismissal of CAPR's amended complaint in its entirety. There is no genuine issue of material fact, and the county is entitled to a judgment dismissing CAPR's amended complaint with prejudice. The court has addressed CAPR's arguments in its previous decision, and in this decision. To the extent that the court might not have addressed particular arguments or points raised by CAPR specifically, the court has considered and rejects them.

The court has entered its order denying CAPR's motion for reconsideration. Copies are enclosed herewith.

Very truly yours,

Alan R. Hancock

Alan R. Hancock, Judge

Enclosure

Copy: File

Appendix C

November 14, 2011 email exchange
CP 877-879

Alexandra Gavora

From: Richard Fralick [RichardF@sanjuanco.com]
Sent: Monday, November 21, 2011 9:52 AM
To: Patty Miller
Subject: FW: Richard Fralick Can't Sleep

Hi Patty,

I read your email expressing concern about the Wetlands process. Your concerns are my concerns and I am sharing with you an email I sent to Pete early last week. I subsequently met with him and would like to share with you the gist of the conversation I had in FH with him on Wednesday.

Can we have a phone conversation this evening?

Richard Fralick

From: Richard Fralick
Sent: Tue 11/15/2011 5:27 AM
To: Pete Rose
Subject: Richard Fralick Can't Sleep

Good Morning Pete,

woke up early this morning unable to get back to sleep hinking about the conversation we had late Monday afternoon and he email thread you will find below. I am distressed for the ollowing reasons.

. On the labor front I am not sure from the outline you gave e that the tentative agreement described will be supported by a ajority of the Council. Without knowing how the classification tudy gets implemented, the total financial implications of the package" and the reaction of the Council to the "package it eels risky to be taking a union vote at this time. I am oncerned that we could end up with a union approval and non- pproval by the Council. Maybe I am reacting from a lack of ill understanding but I am concerned.

See email thread below. I do not know the details of the n sation Shireene had that included Janet Alderton (seems range that she would be included) and Eric Stockdale but I am

000877

EXHIBIT Richard Fralick

11.9

afraid of the comm ty perception that mi[illegible] result would be just one more example of the Department of Ecology and the Friends of the San Juans writing County environmental policy. While not true it could be taken by some to be true and threaten to undo much of the hard work of the past 2 years. It seems [illegible]e Shireene, by not pulling in the Implementation Team immediately and having the conversation with others has compromised the integrity of the process. Once again maybe I am overreacting or operating from a position of incomplete information but I am concerned.

I know your schedule is jammed and I am reluctant to ask for more of your time but I will be in FH for a Board of Health meeting Wednesday morning and would welcome an opportunity to meet with you to discuss if you can spare the time.

Richard Fralick

From: Richard Fralick
Sent: Mon 11/14/2011 10:31 PM
o: richpeterson@rockisland.com
C Patty Miller
Subject: RE: What the heck is going on?

Hi Rich,

I received a call from Lovel mid-afternoon today telling me that Paul Adamus threw a monkey wrench into the Planning Commission process on Thursday. She also told me that Shireene was going to schedule a telecom with various players including Janet Alderton some time soon. I told Lovel that I felt the process was spinning out of control and that Janet among others had no business being involved at this point in time. I strongly suggested that the Implementation Team needed to meet ASAP to sort things out, even if it meant meeting Thanksgiving Week. At my insistence we are trying to schedule an Implementation Team Meeting next Monday.

Until your email, I had no idea that the call including Janet d been made as I was not copied on Shireene's email on a[illegible]day. I share your distress and promise that if it is at ll within my power we will sort things out if and when we meet

next Monday. Plea bear with me till the

Richard Fralick

From: richpeterson@rockisland.com
[mailto:richpeterson@rockisland.com]
Sent: Mon 11/14/2011 8:24 AM
To: Richard Fralick
Cc: Patty Miller
Subject: What the heck is going on?

I'm sending on a memo Shireene sent to the Planning Commission for your information and to see if either of you have some of the questions I have about this process. Among mine is: What is it about Janet Alderton that gives her special standing enabling her participation in a conference call that ends up changing a staff reccomendation? Rich

From: Shireene Hale [mailto:shireeneh@sanjuanco.com]
Sent: Saturday, November 12, 2011 1:03 AM
To: Shireene Hale; Lynda Guernsey; Janice Biletnikoff; Amy Vira; barbara thomas; Bob Gamble; Brian Ehrmantraut; Evelyn F Fuchser; John Lackey; john@sanjuanislands.com; Jon Cain; Karin Agosta; Lynda Guernsey; Mike Carlson; steph3339@gmail.com; Susan Dehlendorf
Subject: Update on discussion with scientists

Hello again,

After the Planning Commission hearing we had a conference call that included Dr. Adamus, Erik Stockdale (Ecology), and Janet Alderton. The main purpose of the call was to discuss Dr. Adamus' comments - which came as quite a surprise considering he ›ld us he had reviewed the proposed changes, and he provided c nents that were incorporated into the most recent draft. After talking he understood how we got from his prior version of

Appendix D

Wash AGO 1986 No. 16

Wash. AGO 1986 NO. 16, 1986 WL 706343 (Wash.A.G.)

Office of the Attorney General
State of Washington

AGO 1986 No. 16

December 31, 1986

MEETINGS -- PUBLIC -- APPLICABILITY OF OPEN PUBLIC MEETINGS ACT TO A COMMITTEE OF THE GOVERNING BODY.

(1) The definition of governing body, including any "committee thereof," covers both committees composed of members of the governing body and committees composed of nonmembers appointed by the governing body.

(2) A committee of the governing body is required to comply with the provisions of the Open Public Meetings Act when it acts on behalf of the governing body by exercising actual or de facto decisionmaking power.

Honorable Robert V. Graham
State Auditor
Legislative Building, AS-21
Olympia, Washington 98504

Dear Sir:

By letter previously acknowledged, you have requested our opinion regarding an amendment to the Open Public Meetings Act (ACT), chapter 42.30 RCW, which defines the term "governing body." (Section 1, chapter 155, Laws of 1983 amended RCW 42.30.020(2).) The amendment expanded 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."You have requested our opinion about the meaning of the phrase underscored above.

Your inquiry raises two questions which we phrase as follows:

(1) Does a "committee thereof" include both committees composed of members of the governing body and committees composed of nonmembers of the governing body when appointed by the governing body?

(2) Under what circumstances is a committee of a governing body required to comply with the provisions of the Open Public Meetings Act?

We answer the first question in the affirmative and the second question in the manner set forth in our analysis.

ANALYSIS

We begin our analysis by reciting two rules of statutory construction we will rely on in answering both questions. The first rule of construction is that words in a statute that are not defined must be accorded their usual and ordinary meaning. Pacific First Fed. Sav. & Loan Ass'n v. State. 92 Wn.2d 402, 409, 598 P.2d 387 (1979).

In determining the usual and ordinary meaning of words, it is appropriate to consult the dictionary. See Purse Seine Vessel Owners Ass'n v. Moos, 88 Wn.2d 799, 808, 567 P.2d 205 (1977).

The second rule of statutory construction is that where legislative intent is not clear from the language of the statute it is appropriate to consider the legislative history of the statute. Bellevue Fire Fighters Local 1604 v. Bellevue, 100 Wn.2d 748, 751, 675 P.2d 592 (1984). This legislative history can include the sequence of amendments to the statute as well as comments made during the statute's consideration. See State v. Turner, 98 Wn. 2d 731, 735, 658 P.2d 658 (1983).

With these two principles of statutory construction in mind, we turn to your first question:

> Does a "committee thereof" include both committees composed of members of the governing body and committees composed of nonmembers of the governing body when appointed by the governing body?

*2 To answer this question, we must first review what committees were subject to the Act prior to the 1983 amendment at issue here. The Open Public Meetings Act was enacted in 1971. Laws of 1971, 1st Ex. Sess., ch. 250. The scope of the Act was set forth in section 3, (now codified as RCW 42.30.030) which stated:

> 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 act.

Laws of 1971, 1st Ex. Sess., ch. 250, § 3, p. 1114.

Under section 3 the Act applied only to the "governing body" of a "public agency." The term "public agency" was specifically defined in section 2(1) to include committees and states:

> "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, and other boards, commissions, and agencies. (Emphasis supplied)

Laws of 1971, 1st Ex. Sess., ch. 250, § 2(1), p. 1113.

In AGO 1971 No. 33, copy enclosed, we answered a number of questions pertaining to the scope and operation of the Act. Two or those questions dealt specifically with whether certain committees and subcommittees were subject to the Act. These two questions were as follows:

Question (2):

> Are advisory committees, boards and commissions subject to the provisions of the open meetings act?
> ...

Question (3):

> When a governing body of a public agency forms a subcommittee composed of members of the governing body, is the subcommittee subject to the provisions of the open public meetings act?

AGO 1971 No. 33, at 8-9.

With regard to question 2, we concluded that advisory committees, boards, and commissions were not subject to the Act unless they were "public agencies" under section 2(1) of the Act. To be a public agency under section 2(1)(a) or (c), a committee or other group must be created "by or pursuant to statute, ordinance or other legislative act."Based on this requirement, AGO 1971 No. 33 concluded: "[W]e do not believe that this definition would include those discretionary ad hoc groups which may be formed pursuant to a general, implied executive authority instead of a specific statute or ordinance."AGO 1971 No. 33, at 8.

We reached a similar conclusion in responding to question 3, where we stated:

> Such a subcommittee is normally not created "by or pursuant to a statute, ordinance or other legislative act" and, therefore, it would not be included within the definition of a public agency. If it is not a "public agency," then even though it has a multimember composition its activities would not be subject to the provisions of the act. However, if the subcommittee membership is such that it comprises a majority of the governing body, then the "subcommittee" would have to be considered as the governing body itself, under the act, and would then be subject to all of the notification and meeting requirements of the act.

*3 AGO 1971 No. 33, at 9.

Thus, as enacted in 1971, the Act did not apply to committees, subcommittees, and other groups that were not created by or pursuant to statute, ordinance, or other legislative act.

This gap in the coverage of the Act seems to have been a matter of concern. For example, in 1983 we received a letter from Representative Nelson inquiring whether certain committee meetings of the Washington Public Power Supply System (WPPSS) were subject to the Act. We responded to this inquiry by letter dated March 18, 1983, copy enclosed. In that letter, we referred Representative Nelson to AGO 1971 No. 33 and indicated that only committees created by or pursuant to a statute, ordinance, or other legislative act were subject to the Act.

In 1983 the Legislature amended the definition of "governing body" in RCW 42.30.020(2) to include committees thereof. The amendatory language in question here is 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.

Laws of 1983, ch. 155, § 1, p. 669.

It appears to us that the purpose of this amendment was to extend the coverage of the Act to committees, subcommittees, and other groups that are not created by or pursuant to statute, ordinance, or other legislative act. This conclusion is buttressed by the legislative history of the 1983 amendment. In response to a point of inquiry, Senator Thompson, one of the sponsors, stated:

> Senator McDermott, this language does, indeed, relate to the WPPSS situation, because another portion of the bill that Senator Lee alluded to, brings committees of governing bodies under the effect of the open meetings act, which is substantial in its effect on WPPSS operations, because they have organized into committees. The executive board is organized into committees and as I understand it, they are substantially conducting their business in that manner. This has caused some concern, because an LBC auditor was even prevented from attending some of those sessions, even though he was under instruction to do so. It does, indeed, apply to the WPPSS situation.

Senate Journal, 48th Legislature (1983), at 880.

Under the 1983 amendment, a committee is considered to be part of the governing body itself, even though the committee does not, in and of itself, constitute a new public agency or subagency because it is not created by or pursuant to statute, ordinance, or other legislative act.

The thrust of your question goes to the scope of the term "committee thereof." In our opinion, the term "committee thereof" includes all committees created by a governing body pursuant to its executive authority as opposed to a specific statute, ordinance, or other legislative act. Thus, a "committee thereof" includes committees composed solely of a minority of the members of the governing body. It also includes committees composed of nonmembers of the governing body.

*4 We reach this conclusion for two reasons. The first is the policy of the Act itself. RCW 42.30.010 states:

> 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 42.30.910 further provides that the Act is remedial and shall be liberally construed.

These two provisions were relied upon by the Supreme Court in Cathcart v. Andersen, 85 Wn. 2d 102, 107, 530 P.2d 313 (1975). In that case, the court ruled that the University of Washington Law School is a subagency and its faculty is a governing body subject to the Act.

The second reason for our conclusion is the plain meaning of the words "committee thereof." Neither of these words is defined in the statute. Thus, we must resort to their usual and ordinary meaning. The term "committee" is defined as "2a: a body of persons delegated to consider, investigate, or take action upon and usu. to report concerning some matter of business;..." Webster's Third New International Dictionary 458 (1971).

There are two significant points about the definition of the word "committee." The first is 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. The second is that there is nothing in the definition that restricts the composition of the group to members of the governing body or, for that matter, to nonmembers of the governing body. The definition includes both.

The term "thereof" is defined as: "1: of that: of it... 2: from that cause: from that particular: Therefrom..."Webster's Third New International Dictionary 2372 (1971). There are two definitions of the word "thereof". The first definition would seem to limit the composition of committees to members of the governing body. However, the second definition includes any committee the governing body brings into being.

We find nothing in the language of the Act or its legislative history to indicate that the Legislature intended the more restrictive first definition. Also, the policy of the Act and the legislative declaration that the statute be liberally construed support our application of the broader definition of the word "thereof."

Having concluded that the phrase "committee thereof" includes all committees, regardless of the identity of their members, we turn to your second question:

Under what circumstances is a committee of a governing body required to comply with the provisions of the

Act?

The 1983 amendment at issue here added the following words to the term "governing body": "or 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, p. 669.

*5 In responding to your second question, we are concerned with the phrase "when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment."Your question focuses specifically on when a committee "acts on behalf of the governing body."We begin our analysis by again turning to the dictionary. The term "act" or "acts" has a number of definitions. These include:

> 4: to discharge the duties of a specified office or post: perform a specified function:... 5a: to exert power or influence: produce an effect... b: to produce a desired effect: perform the function for which designed or employed: work...

Webster's Third New International Dictionary 20 (1971). The term "on behalf of" is defined as: "in the interest of: as the representative of: for the benefit of..."Webster's Third New International Dictionary 198 (1971).

These definitions present two alternate meanings to the phrase "acts on behalf of." On the one hand, a committee might act on behalf of the governing body whenever it performs a specified function in the interest of the governing body. This would be a very broad definition. Under this construction, all acts of a committee would be subject to the Act, just as a governing body is subject to the Act whenever it meets to take action.

On the other hand, 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. This is a narrower interpretation of the phrase. Under this construction, a committee acts on behalf of the governing body when its exercises actual or de facto decisionmaking authority for the governing body.

The policy of the Act set out in RCW 42.30.010 and the legislative declaration of liberal construction in RCW 42.30.910 support the broad interpretation of the phrase. However, we are persuaded that the narrower construction correctly reflects the intent of the Legislature.

We reach this conclusion for two reasons. The first is the rule or statutory construction that the Legislature is presumed not to have used superfluous words. If possible, each word in a statute is to be accorded meaning. State v. Lundquist. 60 Wn.2d 397, 403, 374 P.2d 246 (1962). Here, 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 committee meetings were subject to the Act.

RCW 42.30.030 provides that "[a]ll meetings of the governing body of a public agency shall be open and public...."The term "meeting" is defined as "meetings at which action is taken."RCW 42.30.020(4).

Before 1985, the word "action" was defined in RCW 42.30.020(3) as:

> the transaction of the official business of a public agency by a governing body including but not limited to a collective decision made by a majority of the members of a governing body, a collective commitment or promise by a majority of the members of a governing body to make a 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.

*6 Laws of 1971, 1st Ex. Sess., ch. 250, § 2(3), p. 1114.

In AGO 1971 No. 33, we interpreted the term "action" broadly. Under our construction, the Act applied to any meeting of a majority of the members of a governing body, even an informal one, where matters within the ambit of the agency's official business were considered. This interpretation is reinforced by the 1985 amendment to the definition which is even broader than the 1971 definition. Laws of 1985, ch. 366, § 1, p. 1301. [FN1]

If the Legislature intended a broad interpretation of the phrase "acts on behalf of," it simply would have added the words "or any committee thereof" to the definition of "governing body." Had the Legislature done so, a committee would have been subject to the Act on the same basis as the governing body itself--whenever it conducts a meeting at which action is taken.

However, the Legislature also added the phrase "when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment."These words would be rendered meaningless if a committee is required to comply with the Act when it holds a meeting where action is taken. Under this language a committee of a governing body is required to comply with the Act only "when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment."

We also note that the Legislature selected the word "acts" instead of the word "action," which is broadly defined in RCW 42.30.020(3). If the Legislature intended the phrase "acts on behalf of" to be broadly construed we believe it would have used the word "action."

The second reason we conclude that the phrase should be narrowly construed is the legislative history of the amendment. the 1983 amendment was introduced as part of Senate Bill 3206. That bill would have amended the definition of "governing body" by adding the following language to the definition: "or any committee thereof if the committee is authorized to act on behalf of the governing body in conducting hearings, taking testimony or public comment, or deliberating the making of policy or rules."Senate Bill 3206, 48th Legislature (1983).

Subsequently, Senate Bill 3206 was replaced by Substitute Senate Bill 3206. The substitute bill narrowed the amendment to the term governing body as follows: "or any committee thereof if the committee is authorized to act on behalf of the governing body, conduct hearings or take testimony or public comment."Substitute Senate Bill 3206, 48th Legislature (1983).

The substitute bill eliminated the phrase "or deliberating the making of policy or rules."We believe this change indicates that the Legislature did not intend to extend the coverage of the Act to committees that do nothing more than deliberate the making of policy or rules.

The 1983 amendment to the term "governing body" was modified once more on the floor of the Senate in an amendment proposed by Senator Hemstad. His amendment struck the language: "if the committee is authorized to act on behalf of the governing body, conduct hearings, or take testimony or public comment."In its place Senator Hemstad proposed the following language: "when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment."Senate Journal, 48th Legislature (1983), at 881.

*7 On the floor of the Senate, Senator Hemstad explained the purpose of the amendment as follows:

> Frankly, I was thus very uncertain as to how far that would go because it does not limit the situation to where it was acting on behalf of the governing body, conducting hearings or taking public comment but was authorized to. So it would mean that any subcommittee acting in other kinds of capacities would at least

technically come within the scope of the new language. I think my phrasing now if it says when the committee acts on behalf of the governing body, conducts hearings and takes testimony or public comment, it would then require to be open would limit it, define it, and I think would make it more acceptable.

Senate Journal, March 30, 1983 (transcribed from tape).

The Senate adopted the Hemstad amendment and this is the language that became law. The Hemstad amendment further demonstrates that the Legislature did not intend all committee meetings to be subject to the Act.

This conclusion is also supported by the legislative history of the 1983 amendment in the House of Representatives. In response to a point of inquiry from Representative Isaacson, Representative Hine described the scope of the 1983 amendment as follows:

Mr. Isaacson: "Representative Hine, would formal notices be required when preliminary discussions were being held by members of the city council and city staff?"
Ms. Hine: "Representative Isaacson, I believe that is not the intent of this legislation."
Mr. Isaacson: "Would the bill apply to the meeting of a budget committee consisting of less than a majority of the governing body, discussing the budget with a department head?"
Ms. Hine: "No, Representative Isaacson."
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 the 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."(Emphasis supplied.)

House Journal, 48th Legislature (1983), at 1294.

In our judgment, this legislative history establishes that the Legislature intended the narrower definition of the phrase "acts on behalf of." Based on this narrow definition, we conclude that a committee acts on behalf of the governing body when it exercises actual or de facto decisionmaking 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.

*8 Since your question does not pose a specific factual situation, we are unable to say precisely when a committee acts on behalf of the governing body and is thus subject to the Act. The line between exercising actual or de facto decisionmaking powers and simply giving advice will obviously depend upon the responsibilities and powers of the particular committee in question. Two decisions by the Supreme Court of Oklahoma interpreting that state's open meeting law, prior to its repeal and reenactment in 1977, illustrate this distinction.

Oklahoma's prior open meeting law provided that all meetings of certain governing bodies must be public meetings. 25 O.S. 1971 § 201. In Sanders v. Benton, 579 P.2d 815 (Okla. 1978) the court considered the application of the open meeting law to a citizens advisory committee impaneled to provide information to assist in determining the site for a community treatment center. The plaintiff claimed that the citizens advisory committee was subject to the open meeting law because it was acting for and on behalf of the Board of Corrections, which was clearly a governing body subject to the Oklahoma law. In Sanders, the court ruled that the citizens advisory committee was not subject to the open meeting law because the citizens advisory committee exercised no gov-

ernmental powers or decisionmaking authority.

The court in Sanders distinguished its decision in Carl v. Board of Regents, 577 P.2d 912 (Okla. 1978).Carl concerned an admissions board of the University of Oklahoma. The court ruled that the admissions board was subject to the open meeting law because the Board of Regents, which was ultimately responsible for admissions, had delegated decisionmaking authority to the admissions board to select students for the college of medicine.

In our opinion a committee acts on behalf of the governing body when it exercises actual or de facto decisionmaking power, such as the admissions board in Carl.Such a committee is subject to the Act whenever it meets to conduct business related to the exercise of its decisionmaking power. An advisory committee, such as the citizens advisory committee in Sanders, is not subject to the Act.

A committee that exercises decisionmaking power and also serves a separate advisory function is subject to the Act when it meets to conduct business related to the exercise of decisionmaking power. To the extent the committee has a separate advisory role, it is not subject to the Act when it meets to conduct business related to that advisory role. However, where a committee performs both functions it is subject to the Act unless the advisory function can be separated from the exercise of its decisionmaking authority.

We trust that the foregoing will be of assistance to you.

Very truly yours,
Kenneth O. Eikenberry
Attorney General

William B. Collins
Assistant Attorney General

Christine O. Gregoire
Deputy Attorney General

[FN1]. "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.

Wash. AGO 1986 NO. 16, 1986 WL 706343 (Wash.A.G.)

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Appendix E

Wash AGO 2006 No. 6

Wash. AGO 2006 NO. 6, 2006 WL 864221 (Wash.A.G.)

Office of the Attorney General
State of Washington

AGO 2006 No. 6

March 28, 2006

OPEN PUBLIC MEETINGS ACT - CITIES AND TOWNS - COUNTIES - Applicability of Open Public Meetings Act when a quorum of the members of a governing body are present at a meeting not called by that body.

The presence of a quorum of the members of a city or county council at a meeting not called by the council does not, in itself, make the meeting a "public meeting" for purposes of the Open Public Meetings Act (RCW 42.30); the Open Public Meetings Act would apply if the council members took any "action" (as defined in RCW 42.30) at the meeting, such as voting, deliberating together, or using the meeting as a source of public testimony for council action.

The Honorable Alex Deccio
State Senator
14th District
P. O. Box 40414
Olympia, WA 98504-0414

Dear Senator Deccio:

This letter responds to your request for an opinion with regard to the following question:

> **When a city or county council or council members are invited to attend a public meeting not called by the city or county council, is it legal for a quorum of such members to be present without violating the Open Meeting law?**

BRIEF ANSWER

The presence of a quorum of members of a city or county council does not, of itself, cause the Open Public Meetings Act to apply if council members attend a public meeting called by a third party. The gathering of council members would be a "meeting" for purposes of the Act only if the council members take "action" as defined in the Act, such as voting, deliberating, or other official business of the council. Assuming the Act applied, it would not be violated if the council has followed the advance notice requirements and treated the gathering as a special meeting.

ANALYSIS

The Open Public Meetings Act (the Act) applies to all meetings of a governing body of a public agency. RCW 42.30.030 provides the core requirement of the Act:

*[original page 2]*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.
(Emphasis added.)

City and county councils, as well as numerous other types of state and local multi-member boards, are "governing bodies" of "public agencies" within the meaning of the Act. RCW 42.30.020(1) (defining "public agency"); RCW 42.30.020(2) (defining "governing body"). The Act defines "meeting", however, as only meetings where an "action" is taken there. *See* RCW 42.30.020(4) (" 'meeting' means meetings at which action is taken"). The Act then defines an "action" as the "transaction of the official business of the agency".RCW 42.30.020(3). Some specific examples of "actions" are provided in the Act: "[T]he 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).[FN1]

*2 Your question asks whether the presence of a quorum of the governing body at a third party's meeting by itself violates the Act, and we conclude that it does not. The fact that a quorum of the council members is present at the same time and place does not "automatically" mean that a "meeting" has occurred for purposes of the Act because an "action" must occur to trigger the Act. *SeeIn re Recall of Estey*, 104 Wn.2d 597, 604, 707 P.2d 1338 (1985). In *Estey*, the Supreme Court rejected proposed recall charges based on alleged violations of the Act because the charges did not sufficiently identify an action taken at a meeting. Similarly, in *Eugster v. City of Spokane*, 118 Wn. App. 383, 424, 76 P.3d 741 (2003), the Court of Appeals explained the Act as applying when "(1) members of a governing body (2) held a meeting of that body (3) where that body took *action* ".*Id.* (emphasis added).[FN2]

We emphasize that whether the members take an "action" depends on if the particular circumstances fall within the "transaction of the official business" of the governing body. Examples of an "action" include members deliberating or discussing a decision they might eventually make. *See, e.g., In re Recall of Beasley*, 128 Wn.2d 419, 908 P.2d 878 (1996) (discussions among school board members regarding contract issue would constitute "meetings"). Another express example of an "action" is when the members take a vote on a matter. RCW 42.30.020(3). "Action" includes "receipt of public testimony", so council members attending a third party's public meeting would need to consider whether they are receiving public testimony. [FN3]

*[original page 3]*Even if some "action" takes place when council members attend some other entity's public meeting, the conclusion that the Act applies does not force the members to choose between attendance or violation of the Act. The Act requires that a meeting to which the Act applies be "open and public and all persons shall be permitted to attend".RCW 42.30.030. If the gathering or event is in fact open to the public, as your question assumes, then even if the Act applies, council members may avoid violating the Act if proper advance notice is given, designating the third party's event as a "special meeting."

State law provides for calling a special meeting, setting forth certain requirements for a special meeting, including that (1) the meeting be called by the presiding officer (such as a chairman) or by a majority of the membership, and (2) notice be given personally or by mail delivery to all of the members, as well as to local media who have requested notice. RCW 42.30.080 (requirements for special meeting). The notice must designate the time and place and the business to be transacted, and final action cannot be taken as to any matter for which notice is not given. *Id.* Therefore, if the council is concerned that, given the nature of any particular gathering, public testimony, discussions, or some other action might take place, the council can designate it in advance as a

"special meeting" for the purpose of complying with the Act and removing any doubt as to the legality of any action that might be taken there.

*3 For these reasons, we conclude that the presence of a quorum of members of a city council or county council at a public event, gathering, or meeting does not trigger application of the Act unless the quorum takes an "action" by transacting official business of the city or county. We also conclude that when the Act applies to council members attending a third party's meeting, the council members do not violate the Act if the meeting is open to the public and if the governing body follows the requirements of the Act for giving notice of a special meeting.

We trust that the foregoing analysis will be helpful to you.

Sincerely,
Rob Mckenna
Attorney General

Jay Douglas Geck
Deputy Solicitor General

[FN1]. The statute goes on to define the term "final action", but it is not necessary to consider that definition in order to respond to your question.

[FN2]. Additionally, before a member of the governing body incurs personal liability for a violation, RCW 42.30.120(1) requires that the person act "with knowledge of the fact that the meeting is in violation" of the Act.

[FN3]. It goes beyond your question to define what is, and is not, the taking of public testimony. We do not mean to suggest that council members "take public testimony" simply by attending a meeting with information that has general relevance to their council work. Whether council members are taking public testimony depends, at a minimum, on the type of official business facing the council and whether the third party's meeting falls within the concept of public testimony for purposes of the council's official business.

Wash. AGO 2006 NO. 6, 2006 WL 864221 (Wash.A.G.)

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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, Defendants.,	NO. 70606-3-I (San Juan County Superior Court Case No. 12-2-05218-3) CERTIFICATE OF SERVICE

Elizabeth W. Halsey declares and states:

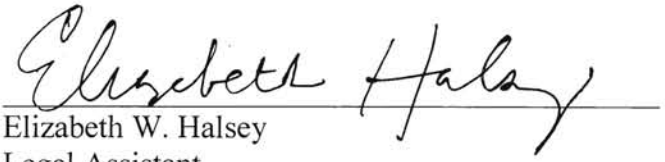
That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on November 26, 2013, I caused to be delivered in the manner indicated below a true and

correct copy of BRIEF OF RESPONDENT SAN JUAN COUNTY 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
Stephanie Marshall Hicks Attorney at Law 60852 Yellow Leaf St. Bend, WA 97702	By First-Class Mail

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

Dated this 26th day of November, 2013, at Friday Harbor, Washington.



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