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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 90500-2

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

Appellant,

v.

SAN JUAN COUNTY, et al.

Respondents.

SAN JUAN COUNTY'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

For six years, the legislative body for San Juan County ("the County") was a six member County Council.[1] While undertaking a review of the critical Areas ordinances, three of the six members of the County Council and County Administrator coordinated their work by gathering together as the Critical Areas Ordinance Implementation Team (the "CAO Team"). Though never a majority of the County Council, and without the power to take action for the County Council, the CAO Team gathered periodically to facilitate and coordinate the County's update to the critical areas ordinances, as required by the Growth Management Act.

The CAO Team gatherings ended in April 2012; eight months before the critical area ordinances were adopted. CP 823. In October 2012, Petitioners Citizens Alliance for Property Rights Legal Fund ("CAPR") filed a complaint alleging that the gatherings of the CAO Team violated the Open Public Meetings Act (OPMA).

The superior court granted the County's motion for summary judgment (CP 816-28; 854-57) and denied CAPR's motion for

[1] In 2012, the voters of San Juan County approved charter amendments which returned the County to a three member County Council, as explained in the briefing in Supreme Court Case No. 88574-5.

reconsideration. CP 924-33; 934-35. The Court of Appeals affirmed the superior court ruling in an unpublished decision.[2]

The Court of Appeals relied upon this Court's decision *In re Recall of Roberts*, which held that a gathering that includes less than a majority of the governing body does not violate the OPMA. 115 Wn.2d 551, 554 (1990); *See CAPR v. San Juan County*, 326 P.3d 730, 734 (also citing *In re Recall of Beasley*, 128 Wn.2d 419, 427 (1996) and *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 564 (2001)). The Court of Appeals additionally followed the approach set out in a 1986 Attorney General Opinion which analyzes the circumstances under which a committee "acts on behalf of" a governing body under the OPMA. *Id.* at 735-37 (citing AGO 1986 No. 16). The guidance of these decisions and others which have followed them are well established and have been used by municipal lawyers for over two decades.

The County submits that there are no legitimate grounds for Supreme Court review. Today, the San Juan County Council is a three member council, thus the guidance to be provided on appeal will be of limited value. The only potential relief that could come from the Supreme Court is an award of attorney fees. The ruling of the Court of Appeals was

[2] The Court of Appeals subsequently granted the motion to publish filed by the Washington State Association of Municipal Attorneys. 326 P.3d 730, WL 2739461 (2014).

in conformance with the OPMA and with Washington case law. There is no reason for this Court to revisit this settled area of law. The Petition for Discretionary Review should be denied.

II. ISSUES PRESENTED FOR REVIEW

The issues presented by CAPR's Petition for Review are restated as follows:

A. **Whether RAP 13.4(b)(1) or (2) provides a basis for review where the Court of Appeals ruled, consistent with prior decisions of this Court and the Courts of Appeals, that members of the San Juan County Council did not violated the Open Public Meetings Act by attending CAO Team gatherings where three of the six Council members were present?**

B. **Whether summary judgment was properly granted when CAPR failed to present sufficient evidence to establish the elements of a claim?**

C. **Whether review is proper under RAP 13.4(b)(4) when the issues in this case cannot be repeated under the current system of governance in San Juan County?**

III. FACTUAL BACKGROUND

The CAO Team, which included three or fewer County Council members and members of the County executive staff, began gathering in 2010 and met periodically 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 CAO Team was not established by the County Council as a subcommittee. Each of the six County Council members filed a declaration that confirmed: (1) the CAO Team was not brought into being by the County Council, and (2) the CAO 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.

After receiving the cautious advice of the Prosecuting Attorney, Randall K. Gaylord, the CAO Team gatherings were discontinued in April 2012. CP 263-64, 291, ln 16-19, 334-35. The public's ability to participate in the adoption of the critical areas ordinances was not affected by the CAO Team gatherings. Prior to adoption of its critical areas ordinances, the County Council held approximately 75 public meetings, over 30 of which occurred after the CAO Team stopped gathering. *CAPR v. San Juan County*, 326 P.3d at 732; CP 771-75. CAPR filed this lawsuit and requesting declaratory relief and attorney's fees six months after the CAO Team stopped gathering. CP 1-21.

The County respectfully asks this Court to deny discretionary review. The Court of Appeals' unanimous opinion properly rejected CAPR's argument that all subcommittees of a governing body are subject to the OPMA. As discussed in the Court of Appeals opinion, and analyzed in the 1986 Attorney General opinion, to accept CAPR's

assertion renders the phrase "acts on behalf of" superfluous. *See*, *CAPR v. San Juan County*, 326 P.3d at 736; AGO 1986 No 16. This Court should deny review.

IV. ARGUMENT

A. The Court of Appeals Correctly Held That a Committee Acts on Behalf of a Governing Body When It Exercises Actual or De Facto Decision Making Authority.

The County agrees that the County Council is a public agency subject to the OPMA. RCW 42.30.020(1). In 1990, this Court established a bright-line rule that a gathering of less than a majority of the governing body does not violate the OPMA. *In re Recall of Roberts*, 115 Wn.2d 551, 553 (1990); *see also Wood v. Battle Ground Sch. Dist*, 107 Wn. App. 550, 565 (2001). Though CAPR continues to state that "four County Council members" attended or were present at meetings, there is no question that under the facts presented four members of the County Council (a majority) never met. *See* Petition for Review, pgs. 1, 10, and 11. As noted by the Court of Appeals, CAPR "fails to back up this claim with argument or citations to the record." 326 P.3d at 734. CAPR's claim was properly rejected by the Court of Appeals. *See* RAP 10.3(a)(5). CAPR provided no reference to the record which shows a date, time, persons present or action taken of a meeting of four County Council members.

The County further agrees that a committee of the County Council, when acting on behalf of the County Council, is subject to the OPMA. RCW 42.30.020(2); AGO 1986 No. 16. But the CAO Team was never granted actual or de facto decision making authority to act for the County Council.

Because CAPR was unable to show that the Team "acted on behalf of" the full County Council, it failed to meet the standard of proof needed under the OPMA. Judge Hancock explained the lack of proof when he wrote:

> 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. The Court of Appeals agreed stating, "CAPR submitted no evidence that a majority of the Council attended CAO Team gatherings or that the CAO Team exercised actual or de facto decision making authority..." *CAPR v. San Juan County*, 326 P.3d at 737.

Because CAPR failed to present evidence that a quorum of the County Council met in violation of the OPMA, the existence of a committee of the County Council, or any evidence that such a committee "acted on behalf of" the County Council, the Court of Appeals correctly

affirmed the superior court's order granting summary judgment in favor of the County and dismissing CAPR's claims. *CAPR v. San Juan County*, 326 P.3d 730.

CAPR's assertion that the Court of Appeals decision is inconsistent with decisions of the Supreme Court and Court of Appeals is similarly unsupported. CAPR lists a handful of case but fails to provide any explanation or meaningful analysis to support its assertion that the Court of Appeals disregarded or failed to follow those decisions. The Court of Appeals decision is well supported by established case law. Mere unfounded assertions of what a party would like the law to be do not create an inconsistency sufficient to satisfy the requirements of RAP 13.4(b).

B. The Court of Appeals Correctly Affirmed the Order Granting Summary Judgment Where CAPR Failed to Present Evidence to Establish the Elements of its Claims.

After CAPR conducted extensive discovery, this case came before the superior court on Defendant County's motion for summary judgment which showed that CAPR simply had no proof to support its claim. On a motion for summary judgment, 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. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (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)). Speculation and argumentative assertions that unresolved factual issues remain, are not sufficient to overcome summary judgment. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13 (1986).

There is no question that CAPR submitted voluminous evidence. *CAPR v. San Juan County*, 326 P.3d at 732. Yet volume is not the test. CAPR failed to show that (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." *Id.* at 737; *See also, Eugster v. City of Spokane*, 118 Wn. App. 383, 424 (2003). Absent these necessary elements of an OPMA claim, the Court of Appeals properly affirmed the superior court's order granting summary judgment in favor of the County.

The superior court dismissed CAPR's claims on the County's motion for summary judgment because CAPR failed to present evidence to support its claims. CP 925. CAPR failed to allege or show any specific action taken in violation of the OPMA; when the action was taken or by

whom it was taken. CP 827. In the absence of even one of the required elements of an OPMA violation, summary judgment was properly granted.

C. This Case Does Not Involve Issues of Substantial Public Interest and Is Not Likely to Reoccur.

This case does not present any novel issues of law. For years, less than a majority of members of a legislative body have gathered together with others as working groups as expressly authorized by the legislature and this Court. *See*, RCW 42.30.020(2); *In re Recall of Roberts*, 115 Wn.2d 551, 553 (1990); *In re Recall of Beasley*, 128 Wn.2d 419, 427 (1996); *Wood v. Battle Ground Sch. Dist*, 107 Wn. App. 550, 565 (2001). CAPR's Petition for Review asserts that the issues of this case are of substantial public interest and likely to reoccur. Petition for Review, pg. 16. Certainly, it is unlikely to reoccur in San Juan County in light of the changes made to the County charter in 2012.

Moreover, CAPR's assertion of public interest is belied by the fact that it joined in the argument made by Amici Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government to the Court of Appeals stating that the "negative quorum" section of the Court of Appeals Opinion need not be published because "it is based on unusual facts which, according to [the Court of Appeals], are unlikely to recur."

Answer of Amicus in Opposition to Motion to Publish, pg. 2; Appellant's Response in Opposition to Washington State Association of Municipal Attorney's Motion to Publish Opinion. Amici wrote that the,

> meetings at issue involved three members of the San Juan County Council at a time when the council consisted of a total of six members. As [the Court of Appeals] noted on page 6 of its Opinion, 'effective May 2013, San Juan County voters reduced the size of the Council from six members to three, thereby eliminating the possibility that a negative quorum issue could arise again in San Juan County.'

Id. pgs. 2-3. Consequently, CAPR's further assertions that the County requires proper guidance for the future (Petition for Review, fn 5) is without merit.[3]

Unsupported statements and speculation do not create issues of substantial public interest. This is an ordinary case where both the superior court and the Court of Appeals examined the evidence presented and determined that CAPR failed to established the elements of its claim. This Court should deny review.

[3] CAPR claims the County's critical areas ordinances were "found noncompliant in numerous respects." (Petition for Review, fn. 5) In fact, the County was found noncompliant on only 8 of the over 100 issues raised by the challengers. Notably, both the Growth Management Hearings Board and the San Juan Superior Court have found the critical areas ordinances compliant with the public participation requirements of the GMA. *Friends of the San Juans, et al. v. San Juan County*, Case No. 13-2-0012c, FDO (09/06/2013); *Common Sense Alliance, et al. v. GMHB*, San Juan County Sup. Ct. No. 13-2-05190-8, Final Order (2014).

V. CONCLUSION

For all of the above reasons, San Juan County respectfully asks this Court to deny discretionary review.

Respectfully submitted this 4th day of August 2014.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

By: _____
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Attorney for San Juan County

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CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation , Appellant, v. SAN JUAN COUNTY, et al, Respondents.	NO. 90500-2 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 August 4, 2014, I caused to be delivered in the manner indicated below a true and correct copy of SAN JUAN COUNTY'S ANSWER TO PETITION FOR REVIEW in the above-entitled cause to:

Mr. Dennis D. Reynolds
200 Winslow Way West, Suite 380
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By First-Class Mail

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

Dated this 4th day of August, 2014, at Friday Harbor, Washington.

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