

No. 36112-4-II

COURT OF APPEALS DIVISION II
FOR THE STATE OF WASHINGTON

ARTHUR S. WEST,

Appellant

v.

WASHINGTON PUBLIC PORTS ASSOCIATION
AND ROBERT VAN SCHOORL

Respondents,

Appeal of the rulings of the Honorable
Judge Tabor of the Thurston County Superior Court

OPENING BRIEF OF APPELLANT WEST

ARTHUR WEST
Olympia, Washington 98501
(360) 292-9574

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DIVISION II
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INTRODUCTION

In Chapter 31 of the Laws of 1961, under the title of coordinating administration programs and operations, the Legislature of the State of Washington provided authorization for Port Districts to delegate authority to make a biennial report to a new legislatively created entity, the Washington Public Ports Association.

Its functions, specified by RCW 53.06.030, are inherently governmental and public in nature. Port District Commissioners, such as Port of Olympia Commissioner Robert Van Schoorl, are vested with discretion to pay to the WPPA an amount up to one cent per thousand dollars of assessed value in the District, under RCW 53.06.040.

Originally subject to audit by the State Auditor's division of municipal corporations, the WPPA remains subject to audit by the State Auditor under the express terms of RCW 53.06.040.

While there is, sadly, no evidence that the actual and primary

function of the WPPA as mandated by statute RCW 53.06.020, (preparation of a biennial report to the Governor and Legislature) has ever been performed, in the 46 years since its inception the WPPA has grown to become an organization with over a Million Dollar annual budget, which performs a number of statutory governmental functions while it conducts separate, extra-legal private lobbying activities as a registered lobbying organization. It has even expressly contracted with the DOT to spend public funds as a "State Agency". WPPA studies are regularly used by Department of Transportation and the Governor as a basis for their projections and policy determinations. The WPPA also acts jointly with the Department of Natural Resources to regulate public use of DNR lands and develop DNR land use policies.

While the WPPA is authorized under RCW 53.06.080 to employ distinct nonprofit corporate organizations, the

"Actions taken under this section must be implemented pursuant to the powers granted in chapter 39.84 RCW. (And)

Any nonprofit corporation utilized pursuant to this section must be a tax exempt nonprofit corporation, may be a nonprofit corporation created by the Washington public ports association, and must be created for the sole purposes of education and training for port district officials and employees."

Significantly, while the WPPA is itself a nonprofit

organization, **it is not formed under chapter 39.84 RCW**, since that statute postdates the (1961) articles of incorporation of the WPPA by several decades. The WPPA Articles of Incorporation have not been amended in almost 50 years, and do not provide authority for lobbying activities. In the 46 years since the WPPA filed its Articles of incorporation, a number of regulatory reforms have been adopted into law, the Open Public Meetings Act, the Open Public Records Act, SEPA, and the laws on conflict of interest. It is time that the operations of the WPPA are brought into conformity with these legislatively declared public policies.

This case presents the central issue of how best to legally characterize this organization created pursuant to an act of the Washington State Legislature, the Washington State Public Ports Association. The Court's task in making this determination is complicated by the circumstance that while the intent of the Legislature in creating the WPPA was somewhat limited, and the legal restrictions on its lawful organization very circumscribed by RCW Title 39.84, the Legislature's theoretical intent and restrictions have been transcended by the practice of the organization in the real world.

An organization that was originally intended to provide for administrative efficiency in the limited role of making of a biennial report , (RCW 53.06.020) and whose lawful functions cannot exceed training and education of port employees, has grown into an agency with over a million dollars a year in annual budget which conducts

lobbying and various other activities. (See Auditors Report at CP 184)

The failure of defendant to respond to the complaint or respond to admissions technically requires a verdict on all claims. However, in order to facilitate a decision on the merits, should there be any doubt in the Court's mind, this case should be remanded down for discovery to be completed and a decision made by an impartial alternate magistrate based upon a fully developed record.

Similarly, in regard to the conflict of interest of defendant Van Schoorl and his 3 incompatible offices he held at the time of the filing of this suit, the clear direction of the only AGO legal analysis on point is that a Port Commissioner cannot also hold a position with a superior regulating agency such as the DNR. The undisputed existing contractual relationship between the Port of Olympia and DNR, and the interchange of funds and regulatory authority between the Port, the WPPA and the DNR demonstrated by State law and plaintiff's exhibits makes a plain case of numerous impermissible conflicts of interest.

Public policy would mandate a determination of the propriety of these evident conflicts of interest of an executive state officer, Port Commissioner and WPPA President, even if the defendants has denied the allegations in the complaint and requests for admissions. Based upon the undisputed established facts of this case, a remand with directions to enter judgment on all of appellant's claims, or at the very least for a fair and impartial hearing in the trial court

on all claims, based upon full discovery, should issue from this Court.

It is a disturbing irony that the indisputably public issues of this case are precisely the type which the Courts of this State have consistently considered vital to the operation of government and for which significantly relaxed standing requirements have been almost universally applied.

Despite the disturbing discontinuity between the law and the reality of WPPA activities, it is indisputable that **the Legislature's intent in 1961 was to create an agency to perform exclusively public functions**. For the WPPA to operate in secret, insulated from judicial review, is a betrayal of the clear intent of the Legislature in adopting the act and an affront to the fundamental principles of our democratic Republic.

Following the reasoning of this Court in Telford v. Board of County Commissioners, 95 Wn. App. 149, (1999) and that of the Washington State Attorney General in AGO 2002-2, it is beyond reasonable argument that the WPPA should be considered the functional equivalent of a public agency for the purposes of the PRA and the Open Public Meetings Act, just as the similar organizations reviewed in Telford were found to be functionally equivalent to public agencies.

The De novo Standard of review is the proper standard of review for the issues of this case. Under this standard the Court erred in failing to rule in accord with substantial evidence and established

precedent.

STATEMENT OF THE CASE

A public records request originally made by Appellant West to the WPPA on September 25, 2006. (CP 15 at 3.2)

The WPPA initially failed to comply with the PDA and release documents, assert exemptions, or provide a time when any documents might be released. (CP 15 at 3.3)

On October 20, 2006, Plaintiff West filed the original lawsuit in this case. (CP 3-7)

On October 25, 2006 defendants agreed to comply "voluntarily" with the PRA, but denied that the WPPA was a public agency. (CP 13)

On October 31, 2006, Plaintiff West submitted a request to the Attorney General and Thurston County Prosecutor to investigate the unconstitutional expenditure of funds by the WPPA..(CP 182)

Subsequent to this request, on October 31, 2006, plaintiff West filed an amended complaint. (CP 10-18)

On December 22, 2006, Appellant filed requests for admission and for production of documents. (CP 59-60)

On December 29, 2006 Defendant's CR 12 (b) 6 motion (CP 26-36) was denied.

On January 19, 2007, in response to defendants request (CP 56-61), the CR 12 (b) 6 hearing was continued to January 26, 2007.

On January 26, 2007 despite the passage of over 30 days since plaintiff had served requests for admission, and despite defendants

failure to deny these requests, and their failure to answer the complaint or respond to discovery, (CP 67-91) the Court inexplicably determined that no disputed issues of fact remained.

On February 9, 2007, the court denied West's motion to compel answers to discovery and requests for admission, (CP 92-93) and despite the technical admission by defendants of all of plaintiff's requests for admission, and defendants further stipulation to the truth of the amended complaint by their refusal to answer or deny the allegations, and despite Plaintiff's filing of a declaration and offer of proof, (CP 12-145) and an ER 201 submission, (CP 62-66) the Court inexplicably entered an order dismissing all of plaintiff's claims. (CP 146-8)

West filed a motion to reconsider on February 20, 2007. (CP 149-182)

A lease between DNR and the Port of Olympia, which provided that "The DNR and the Washington Public Ports Association...shall meet annually to review statutes, regulations and policies." was submitted in support of the motion for reconsideration. (CP 188, at N. 6)

The Court denied West's motion to reconsider on February 21, 2007. (CP 183-4)

On March 26, 2007, West filed a timely Notice of Appeal. (CP 207-208)

ASSIGNMENTS OF ERROR

I. The Court erred, in the orders of February 9 and 21, 2007, in failing to rule that the WPPA be considered the functional equivalent of a public agency or otherwise subject to the Public Records and Open Public Meetings Acts when uncontested evidence and State Law demonstrated the WPPA was created by statute, performed governmental functions, expended public funds subject to audit by the State Auditor, had expressly contracted with the Washington State Department of Transportation as a "State Agency", exercised regulatory functions over the Port of Olympia in combination with DNR, and in all respects constituted the functional equivalent of a public State Agency under the standards and balancing test set forth in Telford.

II. The Court erred, in the orders of February 9 and 21, 2007, in denying plaintiff's standing when uncontested evidence demonstrated that: issues of statewide importance existed justifying relaxed standing requirements, appellant was a landowner and taxpayer in a port district paying funds to the WPPA, appellant had filed a request for investigation of unconstitutional expenditures with the Attorney General and County Prosecutor, and when defendants had expressly refused to disclose public records at the time of the filing of the original complaint, and had entered into a special relation with the plaintiff.

III. The Court erred in summarily dismissing plaintiffs claims, failing to require admission and production of material evidence identified by plaintiff under CR 56 (f), and in entering the findings of fact No 1,2,3, and 4 in the order of February 9, 2007, when defendants had failed to dispute the allegations in the complaint or respond to requests for admission of dispositive facts, and when such failure to answer or deny required that all such allegations be regarded as true and all such admissions be regarded as admitted..

IV. The Court erred in ruling that no disputed issues of fact existed in regard to defendant Van Schoorl's violation the open public meetings act in the absence of any reply to the allegations in the complaint or denial of the requests for admissions, or answers to relevant discovery of material facts

V. The Court erred in ruling that no disputed issues of fact existed in regard to defendant Van Schoorl's impermissible conflict of interest in regard to his duties as the president of the WPPA, in the absence of any reply to the allegations in the complaint or denial of the requests for admissions, or answers to relevant discovery of material facts.

VI. The Court erred in failing to find the WPPA's lobbying and other private activity exceeded its lawful scope of actions under

RCW Titles 39.84 and 53.06.

VII. The Court erred in striking plaintiff's exhibits when they were readily verifiable copies of public records legitimately subject to admission under the Rules of Evidence, when there had been no challenge to their accuracy, when they included articles filed under seal with the Secretary of State, and when the prejudice resulting from their removal far outweighed any possible prejudice from their admission.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. Did the Court err the orders of February 9 and 21, 2007, in failing to rule that the WPPA be considered the functional equivalent of a public agency or otherwise subject to the Public Records and Open Public Meetings Acts when uncontested evidence and State Law demonstrated the WPPA was created by statute, performed governmental functions, expended public funds subject to audit by the State Auditor, had expressly contracted with the Washington State Department of Transportation as a "State Agency", exercised regulatory functions over the Port of Olympia in combination with DNR, and in all respects constituted the functional equivalent of a public State Agency under the standards and balancing test set forth in Telford?

II. Did the Court err in denying plaintiff's standing when

uncontested evidence demonstrated that: issues of statewide importance existed justifying relaxed standing requirements, appellant was a landowner and taxpayer in a port district paying funds to the WPPA, appellant had filed a request for investigation of unconstitutional expenditures with the Attorney General and County Prosecutor, and when defendants had expressly refused to disclose public records at the time of the filing of the original complaint, and had entered into a special relation with the plaintiff?

III. Did the court err in in summarily dismissing plaintiffs claims, failing to require admission and production of material evidence identified by plaintiff under CR 56 (f), and in entering the findings of fact No 1,2,3, and 4 in the order of February 9, 2007, when defendants had failed to dispute the allegations in the complaint or respond to requests for admission of dispositive facts, and when such failure to answer or deny required that all such allegations be regarded as true and all such admissions be regarded as admitted.?

IV. Did the Court err in ruling that no disputed issues of fact existed in regard to defendant Van Schoorl's violation the open public meetings act in the absence of any reply to the allegations in the complaint or denial of the requests for admissions, or answers to relevant discovery of material facts?

V. Did the Court err in ruling that no disputed issues of fact existed in regard to defendant Van Schoorl's impermissible conflict of interest in regard to his duties as the president of the WPPA, in the absence of any reply to the allegations in the complaint or denial of the requests for admissions, or answers to relevant discovery of material facts?

VI. Did the Court err in failing to find the WPPA's lobbying and other private activity exceeded its lawful scope of actions under RCW Titles 39.84 and 53.06?

VII. Did the Court err in striking plaintiff's exhibits when they were readily verifiable copies of public records legitimately subject to admission under the Rules of Evidence, when there had been no challenge to their accuracy, when they included articles filed under seal with the Secretary of State, and when the prejudice resulting from their removal far outweighed any possible prejudice from their admission.

ARGUMENT ERROR I

The Court erred in failing to find that the WPPA was the functional equivalent of a public agency or otherwise subject to the Public Records and Open Public Meetings Acts when it clearly appeared from the express letter of law, the balancing test set forth in Telford, and uncontested evidence and clear precedent that it should be required to conduct its public purposes openly.

The existing authority on what circumstances are to be balanced to determine of whether the WPPA is properly subject to the Public Records Act and Open Public Meetings Act is contained in Telford, and AGO 2002, No. 2.

The Telford Court and the State Attorney General have agreed on the following criteria.

1. Whether the organization performs Governmental functions
2. Whether the entity receives significant governmental funds
3. Whether the organization is subject to governmental control
4. Whether the entity was created by the legislature

From the express terms of Statute and from the evidence submitted by plaintiff, there is no reasonable dispute that the WPPA meets these criteria, and should be considered a public entity under any reasonable balancing test.

1. The WPPA performs governmental functions.

The legislative mandate expressed in the enactment of the WPPA was identical to that of the organizations the court reviewed in Telford, the statewide coordination of administrative programs, declared by the Legislature to be a public purpose. The duties of the organization described in RCW53.06.030 are exclusively public functions. It expressly contracts with the DOT as a public "Agency", to expend public funds and conduct studies, and acts in conjunction with the DNR to exercise State regulatory and policy review. There can be no dispute that the lawful scope of WPPA action is exclusively governmental in scope.

2. The WPPA receives significant public funding.

The WPPA is primarily funded by public tax revenue, and receives significant public funding of these tax revenues from Port Districts for the performance of its public functions (RCW 53.06.30, CP 158-65)

3. The WPPA is subject to governmental audit and control.

Under the express terms of RCW 53.06 050, the WPPA is subject to audit and control by the State Auditor, and has been audited by Mr. Sontag (CP 155-179). Under Van Schoorl's presidency, it was subject to control by an executive State officer of the DNR and an elected Port Commissioner of the Port of Olympia. From its inception it has functioned primarily as an association of publicly elected officials. Its funding under RCW 53.06.040 is set at the discretion the elected Commissioners of the Port Districts which are empowered to give it up to one cent per thousand dollars of assessed value in their respective districts.

4. The WPPA was created by act of Legislature.

Since its creation by the enactment of Chapter 31 of the Laws of 1961, the WPPA has been an agency created by Statute. RCW 53.06.030 vests the WPPA with the following duties

(1) To initiate and carry on the necessary studies, investigations and surveys required for the proper development and improvement of the commerce and business generally common to all port districts, and to assemble and analyze the data thus obtained and to cooperate with

the state of Washington, port districts both within and without the state of Washington, and other operators of terminal and transportation facilities for this purpose, and to make such expenditures as are necessary for these purposes, including the proper promotion and advertising of all such properties, utilities and facilities;

(2) To establish coordinating and joint marketing bodies comprised of association members, including but not limited to establishment of a federation of Washington ports as described in RCW 53.06.070, as may be necessary to provide effective and efficient marketing of the state's trade, tourism, and travel resources;

(3) To exchange information relative to port construction, maintenance, operation, administration and management;

(4) To promote and encourage port development along sound economic lines;

(5) To promote and encourage the development of transportation, commerce and industry;

(6) To operate as a clearing house for information, public relations and liaison for the port districts of the state and to serve as a channel for cooperation among the various port districts and for the assembly and presentation of information relating to the needs and requirements of port districts to the public.

These purposes, especially (6), are additional specific authority for the WPPA to be found subject to the disclosure requirements of the Public Records Act.

In PAWS v. University of Washington, 125 Wn.2d 258, 884 P.2d 592, The Supreme Court recognized that Public Records Act contains a broad and inclusive statement of policy.

(T)he people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivisions of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy. RCW 42.56.030

The Open Public Meetings Act also Contains a similar broad remedial intent to insure that the public remains informed of the actions of Government and a powerful statement of public policy favoring public observance of governmental decision making. It is clearly established that Chapter 42.30 RCW is also to be liberally construed to further its policies and purpose. Eugster v. City of Spokane, 110 Wn. App. 212, (2002). As this Court recognized in Telford, the remedial intent of these acts argues persuasively for the inclusion of the WPPA within their ambit.

The Trial court in this case committed obvious error when it failed to broadly construe the Open Public Meetings Act and the Public Disclosure Act broadly to include the WPPA within their regulatory

scheme when the primary objective of statutory interpretation is to give force to the language of statute and carry out the intent of the legislature. State v. Brown, 140 Wn. 2d 456, 466, 998 P.2d 321 (2000).

The intent of the Legislature in enacting open government law is not effected when an organization performing undeniably public functions can operate in the shadows for nearly fifty years and then, when legitimate questions of public policy are finally raised, they are summarily dismissed without even a pretense of a fair and full examination of the evidence.

ARGUMENT ERROR II

The Court erred in the orders of February 9 and 21 in denying standing or the existence of a controversy subject to adjudication when the following conditions were demonstrated by plaintiff without answer or denial by the Port.

1. The Statewide (and National) importance of the WPPA and its functions was uncontested and unambiguous, justifying relaxed standing requirements to determine these public policy issues.

2. Plaintiff has filed the requisite request with the Attorney General and County Prosecutor prior to maintaining his claim for unconstitutional expenditure.

3. Plaintiff was a landowner in a port district whose tax dollars were employed by the port to fund the WPPA.

4. The denial of plaintiff's request for inspection of public

records prior to suit was uncontested and the WPPA had entered into a special relationship with plaintiff by accepting over \$100 for copies of public records.

5. The Conflict of interest issues raised provided additional public policy issues of a type uniquely subject to judicial review, and of statewide importance.

1. It is almost an oxymoron that status of the Washington Public Ports association, being a statewide organization of many diverse local entities controlling imports in the most trade dependant state in the nation, is an issue of statewide significance. However, plaintiff filed a specific Evidence Rule 201 submission of Newspaper reports from 3 cities where the lobbying activities of trade associations including the WPPA had been considered a matter of statewide importance by the PDC.

"Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer. Washington Natural Gas Co.. v. PUD 1, 77 Wn.2d 94, 96, 459 P.2d 633 (1969); accord, Volvos v. Grant, 87 Wn.2d 697, 701, 555 P.2d 1343 (1976). Where an "issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and

it is desirable to provide an authoritative determination for the future guidance of public officials. Cathcart Community Council. v. Snohomish County, 96 Wn.2d 201, 208, 634 P.2d 853 (1981).

A determination of the status of the WPPA is a perfect example of a controversy the outcome of which will have a direct bearing on the commerce, finance, labor, industry or agriculture generally. In fact, it would be difficult to find an organization with a greater influence, statewide upon these trade related economic issues. It is difficult to even imagine a controversy with a greater justification for a relaxed standing requirement.

The existence of the need for resolution of this controversy was acknowledged by Tim Sheldon, (coincidentally the representative from the district where plaintiff owns land and pays property tax) in his request for an AGO opinion on the very question that forms the basis of this suit..

2. Even without a relaxed standing requirement, plaintiff has filed the requisite request with the Attorney General and County Prosecutor prior to maintaining his claim for unconstitutional expenditure. This was one of the matters specifically addressed (and admitted by defendants' default) in the requests for admission, and a copy of the admission appears at CP 182.

The submission of such a letter has provided for standing to challenge unlawful expenditure in a long line of unbroken Washington Cases stretching back over 60 years. Reiter v. Wallgren, 28 Wn.2d

872, 184 P.2d 571 (1947) The Supreme Court has expressly ruled that the danger of leaving a citizen with no recourse in the face of unlawful governmental action far outweighs any potential for theoretic misuse of the right. Significantly, the Court recognized that it had never been presented with such a misuse. The status and legal scope of operation of a purportedly "Public" agency such as the "Public" Ports association (expending over a million dollars a year of taxpayer funds) is precisely the type of legitimate public policy issue that Washington Courts have deliberately refused to erect barriers in regard to the determination of.

3. Third, even if the two grounds above were unavailing, plaintiff, as mentioned above, and to the Court, is a landowner in Mason County, in a district where a portion of his tax money is directed, through the Port of Shelton, to the WPPA. Such a direct expenditure provides a direct and particularized injury in fact required under even the most restrictive and exclusive test for standing.

It should also be noted that Plaintiff's standing was specifically plead in the complaint and never denied. Further, a request for admission that plaintiff had the requisite standing was not denied and the issue must therefore be considered proven by plaintiff. See CR 36, Melby v. Hawkins Pontiac, 13 Wn. App. 745, 537 P.2d 807 (1975)

As a further standing argument, plaintiff has a special relationship and particularized standing based upon the WPPA failing

to disclose records until after the filing of the suit and then charging him over \$100 for public records disclosure. By failing to disclose records prior to suit, and then charging plaintiff for public records disclosure, the WPPA has established a "special relationship" or other relation providing a particularized effect upon plaintiff required for standing.

If a plaintiffs lack standing to determine if an agency is public to begin with, then the entire enforcement of the PRA is jeopardized. If such a ruling were allowed to set precedent, then any agency could deny disclosure of records based upon its private nature and the requesters would be entirely without recourse. Such a result is so absurd as to make a mockery of the entire concept of Public Disclosure. The broad mandate of the Public Records and Open Public meetings Acts and Title 7.16 RCW regarding Declaratory Relief must be construed to effectuate the remedial intent of the legislature. The narrow and hyper-technical standing determination by the Trial Court is completely at odds with all principles of construction of remedial statutes, and the Public Records Act in particular.

ARGUMENT ERROR III

Plaintiff specifically objects to the findings 1-4 in the order of February 9, as set forth below.

1. **To the extent that the Plaintiff seeks a Declaratory Judgment, the Plaintiff lacks standing to bring to bring this Declaratory Judgment action pursuant to RCW 7.24.020 under the facts presented to the Court.**

2. Based on Plaintiff's failure to present facts or make an offer of proof in support of his claim of WPPA's alleged violation of the Open Public Meeting Act, i.e., no justiciable controversy exists and or Plaintiff has failed to state a claim upon which relief may be granted pursuant to CR 12(b)(6).
3. Based on Plaintiff's failure to present facts or make an offer of proof in support of his claim of WPPA's alleged "Unconstitutional Expenditure of Public Funds", no justiciable controversy exists and or Plaintiff has failed to state a claim upon which relief may be granted pursuant to CR 12(b)(6).
4. Based on Plaintiff's failure to present facts or make an offer of proof (a) in support of his claims of WPPA's alleged violation of the Public Records Act, (b) in Support of Plaintiff's requested Global Declaration that the WPPA is subject to the Public Records Act (PRA), (c) in support of his claims of WPPA's alleged violation of the State Environmental Policy Act, and (d) in support of his claims of Defendant Van Schoorl's alleged conflict of interest claim, no justiciable controversy exists and or Plaintiff has failed to state a claim upon which relief may be granted pursuant to CR 12(b)(6).

The Court erred in the order of February 9 and 21 and in entering findings 1-4 (CP 147) when all of the issues it determined adversely to the plaintiff had been properly alleged in the amended complaint without any answer filed by defendants contesting their veracity, and it was therefore required to consider them as true for the purposes of a CR 56 determination.

The Court erred and failed to rule in accord with substantial

evidence, (and abused discretion) in the order of February 9 and 21 in entering findings 1-4 when defendants were in default of responding to the complaint, Hill v. King County, 41 Wn. 2d 592, 250 P. (2d) 960, (1952). And when all of the issues it determined against plaintiff had been the subject of a timely request for admission, and were required to be deemed admitted by such default for the purposes of a CR 56 determination. Melby v. Hawkins Pontiac, 13 Wn. App. 745, 537 P.2d 807 (1975) The trial Court erred, on summary judgment, in failing to construe all facts and reasonable inferences in the light most favorable to the non-moving party. Central Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 351, 779 P.2d 697 (1989)

The Courts findings 1-4 were in error as contrary to all existing precedent and not in accord with substantial evidence.

ARGUMENT ERROR IV

The Court erred in summarily dismissing and/or failing to consider Van Schoorls' violations of the OPMA to be a justiciable controversy, and in entering the orders of February 9 and 21 when the facts presented to the court made a prima facia case of violations of the Open Public Meeting Act, when the admissions and uncontested allegations in the complaint required that judgment be entered finding that such violations had occurred, and when further more specific details of such violations were impossible due to the secretive nature of the organization.

The legislature has declared the OPMA's purpose in forceful terms:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. RCW 42.30.010. See also RCW 42.30.910 (directing that the OPMA be liberally construed); Equitable Shipyards, Inc. v. State, 93 Wn.2d 465, 482, 611 P.2d 396 (1980) ("We recognize the statutory statement of purpose in [the OPMA] employs some of the strongest language used in any legislation."). Wood v. Battle Ground School. District. 107 Wn. App. 550, (2001)

In Plaintiff's Amended Complaint, (CP 10-18) Plaintiff's Declaration and Offer of Proof, (CP 94-119), Plaintiff's Declaration re Disputed Issues of Fact and Pending Admissions, (CP 67-91), and Plaintiff's Motion for Reconsideration, (CP 149-142), plaintiff sets forth the dates and times of meetings of the WPPA and makes a prima facia showing of violations of the Open Public Meetings Act, if it is considered a public Agency.

The Court erred in dismissing plaintiff's OPMA claims on summary judgment, by failing to consider the OPMA a justiciable statute, in failing to construe the definition of meeting broadly in order to effectuate the act, (See Wood, supra) and in failing to construe all inferences and undisputed allegations in favor of plaintiff as the non moving party. Before a Magistrate who refuses to believe the plaintiff has any right to be heard to begin with, it is not a surprise that the matters asserted in uncontested allegations and requests for admissions were not even considered in such a partial review.

Failure of the Court to even consider the OPMA a valid cause of action to begin with, in addition to its various procedural and substantive errors was not in accord with substantial evidence and contrary to established precedent.

ARGUMENT ERROR V

The Court erred in the orders of February 9 and 21 dismissing

plaintiff's conflict of interest claims concerning Defendant Van Schoorl's impermissible conflict of interest when the facts presented to the court made a prima facia case of a serious impermissible conflict, and when the admissions and uncontested allegations in the complaint required that judgment be entered finding that an impermissible conflict existed.

The Courts of this State have long held that the laws concerning conflicts of interest be strictly enforced no matter how devious and winding the chain may be. It is clear from the form and content of the February 9 order (CP 146-148) that the Court had already determined to dismiss plaintiff's claims and all other considerations were subordinated to this determination, including any reasonable review of evidence in the file or that conceded by default or properly available through discovery. This was in clear contrast to the zealous duty of evidentiary consideration governing matters of public officials duty.

"However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void."City of Northport v. Northport Town Site Co., 27 Wash.543, 549, 68 R 204 (1902).

In AGO 1978-12 the issue of incompatibility of office of a Court Commissioner is discussed. At law the duties of a Port commissioner are incompatible with the duties of an officer on a board that they pay money to or have regulatory oversight over. All of these conditions are met by the Contemporaneous office holding of DNR

Director of Finance and Budget, Port Commissioner, and President of the WPPA.

The Authority directly on point that exists strongly suggests that Defendant Van Schoorl's simultaneous holding of the office of DNR officer, Port Commissioner, and WPPA president presents a legitimate question of conflict of interest and incompatibility of offices.

AGO 1978 No. 12 concerned the issue of incompatibility of the office of Port Commissioner and mayor of a fourth class City, and determined that it was impermissible as a matter of law for the same individual to hold both offices. The AGO concluded that where the first office held is that of commissioner of a port district subject to regulation and there is a connection between the regulation of said district by the second office, a an impermissible conflict of interest and incompatibility of office is presented. AGO 1978 No. 12, at page 5.

Significantly, the 1978 opinion cites to a previous AGO where an office vested with discretionary expenditure of forest funds was found to be incompatible with a school district that received funds.

It is beyond question that as Port Commissioner defendant has the discretion to delegate authority to and pay funds to the WPPA. Also, as DNR budget director he is vested with discretionary control of all of DNR revenue, and is an executive officer of two the agencies charged with regulating the policies governing the lease to the Port of Olympia.

The discretionary authority to fund the WPPA vested in the commissioners of Port Districts is another prima facia example of incompatibility of offices for such incompatibility is determined to exist...

Where the performance of one of his offices would automatically enrich the coffers of the other. AGO 65-66 No.7, citing De Feo v. Smith, 110 A. (2d) at 557

Where a commissioner serves simultaneously in both a board that allocates money and one that receives it a legitimate question of incompatibility and conflict of interest is presented. AGO 65-66 No. 7 At P. 3 Incompatibility can also arise as a consequence of an existing contractual relationship between the two agencies, as well as because of some statutory interrelationship. AGO 1978 No. 12 at page 4.

Offices are incompatible when the nature and duties of the offices are such as to render it improper from consideration of public policy for one person to retain both...the question is whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest. Kennet v. Levine, 50 Wn. 2d 214, at 216 (1957)

Significantly, the 1978 AGO specifically references that even in the case where a prima facia incompatibility is not demonstrated, the validity of contracts between the Port District and the agency employing such a dual office holder could well be affected.

With the existing statutory interrelationship between the Port

of Olympia, the WPPA and the DNR, the DNR lease to the port vesting policy determination rights in the WPPA, and the transfers of money between the port and the WPPA and between the DNR and the Port Regulatory oversight of DNR over the port the for leasing fees, permit and liscense approvals, a legitimate issue of conflict of interest, if not outright incompatibility of office was presented to the trial court.

The court erred in dismissing plaintiffs claims when defendants had failed to deny requests for admissions regarding the conflict presented by the 3 offices held by Van Schoorl, when the allegations in the complaint remained unanswered, and when the requests for admissions remained undenied.

In the absence of any denial, credible or otherwise, the court manifestly abused discretion, let alone ruled against the weight of substantial evidence when it dismissed plaintiff's claims.

Ethics in government are the foundation on which the structure of government rests. State officials and employees of government hold a public trust that obligates them, in a special way, to honesty and integrity in fulfilling the responsibilities to which they are elected and appointed. Paramount in that trust is the principle that public office, whether elected or appointed, may not be used for personal gain or private advantage.

The citizens of the state expect all state officials and employees to perform their public responsibilities in accordance with the highest ethical and moral standards and to conduct the

business of the state only in a manner that advances the public's interest. LAWS OF 1994, ch. 154, § 1.

Based on the plain language of RCW 42.23.070(1) and the legislative intent in enacting the Ethics in Public Service Act, the Court of Appeals erred in limiting the purpose of the statute to situations only involving conflicts of interest. RCW 42.23.070(1) clearly prohibits municipal officers from using their positions to secure special privileges or exemptions for others.

Thus, its plain language does not limit the prohibition to only conflict of interest situations. Furthermore, the express purpose of the act was to ensure that government officials conducted business in a "manner that advances the public's interest." LAWS OF 1994, ch. 154, § 1.

The Trial Court erred in dismissing claims based upon substantial evidence when RCW 42.23.070(1) creates a valid public policy in favor of prohibiting municipal officers from granting special privileges or exemption to others, and when public officials serve the interests of the citizens of Washington, consistent with the Ethics in Public Service Act, are appropriately held to a high standard. See Hubbard v. Spokane County, 713 146 Wn.2d 699 (2002)

A ruling should be directed on the Conflict of Interest claims or at the very least, further discovery should be required to specifically delineate the compatibility or lack thereof of the Three offices held by defendant van Schoorl.

ARGUMENT ERROR VI.

The Court erred in the orders of February 9 and 21 in failing to find the WPPA's lobbying and other private activity exceeded its lawful scope of actions under RCW Titles 39.84 and 53.06. The Court erred and ruled at variance with precedent and the weight of evidence when it failed to rule that WPPA lobbying constituted an unlawful expenditure of funds when it was demonstrated by the PDC reports that the WPPA conducted Lobbying and undenied by the defendants that the WPPA could not lawfully lobby under RCW 53.06 and RCW 39.84. The evidence in the record of the report of the Auditor and the Lobbyist registration and expenditure forms executed by defendant Van Schoorl and WPPA employees clearly demonstrate lobbying activities. The Court erred in failing to rule that such activity was unlawful and violative of law when plaintiff had made the requisite standing request, and when such order was necessary for the continued sound operation of Government. See Reiter v. Walgren, supra. Said error was not based upon substantial evidence or existing precedent.

ARGUMENT ERROR VII

The Court erred in striking exhibits when they were copies of public records, when there was no question as to their authenticity, and when their exclusion was a deliberate hyper-technical redaction of the record made for the purpose of prejudicing plaintiff and denying an adjudication on the merits of legitimate claims.

RCW 5.45, the Uniform Business Records as Evidence Act, and RCW 5.46 the Uniform photographic copies of business and public records as evidence act allow copies of records to be admitted. RCW 5.46 states in particular...

"Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court."

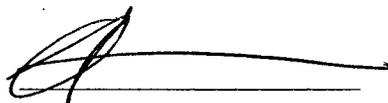
It should also be noted that the non moving parties evidence on summary judgment is not scrutinized with the same degree of care as that of the moving party. (CR 56) Under these circumstances the Curt erred in striking the copies of records, including those under seal from the Secretary of State, that the plaintiff had filed to support his claims. Said error violated existing precedent and was contrary to substantial evidence..

CONCLUSION AND RELIEF SOUGHT

This court should act in accord with the clear letter of the law and existing precedent, and remand this case back to the Trial Court with instructions to vacate the orders of February 9 and 21, 2007, issue judgment on all plaintiff's claims, and award costs to plaintiff in the Trial Court and on appeal. In the alternate an order of remand should issue with instructions to vacate the dismissal,

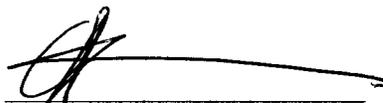
compel discovery, and conduct a full evidentiary hearing based upon all relevant evidence.

Done February 23, 2007.

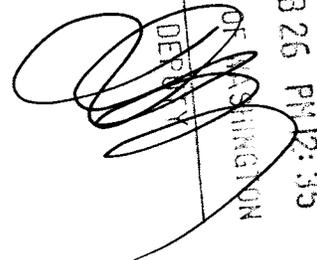


ARTHUR WEST

Done this day of February 23, 2008. I certify that on February 24, 2008, I electronically served a copy of this document to Counsel for defendants at their address of record. I certify the foregoing to be true.



ARTHUR S. WEST

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DIVISION II
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