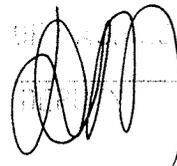


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DIVISION II

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STATE OF WASHINGTON
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36112-4II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST
APPELLANT

VS.
WASHINGTON PUBLIC PORTS ASSOCIATION
RESPONDENT

RESPONSE BRIEF OF RESPONDENT WASHINGTON PUBLIC
PORTS ASSOCIATION

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I. INTRODUCTION / SUMMARY

This is a Public Records Act case. Appellant fails to state a cause of action upon which relief can be granted. Appellant misuses the resources of the Court by complaining of a Public Record Act Chapter 42.56 RCW (PRA) violation which simply did not occur. Appellant then bootstraps various other non-justiciable and or factually unsupported claims (alleged state officer's conflict of interest claim, an alleged open public meeting act "question", and unidentified unconstitutional expenditure (lobbying) of public funds) onto the frivolous PRA case. The appeal should be dismissed in its entirety.

II. RESPONDENT WPPA'S RESTATEMENT OF FACTS¹

On or about September 25, 2006, Appellant Mr. West submitted his initial request for information to the Defendant WPPA. CP 43, Exhibit 1 attached to Declaration of Pat Jones. Thereafter, on September 29, 2006, the WPPA *timely* responded and notified Appellant West that the WPPA required clarification and additional time to respond to the request. CP 45-47, Exhibit 2 attached to Declaration of Pat Jones. WPPA's response was within five business days of receiving Appellant West's request for records. *Id.*

¹ The majority of Port facts are based on the Declaration of WPPA Executive Director Pat Jones filed 30 November 2007. CP 38-15.

On October 6, 2006, the WPPA received Mr. West's clarification of his information request. CP 49, Exhibit 3 attached to Declaration of Pat Jones. Four days later on October 10, 2006, the WPPA timely responded and advised Appellant West that the WPPA was reviewing records and would respond no later than October 24, 2006. CP 51-52, Exhibit 4 attached to Declaration of Pat Jones. By letter dated October 23, 2006, the WPPA advised Appellant West in writing that the requested records were ready for review. CP 54, 55, Exhibit 5 attached to Declaration of Pat Jones.

Notwithstanding the WPPA's compliance with the PRA and particularly RCW 42.17.320, the Appellant West filed this suit alleging a violation of the PRA on or about October 20, 2006. CP 3-7. The Washington Public Port Association (WPPA) originally filed a Motion to Dismiss this Cause pursuant to CR 12(b)(6) on November 30, 2006. CP 26-37. The parties stipulated to convert the pleading to a Summary Judgment Motion, with an agreed hearing date of December 29, 2006. CP ____²Appellant West did not undertake discovery until on or about December 23, 2006 - mere days before the agreed Summary Judgment Motion hearing date. CP 67-91.

² See WPPA Sur-Response in Support of Motion for Summary Judgment at 1. Respondent WPPA has moved to supplement to the Clerks Papers by pleading filed December 10, 2007, and will update the Court on the Clerk's Papers assigned numbering when issued.

Shortly before hearing, upon affidavit of prejudice filed by Appellant West, the case was transferred to Judge Tabor. CP __.³ At hearing, the Court set the matter over to January 12, 2007. CP __.⁴ WPPA was to submit their additional briefing by January 5, 2007. CP __.⁵ WPPA timely filed. Appellant West was to submit his reply by January 9, 2007. *Id.* West failed to submit any pleadings in advance of the January 12, 2007 hearing. *Id.* Appellant West requested a one week continuance to January 19, 2007. *Id.* WPPA agreed, on condition that WPPA's answers to Appellant's Request for Admission and Production be set over one additional week to January 26, 2007 (after the Summary Judgment hearing date). *Id.* West agreed. West and WPPA further agreed that West would submit his reply briefing on Monday January 15, 2007. West failed again to submit briefing. Thereafter, West requested to submit his brief the next day - Tuesday, January 16, 2007. *Id.* WPPA again agreed. West failed to file or serve any brief, explaining he forgot, and requested to file the next

³ See Affidavit of Prejudice filed by Appellant West. Respondent WPPA has moved to Supplement to the Clerks Papers by pleading filed December 10, 2007, and will update the Court on the Clerk's Papers assigned numbering when issued.

⁴ See WPPA Sur-Response in Support of Motion for Summary Judgment at 2, and 11-12 Respondent WPPA has moved to supplement to the Clerks Papers by pleading filed December 10, 2007, and will update the Court on the Clerk's Papers assigned numbering when issued.

⁵ See WPPA Sur-Response in Support of Summary Judgment at 2, 11-12. Respondent WPPA has moved to Supplement to the Clerks Papers by pleading filed December 10, 2007, and will update the Court on the Clerk's Papers assigned numbering when issued.

day, Wednesday. WPPA did not agree, and West filed no additional briefing prior to the January 19, 2007 hearing. *Id.*

At the 19 January 2007 hearing, Appellant West requested the matter be set over, stating he only lacked funds to timely reply to the Motion, and no other basis for requesting the re-set. *Id.* West did not ask that the matter be continued to undertake discovery *Id.* Over WPPA's objection, the Court re-set the hearing over one week to January 26, 2007. *Id.* On January 26, 2007, after hearing, the Court granted Summary Judgment to WPPA. CP 146-148. Appellant filed for Reconsideration on February 20, 2007, CP 149-182, which was denied by the Court on February 21, 2007. CP 183-184.

III. AUTHORITY & ARGUMENT

A. Standard Of Review

In reviewing a trial court's decision to grant summary judgment, the appellate court considers all facts and reasonable inferences in the light most favorable to the nonmoving party. *Mason v. Kenyon Zero Storage*, 71 Wash.App. 5, 8-9, 856 P.2d 410 (1993). Absent a genuine issue of any material fact, the moving party is entitled to summary judgment as a matter of law. *Condor Enters., Inc. v. Boise Cascade Corp.*, 71 Wash.App. 48, 54, 856 P.2d 713 (1993) (citing CR 56(c); *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990)). This case raises questions of

law, which the court reviews de novo. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 813, 854 P.2d 1072 (1993).

B. Trial Court Properly Found Appellant Lacked Standing To Bring Declaratory Judgment Action. (Appeal Issue Ii).

To find that a party has personal standing in order to seek a declaratory judgment, the Uniform Declaratory Judgments Act (UDJA), Chapter 7.24.020 RCW, states:

A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm **personal to the party** that are substantial rather than speculative or abstract. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). This statutory right is clarified by the common law doctrine of standing, which prohibits a litigant from raising another's legal right. "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Id.* at 419.

The Washington Supreme Court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is "arguably within the zone of

interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)). The second part of the test considers whether the challenged action has caused " 'injury in fact,' " economic or otherwise, to the party seeking standing. *Id.* at 866. Both tests must be met by the party seeking standing.

No Timely Facts Support Standing. Appellant failed to timely address standing in pleadings filed **prior** to the Court's Summary Judgment ruling. **After** the Trial Court verbally granted the Port's Summary Judgment Order (oral ruling January 26, 2007) CP ___,⁶ Appellant improperly attempted to rehabilitate his fatal factual omissions in the record on standing and other issues by filing two pleadings, both entitled "Appellant's Declaration and Offer of Proof", dated 8 February 2007. CP 100, CP 94-119 and CP 120-145. This Court should refuse consideration of these tardy and improper pleadings.⁷ The appellate

⁶ See WPPA Sur-Response in Support of Motion for Summary Judgment at 2, 11-12. Respondent WPPA has moved to supplement to the Clerks Papers by pleading filed December 10, 2007, and will update the Court on the Clerk's Papers assigned numbering when issued.

⁷ See WPPA's Motion to Strike filed contemporaneous hereto. Note: In Appellant's Opening Brief, allegations in support of standing are not substantiated by any cite to the record. See Appellant's Opening Brief at page (un-paginated) 15.

review following grant of summary judgment is limited to the record before the trial court. *Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland* (1999) 95 Wash.App. 896, 977 P.2d 639, *review denied* 139 Wash.2d 1005, 989 P.2d 1139. Matters not before trial court when considering motion for summary judgment may not be considered on appeal from trial court's ruling. *Jones v. Brandt* (1970) 2 Wash.App. 936, 471 P.2d 696.

No Injury Pled. Further, the Courts have required a specific injury in fact in order to invoke standing. For example, a taxpayer may not invoke Declaratory Judgments Act to test constitutionality of Port Districts Act, where he does not allege that he owns or is interested in any property within district or will be in any way affected by acts done pursuant to such act, and he shows no substantial interest therein. *Heisey v. Port of Tacoma* (1940) 4 Wash.2d76, 102 P. 2d 258. Here, Appellant has not properly established that he is 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' Nor has he established any 'injury in fact'. One may not, by declaratory judgment action, challenge constitutionality of statute **unless it appears that he will be directly damaged in person** or in property by its enforcement. *De Grief v. Seattle* (1956) 49 Wash.2d 912, 297 P.2d 940.

Accordingly, the Court should find on appeal that Appellant lacks standing to bring the Declaratory Judgment action.

C. Trial Court Properly Struck Improper Attachments. (Issue VII).

The Trial Court properly granted the WPPA's Motion to Strike the various unauthenticated documents relied on by Appellant in defense of this Summary Judgment Motion for (1) lack of authentication under ER 901 and or (2) hearsay under ER 801. Appellant filed and or refers to various unauthenticated documents in his Complaint CP 3-7, Amended Complaint, CP 10-18, and or his Declaration of Disputed Facts CP 67-91:

1. 1960 WPPA Articles of Incorporation .
2. Check dated December 2006
3. Letter from Appellant to Attorney General.
4. A letter from the Executive Conflict of Interest Board
5. A pleading from Cause No. 06-2-00141-6 which cites to the statewide significance of the WPPA at page 3 and 6.
6. A copy of a check received from the Appellant by the WPPA which bears the designation "Agency public records disclosure fee.
7. August 13 Contract purportedly executed by WPPA
8. Receipt for public records
9. Oath of Office by Judge Tabor.

Here, no document submitted by Appellant is sworn to or certified. Appellant's attempt to "certify" is inadequate and improper because he has no personal knowledge to authenticate these documents. Authentication or identification of a document is a condition precedent to admissibility. ER 901(a).

a. Basis For Striking Inadmissible Documents.

A motion for summary judgment is to be determined based on the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits…” CR 56(c). A court may not consider inadmissible evidence when ruling on a motion for summary judgment.

Dunlap v. Wayne, 105 Wash.2d 529, 535, 716 P.2d 842 (1986).

Supporting and opposing affidavits must (1) be made on personal knowledge; (2) set forth facts as would be admissible in evidence; and (3) show that the affiant is competent to testify on the matters contained therein. CR 56(e); *Grimwood v. University of Puget Sound Inc.*, 110 Wash.2d 355, 359, 753 P.2d 517 (1988). The court should consider only **admissible** evidence in a motion for summary judgment. *King County Fire Protection Dist. No. 16*, 123 Wash.2d at 826, 872 P.2d 516; *Dunlap v. Wayne*, 105 Wash.2d 529, 535, 716 P.2d 842 (1986).

In *Burmeister v. State Farm Ins. Co.*, 92 Wash.App. 359, 368, 366-67, 966 P.2d 921 (1998), the reviewing appellate Court disallowed use of a police report which was attached only to a declaration of the moving party’s attorney. The court ruled that because Burmeister did not submit an affidavit of the police officer, the report was not properly authenticated. The trial court consideration of the police report was error. *Burmeister v. State Farm Ins. Co. (1998) 92 Wash.App. 359, 966 P.2d 921.*

Here, Appellant similarly has no personal knowledge about the authenticity or contents of the relied-on documents. They were properly stricken. A ruling on a motion to strike is within the trial court's discretion. *King County Fire Protection Dist. No. 16 v. Housing Auth.*, 123 Wash.2d 819, 826, 872 P.2d 516 (1994).

b. Trial Court Properly Rejected Business Records Exemption.

Appellant's reliance on the exemption of RCW 5.46 is misplaced.

That statute is Washington's codification of the business records exception to the Rules of Evidence, which provides as follows:

If any business, institution, member of a profession or calling or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, optical imaging, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless the same is an asset or is representative of title to an asset held in a custodial or fiduciary capacity or unless its preservation is required by law. 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. The introduction of a reproduced record, enlargement or facsimile, does not

preclude admission of the original.

RCW 5.46.010. "Copies of business and public records as evidence".

The statute by its terms allows business entities to destroy certain business records but rely on their reproduction - "when properly identified". Here, Mr. West is **not** the business entity which produced, relied or maintains the business records, **nor** has he offered any means to "properly identify" same. The Trial Court properly struck Appellant's unauthenticated attachments.

On appeal, Appellant first raised the argument that the records should have been admitted pursuant to Chapter 5.46 RCW, an exemption allow admission of Photographic copies of business records. Because the issue was not presented to the trial court below, the court should decline to consider it. As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). *State v. McFarland*, 127 Wash.2d 322, 332-333, 899 P.2d 1251 (Wash., 1995). If the Court chooses to consider the new argument, it should be rejected for the same reasons as above: Mr. West is **not** the business entity which produced, relied or maintains the business records, **nor** has he offered any means to "properly identify" same. The Trial Court properly struck Appellant's unauthenticated attachments.

c. Appellant May Not Rely on Post Dismissal “Offers of Proof” and Additional Unauthenticated Material.⁸

This is an appeal of a Trial Court grant of the WPPA’s Summary Judgment Motion, dismissing Appellant’s complaint in full. After several continuances, hearing on the WPPA Summary Judgment was held 26 January 2007, CP__⁹, at which time the Court verbally granted WPPA’s Motion, dismissing all claims. CP 146-148. On February 8, 2007, **after** the Trial Court granted the WPPA’s Summary Judgment Order, Appellant West improperly attempted to rehabilitate his fatal factual omissions in the record by filing two pleadings, both entitled "Appellant's Declaration and Offer of Proof". CP 94-119 and CP 120-145. The Trial Court’s written Dismissal Order, entered February 9, 2007 CP 146-148, lists the pleadings relied on by the Court in its ruling to grant Summary Judgment to WPPA, and does **not** include either of Appellant's Declaration and Offers of Proof," CP 94-119 and CP 120-145.

	Date Filed	Pleading
1	11-30-2006	WPPA’s Motion To Dismiss
2	11-30-2006	Declaration Of Pat Jones
3	12-06-2006	Response Of Plaintiff
4	12-27-2006	Declaration Of A. West

⁸ See Respondent WPPA’s Motion to Strike Filed Contemporaneous hereto.

⁹ See WPPA Sur-Response in Support of Motion for Summary Judgment at 2, 11-12. Respondent WPPA has moved to supplement to the Clerks Papers by pleading filed December 10, 2007, and will update the Court on the Clerk’s Papers assigned numbering when issued.

	Date Filed	Pleading
5	01-05-2007	WPPA Memorandum In Support of Summary Judgment & Motion to Strike
6	01-22-2007	Plaintiff's Memorandum In Response
7	01-25-2007	Response Of Defendant WPPA

CP 146-7.

Like the Trial Court, this Court should refuse consideration of these tardy and improper pleadings, submitted after the Trial Court's dismissal ruling, and should also reject the unauthenticated materials attached to it. The appellate review following grant of summary judgment is limited to the record before the trial court. *Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland* (1999) 95 Wash.App. 896, 977 P.2d 639, review denied 139 Wash.2d 1005, 989 P.2d 1139.

Because the Appellant's purported "facts" were not timely presented to the trial court below prior to hearing and oral ruling on the Summary Judgment, the appellate court should decline to consider them. Matters not before trial court when considering motion for summary judgment may not be considered on appeal from trial court's ruling. *Jones v. Brandt* (1970) 2 Wash.App. 936, 471 P.2d 696.

No documents submitted by Appellant in either of his February 8, 2007 "Declarations and Offers of Proof" are sworn to or certified. Appellant's claim of certification is inadequate. Appellant's attempt to

“certify” is improper because he has no personal knowledge to authenticate these documents. Authentication or identification of a document is a condition precedent to admissibility. ER 901(a).

D. TRIAL COURT PROPERLY DISMISSED PUBLIC RECORDS ACT CLAIM PURSUANT TO SUMMARY JUDGMENT CR 56 AND CR 12(B)(6). (Issue I).

1. Trial Court Properly Dismissed Where Alleged Public Records Act Violation Wholly Unsupported by Fact or Law.

Appellant declared in his Amended Complaint opening paragraph that “This is an action for declaratory relief declaring the WPPA to be a public agency subject to the Public Disclosure Act,¹⁰ the Open Public Meetings Act and the State Environmental Policy Act”¹¹. CP 10-11. The Trial Court properly dismissed Appellant’s alleged Public Records Act claim pursuant to CR 56 because it is not supported by either fact or law.

CR 56 provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

¹⁰ The public records provisions of Chapter 42.17 RCW were re-codified as the Public Records Act (PRA) Chapter 42.56 RCW in 2005. See RCW 42.56.001, Laws of 2005, chapter 274. All references will be to the current statute.

¹¹ Appellant abandoned his SEPA claim on appeal as it was not briefed. Points not argued or discussed in opening brief were abandoned and not open to consideration on the merits on appeal. *Fosbre v. State*, 424 P.2d 901. Wash., 1967.

Dismissal of the alleged public record violation pursuant to CR 56(c) was therefore proper because the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

The centerpiece of Appellant's Amended Complaint is an allegation of a violation of the Public Records Act, (PRA), Chapter 42.17 RCW-- a violation which did not occur.¹² Under Washington's PRA all state and local public agencies must disclose any requested public record, unless the record falls within a specific exemption. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash.2d 243, 250, 884 P.2d 592 (1994). The PRA enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government's activities. RCW 42.17.010, RCW 42.56.030.

The Public Records Act allows an agency time to adequately respond. An agency is **not** required to issue all the requested records within five (5) days of the request. RCW 42.56.030. An agency properly

¹² The public records provisions of Chapter 42.17 RCW were re-codified as the Public Records Act (PRA) Chapter 42.56 RCW in 2005. See RCW 42.56.001, Laws of 2005, chapter 274.

may notify the requestor that additional time is needed to gather the records and to notify third parties, and to consider possible exemptions.

Additional time required to respond to a request may be based upon the need to clarify the intent of the request, **to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt** and that a denial should be made as to all or part of the request.

See RCW 42.56.520.

Here, the only sworn information properly before the Court establishes that Defendant WPPA complied with RCW 42.56. The sworn information consists of Declaration of Pat Jones filed with the Trial Court on November 30, 2006. CP 38-55. Appellant failed to timely submit any sworn declaration contesting those facts. Pat Jones' Declaration is therefore un-contradicted and taken as true for purposes of WPPA's Summary Judgment Motion. When pleading or affidavit is properly made and is un-contradicted, it may be taken as true for purposes of passing upon motion for summary judgment. *Leland v. Frogge* (1967) 71 Wash.2d 197, 427 P.2d 724.

Appellant submitted his initial request for information to the Defendant WPPA on or about September 25, 2006. Thereafter, the WPPA *timely* responded on September 29, 2006 and notified Appellant West that the WPPA required clarification and additional time to respond to the

request. The WPPA's response was within five business days of receiving Appellant West's request for records. Mr. West later submitted clarification of his request received by WPPA on October 6, 2006. Thereafter, on October 10, 2006, the WPPA timely responded by advising Appellant West that WPPA was reviewing records and would respond no later than October 24, 2006, which WPPA did. On October 23, 2006, WPPA notified Appellant West that the records were available for review. Notwithstanding the WPPA's compliance with the PRA and particularly RCW 42.56.520, the Appellant West filed this suit alleging a violation of the PRA on or about October 9, 2006.

Pursuant to RCW 42.56.520, an agency is **not** required to respond *instantaneously* on the very date of the request. Instead, here the WPPA timely responded to Appellant West's initial request, thereafter responded within a reasonable timeline made known in advance to Appellant West. The WPPA finalized its review and release of records and provided complete disclosure on October 23, 2006. Because the WPPA fully complied with the PRA, no violation as alleged by Appellant West has occurred. The Trial Court properly dismissed his Amended Complaint as a matter of law for failing to state a claim upon which relief may be granted. CR 12(b)(6), and pursuant to CR 56 because there is no dispute material fact. That ruling should not be disturbed.

2. Appellant's Lack of Facts Robs The Court of Tools Necessary to Render Global Decision That PRA Applies to WPPA.

To the extent that Appellant seeks to bootstrap his singular public records request into a global general declaration that the WPPA is subject in all cases to the PRA, the action is entirely insufficient. The lack of specific facts in support of Appellant's general "shot gun" approach to his allegations is an especially critical omission given that Washington Courts and other authorities have previously ruled that the status of the WPPA in the context of the PRA is **highly fact dependant**. See WA AGO 2002 No.2, citing *Telford v. Thurston Cy. Bd. of Comm'rs*, 95 Wn. App. 149, 974 P.2d 886, *rev. denied*, 138 P.2d 1015, 989 P.2d 1143 (1999).

In *Telford v. Thurston Cy. Bd. of Comm'rs*, the Washington Court of Appeals held that the Washington State Association of Counties (WSAC) and the Washington Association of County Officials (WACO) were the functional equivalents of public agencies for purposes of the campaign finance provisions of the Public Disclosure Act. *Telford*, 95 Wn. App at 166. However, the Court of Appeals opinion suggests that the given purpose of a law must be taken into account in determining whether "hybrid" organizations with both private and public attributes are the "functional equivalent" of public agencies. Thus, whether these organizations are the functional equivalent of public agencies for purposes

of the public records provisions of the Public Disclosure Act is not answered by the *Telford* decision. “The answer to this question would depend on a case-by-base analysis that takes into account the purposes of the public records provisions of the Public Disclosure Act and the nature of the particular organization.” See AGO 2002 No. 2, citing *Telford*.

The Attorney General Opinion 2002 No 2 also underscores the **fact-dependant** nature of whether the PRA applies to the WPPA. As an initial step, the Attorney General first addresses the same inquiry applied to two other quasi public associations, the Washington State Association of Counties (WSAC) and the Washington Association of County Officials (WACO).

Unlike the issue before the court in *Telford*, **your inquiry** is posed in very general terms and **asks whether, as an abstract matter, WSAC and WACO should be considered agencies for purposes of the public records provisions of the Public Disclosure Act. Providing a definitive answer to your question is problematic for two related reasons. First, the statutes related to WSAC and WACO do not establish that these associations are the functional equivalents of agencies for purposes of the public records provisions of the Public Disclosure Act. Second, as *Telford* makes plain, functional equivalency analysis is highly fact dependent.** Although the *Telford* court recounts numerous facts relating to WSAC and WACO, presumably the parties to that litigation presented the factual information that they thought relevant to the specific challenge at issue -the expenditure of public funds for purposes of political campaigns. Additional facts not presented or considered in *Telford* might well be relevant to whether WSAC and WACO would be treated as “public agencies” for purposes of the public records provisions of the Act. Whether an entity is public “may

depend on the purpose for which the determination is made.”
Telford, 95 Wn. App. at 157 n.11.

An examination of the statutes related to WSAC and WACO does not provide a definitive answer to the nature of these associations for purposes of the public records provisions of the Public Disclosure Act. As noted in *Telford*, there are statutes relating to WSAC and WACO that declare the public necessity of coordinating county administrative programs. RCW 36.32.335; RCW 36.47.010. Both acts require county officials to take such action as is necessary to effect this coordination and empower the counties to employ WSAC or WACO to fulfill their statutory duties. *Id.* **However, we cannot conclude from these statutes standing alone that WSAC or WACO exercises governmental power. As in *Telford*, this determination would depend on additional facts.**

See AGO 2002. No.2 Copy attached.

Next, the Attorney General Opinion applies the same reasoning to address whether the WPPA is subject to the Public Record Act, finding also the answer **cannot** be resolved due to the absence of specific facts.

Your second question essentially is the same as your first but relates to the Association of Washington Cities and the Washington Public Ports Association, rather than to WSAC and WACO. **As with WSAC and WACO, the statutes referring to these associations do not provide a definitive answer to your question**¹³

¹³ RCW 53.06.030 empowers the port district commissions in this state to designate the WPPA as a coordinating agency, but does not confer governmental power on the WPPA itself. Additionally, RCW 53.06.090 provides that “the legislature recognizes that any nonprofit corporation created or re-created for the purposes of this chapter, is a private nonprofit corporation contracting to provide services to which port districts may subscribe.” Several statutes provide for the WPPA to nominate persons for committees or boards. See, e.g., RCW 47.06A.030; RCW 47.26.121. Similarly, certain statutes provide for the AWC to nominate or appoint persons for committees or boards. See, e.g., RCW 90.58.170 (shorelines hearings board) and RCW 43.20A.685 (state council on aging). Again, as noted above, a number of statutes also provide for similar nominations by decidedly private organizations.

Nor are we in a position to weigh this question in the context of relevant factual circumstances. Thus, for the same reasons that we have explained in responding to your first question, we are not in a position to answer this question with an appropriate degree of confidence in the analysis that we would provide. Indeed, we have considerably less necessary factual information before us with respect to AWC and WPPA than with respect to the associations who are the subject of your first inquiry, as we do not even have the benefit of factual determinations of the sort made by *Telford* concerning WSAC and WACO. **Accordingly, any analysis of the status of the WPPA or of the AWC in a public records context must await the development of an actual factual situation to which the principles set forth in the statute, as interpreted in *Telford*, might be applied.**

See AGO 2002, No.2 CP .

E. Trial Court Properly Found That No Justiciable Controversy Exists As Appellant Did Not Alleged Actual Open Public Meeting Act Violation.(Issue Iv).

A controversy must be justiciable in order to support a proceeding for, or the award of, declaratory relief. RCW 7.24.010. Here, Appellant timely alleged no *actual* violation of the Open Public Meeting Act by WPPA. Instead, Appellant merely seeks an advisory opinion from the Court, which is not permissible. Declaratory Judgment Action may not be used for the purpose of obtaining a purely advisory opinions. *Seattle First National Bank v. Crosby*, 41 Wn2d 234, 254 P2d 732 (1953). Declaratory Judgment action must be adversarial in character, and involve present and actual, as opposed to possible or potential controversy between parties. *De Grief v. Seattle*, 50 Wa2d 1, 297 P.2d 940 (1956). The controversy

must be justiciable in order to support a proceeding for, or the award of, declaratory relief.¹⁴ The requirements for a justiciable controversy are no less exacting in a case brought under the declaratory judgment statute than in any other type of suit. *Id.*¹⁵ In order to be justiciable, the controversy must be within the jurisdiction of the court. *Id.* “Justiciable controversy” requires parties having existing and genuine, as distinguished from theoretical, rights or interests; controversy must be one upon which judgment of court may effectively operate;¹⁶ judicial determination of controversy must have force and effect of final judgment or decree upon relationships of one or more of parties in interest or be of such great public moment as to constitute legal equivalent of them; and proceedings must be genuinely adversary in character. RCW 7.24.010.

Here, Appellant failed to timely allege any actual violation of the Open Public Meetings Act by WPPA, and therefore, failed to assert any facts upon which relief may be granted.

What are the principal elements of a justiciable controversy as contemplated by the Uniform Declaratory Judgments Act,

¹⁴ *Nostrand v. Little, 58 Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 73 S. Ct. 236, 97 L. Ed. 291 (1952); *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir. 1960). *Wash. 2d* 111, 361 P.2d 551 (1961).

¹⁵ See also *Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 210 U.S.P.Q. (BNA) 344 (9th Cir. 1981); *Landau v. Chase Manhattan Bank, N.A.*, 367 F. Supp. 992 (S.D.N.Y. 1973).

¹⁶ *State ex rel. O'Connell v. Dubuque*, 68 Wash. 2d 553, 413 P.2d 972 (1966).

RCW 7.24? **First, a justiciable controversy requires parties having existing and genuine, as distinguished from theoretical, rights or interests.** Second, the controversy must be one upon which the judgment of the court may effectively operate, **as distinguished from a debate or argument evoking a purely political, administrative, philosophical** or academic conclusion. Third, it must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities be of such great and overriding public moment as to constitute the legal equivalent of all of them. Finally, the proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues. **Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution.** The decisions of this court, when considered seriatim, recognize and apply this definition. *Hubbard v. Medical Ser. Corp.*, 59 Wash.2d 449, 367 P.2d 1003 (1962); *State ex rel. Ruoff v. Rosellini*, 55 Wash.2d 554, 348 P.2d 971 (1960); *Huntamer v. Coe*, 40 Wash.2d 767, 246 P.2d 489 (1952); *Adams v. City of Walla Walla*, 196 Wash. 268, 82 P.2d 584 (1938); *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403 (1938); *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P.2d 341, 114 A.L.R. 1345 (1937).

State ex rel. O'Connell v. Dubuque, 68 Wash. 2d 553, 557, 413 P.2d 972 (1966).

'It should be remembered that this court is not authorized to render advisory opinions or pronouncements upon abstract or speculative questions under the declaratory judgment act. The action still must be adversary in character between real parties and upon real issues, that is, between a plaintiff and defendant having opposing interests, and the interest must be direct and substantial and involve an actual as

distinguished from a possible or potential dispute, to meet the requirements of justiciability.’ See also *Kitsap County v. City of Bremerton* (1955), 46 Wash.2d 362, 281 P.2d 841; *Adams v. City of Walla Walla* (1938), 196 Wash. 268, 82 P.2d 584.

Washington Beauty College, Inc. v. Huse (1938), 195 Wash. 160, 164, 80 P.2d 403, 405.

F. The Trial Court Properly Dismissed Claim of Unconstitutional Expenditure of Public Funds Because Appellant Presented No Facts to Support that a Justiciable Controversy Exists (Issue VI).

As part of his relief request, Appellant claims that, “By their acts and omissions, defendants unconstitutionally expended public funds, and unconstitutional application of [unnamed] statute for which plaintiff is entitled to the relief requested in section 5 below” See CP 16, Amended Complaint at page 7, paragraph 4.3. Yet no where did the Appellant timely provide the Trial Court or the Defendant WPPA with any specific information supporting such a claim, or identify any activity claimed to be constitutional, or provide any supporting legal analysis as to why or how the undisclosed activity is unconstitutional. In fact, in his “Request for Relief” section of his Amended Complaint, Appellant appears to ask the Court to “fill in the blanks” as to what state laws Appellants seeks to invalidate, when Appellant asks, “That any provision of state law which authorizes the WPPA to function as a private entity be declared

unconstitutional as applied, and WPPA be prohibited from further unconstitutional expenditure of public funds”. See Amended Complaint at 8-9. CP 17-18. Thus, this cause of action does not present any specific facts nor any actual justiciable controversy for the Court to decide, and the appeal should be denied.

The action still must be adversary in character between real parties and **upon real issues**, that is, between a plaintiff and defendant having opposing interests, and **the interest must be direct and substantial and involve an actual as distinguished from a possible or potential dispute**, to meet the requirements of justiciability.’ See also *Kitsap County v. City of Bremerton* (1955), 46 Wash.2d 362, 281 P.2d 841; *Adams v. City of Walla Walla* (1938), 196 Wash. 268, 82 P.2d 584.

Washington Beauty College, Inc. v. Huse (1938), 195 Wash. 160, 164, 80 P.2d 403, 405. Any controversy lacking these elements becomes an exercise in academics and **is not properly before the courts for solution**. State ex rel. O’Connell v. Dubuque, 68 Wash. 2d 553, 557, 413 P.2d 972 (1966).

G. Allegation Of Conflict Of Interest Is Moot And Or Court Lacks Jurisdiction To Consider. (Issue V).

In paragraph 2.3 of the Complaint, Appellant alleges that Robert Van Schoorl is the Budget Director of the Washington State Department of Natural Resource, a Port Commissioner for the Port of Olympia, and the President of the WPPA, and that in his role as president of the WPPA,

Robert Van Schoorl oversees the expenditure of public funds for lobbying and electoral politics in a wholly improper manner and / or in a manner violative of State law and that his various positions create an unlawful and impermissible conflict of interest. Because the term of Port Commissioner Robert Van Schoorl will end on December 31, 2007 prior to this Court's consideration of the issue, the question is moot.¹⁷ Even if the question remained viable, this Court should find that it lacks jurisdiction to consider an allegation of conflict of interest by this state officer because Appellant failed to exhaust administrative remedies.

1. Courts Do Not Consider Moot Issues.

As a general rule, appellate courts will not decide moot questions or abstract propositions. *See Housing Auth. of Everett v. Terry*, 114 Wash.2d 558, 570, 789 P.2d 745 (1990). A case is moot if a court can no longer provide effective relief. *See Orwick v. Seattle*, 103 Wash.2d 249, 253, 692 P.2d 793 (1984); *State v. Turner*, 98 Wash.2d 731, 733, 658 P.2d 658 (1983). "A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights. *Thomas v. Van Zandt*, 1910, 56 Wash. 595, 603, 106 P. 141. Here because the term of Port Commissioner Robert Van Schoorl will end on December 31, 2007 prior to this Court's consideration of the issue, the question is moot. The

¹⁷ See WPPA Motion to Supplement Record/Judicial Notice of Election Results.

appellant courts refuse to take jurisdiction of moot cases, *Bowen v.*

Department of Social Security, 1942, 14 Wash.2d 148, 153, 127 P.2d 682.

2. Court Lacks Jurisdiction On Conflict if Interest Issue Due to Appellant's Failure to Exhaust Administrative remedies.

Even if the conflict of interest issue were not moot, the Court lacks jurisdiction on conflict of interest issue due to Appellant's failure to exhaust administrative remedies. The Washington State legislature has established ethics standards and oversight for state officers in Chapter 42.52 RCW, "Ethics in Public Service". The state standards apply to elected Port Commissioners, pursuant to the terms defined by RCW 42.52.010 (18) and (1):

(18) "State officer" means every person holding a position of public trust in or under an executive, legislative, or judicial office of the state. "State officer" includes ... members of boards, commissions, or committees with authority over one or more state agencies or institutions, and employees of the state who are engaged in supervisory, policy-making, or policy-enforcing work....

(1) "Agency" means any state board, commission, bureau, committee, department, institution, division, or tribunal in the legislative, executive, or judicial branch of state government. "Agency" includes all elective offices, ...

The State ethics standards also specifically address allegations of conflicts of interest:

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties.

RCW 42.52.020 “Activities Incompatible with Public Duties.”

The Executive ethics board oversees enforcement for state officers including Port Commissioners.

(1) The executive ethics board shall enforce this chapter and rules adopted under it with respect to statewide elected officers and all other officers and employees in the executive branch, boards and commissions, and institutions of higher education.

RCW 42.52.360. The State Ethics Chapter also allows agencies to adopt their own ethics rules, consistent with state standards. RCW 42.52.200, “Agency Rules”.¹⁸ Ethics Board decisions rendered pursuant to the State Ethics Standards are reviewable by the Court pursuant to the Administrative Procedures Act, Chapter 34.95 RCW. See RCW 42.52. 440.¹⁹ The evidence considered by judicial

¹⁸ RCW 42.52.200: “(1) Each agency may adopt rules consistent with law, for use within the agency to protect against violations of this chapter.

(2) Each agency proposing to adopt rules under this section shall forward the rules to the appropriate ethics board before they may take effect. The board may submit comments to the agency regarding the proposed rules.”

¹⁹ RCW 42.52. 440, “Review of Order”: “Except as otherwise provided by law, reconsideration or judicial review of an ethics board's order that a violation of this chapter or rules adopted under it has occurred shall be governed by the provisions of chapter 34.05 RCW applicable to review of adjudicative proceedings”.

review is limited to the records developed at the administrative level. RCW 34.05.558. The Administrative Procedures Act, Chapter 34.05 RCW, requires a Petitioner seeking judicial review to first exhaust administrative remedies as a condition precedent to Court action. RCW 34.05.534 “Exhaustion of Administrative Remedies”.²⁰

Where a party affirmatively seeks declaratory or injunctive relief, it must first show that its administrative remedies have been exhausted in order to show standing to raise even a constitutional question. *Harrington v. Spokane County*, 128 Wash App 202 114 P3rd 1233 (2005). Courts will not intervene when an exclusive administrative remedy is provided. *Id.* Here, the Appellant failed exhaust administrative remedies by first seeking review of this alleged ethics complaint either with the agency its self (Port of Olympia) or with the Executive Ethics Board as required. An agency action cannot be challenged on review until all rights under administrative action have been exhausted. *Northwest Ecosystem Alliance v. Department of Ecology*, 104 Wn App 901, 45 P.3rd 697

²⁰ A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review,...

(2001) *review granted* 146 Wa2d 1001, 45 P3rd 551, *reversed in part, affirmed in part*, 66 P.3rd 614. Accordingly, the Court should dismiss the Complaint with prejudice.

H. Trial Court Properly Denied Continuance (Issue III).

After Appellant West failed to timely file response to Summary Judgment Motion and to timely pursue discovery, the Trial Court properly denied Appellant West's request for additional continuances of the Summary Judgment Motion to "develop facts". Appellant infers that WPPA has improperly failed to respond to Discovery, even though Appellant West expressly agreed that WPPA's due date for answering the Discovery was one week after the agreed Summary Judgment motion. Appellant West also failed to present a good faith explanation why yet another continuance would be warranted since West delayed pursuing any discovery until days prior to the date the Summary Judgment was first set to be heard. Further, West asked only that the hearing be reset **due to lack of funds**. CP ____.²¹ West did not ask that the matter be continued to undertake discovery. CP ____.²² Even more fatal, West fails to explain

²¹ See WPPA Sur-Response in Support of Motion for Summary Judgment at 2, 11-12. Respondent WPPA has moved to supplement to the Clerks Papers by pleading filed December 10, 2007, and will update the Court on the Clerk's Papers assigned numbering when issued.

²² See WPPA Sur-Response in Support of Motion for Summary Judgment at 2, 11-12. Respondent WPPA has moved to supplement to the Clerks Papers by pleading filed

what evidence would be established through the additional discovery; or how the evidence sought will raise a genuine issue of fact. A court may deny a motion to continue a summary judgment hearing if: (1) the moving party does not offer a good reason for the delay in obtaining evidence; (2) the moving party does not state what evidence would be established through the additional discovery; or (3) the evidence sought will not raise a genuine issue of fact. *Briggs v. Nova Services (2006) 147 P.3d 616*. See also *Colwell v. Holy Family Hosp. (2001) 104 Wash.App. 606, 15 P.3d 210, amended on reconsideration, review denied 144 Wash.2d 1016, 32 P.3d 283*. Here, Appellant West argues in a vacuum that he lacks facts “to establish a proper factual basis for the Court to evaluate the status of the WPPA”, CP 67-91, but fails entirely to make any offering of what he seeks through discovery, why he waited to pursue discovery, and how the evidence sought will raise a genuine issue of fact. The Trial Court did not abuse its discretion in denying the continuance. A ruling on motion for continuance of summary judgment motion is reviewed for manifest abuse of discretion. *Janda v. Brier Realty (1999) 97 Wash.App. 45, 984 P.2d 412*.

December 10, 2007, and will update the Court on the Clerk’s Papers assigned numbering when issued.

Here- **no facts exist** to support Appellant's claims - disputed, material, or otherwise. In order to demonstrate a genuine issue of material fact, the facts shown must be facts upon which the outcome of the litigation depends; **mere argumentative assertions are insufficient.**

Blakely v. Housing Authority of King County (1973) 8 Wash.App. 204, 505 P.2d 151.

I. WPPA Should Be Awarded Fees & Costs

WPPA requests attorney fees and costs based on this frivolous appeal. RAP 18.1;²³ RCW 4.84.185.²⁴ A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts. *Tiger*

²³ RAP 18.1. **(a) Generally.** If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court. **(b) Argument in Brief.** The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

²⁴ **4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense.** In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

Oil Corp. v. Department of Licensing, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997).

IV. CONCLUSION

Appellant's appeal should be denied as to all issues.

- **Issue VIII & III:** The Trial Court properly struck Appellant's inadmissible, unauthenticated material, which this Court should also disregard.
- **Issue II:** Appellant lacks standing to bring this Declaratory Judgment action pursuant to RCW 7.24.020 as no standing or injury is alleged or supported.
- **Issue I:** Appellant fails to prove a violation of the Public Records Act, as none occurred..
- **Issue IV: (a)** Appellant failed to pled any actual violation of the Open Public Meeting Act, i.e., no justiciable controversy exists. WPPA is entitled to Summary Judgment pursuant to CR 56 and RCW 7.24.010, and **(b)** Appellant failed to state a claim upon which relief may be granted pursuant to CR 12(b)(6). Further, **(c)** Appellant failed to pled ay facts or law in support of finding any actual violation of the Public Records Act, for which WPPA is entitled to Summary Judgment pursuant to CR 56, and **(d)** Appellant lacked Facts in Support of a Global Declaration that the

WPPA is subject to the Public Records Act (PRA) and thus Appellant failed to state a claim upon which relief may be granted pursuant to CR 12(b)(6)

- **Issue VI:** Appellant Lacked of Facts in Support of Appellant's Claim of "Unconstitutional Expenditure of Public Funds", and thus Appellant failed to state a claim upon which relief may be granted pursuant to CR 12(b)(6).
- **Issue V:** Appellant's alleged conflict of interest claim should be dismissed because (a) the issue is moot and (b) for failure to state a claim upon which relief can be granted pursuant to CR 12(b)(6) because Appellant failed to exhaust administrative remedies.

In addition, WPPA should be awarded its fees and costs.

RESPECTFULLY SUBMITTED this 11th day of December 2007.

~~GOODSTEIN LAW GROUP PLLC~~

By: 

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