

No. 44139-0-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MASON COUNTY, a Washington municipal corporation, MASON  
COUNTY BOARD OF COMMISSIONERS, the legislative body of  
Mason County, and REGIONAL DISPOSAL COMPANY,

Appellants,

v.

ADVOCATES FOR RESPONSIBLE GOVERNMENT, a Washington  
nonprofit corporation, and DOES 1-10,

Respondents.

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**OPENING BRIEF OF APPELLANT  
MASON COUNTY**

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I. INTRODUCTION

Regional Disposal Company (“RDC”) is a Washington general partnership. RDC’s principal business is the acceptance of solid waste for transport to and disposal at RDC’s Roosevelt Regional Landfill near Goldendale, in Klickitat County. Since 1993, RDC has contracted with Mason County for such disposal services.

The original 1993 contract between RDC and the County, which had an initial five-year term, has been extended four times, most recently in 2012.

Under RDC’s contract with the County, RDC picks up containers on truck-trailers (both of which are supplied by RDC) that the County has filled with solid waste at a County-operated transfer station in Mason County. The contract makes the County solely responsible for the operation of its transfer station; RDC is not involved in the operation of that County facility.

Under Section 10.1 of the contract, title to the waste that the County has loaded into RDC-supplied containers passes to RDC when RDC accepts it at the County’s transfer station. Following RDC’s acceptance of the waste, RDC transports the waste by truck-trailer to an RDC intermodal facility, where RDC transfers its waste-filled containers

onto rail cars. Its containerized waste is then transported by rail to Roosevelt Landfill, where RDC disposes of it.

At issue in this appeal is an amendment of the Mason County/RDC contract, which the parties approved and signed in 2012, by which the term of the contract has been extended. Respondents Advocates for Responsible Government and several of its members (collectively “Advocates”) contend — as set forth in their Petition — that the County was precluded by law from extending its contract with RDC, and instead was required to let a new contract using a request-for-proposal process set forth in RCW 36.58.090. However, the Judgment and Order Granting Writ of Mandamus and Declaratory Relief from which RDC, Mason County and the Mason County Board of Commissioners appeal invalidated the contract extension on the basis that it was the product of neither the RFP process set forth in RCW 36.58.090 *nor* the competitive bidding process set forth in RCW 36.32.250 — a statute upon which Advocates did not base their claim. As a result, the applicability of both statutes is at issue on appeal.

Appellants contend that neither of those statutes applies to the Mason County-RDC contract. Appellants rely upon a line of Washington appellate decisions that have held that letting contracts for collection and disposal of solid waste is an exercise of the inherent police powers conferred by our state’s Constitution, which municipalities are free to

pursue by whatever means they consider best, and are not contracts for “public works” subject to RCW 36.32.250 or contracts with respect to the design, construction or operation of municipal solid waste facilities or systems subject to RCW 36.58.090. Appellants further contend that the RFP process set forth in RCW 36.58.090 by the terms of that statute is permissive and does not supplant or preclude the use of any other available contracting process. In short, contrary to Advocates’ position, counties in Washington are free to contract for disposal of waste by whatever reasonable method they consider best. With respect to this issue, Mason County adopts the Opening Brief of Appellant Regional Disposal Company as if fully set forth herein.

RDC and the County further contend on appeal, as they did below, that: (1) Advocates and its members lack standing to bring their Petition, given the lack of affected “taxpayer status” and a failure to abide by required pre-mandamus procedures, and (2) contrary to the trial court’s *sua sponte* finding of a violation of Washington’s Open Public Meetings Act, the amendment extending the Mason County/RDC contract was approved by the County’s Board of Commissioners after a thorough review process conducted in open public meetings at which members of the public, including representatives of RDC’s competitors, had an opportunity to (and in fact did) address their concerns.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in declaring the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County “null and void” and in issuing a writ of mandamus requiring Mason County to submit a new “contract for solid waste export and disposal” to a competitive bidding process under RCW 36.32.250 or the request-for-proposal process under RCW 36.58.090.

**Issue Presented:** As state law does not require that municipal contracts for the collection and disposal of solid waste be subject to either a competitive bidding or a request-for-proposal process, did the trial court err and abuse its discretion in declaring that the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County was “null and void” because it was not let subject to a statutory competitive bidding or request-for-proposal process?

2. The trial court erred with respect to that part of its Order that would require the County in any respect to comply with the competitive bidding process under RCW 36.32.250.

**Issue Presented:** Where (a) Advocates did not seek relief requiring the County to comply with RCW 36.32.250; (b) the trial court’s

initial Order to Show Cause did not direct the County to “appear ... and show cause” with respect to the alleged failure to comply with the statute; (c) no briefing or argument was submitted by the parties on this issue; (d) Advocates acknowledged that it was not seeking relief under RCW 36.32.250; and (e) the trial court itself in its oral ruling found that the Count was not required to comply with the statute, did the trial court err in its Order in finding that the County “did not comply with the public works competitive bidding process in accordance with RCW 35.32.250” and in ordering that the “Board of Mason County Commissioners ... comply with RCW 36.32.250?”

3. The trial court erred and abused its discretion in finding that Advocates or its members had standing to bring the mandamus action.

**Issue Presented:** Where: (a) Advocates for Responsible Government is a nonprofit corporation that pays no taxes; (b) taxes are not used to fund Mason’s County solid waste collection and disposal program; and (c) Advocates failed to follow the requisite process before filing its Petition for Writ of Mandamus, did the trial court err in finding that Advocates had standing to bring the petition?

4. The trial court erred in ruling that Mason County violated the Open Public Meetings Act based on its finding that the “Board of Mason County Commissioners did not discuss the contract ... in an open public meeting at any time in 2012 prior to the June 5, 2012 meeting at which the ... contract was approved.”

**Issue Presented:** Where (a) the Mason County Board of Commissioners conducted three open public meetings at which the contract extension with RDC was discussed and various stakeholders, including competitors of RDC, attended and were heard; (b) the Board voted on and approved the contract extension at the third of those open public meetings; and (c) the Open Public Meetings Act does not required that more than one public meeting be held to endorse municipal action, did the trial court err in finding that Mason County violated the Open Public Meetings Act?

5. The trial court erred in finding that Mason County violated the Open Public Meetings Act because Advocates failed to raise or argue the issue after filing its petition.

**Issue Presented:** Where: (a) Advocates, beyond its initial Petition, did not seek relief requiring the County to comply with the Open Public Meetings Act; (b) the trial court’s initial Order to Show Cause did not direct the County to “appear ... and show cause” with respect to the alleged

failure to comply with the Open Public Meetings Act; (c) no subsequent order of the trial court required the County to make any such showing; and (d) no briefing or argument was submitted by the parties on this issue, did the trial court err in finding that the County violated the Act?

### III. STATEMENT OF CASE

#### A. RDC's Contract with Mason County

RDC and Mason County are parties to a Contract Regarding Solid Waste Export Services For Mason County dated August 26, 1993 (the "Contract"), pursuant to which RDC is required to accept delivery from the County of contained solid waste at a transfer facility owned and operated by the County, and to export that waste for disposal at RDC's Roosevelt Regional Landfill in Klickitat County. CP 162, 167–267. The transfer facility is located on the site of the County's former landfill, which it closed in 1993, thus requiring the County to seek a contractor for export and disposal services. CP 162. RDC does not operate any part of the County's transfer station or any other part of the County's system of solid waste facilities. Rather, this is the County's responsibility. CP 162.

Under the Contract, the County loads municipal solid waste that the County receives at its Transfer Station into RDC-owned containers

that RDC supplies to the County for that purpose. RDC, through an RDC subcontractor, picks up the filled containers, which are then loaded on rail cars and transported to the RDC landfill in Klickitat County, where RDC disposes of the waste in accordance with applicable laws pertaining to landfills. The County pays RDC a fee for these services on a per-ton basis. CP 162, 313–314. Title to waste accepted by RDC at the County’s landfill immediately passes to RDC, and thus all of the waste that RDC transports and landfills is waste that already has become the property of RDC. CP 208.

The Contract is not for the design, construction, operation, or other services with respect to the Transfer Station or any other solid waste handling systems, plants, sites or other facilities of the County; indeed, Section 7.1(d) of the Contract specifically places upon the County the responsibility for operation and maintenance of “all facilities necessary for operation of the Transfer Station.” CP 197–198.

The County’s payments to RDC under the Contract are not funded by taxes. Rather, the money to finance the County’s solid waste operation, including the payments it makes to RDC to export and dispose of waste, come from tipping fees and other sources of non-tax revenue derived by the County in the operation of its solid waste services and facilities. CP 371–372, 374.

As originally executed, the Contract provided for a five-year term, with three five-year renewal options in favor of the County. CP 162–163, 232. Prior to 2012, the County approved and executed with RDC three contract amendments, which in part extended the contract term to August 26, 2013, with the same effect as if the County had exercised all three of its original extension options. CP 162–163, 270–291.

In 1994, the County and RDC entered into an Addendum To Contract Regarding Solid Waste Export Services For Mason County, dated June 28, 1994, by which the County agreed to take certain actions necessary to accommodate RDC’s use of rail lines for the transport of waste delivered to RDC pursuant to the Contract, and RDC agreed to a reduction in its per-ton fee to the County. CP 162–163, 270–274.

In 1997, the County and RDC entered into a 1997 Addendum To Contract Regarding Solid Waste Export Services For Mason County, Washington, dated November 25, 1997, under which, among other things, the term of the Contract was extended to August 26, 2013 (in lieu of separately exercising the three five-year options), and the amounts payable to RDC for its services were further reduced. CP 163, 277–279.

In the following year, the County and RDC entered into a 1998 Addendum To Contract Regarding Solid Waste Export Services For Mason County, effective December 1, 1998, by which: (1) the County

consented to RDC's acquisition by Allied Waste Industries, Inc.; (2) the definition of "Contractor" was changed to "Allied operating through its subsidiary, RDC;" and (3) amounts payable to RDC for its services were even further reduced. CP 163, 282-291.

In June 2012, the Mason County Board of Commissioners approved and the County executed with RDC a further amendment to the Contract: the 2012 Addendum To Contract Regarding Solid Waste Export Services For Mason County (the "Addendum"). The Addendum provided for a further, seven-year extension of the Contract to August 26, 2020, with the County having a further option to extend the Contract for an additional three years. As part of the Addendum, RDC agreed to pay the County an additional \$150,000 in the first quarter of 2013, and agreed to implement a price reduction once the County installed and began using new scales at its transfer facility. CP 163, 294-295, 416-417.

B. The Board's Meetings Regarding the Export Contract

The Mason County Board of Commissioners considered an extension of the Contract on at least three occasions in open public meetings between January and June 2012. On January 30, 2012, in a regularly scheduled, open public meeting, Tom Moore, the deputy director of the Mason County Public Works Department, Utilities Division, briefed

the Board regarding issues relating to the Contract. The discussions specifically involved the need to extend the Contract. CP 423.

On May 7, 2012, in a regularly scheduled, open public meeting, Moore again briefed the Board regarding the Contract. The discussion again concerned the need to extend the Contract, as well a proposal for reducing the minimum trailer weight charge. CP 424.

The Board's June 5, 2012 regular meeting was a public meeting to which members of the public were invited and offered input on the Contract proposal. CP 121–129, 424. As noted in the minutes, the following proceedings took place:

8. Approval of Action Agenda:

\* \* \* \*

8.13 Approval of the 2012 Addendum to the Contract for Solid Waste Export Services (long haul and disposal) between Mason County and Regional Disposal Company/Allied Waste extending said contract through August 26, 2020 and providing additional considerations to the parties to the Contract and authorizing execution of said 2012 Addendum by the Mason County Board of Commissioners.

\* \* \* \*

Item 8.13

Denny Hamilton wanted to know the amount of the contract.

Tom Moore, Utilities and Waste Management, explained that the amount was on a per ton basis at about \$56 per ton. When 26 tons per trailer is exceeded it goes down to \$35 per ton. There will

also be funding to install a loading scale to load the trucks and do some repairs at the transfer station.

Mr. Hamilton asked if the Solid Waste Advisory Committee had looked at the contract.

Mr. Moore replied that the Solid Waste Advisory Committee hadn't met in the last year.

David Baker asked for the Item to be considered for a separate vote.

Eric Johnson wanted to know if there was an opportunity for a new contract instead of extending the current contract.

Mr. Moore replied that they considered that option. They needed more time to evaluate what they were going to do with the solid waste transfer station in general. They realized that a two-year extension wouldn't be enough time so they went to a five year contract.

Mr. Johnson thought the County and the public would be better served if the contract went through a competitive process.

Mr. Moore stated that they had a good relationship with the landfill they use. The process they are currently using is working an[d] they have the opportunity to save the citizens money with the contract.

Cmmr. Sheldon noted that the long haul and disposal services that the County had been provided so far had been very satisfactory. The company also agreed to provide money to upgrade the transfer station's scales. The waste is going to a state of the art landfill. The open market gives a competitive look at things but negotiations can sometimes create a deal that you couldn't get through a bid process.

Mr. Moore was also concerned that the fuel costs would be considerably higher through the open bid process.

Mr. Johnson noted that at previous meetings a one or two-year extension was discussed and now it is considerably different.

Mr. Baker didn't feel there was enough notice to the public on the Issue. He thought there needed to be an opportunity for a competitive bid process.

The item was removed for a separate vote.

\* \* \* \*

### Item 8.13

Tom Moore explained that in August 1993, Mason County entered into a contract with Regional Disposal Company for solid waste export services (long hauling and disposal) for solid waste from the County's Shelton transfer station. The term of the original contract was for five years, with the right to renew at the County's option for three additional five-year terms. He went over the different amendments to the contract since that time and the proposed amendments for 2012.

Cmmr. Sheldon noted that at the beginning of the contract the County could have chosen a 20 year contract and now it is only an extension of seven years.

Mr. Moore added that it gives some stability to the rates and consistency with the way the County has done business in the past.

Cmmr. Bloomfield thought it was a good deal and the other companies were present at the public meetings. He had no issue continuing the Item to allow the other companies to respond again if they felt the public process wasn't adequate.

Scott Wilson, Wilson Recycling, commented that they have been to all of the meetings and they haven't had an opportunity to respond. They wanted the chance to go to bid but the consultant never contacted them.

Cmmr. Sheldon explained that the contract wasn't about the operations of the transfer station it was only about the hauling and disposal of the solid waste. They were very different subjects.

Mr. Wilson thought extending the long haul contract wouldn't allow a change in the operations of the transfer station.

Cmmr. Sheldon didn't agree and thought they were very separate issues.

Eric Johnson, Waste Management, commented that he is in the business of long haul and disposal. He agreed that there was a comment period but there was no formal request for proposals or bids. The department was allowed to go into negotiations that were not part of the formal bid process. Companies were not allowed to come forward with their proposals.

Rik Fredrickson, Mason County Garbage, was also surprised that the negotiations extended the period of the contract. He thought Allied Waste did a great job but his company felt it was a pivot away from possible privatization. It was his understanding that the contract would be negotiated for only one or two years to further discuss privatization.

Cmmr. Sheldon didn't believe the contract would deter privatization.

Mr. Wilson asked why the Solid Waste Advisory Committee hadn't met for over a year. Cmmr. Ring Erickson stated that was a separate discussion.

Cmmr. Sheldon was comfortable with moving ahead with the contract. He thought a long-term contract was in the best interest of the citizens of the county with the increasing fuel costs. He still felt privatization was a separate issue that could be addressed at a later time.

Cmmr. Bloomfield agreed. He noted that it was an open process where the different companies had the opportunity to speak.

Cmmr. Sheldon moved to approve item 8.13 as presented. Cmmr. Bloomfield wanted to see it extended for two weeks.

Cmmr. Ring Erickson noted that she would recuse herself from the vote because she is in a campaign with supporters on both sides.

Brian Matthews suggested tabling the item for a couple of weeks because there were three companies that would like to bid. They could accept bids or throw them out depending on what was better for the citizens.

Cmmr. Ring Erickson didn't think opening up the issue for bid would be acceptable when there was already a proposal on the table.

Mr. Moore suggested convening the SWAC to get their take on whether or not the contract should be accepted.

Cmmr. Sheldon noted that the difficulty seemed to be that the issue of privatization was overriding the issue of putting the waste in the truck and taking it to the landfill safely. Long-term contracts can be a great asset to the County. He thought the SWAC would be a good resource to look at the privatization issue but not the long haul issue.

Cmmr. Bloomfield didn't want to kick the can down the road. He thought it was a good solid contract. His only objection was that people didn't feel they had an opportunity to respond.

**Cmmr. Sheldon/Bloomfield moved and seconded to approve Action Item 8.13 as presented. Motion carried. RE-abstain; S-aye; B-aye.**

CP 121–125 (underlined/italic emphasis added).

C. The Trial Court Action

Advocates for Responsible Government is a nonprofit corporation headed by Robert Drexler, a Mason County resident. CP 155. On June 25, 2012, Advocates filed a Petition for Writ of Mandamus, Writ of Prohibition, Declaratory Relief and Injunctive Relief in Grays Harbor County Superior Court against Mason County and its Board of Commissioners seeking a writ of mandamus to declare the Addendum invalid. CP 1–9. More specifically, Advocates sought a “Writ of Mandamus ... ordering the Board of Mason County Commissioners to comply with RCW 36.58.090 in awarding the Contract for Solid Waste Services” and a “Writ of Prohibition ... ordering the termination of the new contract between Mason County and Regional Disposal Company/ Allied Waste.” CP 9.

That same day, Advocates obtained an ex parte Order to Show Cause, signed by Judge Gordon Godfrey, who would thereafter preside over the case, requiring the County and the Board to appear before the court on July 16, 2012, and “show cause why they should not be ordered to comply with RCW 36.58.090 in awarding the contract for solid waste export services.” CP 137–138. The Order to Show Cause did not require the County to address either of the other contentions upon which

Advocates' Petition sought to have the Addendum invalidated, *i.e.*, alleged arbitrary and capricious action, and alleged violation of the Open Public Meetings Act. CP 6–8, 137–138. With the consent of both parties, RDC intervened in the action for the purpose of protecting its interests. CP 421–422. Considerable briefing followed.

At the hearing on July 16, 2012, Judge Godfrey indicated that he wished to know more about the manner in which the original contract was let and to consider further the question of Advocates' standing (which the County and RDC had raised), and asked that the parties return for further argument at a later date (August 10, 2012). RP July 16, 2012, August 10, 2012 (“RP I”) at 28–31. This was followed by more briefing, in which Advocates urged the following relief:

[W]e respectfully request that this Court grant our Petition and require the Board of Mason County Commissioners to vacate the 2012 contract with RDC and comply with the procedures outlined under RCW 36.58.090 in awarding the contract for solid waste export and disposal.

CP 328. At the August 10 hearing, argument centered on two issues: (1) whether the County was required to utilize the process set forth in RCW 36.58.090 when contracting for solid waste export and disposal; and (2) whether Advocates and its members had standing to challenge the Addendum. RP I at 34.

At the end of the argument, Judge Godfrey ruled that: (1) “There’s no question in my mind that 36.58.090 applies to this type of contract,” but that the commissioners could “do whatever they wish[,] making an intelligent decision;” (RP I at 47–48); (2) the County had not complied with the Open Public Meetings Act (*id.* at 47–49); and (3) Advocates’ members, being local taxpayers, had standing to bring the Petition. The court also granted Advocates’ oral motion, made at the hearing by Advocates’ counsel (*id.* at 35–36), for joinder of the organization’s proffered members as co-Petitioners (*id.* at 48).

However, as noted, compliance with the Open Public Meetings Act was never briefed or argued by the parties. CP 413. Nevertheless, Judge Godfrey took it upon himself to issue a ruling in this respect, stating:

Let’s get pragmatic here. I like to see things taken care of in a more intellectual approach to common steps. ... Was there compliance with the open public meeting act? No. ... In our day and age there is no question that open government is totally to be observed at all times. ... Because the main question, was this a type of matter that should have been discussed in an open public meeting. End of my discussion.

RP I at 47–48.

Advocates also never asked the Court to require the County to comply with RCW 36.32.250; thus, that issue also was never briefed or

argued. As Advocates admitted in their last substantive pleading filed in the trial court, they did not seek relief under RCW 36.32.250:

Our pleadings have never asserted that the Commissioners must comply with the stricter competitive bidding requirements of RCW 36.32.250. Rather, we have only asked that, at a minimum, the alternative process under RCW 36.58.090 be used to ensure that the taxpayers of Mason County have their money spent in a fiscally responsible manner.

CP 328.<sup>1</sup> “[W]hat we do dispute is whether or not [the County is] required to comply with 36.58.090....” RP I at 46:22–24.

As a result, Judge Godfrey did not rule at the August 16 hearing that the County had to comply with RCW 36.32.250. Rather, he stated:

[T]he county commissioners are not required under the statute to comply with — with lowest competitive bidding. They can do whatever they wish making an intelligent decision. ... [T]his statute [RCW 36.58.090] ... does not require them to take the lowest competitive bid ....

... The county should be given an opportunity to conduct an open public meeting. They should then, if anyone wants to give them further information after public discussion, they can exercise 36.58.090 and award the contract according to the power that they have.

RP I at 48–49.

However, Judge Godfrey did “invent” a remedy.

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<sup>1</sup> Advocates subsequently filed their Motion for Entry of Judgment and Order on September 28. CP 399–400.

So therefore are you [Advocates] entitled to relief?  
Yes. Remedy? I'm going to invent the remedy.  
The remedy is that the contract is basically void and  
they're relieved, but there is a six month time  
frame. And the purpose is very simple in my  
opinion. A mistake has been made. The mistake  
needs to be given the opportunity to be clear itself.

...

Bottom line, maybe they'll change their mind. The  
other side of the coin, maybe this is just an exercise  
in futility and the public will have a right to their  
[open] public meeting and the commissioners will  
have a right to make a decision according to that  
statute to what they feel is appropriate under the  
contract. I'm giving a six month period of time to  
enable that to take place and the order shall read  
that none of this decision of this Court shall  
interfere with the county commissioners['] right to  
proceed and conduct an open public meeting  
pursuant to 36.58.090 and entertain appropriate bids  
and/or. It's up to them.

Now, if you people don't like it[,] it's [a] tough  
break. As far as I'm concerned, I have given you a  
pragmatic response. The public is going to get their  
alternative and the commissioners are going to be  
able to exercise their power.

And I'm done, have a nice day.

RP I at 48-49.

Advocates then moved for entry of their preferred form of an order  
and judgment. CP 399-409. The County, joined by RDC, opposed entry  
of that form. CP 410-415. Principal among the County/RDC objections  
was the fact that only one issue was presented to the trial court as set forth  
in the court's initial Order to Show Cause: whether the County should be

“ordered to comply with RCW 36.58.090.” CP 137–138, 413. Other than the standing issue raised by the County and RDC, no other issues, including the application of RCW 36.32.250 and the Open Public Meetings Act, were addressed to the trial court or argued by the parties. CP 328, 413.

At the subsequent hearing on October 15, the trial court, without addressing the County’s and RDC’s stated concerns, summarily signed Advocates’ proffered Judgment and Order Granting Writ of Mandamus and Declaratory Relief (“Order”) [CP 416–419],<sup>2</sup> after a colloquy with counsel.

Gosh, I hate to do something stupid, like solve a problem with common sense.

You know, realistically, when you look at the statutes, they don’t have to go through the competitive bids process, we already had that matter, they can go and pick whoever they want. They just didn’t hold a public meeting so they can have the discussion so everybody could put their two bits in. . . . [I]nstead, we are going to sit here and play this game.

So, the order that is submitted by the Advocates will be signed. . . .

And you people can go appeal and waste more public money instead of doing what’s common sense. I would appreciate it, when you get up to the Court of Appeals, that, maybe the Court of Appeals would do something like, say, it’s too bad that you had a judge that used common sense, I would like

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<sup>2</sup> The Order has been stayed pending the outcome of this appeal. *See* March 1, 2013 letter from Clerk David C. Ponzoha regarding “notation ruling” by Commissioner Eric B. Schmidt.

that kind of a decision, it would make me feel better. So, in the mean time, have at it. Goodbye.

RP October 15, 2012 (“RP II”) at 4–5.

The Findings of Fact in the Order provide, in part:

In awarding the 2012 contract for solid waste export and disposal, Mason County and the Board of Mason County Commissioners did not comply with the public works competitive bidding process in accordance with RCW 36.32.250, or the vendor selection process for contracts for the design, construction, operation, or service related to solid waste handling systems, plants, sites, or other facilities in accordance with RCW 36.58.090.

The Board of Mason County Commissioners did not discuss the contract for solid waste export and disposal in an open public meeting *at any time prior to the June 5, 2012 meeting* at which the 2012 contract was approved.

CP 417 (emphasis added). The Order and Judgment portion provides, in part:

Pursuant to RCW 7.16 *et seq.*, a writ of mandamus is hereby issued requiring Mason County and the Board of Mason County Commissioners to comply with RCW 36.32.250, or the alternative vendor selection process under RCW 36.58.090 in awarding any contract for solid waste export and disposal for Mason County. ...

\* \* \* \*

The Board of Mason County Commissioners violated the Open Public Meetings Act by failing to transact the official business of Mason County in open and public meetings. The purpose of the Open Public Meetings Act is to ensure that public bodies conduct deliberations and make decisions in an

open and transparent manner. The 2012 contract between Mason County and Regional Disposal Company was entered into on June 5, 2012, without prior opportunity for public input or proposals, thereby violating RCW 42.30, *et seq.*

CP 417–418.

D. Facts Related to Respondents' Standing

Advocates for Responsible Government filed its Petition for Writ of Mandamus on June 25, 2012. CP 1. On July 12, in its Response to Order to Show Cause, the County argued that Advocates lacked standing to bring its Petition. CP 145–146. RDC made a similar argument in its response to the Order to Show Cause. CP 308–309. The trial court held its first hearing on the Petition and Order on July 16, 2012. RP I at 1.

On July 18, two days after the initial hearing, Respondent Jack Johnson, a member of Advocates, wrote a letter to the Attorney General's Office, which stated in its entirety:

I am a resident and taxpayer of Mason County and am writing this letter to request that the Attorney General's office take action in the following matter. On June 5, 2012, the Board of Commissioners for Mason County voted to approve the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County. This contract between Mason County and Regional Disposal Company provided that Regional Disposal Company would transport and dispose of solid waste for the county. The original 1993 contract for solid waste export services was for a term of five years with three options to renew for additional five year periods. This contract was set to expire in 2012 with no additional options for renewal remaining.

Mason County violated RCW 36.58.090 by not publishing notice of its requirements for this contract or requesting submission of qualifications statements or proposals.

I request that the Attorney General's office take immediate action to prevent enforcement of this new contract and require Mason County to comply with the requirements of RCW 36.58.090 in awarding this contract.

If you have any questions regarding this matter, please feel free to contact me at [phone number] or [email address].

CP 396.

The reply from Solicitor General Maureen Hart, dated July 24, 2012, stated, in part:

Your letter requests that the "Attorney General's office take immediate action to prevent enforcement of this new contract and require Mason County to comply with the requirements of RCW 36.58.090 in awarding this contract." ... As I understand it your contention is that Mason County was required to but did not invoke a competitive process in this matter, RCW 36.58.090. You do not indicate whether your interest is as a potential bidder, or more generalized.

... We ... evaluate the interests of taxpayers in considering requests such as yours, and in light of the principal purposes of competitive bid laws, the criteria we consider in determining whether to bring litigation to challenge a public contract focus on the overall financial interests of taxpayers. As a general rule, we believe that taxpayers would be best served by initiation of action on their behalf in three types of cases: (1) where there is evidence that decisions concerning the bid award are fraudulent or collusive; (2) where there are clear violations of law that will result in significant additional costs to taxpayers; or (3) where there are clear violations of law of such a nature as to seriously compromise the public's interest in a fair and competitive bidding system. In evaluating the interests of taxpayers, we

also balance potential additional contract costs to taxpayers, if any are alleged, against additional costs to taxpayers that would accompany litigation. The information provided in your letter does not provide a basis to conclude that your request satisfies these criteria.

Because your concern relates to a financial transaction of the county, I am forwarding your letter to the State Auditor's Office for its consideration in periodically auditing the financial affairs of local governments for compliance with governing laws.

CP 397–398. Advocates brought these communications to the trial court's attention in Petitioner's Supplemental Memorandum of Law, filed on August 7, 2012, but did not include copies of the letters. CP 322. Rather, the County thereafter filed them with the trial court. CP 394–398.

#### IV. ARGUMENT

1. The trial court erred in declaring the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County "null and void" and in issuing a writ of mandamus requiring Mason County to submit a new "contract for solid waste export and disposal" to a competitive bidding process under RCW 36.32.250 or the request-for-proposal process under RCW 36.58.090.

Mason County adopts and incorporates the briefing of RDC on this topic.

2. The trial court erred with respect to that part of its Order that would require the County in any respect to comply with the competitive bidding process under RCW 36.32.250.

Mason County adopts and incorporates the briefing of RDC on this topic.

3. The trial court erred and abused its discretion in finding that Advocates or its members had standing to bring the mandamus action.

The trial court's conclusions of law found at paragraphs 3, 4, and 5 under the caption "Order and Judgment" of the trial court's "Judgment and Order Granting Writ of Mandamus and Declaratory Relief," are error. CP 401- 403.

Advocates for Responsible Government and its members lack standing to bring this action because they do not have an interest in the proceeding beyond that shared in common with the public at large. *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 98 P.2d 658, 659 (1940).

Still more, Advocates lacks standing to assert the rights of its members because it did not meet its burden of establishing that the members of its organization would have standing to sue in their own right. *Des Moines Marina Ass'n v. City of Des Moines*, 124 Wn. App. 282, 291-292, 100 P.3d 310 (2004). As such, Advocates never established that it is

a "beneficially interested" party, and it, therefore, lacks standing to bring the Petition. RCW 7.16.050.

Although Advocates initially filed suit in its capacity as a non-profit advocacy group, at the hearing on Advocate's Order to Show Cause the trial court allowed Advocates to orally amend its petition to add several members of Advocates as plaintiffs in their capacities as individuals. RP I at 35-36, 48. In order to have standing, however, these individuals must allege a taxpayer's cause of action, together with facts that support the allegation. *Dick Enterprises, Inc. v. Metro. King County*, 83 Wn. App. 566, 572-73, 922 P.2d 184, 187 (1996). The individual taxpayers must show that they pay the kind of tax that funds the contract they are seeking to invalidate, and they must show that, prior to bringing the suit, they have asked the Attorney General to take action against the contract. *Id.* at 573. In the instant case, each of the parties named as plaintiffs has alleged that he pays taxes, but none have alleged that they pay the kind of taxes at issue here.

In the instant case, only one of the individual plaintiffs, Jack Johnson, asked the Attorney General to take action. CP 396. But Johnson's letter to the Attorney General came after, not before, Advocates filed suit in this case, and Johnson was not added as a plaintiff until the parties appeared at a hearing to argue the merits of Advocate's Order to

Show Cause. CP 1-132, 133-34; RP I at 35-36, 48. Additionally, Johnson's letter to the Attorney General was deficient in that it failed to allege facts sufficient to justify intervention by the Attorney General. CP 396-98.

Each of the plaintiffs in the instant case lack standing because none of them pay taxes related to the subject of the complaint. To assert taxpayer status, a plaintiff must pay the kinds of taxes that the subject of the complaint. *Dick Enterprises, Inc. v. Metro. King County*, 83 Wn. App. 566, 572-73, 922 P.2d 184, 187 (1996). But the contract at issue in the instant case is not funded by taxpayer money; instead, the solid waste program is funded by user fees. CP 371-93 (Declaration of John Cunningham, together with attachments).

The mere fact that Advocates, or any one or more of the named individual plaintiffs, might disagree with Mason County's decision to contract with RDC is legally insufficient to bestow standing to bring suit to enjoin the contract. *Greater Harbor 2000 v. City of Seattle*, 132 Wn. 2d 267, 281, 937 P.2d 1082 (1997). To successfully assert standing, at least one of the plaintiffs must show that the contract interferes with his or her legal rights or privileges. *Id.* at 381-282. None of those named as plaintiffs have shown that they have any legal right or privilege that is impacted by the challenged contract.

Because neither Advocates nor any of the individuals who have been named as plaintiffs have either taxpayer or bidder status, the trial court should have dismissed the suit with prejudice. *Dick Enterprises, Inc. v. Metro. King County*, 83 Wn. App. 566, 573, 922 P.2d 184, 187 (1996).

4. The trial court erred in ruling that Mason County violated the Open Public Meetings Act based on its finding that the “Board of Mason County Commissioners did not discuss the contract ... in an open public meeting at any time in 2012 prior to the June 5, 2012 meeting at which the ... contract was approved.”

Advocates assertions’ -- and the trial court’s findings -- that Mason County violated the Open Public Meetings Act (OPMA), RCW 42.30.010 et seq., in the instant case are factually incorrect. The uncontroverted evidence in the record shows that the contract extension that is at issue in the instant case was discussed in at least two open public meetings before the contract extension was approved in an open public meeting on June 5, 2012. CP 121-29, 423-24. These preliminary open public meetings occurred on January 30, 2012, and on May 7, 2012. CP 423-424. Thus, the trial court’s Finding of Fact No. 3 (CP 402) and conclusion of law No. 6 (CP 403) are error.

Additionally, although Advocates erroneously alleges error based upon its assertion that no relevant public meeting occurred prior to approval of the contract at issue in this case, and although the trial court agreed when voiding the contract, neither Advocates nor the trial court has cited any authority to support its proposition that a public body may be required to hold a public meeting where no action is taken prior to -- and preliminary of -- holding a public meeting where action is taken.

Appellate review of errors related to interpretation of the OPMA is de novo. *Eugster v. City of Spokane*, 110 Wn. App. 212, 221, 39 P.3d 380, 384 (2002).

The OPMA requires that “[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.” RCW 42.30.030. A violation of the OPMA occurs when a governing body takes action in a meeting that is not open to the public. *Id.* However:

To defeat summary dismissal of an OPMA claim, the plaintiff must submit evidence showing “(1) that a ‘member’ of a governing body (2) attended a ‘meeting’ of that body (3) where ‘action’ was taken in violation of the OPMA, and (4) that the member had ‘knowledge’ that the meeting violated the OPMA.”

*Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380 (2002), quoting *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 557, 27 P.3d 1208 (2001).

It is undisputed in the instant case that the Mason County Commission is a public body and that, if the Commission met to discuss an extension of the County's contract with RDC, the meeting was required by the OPMA to be an open meeting unless a statutory exception applied. However, there is no evidence in the instant case that the Commission ever held any meeting (regarding the contract with RDC) that was not open to the public. Instead, the trial court found that Mason County violated the OPMA because it did not have a meeting even though the OPMA required the county to have a meeting prior to having a meeting to approve the contract with RDC. CP 402 (No. 4); CP 403 (No. 6).

As argued above, the trial court's finding is factually incorrect. CP 121-29, 423-24. But irrespective of the trial court's erroneous finding of fact, the trial court erred as a matter of law even in regard to the facts it found. The trial court erred in this respect because if found that Mason County's extension of its contract with RDC was approved by the County Commission at an open public meeting but that this action of the County Commission nevertheless violated the OPMA because the Commission did not have a pre-meeting prior to the meeting where action was taken.

CP 402 (No. 4); CP 403 (No. 6). Because the action that the Commission took, extension of Mason County's contract with RDC, was taken at an open public meeting in compliance with RCW 42.30.010 et seq., and because there is no evidence in the record that any action was taken that was not at an open public meeting, the trial court erred by finding a violation of the OPMA. *Org. to Pres. Agr. Lands v. Adams County*, 128 Wn. 2d 869, 883, 913 P.2d 793 (1996); *Eugster v. City of Spokane*, 118 Wn. App. 383, 76 P.3d 741 (2003), *review denied* 151 Wn.2d 1027, 94 P.3d 959.

5. The trial court erred in finding that Mason County violated the Open Public Meetings Act because Advocates failed to raise or argue the issue after filing its petition.

Advocates did not file its Petition under the OPMA. Instead, the action was brought as an order to show cause regarding compliance with RCW 36.58.090. In this respect, Appellants were not put on notice that the trial court's Order to Show Cause would required them to address an alleged violation of the OPMA.

A trial court abuses its discretion when its order is manifestly unreasonable or is based upon untenable grounds. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 339, 858

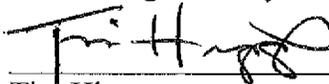
P.2d 1054 (1993). Mason County asserts that the trial court's order voiding the County's contract with RDC was manifestly unreasonable because the trial court's Order to Show Cause only ordered the County to appear and show cause why RCW 36.58.090 did not apply to the disputed contract, but at the hearing on the Order to Show Cause the trial court then, without prior notice to the County, voided the contract due to the court's interpretation of the OPMA.

V. CONCLUSION

On the basis of the foregoing, Mason County and the Mason County Board of Commissioners, joined by Regional Disposal Company, respectfully requests that the Court of Appeals reverse the trial court's Judgment and Order Granting Writ of Mandamus and Declaratory Relief and reinstate the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County.

Respectfully submitted this 29th day of March, 2013.

MICHAEL DORCY  
Mason County  
Prosecuting Attorney



Tim Higgs  
Deputy Prosecuting Attorney  
WSBA #25919

# MASON COUNTY PROSECUTOR

## March 29, 2013 - 4:25 PM

### Transmittal Letter

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Court of Appeals Case Number: 44139-0

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Objection to Cost Bill

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Letter

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#### Comments:

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