

NO. 48182-1-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

ARTHUR WEST, Appellant

v.

PIERCE COUNTY COUNCIL, et al., Respondents

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**RESPONDENTS' SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

Mr. West's Reply Brief argues the fundamental jurisprudential prerequisite of a demonstrable personal stake or harm is not required under the Open Public Meetings Act (hereinafter "OPMA") because that question supposedly was "conclusively determined by the July 5, 2016 opinion of Division I in *West v. Seattle Port Comm'n*," 194 Wn. App. 821, \_\_ P.3d \_\_ (2016). See Reply 4-5. Though Mr. West's suit also was dismissed by the trial court for its lack of substantive merit, see 9/18/15 VRP 44-50; Resp. Br. 20-38, his procedural lack of standing remains a separate ground for affirming dismissal because the new Division One decision he cites is not "conclusive[]" as to his standing, not binding, and not soundly reasoned.

## II. ANALYSIS

First, Mr. West has not disputed the previously briefed collateral estoppel effect *on him* of this Court's rejection of his identical claim of automatic standing in an earlier OPMA action *he* lost. Compare Resp. Br. 14-15 with Reply: see also *West v. Marzano*, 171 Wn.App. 1004 (2012) (unpublished) (rejecting West's standing claim citing *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 772, 630 P.2d 930 (1981) and our state's adoption of "well-settled principles of federal standing doctrine that a legislative grant of standing to the public as a whole is ineffective to confer standing on an individual"). Plaintiff's failure to dispute estoppel

resolves the standing issue to the County's favor. *Compare Alcantara v. Boeing Co.*, 41 Wn. App. 675, 679, 705 P.2d 1222 (1985) ("When an issue of fact *or law* is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.") (*citing* Restatement (Second) of Judgments § 27) (emphasis added) *with Nims v. Wash. Bd of Registration*, 113 Wn. App. 499, 509, 53 P.3d 52 (2002), *as amended* (Oct. 14, 2002) ("collateral estoppel does not foreclose a higher court from relitigating *the decision of a lower court* on an important issue of law") (emphasis added).

Second, the recent Division One decision in *Seattle Port Commission* cited by Mr. West is contrary to binding precedent. In *Kirk v. Pierce County Fire Protection Dist. No. 21*, the Supreme Court affirmed dismissal of an OPMA claim because plaintiff failed to meet well-established standing requirements. *See* 95 Wn.2d at 772-73. However, Division One in *Seattle Port Commission* would eviscerate this Supreme Court decision by artificially limiting *Kirk's* OPMA standing requirement to claims only by members of the public seeking to void a governing body's decisions because a member of that body was not given notice of an executive session. *See* 194 Wn.App. at ¶ 17. However, if Division One were correct that "the OPMA authorizes any person to file an action," *id.* at ¶ 2 (emphasis

added), the “person” who filed suit in *Kirk* would have been entitled “to file an action” under the OPMA despite his lack of individual standing. Thus, the analysis and holding of *Seattle Port Commission* conflicts with the Supreme Court’s analysis and holding in *Kirk*.<sup>1</sup>

Third, *Seattle Port Commission* is not precedent in this Court and is wrongly decided. Our state has “one Court of Appeals with three divisions,” and because each division is “co-equal and part of one court,” one division’s opinions are not “superior to another.” See *Union Bank, N.A. v. Vanderhoek Assoc., LLC*, 191 Wn.App. 836, 847 (2015). Thus, a division of the Court of Appeals “need not follow the decisions of other divisions of this court,” *State v. Schmitt*, 124 Wn. App. 662, 669 n. 11, 102 P.3d 856, 860 (2004), and often chooses not to do so because “if the first panel

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<sup>1</sup> *Seattle Port Commission* asserts its finding of automatic standing “is consistent with [two other court of appeals] cases following *Kirk* that have allowed OPMA actions to proceed without analyzing standing.” 194 Wn.App. at ¶18. However, as noted below, this is mistaken. See e.g. *Advocates For Responsible Gov’t v. Mason Cty.*, 177 Wn.App. 1003 (2013) (analyzing standing in OPMA action); GR 14.1(a). Further, as to published Court of Appeals opinions, for a legal issue to be discussed it must be raised by the underlying facts and by legal arguments of counsel and then found by the Court of Appeals as worthy of publication due to its precedential value. See RCW 2.06.040. The mere absence of a prior published Court of Appeals decision that once again analyzes an issue already settled by the Supreme Court is not a basis for the Court of Appeals to vitiate that binding Supreme Court precedent. Indeed, Division One elsewhere has observed that the “fact that *this court* interpreted and enforced the procedural requirements of [a statute] in [a published case] is not a precedent for doing so in *other cases where the issue of the court’s lack of authority to do so is squarely raised.*” *Verbeek Properties, LLC v. Green-Co Envtl., Inc.*, 159 Wn. App. 82, 88, 246 P.3d 205 (2010) (emphasis added). Unlike the two Court of Appeals cases cited by *Seattle Port Commission*, the lack of authority to disregard the OPMA standing requirement recognized by *Kirk* and *Advocates For Responsible Gov’t* is squarely raised here. See e.g. CP 255; 9/18/15 VRP 43-44; Resp. Br. 14-15.

to decide an issue gets it wrong, the error would be perpetuated unless and until the Supreme Court took review.” *See Grisby v. Herzog*, 190 Wn. App. 786, 810, 362 P.3d 763 (2015) (disagreements within the Court of Appeals serve “the positive function of alerting the high court to unsettled areas of the law that are in need of review”). Though this court will follow the decisions of another Division if “its reasoning is sound,” *see Eriksen v. Mobay Corp.*, 110 Wn. App. 332, 346, 41 P.3d 488 (2002), *Seattle Port Commission's* reasoning was fundamentally unsound in its rejection for OPMA claims of the essential requirement for justiciability of a personal stake or harm.

Among other things, the trial court here held Mr. West lacked standing because it found “persuasive” the reasoning of this Court’s unpublished opinion in his previous OPMA suit. *See* 9/18/15 VRP at 29-30, 43-44. In that case, this Court had rejected Mr. West’s identical claim of automatic OPMA standing because it conflicted with the Supreme Court’s *Kirk* precedent and with our state’s adoption of “well-settled principles of federal standing doctrine that a legislative grant of standing to the public as a whole is ineffective to confer standing on an individual.” *See* 171 Wn. App. 1004 \*6. In later ruling to the contrary in *Seattle Port Commission*, Division One “gets it wrong” as to Mr. West’s standing under the OPMA.

Independent of its being in conflict with the Supreme Court’s binding

*Kirk* precedent, *Seattle Port Commission* is contrary to this Court's persuasive authority of *Advocates For Responsible Gov't v. Mason Cty.*, 177 Wn. App. 1003 (2013) (unpublished).<sup>2</sup> There Division Two recognized in that *OPMA* action that "standing prohibits a party from asserting another's legal right" and "ensures that courts render a final judgment on an actual dispute between opposing parties that have a genuine stake in resolving the dispute." *Id.* (citing *West v. Thurston County*, 144 Wn.App. 573, 578, 183 P.3d 346 (2008); *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010)). Thus plaintiffs in that case were held to lack standing to bring a *OPMA* action because "none of them have alleged that they pay taxes related to the RDC contract in question."<sup>3</sup> See *Advocates For Responsible Gov't v. Mason Cty.*, *supra*.

*Seattle Port Commission* also conflicts with our state's adoption of well-settled principles of federal justiciability which establish that a legislative grant of standing to the public as a whole is ineffective to confer automatic standing on an individual. Division One in *Seattle Port Commission* rejected that this had been adopted by our state courts because it asserted our state Supreme Court had followed federal standing law only

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<sup>2</sup> Under GR 14.1(a), the October 1, 2013, unpublished decision of Division Two in *Advocates* may be considered as persuasive authority because it was filed after March 1, 2013.

<sup>3</sup> Here the record establishes Mr. West is not even a Pierce County taxpayer, much less that he has any other justiciable interest in the underlying issue. See Resp. Br. 15-20.

when “addressing standing under federal law, not Washington law.” See 194 Wn.App. at ¶ 19 (citing *High Tide Seafoods v. State*, 106 Wn.2d 695, 701-02, 725 P.2d 411 (1986)). In fact, in support of *Kirk*'s holding requiring standing for an OPMA claim, our Supreme Court cited this division's decision in *Casebere v. Clark Cty. Civil Serv. Comm'n-Sheriff's Office*, 21 Wn.App. 73, 76, 584 P.2d 416, 418 (1978) which had relied on *federal* standing principles. See 95 Wn.2d at 772 (citing *Casebere, supra.* (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) for the “well settled” principle that “a person whose only interest in a legal controversy is one shared with citizens in general has no standing to invoke the power of the courts to resolve the dispute”)).

Indeed, federal standing doctrine, and Washington state cases applying that doctrine, are commonly cited without reservation by our Supreme Court and this Division to hold that standing is absent in other *state* statutory and common law actions as well. See e.g. *Allan v. Univ. of Washington*, 140 Wn.2d 323, 328-333, 997 P.2d 360 (2000) (analyzing State APA pursuant to standing principles of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)); *Goldberg Family Inv. Corp. v. Quigg*, 184 Wn.App. 1019 (2014) (citing *High Tide Seafoods* for standing principles applicable to

state lawsuit for failure of a limited liability company) (unpublished).<sup>4</sup>

This is so because our Supreme Court recognizes that “[i]nherent” in our state court’s rule of justiciability are “the traditional limiting doctrines of standing, mootness, and ripeness, *as well as the federal case-or-controversy requirement.*” *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149, 1153 (2001). This later principle of justiciability is “fundamental to the separate and distinct constitutional role of the Third Branch -- one of the essential elements that identifies those ‘Cases’ and ‘Controversies’ that are the business of the courts rather than of the political branches.” *See Lujan*, 504 U.S. at 572, 576–78 (rejecting automatic standing based solely on statutory provision that “any person may commence” a suit thereunder). Any other rule would overwhelm the judicial branch and impose unlimited governmental liability because every citizen without limitation could bring suit for any and every OPMA infraction anywhere else in the state.<sup>5</sup>

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<sup>4</sup> GR 14.1 permits this 2014 unpublished decision to be considered as persuasive authority.

<sup>5</sup> Any such unlimited privately actionable duty under the OPMA would create a duty owed -- not to a specific identifiable person -- but to the public in general. However, civil liability can only exist for breach of a duty "owed to the injured person as an individual and ... not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)." *See Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). Such an interpretation of the OPMA which abolishes jurisprudential limitations would impose unlimited liability on government to an unlimited class of plaintiffs -- indeed, to the entire populace -- for any every OPMA violation no matter how minor or inconsequential or by whose government agency. This is an invalid interpretation of the OPMA. *See Fisk v. City of Kirkland*, 164 Wn.2d 891, 897, 194 P.3d 984 (2008) (rejecting statutory interpretation, among other reasons, because it "could lead to catastrophic liability for a municipality").

Thus, *Seattle Port Commission* not only fails to bind this Court while itself being contrary to binding state Supreme Court precedent, but has been shown not to be well reasoned in its rejection of the well settled principle that when the legislature purports to confer standing on all members of the public, a plaintiff still must demonstrate standing by proving he suffered an injury in fact rather than an injury to the public in in general.<sup>6</sup>

### III. CONCLUSION

For the above reasons, Mr. West's reliance on *Seattle Port Commission* is without effect because he nevertheless lacks standing as a matter of law. Thus, the trial court's order of dismissal can be affirmed on the additional issue of standing. *See* 9/18/15 VRP 43-44; Resp. Br. 14-15.

DATED: SEPTEMBER 30, 2016

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<sup>6</sup> For the first time on appeal, Mr. West's Reply also cites a long-existing AGO 1971 No. 33 claiming it supports his standing to bring an OPMA suit. Reply 4-5. However, opinions of the Attorney General are not binding authority on any court -- especially those opinions predating contrary Supreme Court precedent. Here, the Attorney General's 1971 opinion is contrary to both the Supreme Court's later binding *Kirk* precedent as well as this court's persuasive *Advocates For Responsible Gov't* which require proof of standing to commence OPMA actions. Further, the opinion addresses only standing to "commence a *mandamus* or *injunction* action" under the OPMA rather than to impose OPMA sanctions on board members -- and the latter is the only claim remaining in this appeal. *See* Resp. Br. 7 n. 6.

**PIERCE COUNTY PROSECUTOR**

**September 30, 2016 - 4:09 PM**

**Transmittal Letter**

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**Comments:**

Appendix: Supplemental Brief

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