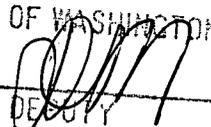


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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY 
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No. **48182-1-II**

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION II

ARTHUR WEST,
Appellant,
v.

PIERCE COUNTY COUNCIL, et al
Respondents

On appeal from the rulings of Thurston
County Superior Court Judge Erik Price

APPELLANT WEST'S
REPLY BRIEF

Arthur West
120 State Ave, NE # 1497
Olympia, Washington 98501

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I. The issue of citizen standing under the OPMA has been conclusively determined by the Attorney General in AGO 1971 No. 33 and the July 5, 2016 Published Opinion of Division I of the Court of Appeals.

Respondents devote half of their Brief to standing issues. Fortunately, these issues have been conclusively determined by the July 5, 2016 published opinion of Division I in *West v. Seattle Port Commission*. This decision is supplemental authority on the issue of citizen standing under the OPMA and is appended for consideration under RAP 10.8.

Similarly, AGO 1971 No. 33 and the October, 1, 2015 decision of the Supreme Court in *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, ___ Wn.2d ___ (2015) constitute additional authority on the issue of standing under the OPMA.

AGO 1971 No. 33 (<http://www.atg.wa.gov/ago-opinions/meetings-public-applicability-open-public-meetings-act-state-and-local-governmental/#sthash.Kv2Mp8JZ.dpuf>) states, in pertinent part...

Question (16):

Who has standing to commence a mandamus or injunction action under the act?

Answer:

Section 13 of the act clearly provides that:

"**Any person** may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing [[Orig. Op. Page 39]] threatened violations of this act by members of a governing body." ^{19/}
(Emphasis supplied.)

In regard to the weight to be given to such opinions in construing the OPMA, the Supreme Court in the *Citizens Alliance* case ruled that...

^{19/} Notably, this section is broader than the original bill, § 14 of which would have limited standing to sue to "any interested person."

“Although not controlling, attorney general opinions are entitled to great weight.” *Thurston County v. City of Olympia*, 151 Wn.2d 171, 177, 86 P.3d 151 (2004). This is particularly true where the AGO issues an opinion shortly after the passage of legislation and where the legislature fails to amend the statute in response to the opinion: [W]e presume that the legislature is aware of formal opinions issued by the attorney general and a failure to amend the statute in response to the formal opinion may, in appropriate circumstances, be treated as a form of legislative acquiescence in that interpretation. The weight of this factor increases over time and decreases where the opinion is inconsistent with previous formal opinions, administrative interpretations, or court opinions. [W]here the opinion is issued in close temporal proximity to the passage of the statute in question, it may shed light on the intent of the legislature, keeping in mind, of course, that the attorney general is a member of a separate branch of government... *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, ___ Wn.2d ___ (2015), citing *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011).

The OPMA was initially adopted in 1971, the same year that AGO Opinion 1971 No. 33 was issued. The provision of AGO 1971 No. 33 stating that “any person” may maintain an action under the OPMA is therefore entitled to great weight

Both of the recent decisions in *Citizen's Alliance* and *West v. Seattle Port Commission* support the self evident conclusion that the Legislature in using the term “any person” to define who could bring an action under the OPMA meant that “any person” could, indeed, bring an action in accord with the express language and manifest intent of the law.

II The county's own declarations showing exchanges of emails between all of the Pierce County council members, and the active participation in serial deliberation and discussion by a quorum of the council on a matter that came before it for a vote demonstrates an intent to meet sufficient to trigger the provisions of the OPMA

The next argument advanced by the county is that no evidence exists in the record to support a claim for serial meetings of a quorum of the commissioners.

This argument is contradicted by the Declarations of council members Young, Richardson, Roach, Ladenberg, Talbert McClune and Swanson, as well as the Declaration of Deputy Prosecutor Vanscoy. (See Clerk's Papers at 9-68)

The county's own evidence (summarized by a table prepared by Deputy Prosecutor Vanscoy, which is appended in true and correct form for convenient reference as Exhibit 1) demonstrates that the entire council was a party to serial discussions and deliberations, and that 5 out of the 7 of the council members (a quorum) actively participated in these discussions and deliberations between February 26 and March 2.

On February 27 alone, the Pierce County Council conducted eight (8) repeated serial deliberative discussions and communications: (See Exhibit 2, CP at 24)

Of these serial communications, the overwhelming majority were sent to the entire council. Further, the serial meetings of February 27 were

preceded by repeated email exchanges sent to the entire council on February 25 and 26.

The County also attempts to argue that the issue of whether such serial meetings violate the OPMA is settled by ignoring the decision of the Supreme Court in Wood and by an overly technical reading of the intent related dicta in the recent Decision of the Supreme Court in Citizens Alliance for Property Rights Legal Fund v. San Juan County, ___ Wn.2d ___ (2015).

As the Supreme Court held in Wood,

(T)he active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business. Wood v. Battleground School District, 107 Wn. App 550, 27 P.3d 1208 (2001). (Emphasis added)

Similarly, in the Citizen's Alliance case, the actual operative precedent of the Court's decision hinged upon the lack of a quorum of the council having been aware of the exchange of deliberative communications and the lack of active participation by a quorum of the Council, not the lack of "intent" that the county alleges.

The text of the e-mails do not indicate that Miller or Peterson were aware of Fralick's call to Pratt before Fralick sent his e-mail summarizing it; certainly, the e-mails do not suggest that Miller or Peterson actually intended for a telephone call to Pratt to be part of an otherwise e-mail-based "meeting" of the Council. Likewise, there is no indication that Pratt was aware of the e-mails sent by Peterson or Fralick.

Consequently, the communications cited by CAPR do not evidence a collective intent for the four council members to meet to transact council business.

Moreover, the record does not contain any e-mails sent by Miller in this exchange, nor does it reference any telephone calls in which Miller participated. Instead, Miller passively received one e-mail each from Fralick and Peterson. Because passive receipt of e-mail does not constitute participation in a meeting, Wood, 107 Wn. App. at 564, Miller could not have been part of the ostensible "meeting" for OPMA purposes.

Without Miller, the communications at issue involve only three council members-the same number that participated on the CAO Team and less than a majority of the full Council. **For these reasons, the e-mail/telephone exchange did not constitute a "meeting" of the Council.** (emphasis added)

Additionally, the Supreme Court explained in a footnote that...

We do not reach the issue of whether such a serialized sequence of communications can ever constitute a "meeting" under OPMA. (emphasis added)

As such, the actual precedent of Citizen's Alliance is not determinative of the very different fact situation in the present case.

"In considering . . . statements made in the course of judicial reasoning, **one must remember that general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved.**" Peterson v. Hagan, 56 Wn.2d 48, 53, 351 P.2d 127 (1960) (citations omitted); see also Waremart v. Progressive Campaigns, 139 Wash.2d 623, 647-48, 989 P.2d 524 (1999) (Madsen, J., concurring).(emphasis added)

This Court should determine the issue the Supreme Court declined to address in Citizen's Alliance, whether deliberative communications sent to the entire governing body of a county council, and active participation of a quorum of the governing body in discussions and the exchange of deliberative communications (about a matter that was within the authority of the council to decide and which did come before the council for a vote) constitutes a violation of the OPMA.

Regardless of the self-serving declarations of the defendants, and in accord with Wood, the email exchanges and telephone calls themselves demonstrate an intent of the Council to meet, "discuss" and "deliberate". This should be sufficient to invoke the protections of the OPMA, especially since RCW 42.30.020 (3) provides...

"Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, **deliberations, discussions,** considerations, reviews, evaluations, and final actions. (Emphasis added)

Either way the Court decides on this issue, both the public and their public servants will benefit from clear, bright line rules as to whether, and how, precisely, a quorum of a governing body may, in accord with the OPMA, actively participate in deliberative serial communications with the knowledge and passive acquiescence of the entire governing body, which is the precise factual situation this case presents.

III The discussion and deliberation between the Pierce County Council members did not take place in an executive session or a discussion of whether to hold an executive session

Pierce County additionally attempts to argue that the discussion and deliberations of a quorum of the council at issue were exempt because they were either subject to an exception to the OPMA as an executive session under RCW 42.30.110 or were communications concerning an executive session.

This argument is not well taken because it is readily apparent from the communications themselves that the deliberative communications of the Pierce County Council at issue simply did not take place in a duly convened executive session under RCW 42.30.110 or in the context of determining whether to hold an executive session.

Nowhere in any of the communications is the term “Executive Session” mentioned even in passing, and no discussion of any possible executive session took place. Nor were the communications between the council “legal advice” exempt from the provisions of the OPMA.

Similarly, banking regulations concerning lawful withdrawals of funds from a bank account by the account holder, although they apply to certain legal banking transactions, do not serve to legitimize the actions of those such as John Dillinger or Baby Face Nelson who partake in the (possibly lawful) activity of withdrawing money from a bank without, however, the necessary prerequisite of a bank account or a properly

completed withdrawal slip required for such activity to be in accord with the law.

The authority advanced to support the County's arguments in this regard *Port of Seattle v. Rio*, 16 Wn.App. 718 , 720-21, 559 P.2d 18 (1977), and *In re Recall of Lakewood City Council Members*, 144 Wn. 2D 583, 587 (2001) involved executive sessions, making these cases inapplicable to circumstances where no executive session was conducted.

In the only other case cited by the county, *Washington Public Trust Advocates v. City of Spokane*, (2004) 120 Wn. App. 892, 903 (2004), the Court did not consider deliberation by the members of the governing body...

The issue is whether the trial court erred in concluding no violation of the Washington Open Public Meetings Act of 1971 (OPMA), chapter 42.30 RCW, occurred when litigation conferences were privately conducted between the Mayor and special counsel

Clearly, while the county should be commended for its creativity in breaking new legal ground in its unprecedented “executive session” arguments, it is a sad irony that their ability to envision unique and novel arguments is eclipsed by the lack of anything close to any existing precedent to base a good faith argument upon.

The council's discussions were not exempt as executive session communications because they were not executive session communications

IV Conclusion- This Court should determine the unresolved issue of whether exchange of serial deliberative emails showing discussions involving an entire governing body with active participation of a quorum of that body in the exchanges constitutes a violation of the Open Public Meetings Act.

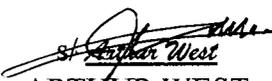
Both RCW 42.30.101 and Telford v. Thurston County Board of County Commissioners, 95 Wn.App. 149, 157, 974 P.2d 886, (1999) provide authority for suits against governing bodies of a County.

It is undisputed in the record of this case that the entire Pierce County Council, (or at the very least a quorum of the council) intended to “meet” electronically for the purpose of exchanging deliberative communications to “deliberate” and conduct a “discussion” concerning an issue within the authority of the council.

While appellant readily admits that this precise factual situation has not previously been presented to the appellate courts for their determination, the resolution of this case on the merits of the undisputed facts appearing in the record will provide much needed clarity in the interpretation of Washington State's Open Public Meetings Act.

Respectfully submitted this 8th day of July, 2016.

By:


ARTHUR WEST

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COURT OF APPEALS
DIVISION II
2016 JUL -8 AM 10:44
STATE OF WASHINGTON
BY DM
DEPUTY

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Reply Brief of Appellant, **by Email** with backup **by regular U.S. Mail** on the 8th day of July, 2016, to counsel of record:

This document was electronically served upon the following counsel on this 8th day of July, 2016.

Dan Hamilton
dhamilt@co.pierce.wa.us

Dated this 8th day of July, 2016.

Arthur West
ARTHUR WEST

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Exhibit 1

1 Open Public Meetings Act." Complaint, p. 2 ¶ 3.1-3.2. Rather, after the Prosecutor's end of the day
 2 email on February 26, 2015, and before the County filed suit at 4:25 p.m. the next day, *see* 2/27/15
 3 Complaint in Pierce County Superior Court Cause # 15-2-06419-9, the only communications
 4 between council members and the Prosecutor's Office occurred on February 27, 2015, and were as
 5 follows:

- 6 1. **11:35 a.m.:** Councilmember Joyce McDonald emails the Prosecutor's Office, with
 7 copies to Chairman Dan Roach and the Executive, questioning whether "you need
 8 additional direction from the Council seeing that the ordinance has already passed the
 9 Council and has been signed by the Executive?"
- 10 2. **12:07 p.m.:** Chairman Roach also responds to the Prosecutor's email to explain that the
 11 "council is not asking for a lawsuit challenging the proposal."
- 12 3. **12:31 p.m.:** Councilmember Joyce McDonald provides a copy to the Prosecutor of her
 13 email to Chairman Roach wherein she again states her belief that "since the measure
 14 was already passed by the Council and signed by the Executive, the decision on seeking
 15 to resolve the legal conflict would lie with the Executive branch."
- 16 4. **2 p.m.:** Chairman Roach conveys to the prosecutor and others his similar belief that the
 17 issue was "between the Execs office and the prosecutors office" and asks the Prosecutor
 18 if the council had a veto power despite the fact it "seems that once the exec signs an
 19 ordinance it's in her court."
- 20 5. **3:43 p.m.:** Councilmember Ladenburg sends an email to the Prosecutor, stating that the
 21 "Executive has requested that the Court determine the validity of the referendum and I
 22 support this request," but that "the Council is a body of seven separately elected
 23 members" so that "Chair Roach does not speak for the body of the Council without the
 24 approval of the majority of the Council" and "[s]ince we have not met on this matter,
 25 his comments are not representative of the majority."
6. **3:59 p.m.:** Councilmember Talbert sends an email to the Prosecutor stating "I support
 the executive's request for legal support from your office."
7. **Time unknown:** Councilmember Young calls the Prosecutor by telephone to convey
 that he does not oppose the executive's decision to file suit.
8. **Time unknown:** Chairman Roach speaks with the Prosecutor, continues to decline to
 provide direction regarding filing the suit, and is advised that council's role includes
 controlling County litigation but due to the Executive's direction to file suit and the lack
 of any contrary direction from the Chairman, the suit had been or was in the process of
 being filed.

See Vanscoy Dec.; Roach Dec.; McDonald Dec.; Young Dec.; Ladenberg Dec.; Talbert Dec.⁵ As
 noted above, because the executive had requested the action be filed and the council chair after

⁵ Council Members McCune and Richardson did not respond to the Prosecutor regarding the County filing a
 lawsuit challenging the referendum before the County filed it. *See* Richardson Dec.; McCune Dec.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ARTHUR WEST,)	
)	No. 73014-2-1
Appellant,)	
)	DIVISION ONE
v.)	
)	PUBLISHED OPINION
SEATTLE PORT COMMISSION,)	
TACOMA PORT COMMISSION,)	
PORT OF TACOMA, PORT OF)	
SEATTLE, CLARE PETRICH, DON)	
JOHNSON, RICHARD MARZANO,)	
DON MEYER, CONNIE BACON, TOM)	
ABRO, STEPHANIE BOWMAN, BILL)	
BRYANT, JOHN CREIGHTON,)	
COURTNEY GREGOIRE,)	
)	
Respondents.)	FILED: July 5, 2016

TRICKEY, J. — Arthur West sued the Port of Tacoma and the Port of Seattle for violating the Open Public Meetings Act of 1971 (OPMA), chapter 42.30 RCW. The Ports moved for dismissal for failure to state a claim. The Port of Tacoma claimed West lacked standing to bring his OPMA claim. The Port of Seattle argued that the Federal Shipping Act of 1984, 46 U.S.C. §§ 40101-41309, preempted this application of the OPMA. The trial court granted both motions.

Because the OPMA authorizes any person to file an action, we hold that the trial court erred when it concluded that West lacked standing. But, because we hold that complying with the OPMA would frustrate the purposes of the Shipping Act in this case, we affirm the dismissal of West's claims.

FACTS

The Commissioners of the Port of Tacoma and Port of Seattle conducted a series of confidential meetings between May and September 2014. West became aware of the

meetings in September 2014 and sought to attend one. The Ports explained that the Federal Shipping Act authorized their meetings and allowed them to keep the meetings confidential. Therefore, they claimed, the meetings were not subject to the OPMA. West was not allowed to attend any of the meetings.

West filed suit against both Ports and several individual commissioners on September 26, 2014. He sought a declaratory judgment and sanctions under the OPMA.

The Ports moved to dismiss West's complaint for failure to state a claim because he lacked standing and federal law preempted the OPMA for this type of meeting. The trial court granted both motions to dismiss with prejudice. West appeals the dismissal of his OPMA claims.

ANALYSIS

Motions to Dismiss

West argues that the trial court erred when it dismissed his OPMA claims for "failure to state a claim upon which relief can be granted." CR 12(b)(6). When deciding whether to dismiss under this standard, the court assumes all the plaintiff's factual allegations are true and "may consider hypothetical facts supporting the plaintiff's claims." Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal is appropriate only where "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

We review dismissal under CR 12(b)(6) de novo as a question of law. Tenore, 136 Wn.2d at 329-30. We also review questions of standing, statutory interpretation, and preemption de novo. Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., 176 Wn.

App. 185, 199, 312 P.3d 976 (2013), review denied, 179 Wn.2d 1010, 316 P.3d 494 (2014) (standing); State v. Mitchell, 169 Wn.2d 437, 442, 237 P.3d 282 (2010) (statutory interpretation); Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp., 171 Wn.2d 88, 99, 249 P.3d 607 (2011) (preemption).

The trial court granted the Port of Tacoma's motion to dismiss on the grounds that West lacked standing under the OPMA to bring his claims. It also granted the Port of Seattle's separate motion to dismiss West's claims under CR 12(b)(6) because the Shipping Act preempted the OPMA in these circumstances.

Standing

The threshold question in this case is whether West has standing under the OPMA to bring this claim against the Ports. The trial court held that he did not. We agree with West that this was error.

"The claims of a plaintiff who lacks standing cannot be resolved on the merits and must fail." Trinity Universal Ins., 176 Wn. App. at 199. Questions of standing under Washington law begin with the statutes themselves. See, e.g., Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (looking first to the language of the Uniform Declaratory Judgments Act, chapter 7.24 RCW, to determine whether a party had standing).

Courts give effect to the plain meaning of unambiguous statutes. West v. Wash. Ass'n of Cty. Officials, 162 Wn. App. 120, 130, 252 P.3d 406 (2011). Courts may look at the provision of a statute in context to determine its plain meaning. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10, 43 P.3d 4 (2002).

Here, West seeks to bring suit under the OPMA. The act 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.” RCW 42.30.030.

The standing requirements in the OPMA are very broad: “Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body.” RCW 42.30.130. And “[a]ny person” may bring an action to enforce civil penalties against members of a governing body who attend meetings in violation of the OPMA. RCW 42.30.120.

The statute does not define “person” or limit the people eligible to bring claims under the act. RCW 42.30.130. It does not indicate that a person seeking standing must show a particular injury or satisfy a rigorous standing test. A permissive standing requirement is in line with the legislature’s declaration that “the people . . . do not yield their sovereignty” and “insist on remaining informed” and the OPMA’s instruction to construe the statute liberally. RCW 42.30.010, .910.

Few published cases have addressed the OPMA’s standing requirements. In Lopp v. Peninsula School District No. 401, the Washington State Supreme Court concluded that RCW 42.30.130 “allows anyone standing to challenge the validity of a governing body’s action.” 90 Wn.2d 754, 757, 585 P.2d 801 (1978). But the court later determined that a plaintiff did not have “standing to raise the matter of improper notice” to a specific member of a governing body. Kirk v. Pierce Cty. Fire Prot. Dist. No. 21, 95 Wn.2d 769, 772, 630 P.2d 930 (1981).

In Kirk, a board of fire commissioners terminated the fire chief through a special

meeting.¹ 95 Wn.2d at 770-71. The board, allegedly, did not properly notify one of the commissioners of the meeting. Kirk, 95 Wn.2d at 772. The terminated fire chief sought to invalidate the action taken at the meeting, on the grounds that the failure to notify one of the commissioners violated the OPMA. Kirk, 95 Wn.2d at 771-72. The court ruled that only the aggrieved commissioner, who did not receive proper notice, would have had standing to raise the issue. Kirk, 95 Wn.2d at 772.

The different results in Kirk and Lopp may be due to the different relief they sought. The plaintiff in Lopp sought to enjoin a school district from selling bonds and to fine the individual board members of the school district. 90 Wn.2d at 755. Both actions are contemplated in RCW 42.30.120 and .130. The fire chief in Kirk sought to invalidate action taken at an earlier meeting. 95 Wn.2d at 771. Although the OPMA declares that “[a]ny action taken at meetings failing to comply with [chapter 42.30 RCW] shall be null and void” it does not authorize individual people to annul or invalidate those actions. RCW 42.30.060(1).

Additionally, Kirk is distinguishable on its facts. There, the OPMA violation at issue was improper notice to a specific person. Kirk, 95 Wn.2d at 771. There was no claim that anyone, including the fire chief, was prohibited from attending the meeting. By contrast, West claims he was personally denied access to the Ports’ meetings.

Accordingly, Kirk did not establish more stringent requirements for standing under RCW 42.30.120 or .130 than those suggested by the statute’s plain language. This conclusion is consistent with cases following Kirk that have allowed OPMA actions to proceed without analyzing standing. See, e.g., West, 162 Wn. App. at 127; Eugster v.

¹ Special meetings have different notice requirements than regularly scheduled meetings. Cf. RCW 42.30.075, .080

City of Spokane, 128 Wn. App. 1, 7, 114 P.3d 1200 (2005). Therefore, West, a person, has standing to bring actions under the OPMA.

The Ports also claim that Washington draws its standing requirements from federal law, citing High Tide Seafoods v. State, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). While the court followed federal authority in High Tide Seafoods, the plaintiffs there sought to invalidate Washington's tax code on the basis of federal authority: the United States Constitution and treaty rights of Indians. 106 Wn.2d at 701-02. Therefore, the court was addressing standing under federal law, not Washington law. High Tide Seafoods, 106 Wn.2d at 701-02. There was no assertion in that case that Washington's standing doctrine is always parallel to its federal counterpart.

The Ports rely heavily on Lujan v. Defenders of Wildlife and other federal cases to support their argument that West does not have standing because he cannot demonstrate any injury. 504 U.S. 555, 577, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).² This line of cases does not automatically apply to Washington courts interpreting Washington law.

The Court held in Lujan that Congress, although able to establish new categories of cognizable injuries, did not have the authority to confer standing by statute on plaintiffs who had suffered no injury. 504 U.S. at 577-78. The Court held that the plaintiff must allege a concrete injury in order to satisfy the "case-or-controversy requirement" of article III, from which federal courts receive their authority to adjudicate cases. Lujan, 504 U.S. at 560, 577; U.S. CONST. art. III, § 2, cl. 1.

State courts are not bound by this requirement because they do not rely on the

² Those cases include Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); Craig v. Boren, 429 U.S. 190, 193-94, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); Fairchild v. Hughes, 258 U.S. 126, 129-30, 42 S. Ct. 274, 66 L. Ed. 499 (1922).

federal constitution for their authority. “In federal courts, a plaintiff’s lack of standing deprives the court of subject matter jurisdiction, making it impossible to enter a judgment on the merits.” Trinity Universal, 176 Wn. App. at 198-99 (citing Fleck & Assocs., Inc. v. City of Phoenix, 471 F.3d 1100, 1102 (9th Cir. 2006)). “By contrast, the Washington Constitution places few constraints on superior court jurisdiction.” Trinity Universal, 176 Wn. App. at 198; see WASH. CONST. art. IV, § 6. The Ports do not suggest that standing is a constitutional issue in Washington.

In short, the Ports have not shown that West lacks standing under the OPMA. Because West has not appealed the dismissal of his claim under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, we do not address the Ports’ argument that West lacks standing to bring a claim under that statute.³

Concluding that West does have standing, we proceed to the merits of the Ports’ preemption argument.

Federal Conflict Preemption

West argues that the trial court erred when it determined that the Shipping Act preempted the OPMA for these meetings between the Ports. He asserts that the Shipping Act is irrelevant because there is no maritime component to this case. The Ports argue that federal law preempts this application of the OPMA because the Shipping Act preempted state regulation in this field, and because the OPMA and Shipping Act conflict.

³ West argues in his reply brief that the Port of Tacoma is judicially estopped from asserting a standing argument here because, in another case, the Port of Tacoma used the trial court’s order to argue that federal law preempts the operation of Washington’s Sunshine laws. This argument refers to material outside the record on appeal. We do not consider it. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We hold that the Shipping Act preempts this application of the OPMA because complying with the OPMA would frustrate the goals and purposes of the Shipping Act.

Federal law preempts state law when state law operates in a field that is completely occupied by federal law or when state law conflicts with federal law. Inlandboatmen's Union of the Pac. v. Dep't of Transp., 119 Wn.2d 697, 700-01, 836 P.2d 823 (1992); U.S. CONST. art. VI, cl. 2. Congressional intent guides federal preemption analysis. Inlandboatmen, 119 Wn.2d at 701. There is a presumption against preemption when the state acts within the scope of its historic police powers.⁴ Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009).

Conflict preemption exists when it is impossible to comply with federal and state law, or when “a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Inlandboatmen, 119 Wn.2d at 702. Compliance is impossible when a federal law forbids an action that state law requires. Mutual Pharm. Co., Inc. v. Bartlett, ___ U.S. ___, 133 S. Ct. 2466, 2476, 186 L. Ed. 2d 607 (2013).

Here, the two potentially competing laws are Washington’s OPMA, described above, and the Federal Shipping Act of 1984. The Shipping Act regulates ocean shipping. It allows certain marine actors, including ports, to work cooperatively, including in ways that might otherwise run afoul of antitrust legislation. 46 U.S.C. §§ 40301–07. Regulations implementing the statute require that the parties take detailed minutes for any meetings they hold under the act and submit those minutes to the Federal Maritime

⁴ The Court held there was no presumption against preemption in U.S. v. Locke, but both the federal and state laws in that case were clearly in the field of maritime safety and commerce. 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000).

Commission (FMC). 46 C.F.R. §§ 535.701(b), .704(a). The statute exempts those minutes from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552:

Information and documents (other than an agreement) filed with the Federal Maritime Commission under this chapter are exempt from disclosure under [FOIA] and may not be made public except as may be relevant to an administrative or judicial proceeding.

46 U.S.C. § 40306; see also 46 C.F.R. § 535.701(i).

The Ports argue that allowing the public to attend their meetings would conflict directly with that nondisclosure requirement. West counters that Congress's decision to exempt written records from disclosure under FOIA does not require the agencies to make the meetings themselves closed to the public. We agree with West. It would be possible for the Ports to have their meetings open to the public and then file the minutes confidentially with the FMC. There is no impossibility preemption here.

But the Shipping Act could still conflict with the OPMA if complying with the OPMA would frustrate Congress's purposes and objectives. To determine whether state law presents an obstacle to federal objectives, courts must examine "the federal statute as a whole and [identify] its purpose and intended effects." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). Because the presumption against preemption applies, state law "must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law will be overridden." Hillman v. Maretta, ___ U.S. ___, 133 S. Ct. 1943, 1950, 186 L. Ed. 2d 43 (2013) (internal quotation marks omitted) (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979)).

The purposes of the Shipping Act include developing "competitive and efficient ocean transportation" and establishing "a nondiscriminatory regulatory process" for

international maritime commerce “with a minimum of government intervention and regulatory costs.” 46 U.S.C. § 40101(1), (4). To further these purposes, the Shipping Act allows the Ports to “discuss, fix, or regulate rates or other conditions of service” and “engage in exclusive, preferential, or cooperative working arrangements.” 46 U.S.C. § 40301(b)(1), (2).

Allowing the public, including possible competitors, access to the Ports’ meetings on these matters would make it far more difficult for the Ports to develop competitive approaches. As the Ports argue, open meetings here would “give the Ports’ competitors access to their strategies and would place the Ports at a competitive disadvantage vis-à-vis marine terminal operators (both here and abroad) who were not subject to similar open public meetings acts.”⁵ Congress’s decision to exempt the records filed with the FMC from disclosure requests under FOIA, is consistent with the Ports’ argument.

Similarly, Washington has recognized that, in certain circumstances, having open meetings may be incompatible with competitive activity. There are several exceptions to the OPMA that allow the governing body to hold an “executive session,” without the public’s scrutiny. RCW 42.30.110(1). Three of the exceptions are for instances when “public knowledge” of the meeting’s contents “would cause a likelihood of increased costs” or decreased income to the governing body. RCW 42.30.110(1)(b), (c), (d).⁶

Requiring the Ports to open their meetings to the public would frustrate Congress’s intent to have American marine terminal operators be competitive in international maritime commerce. We hold that the Shipping Act preempts this application of the OPMA, because the OPMA would do major damage to the Shipping Act’s objectives.

⁵ Answering Br. of Defs./Resp’ts at 28.

⁶ Neither party has argued that the Ports’ meetings fall within these exceptions.

Because there is conflict preemption, we do not address whether there would also be field preemption.

Continuance

West argues that the trial court erred by denying his motion for a continuance. We conclude that the trial court did not abuse its discretion by failing to grant West a continuance.

West requested a continuance under CR 56(f), the rule for summary judgment, even though the Ports moved to dismiss for failure to state a claim under CR 12(b)(6). But, assuming that the trial court converted the motions to dismiss into summary judgment motions when it considered the discussion agreements, the trial court did not abuse its discretion by denying West's request for a continuance.

When a party moves for summary judgment, the opposing party may request a continuance if it needs additional time to obtain affidavits that will justify its opposition to summary judgment. CR 56(f). But the court "may deny a motion for a continuance when (1) the moving party does not offer a good reason for the delay in obtaining the 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." Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

This court reviews a trial court's decision to deny a continuance for an abuse of discretion. Coggle, 56 Wn. App. at 504. It is an abuse of discretion if the court bases its decision on untenable grounds or for untenable reasons. Coggle, 56 Wn. App. at 507.

West did not file a separate motion for a continuance but requested one in the conclusion of his response to the Ports' motions to dismiss. He did not support his one-

sentence request with affidavits or specify exactly what evidence he could obtain through additional discovery. Additionally, this case revolves around a pure question of law. No evidence could help West raise a genuine issue of material fact. Denying West's request was within the trial court's discretion.

Attorney Fees

The Port of Tacoma requests attorney fees on the grounds that West's appeal is frivolous. See RAP 18.9(a). "An appeal is not frivolous or brought for purposes of delay if it involves 'debatable issues upon which reasonable minds might differ.'" O'Neill v. City of Shoreline, 183 Wn. App. 15, 26, 332 P.3d 1099 (2014) (internal quotation marks omitted) (quoting Olsen Media v. Energy Scis., Inc., 32 Wn. App. 579, 588, 648 P.2d 493 (1982)).

The Port of Tacoma's entire argument that West's appeal is frivolous relates to standing. West prevailed on the issue of standing. His appeal of that issue was not frivolous.

Affirmed.

Trickey, ACJ

WE CONCUR:

Speciman, J.

Leach, J.

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PORT OF TACOMA
STATE OF WASHINGTON