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Supreme Court No. 92455-4

(Clark County Superior Court No. 13-2-03431-3)

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COLUMBIA RIVERKEEPER; SIERRA CLUB; and NORTHWEST
ENVIRONMENTAL DEFENSE CENTER,

Petitioners,

v.

PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver USA
Board of Commissioners President; BRIAN WOLFE, Port of Vancouver
USA Board of Commissioners Vice President; and NANCY I. BAKER,
Port of Vancouver USA Board of Commissioners Secretary,

Respondents.

OPPOSITION TO MOTION FOR DISCRETIONARY REVIEW

David B. Markowitz, *specialy admitted*
DavidMarkowitz@MarkowitzHerbold.com
Kristin M. Asai, WSBA No. 49511
KristinAsai@MarkowitzHerbold.com
MARKOWITZ HERBOLD PC
3000 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204-3730
Telephone: (503) 295-3085
Facsimile: (503) 323-9105

Lawson E. Fite, WSBA No. 44707
LawsonFite@gmail.com
5100 SW Macadam Avenue,
Suite 350
Portland, OR 97239
Telephone: (503) 222-9505
Facsimile: (503) 222-3255

Attorneys for Respondents

 ORIGINAL

TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION	1
II. NATURE OF THE CASE	3
A. The Port engaged in a months-long public process prior to approving the proposed lease.....	3
B. The Superior Court rejected Riverkeeper’s attempts to invalidate the lease based on the Port’s executive sessions.....	7
C. Riverkeeper seeks review beyond the parties’ and the Superior Court’s stipulation.	10
III. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW	11
IV. REASONS WHY REVIEW SHOULD BE DENIED	11
A. Standard of review.	11
B. The Court of Appeals should interpret the “minimum price” provision of the OPMA, which meets the test under RAP 2.3(b)(4).....	12
C. Riverkeeper’s uncertified issues involve straightforward application of authority and do not justify discretionary review.	14
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Clark v. City of Lakewood</i> , 259 F.3d 996 (9th Cir. 2001)	17
<i>Eugster v. City of Spokane</i> , 118 Wn. App. 383, 76 P.3d 741 (2003)	16, 18
<i>Feature Realty, Inc. v. City of Spokane</i> , 331 F.3d 1082 (9th Cir. 2003)	17
<i>Henry v. Town of Oakville</i> , 30 Wn. App. 240, 633 P.2d 892 (1981)	16
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	19
<i>Mason County v. Public Emp't Relations Comm'n</i> , 54 Wn. App. 36, 771 P.2d 1185 (1989)	17
<i>Org. to Preserve Agric. Lands v. Adams County</i> , 128 Wn.2d 869, 913 P.2d 793 (1996)	9, 16, 17, 18
<i>Right-Price Recreation, LLC v. Connells Prairie Cmty. Council</i> , 105 Wn. App. 813, 21 P.3d 1157 (2001)	12, 15
 Statutes	
RCW 42.30.110	7, 9, 11
 Rules	
RAP 2.3	1, 2, 10, 11, 12, 13, 14, 15, 16, 20
RAP 4.2	10, 12, 13, 14, 20

I. INTRODUCTION

The Port of Vancouver USA (together with the other respondents, the “Port”) opposes the Motion for Discretionary Review (“Motion”) filed by Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center (collectively “Riverkeeper”) because only one issue—the interpretation of the “minimum price” provision of the Open Public Meetings Act (“OPMA”)—warrants immediate appellate review. The parties stipulated, and the Superior Court certified, that only the “minimum price” ruling met the standard for discretionary review under RAP 2.3(b)(4), which requires a controlling question of law as to which there is substantial ground for a difference of opinion and immediate review may materially advance the ultimate termination of the litigation. This Court should reject Riverkeeper’s attempt to expand the scope of review beyond the parties’ stipulation and the Superior Court’s certification. This matter can be, and should be, adjudicated by the Court of Appeals. Riverkeeper fails to establish any basis for immediate review in this Court.

In contrast, Riverkeeper’s uncertified issues for review challenging the Superior Court’s rulings on mootness and the content of seven executive sessions do not meet the standard under RAP 2.3(b). RAP 2.3(b)(4) does not apply because Riverkeeper did not seek the necessary

certification from the Superior Court. Moreover, the Superior Court's decision finding moot all of Riverkeeper's requests for injunctive relief was based on well-settled precedent permitting a public body to cure a violation under the OPMA by retracting its steps and holding a new vote. This ruling does not involve a substantial difference of opinion and does not warrant discretionary review. Riverkeeper does not attempt to satisfy RAP 2.3(b)(1)-(3), and review would not be warranted under those provisions.

The Superior Court's other ruling finding that the Port did not violate the OPMA during five executive sessions between March and July 2013 also does not require review. The Superior Court's decision was based on its interpretation of "minimum price" under the OPMA and the substantial record presented by the parties. Once the Court of Appeals resolves the legal issue concerning the scope of the "minimum price" provision, the Superior Court is best suited to determine whether the Port complied with the Court of Appeals' standard. Because the Superior Court found disputed factual issues regarding two executive sessions, the Superior Court is already scheduled to apply the Court of Appeals' standard during trial on these remaining two meetings. Further appellate review is premature.

II. NATURE OF THE CASE

A. The Port engaged in a months-long public process prior to approving the proposed lease.

In 2012, the Port's staff sought proposals from companies interested in developing petroleum facilities on the Port's property. (Appendix ("App.") at 96.) Once the Port's staff selected the proposed tenant, Tesoro-Savage Joint Venture ("TSJV"),¹ and executed an exclusive dealing agreement with TSJV, the Port announced the project to the public. (*Id.* at 96-97.) The Port's Board of Commissioners ("Commission") did not, and did not need to, provide approval to the Port's staff to pursue these preliminary steps, as they are within the authority granted previously to the Port's CEO/Executive Director by the Commission. (*Id.* at 97.)

For the next several months, the Port's staff negotiated with TSJV and drafted the proposed lease terms, including the numerous monetary terms. (*Id.* at 98-99.) For example, the proposed lease included terms relating to base rent, wharfage rates, the land lease, rail maintenance fees, rail usage fees, and costs for improving or building structures. (*Id.* at 98.) In addition to direct pricing terms, the proposed lease had many components that must be identified and analyzed to determine its ultimate

¹ The full name of the entity is now Tesoro Savage Petroleum Terminal, LLC, which does business as Vancouver Energy. "TSJV" refers to this entity throughout this brief.

price, such as: the amount of property to be leased; the market value of any existing feature or amenities of the site; the duration of the lease; any required investments or improvements by the Port; the Port's expected return on its investment in the short and long term, and whether the lease represents the highest return to the Port for that location; the projected flow of potential revenue streams; the feasibility of the lease rate, including the financial strength of the tenant, the stability of the tenant's business industry, and any tenant risks that must be mitigated; and the direct and indirect economic benefits for the local community (including family-wage jobs). (*Id.* at 99.) Due to the complexity of the proposed lease, a change to one of the monetary terms usually affected the other terms. (*Id.* at 98.)

The Commission had no involvement with these negotiations, so Port staff occasionally provided updates by delivering summary documents to the Commission in emails or as part of their Board packets. (*Id.* at 99.) The Port's CEO also provided verbal updates to the Commission via one-on-one communications, which do not implicate the OPMA. (*Id.* at 99-100.)

The Commission also convened in executive sessions to consider matters designated under the OPMA. As relevant to Riverkeeper's Motion, the Port held seven executive sessions between March and July

2013 to consider matters affecting the minimum price on the Port's proposed lease with TSJV.² (*Id.* at 104-111.) During these executive sessions, Port staff presented information to the Commission related to the price at which the real estate would be offered for lease because if made public, the disclosure would lead to a likelihood of decreased price. (*Id.* at 104.) Specifically, the Port staff discussed: the current status of the price-related lease terms, such as the base rate, wharfage fees, dockage fees, and rail fees; a proposed schedule for exclusivity with the tenant and associated rate structures; acreages, facilities, rail infrastructure, and other essential deal terms; and financial risks related to the tenant. (*Id.* at 104-111.)

During the three months while the Port staff negotiated the lease terms, the Commission provided opportunities for the public to provide and receive information about the proposed lease, including five public workshops in May, June, and July 2013. (*Id.* at 100-101.) The workshops included discussions on safety, the environmental review process, and TSJV's presentation about the crude oil market, its safety records, and the proposed job growth from the project. (*Id.*) Although the Commission

² Although Riverkeeper references "at least thirteen" executive sessions relating to the Vancouver Energy project in its Motion, Riverkeeper challenges only seven of those meetings and the Superior Court concluded that no OPMA violations occurred during at least five of those meetings. (*See* Mot. at 6; App. at 164.)

had no obligation to take comment at the workshops, it invited the public's participation at each step. (*Id.*) Riverkeeper attended each workshop and provided public comment. (*Id.*)

The Commission held a final public workshop on the evening of July 22, 2013, to provide information about the project (including the potential for 80-120 direct jobs from the project), offer an overview of the proposed lease terms, and receive public comment. (*Id.* at 101.) The workshop was held in the evening to ensure that members of the public who could not attend day sessions could make this one. (*Id.*)

The following morning, July 23, the Commission considered the lease to TSJV in its regular meeting. (*Id.*) Port staff presented an overview of the lease to the Commission and the public, including the environmental provisos and contingency requirements related to the permitting and approval process. (*Id.*) The Commission acknowledged the public comments from 30-40 people the previous night and took public comment from an additional 10 people. (*Id.* at 101-02.) The Commissioners then deliberated publicly and voted unanimously to approve the lease. (*Id.* at 102.)

After the lease was approved, the Port faced questions about whether the announcement of the July 22 executive session complied with the OPMA. (*Id.* at 111.) In response to these concerns, the Port took two

corrective actions. First, the Port improved its procedures for announcing executive sessions by developing and immediately implementing an Executive Session Reference Guide for the Commission's use. (*Id.* at 111-12.) Next, the Port re-opened the lease for public comment and a new vote by the Commission on October 22, 2013, to comply with the Port's commitment to transparency. (*Id.* at 112.) The Commission moved forward on the assumption that the earlier vote was "not effective" and "[i]f the lease is not approved, the process stops." (*Id.*) The Commission took public comment from 35 separate individuals, for nearly two hours, and then deliberated in open session. (*Id.*) Following the public deliberation, the Commission voted unanimously to approve the lease. (*Id.*)

B. The Superior Court rejected Riverkeeper's attempts to invalidate the lease based on the Port's executive sessions.

Like other public bodies, the Port is permitted to hold executive sessions under the OPMA. *See* RCW 42.30.110. Riverkeeper, however, challenged the Port's use of executive session alleging that the Port violated the OPMA by: (1) improperly deliberating on topics outside the scope of the OPMA during executive sessions between February and July

2013; (2) approving the lease during executive session;³ (3) failing to announce a definite end time for the executive session on July 22, 2013; and (4) failing to announce a valid purpose for the executive session on July 22, 2013. (*Id.* at 48, 60, 113-14.) The Port conceded the announcement of the executive session on July 22 violated the OPMA, but argued that any injunctive relief was moot because the Port cured the procedural error during its new vote in October. (*Id.* at 130.)

The Superior Court twice agreed. First, in March 2014, the court concluded that the Port's corrective actions, including public votes on July 23 and October 22, and the adoption of a revised executive session announcement procedure, rendered moot all of Riverkeeper's requests for injunctive relief under the OPMA. (*Id.* at 21-26, 43.) Then in July 2015, following substantial discovery, the Superior Court upheld its decision and rejected Riverkeeper's request for reconsideration of the court's rulings that Riverkeeper was not entitled to injunctive relief or a declaration that the lease approval was null and void. (*Id.* at 163.)

In its oral ruling, the Superior Court concluded,

[R]egardless of whatever factual information has come up, it does not change the Court's analysis, which the Court deems to be consistent with the OPAL case and other cases like it, which establish what appears to

³ At summary judgment, Riverkeeper abandoned this claim, and the Superior Court dismissed it. (*App.* at 48, 164.)

be a well-established rule, that any sort of violations can be cured by retracing the steps and going through the appropriate procedures.

(*Id.* at 150, referring to *Org. to Preserve Agric. Lands v. Adams County* (“OPAL”), 128 Wn.2d 869, 884, 913 P.2d 793, 802 (1996).)

As part of its summary judgment decision, the Superior Court also held that the Port’s discussions during five of seven executive sessions complied with RCW 42.30.110(1)(c), the OPMA provision permitting a public body to consider in executive session “the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price.” (*Id.* at 163.) For the remaining two executive sessions, the court found that disputed facts precluded summary judgment. (*Id.*)

In interpreting the OPMA, the Superior Court noted that “the notion of price taken by itself in a vacuum really means nothing.” (*Id.* at 153.) The Superior Court explained that price “is a function of a prior equation,” such that variables including the term of the lease, the identity of the tenant, and the proposed use for the lease are “essential to an ultimate determination of price.” (*Id.* at 153-54.) As a result, the Superior Court sustained the Port’s interpretation and use of the “minimum price” provision, namely, that the Port may convene in executive session to discuss: (1) information that would give the customer an advantage in

negotiating a lower price; and (2) information that would give a competitor an opportunity to negotiate with the Port's customer, thus creating a bidding process that would decrease the Port's price. (*Id.* at 154, 163-64.)

C. Riverkeeper seeks review beyond the parties' and the Superior Court's stipulation.

Due to the lack of appellate authority interpreting the "minimum price" provision of the OPMA, the parties stipulated to discretionary review, under RAP 2.3(b)(4), that the Superior Court's interpretation of that provision involves a controlling question of law as to which there is substantial ground for a difference of opinion and immediate review may materially advance the ultimate termination of the litigation. (*Id.* at 165.) The stipulation never discussed direct review in the Supreme Court under RAP 4.2 or review of the Superior Court's other rulings.

As a result, this Court should transfer Riverkeeper's request for interpretation of the "minimum price" provision, which the parties agreed met the standard for discretionary review, to the Court of Appeals for its determination. *See* RAP 4.2(e)(2). The remainder of Riverkeeper's Motion should be denied because it fails to meet the requirements of RAP 2.3(b) and goes beyond the parties' stipulation and the Superior Court's order. Riverkeeper's request for premature review of the Superior Court's mootness finding and its rulings on summary judgment that the content of

five executive sessions complied with the OPMA does not qualify for consideration under RAP 2.3(b)(4). These rulings do not necessitate appellate review because they will not materially advance the ultimate termination of this litigation. Riverkeeper has not sought, nor can it obtain, discretionary review under RAP 2.3(b)(1)-(3).

III. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

Contrary to Riverkeeper's Motion, only one issue is appropriate for appellate review:

1. Under the OPMA's provision in RCW 42.30.110(1)(c), a public body is permitted to consider in executive session "the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price." May a public body consider key deal terms that affect the minimum price for the sale or lease, including information that would give a customer an advantage in negotiating a lower price and that would give a competitor an opportunity to negotiate with the public body's customer to decrease the price?

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Standard of review.

Discretionary review should be granted in limited circumstances and is not favored because it lends itself to piecemeal appeals. *Right-*

Price Recreation, LLC v. Connells Prairie Cmty. Council, 105 Wn. App. 813, 820, 21 P.3d 1157, 1161 (2001). A party may seek discretionary review under RAP 2.3(b)(4) only if the “superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law for which there is a substantial ground for a difference of opinion and for which immediate review may advance the ultimate termination of this litigation.”

Here, because the Superior Court certified and the parties stipulated to the ruling regarding the interpretation of “minimum price” under the OPMA, only that issue is appropriate for appellate review. In addition, because the Court of Appeals can adequately adjudicate this single legal issue, this Court should transfer Riverkeeper’s Motion to the Court of Appeals for its determination under RAP 4.2(e)(2).

B. The Court of Appeals should interpret the “minimum price” provision of the OPMA, which meets the test under RAP 2.3(b)(4).

The sole issue warranting discretionary review is the statutory interpretation of the “minimum price” provision of the OPMA, which permits a public body to consider the minimum price for which real estate may be offered for sale or lease, and should be determined by the Court of Appeals. The Superior Court rejected Riverkeeper’s overly narrow and rigid interpretation of “minimum price,” and agreed with the Port’s

practical interpretation of the clause which allows the Commission to hold executive session to consider the factors that drive the minimum price. (App. at 152-54, 163-64.) The Superior Court agreed that price in a vacuum is meaningless, so a public body should be allowed to consider the essential deal terms that determine price. (*Id.* at 153-54.)

Nevertheless, the Superior Court noted the lack of controlling authority on this specific statutory provision and acknowledged that an appellate court could reach a different conclusion. (*Id.* at 151-52, 155.) The parties therefore stipulated, and the Superior Court certified, that this specific legal issue met the test under RAP 2.3(b)(4). (*Id.* at 165.) Accordingly, the Port agrees that the interpretation of the “minimum price” provision is suitable for discretionary review.

But contrary to Riverkeeper’s request, the Court of Appeals is the appropriate forum to handle this legal question. In its Motion, Riverkeeper never identifies the kind of special circumstances that warrant immediate review in this Court. Riverkeeper cited no statute authorizing direct review in this Court. *See* RAP 4.2(a)(1). This case does not involve a constitutional challenge, a death penalty decision, or an urgent public issue. *See* RAP 4.2(a)(2), (4), (6). The legal issue also does not involve a conflict of appellate authority, as the Superior Court mentioned the lack of controlling authority specifically. *See* RAP 4.2(a)(3). Riverkeeper has not

established any reason for this Court to depart from the usual review procedures and bypass the Court of Appeals. Accordingly, because an available and adequate appellate forum exists to adjudicate the legal issue—the Court of Appeals—this Court’s immediate review is unnecessary. This Court should transfer Riverkeeper’s Motion to the Court of Appeals under RAP 4.2(e)(2).

C. Riverkeeper’s uncertified issues involve straightforward application of authority and do not justify discretionary review.

This Court should deny the remainder of Riverkeeper’s Motion because it seeks review of uncontroversial decisions by the Superior Court that do not conform to RAP 2.3(b)(4)’s requirement of certification by the Superior Court or stipulation by the parties. The parties expressly stipulated that only the Superior Court’s ruling interpreting the “minimum price” provision merited discretionary review. (App. at 165.) Riverkeeper’s expanded request for review conflicts with this stipulation and the Superior Court’s certification.

But even if this Court considered accepting review of the Superior Court’s rulings that do not meet the requirements under RAP 2.3(b)(4), these issues do not warrant immediate review. As explained in greater detail below, the Superior Court’s mootness ruling was uncontroversial and its summary judgment decision on five specific executive sessions

was a straight-forward application of the court’s “minimum price” interpretation. Thus, these issues do not involve obvious or probable error, a far departure from the accepted course of proceedings, or a substantial ground for difference of opinion as required under RAP 2.3(b). In addition, the uncertified issues do not justify special consideration because they will not prejudice the legal issue subject to discretionary review. *See Right-Price Recreation, LLC*, 105 Wn. App. at 819-21 (denying discretionary review of additional rulings that would not prejudicially affect the appellate court’s consideration of the designated issue). An immediate appeal of these issues also will not serve judicial economy, as the Superior Court may revise its findings or conduct a trial on the specific executive sessions following the Court of Appeals’ determination of “minimum price.”

1. The Superior Court’s mootness ruling was based on well-settled precedent.

Neither this Court nor the Court of Appeals should accept discretionary review of the Superior Court’s mootness ruling because it was based on accepted authority permitting a public body to retrace its steps and cure an OPMA violation. Riverkeeper’s own disagreement with this precedent does not constitute a substantial ground for a difference of opinion to trigger review under RAP 2.3(b)(4).

For decades, Washington courts have held that a public body may retrace its steps to correct alleged procedural errors by re-doing its action in compliance with the OPMA. *Henry v. Town of Oakville*, 30 Wn. App. 240, 246, 633 P.2d 892, 896 (1981). “The well-established rule is that where a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defect by re-enactment with the proper formalities.” *Id.* Thus, this Court recognized that even if an OPMA violation occurred in a prior meeting, subsequent actions taken in compliance with the OPMA are not invalidated by the prior violation. *OPAL*, 128 Wn.2d at 884. This Court explained,

[I]f the *final action* taken by the public agency is in accordance with our open public meetings act requirements, then it would appear to us that this action would be defensible even though there may have been a failure to comply with the act earlier during the governing body’s preliminary consideration of the subject.

Id. at 883 (emphasis in original); *see also Eugster v. City of Spokane*, 118 Wn. App. 383, 423, 76 P.3d 741, 763 (2003) (holding “even if the challenged meetings violated OPMA, such violations will not nullify the properly enacted ordinance”).

The only circumstance where a prior OPMA violation could nullify a subsequent action is where the public body merely makes a

“summary approval of decisions made in numerous and detailed secret meetings.” *OPAL*, 128 Wn.2d at 884. For this exception to apply, the public body must have improperly reached agreement on the action outside a public meeting. *See, e.g., Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1091 (9th Cir. 2003) (holding city council could not ratify a settlement agreement that was approved in executive session); *Clark v. City of Lakewood*, 259 F.3d 996, 1014 n.10 (9th Cir. 2001) (noting that if a public body met in secret, decided how to vote, and then ratified that prior vote in a public meeting, “that formal vote would be invalid”); *Mason County v. Public Emp’t Relations Comm’n*, 54 Wn. App. 36, 38-39, 771 P.2d 1185, 1186 (1989) (holding that agreements reached during collective bargaining sessions with the public body’s decision-makers outside a public meeting are void); *Miller v. City of Tacoma*, 138 Wn.2d 318, 329-30, 979 P.2d 429, 435 (1999) (finding improper vote taken in executive session because “the council members were balloted until a consensus was reached”).

Riverkeeper provides no credible argument to challenge the acceptance of these principles. Instead, Riverkeeper asserts that the specific facts underlying the development of the Port’s lease with TSJV somehow negates the well-established precedent authorizing a public body to cure an OPMA violation. Riverkeeper is wrong.

Under *OPAL* and *Eugster*, the Port's public votes taken in accordance with OPMA moots Riverkeeper's challenge to the validity of the vote. Riverkeeper also cannot meet the lone exception to this rule because it conceded that the Port never approved the lease in executive session. (App. at 48.) The undisputed testimony from the attendees at the Port's executive sessions uniformly confirmed that no vote or approval took place outside a public meeting. (*Id.* at 136.) Thus, even if a substantial ground for difference of opinion existed regarding a public body's ability to cure an OPMA violation, which it does not, Riverkeeper still could not obtain the remedy it seeks. Because the parties agree that no approval or vote on the lease occurred in executive session, there is no action for the appellate courts to nullify. Discretionary review is therefore unnecessary.

2. The Superior Court's summary judgment ruling as to seven executive sessions does not require immediate appellate review.

The Superior Court's summary judgment findings regarding seven executive sessions held by the Port from March to July 2013 does not involve probable error or a departure from accepted procedures. The Superior Court's determination that five executive sessions complied with the OPMA involved a straightforward application of the "minimum price" provision as interpreted by the Superior Court. Once the Court of Appeals

defines the scope of the “minimum price” provision, the Superior Court can easily apply that interpretation to the facts presented at summary judgment or trial.

In addition, the Superior Court’s finding of disputed facts was based on well-settled precedent that summary judgment is appropriate only when “reasonable persons could reach but one conclusion” in light of the evidence, and there are no genuine issues of material fact. CR 56; *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10, 15 (2007). In its summary judgment motion, Riverkeeper relied on documents to speculate about discussions during an executive session on April 9, 2013, even though testimony from the Port’s staff and Commission contradicted Riverkeeper’s description. (*See, e.g.*, App. at 67-71, 105-08, 125-29.) Even though Riverkeeper argues in its Motion that the content of the seven executive sessions is “undisputed” (Mot. at 16), the Superior Court agreed with the Port that factual issues existed. (App. at 154.)

To the extent the Court of Appeals disagrees with the Superior Court’s interpretation of the OPMA, the Superior Court can revisit its rulings on the seven executive sessions in accordance with the usual procedures. Requiring the appellate courts to prematurely review these

rulings would add unnecessary expense and delay to this litigation, and detract from the narrow legal issue presented to the Court of Appeals.

V. CONCLUSION

Only the Superior Court's interpretation of the "minimum price" provision in the OPMA is a controlling legal issue that meets the requirements for discretionary review under RAP 2.3(b)(4). This issue can and should be reviewed by the Court of Appeals, so this Court should transfer Riverkeeper's Motion for Review regarding "minimum price" to the Court of Appeals for its determination under RAP 4.2(e)(2). The remaining issues presented in Riverkeeper's Motion do not justify discretionary review, and should be denied.

RESPECTFULLY SUBMITTED this 25th day of November,
2015.

By: *s/ Kristin M. Asai*

David B. Markowitz, *specially admitted*
DavidMarkowitz@MarkowitzHerbold.com
Kristin M. Asai, WSBA No. 49511
KristinAsai@MarkowitzHerbold.com
MARKOWITZ HERBOLD PC
3000 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204-3730

Lawson E. Fite, WSBA No. 44707
LawsonFite@gmail.com
5100 SW Macadam Avenue, Suite 350
Portland, OR 97239
Attorneys for Respondents

480494

DECLARATION OF SERVICE

I, Kristin M. Asai, declare under penalty of perjury under the laws of the State of Washington that I am an attorney employed by Markowitz Herbold PC and that on November 25, 2015, I caused to be mailed, via first-class U.S. Mail, an original **OPPOSITION TO MOTION FOR DISCRETIONARY REVIEW**, to the following counsel for parties at the addresses shown below:

Eric D. 'Knoll' Lowney
Smith and Lowney PLLC
2317 E John Street
Seattle, WA 98112-5412

- U.S. Mail
- Facsimile
- Hand Delivery (___ copies)
- Email knoll@igc.org
jessie.c.sherwood@gmail.com

Brian A. Knutsen
Kampmeier & Knutsen PLLC
833 SE Main Street, Suite 327
Mail Box No. 318
Portland, OR 97214

- U.S. Mail
- Facsimile
- Hand Delivery (___ copies)
- Email
brian@kampmeierknutsen.com

Miles B. Johnson
(admitted pro hac vice)
111 Third Street
Hood River, OR 97031

- U.S. Mail
- Facsimile
- Hand Delivery (___ copies)
- Email
miles@columbiariverkeeper.org

Attorneys for Appellants

Frank Chmelik
John Sitkin
Chmelik Sitkin & Davis
1500 Railroad Avenue
Bellingham, WA 98225

U.S. Mail
 Facsimile
 Hand Delivery (___ copies)
 Email jsitkin@chmelik.com
fchmelik@chmelik.com

*Attorneys for Proposed
Amicus Washington Public
Ports Association*

DATED this 25th day of November, 2015, at Portland, Oregon.

MARKOWITZ HERBOLD PC

By: *s/ Kristin M. Asai*

David B. Markowitz, *specially admitted*
DavidMarkowitz@MarkowitzHerbold.com
Kristin M. Asai, WSBA No. 49511
KristinAsai@MarkowitzHerbold.com
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204-3730
Telephone: (503) 295-3085

Lawson E. Fite, WSBA No. 44707
LawsonFite@gmail.com
5100 SW Macadam Avenue, Suite 350
Portland, OR 97239
Telephone: (503) 222-9505

Attorneys for Respondents

OFFICE RECEPTIONIST, CLERK

To: Lynn Gutbezahl
Cc: Kristin Asai; David Markowitz; Lawson Fite; brian@kampmeierknutsen.com; knoll@igc.org; jessie.c.sherwood@gmail.com; miles@columbiariverkeeper.org; jsitkin@chmelik.com; fchmelik@chmelik.com
Subject: RE: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., Supreme Court No. 92455-4

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Sent: Wednesday, November 25, 2015 4:37 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Kristin Asai <kristinasai@markowitzherbold.com>; David Markowitz <davidmarkowitz@markowitzherbold.com>; Lawson Fite <lawsonfite@gmail.com>; brian@kampmeierknutsen.com; knoll@igc.org; jessie.c.sherwood@gmail.com; miles@columbiariverkeeper.org; jsitkin@chmelik.com; fchmelik@chmelik.com
Subject: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., Supreme Court No. 92455-4

Attached for filing are the following documents with regard to the above-referenced case:

- Respondents' Request for Oral Argument;
- Opposition to Motion for Discretionary Review; and
- Answer to Statement of Grounds for Direct Review.

The Appendix will follow via FedEx as it contains more than 25 pages.

Respectfully submitted,

Lynn A. Gutbezahl | Legal Assistant
Markowitz Herbold PC
1211 SW Fifth Avenue, Suite 3000 | Portland, OR 97204-3730
T (503) 295-3085 | [Web](#)

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92455-4

Hon. David E. Gregerson (Dept. 2)
Set: January 10, 2014
Time: 9:00 a.m.

Received *E*
Washington State Supreme Court

NOV 30 2015 *byh*

Ronald R. Carpenter
Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

COLUMBIA RIVERKEEPER; SIERRA
CLUB; and NORTHWEST
ENVIRONMENTAL DEFENSE CENTER,

Plaintiffs,

vs.

PORT OF VANCOUVER USA; JERRY
OLIVER, Port of Vancouver USA Board of
Commissioners President; BRIAN WOLFE,
Port of Vancouver USA Board of
Commissioners Vice President; and NANCY
I. BAKER, Port of Vancouver USA Board of
Commissioners Secretary,

Defendants.

No. 13-2-03431-3

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

[CR 56(c)]

APPENDICES

i - **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
No. 13-2-03431-3

MARKOWITZ, HERBOLD,
GLADE & MEHLHAF, P.C.
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INTRODUCTION AND RELIEF REQUESTED 1

STATEMENT OF FACTS..... 2

I. The Port has a comprehensive environmental program...... 2

II. The Tesoro-Savage Joint Venture proposes to build a crude oil terminal...... 3

III. The Port considered whether to lease to TSJV in a months-long public process...... 3

IV. When procedural concerns were raised, the Port acted to address them...... 6

V. The lease accounts for the intense environmental review that EFSEC will conduct...... 8

VI. Proceedings in this case. 9

ISSUES PRESENTED..... 10

EVIDENCE RELIED UPON..... 11

LEGAL STANDARDS..... 12

ARGUMENT AND AUTHORITY 15

I. Summary judgment should be granted on the OPMA claims...... 15

 A. The OPMA claims are moot because the Port approved the initial lease in an open public meeting on July 23.. 15

 B. The OPMA claims are moot because the Port retraced its steps and approved the TSJV lease in a new vote. 17

 C. The undisputed facts show that the July 22 executive session complied with the OPMA. 20

II. Summary judgment should be granted on the SEPA claims...... 23

 A. The EFSEC Act exempts the Port’s lease approval action from SEPA..... 23

 B. The lease cannot limit the range of reasonable alternatives to be considered by EFSEC and the governor. 26

III. Plaintiffs are not entitled to attorney fees...... 30

CONCLUSION 33

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

<u>Cases</u>	Page
<i>Beverly Hills Gov't Ethics Comm'n v. City of Beverly Hills</i> , No. B148571, 2003 WL 690649 (Cal. App. Mar. 3, 2003).....	17
<i>Cathcart v. Andersen</i> , 10 Wn. App. 429, 517 P.2d 980 (1974).....	21, 22
<i>Center for Envtl. Law & Policy v. U.S. Bureau of Reclamation</i> , 715 F. Supp. 2d 1185 (E.D. Wn. 2010), <i>aff'd</i> , 655 F.3d 1000 (9th Cir. 2011),.....	29
<i>Citizens Financially Responsible Gov't v. City of Spokane</i> , 99 Wn. 2d 339, 662 P.2d 845 (1983).....	13
<i>Conner v. Burford</i> , 848 F.2d 1441 (9th Cir. 1988)	28, 29, 30
<i>Contreras v. Crown Zellerbach Corp.</i> , 88 Wn.2d 735, 565 P.2d 1173 (1977).....	13
<i>Davis v. State</i> , 102 Wn. App. 177, 184, 6 P.3d 1191 (2000).....	12
<i>E. Cnty. Reclamation Co. v. Bjornsen</i> , 125 Wn. App. 432, 105 P.3d 94 (2005).....	25
<i>Elcon Const., Inc. v. E. Wash. Univ.</i> , 174 Wn.2d 157, 273 P.3d 965 (2012).....	12
<i>Eugster v. City of Spokane</i> , 110 Wn. App. 212, P.3d 380 (2002).....	18, 19, 22, 23, 31
<i>Eugster v. City of Spokane</i> , 118 Wash. App. 383, 76 P.3d 741 (2003).....	16, 17, 20, 21
<i>Feature Realty, Inc. v. City of Spokane</i> , No. 00-CS-00-0444-AAM, 2001 WL 36136186 (E.D. Wn. Aug. 30, 2001), <i>aff'd</i> , 331 F.3d 1082 (9th Cir. 2003).....	18, 19, 20
<i>Henry v. Town of Oakville</i> , 30 Wn. App. 240, 33 P.2d 892 (1981).....	17, 18, 19
<i>Humphrey Indus., Ltd. v. Clay St. Assoc., LLC</i> , 176 Wn.2d 662, 295 P.3d 231 (2013).....	30
<i>In re Tortorelli</i> , 149 Wn.2d 82, 66 P.3d 606 (2003).....	24

1	<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007).....	12
2		
3	<i>International Longshore and Warehouse Union, Local 19 v. City of Seattle</i> , 176 Wn. App. 512, 309 P.3d 654 (2013).....	27, 28, 29
4	<i>Lands Council v. Wash. State Parks & Rec. Comm'n</i> , 309 P.3d 734 (Wn. App. 2013).....	28
5		
6	<i>Metcalf v. Daley</i> , 214 F.3d 1135 (9th Cir. 2000).....	29
7	<i>Meyer v. Univ. of Wash.</i> , 105 Wn.2d 847, 719 P.2d 98 (1986).....	12
8		
9	<i>Miller v. City of Tacoma</i> , 138 Wn.2d 318, 979 P.2d 429 (1999).....	16
10	<i>Nielson v. Spanaway Gen. Med. Clinic, Inc.</i> , 135 Wn.2d 255, 956 P.2d 312 (1998).....	12
11		
12	<i>Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council</i> , 87 Wn.2d 267, 552 P.2d 674 (1976).....	14
13	<i>Organization to Preserve Agr. Lands v. Adams Cnty.</i> , 128 Wn.2d 869, 913 P.2d 793 (1996).....	15, 16, 17
14		
15	<i>Ottgen v. Clover Park Tech. Coll.</i> , 84 Wn. App. 214, 928 P.2d 1119 (1996).....	13
16	<i>Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.</i> , 172 Wn. App. 799, 292 P.3d 147, rev. granted, 177 Wn.2d 1019, 304 P.3d 115 (2013).....	12
17		
18	<i>Protect the Peninsula's Future v. Clallam Cnty.</i> , 66 Wn. App. 671, 833 P.2d 406 (1992).....	32
19		
20	<i>PUD No. 1 of Clark County v. Pollution Control Hearings Bd.</i> , 137 Wn. App. 150, 151 P.3d 1067 (2007).....	26, 27, 28
21	<i>Residents Opposed to Kittitas Turbines v. EFSEC</i> , 165 Wn.2d 275, 197 P.3d 1153 (2008).....	15
22		
23	<i>S. Martinelli & Co., Inc. v. Washington State Dep't of Revenue</i> , 80 Wn. App. 930, 912 P.2d 521 (1996).....	21
24	<i>SEIU Healthcare 775NW v. Gregoire</i> , 168 Wn.2d 593, 229 P.3d 774 (2010).....	13
25		
26	<i>Sierra Club v. FERC</i> , 754 F.2d 1506 (9th Cir. 1986).....	30

1	<i>Snohomish County v. State,</i>	
2	69 Wn. App. 655, 850 P.2d 546 (1993).....	24
3	<i>Suarez v. Newquist,</i>	
4	70 Wn. App. 827, 855 P.2d 1200 (1993).....	12
5	<i>WildWest Inst. v. Bull,</i>	
6	547 F.3d 1162 (9th Cir. 2008)	28
7	<i>Wood v. Battle Ground Sch. Dist.,</i>	
8	107 Wn. App. 550, 27 P.3d 1208 (2001).....	17
9	<i>Wright v. Colville Tribal Enter. Corp.,</i>	
10	159 Wn.2d 108, 147 P.3d 1275 (2006) (Madsen, J., concurring).....	12, 13
11	<i>Zorc v. City of Vero Beach,</i>	
12	722 So. 2d 891 (Fla. Dist. Ct. App. 1998).....	17
13	<u>Other</u>	
14	40 C.F.R. § 1506.1(a)(2)	28
15	CR 12	1, 12, 13
16	CR 56(c).....	1
17	RCW Chapter 4.84	
18	(Equal Access to Justice Act)	32
19	RCW 34.05.010(2).....	32
20	RCW Chapter 42.30	
21	(Open Public Meetings Act)	1, 5, 9, 10, 11, 13, 15, 17, 18, 20, 21, 22, 30, 31, 32, 33
22	RCW Chapter 43.21C	
23	(State Environmental Policy Act)	1, 2, 4, 8, 10, 11, 13, 14, 15, 23, 24, 25, 26, 28, 30, 33
24	RCW 43.372.010(9).....	24
25	RCW 70.105D.010(4).....	3
26	RCW 76.09.050(1)(d)	25
	RCW Chapter 80.50	
	(Energy Facilities Site Locations Act).....	1, 2, 4, 8, 9, 10, 14, 15, 23, 24,
	25, 26, 27, 28, 29, 33
	42 U.S.C. § 4321	
	National Environmental Policy Act).....	29
	WAC 197-11	10, 14, 24, 25, 26, 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

WAC 463-14-050..... 15
WAC 463-47-020..... 10
WAC 463-47- 060(1)..... 8
Black’s Law Dictionary 22

1 (“EFSEC”). EFSEC’s enabling statute preempts SEPA and exempts all local decisions on an
2 energy facility from SEPA procedures. Instead, the full burden of SEPA procedures is
3 placed on EFSEC and only EFSEC. Plaintiffs’ claim is a misplaced attempt to escape the
4 special statutory scheme that the Legislature has established for review of energy facilities.

5 Plaintiffs’ second SEPA claim alleges that the approval of the lease impermissibly
6 limits the choice of reasonable alternatives during the upcoming SEPA process. Summary
7 judgment should be granted against this claim. The lease is explicitly subject to the outcome
8 of the SEPA process, placing no limitation, legal or otherwise, on the alternatives that
9 EFSEC will consider in its environmental impact statement. While the SEPA process is
10 underway, the financial provisions of the lease are so limited in the context of the project that
11 they do not constrain the SEPA process to come.

12 STATEMENT OF FACTS

13 I. The Port has a comprehensive environmental program.

14 The Port of Vancouver USA is one of the premier seaports on the West Coast and a
15 key driver of Clark County’s economy. The Port’s mission is to “provide economic benefit
16 to our community through leadership, stewardship and partnership in marine and industrial
17 development.” (Coleman Ex. C at 3.) In keeping with the stewardship component of its
18 mission, the Port has established Environmental Values of integrated decision making,
19 sustainability, pollution prevention, and compliance. (*Id.* at 6.) The Port seeks to incorporate
20 these environmental values into every stage of its business operations. (*Id.*) To further these
21 principles, the Port operates a leading environmental compliance program and regularly
22 produces a sustainability report reflecting progress on waste reduction, energy efficiency,
23 and protection of Clark County’s clean air and water. (Boyden Ex. A.) The Port conducts
24 regular environmental walkthroughs and reviews of all tenants of the Port, making sure each
25 tenant’s products and facilities are handled responsibly. (Boyden Decl. ¶ 2.)
26

1 **II. The Tesoro-Savage Joint Venture proposes to build a crude oil terminal.**

2 The Port specializes in transport of bulk commodities and high-value items like wind
3 turbines and vehicles. (Shuck Decl. ¶ 1.) In particular, the Port has handled bulk liquid
4 petroleum products “for decades.” (Coleman Ex. B at 4.) As the North American oil shale
5 market has matured in recent years, the Port began to receive inquiries from parties interested
6 in transporting petroleum products through the Port. (*Id.*)

7 In November 2012, the Port solicited statements of interest from companies interested
8 in developing petroleum facilities. (Coleman Ex. B at 4.) After receiving these statements,
9 the Port selected the Tesoro-Savage Joint Venture as the potential tenant and began
10 preliminary negotiations. (*Id.*) TSJV announced in April that it intended to build an oil
11 transit facility at the Port. (Wagner Ex. E at 1.) The facility is envisioned to have an initial
12 capacity for 120,000 crude barrels per day. (Wagner Ex. D at 1.) The facility will use 42
13 acres and includes rail unloading at Port Terminal 5, a storage area, and vessel loading at
14 Terminal 4. (*Id.*) Oil transiting the terminal is expected to be shipped to refineries along the
15 West Coast. (*Id.*)

16 Terminal 5, the site of part of the proposed crude oil terminal, is a formerly
17 contaminated “brownfield” property. (Coleman Ex. B at 7.) Brownfield redevelopment is
18 one of the priorities of Washington’s environmental cleanup statute, the Model Toxics
19 Control Act. The Legislature has determined that “[i]t is in the public’s interest . . . to clean
20 up and reuse contaminated industrial properties in order to minimize industrial development
21 pressures on undeveloped land and to make clean land available for future social use.” RCW
22 70.105D.010(4).

23 **III. The Port considered whether to lease to TSJV in a months-long public process.**

24 The Port repeatedly engaged the public throughout its negotiations with TSJV. These
25 efforts included five public workshops in May, June, and July. (Coleman Ex. B. at 4.) The
26 Port took public comment at each one of these five workshops. (*Id.*) The Port had no

1 obligation to take comment at the workshop, and its practice is normally not to do so at
2 workshops, but the Port invited the public's participation at each step. (*See, e.g.*, Allan Ex. A
3 at 5.) The Port also sought public comment in writing. (Allan Decl. ¶ 18 & Ex. J.) As a
4 result of repeated public comments regarding safety, the Commission held a workshop on
5 safety on June 11. The Port subsequently added a term to the proposed lease requiring that
6 TSJV submit its final Facility Operation and Safety Plan to the Port for approval prior to
7 beginning operations. (Coleman Ex. B at 5; Allan Ex. F at 5; Allan Ex. G ¶ 30.) The Port
8 understood that this change could affect the pricing and value of the lease. (Coleman Decl.
9 ¶ 4; Estuesta Decl. ¶ 4; Lowe Decl. ¶ 6; Shuck Decl. ¶ 4.) The Port has committed a
10 dedicated staff member to work proactively with TSJV and railroads on emergency
11 avoidance and response. (Coleman Ex. B at 5.)

12 At a June 27 workshop, Jim Luce, the chairman of EFSEC, presented an overview of
13 the EFSEC process to the Commissioners and the public. (Allan Ex. A at 6.) The press
14 release for the workshop noted that “[a]s with every potential tenant, the Tesoro-Savage Joint
15 Venture is required to obtain all necessary environmental permits for the proposed facility as
16 a condition of operation at the port.” (Wagner Ex. C at 1.) Mr. Luce told the Commissioners
17 that EFSEC’s purpose is “one stop shopping” for covered projects and that EFSEC’s “[f]inal
18 decision preempts all other state and local governments.” (Allan Ex. I at 2.) Mr. Luce
19 explained how the EFSEC process would incorporate compliance with SEPA throughout its
20 review of the project. (Allan Ex. A at 6; Allan Ex. I at 9, 15-16.) Fifteen members of the
21 public commented or asked questions during the June 27 workshop. (Allan Ex. A at 6-7,
22 9-11.) None of these commenters suggested that the Port should perform a separate SEPA
23 process solely on the lease. (*Id.*)

24 The Port held a final public workshop on the evening of July 22 to review and discuss
25 with the public the proposed lease terms prior to making any decisions. Several days prior,
26 the Port circulated an agenda for the workshop and for the July 23 regular meeting of the

1 Commission. (Allan Ex. H, item E-3.) The July 22 workshop was first announced on July 3.
2 (Wagner Ex. A.) The public notice for the workshop included a statement that
3 “[i]mmediately following the workshop, the Commission will recess into a special executive
4 session for the purpose of discussing real estate matters, pursuant to RCW 42.30.110(c).
5 No final action will be taken during the workshop or special executive session.” (Allan Ex.
6 B; Allan Ex. C at 1.) At the July 22 workshop, Port staff went through the proposed terms of
7 the lease. They noted the potential for 80-120 direct jobs from the project, 2,700 total jobs,
8 \$100 million in private investment, and the environmental provisos in the lease. (Coleman
9 Ex. A at 11-20, 32.) Staff also indicated to the Commissioners that an EIS would be
10 prepared during the EFSEC evaluation process. (*Id.* at 29.) Again, though the Commission
11 does not normally take public comment at workshops, it invited public comment here. (Allan
12 Ex. C at 4.) Thirty members of the public provided comment. (*Id.* at 4-10.)

13 At the conclusion of the public portion of the workshop, at close to 10:00 p.m., the
14 minutes state that Commission Chair Oliver said that the Commission “would be recessing
15 into executive session for the purpose of discussing what the Commission had heard and
16 advised that the commission would be in executive session for at least 15 minutes.” (*Id.* at
17 10.) Commissioner Oliver misspoke about the purpose of the executive session. (Oliver
18 Decl. ¶ 5.) The executive session discussed solely whether the proposed lease terms should
19 be modified prior to the Commission’s deliberations and decisions. (Oliver Decl. ¶ 3; Wolfe
20 Decl. ¶ 3; Baker Decl. ¶ 5; Coleman Decl. ¶ 3; Allan Decl. ¶ 5; Boyden Decl. ¶ 5; Lowe
21 Decl. ¶ 3; Smith Decl. ¶ 3; Wagner Decl. ¶ 3; Estuesta Decl. ¶ 3; Marler Decl. ¶ 3; Brooks
22 Decl. ¶ 3; Mattix Decl. ¶ 2; Shuck Decl. ¶ 3; Jacobs Decl. ¶ 3.) As stated in the minutes,
23 “Executive session was held from 9:57 p.m. to 10:41 p.m. to discuss real estate matters
24 pursuant to RCW 42.30.110(1)(c). The executive session ended at 10:41 p.m.” (Allan Ex. C
25 at 10.) During the executive session, the Commission did not discuss, deliberate, or vote on
26 whether to approve the lease. (Oliver Decl. ¶ 4; Wolfe Decl. ¶ 4; Baker Decl. ¶ 4; Coleman

1 Decl. ¶ 6; Allan Decl. ¶ 5; Boyden Decl. ¶ 6; Lowe Decl. ¶ 4; Smith Decl. ¶¶ 4-6; Wagner
2 Decl. ¶ 4; Estuesta Decl. ¶ 5; Schiller Decl. ¶ 3; Marler Decl. ¶ 4; Brooks Decl. ¶ 4; Mattix
3 Decl. ¶ 3; Shuck Decl. ¶ 5; Jacobs Decl. ¶ 4.) At the end of the executive session, the
4 Commissioners inquired whether any members of the public were still present. (Allan Ex. C
5 at 10; Allan Decl. ¶ 7; Smith Decl. ¶ 7.) As none were still present, the public workshop was
6 reopened and closed at 10:42. (*Id.*) As the Commission left, none of the session attendees
7 knew how the following day's planned vote would go. (Oliver Decl. ¶ 6; Baker Decl. ¶ 4;
8 Coleman Decl. ¶ 7; Wolfe Decl. ¶ 4; Allan Decl. ¶ 8; Boyden Decl. ¶ 7; Lowe Decl. ¶ 5;
9 Smith Decl. ¶ 8; Wagner Decl. ¶ 5; Estuesta Decl. ¶ 6; Schiller Decl. ¶ 3; Marler Decl. ¶ 4;
10 Brooks Decl. ¶ 5; Mattix Decl. ¶ 4; Shuck Decl. ¶ 6; Jacobs Decl. ¶ 5.) Commissioner Wolfe
11 did not know even how he would vote on the lease. (Wolfe Decl. ¶ 4; Coleman Decl. ¶ 7;
12 Smith Decl. ¶ 5.)

13 The following day, July 23, the Commission's regular meeting included consideration
14 of the lease to TSJV. Port staff presented an overview of the lease to the Commission and
15 the assembled public. Director of Economic Development and Facilities Curtis Shuck
16 explained that the lease contains "contingency requirements and periods related to the
17 permitting and approval processes which are required to be obtained for the permitted use,
18 prior to the construction and operation of the facility." (Allan Ex. D at 4.) Commissioner
19 Oliver noted that the previous evening's workshop had received public comment from "some
20 30 to 40 people . . . in broad opposition to this project." (*Id.* at 5.) The Commission then
21 took public comment from an additional 10 people, the majority of whom supported approval
22 of the lease. (*Id.* at 6-8.) The Commissioners deliberated publicly and voted unanimously to
23 approve the lease. (*Id.* at 8-10.)

24 **IV. When procedural concerns were raised, the Port acted to address them.**

25 After the lease was approved, the Port was faced with questions about the July 22
26 executive session, including allegations that the Commissioners had voted in secret. There

1 were also concerns raised about the appropriateness of the announcement that the executive
2 session would take “at least” 15 minutes, rather than giving an exact end time. Initially,
3 these concerns were raised with the Port via newspaper articles and public comments, and
4 ultimately in this lawsuit.

5 In response to these concerns, the Port took two sets of actions. First, the Port
6 initiated improvement to its public meeting processes. The Port developed an Executive
7 Session Reference Guide for the Commissioners’ use. (Allan Ex. F at 4.) The Reference
8 Guide provides for a citation to the relevant statutory provision for each executive session.
9 (*Id.*) This guide was put in place for use immediately, beginning with the Commission’s
10 meeting on August 13. (Coleman Ex. B at 3.) The port’s Internal Auditor and Director of
11 Finance then contacted the State Auditor’s office to discuss the issues and the new procedure
12 that was implemented on August 13, providing a copy of the Executive Session Reference
13 Guide. (Estuesta Decl. ¶ 7.) The State Auditor’s Office had no questions or concerns. (*Id.*)

14 Next, the Port re-opened the lease for public comment and a new vote by the
15 Commission. Although, as discussed noted above, the lease was appropriately debated and
16 approved in public on July 23, an extra level of transparency was consistent with the Port’s
17 values. (Coleman Ex. B at 3.) In announcing the new vote the Port stated that the
18 Commission would proceed on the assumption that the July 23 vote had not been effective.
19 (Wagner Ex. B.) The Port scheduled the new vote to occur at its regular October 22 meeting
20 and invited public comment. The Commissioners and Port staff did not know how the new
21 vote would turn out. (Oliver Decl. ¶ 7; Wolfe Decl. ¶ 5; Baker Decl. ¶ 6; Coleman Decl. ¶ 9;
22 Allan Decl. ¶ 11; Boyden Decl. ¶ 8; Lowe Decl. ¶ 7; Wagner Decl. ¶ 6; Estuesta Decl. ¶ 8;
23 Marler Decl. ¶ 5; Brooks Decl. ¶ 6; Shuck Decl. ¶ 7.) When Executive Director Coleman
24 presented the lease again to the Commissioners, he stated that “[T]he TSJV lease is
25 considered ineffective at this time.” (Allan Ex. F at 5.) The Commission moved forward on
26 the assumption, without making any legal conclusions, that the earlier vote was “not

1 effective.” (Coleman Ex. B at 3.) Mr. Coleman further emphasized that “[i]f the lease is not
2 approved, the process stops.” (*Id.* at 7; Coleman Decl. ¶ 10.)

3 The Commission took public comment from 35 separate individuals, for nearly two
4 hours. (Allan Ex. F at 7-16.) As before, none of the commenters suggested that the Port
5 needed to complete a SEPA determination separate from the EFSEC process. (*Id.*)
6 Following the public comments, the Commissioners deliberated in open session about
7 regulatory, safety and environmental issues. (*Id.* at 17-19.) Commissioner Wolfe noted that
8 the EFSEC permitting process would address many of these same issues. (*Id.* at 19.) He also
9 stated that he had reviewed all written comments on the lease. (*Id.*) At the conclusion of this
10 public process, the Commissioners voted unanimously to approve the lease. (*Id.*)

11 **V. The lease accounts for the intense environmental review that EFSEC**
12 **will conduct.**

13 TSJV filed its 872-page application with EFSEC on August 29. (Lowe Ex. A.) In
14 its cover letter, TSJV “request[ed] that EFSEC make a determination under WAC 463-47-
15 060(1) that an Environmental Impact Statement is required.” (Lowe Ex. B.) EFSEC issued
16 a Determination of Significance and Scoping Notice on October 3. (Lowe Ex. C.) This
17 Notice designates EFSEC as the lead agency. (*Id.* at 2.) It also states that “[t]he lead agency
18 has determined that this proposal is likely to have a significant adverse impact on the
19 environment. An Environmental Impact Statement (EIS) is required under
20 RCW 43.21C.030(2)(c) and *will be prepared.*” (*Id.*, emphasis added.)

21 The October 22 lease between TSJV and the Port contains several conditions to
22 account for the environmental review process that EFSEC will conduct. (Allan Ex. G.)
23 Under the lease TSJV is responsible for obtaining all “licenses, permits and approvals needed
24 for its operation on the Premises.” (*Id.* ¶ 2.C.) These approvals are conditions precedent to
25 the lease. (*Id.* ¶ 2.D(1).) Indeed, TSJV is not allowed to take possession of the leased
26 premises until it obtains all the needed approvals. (*Id.* ¶ 3.A.) For the first twelve months,

1 the Port, or any third party authorized by the Port, may use the property for any purpose
2 without approval from TSJV. (*Id.* ¶ 2.F.) The operative term of the lease does not begin
3 until the conditions precedent, including the EFSEC approval, are satisfied. (*Id.* ¶ 1.D.) The
4 lease is for a term of 10 years *after* approval and construction. (*Id.*) The period before
5 approval is called the “contingency period” and during that time TSJV is only obliged to pay
6 rent of \$30,000 per month, increasing to \$50,000 after 18 months. (*Id.*) Only once the
7 project is operating would significant monies begin to flow to the Port. (*See id.* ¶ 1.D.)
8 Thus, TSJV’s lease is the practical equivalent of an exclusive option pending the outcome of
9 the EFSEC process. Just as TSJV may not have possession of the property until EFSEC
10 approval is granted, so the EFSEC Act prohibits construction of subject projects until
11 approval is obtained. RCW 80.50.060(1). The lease states that the “Facility is subject to the
12 exclusive jurisdiction of [EFSEC].” (Allan Ex. G; *See* Allan Ex. D at 2.)

13 The lease explicitly requires that TSJV comply with all environmental laws and
14 permits and with the Port’s environmental review program. (Allan Ex. G ¶¶ 11.C, 11.D.,
15 11.E.) It requires TSJV to carry \$25 million in pollution legal liability insurance. (*Id.* ¶¶ 1.L,
16 15.A.) Tesoro-Savage must also comply with the prior consent decrees and restrictive
17 environmental covenants relating to the cleanup of prior contamination on the site from
18 aluminum smelting. (*Id.* ¶ 2.C.) These consent decrees and covenants are Exhibits M and N
19 to the lease. (Allan Ex. G at 189-232, 348-353, 383-387, 396-99.) An extensive Health,
20 Safety, Security, and Environmental plan is attached and incorporated into the lease. (Allan
21 Ex. G at 145-188.) Paragraph 30 additionally states that “a final Facility Operation and
22 Safety plan shall be mutually approved prior to operation of the Facility [by the Port and
23 TSJV].”

24 **VI. Proceedings in this case.**

25 This lawsuit was filed October 2, 2013, bringing the following four OPMA claims:
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- Count 1 alleges that the Port violated the OPMA by improperly deliberating beyond the appropriate scope of the July 22 executive session (Amended Complaint (“Compl.”) ¶¶ 50-52);
 - Count 2 alleges that the Port violated the OPMA by approving the lease during the July 22 executive session (Compl. ¶¶ 53-54);
 - Count 3 alleges that Commissioner Oliver’s failure to announce a definite end time for the July 22 executive session was an OPMA violation (Compl. ¶¶ 55-57); and
 - Count 4 alleges that Commissioner Oliver violated the OPMA by failing to announce a valid purpose for the July 22 executive session. (Compl. ¶¶ 58-60.)

12 On October 31, plaintiffs amended their complaint to add two claims under SEPA:

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- Count 5 alleges the Port improperly approved the lease prior to engaging in a SEPA process (Compl. ¶¶ 61-62);
 - Count 6 alleges that the Port’s approval of the lease improperly restricts the range of alternatives to be considered during the SEPA process in violation of WAC 197-11-070(1) and 463-47-020. (Compl. ¶¶ 63-64.)

19 **ISSUES PRESENTED**

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1. Are plaintiffs’ claims moot because the lease was appropriately approved at a public session of the Commission?
 2. Are plaintiffs’ OPMA claims moot because the challenged decision has been reconsidered and reenacted with proper formalities?
 3. Can plaintiffs maintain an action under the OPMA when the uncontradicted statements of the participants in the July 22 executive session show that the discussion was appropriate?

- 1 4. Does the EFSLA, exempt local preliminary steps like the Port's lease approval from
- 2 SEPA analysis?
- 3 5. Does execution of a lease limit the range of reasonable alternatives when the lease
- 4 explicitly conditions itself on the completion of a SEPA process?
- 5 6. Are plaintiffs entitled to attorney fees even though they cannot show that a violation
- 6 of the OPMA or of SEPA occurred?

7 **EVIDENCE RELIED UPON**

8 Defendants rely on the papers and pleadings herein, and the following additional
9 evidence:

- 10 1. Declaration of Michelle Allan;
- 11 2. Declaration of Commissioner Nancy I. Baker;
- 12 3. Declaration of Patty Boyden;
- 13 4. Declaration of Katy Brooks;
- 14 5. Declaration of Todd Coleman;
- 15 6. Declaration of Jeff Estuesta;
- 16 7. Declaration of Addison Jacobs;
- 17 8. Declaration of Alicia L. Lowe;
- 18 9. Declaration of Julianna Marler;
- 19 10. Declaration of Mary Mattix;
- 20 11. Declaration of Commissioner Jerry Oliver;
- 21 12. Declaration of Mike Schiller;
- 22 13. Declaration of Curtis Shuck;
- 23 14. Declaration of Alastair Smith;
- 24 15. Declaration of Theresa Wagner; and
- 25 16. Declaration of Commissioner Brian Wolfe.
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LEGAL STANDARDS

“The purpose of a summary judgment is to avoid a useless trial when no genuine issue of material fact remains to be decided.” *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312, 315 (1998). To defeat summary judgment, the non-moving party’s evidence must set forth specific and disputed facts; speculation, argumentative assertions, opinions, and conclusory statements will not suffice. *Suarez v. Newquist*, 70 Wn. App. 827, 832, 855 P.2d 1200, 1204 (1993); *Elcon Const., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965, 972 (2012). Once the moving party sets forth evidence sufficient to show that judgment as a matter of law is warranted, “the nonmoving party must set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.” *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98, 102 (1986). When weighing the evidence, summary judgment is appropriate if “reasonable persons could reach but one conclusion” in light of all the evidence. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10, 15 (2007). If a non-moving party fails to submit any evidence of an essential element of its case, the moving party is entitled to judgment as a matter of law. *Davis v. State*, 102 Wn. App. 177, 184, 6 P.3d 1191, 1195 (2000).

Alternatively, with respect to mootness of the OPMA claims, the Court should consider this motion as a “factual” motion to dismiss for lack of subject matter jurisdiction under CR 12(b)(1) and 12(h)(3). In reviewing a factual jurisdictional motion, “the trial court must weigh evidence to resolve disputed jurisdictional facts. Once challenged, the party asserting subject matter jurisdiction bears the burden of proof on its existence.” *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147,151, *rev. granted*, 177 Wn.2d 1019, 304 P.3d 115 (2013). As in responding to a summary judgment motion, “when faced with a factual challenge to subject matter jurisdiction, the nonmoving party may not rest on the mere assertion that factual issues exist.” *Wright v. Colville Tribal*

1 *Enter. Corp.*, 159 Wn.2d 108, 119, 147 P.3d 1275, 1282 (2006) (Madsen, J., concurring).
2 Mootness is jurisdictional. *Citizens for Financially Responsible Gov't v. City of Spokane*,
3 99 Wn. 2d 339, 350, 662 P.2d 845, 852 (1983). “The central question of all mootness
4 problems is whether changes in the circumstances that prevailed at the beginning of litigation
5 have forestalled any occasion for meaningful relief.” *SEIU Healthcare 775NW v. Gregoire*,
6 168 Wn.2d 593, 602, 229 P.3d 774, 779 (2010) (quoting *City of Sequim v. Malkasian*,
7 157 Wn.2d 251, 259, 138 P.3d 943 (2006)).

8 With regard to the first SEPA claim, the Court may consider the motion, alternatively,
9 as a motion to dismiss for failure to state a claim under CR 12(b)(6) or for judgment on the
10 pleadings pursuant to CR 12(c). “The question under CR 12(b)(6) is basically a legal one,
11 and the facts are considered only as a conceptual background for the legal determination.”
12 *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173, 1177, 1123
13 (1977). Questions of statutory exemption are issues of law properly raised under
14 CR 12(b)(6). *Ottgen v. Clover Park Tech. Coll.*, 84 Wn. App. 214, 222, 928 P.2d 1119
15 (1996).

16 Washington’s Open Public Meetings Act is designed to ensure that public agency
17 actions “be taken openly and that their deliberations be conducted openly.” RCW 42.30.010.
18 All meetings of public agencies are to be open and public, RCW 42.30.020, unless an
19 exception, most commonly for executive session, applies. Section 110 of the OPMA lists
20 permissible executive session purposes, including “[t]o consider the minimum price at which
21 real estate will be offered for sale or lease when public knowledge regarding such
22 consideration would cause a likelihood of decreased price. However, final action selling or
23 leasing public property shall be taken in a meeting open to the public. . . .”
24 RCW 42.30.110(c).

25 Like the OPMA, SEPA is primarily a procedural statute. It constitutes “an
26 environmental full disclosure law. The act’s procedures promote the policy of fully informed

1 decision making by government bodies when undertaking ‘major actions significantly
2 affecting the quality of the environment.’” *Norway Hill Pres. & Prot. Ass’n v. King Cnty.*
3 *Council*, 87 Wn.2d 267, 272, 552 P.2d 674, 677 (1976) (quoting RCW 43.21C.010, .030).
4 SEPA requires state and local government agencies to “[i]nclude in every recommendation or
5 report on proposals for legislation and other major actions significantly affecting the quality
6 of the environment, a detailed statement by the responsible official on:

- 7 (i) the environmental impact of the proposed action;
- 8 (ii) any adverse environmental effects which cannot be avoided should the
proposal be implemented;
- 9 (iii) alternatives to the proposed action;
- 10 (iv) the relationship between local short-term uses of the environment and
the maintenance and enhancement of long-term productivity; and
- 11 (v) any irreversible and irretrievable commitments of resources which
would be involved in the proposed action should it be implemented[.]”

12 RCW 43.21C.030(2)(c). The “detailed statement,” called an “environmental impact
13 statement,” or “EIS,” must be prepared on “major actions having a probable significant,
14 adverse environmental impact.” RCW 43.21C.031(1). A threshold determination of
15 significance or non-significance “is required for any proposal which meets the definition of
16 action and is not categorically exempt . . .” WAC 197-11-310. Exemptions are established
17 by regulation and by statute. “An agency is not required to document that a proposal is
18 categorically exempt.” WAC 197-11-305.

19 Plaintiffs’ complaints also implicate the Energy Facilities Site Locations Act
20 (“EFSLA” or “EFSEC Act”), RCW Chapter 80.50. This statute was enacted to “avoid costly
21 duplication in the siting process [for energy facilities] and ensure that decisions are made
22 timely and without unnecessary delay.” RCW 80.50.010(5). All local decisions or actions
23 on such facilities, such as the lease here, are “exempt from the ‘detailed statement’ required
24 by [SEPA].” RCW 80.50.180. The Act also supersedes all other laws or regulations,
25 RCW 80.50.110(1), and preempts local “regulation and certification of the location,
26 construction, and operational conditions of certification of the energy facilities included

1 under RCW 80.50.060. . . .” RCW 80.50.110(2). Since the EFSEC Act “operates as a state
2 preemption of all matters relating to energy facility sites[,] Chapter 80.50 RCW certification
3 is given in lieu of any permit, certificate, or similar document which might otherwise be
4 required by state agencies and local governments.” WAC 463-14-050.

5 The Act’s specific exclusive jurisdiction controls over general statutes, like SEPA or
6 the Growth Management Act, even if the general statute is enacted later. *Residents Opposed*
7 *to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 309, 197 P.3d 1153, 1170 (2008). The Act
8 provides that “[n]o construction of [subject] energy facilities may be undertaken, except as
9 otherwise provided in this chapter, . . . without first obtaining certification in the manner
10 provided in this chapter.” RCW 80.50.060(1). The Act also has a unique element in that a
11 specific “counsel for the environment” an assistant attorney general is appointed to
12 “represent the public and its interest in protecting the quality of the environment.”
13 RCW 80.50.080. If EFSEC recommends a cite certification application, the final decision
14 whether to approve an energy project is made by the Governor. RCW 80.50.100(3).

15 ARGUMENT AND AUTHORITY

16 I. Summary judgment should be granted on the OPMA claims.

17 A. The OPMA claims are moot because the Port approved the initial lease in 18 an open public meeting on July 23.

19 The Port’s Board of Commissioners first approved a lease to TSJV on July 23, 2013
20 in an open public meeting. This public meeting satisfied RCW 42.30.110(c)’s mandate that
21 “final action selling or leasing public property shall be taken in a meeting open to the
22 public. . . .” This public action undermines any claim that the prior executive session
23 violated the OPMA. As the Washington Supreme Court held in *Organization to Preserve*
24 *Agr. Lands v. Adams Cnty.*, 128 Wn.2d 869, 884, 913 P.2d 793, 802 (1996) (“*OPAL*”), if
25 allegedly improper private discussions are followed by a proper open meeting then there can
26 be no violation of the OPMA. *OPAL* affirmed the lower court’s ruling that an “ex parte

1 communication between the commissioners was irrelevant because the final vote occurred in
2 a proper, open public meeting.” 128 Wn.2d at 883, 913 P.2d at 802. The court’s conclusion
3 was buttressed by the “extensive opportunity for input by opposing parties in this case. . . .”
4 128 Wn.2d at 884, 913 P.2d at 802. Plaintiffs here have been afforded similar opportunities
5 for input. Thus, in the unlikely event plaintiffs could show improper communications during
6 the July 22 executive session, those communications would be irrelevant because the final
7 vote approving the lease was proper and open on July 23.

8 In a similar case, Division III of the Court of Appeals found no OPMA violation
9 where “unquestionably the City Council adopted the ordinance in a public meeting after
10 listening to a great deal of public comment, both for and against the project, much of the
11 opposing comments coming from Mr. Eugster.” *Eugster v. City of Spokane*, 118 Wash. App.
12 383, 423, 76 P.3d 741, 763 (2003) (“*Eugster II*”). Here, the initial TSJV lease was adopted
13 in a public meeting after the public, including opponents of the lease decision, were given
14 opportunity to provide comment. Under *OPAL* and *Eugster II*, this public action means that
15 any violations that could have occurred during the executive session are rendered moot.

16 *Miller v. City of Tacoma*, 138 Wn.2d 318, 979 P.2d 429 (1999) is not to the contrary.
17 *Miller* distinguished *OPAL* because the public action in *Miller* was only a “summary
18 approval” of a decision that had been made in private. 138 Wn.2d at 329, 979 P.2d at 435
19 (quoting *OPAL* and citing *Tolar v. Sch. Bd. of Liberty Cnty.*, 398 So.2d 427, 428 (Fla. 1981)).
20 The Tacoma City Council had conducted an executive session “where all council members
21 were balloted until a consensus was reached.” 138 Wn.2d at 330, 979 P.2d at 435. Here, as
22 described in the declarations of every attendee of the executive session, no balloting or vote

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1 on whether to approve the lease was conducted and no consensus was reached. *OPAL* and
2 *Eugster II* apply to preclude any OPMA challenge to the executive session.¹

3 **B. The OPMA claims are moot because the Port retraced its steps and**
4 **approved the TSJV lease in a new vote on October 22.**

5 The plaintiffs' OPMA claims are moot because the limited lease was debated and
6 voted on publicly on July 23. The claims are also moot because the Port retraced its steps
7 and re-did the approval process in October. At its October 22 public meeting, the
8 Commission took new public comment from at least 35 members of the public in a packed
9 commission room. The Commission proceeded on the assumption that the prior vote had not
10 been effective to approve the lease to TSJV. Thus the October 22 vote acted as the only vote
11 whether to enter into the lease. By re-opening the lease, taking public comment, deliberating
12 publicly, and then voting, the Port wiped the slate clean. Any potential violations of the
13 OPMA from the July proceedings were rendered moot. Thus plaintiffs' OPMA claims must
14 be dismissed for lack of jurisdiction.

15 Washington has long given its public agencies the ability to re-do actions to correct
16 alleged procedural errors. In *Henry v. Town of Oakville*, 30 Wn. App. 240, 241-42, 633 P.2d
17 892, 893-894 (1981), the plaintiff succeeded in invalidating, under the OPMA, the town's
18 ordinances for sale of bonds to construct a water system. The town council then passed
19 "ratification" ordinances using the appropriate procedures. *Id.* The trial court found both the

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22 ¹ The Port's argument is consistent with cases from California and Florida. These
23 decisions' are persuasive because the OPMA was modeled on the open meetings laws of
24 those states. *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 560, 27 P.3d 1208, 1215
25 (2001). See *Beverly Hills Gov't Ethics Comm'n v. City of Beverly Hills*, No. B148571, 2003
26 WL 690649, at *6 (Cal. App. Mar. 3, 2003) (holding that although the plaintiff contended
that the decisions which led the city to select and approve lease for a public office building
were held in secret, all issues pertinent to whether to enter the lease were fully and openly
discussed at the public hearing where the city council voted to approve the lease, so any
violation was cured); *Zorc v. City of Vero Beach*, 722 So. 2d 891, 903 (Fla. Dist. Ct. App.
1998) (holding that a ratification must be made in "a full, open public hearing convened for
the purpose of enabling the public to express its views and participate in the decision-making
process" rather than a "perfunctory acceptance of the City's prior decision").

1 original and ratification ordinances invalid. The Court of Appeals rejected the trial court's
2 ruling that the "ratification" ordinances were invalid: "The well-established rule is that
3 where a governing body takes an otherwise proper action later invalidated for procedural
4 reasons only, that body may retrace its steps and remedy the defect by re-enactment with the
5 proper formalities." *Id.*, 30 Wn. App. at 246, 633 P.2d at 896. Thus,

6 (W)here the procedure followed has not been in accordance
7 with law, proceedings had thereunder must be held void; but
8 this nowise precludes the ultimate municipal authority, . . .
9 from again exercising in a lawful manner its authority for the
purpose of correcting errors and mistakes due, not to a basic
want of power, but to defective procedure which has, in some
respects, caused the municipal machinery to cease to function.

10 *Id.* (quoting *Jones v. Centralia*, 157 Wn. 194, 212, 220, 289 P. 3 (1930)).

11 Similarly, in *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002)
12 ("*Eugster I*"), the Spokane City Council took corrective action that cured a prior OPMA
13 defect. The Council specifically took the following actions:

14 First, President Higgins, and to any relevant extent, individual
15 Council Members, abandoned the [defective] Procedure on
16 January 8 by conceding it needed correction. Second, the
amended process was substituted. Third, the amended process
was subsumed in Resolution 01-05 on February 5.

17 110 Wn. App. at 228, 39 P.3d at 387. These actions rendered moot the claims for declaratory
18 equitable relief. *Id.* at 232, 39 P.3d at 389.

19 *Feature Realty, Inc. v. City of Spokane*, No. 00-CS-00-0444-AAM, 2001 WL
20 36136186 (E.D. Wn. Aug. 30, 2001), *aff'd*, 331 F.3d 1082 (9th Cir. 2003), addresses how a
21 public body should deal with a contract that was allegedly approved in violation of the
22 OPMA. The Spokane City Council entered into a settlement agreement after reaching a
23 secret consensus on the agreement during an executive session. *Id.*, 2001 WL 36136186 at
24 *2. The realty company brought a lawsuit and attempted to enforce the settlement. Spokane
25 argued that the agreement was void because it had been adopted in secret in violation of the
26 OPMA.

1 The court rejected the argument that later city council meetings served to ratify the
2 agreement, because at the later meetings the council just took actions in accordance with the
3 agreement. It never reconsidered whether the agreement should be entered into. “[T]he City
4 Council conducted those meetings on the assumption the agreement had been validly
5 executed. The City Council did not conduct an open public meeting where the assumption
6 was the agreement had not yet been executed (or at least not validly executed), allowing for
7 public comment on whether the agreement should be executed.” *Id.*, 2001 WL 36136186 at
8 *13. Instead, the court held, “The only way the Spokane City Council could have remedied
9 the defect of the October 5, 1998 executive session was to conduct a full open public meeting
10 for the express purpose of determining whether the Stipulated Settlement Agreement should
11 be executed. Summary approval of the already executed agreement at an open public
12 meeting was not an option.” *Id.*, 2001 WL 36136186 at *14.

13 In this case, the October 22 Commission meeting agenda included an action item
14 entitled “Approve the Ground Lease Agreement Between the Port of Vancouver USA and
15 Tesoro Savage Petroleum Terminal LLC.” (Allan Ex. E at 4.) The description of the agenda
16 item re-opened the merits of the lease, noting that the lease “has certain contingency
17 requirements and contingency periods related to the permitting and approval processes which
18 are required to be obtained for the permitted use, prior to the construction and operation of
19 the facility.” (*Id.*) In presenting the agenda item back to the Commission, the Port’s
20 Executive Director, Todd Coleman, stated that the Port was “[m]oving forward under the
21 assumption that the earlier vote was not effective.” (Coleman Ex. B at 3.) He also stated that
22 “at this point, we do not have a lease.” (Coleman Decl. ¶ 10.) The Commission then took
23 public comment and openly deliberated over whether to enter into the lease. (Allan Ex. F at
24 7-17.) The Commission held this meeting without any executive session. (*Id.* at 1.)

25 The Port’s actions satisfy the requirements for retracing its steps as set forth in *Henry*,
26 *Eugster I*, and *Feature Realty*. As in *Henry*, the Port retraced its steps and re-voted on the

1 lease, ensuring that the “proper formalities” would be used. *Feature Realty* said that the
2 Spokane Council “could have remedied the defect of the October 5, 1998 executive session
3 was to conduct a full open public meeting for the express purpose of determining whether the
4 Stipulated Settlement Agreement should be executed.” 2001 WL 36136186 at *14. It also
5 said the Council should have conducted “an open public meeting where the assumption was
6 that the agreement had not yet been executed (or at least validly executed) allowing for
7 public comment on whether the agreement should be executed.” *Id.* 2001 WL 36136186 at
8 *13. Here, the Commission conducted a full open public meeting where it was assumed the
9 lease had not been executed, for the express purpose of taking public comment on and
10 determining whether the lease to TSJV should be executed. And, as the city council did in
11 *Eugster I*, the Port abandoned the prior procedure (the July 23 vote), and adopted the new
12 procedure, the October 22 vote. The Port also immediately abandoned and corrected its
13 procedure for announcing executive sessions.

14 Plaintiffs’ claims for declaratory and injunctive relief must be dismissed as moot
15 under *Eugster I*. 110 Wn. App. at 227, 39 P.3d at 386 (stating that “the trial court was correct
16 in reasoning the OPMA violation set forth in the January 5 Memo was mooted when the
17 Procedure and the amended process were superseded . . .”). In this case any remaining
18 OPMA claims, such as for attorney fees, are also moot, because the procedures have been
19 corrected and the alleged violation is not likely to recur. *Eugster I*, 110 Wn. App. at 229,
20 39 P.3d at 387 (citing *Dunner v. McLoughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984)).
21 The Court should dismiss the OPMA claims, Counts 1-4, as moot.

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23 **C. The undisputed facts show that the July 22 executive session complied
with the OPMA.**

24 In the event the Court reviews the merits of plaintiffs’ OPMA claims—which it
25 should not—the Court should still grant summary judgment in defendants’ favor.
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1 “To escape summary dismissal of an OPMA claim, the plaintiff
2 must produce evidence showing (1) members of a governing
3 body (2) held a meeting of that body (3) where that body took
 action in violation of OPMA, and (4) the members of that body
 had knowledge that the meeting violated the statute.”

4 *Eugster II*, 118 Wn. App. at 424, 76 P.3d at 763-64. If a party produces uncontroverted
5 affidavits regarding the contents of an executive session, the Court may rely on the affidavits
6 in granting summary judgment. *Cathcart v. Andersen*, 10 Wn. App. 429, 436-37, 517 P.2d
7 980, 985 (1974). Plaintiffs cannot produce the necessary evidence to avoid summary
8 dismissal.

9 Here the affidavits of all three Commissioners, and all other attendees of the session,
10 indicate that the executive session discussion was limited to its announced purpose,
11 discussion of real estate matters. (Oliver Decl. ¶ 3; Wolfe Decl. ¶ 3; Baker Decl. ¶ 5.) The
12 Commissioners discussed whether the terms required in the *proposed* lease should be revised
13 in light of information received during the workshop and comment periods. Any such
14 change would likely have a negative effect on the value of the lease. (Estuesta Decl. ¶ 4;
15 Coleman Decl. ¶ 4; Lowe Decl. ¶ 6.) And if such discussion had been made public, then the
16 value obtained by the public for the lease could have been lowered via, for example,
17 competitive offers from other ports. (*Id.*)

18 These subjects fit within the executive session topic provided for by RCW
19 42.30.110(c), which provides a body may go into executive session “[t]o consider the
20 minimum price at which real estate will be offered for sale or lease when public knowledge
21 regarding such consideration would cause a likelihood of decreased price. However, final
22 action selling or leasing public property shall be taken in a meeting open to the public”
23 Although “price” is not defined by the statute, the Court may use a dictionary to define it.
24 *See, e.g., S. Martinelli & Co., Inc. v. Washington State Dep’t of Revenue*, 80 Wn. App. 930,
25 938, 912 P.2d 521, 525 (1996). The dictionary defines “price” as “[t]he amount of money or
26 other consideration asked for or given in exchange for something else; the cost at which

1 something is bought or sold,” Black’s Law Dictionary (9th ed. 2009), or simply as “[t]he
2 consideration given for the purchase of a thing.” Black’s Law Dictionary 1353 (4th ed.
3 1951). Thus it was proper for the Commissioners to discuss lease terms that were not strictly
4 monetary, such as the amount of pollution liability insurance to be carried. These terms are
5 part of the consideration that TSJV would give for the lease.

6 The uncontradicted declarations of all the attendees of the executive session show that
7 no final action, and no deliberation on whether to approve the lease, was taken during the
8 July 22 executive session. (*See* Allan Decl. ¶ 4, listing attendees.) Thus the session
9 complied with RCW 42.30.110(c)’s requirement that “final action selling or leasing public
10 property shall be taken in a meeting open to the public. . . .” There was no vote or decision
11 on the lease. (Oliver Decl. ¶ 4; Wolfe Decl. ¶ 4; Baker Decl. ¶ 5; Coleman Decl. ¶ 6; Allan
12 Decl. ¶ 6; Boyden Decl. ¶ 6; Lowe Decl. ¶ 4; Smith Decl. ¶ 4; Wagner Decl. ¶ 4; Estuesta
13 Decl. ¶ 5; Schiller Decl. ¶ 3; Marler Decl. ¶ 4; Brooks Decl. ¶ 4; Mattix Decl. ¶ 3; Shuck
14 Decl. ¶ 5; Jacobs Decl. ¶ 4.) There was not any discussion or deliberation on whether to
15 approve the lease. (*Id.*) The Commissioners and other Port staff did not know at the
16 conclusion of the July 22 executive session how the vote would go. (Oliver Decl. ¶ 6; Wolfe
17 Decl. ¶ 4; Coleman Decl. ¶ 7; Allan Decl. ¶ 8; Boyden Decl. ¶ 7; Lowe Decl. ¶ 5; Smith
18 Decl. ¶ 8; Wagner Decl. ¶ 5; Estuesta Decl. ¶ 6; Schiller Decl. ¶ 3; Marler Decl. ¶ 4; Brooks
19 Decl. ¶ 5; Mattix Decl. ¶ 4; Shuck Decl. ¶ 6; Jacobs Decl. ¶ 5.) Commissioner Wolfe did not
20 know how his *own* vote would go. (Wolfe Decl. ¶ 4; Coleman Decl. ¶ 7; Smith Decl. ¶ 5;
21 Estuesta Decl. ¶ 6.) These affidavits are sufficient to establish summary judgment against the
22 OPMA claims. *Cathcart*, 10 Wn. App. at 436-37, 517 P.2d at 985; *Eugster I*, 110 Wn. App.
23 at 221, 232, 39 P.3d at 380, 384 (noting the trial court “dismissed Mr. Eugster’s complaint as
24 a matter of law, after reviewing evidence consisting entirely of affidavits and largely
25 affirming”). With regard to Counts 3 and 4, aimed at Commissioner Oliver’s announcement,
26 the evidence supports the finding that Commissioner Oliver simply misspoke. (Oliver Decl.

¶ 5.) Under *Eugster I*, such claims about the form of an announcement are definitively mooted when the procedure is corrected. *Eugster I*, 110 Wn. App. at 227, 39 P.3d at 386.

II. Summary judgment should be granted on the SEPA claims.

A. The EFSEC Act exempts the Port's lease approval action from SEPA.

Plaintiffs' first SEPA claim fails as a matter of law since it is barred by the EFSLA. The Port's lease approval action is not subject to SEPA's procedural requirements.

Specifically, section 14 of the EFSEC Act, RCW 80.50.180, provides: "Except for actions of the council under chapter 80.50 RCW, all proposals for legislation *and other actions* of any branch of government of this state, including . . . *municipal and public corporations* . . . to the extent . . . [the] action involved *approves, authorizes, permits* . . . the *location, financing or construction* of any energy facility subject to certification under chapter 80.50 RCW, *shall be exempt from the 'detailed statement' required by RCW 43.21C.030*. Nothing in this section shall be construed as exempting any action of the council from any provision of chapter 43.21C RCW." (Emphasis added).

The oil terminal is a facility subject to EFSEC. The EFSLA applies to construction of "energy facilities." RCW 80.50.060(1). This includes "[f]acilities which will have the capacity to receive more than an average of fifty thousand barrels per day of crude or refined petroleum or liquefied petroleum gas which has been or will be transported over marine waters" RCW 80.50.020(12)(d). The TSJV terminal fits this bill. It is proposed to have an initial capacity of 120,000 barrels per day, twice the EFSLA threshold, with eventual

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1 capacity of 360,000 bpd, and the oil is proposed to be transported over marine waters,
2 namely the Columbia River and the Pacific Ocean. (Wagner Ex. D; Lowe Ex. B at 1.)²

3 The Port's approval of the lease is an "action" of a "municipal corporation" covered
4 by RCW 80.50.180. To the extent the lease can be read to "authorize, approve," or "permit"
5 the "location, financing, or construction" of the TSJV terminal, every reason that it could
6 possibly be subject to SEPA, it is instead exempted from SEPA by RCW 80.50.180. The
7 statute has determined that the Port need not prepare an environmental impact statement.
8 The EIS should be, and will be, prepared by EFSEC. (Lowe Ex. C at 2, stating "[a]n
9 Environmental Impact Statement is required under RCW 43.21C.030(2)(c) and will be
10 prepared.")

11 This provision of the EFSLA also excuses the Port from preparing a "threshold
12 determination" such as a determination of significance or a determination of non-
13 significance. The purpose of a threshold determination is the "decision by the responsible
14 official of the lead agency whether or not an EIS is required for a proposal that is not
15 categorically exempt." WAC 197-11-797. The EFSEC Act has determined that an EIS is not
16 required for the Port's action in approving the lease. Having the Port make its own
17 determination would be unnecessary, inefficient, and duplicative.

18 In *Snohomish County v. State*, 69 Wn. App. 655, 670, 850 P.2d 546, 555 (1993),
19 Division I held that because certain forest practices were "generally exempt from preparation
20 of an EIS, it logically follows that no intermediate steps need be taken." *Snohomish* reasoned
21 that the very purpose of the preliminary steps was to facilitate the preparation of an EIS, so
22

23 ² The EFSLA does not define "marine waters." Another statute, RCW 43.372.010(9),
24 defines "marine waters" as "aquatic lands and waters under tidal influence, including
25 saltwaters and estuaries to the ordinary high water mark lying within the boundaries of the
26 state. This definition also includes the portion of the Columbia river bordering Pacific and
Wahkiakum counties . . ." See also *In re Tortorelli*, 149 Wn.2d 82, 92, 66 P.3d 606, 610
(2003) (holding, in the context of the Submerged Lands Act that the term "marine" waters
"encompasses navigable waters other than seas"). The dictionary defines "marine" as "of or
relating to the commerce of the sea." *Id.* By any definition, the shipments at issue would
pass over marine waters.

1 when a statute, RCW 76.09.050(1)(d), exempted the practice from an EIS, the intermediate
2 steps would be pointless. The same is true here.

3 The exemption is consistent with the intent of the EFSLA to establish a “one stop”
4 process for permitting major energy projects. If every component of such projects were
5 subject to its own SEPA analysis, the Legislature’s goal of expedited, efficient and
6 comprehensive review would be undermined. The exemption is also consistent with WAC
7 197-11-050(2), which provides that “[t]he lead agency shall be the agency with main
8 responsibility for complying with SEPA’s procedural requirements and shall be *the only*
9 *agency* responsible for: (a) The threshold determination; and (b) Preparation and content of
10 environmental impact statements.” (Emphasis added.) EFSEC has assumed lead agency
11 status on the Vancouver terminal. (Lowe Ex. C at 2.) Thus, under both the EFSLA and
12 SEPA regulations, compliance with SEPA’s procedures is the responsibility of ESFEC.

13 Plaintiffs’ claim would frustrate EFSEC’s purpose by breaking apart the consolidated
14 process established by its statute. Segmenting the lease from the project would, in this
15 instance, also be inconsistent with SEPA principles of comprehensive environmental review,
16 principles that the EFSEC Act is designed to preserve. The SEPA regulations make clear
17 that “phased review” of a project is appropriate in limited situations, particularly when the
18 first phase is a framework and the second is more project-specific. WAC 197-11-060(5)(c).
19 Phased review is “not appropriate” if “[i]t would merely divide a larger system into
20 exempted fragments or avoid discussion of cumulative impacts” WAC 197-11-
21 060(5)(d)(ii). The courts disfavor attempts to “piecemeal” a project’s SEPA review.
22 *E. Cnty. Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 441, 105 P.3d 94, 99 (2005).
23 Doing a review of the lease in isolation could present the same dangers of piecemealing.
24 Thus dismissing the first SEPA claim would further SEPA principles favoring
25 comprehensive review.
26

1 The Port's lease approval is exempt from SEPA's procedures, so Count 5 fails as a
2 matter of law.

3
4 **B. The lease cannot limit the range of reasonable alternatives to be
considered by EFSEC and the governor.**

5 Plaintiffs' sixth claim alleges that the approval of the TSJV lease violates WAC 197-
6 11-070(1)(b), which prohibits any agency from taking action before issuance of an EIS that
7 would "[l]imit the choice of reasonable alternatives." This claim fails on the facts and the
8 law.

9 As described above, the operative portions of the lease are entirely dependent on the
10 SEPA process. TSJV's possession of the property and payment of market rate rent are
11 contingent on the Governor's approval of the project. The approval can only happen after
12 EFSEC completes its EIS and makes a recommendation to the Governor. And the lease has
13 no binding effect on EFSEC. EFSEC, as the lead SEPA agency, cannot be limited by a lease
14 that it is not a party to. Nor can plaintiffs claim that Governor Inslee, the ultimate
15 decisionmaker, would be bound by a lease that is contingent on his decisions.

16 A "reasonable alternative" is "an action that could feasibly attain or approximate a
17 proposal's objectives, *but at a lower environmental cost* of decreased level of environmental
18 degradation. Reasonable alternatives may be those over which an agency with jurisdiction
19 has authority to control impacts, either directly, or indirectly through requirement of
20 mitigation measures." WAC 197-11-786, as quoted in *PUD No. 1 of Clark County v.*
21 *Pollution Control Hearings Board*, 137 Wn. App. 150, 161, 151 P.3d 1067, 1072 (2007)
22 ("*Clark PUD*").³ WAC 197-11-070(1)(b) is designed to prevent environmental impacts from
23 being locked in before they are fully studied.

24
25 ³ The Port was a plaintiff in the *Clark PUD* case and took the position, while the law
26 in the area was still unsettled, that *Clark PUD* had impermissibly limited the range of
reasonable alternatives. The Port's position in that case was overruled by the Court of
Appeals and the decision in *Clark PUD* is settled law.

1 The caselaw shows that the Port's approval of a lease, conditioned on environmental
2 review, does not limit the range of reasonable alternatives. *Clark PUD* is instructive. There,
3 the plaintiffs argued that issuance of an exploratory well permit, and the PUD's expenditure
4 of funds on exploratory drilling, would limit reasonable alternative sites for a wellfield. *Id.*
5 The court disagreed because the permit grant did not have any bearing on whether Ecology
6 would eventually grant a wellfield permit. *Id.* Additionally, while the court noted that
7 reasonable alternatives could be limited if the PUD "was forced to put all of its financial
8 resources in one project," the \$109,000 spent on test wells was a "small fraction" of the
9 overall project and so did not limit the range of reasonable alternatives. *Id.* at 162-63.

10 Here, the lease does not limit EFSEC's ultimate discretion to issue a site certificate,
11 nor does it bind the Governor. Financially, the amounts involved during the SEPA process
12 are likewise a small fraction of the overall project, plus EFSEC itself has no financial
13 commitment. The EFSEC process is presumptively limited to twelve months from the
14 application to the recommendation to the Governor. RCW 80.50.100(1)(a). The Governor
15 generally has 60 days to consider the application, though he or she may ask the council to
16 reconsider its work. RCW 80.50.100(3). The first 12 months of the lease require payment of
17 a total of \$360,000 in rent. (Allan Ex. G ¶ 1.D.) This is less than one half of 1% of the
18 project's potential cost, less than 1% of the total rent anticipated if the project is built (Allan
19 Ex. E at 4), and less than one half of 1% of the Port's annual budget (Allan Ex. E at 6). If
20 EFSEC review extends as far as 24 months, the total amount of rent at that point is \$840,000,
21 still less than 1% of the total project cost and less than 1% of the Port's budget for that
22 period. (See Allan Ex. G ¶ 1.D.) Thus the financial commitment cannot rise to the level of
23 limiting the reasonable range of alternatives.

24 Similarly to the TSJV lease, a memorandum of understanding in *International*
25 *Longshore and Warehouse Union, Local 19 v. City of Seattle*, 176 Wn. App. 512, 309 P.3d
26 654, 661 (2013), "[id] not preclude consideration of alternate sites during SEPA review;

1 indeed, it expressly anticipates that the review process will consider at least the alternative of
2 Seattle Center as well as a ‘no action’ alternative.” The memorandum thus complied with
3 WAC 197-11-070. Here the lease does not restrict any element of the SEPA process, and the
4 same range of alternatives is open to EFSEC’s consideration, including at minimum the no
5 action alternative. See WAC 197-11-440(5). Like the memorandum at issue in *International*
6 *Longshore*, and unlike the classification decision at issue in *Lands Council v. Wash. State*
7 *Parks & Rec. Comm’n*, 309 P.3d 734, 744 (Wn. App. 2013), the Port’s lease approval has not
8 “effectively approved” the project as a whole. Only the Governor has that power.

9 *International Longshore* cites with approval the Federal caselaw such as *Conner v.*
10 *Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988), and *WildWest Inst. v. Bull*, 547 F.3d 1162
11 (9th Cir. 2008), holding that agencies are precluded from making an “irreversible or
12 irretrievable commitment of resources” before completing an EIS under the National
13 Environmental Policy Act (“NEPA”). *Bull*, 547 F.3d at 1168-69, holds that the limitation of
14 alternatives is equivalent to avoiding an irreversible or irretrievable commitment. “NEPA is
15 substantially similar to SEPA, [so] Washington Courts may look to federal caselaw for SEPA
16 interpretation.” *Clark PUD*, 137 Wn. App. at 158, 151 P.3d at 1070. *Bull* is particularly
17 persuasive in interpreting WAC 197-11-786 because it construes a Federal regulation,
18 40 C.F.R. § 1506.1(a)(2), with the same language on limiting reasonable alternatives as in
19 WAC 197-11-786, 947 F.3d at 1168.

20 *Bull*’s facts are analogous as well. The court held that the Forest Service did not
21 irretrievably commit resources when it spent over \$200,000 marking trees that were to be cut
22 down after the timber sale at issue was approved. *Id.* at 1169. “[T]he Forest Service’s
23 expenditure of \$208,000 to pre-mark trees was clearly not so substantial an investment that it
24 limited such choice.” *Id.* Similarly, the initial lease payments are not so substantial that they
25 have limited the eventual choices to be made in implementing the project.

1 In *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000), the court stated that conditioning
2 a contract on environmental review, like the Port did here, precludes any irreversible or
3 irretrievable commitment of resources. The National Oceanic and Atmospheric
4 Administration (“NOAA”) signed an agreement with the Makah tribe providing that NOAA
5 would actively support the Makah’s efforts to obtain a whaling quota and would participate
6 in whale harvest. *Id.* at 1144. “Although it could have, NOAA did not make its promise to
7 seek a quota . . . and to participate in the harvest conditional upon a NEPA determination that
8 the Makah whaling proposal would not significantly affect the environment.” *Id.* This
9 failure to condition the contract constituted an irretrievable commitment. Here, the Port
10 explicitly conditioned the lease on TSJV’s receipt of the appropriate permits, which will
11 require preparation of an EIS by EFSEC. The Port’s approval of the lease was at every step
12 premised on the requirement that TSJV would go through the full environmental process.
13 Since obtaining the permits is a condition precedent to the full operation of the lease, the Port
14 retains absolute authority to terminate the lease if the permits are not obtained. (Allan Ex. G
15 ¶ 2.D.)

16 Under *Metcalf*, these conditions avoid limiting the range of reasonable alternatives.
17 *Center for Env’tl. Law & Policy v. U.S. Bureau of Reclamation*, 715 F. Supp. 2d 1185, 1195
18 (E.D. Wn. 2010), *aff’d*, 655 F.3d 1000 (9th Cir. 2011), similarly held that obtaining water
19 right permits without actually diverting water was not an irreversible commitment. This
20 corresponds to the lease, which grants TSJV a contingent right to develop the Port property,
21 but does not allow TSJV possession until the EFSEC process, and full SEPA review, are
22 completed. *See Longshore*, 309 P.3d at 661 (citing the Ninth Circuit decision in
23 *Reclamation*). The Bureau of Reclamation, like the Port, retained “absolute authority” to
24 determine whether the project would commence prior to completion of the environmental
25 review process. 655 F.3d at 1006 (quoting *Friends of Southeast’s Future v. Morrison*,
26 153 F.3d 1059, 1063 (9th Cir.1998)); *see also Conner*, 848 F.2d at 1447-48 (holding that

1 leases reserving “absolute authority” to the agency pending environmental review did not
2 constitute an irreversible or irretrievable commitment of resources).

3 The TSJV lease is like the “no surface occupancy” leases approved in *Conner*. TSJV
4 is not allowed to occupy the property until the completion of environmental review, just as
5 the lessees in *Conner* had to seek further approval to “occupy[] or us[e] the surface of the
6 leased land.” 848 F.2d at 1447. The Ninth Circuit held that “the sale of an NSO lease cannot
7 be considered the go/no go point of commitment at which an EIS is required. What the
8 lessee really acquires with an NSO lease is a right of first refusal, a priority right much like
9 the one granted in *Sierra Club v. FERC*[], 754 F.2d 1506 (9th Cir. 1986)]. This does not
10 constitute an irretrievable commitment of resources.” *Id.* at 1448. Nor does the Port’s lease
11 to TSJV.

12 **III. Plaintiffs are not entitled to attorney fees.**

13 In Washington, a party may recover attorney fees “only if authorized by contract,
14 statute, or a recognized ground in equity.” *Humphrey Indus., Ltd. v. Clay St. Assoc., LLC*,
15 176 Wn.2d 662, 676, 295 P.3d 231, 238 (2013). Plaintiffs seek attorney fees under two
16 statutes, the OPMA, RCW 42.30.120(2), and SEPA, RCW 43.21C.75(9). (Amended Compl.,
17 Prayer for Relief, ¶ M.) However, neither statute authorizes plaintiffs to recover fees in this
18 case.

19 The OPMA requires a party to “prevail[] against a public agency in any action in the
20 courts” before being entitled to attorney fees. RCW 42.30.120(2). SEPA is stricter.
21 RCW 43.21C.075(9) allows an award of attorney fees only to a “prevailing party,” and then
22 only “if the court makes specific findings that the legal position of a party is frivolous and
23 without reasonable basis.” *Id.* Plaintiffs cannot meet either element. The Court should
24 dismiss both requests for attorney fees since plaintiffs are not prevailing parties. If the Court
25 grants the summary judgment motion, defendants will be the prevailing parties.
26

1 Plaintiffs may argue that they are OPMA prevailing parties, despite dismissal of their
2 claims, under *Eugster I*. In that case, the Court of Appeals remanded the claim for attorney
3 fees even though it dismissed the claims on the merits as moot. The court found, “we believe
4 it can reasonably be inferred that Mr. Eugster’s actions at the Council meeting prevented
5 what seems conceded, that the Procedure without correction would have violated the OPMA.
6 Taking President Higgins’s statements in a light most favorable to Mr. Eugster, it can be said,
7 considering the January 5 Memo, and the timing and sequence of events, that by virtue of
8 Mr. Eugster’s stubbornness, the offending part of the Procedure was abandoned at the
9 Council meeting.” *Eugster I*, 110 Wash. App. 212, 227, 39 P.3d 380, 386 (2002). The court
10 found Mr. Eugster “may be viewed as having fostered OPMA principles through his
11 actions.” *Id.* at 228, 39 P.3d at 387. In light of Eugster’s fostering of OPMA principles, the
12 court instructed fact-finding to determine whether a “proscribed meeting took place.” *Id.*

13 This case has none of the unique circumstances present in *Eugster I*. Plaintiffs did
14 not “foster OPMA principles” by preventing the Commissioners from adopting any improper
15 procedures. To the extent that the Court could find that the Port improperly announced the
16 July 22 executive session, the Port has already corrected the procedure on its own initiative.
17 The correction was due to the Port’s commitment to transparency and compliance with the
18 OPMA, not to any actions by the plaintiffs, much less their “stubbornness.” As detailed
19 above, plaintiffs here cannot establish that a proscribed meeting took place. The Port’s
20 public vote on July 23, its immediate revision of the executive session announcement
21 procedure, and its conduct of a new vote on October 22 preclude a fee award. As stated in
22 *Eugster I*, the court should not review whether a “[p]rocedure would have violated the
23 OPMA had it not been abandoned and superseded before [the plaintiff] filed [the] lawsuit.”
24 *Eugster I*, 110 Wn. App. at, 227, 39 P.3d at 386. As described above, all potential OPMA
25 violations were resolved on July 23, well before suit was filed. The Port also revised its
26 announcement procedures well before suit was filed, on August 13.

1 If the court awards any OPMA attorney fees, it should cut off the fees at the point any
2 violations were cured. This date is as early as July 23 and no later than October 22. In
3 *Protect the Peninsula's Future v. Clallam Cnty.*, 66 Wn. App. 671, 678, 833 P.2d 406, 410
4 (1992), the plaintiffs "established at trial that the Commission had taken an 'action' on
5 August 15 and that, therefore, a violation of the Act had occurred. Consequently, [the
6 plaintiff] is entitled to an award of attorney's fees. The fees should, however, be limited to
7 the fees chargeable for time spent before any settlement was reached with Clallam County."
8 Here any fees should be limited to time spent before the claims were rendered moot.

9 Plaintiffs may also claim they are entitled to attorney fees under the Equal Access to
10 Justice Act, RCW 4.84.340-.360 ("EAJA"). The EAJA does not apply to this case. For one,
11 EAJA requires a party to prevail and to show that the defendants' position was not
12 substantially justified. RCW 4.84.350(1). Plaintiffs could not make such a showing here.
13 Moreover, EAJA provides for attorney fee awards only in a "judicial review of agency
14 action. . . ." *Id.* "Agency action" for EAJA purposes "means agency action as defined by
15 chapter 34.05 RCW." RCW 4.84.340(2). Chapter 34.05 defines the scope of agency action
16 to include only a "state board, commission, department, institution of higher education, or
17 officer, authorized by law to make rules or to conduct adjudicative proceedings. . . ."
18 RCW 34.05.010(2). The Port, as a municipal corporation, is not a state agency subject to
19 Washington's Administrative Procedure Act. Accordingly, the Port's actions do not invoke
20 the fee-shifting provisions of the EAJA.

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CONCLUSION

Plaintiffs' OPMA claims have been rendered moot by the Port's July 23 public vote and its October 22 re-vote on the TSJV lease. The lease approval decision is exempted by the EFSEC Act from SEPA procedural requirements. The approval of a conditional lease does not limit the range of reasonable alternatives. Thus plaintiffs' claims should be dismissed in their entirety.

DATED this 6th day of December, 2013.

MARKOWITZ, HERBOLD, GLADE
& MEHLHAF, P.C.

By: 

David B. Markowitz, *pecially admitted*
Lawson E. Fite, WSBA # 44707
Kristin M. Asai, *pecially admitted*

Of Attorneys for Defendants

COLUPV357185

ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2013, I have made service of the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** on the parties listed below in the manner indicated:

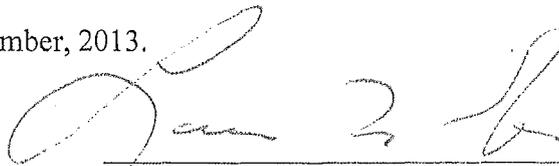
Brian A. Knutsen
Smith & Lowney, PLLC
917 SW Oak Street, Suite 300
Portland, OR 97205

- U.S. Mail
- Facsimile
- Hand Delivery
- Overnight Courier
- Email - briank@igc.org

Elizabeth H. Zultoski / Eric D. Lowney
Smith & Lowney, PLLC
2317 E John Street
Seattle, WA 98112
Attorneys for Plaintiffs

- U.S. Mail
- Facsimile
- Hand Delivery
- Overnight Courier
- Email - elizabethz@igc.org
briank@igc.org

DATED this 6th day of December, 2013.



Lawson E. Fite, WSBA # 44707
Attorneys for Defendants

RECEIVED

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Original Filed

MAR 28 2014

MAR 27 2014

MARKOWITZ, HERBOLD,
GLADE & MEHLHAF, P.C.

Scott G. Weber, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

COLUMBIA RIVERKEEPER; SIERRA
CLUB; and NORTHWEST
ENVIRONMENTAL DEFENSE CENTER,

No. 13-2-03431-3

Plaintiffs,

~~PROPOSED~~ ORDER ON
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
MOTION FOR PARTIAL STAY
OF DISCOVERY

vs.

PORT OF VANCOUVER USA; JERRY
OLIVER, Port of Vancouver USA Board of
Commissioners President; BRIAN WOLFE,
Port of Vancouver USA Board of
Commissioners Vice President; and NANCY
I. BAKER, Port of Vancouver USA Board of
Commissioners Secretary,

Defendants.

THIS MATTER came for hearing on January 10, 2014 before the Court, the
Honorable David E. Gregerson, on defendants' Motion for Summary Judgment pursuant to
CR 56(c) as to plaintiffs' claims arising under Washington's Open Public Meetings Act
("OPMA") and State Environmental Policy Act ("SEPA"), and on defendants' Motion for
Partial Stay of Discovery. Plaintiffs were represented by Brian A. Knutsen, Miles Johnson,
and Elizabeth Zultoski, and defendants were represented by David Markowitz and Lawson
Fite. The Court heard oral argument of counsel and considered the following documents and
other evidence:

1 - ~~PROPOSED~~ ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND MOTION FOR PARTIAL
STAY OF DISCOVERY

MARKOWITZ, HERBOLD,
GLADE & MEHLHAF, P.C.
SUITE 2005 PROWESS CENTER
1211 SW FIFTH AVENUE
SEASIDE, OREGON 97138-3700
(503) 795-2055

- 1 1. Defendants' Motion for Summary Judgment;
- 2 2. Declaration of Michelle Allan;
- 3 3. Declaration of Commissioner Nancy I. Baker;
- 4 4. Declaration of Patty Boyden;
- 5 5. Declaration of Katy Brooks;
- 6 6. Declaration of Todd Coleman;
- 7 7. Declaration of Jeff Estuesta;
- 8 8. Declaration of Addison Jacobs;
- 9 9. Declaration of Alicia Lowe;
- 10 10. Declaration of Julianna Marler;
- 11 11. Declaration of Mary Mattix;
- 12 12. Declaration of Commissioner Jerry Oliver;
- 13 13. Declaration of Mike Schiller;
- 14 14. Declaration of Curtis Shuck;
- 15 15. Declaration of Alastair Smith;
- 16 16. Declaration of Theresa Wagner;
- 17 17. Declaration of Commissioner Brian Wolfe;
- 18 18. Plaintiffs' Response to Defendants' Motion for Summary Judgment;
- 19 19. Declaration of Brian A. Knutsen;
- 20 20. Declaration of Brent Vandenhuevel;
- 21 21. Defendants' Reply in Support of Motion for Summary Judgment;
- 22 22. Supplemental Declaration of Todd Coleman;
- 23 23. Defendants' Motion for Partial Stay of Discovery;
- 24 24. Declaration of Lawson Fite; and
- 25 25. Plaintiffs' Response to Defendants' Motion for Partial Stay of Discovery.
- 26 The Court, being fully advised, hereby enters the following ORDER:

2 - **[PROPOSED] ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND MOTION FOR PARTIAL
STAY OF DISCOVERY**

MARKOWITZ, HERBOLD,
GLADE & MERTZAY, P.C.
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3005

- 1 The Court finds that the Energy Facilities Site Locations Act, RCW 80.50 180,
2 exempts the execution of the lease at issue in this action from procedures under
3 SEPA. The Court further finds that the contingencies contained in the lease ensure
4 that the execution of the lease does not limit the reasonable range of alternatives to be
5 considered in SEPA review of the project. Accordingly, Defendants' Motion for
6 Summary Judgment is GRANTED as to plaintiffs' Fifth and Sixth Causes of Action;
- 7 2. The Court finds that the corrective actions taken by defendants, including the public
8 votes on July 23 and October 22, 2013, and adoption of a revised executive session
9 announcement procedure beginning on August 13, 2013, render moot plaintiffs'
10 requests for injunctive relief under the OPMA. Defendants' Motion for Summary
11 Judgment is GRANTED as to plaintiffs' requests for injunctive relief on their First,
12 Second, Third, and Fourth Causes of Action pertaining to any OPMA violations;
- 13 3. Defendants' Motion for Summary Judgment is GRANTED as to plaintiffs' request
14 for a declaratory judgment that defendants' decision to approve the lease for a
15 petroleum products facility at the Port of Vancouver USA is null and void;
- 16 4. The Court finds, with respect to the remainder of plaintiffs' First, Second, Third, and
17 Fourth Causes of Action, that the present record does not demonstrate that discovery
18 would be inappropriate or fruitless. The Court therefore declines ruling on
19 defendants' Motion for Summary Judgment on these claims and GRANTS plaintiffs'
20 CR 56(f) request for continuance;
- 21 5. Defendants' Motion for Partial Stay of Discovery is DENIED WITHOUT
22 PREJUDICE.

23 IT IS SO ORDERED.

24 DATED this 21st day of March, 2014.

25 /s/ David E. Gregerson

26 _____
Hon. David E. Gregerson

3 - [PROPOSED] ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND MOTION FOR PARTIAL
STAY OF DISCOVERY

MARKOWITZ, HERBOLD,
GLADE & MEHURAF, P.C.
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3720
1503; 255 3085

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Superior Court Judge
Clark County Superior Court

Presented by:

MARKOWITZ, HERBOLD, GLADE &
MEHLHAF, P.C.

By: 

David B. Markowitz, *pecially admitted*
Lawson E. Fite, WSBA #44707
Krislin M. Asai, *pecially admitted*

Of Attorneys for Defendants

Approved as to form, notice of presentation waived:

SMITH & LOWNEY, PLLC

By: 

Brian A. Knutsen, WSBA #38806
Elizabeth H. Zultoski, WSBA #44988

COLUMBIA RIVERKEEPER

Miles Johnson, *pecially admitted*

Of Attorneys for Plaintiffs

COLUPV388380

4 - [PROPOSED] ORDER ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND MOTION FOR PARTIAL
STAY OF DISCOVERY

MARKOWITZ, HERBOLD,
GLADE & MEHLHAF, P.C.
SUITE 3000 PACWEST CENTER
12.11 SW FIFTH AVENUE
PORTLAND OREGON 97204-3710
(503) 285-3055

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Honorable David E. Gregerson (Dept. 2)
Set: July 24, 2015 at 1:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

COLUMBIA RIVERKEEPER; SIERRA CLUB; and NORTHWEST ENVIRONMENTAL DEFENSE CENTER)	No. 13-2-03431-3
)	
Plaintiffs,)	PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
)	
v.)	
)	
PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver USA Board of Commissioners President; BRIAN WOLFE, Port of Vancouver USA Board of Commissioners Vice President; and NANCY I. BAKER, Port of Vancouver USA Board of Commissioners Secretary,)	
)	
Defendants.)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

KAMPMEIER & KNUTSEN, PLLC
833 S.E. Main St., Suite 327; Mail Box 318
Portland, OR 97214
(503) 841-6515

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. MOTION.....1

II. INTRODUCTION.....1

III. LEGAL BACKGROUND.....3

 A. OPMA Overview.....3

 B. OPMA’s Narrow Exception for Executive Sessions.....5

 C. OPMA Applies to Meetings of the Board Where
 Action is Taken.....6

IV. STATEMENT OF FACTS.....6

 A. The Proposed Crude-by-Rail Facility.....6

 B. Defendants’ Secret Deliberations on the Project.....8

 C. Procedural History.....11

V. ISSUES.....13

VI. EVIDENCE.....13

VII. ARGUMENT.....14

 A. Standard of Review.....14

 B. Defendants Violated OPMA by Excluding the
 Public from Seven Meetings.....15

 1. OPMA only allows executive sessions to
 discuss the “minimum price” at which
 real estate will be offered.....15

 a. Minimum price.....16

 b. Any information affecting the price.....17

 c. Likelihood of decreased price.....19

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- 2. Defendants violated OPMA by excluding the public from at least seven meetings on the crude-by-rail facility.....19
 - a. The unlawful March 26, 2013 executive session.....20
 - b. The unlawful April 9, 2013 executive session.....20
 - c. The unlawful July 9, 2013 executive session.....24
 - d. The unlawful July 16 and 17, 2013 executive sessions.....25
 - e. The unlawful July 22, 2013 executive session.....26
 - f. The unlawful July 23, 2013 executive session.....28
- C. The Port Violated OPMA by Failing to Properly Announce the July 22, 2013 Executive Session.....29
- D. The Lease and its Terms are Null and Void.....30
 - 1. The Court should reconsider its mootness ruling.....31
 - 2. The lease and its terms are a legal nullity.....32
 - 3. The public votes did not validate the lease.....35
- E. Riverkeeper has Standing to Bring this Action.....38
- VIII. CONCLUSION.....39

1 **I. MOTION.**

2 Plaintiffs Columbia Riverkeeper, the Northwest Environmental Defense Center, and
3 the Sierra Club (collectively “Riverkeeper”) hereby move the Court under CR 56 for summary
4 judgment on their First, Third, and Fourth Causes of Action—each of which alleges violations
5 of the Open Public Meetings Act (“OPMA”). *See Riverkeeper’s Second Am. Compl.* (“Sec.
6 Am. Compl.”), ¶¶ 53-55; ¶¶ 58-63.¹ Riverkeeper requests that the Court enter declaratory
7 relief determining that Defendants Port of Vancouver USA and its Board of Commissioners—
8 Jerry Oliver, Nancy Baker, and Brian Wolfe—(collectively “Defendants”) violated OPMA by
9 repeatedly excluding the public from Board meetings where deliberations on a proposed lease
10 for a petroleum storage and transport facility occurred. Given the pervasive nature of these
11 violations throughout the development of the project, Riverkeeper further requests the Court
12 declare the Defendants’ approval of the lease null and void.² Finally, Riverkeeper requests the
13 Court enter declaratory relief determining that Defendant Jerry Oliver violated OPMA by
14 failing to publically announce the time a July 22, 2013, executive session would conclude and
15 by failing to publically announce a valid purpose and each actual purpose for which members
16 of the public were excluded from that executive session.

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19 **II. INTRODUCTION.**

20 The right of the public to be present and to be heard during all phases of enactments by
21 boards and commissions [sic] is a source of strength in our country.... [T]hese specified
22 boards and commissions, through devious ways, should not be allowed to deprive the
23 public of this inalienable right to be present and to be heard at all deliberations wherein
24 decisions affecting the public are being made.

24 ¹ Riverkeeper does not intend to pursue its Second Cause of Action.

25 ² The Court previously ruled that Riverkeeper’s request for injunctive relief on the OPMA
26 claims was rendered moot by Defendants’ second vote to approve the lease. As explained
27 below, Riverkeeper respectfully requests the Court reconsider that decision in light of
28 subsequently discovered evidence of much more extensive OPMA violations.

1 *Cathcart v. Andersen*, 85 Wn.2d 102, 108 (1975) (quoting *Board of Pub. Instruction v. Doran*,
2 224 So. 2d 693 (Fla. 1969)).³ OPMA mandates that the public has access to all stages of the
3 decision-making processes of our elected officials. The Port of Vancouver USA (“Port”) and
4 its Board of Commissioners (the “Board”) repeatedly violated the statute by deliberating on
5 plans to develop the nation’s largest “crude-by-rail” terminal in a series of private meetings.

6 *Before the project was even announced to the public*, Defendants had already met
7 behind closed doors numerous times to discuss essentially every aspect of the proposal to build
8 a massive petroleum storage and transport facility on public property near downtown
9 Vancouver, Washington. Remarkably, there was even a secret meeting in which the
10 *developers of the project* were allowed to pitch the proposal to the Board. That meeting
11 included discussion on all aspects of the proposal—including safety and other public concerns.
12 By the time the public was finally informed of the project, it was already well-developed and
13 proceeding with a significant amount of inertia. However, the OPMA violations did not cease
14 there, as Defendants continued to exclude the public from meetings in which significant
15 deliberations occurred right up until the morning of the Board’s vote to approve the lease.
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18 Defendants take the untenable position that these private meetings were lawful under
19 OPMA’s narrow exception that allows executive sessions to “consider the minimum price at
20 which real estate will be offered for...lease when public knowledge regarding such
21 consideration would cause a likelihood of decreased price.” RCW § 42.30.110(1)(c).
22 According to Defendants, this provision allows them to exclude the public from any discussion
23 on any topic where public knowledge could affect the price they ultimately obtain for a lease.
24

25 ³ OPMA was modeled after California’s and Florida’s open meetings laws. 1971 Wash. Op.
26 Atty. Gen. No. 33, at 2. Thus, Washington courts will also look to decisions from those
27 jurisdictions for guidance on interpreting the OPMA. *Wood v. Battle Ground Sch. Dist.*, 107
Wn. App. 550, 560 (2001).

1 Defendants candidly admit that their interpretation would allow them to secretly discuss
2 essentially *any topic* related to a lease.

3 Defendants' interpretation is contrary to the plain language of the statute—which
4 narrowly circumscribes the executive sessions to “consider *the minimum price* at which real
5 estate will be offered”—and is wholly inconsistent with the Washington Supreme Court’s
6 instruction to construe OPMA’s exemptions narrowly to foster public access to government.
7 The Court should grant summary judgment determining that Defendants violated OPMA to
8 ensure that the public is not unlawfully excluded from future meetings, including those
9 involving this proposed crude-by-rail facility.

11 OPMA demands that actions taken in violation of the statute, including unlawful
12 deliberations, be considered a legal nullity. The proposed lease that was presented to the
13 Board for a vote was the product of numerous meetings conducted in violation of OPMA.
14 Accordingly, the lease itself should be declared null and void. Such relief is necessary to
15 remedy the extensive OPMA violations that enabled Defendants to hide important discussions
16 and information from the public at key stages of the lease negotiations. Only by voiding the
17 lease and requiring Defendants to disclose to the public their unlawful deliberations before
18 holding another vote will the intent of OPMA be fulfilled.

20 **III. LEGAL BACKGROUND.**

21 **A. OPMA Overview.**

22 OPMA is intended “to allow the public to view the decisionmaking process at all
23 stages.” *Cathcart*, 85 Wn.2d at 107. In enacting the statute, the Washington State Legislature
24 declared:
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26 that all public commissions, boards, councils, committees, subcommittees,
27 departments, divisions, offices, and all other public agencies of this state and

1 subdivisions thereof exist to aid in the conduct of the people's business. It is
2 the intent of this chapter that their actions be taken openly and that their
deliberations be conducted openly.

3 The people of this state do not yield their sovereignty to the agencies which
4 serve them. The people, in delegating authority, do not give their public
5 servants the right to decide what is good for the people to know and what is not
good for them to know. The people insist on remaining informed so that they
may retain control over the instruments they have created.

6 RCW 42.30.010. This is "some of the strongest language used in any legislation." *Equitable*
7 *Shipyards, Inc. v. State*, 93 Wn.2d 465, 482 (1980). "The purposes of [OPMA] are...remedial
8 and shall be liberally construed." RCW 42.30.910; *and see Cathcart*, 85 Wn.2d at 107.

9
10 The centerpiece of the OPMA is the requirement that "[a]ll meetings of the governing
11 body of a public agency shall be open and public and all persons shall be permitted to attend
12 any meeting of the governing body of a public agency, except as otherwise provided in
13 [OPMA]." RCW 42.30.030. A governing body subject to OPMA includes a multimember
14 commission of a public agency, which includes a municipal corporation of the state. RCW
15 42.30.020(1)-(2). A "meeting" under OPMA is one "at which action is taken." RCW
16 42.30.020(4). "Action" is defined broadly to include "the transaction of the official business
17 of a public agency by a governing body including but not limited to...deliberations,
18 discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3); *and*
19 *see Eugster v. City of Spokane*, 110 Wn. App. 212, 225 (2002) ("*Eugster I*") (action definition
20 includes a "nonexclusive list of examples"). Thus, an action is not limited to "final action,"
21 but rather occurs if "[t]he governing body members...merely 'communicate about issues that
22 may or will come before [them] for a vote.'" *Eugster I*, 110 Wn. App. at 225 (citing *Wood v.*
23 *Battle Ground Sch. Distr.*, 107 Wn. App. 550, 565 (2001)).
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1 OPMA demands strict enforcement at *all stages* of government deliberations—not just
2 for the final vote:

3 Every thought, as well as every affirmative act, of a public official as it relates
4 to and is within the scope of his official duties, is a matter of public concern;
5 and it is the entire *decision-making process* that the legislature intended to
6 affect by the enactment of the [OPMA]. This act is a declaration of public
7 interest. Every step in the decision-making process, including the decision
8 itself, is a necessary preliminary to formal action.

9 **** **

10 If the [OPMA] is to be effective, it must apply at the point where authority is
11 exercised, as well as where it is initially lodged.

12 *Cathcart v. Andersen*, 10 Wn. App. 429, 435-36 (1974) (citation omitted), *affirmed*, 85 Wn.2d
13 at 107.

14 **B. OPMA’s Narrow Exception for Executive Sessions.**

15 OPMA contains narrow exceptions that permit a governing body to go into executive
16 session to discuss specific issues. RCW 42.30.110. One of these exceptions is:

17 To consider the minimum price at which real estate will be offered for sale or
18 lease when public knowledge regarding such consideration would cause a
19 likelihood of decreased price.

20 RCW 42.30.110(1)(c). It is well-established that OPMA’s mandate for liberal construction in
21 furtherance of the statute’s general rule of openness carries with it a “concomitant intent that
22 its exceptions be narrowly confined.” *See Miller v. City of Tacoma*, 138 Wn.2d 318, 324
(1999) (quoting *Mead Sch. Dist. No. 354 v. Mead Educ. Ass’n*, 85 Wn.2d 140, 145 (1975)).

23 “Before convening in executive session, the presiding officer of a governing body shall
24 publicly announce the purpose for excluding the public from the meeting place, and the time
25 when the executive session will be concluded.” RCW 42.30.110(2). Once an executive
26 session is lawfully convened, a governing body is “not immunized from the provisions of the
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1 [OPMA];” rather, it is “required to limit its action in executive session to that authorized by the
2 relevant exception.” *Miller*, 138 Wn.2d at 327. Thus, “only the action explicitly specified by
3 the exception may take place in executive session” and “any action taken beyond the scope of
4 the exception violate[s] the [A]ct.” *Id.*

5 **C. OPMA Applies to Meetings of the Board Where Action is Taken.**

6 The Port is a municipal corporation of the state and therefore a public agency. *See*
7 RCW 42.30.020(1)(b) (public agency includes municipal corporation); RCW 53.04.060 (Port
8 districts are a municipal corporation of the state); *Tyrpak v. Daniels*, 124 Wn. 2d 146, 152
9 (1994) (Port of Vancouver is a municipal corporation). The Board, which is comprised of
10 three commissioners, is the governing board of the Port. *See* RCW 53.12.010(1) (powers of a
11 port district are exercised through a board of three commissioners); *and see* RCW 42.30.020(2)
12 (“Governing body” is defined to include the “multimember...commission...of a public
13 agency”). Thus, the Board is subject to OPMA and any meeting with two or more
14 Commissioners present at which action is taken “shall be open and public and all persons shall
15 be permitted to attend.” *See* RCW 42.30.030; *and see Wood*, 107 Wn. App. at 564 (“OPMA is
16 not violated if less than a majority of the governing body meet.”).

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19 **IV. STATEMENT OF FACTS.**

20 **A. The Proposed Crude-by-Rail Facility.**

21 The Port owns approximately four miles of riverfront property along the Columbia
22 River west of downtown Vancouver, Washington. *Second Am. Compl.*, ¶ 8 (allegation); *Defs.’*
23 *Answer to Sec. Am. Compl.* ¶ 8 (admitting allegation). Tesoro-Savage Joint Venture (“Tesoro-
24 Savage”) was formed by two private companies—Tesoro Corporation and Savage
25 Companies—to develop a massive petroleum products storage and transportation facility at the
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1 Port. *Sec. Am. Compl.*, ¶ 26 (allegation); *Defrs. ' Answer to Sec. Am. Compl.* ¶ 26 (admitting
2 allegation). Tesoro-Savage seeks to transform this area near downtown Vancouver into the
3 “hub for the distribution of North American crude oil to West Coast refining centers.” *Decl. of*
4 *Theresa Wagner in Support of Defs. ' Mot. for Summ. J.* (“Wagner Decl.”), Ex. E, p. 1.

5 The proposed crude-by-rail facility would receive petroleum products by rail, offload
6 and store the material in tanks, and then load the petroleum products onto marine vessels. *See*
7 *Wagner Decl.*, Exhibit D, p. 1. The project would include a rail unloading facility, seven
8 storage tanks with a combined capacity of over 2.25 million barrels (94.5 million gallons), and
9 vessel loading operations, all of which would be located on approximately forty-two acres of
10 Port property adjacent to the Columbia River. *See id.*; and *see Second Am. Compl.*, ¶ 26; and
11 *see Defs. ' Answer to Sec. Am. Compl.* ¶ 26; *Decl. of Alicia Lowe in Support of Defs. ' Mot. for*
12 *Summ. J.* (“Lowe Decl.”), Ex. C., pp. 1-2. The project would receive up to 360,000 barrels of
13 petroleum product each day. *See Lowe Decl.*, Ex. B., p. 1, Ex. C., p. 1. An average of up to
14 four trains a day would bring oil to the Port, each train consisting of 110 cars and measuring
15 one and a half miles in length. *See Second Am. Compl.*, ¶ 26; and *see Defs. ' Answer to Sec.*
16 *Am. Compl.* ¶ 26; and *Wagner Decl.*, Ex. D, p. 1.

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19 Needless to say, the proposal to develop the nation’s largest crude-by-rail facility on
20 the banks of the Columbia River near downtown Vancouver has attracted an enormous amount
21 of public attention and concern. Such concerns have only grown with the recent increase in
22 rail car explosions attributed to what is likely the same type of oil that will be transported
23 through this proposed facility. *See, e.g., Third Decl. of Brian Knutsen in Support of Pls. ' Mot.*
24 *for Summ. J.* (“Third Knutsen Decl.”), Ex. W, pp. 101:13-17; and *see id.* at Ex. Y. The public
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1 therefore has an overwhelming interest in observing and participating in all deliberations and
2 decisions of their elected officials related to this project. *See, e.g., id.* at Exs. C, D, E, F, T.

3 **B. Defendants' Secret Deliberations on the Project.**

4 The Port began seriously pursuing the development of a crude-by-rail facility in 2012
5 with the issuance of a request for proposals. *See id.* at Ex. A, pp. 55:2-18, 57:3-9. After
6 receiving responses from potential tenants in early 2013, the Port ranked them on a scoring
7 “matrix.” *Id.* at Ex. A, p. 57:3-9; *id.* at Ex. V, p. 3. The matrix was provided to the Board,
8 which then apparently discussed the potential tenants and selected Tesoro-Savage—all outside
9 of the public eye. *See id.* at Ex. U, pp. 81:3-15, 83:8-17, 84:22-85:4 (Commissioner Oliver
10 recalling seeing the matrix and “probably” discussing potential tenants); *id.* at Ex. W, pp.
11 69:18-70:14, 71:15-19 (Commissioner Wolfe recalled seeing the matrix and that Port staff
12 “went through it, explaining each company”); *and id.* at Ex. A, p. 66:12-21 (testifying the
13 matrix “may have been given to [the Commissioners] in Executive Session in hard copy”). As
14 Commissioner Oliver testified, the Board considered “a number of factors” in a private
15 meeting—including the “operating experience of the potential tenant”—that lead them to
16 decide to pursue negotiations with only Tesoro-Savage. *See id.* at Ex. U, p. 58:6-19.

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19 By the time Defendants announced the proposed crude-by-rail facility to the public on
20 April 22, 2013, they had already met multiple times in private to discuss numerous key aspects
21 of the proposed crude-by-rail facility and the concerns of the Board. *See id.* at Ex. A, p. 146:5-
22 9; and *Wagner Decl.*, Ex. E, p. 1. Remarkably, one such secret meeting was held on April 9,
23 2013, to introduce the Board to representatives of Tesoro, Savage, and BNSF, to discuss far
24 ranging topics about the proposed project, and to allow the Board to ask questions of these
25 potential developers regarding the risks and benefits of the project. *Third Knutsen Decl.* at Ex.
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1 I. The Port cagily admits that these discussions were “slightly broader” than what is
2 appropriate. *Id.* at Ex. A, p. 174:18-175:18.

3 Defendants held a public meeting on July 22, 2013—the evening before the Board was
4 scheduled to vote on the proposed lease—during which around forty members of the public
5 testified, the vast majority of which opposed the project. *See Decl. of Brett VandenHeuvel in*
6 *Support of Pls.’ Resp. to Defs.’ Mot. for Summ. J.*, ¶ 3. Before the public testimony,
7 Commissioner Oliver announced the Board’s intent to have an executive session that evening
8 to discuss “what they had heard during public testimony and how that impacts their
9 deliberations.” *Id.* at ¶ 5. Commissioner Oliver announced after the public testimony that the
10 Board would be going into executive session for “a minimum of fifteen minutes” to “review
11 the comments and discuss them.” *Id.* at ¶¶ 4-5. The Board voted to approve the lease the next
12 morning and, in response to this lawsuit, again on October 22, 2013. *Third Knutsen Decl.*, Ex.
13 U, p. 131:4-7; *id.* at Ex. T, pp. 1, 19.

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16 The Port excluded the public from at least twelve meetings during which matters
17 related to the lease were discussed before first voting to approve it on July 23, 2013. *See*
18 *Second Am. Compl.*, ¶ 27; *and see Defs.’ Answer to Sec. Am. Compl.* ¶ 27; *and see Third*
19 *Knutsen Decl.*, Ex. B, pp. 3-6; *id.* at Ex. C-D. Unfortunately, the public will never know most
20 of what occurred behind closed doors on these occasions, as the Board and other witnesses
21 claim to remember very little about these executive sessions. *See, e.g., Third Knutsen Decl.*,
22 Ex. X, pp. 66:19-67:6 (Commissioner Baker did not remember being at or details about
23 meetings with other Commissioners that included discussions of the lease); *id.* at Ex. W, pp.
24 112:19-113:2 (Commissioner Wolfe testified that he does not “have any memory of a specific
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1 executive session”); *id.* at Ex. U, pp. 121:24-122:4 (Commissioner Oliver testified that the July
2 22 meeting is the one he had “some recollection of”).

3 Despite their general lack of memory, the Commissioners testified that, during
4 executive sessions, they can cover a broad range of topics, such the potential terms of the
5 proposed lease, whether the project “accomplishes port goals,” background information on a
6 potential tenant, a potential tenant’s “environmental position and history,” risks of the projects,
7 and environmental impacts. *Id.* at Ex. U, pp. 49:11-16; 50:14-20; *id.* at Ex. X, pp. 23:22-24:9,
8 24:18-25:3. Commissioner Oliver explained they “seek to ascertain, in executive session, the
9 operational characteristics of a prospective tenant and whether or not they have a good
10 operating record, both—on a variety of factors: Safety, environmental, fiscally, to name just a
11 few. Those kinds of things would be presented to us by staff in recommending a potential
12 tenant or potential business opportunity.” *Id.* at Ex. U, pp. 138:17-139:1 (emphasis added).
13 The Commissioners also testified that they ask questions in executive session. *Id.* at Ex. X, p.
14 24:6-9; *id.* at Ex. U, pp. 67:17-25, 142:22-143:7; *id.* at Ex. W, p. 41:7-16; *id.* at Ex. I, p. 2.
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17 The Commissioners were also able to recall that the following actions were taken in
18 executive session at some point during the lease process: learning about the lease proposal and
19 specific lease terms, asking questions to clarify lease terms, discussing specific lease terms and
20 concerns, considering whether “this was an appropriate use of port properties and port
21 facilities,” and discussing safety and environmental issues. *Id.* at Ex. U, pp. 66:14-16, 67:17-
22 25, 68:3-69:4, 72:4-9; *id.* at Ex. X, p. 44:5-8; *id.* at Ex. W, p. 41:7-16. Commissioner Oliver
23 testified that there were “a great many” issues they considered about the lease in executive
24 session, such as his personal concerns about “[s]afety, financial impact..., economic
25 development potential, [and] actual number of jobs.” *Id.* at Ex. U, pp. 142:22-143:9.
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1 These private meetings provide the Port staff with implicit approval to proceed with a
2 particular course of action, such as specific project, tenant, or lease term. Since the
3 Commissioners are not directly involved in the negotiations with potential tenants, the Port's
4 staff are responsible for providing the Commissioners with enough information and getting
5 their feedback to ensure that the lease eventually presented is acceptable to and supported by
6 them. *See, e.g., Id.* at Ex. U, p. 20:2-7; *id.* at Ex. A, pp. 31:13-32:5 (explaining that each
7 conversation with the Commissioners “help[s] [the staff] to formulate” what to recommend
8 and “definitely ha[s] an impact” on staff). Indeed, Commissioner Baker testified that when the
9 Port staff presented the idea of a crude-by-rail terminal, the Commissioners told the staff to
10 research it—and that this probably occurred in an executive session. *Id.* at Ex. X, p. 26:1-10.
11 Similarly, Commissioner Wolfe explained that although the Port staff did not need formal
12 approval to pursue negotiations with Tesoro Savage, the staff “need to know from each of us
13 whether or not there was a fatal flaw in pursuing the investigation.” *Id.* at Ex. W, 34:16-35:11.
14 Commissioner Oliver explained that Port staff learns whether he will accept a specific lease
15 term through his “complaining or commenting on the issue” and that when the Commissioners
16 “express concerns” to the staff “individually and collectively,” “a change would come back.”
17 *Id.* at Ex. U, pp. 22:13-18, 119:14-120:11.

20 The Port also uses executive sessions to “guard against...poaching” of potential
21 tenants—they hide “basically all topics,” including the names of potential tenants, from the
22 public. *Id.* at Ex. W, p. 72:27-73:21.

24 **C. Procedural History.**

25 Riverkeeper commenced this lawsuit on October 2, 2013, and filed its first amended
26 pleading on October 31, 2013. The First Amended Complaint alleged four OPMA violations,
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1 all related to the executive session held July 22, 2013—that Defendants violated OPMA by:
2 (1) excluding the public from the July 22, 2013, meeting; (2) collectively determining to
3 approve the lease during the executive session; (3) failing to announce the time at which the
4 executive session would conclude; and (4) failing to announce each actual purpose and a valid
5 purpose for holding the executive session. *First Am. Compl.*, ¶¶ 50-60. Riverkeeper also
6 alleged two violations of the State Environmental Policy Act (“SEPA”). *Id.* at ¶¶ 61-64.
7

8 Defendants moved for summary judgment on all claims on December 6, 2013, before
9 responding to Riverkeeper’s first set of discovery requests. *See Defs.’ Mot. for Summ. J.* The
10 Court granted Defendants’ motion with respect to the SEPA claims,⁴ but granted Riverkeeper’s
11 request under CR 56(f) for a continuance of Defendants’ summary judgment motion with
12 respect to the OPMA claims. *Order on Defs.’ Mot. for Summ. J. & Mot. for Partial Stay of*
13 *Disc.*, p. 3 (March 26, 2014). The Court indicated during oral argument that there was a
14 “public benefit” to discovery given the “nature and the gravity and the scope of the decision
15 making.” *First Decl. of Elizabeth Zultoski in Support of Pls.’ Mot. to Compel*, ¶ 3, Ex. 2 p.
16 6:18-25. However, the Court found that Riverkeeper’s request for injunctive relief to have the
17 lease declared null and void under the OPMA claims was moot. *Id.*
18

19 Riverkeeper’s subsequent discovery efforts uncovered systemic OPMA violations by
20 Defendants throughout their development of this project. Riverkeeper therefore filed a Second
21 Amended Complaint to expand its First Claim for Relief by alleging that Defendants
22 unlawfully excluded the public from numerous meetings, in addition to that held on July 22,
23 2013, where the crude-by-rail project was discussed. *Sec. Am. Compl.*, ¶¶ 27-29, 55.
24

25 ⁴ The Court subsequently granted Riverkeeper’s CR 54(b) motion to certify an interlocutory
26 appeal of this SEPA ruling. *Final J. on Pls.’ Fifth & Seventh Claims for Relief* (April 1, 2014).
27 That appeal is currently pending before the Washington Court of Appeals, Division II.

1 Defendants' Answer to the Second Amended Complaint denies Riverkeeper's First and
2 Second Claims for Relief, but admits the violations alleged by the Third and Fourth Claims for
3 Relief—those alleging Defendants violated OPMA by failing to announce the time at which
4 the July 22, 2013, executive session would conclude and by failing to announce each purpose
5 for which that executive session was held. *See Defs.' Ans. Sec. Am. Compl.*, ¶¶ 60, 62-63.

6 **V. ISSUES.**

7
8 1. Whether Defendants violated OPMA on the following dates by excluding the
9 public from Board meetings where a wide range of topics were addressed beyond the
10 minimum price at which the lease for a crude-by-rail facility would be offered: March 26,
11 April 9, July 9, July 16, July 17, July 22, and July 23, 2013.

12 2. Whether Commissioner Oliver violated OPMA on July 22, 2013, by failing to
13 announce a valid purpose and each actual purpose of the executive session and by failing to
14 announce the duration of the executive session before excluding the public from a meeting
15 with the Board to discuss the proposed crude-by-rail facility and lease.

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17 3. Whether the lease should be declared null and void given that the public was
18 unlawfully excluded from numerous meetings where deliberations on significant issues
19 occurred at key points in the project development process.

20 **VI. EVIDENCE.**

21 This motion is based on the pleadings, declarations submitted on December 6, 2013 in
22 support of Defendants' Motion for Summary Judgment, and declarations submitted on
23 December 31, 2013 in support of Plaintiffs' Opposition to Defendants' Motion for Summary
24 Judgment. The motion is also based on the Third Declaration of Brian A. Knutsen, and the
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1 Declarations of Dan Serres, Marla Nelson, Don Steinke, and Linda McClain, which are
2 submitted with this motion.

3 **VII. ARGUMENT.**

4 **A. Standard of Review.**

5 Summary judgment is appropriate where the moving party shows that there are no
6 genuine issues of material fact and that the moving party is entitled to judgment as a matter of
7 law. CR 56; *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182 (1997). A
8 material fact is one that will affect the outcome under governing law. *Eriks v. Denver*, 118
9 Wn.2d 451, 456 (1992). Summary judgment should be granted “if reasonable persons could
10 reach but one conclusion.” *Wood*, 107 Wn. App. at 558.

12 A non-moving party “may not rely upon argumentative assertions or on having its
13 affidavits considered at their face value, for upon the submission by the moving party of
14 adequate affidavits the nonmoving party must set forth specific facts that sufficiently rebut the
15 moving party's contentions and disclose that a genuine issue of material fact exists.” *Island*
16 *Air, Inc. v. La Bar*, 18 Wn. App. 129, 136 (1977).

18 Under a liberally construed open government law such as OPMA with narrow
19 exemptions, “the burden of proof is on the agency to establish that a specific exemption
20 applies.” *See West v. Dep't of Natural Res.*, 163 Wn. App. 235, 242, (2011) (discussing the
21 burden under the Public Records Act) (citing *Daines v. Spokane County*, 111 Wn. App. 342,
22 346, 44 P.3d 909 (2002)); *and see In re Recall of Lakewood City Council*, 144 Wn.2d 583, 593
23 (2001) (dissent) (“The burden to establish an exception to the open meeting requirement rests
24 squarely on its proponent.”). Thus, Defendants should bear the burden of showing that
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1 OPMA's exception for an executive session allowed them to exclude the public from Board
2 meetings.

3 **B. Defendants Violated OPMA by Excluding the Public from Seven Meetings.**

4 Defendants are prohibited from excluding the public from Board meetings when any
5 communications, deliberations, discussions, considerations, reviews, or similar transactions of
6 official business related to the proposed Tesoro-Savage facility occur. *See supra* § III.C
7 (OPMA applicability). Defendants may lawfully exclude the public from such meetings only
8 if one of the narrow statutory exceptions applies. *See* RCW 42.30.110; *and see Miller*, 138
9 Wn.2d at 327.

11 Throughout the six months that the Port negotiated the lease with Tesoro-Savage,
12 Defendants excluded the public from at least seven Board meetings that involved key reviews,
13 deliberations, considerations, and communications about the proposed lease under the guise of
14 OPMA's "minimum price" exception.⁵ *See supra* § IV.B; *Third Knutsen Decl.*, Ex. B, pp. 4-6
15 (claiming RCW 42.30.110(1)(c) as the legal authority for all seven executive sessions at issue).
16 Defendants justify these private meetings with an egregiously expansive interpretation of the
17 "minimum price" exception that conflicts with the plain language of OPMA and numerous
18 court rulings interpreting the statute. The Court should reject such an interpretation.

20 **1. OPMA only allows executive sessions to discuss the "minimum**
21 **price" at which real estate will be offered.**

22 Under RCW 42.30.110(1)(c), Defendants may hold an executive session "[t]o consider
23 the minimum price at which real estate will be offered for sale or lease when public knowledge
24 regarding such consideration would cause a likelihood of decreased price." This narrowly

25 ⁵ Riverkeeper is moving for summary judgment on seven of the several executive sessions held
26 in 2013 that included discussions about the crude-by-rail facility. Riverkeeper reserves the
27 right to conduct additional discovery and establish additional violations at trial.

1 drafted exception to OPMA’s public access requirements allows discussion of one topic—the
2 minimum price.

3 Defendants contend this provision allowed discussion about any terms of the proposed
4 lease or other information that, if disclosed to the public, may somehow affect the value
5 eventually obtained for the lease. *See Third Knutsen Decl.*, Ex. A, pp. 23:25-24:17; and *Defs.’*
6 *Mot. for Summ. J.*, pp. 21-22. Topics that Defendants believe may be discussed during
7 executive sessions include environmental concerns, job creation, background information and
8 financial information about potential tenants, and risks of impacts from chemicals or spills.
9 *Third Knutsen Decl.*, Ex. A, pp. 47:23-48:16, 48:18-20, 49:9-15, 50:3-14, and 51:10-25.

11 Defendants’ interpretation adds language to the statutory exemption, relies on
12 conflicting and expansive definitions of “minimum price,” and ignores the word “likelihood.”
13 The Court should reject this interpretation as inconsistent with the plain language of the statute
14 and with the Washington Supreme Court’s instruction to construe exceptions narrowly to
15 effectuate OPMA’s broad purpose. *See Miller*, 138 Wn.2d at 324; and *Feature Realty, Inc. v.*
16 *City of Spokane*, 331 F.3d 1082, 1087, 1089-91 (2003). Rather, the Court should interpret
17 RCW 42.30.110(1)(c) to allow executive sessions only to consider the minimum price.

19 **a. Minimum price.**

20 The plain meaning of “price” is “[t]he amount of money expected, required, or given in
21 payment for something.”⁶ Similarly, the commercial real estate definition of “price” is “[t]he
22 dollar amount that was offered, asked, or actually paid for a property.”⁷ Any broader
23 definitions must be rejected because OPMA’s exceptions are to be narrowly construed. *See*,

24
25 ⁶ http://www.oxforddictionaries.com/us/definition/american_english/price

26 ⁷ Realtors’ Commercial Alliance Glossary of Commercial Real Estate Terms
27 [http://www.realtor.org/ncommsrc.nsf/files/commercial%20real%20estate%20glossary.pdf/\\$file/commercial%20real%20estate%20glossary.pdf](http://www.realtor.org/ncommsrc.nsf/files/commercial%20real%20estate%20glossary.pdf/$file/commercial%20real%20estate%20glossary.pdf), p. 27.

1 e.g., *Mead*, 85 Wn.2d at 143-45 (rejecting broad dictionary definition of term “emergency” in
2 OPMA exception in favor of narrower definition); and see *Feature Realty*, 331 F.3d at 1087,
3 1089-91; and see *Miller*, 138 Wn. 2d at 324. Thus, the term “price” is limited to monetary
4 consideration and does not, as Defendants’ repeatedly assert, include “lease terms that [are] not
5 strictly monetary.” *Def.’ Reply in Support of Mot. for Summ. J.*, p. 6; and see *Third Knutsen*
6 *Decl.*, Ex. A, pp. 25:5-17 (“price” “can be more than” “the dollars and cents that [they] would
7 charge for the lease”).
8

9 The modifier “minimum” not only indicates that the Legislature intended “price” to be
10 a monetary component, but it also limits price issues that may be discussed in executive
11 sessions. The plain meaning of “minimum” is the “least or smallest amount or quantity
12 possible, attainable, or required.”⁸ Thus, Defendants may meet in executive session to
13 consider the lowest price, or the floor, for which they will offer the lease. This does not permit
14 discussions on any other aspects of price—such as an opening price offer, a target price during
15 negotiations, a range of prices for consideration, issues that could change a price offer, or
16 actions necessary to get a higher price.
17

18 **b. Any information affecting the price.**

19 OPMA allows Defendants to “[t]o consider the minimum price” in executive session.
20 RCW 42.30.110(1)(c). Under this exception, the Legislature did not allow consideration of
21 any information or any matters that may affect the minimum price in executive session. In
22 contrast, the Legislature did allow consideration of “matters affecting” national security. See
23 RCW 42.30.110(1)(a). The State Legislature could have easily drafted a similarly broad
24 exception for executive sessions to discuss matters affecting the minimum price for which real
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26 _____
27 ⁸ See http://www.oxforddictionaries.com/us/definition/american_english/minimum

1 estate will be offered; but it did not. By using different language for these exceptions, which
2 clearly have divergent levels of sensitivity and import, the Legislature evinced its intent not to
3 authorize executive sessions for any “matters affecting” the minimum price. *See Columbia*
4 *Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., PLLC*, 168 Wn.2d 421, 435-36
5 (2010) (that Legislature specifically provided for something in one statutory provision and not
6 in another indicates an intention omission).

7
8 Ignoring this clear statutory language, the Port asserts that “minimum price” means any
9 “information” that if discussed publically could be used by a potential tenant or competitor to
10 drive down the price or result in a loss of the potential tenant; the Port further explains the
11 scope of “minimum price” as “anything that would affect those two issues.” *Third Knutsen*
12 *Decl.*, Ex. A, pp. 23:25-24:17; *and see id.* at 50:17-25. Defendants have explained their belief
13 that they may discuss any information if public knowledge would decrease the lease price.
14 *Third Knutsen Decl.*, Ex. A, 52:25-53:11 (appropriate discussion for executive session “is
15 anything, again, that would affect the likelihood of a lower price . . .”) (emphasis added).
16 Notably, Commissioner Baker could not think of *any* topics about a potential lease that could
17 not affect price. *Id.* at Ex. X, p. 61:23-24.

18
19 While there may certainly be a large range of information that could decrease a lease
20 price if disclosed to the public, the Legislature did not provide Defendants with such carte
21 blanche to hide all such information. Rather, the Legislature narrowly circumscribed the
22 discussions that could be shielded from the public to the “minimum price.” The Court should
23 reject Defendants’ invitation to ignore the term “minimum price” and rewrite the statute to
24 protect their bottom-line. *See Seattle v. Fontanilla*, 128 Wn.2d 492, 500 (1996) (every
25 statutory word must be given meaning).
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27

c. Likelihood of decreased price.

Under OPMA, Defendants may only discuss the “minimum price” if “public knowledge regarding such consideration would cause a *likelihood of decreased price*.” RCW 42.30.110(1)(c) (emphasis added). Nevertheless, Defendants have “no real process” for making a determination whether a topic to be discussed at executive session meets the “likelihood of decreased price” standard. *See Third Knutsen Decl.*, Ex. A, p. 44:22-45:13. Indeed, the Port conceded it does not make a specific “likelihood” determination for each topic in advance of executive sessions. *See id.*, Ex. A, p. 46:2-7. Rather, the Port relies on “a bit of dialogue” with staff and counsel ahead of time and then makes decisions “on the fly.” *Id.* at 44:1-17, 46:12-14. Further, in support of their Motion for Summary Judgment, Defendants merely argued that public knowledge of the discussion on July 22 “could have” lowered the value of the lease ultimately obtained. *Def.’ Motion for Sum. Judg.*, p. 21. The exception requires a “likelihood” of decrease, which is a much higher standard than a standard that allows a decrease that “could have” occurred. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21-22 (2008) (a likelihood standard is much less lenient than a possibility standard). At a minimum, OPMA requires more than Defendants’ vague and self-serving assertion that they just “know[] what’s within the guidelines of OPMA.” *See Third Knutsen Decl.*, Ex. A, p. 46:2-14.

2. Defendants violated OPMA by excluding the public from at least seven meetings on the crude-by-rail facility.

Defendants violated OPMA by excluding the public from at least seven meetings leading up to the July 23, 2013, vote on the lease. Each of these purported executive sessions included discussions that strayed beyond the “minimum price” at which the lease would be offered and therefore exceeded the scope of RCW 42.30.110(1)(c). *See Estey v. Dempsey*, 104

1 Wn.2d 597, 603 (1985) (“no de minimis exception to the [OPMA] exists”); *Miller*, 138 Wn.2d
2 at 327; and *Feature Realty, Inc.*, 331 F.3d at 1089; and RCW 42.30.020(3).

3 a. **The unlawful March 26, 2013 executive session.**

4 Defendants met behind closed doors on March 26, 2013, to present “to the
5 Commissioners the current status of the terms” of the lease and to discuss various details about
6 an exclusivity agreement with Tesoro-Savage (e.g., schedule and duration). *See Third Knutsen*
7 *Decl.*, Ex. G; and *id.* at Ex. A, pp. 94:10-25, 96:5-97:13. As to the lease terms, Defendants
8 represent that they discussed the “overall terms,” including “lease rates, the wharfage rates,
9 dockage rates, and rail maintenance, and rail fees because those were still in negotiation at that
10 point.” *Id.* at Ex. A, p. 98:15-21. While these issues arguably could be within the scope of the
11 OPMA exception—if the discussions were actually limited to the minimum amounts at which
12 the rates would be offered—the exclusivity agreement is plainly outside the permissible scope
13 of the OPMA “minimum price” exception. *See Miller*, 138 Wn.2d at 327 (“only the action
14 explicitly specified by the exception may take place in executive session”). Accordingly, the
15 Court should grant summary judgment determining that Defendants violated OPMA by
16 considering, reviewing, discussing, and deliberating on items outside the purview of RCW
17 42.30.110(1)(c) during the March 26, 2013 executive session. The Port’s decision to enter into
18 a contract limiting their negotiations to Tesoro-Savage was a significant step in this project and
19 the public should not have been excluded from meetings related thereto.
20
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22 b. **The unlawful April 9, 2013 executive session.**

23 Defendants held a purported executive session on April 9, 2013, for nearly three hours
24 of introductions, presentations, questions, and other discussions between nine representatives
25 of the project proponents—Tesoro, Savage, and BNSF—and the Commissioners. *See Third*
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27

1 *Knutsen Decl.*, Ex. H (meeting minutes); *and id.* at Ex. A, pp. 99:14-16, 109:9-12, 104:23-
2 105:16; *id.* at Ex. I; *see Second Am. Compl.*, ¶ 29; *and see Defendants' Answer to Sec. Am.*
3 *Compl.* ¶ 29. There was no public portion of this meeting, so the only publically available
4 information related to the meeting were the meeting minutes, which deceitfully represent that
5 only the Board and Port staff were in attendance. *See Third Knutsen Decl.*, Ex. H. This secret
6 meeting between the Board and the project proponents occurred before the project was even
7 announced to the public on April 22, 2013. *See id.* at Ex. A, pp. 144:20-22, 146:7-9. By the
8 end of the meeting, the Commissioners appeared excited about the project. *See id.* at Ex. L.

10 This meeting occurred pursuant to the following request from the Port to the
11 developers:

12 I would like you to consider a visit to the [Port] by some of your key executive
13 staff on **April 9, 2013** for an introduction with the Port Commissioners and
14 discussion with them in Executive Session (which is closed to any public)
regarding the project.

15 *Id.* at Ex. N (emphasis in original). The meeting began with a presentation by Port staff on the
16 project development, lease negotiations to date, and the last workshop with the
17 Commissioners. *Id.* at Ex. A, p. 106:4-16; *id.* at Ex. I, p. 2. Port staff also presented their
18 “May 2012 Six Hats” evaluation—which was an analytical process that evaluated “all of the
19 pluses, minuses, mitigations, and so forth” for the proposed crude-by-rail facility—and focused
20 on safety risk issues and their effects on Port facilities and customers. *Id.* at Ex. A, p. 106:19-
21 108:10; *id.* at Ex., I, p. 2. This was followed by introductions of the people present, needed
22 modifications to a Port rail loop, and the statement of interest process and subsequent selection
23 of Tesoro-Savage. *Id.* at Ex. A, pp. 109:9-110:19; *and see id.* at Ex. I., p. 2. The Port then
24 presented a PowerPoint covering a variety of topics, including the facility design, proposal
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1 highlights, the makeup of the project team, the project timeline, and control points. *See id.* at
2 Ex. J; *and see id.* at Ex. I, p. 2; *and see id.* at Ex. A, pp. 111:12-19, 118:23-123:14.

3 Tesoro and Savage both then provided their own PowerPoint presentations to the
4 Board. *See id.* at Ex. I, p. 2; *and see id.* at Ex. A, p. 111:12-19. These covered an even wider
5 range of topics, including safety, corporate priorities and capabilities, project objectives, and
6 economic evaluations and projections—a thorough sales pitch to the Board. *See generally id.*
7 at Ex. K. Port staff thought that Tesoro and Savage “did a very good job of delivering their
8 presentation...and engaging with the Commissioners with a genuine and open approach.” *Id.*
9 at Ex. I, p. 2; *see also id.* at Ex. L.

11 The Commissioners “had a number of questions” for Tesoro, Savage, and BNSF
12 following the presentations covering topics such as the proponents’ refineries, the stability of
13 the market, price, and safety. *See id.* at Ex. I, p. 2; *see id.* at Ex. L; *and see id.* at Ex. A, pp.
14 106:4-6, 112:12-113:14. Commissioner Baker addressed the number and types of jobs that
15 will supposedly be created, the number of trains that will move through the facility each day,
16 and the number of acres that the facility would occupy. *Id.* at Ex. A, pp. 132:13-134:6.
17 Commissioner Wolfe asked questions about the market variability and risk and the type of
18 crude oil that would move the facility—whether it would be “Bakken crude.” *Id.* at Ex. A, pp.
19 134:7-135:1. A “key” issue for Commissioner Wolfe discussed at the meeting was whether
20 Tesoro-Savage would only be handling their own product or whether it would be an open
21 facility. *Id.* at 135:2-18. Commissioner Wolfe asked additional questions about the
22 corrosiveness of the oil. *Id.* at 136:5-22. Commissioner Oliver’s questions related to the level
23 of investment and commitment from Tesoro-Savage, who would be responsible for
24 construction and management of the facility, whether local workers or people from out of town
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1 would be employed, whether Tesoro and Savage had worked together before, whether the
2 product would be exported, whether the facility would use new rail cars, and the type of water
3 vessels that would be used. *Id.* at 137:12-141:5. Representatives of Tesoro, Savage, and
4 BNSF provided the most information in response to the Commissioners' questions. *Id.* at Ex.
5 I, p. 2; *and see id.* at Ex. A, pp. 134:21-24, 135:23-136:4, 136:23-24, 139:14-16, 140:1-3.

6 Overall, discussions at the April 9, 2013, meeting covered essentially all aspects of the
7 project, including the number of trains and vessels expected at the facility, the impacts of
8 underground pipes, rail capacity and need for rail modification, safety risks, utilization of
9 underutilized facilities at the Port, the numbers and types of jobs expected, the type of oil for
10 transport and storage, the type of train cars to be used, impacts on other tenants, why the Port
11 chose Tesoro-Savage as the potential tenant, job creation, construction impacts, and variability
12 in the market. *See id.* at Ex. A, pp. 102:7-9, 102:22-103:15, 109:4-12, 121:25-122:10; 131:3-
14 141:16, 109:23-110:19; 128:15-129:1; *and see id.* at Ex. M.

15 The meeting wrapped up with the Port staff reminding the Commissioners that the
16 project was a "heavy lift"—a reference, in part, to whether the fossil fuel component of the
17 project would be a concern "as coal had been" *Id.* at Ex. A, pp. 113:15-114:9; *and id.* at
18 Ex. I, p. 2. There was also discussion of the then-upcoming public announcement of the
19 project "as a way to take the cap off the project and allow it to 'breathe' for a period of time."
20 *Id.* at Ex. I, p. 2. Before the Commissioners left, they received an invitation from Tesoro-
21 Savage to tour the crude oil transfer facility in Anacortes. *Id.* at Ex. A, p. 116:23-117:11.
22 According to Port staff, "[a]ll three Commissioners walked away excited about moving
23 forward and...ready to handle Tesoro/Savage [public] announcement on [April] 22nd..." *Id.* at
24 Ex. L (emphasis added).
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1 This unlawful secret meeting was clearly a very significant milestone for the project.⁹
2 These sort of first presentations and pitches by project proponents and initial questioning by
3 the Commissioners on issues they are particularly concerned with are the very sort of
4 deliberations for which OPMA demands public access. *See Cathcart*, 10 Wn. App. at 435-36.
5 The topics described above went well beyond the narrow statutory exemption. Even the Port
6 reluctantly questions the lawfulness of this meeting. *See Third Knutsen Decl.*, Ex. A, p.
7 174:18-175:18. Notably, the Port admits that certain background information about tenants
8 and marketplace issues are not an appropriate topic for executive session, which were both
9 topics discussed at this meeting. *Id.* at 50:17-52:24. The Court should grant summary
10 judgment determining that the Defendants violated OPMA by considering, discussing,
11 reviewing, and deliberating over issues at the April 9, 2013, meeting outside of that permitted
12 in executive sessions. *See Miller*, 138 Wn. 2d at 327 (“any action taken beyond the scope of
13 the exception violate[s] the [A]ct.”).
14
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16 **c. The unlawful July 9, 2013 executive session.**

17 Two weeks before the Commissioners were scheduled to vote on the lease, they met in
18 private for nearly an hour and a half, during which time they continued a “discussion around
19 the formation of the new...[joint venture], the LLC that [Tesoro and Savage] would operate
20 under and the risks associated with that.” *See Third Knutsen Decl.*, Ex. A, pp. 156:5-17; and
21 *see id.* at Ex. P (meeting minutes). Commissioner Wolfe testified that, although he did not
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23 ⁹ It is exceedingly unusual for the Board to allow individuals other than Port staff into
24 meetings from which the public is excluded. *See Third Knutsen Decl.*, Ex. A, p. 37:12-20
25 (twice in the last fourteen years). Remarkably, Commissioner Wolfe testified that he does not
26 even recall meeting with representatives of Tesoro-Savage in executive session, much less
27 testified that they have no recollection of the meeting. *See, e.g., id.* at Ex. U, p. 97:9-18; and
id. at Ex. X, p. 38:18-24.

1 recall when the discussions occurred, the Commissioners discussed “on more than one
2 occasion” concerns related to whether the new Tesoro-Savage “joint venture was merely a
3 shell without adequate assets to do the cleanup and things that [the Commissioners] were
4 concerned about.” *Id.* at Ex. W, p. 66:7-20.¹⁰ The formation of this joint venture and risks
5 associated therewith is beyond the “minimum price” for which the lease was to be offered and
6 therefore should have occurred in a public meeting. The Court should grant summary
7 judgment determining that Defendants violated OPMA by considering, discussing, and
8 deliberating about such topics during the July 9, 2013, executive session. *See Miller*, 138 Wn.
9 2d at 327.

11 **d. The unlawful July 16 and 17, 2013 executive sessions.**

12 Defendants held extensive two day executive sessions on July 16 and 17, 2013, totaling
13 over eight hours to discuss the proposed lease terms that had been negotiated at that point.
14 *Third Knutsen Decl.*, Ex. A, pp. 149:18-150:9; *and id.* at Ex. Q. This was one week before the
15 Board’s July 23, 2013, vote on the lease.

17 There were discussions “about a number of items” at these private meetings, including
18 “what types of crude would flow through the facility” and differences between those types, the
19 facility premises, timelines for operation of the facility and lease, construction start and finish
20 deadlines, whether extensions would be allowed, insurance requirements (property, liability,
21 and pollution insurance), and the “risk associated with any of the potential crude oil that could
22 be handled through the facility.” *Id.* at Ex. A, pp. 157:25-158:22. A document describing the
23

24 ¹⁰ Commission Wolfe testified that, although he could not recall specific dates, the Board
25 discussed the tragic crude-by-rail disaster in Lac-Megantic, Canada in executive session.
26 *Third Knutsen Decl.*, Ex. W, 67:4-18. The July 9, 2013, executive session was just a few days
27 after that incident and the same day Commissioner Wolfe was quoted in a newspaper article
discussing accident and the project. *See id.* at 60:22-61:25; *id.* at Ex. Y.

1 “Ground Lease Highlights” was used as an agenda and addressed all of the key lease terms
2 negotiated at that time, the majority of which were covered during the two days of executive
3 sessions. *See id.* at 160:5-161:17; *and id.* at Ex. O. Several other documents were provided to
4 the Board for discussion at these meetings, including a copy of the current version of the lease
5 terms. *See id.* at Ex. S.

6 Defendants also went through a number of typed-up questions related to concerns of
7 Commissioner Wolfe. *See id.* at Ex. A, pp. 161:24-162:6; *and see id.* at Ex. R. Concerns
8 discussed at the executive session included those related to “the size of the tanks and the risks
9 associated with the tanks” (such as those from vapors) and the Port’s ability to require newer
10 rail cars. *Id.* at Ex. A, p. 162:7-22.

12 These lengthy discussions about lease terms, risks of the project, the Commissioners’
13 concerns, and similar issues were not limited to the “minimum price” that the lease would be
14 offered. The public should not have been excluded from the Board’s consideration on these
15 important issues affecting the community—issues such as the safety of the rail cars to be used
16 to carry explosive oil through Vancouver. The Court should grant summary judgment
17 determining that Defendants violated OPMA by considering, reviewing, discussing, and
18 deliberating about issues outside of those authorized by RCW 42.30.110(1)(c) during the July
19 16 and 17, 2013, executive sessions. *See Miller*, 138 Wn. 2d at 327.

21 **e. The unlawful July 22, 2013 executive session.**

22 On July 22, 2013—the night before the public vote on the lease—Defendants held a
23 meeting that included presentations from the Port, public testimony, and an executive session.
24 *See id.* at Ex. E; *and id.* at Ex. A, p. 164:3-10. Approximately 30 to 40 members of the public
25 testified for about two hours, the vast majority of which opposed the project. *See id.* at Ex. E,
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1 pp. 4-10; *and id.* at Ex. A, p. 164:3-10; *and see Decl. of Brett VandenHeuvel in Support of*
2 *Pls. ' Resp. to Defs. ' Mot. for Summ. J.*, ¶ 3. This was a “long, lengthy public workshop”
3 attended by an “extraordinary” number of people from the public. *Third Knutsen Decl.*, Ex.
4 W, p. 107:14-21; *id.* at Ex. U, pp. 124:19-125:2.

5 The purpose of the executive session was to determine whether the public testimony
6 caused the Commissioners to want to add or modify the lease terms. *Id.* at Ex. W, p. 107:22-
7 25; *and id.* at Ex. A, p. 164:14-18. Indeed, the “the focal point of the whole meeting was [d]id
8 [the Defendants] learn anything in the public discussion that would cause [them] to want to
9 revisit some or all of the lease...” *Id.* at Ex. W, pp. 140:21-141:8 (emphasis added).

11 After the public was excluded, the Commissioners discussed various issues related to
12 the lease, including certain terms of the lease, the approval process for the facility’s operations
13 plan, the public comments, and safety and security concerns. *See Decl. of Brian A. Knutsen in*
14 *Support of Pls. ' Resp. to Defs. ' Mot. for Summ. J.* (“First Knutsen Decl.”), Exhibit 5, pp. 4, 6-
15 7, 9. Port staff “went . . . quickly over the general themes...heard as far as [public] concerns
16 and then asked the Commissioners if there were any additional terms that they wanted to have
17 changed.” *Third Knutsen Decl.*, at Ex. A, p. 165:4-18. The themes of the public comments
18 covered in the executive session were “safety, fossil fuel, and emissions.” *Id.* at p. 165:10-18.
19 Port staff questioned the Commissioners “we’ve heard a lot of comments tonight that are
20 concerned about safety relative to spills, explosions, and fossil fuels, are there any other terms
21 that the Commission needs to have put into this agreement before we bring it before you
22 tomorrow morning.” *Id.* at p. 167:11-24.

25 At this point, the “Commissioners were still concerned over the recent incident in
26 Quebec and how [they] could make sure that [they] felt comfortable that [they] had done
27

1 everything [they] could within [their] facilities to minimize any potential risk.” *Id.* at pp.
2 167:25-168:7. Commissioner Wolfe responded in the executive session by suggesting an
3 additional term that they “needed to have in the lease” that would require Port approval of the
4 facility’s safety and operations plan. *Id.* at pp. 164:14-165:3, 168:16-22; *see also id.* at Ex. U,
5 pp. 122:14-123:5 (Commissioner Oliver recalling considering changing a lease clause).
6 Finally, the Commissioners considered whether a vote should be delayed and they each stated
7 that they “were ready to go forward.” *Id.* at Ex. W, p. 141:19-142:3.

9 These discussions about public comments, an additional lease term, and whether the
10 Board was ready to vote should have occurred in a public meeting, as the minimum lease price
11 was not even discussed. *See id.* at 114:15-23. It is particularly egregious and insulting for the
12 Board to have excluded the public from their deliberations on the public comments after so
13 many people came to this meeting after work on a Monday night to provide the Board with
14 public testimony. The Court should grant summary judgment determining that the Defendants
15 violated OPMA by considering, discussing, and deliberating about topics outside those
16 authorized by RCW 42.30.110(1)(c) during the July 22, 2013, executive session. *See Miller,*
17 138 Wn.2d at 327.

19 **f. The unlawful July 23, 2013 executive session.**

20 Defendants met again in an executive session on July 23, 2013, for approximately an
21 hour, immediately before the public vote on the lease. *Id.* at Ex. F. During the private
22 meeting, Defendants “reviewed one clause . . . [that] was added to the lease that required [the
23 Port] to have the approval . . . [of] the operation and safety plan before [Tesoro-Savage] could
24 go into operation.” *Id.* at 170:16-23. Regarding this executive session, Commissioner Oliver
25 testified:
26

1 The lease was now in its complete form after the addition...that [they] had
2 discussed the previous evening. So now the lease was complete. We went
3 through it, I'm sure, if not line by line, then certainly clause by clause. And I'm
sure that staff solicited inquiry. And, if there was any, that was dealt with. And
then—and questions were asked and answered, I presume.

4 *Id.* at Ex. U, p. 131:1-132:11. The lease was then brought for a vote in a public session and
5 approved. *See id.* at 131:20-21.

6 The issues considered, reviewed, and discussed at this executive session, including an
7 additional term regarding approval over an operations plan, were not limited to the minimum
8 price at which the lease would be offered. The public should not have been excluded from
9 discussions related to why the Commissioners believe this lease term is adequate to address the
10 risks for which they are particularly concerned. The Court should grant summary judgment
11 finding that Defendants violated OPMA by excluding the public from the discussions on July
12 23, 2013. *See Miller*, 138 Wn. 2d at 327.

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15 **C. The Port Violated OPMA by Failing to Properly Announce the July 22, 2013 Executive Session.**

16 Riverkeeper's Third and Fourth Causes of Action allege that Commissioner Jerry
17 Oliver violated OPMA in his announcement of the July 22, 2013, executive session. The Port
18 does not deny these violations.

19
20 The Third Cause of Action alleges that Commissioner Oliver violated the OPMA by
21 failing to announce to the public the duration of the executive session. *Sec. Am. Compl.*, ¶ 60.
22 OPMA requires that, before going into executive session, the presiding officer must publicly
23 announce "the time when the executive session will be concluded." RCW 42.30.110(2). The
24 Port's minutes indicate that Commissioner Oliver announced around 9:42 p.m. at the July 22,
25 2013, meeting that the Commissioners "would be in executive session for at least 15 minutes."
26 *See Allan Decl.*, Exhibit C, p. 10. A more definite time was not announced. *See*

1 *VandenHeuvel Decl.*, ¶ 4. Defendants admit this violated the OPMA. *See Second Am. Compl.*,
2 ¶ 58-60; and see *Defendants' Answer to Sec. Am. Compl.* ¶ 60.

3 Further, the Port's minutes state that the executive session concluded nearly one hour
4 later at 10:41 p.m. *See Allan Decl.*, Exhibit C, p. 10. Thus, members of the public were left
5 with the choice of waiting around late on a Monday night to see whether the Board would
6 reconvene the public meeting, or leaving and forgoing an opportunity to observe any further
7 public deliberations that may occur. *See VandenHeuvel Decl.*, ¶ 6.

8
9 The Fourth Cause of Action alleges that Commissioner Oliver violated OPMA by
10 failing to announce a valid purpose for excluding the public from the July 22, 2013, executive
11 session and by failing to announce each actual purpose for excluding the public. *Sec. Am.*
12 *Comp.*, ¶¶ 61-63. OPMA requires that the presiding officer publicly announce before
13 convening an executive session "the purpose for excluding the public..." RCW 42.30.110(2).
14 The Port's minutes indicate that Commissioner Oliver announced that the Commission "would
15 be recessing into executive session for the purpose of discussing what the Commission had
16 heard." *Allan Decl.*, Exhibit C, p. 10; and see *VandenHeuvel Decl.*, ¶ 5. This was neither a
17 valid purpose for excluding the public nor a complete statement of the topics discussed. *See*
18 RCW 42.30.110(1) (listing purposes for which executive sessions may be held); and see *First*
19 *Knutsen Decl.*, Exhibit 5, pp. 4, 6-7, 9. Accordingly, Commissioner Oliver violated OPMA,
20 which the Defendants admit. *See Second Am. Compl.*, ¶ 63; and see *Defendants' Answer to*
21 *Sec. Am. Compl.*, ¶ 63.

22
23
24 **D. The Lease and its Terms are Null and Void.**

25 Given the pervasive nature of Defendants' OPMA violations throughout the
26 development of the project, the Court should declare Defendants' approval of the lease null
27

1 and void. “If the [OPMA] is to be effective, it must apply at the point where authority is
2 exercised, as well as where it is initially lodged.” *Cathcart*, 10 Wn. App. at 435-36, (emphasis
3 added), *affirmed*, 85 Wn.2d at 107 (“...the purpose of the [OPMA] is to allow the public to
4 view the decisionmaking process at all stages.”). It would undermine OPMA to allow the
5 lease to stand after it was repeatedly and extensively deliberated on during unlawful private
6 meetings merely because there was eventually a publicly displayed vote. Indeed, the
7 Washington Supreme Court has explained that “[s]uch a result is supported . . . by the
8 consideration that the violation of the [OPMA] should not be without consequence . . .” *See*
9 *Mead*, 85 Wn.2d at 145-146. The Board should not be allowed to vote to approve the lease
10 until they publically disclose the extent and content of their unlawful deliberations and conduct
11 the inquiry into potential tenants and lease terms *de novo*.
12

13 **1. The Court should reconsider its mootness ruling.**
14

15 In ruling on the Defendants’ summary judgment motion, the Court determined that
16 Riverkeeper’s requests for injunctive relief on the OPMA violations and for a declaration that
17 the lease is null and void were moot. *See Order on Defs.’ Mot. for Summ. J. & Mot. for*
18 *Partial Stay of Disc.*, p. 3 (March 26, 2014). At the time, Riverkeeper’s effective pleading was
19 its First Amended Complaint, which alleged OPMA violations related only to the July 22,
20 2013, meeting. Riverkeeper subsequently learned that Defendants held unlawful meetings at
21 every stage of the project development process during which they discussed key issues and
22 Riverkeeper therefore amended its pleadings to include these additional violations. *See Second*
23 *Am. Comp.*, ¶¶ 27-29, 54-55 (Dec. 1, 2014). To the extent the Court’s previous order on relief
24 applies to Riverkeeper’s new and expanded claims, the Court should reconsider its ruling
25
26
27

1 under CR 54(b)¹¹ in light of the newly discovered and much more extensive OPMA violations.
2 See *Coggle v. Snow*, 56 Wn. App. 499, 508 (1990) (trial court abused discretion by refusing to
3 evaluate the impact of newly submitted evidence on motion for reconsideration of a grant of
4 summary judgment).

5 **2. The lease and its terms are a legal nullity.**

6 “[A]ny action taken in closed meetings is null and void.” *Clark v. City of Lakewood*,
7 259 F.3d 996, 1012 (9th Cir. 2001). “[T]he Washington Supreme Court has...provided...a
8 clear roadmap...[i]f the action is not ‘explicitly specified’ in the [executive session] exception,
9 then such action must take place in public, or it is null and avoid.” *Feature Realty*, 331 F.3d at
10 1089 (citing *Miller*, 138 Wn.2d at 327). Thus, the actions Defendants took at the seven
11 executive sessions in violation of OPMA—including the discussions, deliberations,
12 considerations, and evaluations that occurred during those executive sessions—are null and
13 void. See RCW § 42.30.020(3) (defining “action” to include these tasks and not limiting the
14 definition to “final action”); *Cathcart*, 10 Wn. App. at 435-36 (“every thought... is a matter of
15 public concern” just as “[e]very step in the decision-making process...is a necessary
16 preliminary to formal action”). The Commissioners could not approve a proposed lease that
17 was the product of the numerous null and void actions taken behind closed doors, rendering the
18 lease ultimately approved by the Commissioners also “null and void.” See *Mason County v.*
19 *Public Employment Relations Commission*, 54 Wn. App. 36, 38 (1989), *rev. denied* 113 Wn.
20 2d 1013 (1989).

21 The Washington Court of Appeals decision in *Mason County* is instructive. At issue
22

23
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¹¹ Under CR 54(b), the Court may reconsider any order that adjudicates fewer than all claims
26 or the rights and liabilities of all parties until a final judgment is issued. See *Washburn v. Beatt*
27 *Equip. Co.*, 120 Wn.2d 246, 300 (1992).

1 was whether a collective bargaining agreement that “had been negotiated and formulated...at
2 meetings which did not comply with the requirements” of OPMA could later be ratified at a
3 public meeting. *Id.* at 37. The Court concluded that:

4 the public agency may not ratify the proposed agreement reached at meetings
5 conducted in violation of the Act because decisions resulting from those sessions and
6 the ultimate formulation of the proposed agreement are void. The County could not
ratify a void agreement . . .

7 *Id.* at 38. The facts presented here are analogous—the proposed lease was unlawfully
8 developed behind closed doors, rendering its ultimate formulation as a proposed lease void,
9 regardless of whether the lease was formally adopted in public. *Id.* Just as in *Mason County*,
10 Defendants cannot “ratify a void” lease. 54 Wn. App. at 38; *and see Clark*, 259 F.3d at 1012
11 (remedy for violating act is “declaring the actions...conducted behind closed doors null and
12 void”).
13

14 As explained above, Defendants used the executive sessions to consider a wide range
15 of issues, ensure that all of the Commissioners’ concerns were addressed, and modify the lease
16 terms as necessary to ensure the lease ultimately presented to the Commissioners would be
17 acceptable to them. *See supra*, § 7.b.2; *and see, e.g., Third Knutsen Decl.*, Ex. U, pp. 122:14-
18 123:5, *and id.* at Ex. W, pp. 141:19-142:3. By expressing their concerns and receiving
19 answers behind closed doors and outside of the public eye, Port staff tailored their negotiations
20 on the lease to ensure the terms chosen resulted in a positive outcome at the ultimate vote. *See*
21 *Third Knutsen Decl.*, Ex. U, pp. 20:2-7, 22:13-18, 119:14-120:11; *and id.* at Ex. X, p. 26:1-10;
22 *and id.* at Ex. W, pp. 34:16-35:11.
23

24 For example, the product of the July 22, 2013, executive session—the night before the
25 public vote—was the addition of a lease term that Commissioner Wolfe “needed to have in the
26 lease” to address his concerns. *See Third Knutsen Decl.*, Ex. A, pp. 163:25-164:2, 167:25-
27

1 168:22. Further, the April 9, 2013, meeting was designed to introduce the Commissioners to
2 the Tesoro, Savage, and BNSF representatives behind closed doors and “inform the[m]” about
3 multiple key “elements of the proposed lease” and allowed the Commissions to question the
4 project proponents about their concerns. *See id.* at 99:14-16, 100:11-23; *and see id.* Ex. I.
5 That meeting had a huge impact on the Commissioners’ opinions on the project—they “walked
6 away excited about moving forward...and...ready to handle [the] Tesoro/Savage
7 announcement.” *Id.* at Ex. L. In particular, Commissioner Baker was visibly pleased after the
8 meeting and appeared to be relieved to “finally...make that connection between the face and
9 the negotiation.” *Id.*; *and id.* at Ex. A, pp. 130:14-24. This unlawful meeting that amounted to
10 a sales pitch provided the project with substantial inertia by allowing the project proponents to
11 present their one-sided perspective before the public even knew of the proposal. OPMA
12 demands that these sort of key meetings of our elected officials occur in a public forum—not
13 behind closed doors.
14

15
16 In *Clark*, the Ninth Circuit held that factual findings supporting a city ordinance were
17 developed in meetings that violated OPMA and that OPMA provided those actions taken
18 behind closed doors were “null and void.” *Clark*, 259 F.3d at 1001, 1012. *Clark* explained
19 that the null and void actions taken at unlawful meetings “potentially undercut[] the
20 evidentiary foundation for [an] Ordinance” that was subsequently approved in public even if
21 the record on appeal did not demonstrate that the Ordinance should be invalidated at that time.
22 259 F.3d at 1015. Here, the product of the unlawful private meetings was not just the
23 “evidentiary foundation” of the lease as it was in *Clark*—the Commissioners’ opinions about
24 the project and the lease terms were refined and developed behind closed doors.
25

26 Collectively, Defendants’ unlawful actions taken in violation of OPMA were integral to
27

1 their development of and eventual approval of the lease, so the Court should rule that the lease
2 is “a legal nullity.” *See Mason County*, 54 Wn. App. at 40-41; *and see Cathcart*, 10 Wn. App.
3 at 435-36 (explaining that all thoughts and actions are a step toward formal action).

4 **3. The public votes did not validate the lease.**

5 The very purpose of OPMA “is to allow the public to view the decisionmaking process
6 at all stages.” *Cathcart*, 85 Wn.2d at 107. This Legislative intent would be entirely subverted
7 if a decision was allowed to stand that was extensively deliberated on during meetings where
8 the public was unlawfully excluded merely because there was eventually a public vote. *See*
9 *Cathcart*, 10 Wn. App. at 435-36, *aff’d* 85 Wn.2d 102. Defendants’ public vote on June 23,
10 2013, and the pro forma ratification of the leasing decision during October 2013, did not
11 remedy the Port’s preceding OPMA violations. *See, e.g., Miller*, 138 Wn.2d at 329-30.

12
13 Cases where subsequent public votes cured previous violations did not involve months
14 of secret deliberations nor unlawful actions that were integral to the ultimate decision. In
15 *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 881-83 (1996)
16 (“OPAL”), the Supreme Court considered whether private phone calls about an upcoming vote
17 on a permit required invalidation of that permit, which was ultimately approved in a public
18 meeting. Notably, the Supreme Court found that any “action” taken during the phone call
19 “would . . . be invalidated.” *Id.* Although *OPAL* held that the ultimate public approval
20 rendered the permit valid, the preceding actions that violated OPMA were limited and of little
21 consequence—only a single telephone conversation involving the substance of the permit was
22 squarely at issue and there was merely “speculation” about the substantive extent of that
23 conversation. *Id.* Unlike the facts in *OPAL*, the Commissioners’ public vote here was a mere
24 “summary approval” of a lease that was extensively negotiated, deliberated on, refined
25
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1 pursuant, and considered during “numerous detailed secret meetings” and therefore warrants
2 invalidation. *See id.* at 884 (distinguishing case requiring invalidation where “formal action is
3 merely summary approval of decisions made in numerous detailed secret meetings.”) (citing
4 *Tolar v. School Bd.*, 398 So. 2d 427, 428 (Fla. 1981)).

5 Further, Riverkeeper was not provided a “full opportunity” to express its views in
6 public meetings on the Commissioners’ considerations of the lease as the public did in *OPAL*.
7 Riverkeeper and the public were shut out of numerous discussions that the Commissioners had
8 about the lease terms and the proposed facility, preventing them from observing key
9 deliberations that would have allowed them to understand the Commissioners’ concerns and to
10 refute inaccurate information provided to the Commissioners. *Cf.*, *OPAL*, 128 Wn.2d at 884
11 (“extensive opportunity for input” in public did not warrant invalidation); *and see Brookwood*
12 *Area Homeowners Ass’n v. Anchorage*, 702 P.2d 1317 (Alaska 1985) (“harmless violation’
13 doctrine does not apply” where public would have presented different testimony at the public
14 hearing if it had known the content of the private meetings).
15
16

17 In *Feature Realty*, the Ninth Circuit held that a settlement agreement that resulted from
18 an unlawful private meeting could not be later ratified at an open public meeting. 331 F.3d at
19 1091. In so holding, the Ninth Circuit explained that the “‘well established rule’ in
20 Washington ‘is that where a governing body takes an otherwise proper action later invalidated
21 for procedural reasons only, that body may retrace its steps and remedy the defects by
22 reenactment with the proper formalities.’” *Id.* (citing *Henry v. Town of Oakville*, 30 Wn. App.
23 240, 246 (1981)). Under that rule, Defendants must retrace their steps back to the initial
24 OPMA violation and make public each of the unlawful deliberations that led to the approval of
25 the lease. *See also* Office of the Attorney General, *Government in the Sunshine Manual*
26
27

1 (2015) at 50¹² (citing *Citizens for Sunshine, Inc. v. City of Sarasota*, No. 2010CA4387NC (Fla.
2 12th Cir. Ct. Feb. 27, 2012) (where two board members held a private discussion about a
3 pending case, the board’s subsequent findings were “null and void,” requiring the board to
4 reconvene and hear the evidence *de novo*)). Defendants do not “remedy the defects” merely by
5 holding another public vote—rather, Defendants must disclose the topics, questions, and other
6 information exchanged in the unlawful private meetings so as not to undermine OPMA’s intent
7 that the public be allowed to view the decision-making process at all stages—not just the final
8 public vote.
9

10 Further, where, as here, the public body treats a non-compliant action as continuing in
11 effect, it has not retraced its steps or cured any defects. *See, e.g., Feature Realty, Inc. v. City of*
12 *Spokane*, No. CS-00-0444-AAM, 2001 U.S. Dist. LEXIS 26417, at *41-44 (2001); *and see*
13 *Third Knusten Decl*, Ex. T, p. 4 (The Port’s executive director announced during the October
14 22, 2013 meeting that “we are confident the use of executive session on July 22, 2013, was
15 appropriate” but procedural “shortcomings” with regard to the announcement warranted a re-
16 vote); *and id.* at Ex. W, p. 116:24-117:6 (Defendants decided that the lease was no longer valid
17 “[w]hen Riverkeeper sued” and only due to the executive session announcement issues).

18 Commissioner Oliver testified that there were no discussions about the elements of the lease
19 between the first vote and the second vote because “it was desirable to reapprove the lease . . .
20 to ensure that the lease was valid and would be recognized in a court of law.” *Third. Knutsen*
21 *Decl.*, Ex. U, p. 133:2-21. Merely re-approving a lease developed in a series of unlawful
22 meetings is “a far cry from retracing [the board’s] steps and remedying the defects.” *Feature*
23 *Realty, Inc.*, 331 F.3d at 1091 (quotations omitted). Defendants’ pattern of violations is “so

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25
26 ¹² Hereinafter “*Sunshine Manual*” available at
27 <http://www.myfloridalegal.com/sun.nsf/sunmanual>.

1 much darkness for so long, that [even] a giant infusion of sunshine” is “too little or too late.”
2 *Sunshine Manual* at 52 (quoting *Bert Fish Foundation v. Se. Volusia Hosp. Dist.*, No. 2010-
3 20801-CINS (Fla. 7th Cir. Ct. Feb. 24, 2011) (series of public meetings did not “cure”
4 Sunshine Law violations that resulted from 21 closed door meetings over 16 months)).

5 **E. Riverkeeper has Standing to Bring this Action.**

6 Riverkeeper has standing because the Port’s OPMA violations kept Riverkeeper and its
7 members from observing the Port’s deliberations about the proposed oil terminal, which poses
8 serious concerns for and will negatively impact Riverkeeper and its members. *Decl. of Daniel*
9 *Serres* (“Serres Decl.”); *Decl. of Donald Steinke* (“Steinke Decl.”); *Decl. of Linda McLain*
10 *(“McLain Decl.”)*; *Decl. of Marla Nelson* (“Nelson Decl.”). For standing under the OPMA
11 and the Uniform Declaratory Judgments Act (“UDJA”), RCW 7.24.020, Riverkeeper must
12 demonstrate that the challenged action injured it and that its interests fall within the zone of
13 interests protected by the OPMA. *See Five Corners Family Farmers v. State*, 173 Wn.2d 296,
14 302–03 (2011); *see also Lopp v. Peninsula School Dist.*, 90 Wn.2d 754, 757 (1978)
15 (explaining that RCW 42.30.130 provides “anyone standing to challenge the validity of a
16 governing body’s action” when an OPMA violation is alleged). The standing requirements are
17 relaxed where a plaintiff alleges a deprivation of a procedural right that protects her concrete
18 interest. *See Five Corners Family Famers*, 173 Wn.2d at 303; *and see Seattle Bldg. & Constr.*
19 *Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 795-96 (1996).

20 The Port injured Riverkeeper and its members by excluding them from meetings about
21 the crude-by-rail terminal that should have been open to the public. *Serres Decl.*; *Steinke*
22 *Decl.*, *McLain Decl.*, *Nelson Decl.* Such unlawful exclusion from public deliberations is an
23 “irreparable injury” to the public interest. *See Cathcart*, 10 Wn. App. at 436. Riverkeeper and
24
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1 its members are within the OPMA's zone of interests because the Legislature enacted the
2 OPMA to ensure public access to government deliberations like those preceding the Port's
3 lease. *See* RCW 42.30.010 (declaring purposes of OPMA). Riverkeeper has standing on
4 behalf of its members who are injured and on behalf of itself. *See, e.g., Save a Valuable*
5 *Environment v. City of Bothell*, 89 Wn.2d 862, 866-7 (1978). Further, this case involves
6 matters of serious public importance, so the Court should exercise its jurisdiction accordingly.
7 *See, e.g., Wash. Natural Gas Co. v. Public Utility District No. 1*, 77 Wn.2d 94, 96 (1969).
8

9 **VIII. CONCLUSION.**

10 For the foregoing reasons, Plaintiffs Columbia Riverkeeper, Sierra Club, and
11 Northwest Environmental Defense Center respectfully request that the Court grant summary
12 judgment as described herein.

13 RESPECTFULLY SUBMITTED this 12th day of June, 2015.

14 KAMPMEIER & KNUTSEN, PLLC

15
16 By: 

17 Brian A. Knutsen, WSBA No. 38806
18 833 S.E. Main Street
19 Suite 327; Mail Box 318
20 Portland, Oregon 97214
21 Tel: (503) 841-6515
22 Email: brian@kampmeierknutsen.com

23 SMITH & LONEY, PLLC

24 Knoll Loney, WSBA # 23457
25 Elizabeth H. Zultoski, WSBA # 44988
26 2317 E. John Street, Seattle, WA 98112
27 Tel: (206) 860-2883; Fax: (206) 860-4187
28 Email: knoll@igc.org; elizabethz@igc.org

28 PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 39

KAMPMEIER & KNUTSEN, PLLC
833 S.E. Main St., Suite 327 Mail Box 318
Portland, OR 97214
(503) 841-6515

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COLUMBIA RIVERKEEPER

Miles B. Johnson, *admitted pro hac vice*
111 Third St., Hood River, OR 97031
Tel: (541) 272-0027
Email: miles@columbiariverkeeper.org

*Attorneys for Plaintiffs Columbia Riverkeeper,
Sierra Club, and Northwest Environmental
Defense Center*

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Hon. David E. Gregerson (Dept. 2)
Set: July 24, 2015
Time: 1:30 p.m.

E-FILED

07-10-2015, 16:28

**Scott G. Weber, Clerk
Clark County**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

COLUMBIA RIVERKEEPER; SIERRA
CLUB; and NORTHWEST
ENVIRONMENTAL DEFENSE CENTER,

Plaintiffs,

vs.

PORT OF VANCOUVER USA; JERRY
OLIVER, Port of Vancouver USA Board of
Commissioners President; BRIAN WOLFE,
Port of Vancouver USA Board of
Commissioners Vice President; and NANCY
I. BAKER, Port of Vancouver USA Board of
Commissioners Secretary,

Defendants.

No. 13-2-03431-3

**DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

**i - DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT
NO. 13-2-03431-3**

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3085
KristinAsai@markowitzherbold.com

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

EVIDENCE RELIED UPON 2

RESTATEMENT OF MATERIAL facts 3

I. The Port’s staff engaged in a comprehensive process to develop and negotiate the complex lease in this case separate from the Commissioners..... 3

II. The Commission considered whether to lease to TSJV in a months-long public process. 7

III. The Port conducts executive sessions in accordance with the OPMA and advice from counsel. 9

IV. The Port held executive sessions relating to the proposed lease terms that could affect price. 11

A. March 26, 2013 11

B. April 9, 2013 12

C. July 9, 2013 15

D. July 16-17, 2013 15

E. July 22, 2013 16

F. July 23, 2013 18

V. When procedural concerns were raised, the Port addressed and cured them. 18

VI. This Court previously granted summary judgment to the Port on the majority of plaintiffs’ claims. 19

VII. Parallel proceedings determined that the Commissioners did not violate the OPMA. 21

LEGAL STANDARDS 22

ARGUMENT AND AUTHORITY 22

I. “Minimum price” in RCW 42.30.110(1)(c) does not limit executive session discussion to numerical lease terms. 23

II. Summary judgment should be denied because the Port has evidence showing the executive sessions complied with the OPMA. 28

ii - **DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT NO. 13-2-03431-3**

MARKOWITZ HERBOLD PC
SUITE 3000 PACWEST CENTER
1211 SW FIFTH AVENUE
PORTLAND, OREGON 97204-3730
(503) 295-3086
KristinAsai@markowitzherhold.com

1	A.	Riverkeeper has not shown any OPMA violation on March 26, July 9, July 16, July 17, or July 23.....	29
2			
3	B.	Material factual disputes regarding what occurred on April 9 preclude summary judgment regarding this meeting.....	32
4			
5	C.	The Port admits its announcement on July 22 was a technical violation of OPMA, but the contents of the executive session were appropriate.....	37
6	III.	Riverkeeper has no basis to seek reconsideration of this Court’s mootness decision.....	39
7			
8	A.	Riverkeeper cannot identify “newly discovered evidence” that was unavailable at the time of this Court’s summary judgment decision.....	39
9			
10	B.	Riverkeeper’s purportedly new evidence does not affect this Court’s mootness decision.....	41
11			
12	1.	Riverkeeper is not pursuing its OPMA claim alleging improper approval of the lease, so it cannot nullify the lease.....	41
13			
14	2.	This Court correctly found that the Port retraced its steps and Riverkeeper’s new arguments do not justify reconsideration.....	43
15	IV.	The Court should grant the Port’s pending summary judgment motion on mootness grounds.....	48
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
		CONCLUSION.....	49

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Cases

ATU Legislative Council of Wash. State v. State,
145 Wn.2d 544, 40 P.3d 656 (2002).....25

Bartlett v. N. Pac. Ry. Co.,
74 Wn.2d 881, 447 P.2d 735 (1968).....22

Bates v. Bowles White & Co.,
56 Wn.2d 374, 353 P.2d 663 (1960).....22

Berrocal v. Fernandez,
155 Wn.2d 585, 121 P.3d 82 (2005).....24

Brookwood.....46

Brookwood Area Homeowners Ass'n, Inc. v. Anchorage,
702 P.2d 1317 (Alaska 1985)46

Clark v. City of Lakewood,
259 F.3d 996 (9th Cir. 2001)43, 45

Coggle v. Snow,
56 Wn. App. 499, 784 P.2d 554 (1990).....40

Davis v. W. One Auto. Grp.,
140 Wn. App. 449, 166 P.3d 807 (2007).....36

Eugster v. City of Spokane,
118 Wn. App. 383, 76 P.3d 741 (2003).....28, 42, 43, 45

Eugster v. City of Spokane, 110 Wn. App. 212, 39 P.3d 380 (2002)48, 49

Henry v. Town of Oakville,
30 Wn. App. 240, 633 P.2d 892 (1981).....42

*In re the Petition to Recall Brian Wolfe, Port of Vancouver
Commissioner*,
Clark Cnty. Super. Ct. No. 15-2-01538-2.....21, 22

*In Re the Petition to Recall Gerald Oliver, Port of Vancouver
Commissioner*,
Clark Cnty. Super. Ct. No. 15-2-01691-5.....21

Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.,
162 Wn.2d 59, 170 P.3d 10 (2007).....22

Mason County v. Public Employment Relations Commission,
54 Wn. App. 36, 771 P.2d 1185 (1989).....44, 45, 46

1	<i>Miller v. City of Tacoma,</i>	
	138 Wn.2d 318, 979 P.2d 429 (1999).....	43, 46
2	<i>Org. to Preserve Agric. Lands v. Adams County,</i>	
3	128 Wn.2d 869, 913 P.2d 793 (1996).....	42, 43, 45
4	<i>Pierce County v. State,</i>	
	159 Wn.2d 16, 148 P.3d 1002 (2006).....	22
5	<i>Port of Seattle v. Rio,</i>	
6	16 Wn. App. 718, 559 P.2d 18 (1977).....	25, 26
7	<i>Port Townsend Pub. Co. v. Brown,</i>	
	18 Wn. App. 80, 567 P.2d 664 (1977).....	33
8	<i>S. Martinelli & Co., Inc. v. Wash. State Dep't of Revenue,</i>	
9	80 Wn. App. 930, 912 P.2d 521 (1996).....	24
10	<i>Shapiro v. San Diego City Council,</i>	
	96 Cal. App. 4th 904, 117 Cal. Rptr. 2d 631 (2002)	25
11	<i>Sligar v. Odell,</i>	
	156 Wn. App. 720, 233 P.3d 914 (2010).....	44
12	<i>Starwich v. Ernst,</i>	
13	100 Wn. 198, 170 P. 584 (1918).....	40
14	<i>State v. Lilyblad,</i>	
	163 Wn.2d 1, 177 P.3d 686 (2008).....	27
15	<i>State, Dep't of Ecology v. Campbell & Gwinn,</i>	
16	146 Wn.2d 1, 43 P.3d 4 (2002).....	24
17	<i>Thys v. State,</i>	
	31 Wn.2d 739, 199 P.2d 68 (1948).....	25
18	<i>Vance v. Offices of Thurston Cnty. Comm'rs,</i>	
19	117 Wn. App. 660, 71 P.3d 680 (2003).....	40
20	<i>West v. Thurston County,</i>	
	144 Wn. App. 573, 183 P.3d 346 (2008).....	40
21	Statutes	
22	1939 Wash. Laws ch. 225, § 7.....	25
23	Rem.Rev.Stat. (Sup.) § 8370-17.....	25
24	Rules	
25	CR 56 22	
26	LR 7(b)(1).....	40

1	RCW 42.30.010	22
2	RCW 42.30.030	33
3	RCW 42.30.060(1).....	41, 42
4	RCW 42.30.110(1).....	22
5	RCW 42.30.110(1)(a).....	33
6	RCW 42.30.110(1)(b).....	27
7	RCW 42.30.110(1)(c).....	23, 42
8	RCW 42.30.110(1)(d).....	33
9	RCW 42.30.110(1)(i).....	33
10	RCW 42.30.110(1)(g).....	33
11	RCW 82.08.010(1)(a)(i)	25
12	RCW 82.45.030(3).....	25
13	Other	
14	<i>Attorney General's Public Records and Meetings Manual</i> § 2.E.5, at 174 (2014).....	33
15	Black's Law Dictionary (10th ed. 2014)	24
16	Black's Law Dictionary 1353 (4th ed. 1951)	24
17	Municipal Research and Services Center, <i>The Open Public Meetings Act</i> (June 2014), available at http://mrsc.org/getmedia/275E74FC-9D43-4868-8987- A626AD2CEA9F/opma14.aspx	33
18	<i>Open Meeting Laws</i> , § 7.76 (1994)	25

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INTRODUCTION

Public bodies are permitted to hold executive sessions under the Open Public Meetings Act (“OPMA”). Contrary to plaintiffs’ (collectively, “Riverkeeper”) depiction, there is nothing secret, remarkable, or improper about the Port of Vancouver USA (“Port”) holding seven executive sessions between March and July 2013 prior to the Port’s Board of Commissioners’ (“Commission”) consideration of a lease agreement. Indeed, Riverkeeper cannot establish as a matter of law that the Port’s discussions exceeded the scope of the OPMA during any of the seven executive sessions they cite: March 26, April 9, July 9, July 16, July 17, July 22, and July 23, 2013. The only undisputed error is Commissioner Oliver’s mistaken announcement of the July 22 executive session, an error that the Port immediately fixed nearly two years ago.

Riverkeeper seeks summary judgment on three of its Claims for Relief, asserting that there is no dispute of material fact and that the Court can find the Port or the Commissioners violated the OPMA as a matter of law. Riverkeeper falls well short of its burden on summary judgment. For the majority of sessions, Riverkeeper has no evidence that any violation occurred during the session, instead basing its motion on an implausible reading of the “minimum price” exemption under RCW 42.30.110(1)(c).

For one meeting, on April 9, 2013, while Riverkeeper alleges that the meeting exceeded the bounds of the minimum price exemption under the OPMA, the record does not establish that the allegedly improper conduct actually occurred during executive session. Riverkeeper asserts that representatives from Tesoro and Savage gave a “sales pitch” to the Commission in executive session based on a PowerPoint presentation, but none of the attendees recalls seeing anything beyond selected price-related portions of the PowerPoint during executive session.

Riverkeeper also asks this Court to reconsider its ruling, over a year ago, dismissing Riverkeeper’s requests for a declaration or injunction voiding the lease. (3/27/14 Order,

1 Docket Entry (“D.E.”) 57A, ¶¶ 2-3.) Riverkeeper fails to meet any of the requirements for
2 reconsideration under LR 7(b) or otherwise. Riverkeeper does not identify any new facts that
3 were unavailable at the time of this Court’s decision. Riverkeeper also concedes that it “does
4 not intend to pursue its Second Cause of Action” alleging the Commission collectively
5 determined to approve the lease during executive session, which would be its only basis to
6 declare the lease null and void. The Court should deny Riverkeeper’s motion for summary
7 judgment. The Court should grant the remainder of the Port’s pending motion for summary
8 judgment, originally filed December 6, 2013, and deferred by the Court’s March 2014 Order.

9 **EVIDENCE RELIED UPON**

10 Defendants rely on the papers and pleadings herein, the Port’s prior papers and
11 pleadings filed in support of its motion for summary judgment (including the prior
12 declarations of Commissioner Nancy Baker, Jeff Estuesta, Addison Jacobs, Commissioner
13 Jerry Oliver, Alastair Smith, Theresa Wagner, and Commissioner Brian Wolfe), any
14 argument the Court may receive at the July 24, 2015 hearing, and the following additional
15 evidence:

- 16 1. Declaration of Michelle Allan, including Exhibits A-F;
- 17 2. Declaration of Patty Boyden;
- 18 3. Declaration of Katy Brooks;
- 19 4. Declaration of Todd Coleman, including Exhibits G-L;
- 20 5. Declaration of David Hepler, including Exhibit M;
- 21 6. Declaration of Kathy Holtby;
- 22 7. Declaration of Todd Krout;
- 23 8. Declaration of Alicia L. Lowe, including Exhibit N;
- 24 9. Declaration of Julianna Marler;
- 25 10. Declaration of Mary Mattix;
- 26 11. Declaration of Mike Schiller, including Exhibits O and P;

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- 12. Declaration of Curtis Shuck;
- 13. Declaration of Greg Westrand; and
- 14. Declaration of Kristin Asai, including Exhibits 1-17.

RESTATEMENT OF MATERIAL FACTS

I. The Port’s staff engaged in a comprehensive process to develop and negotiate the complex lease in this case separate from the Commissioners.

The lease from the Port to Tesoro Savage is 61 pages long (429 pages with exhibits) and includes 42 separate substantive paragraphs. (Allan Ex. C (“Lease”).) It took over three months to negotiate. As with the negotiation of any complex lease, the Port’s staff was responsible for each stage of the lease negotiation process. (See Coleman Dep. 27:19-28:23.)¹ Beginning in 2010, the Port held a public workshop to discuss the potential of crude oil in the marketplace. (Id. 56:9-57:20.) By about July 2012, the Port discussed in public that crude oil transport was becoming a longer term market to invest in. (Id.)

By the fourth quarter of 2012, the Port created a “PBR Team” for a petroleum-by-rail project representing staff members from a broad range of departments, including business development (Curtis Shuck and Mike Schiller), environmental (Mary Mattix and Patty Boyden), engineering (Monty Edberg), finance (Jeff Estuesta), project management (Greg Westrand), marketing and sales (Alastair Smith), communications (Theresa Wagner), and operations (Todd Krout). (Coleman Decl. ¶ 6.) In November 2012, the Port’s PBR Team developed a statement of interest for the project and sought proposals from companies interested in developing petroleum facilities on the Port’s property. (Coleman Dep. 57:3-9; Coleman Ex. J at 4.) At least four companies provided proposals to the Port for a project. (See Third Decl. of Brian Knutsen in Support of Pls.’ Mot. for Summ. J. (“Knutsen”), Ex. V at 3.)

¹ All depositions are attached to the declaration of Kristin Asai.

1 By early February 2013, the PBR Team prepared a ranking sheet for the proposals
2 provided by these companies. (Schiller Decl. ¶ 2; Coleman Dep. 78:1-9, 83:5-25, 88:18-
3 89:14.) The PBR Team used the same criteria it typically used to evaluate potential
4 contracts. (Schiller Decl. ¶ 2.)

5 Port staff provided a written copy of the ranking sheet to the Commissioners.
6 (Coleman Dep. 78:1-9, 88:8-17.) The Commissioners did not discuss the ranking sheet in
7 executive session. (Coleman Dep. 66:12-25, 79:7-80:19; Oliver Dep. 81:5-21, 83:8-19,
8 84:22-85:17; Wolfe Dep. 70:1-14, 71:15-72:2.) The Commissioners did not, and did not
9 need to, provide approval to the Port staff to pursue the crude-by-rail facility. (Coleman Dep.
10 63:12-64:14, 65:5-66:11.) These preliminary steps are within the authority of the Port CEO
11 and staff he designates. (*Id.*)

12 After the PBR Team evaluated the proposals based on the criteria the team developed,
13 the PBR Team selected the Tesoro-Savage Joint Venture (“TSJV”)² as the potential tenant.
14 (Schiller Decl. ¶ 2.) The PBR Team brought its recommendation of TSJV to Executive
15 Director/CEO, Todd Coleman, and the members of the Port’s executive leadership team.
16 (*Id.*) CEO Coleman and his leadership team agreed with the selection of TSJV and directed
17 the PBR Team to begin preliminary negotiations. (*Id.*; Coleman Decl. ¶ 7.)

18 At the end of February 2013, the PBR Team held a “Kick Off Meeting” to bring the
19 Port’s legal counsel, TSJV, and the PBR Team together to discuss responsibilities for
20 developing the proposed lease. (Schiller Decl. ¶ 3, Ex. O.) Curtis Shuck and Jeff Estuesta
21 served as the lead negotiators for the Port, with the assistance of Kathy Holtby and Mike
22 Schiller. (*Id.* ¶ 4; Holtby Decl. ¶ 2.) However, all members of the PBR Team participated
23 when the negotiations on a specific lease term or description related to their department or
24

25 ² The full name of the entity is now Tesoro Savage Petroleum Terminal, LLC, which
26 does business as Vancouver Energy. “TSJV” refers to this entity throughout this
memorandum.

1 expertise (e.g. environmental, engineering). (Schiller Decl. ¶ 4.) David Hepler, legal counsel
2 for the Port, was responsible for drafting the lease. (Hepler Decl. ¶ 2.)

3 In April 2013, CEO Coleman, using authority granted him in 2009 by the
4 Commission, negotiated and directed the execution of an exclusive dealing agreement with
5 TSJV. (Coleman Dep. 26:19-27:4, Ex. G.) The project was announced to the public shortly
6 after the exclusive dealing agreement was signed.

7 For the next several months, the PBR Team engaged in daily negotiations with TSJV.
8 Members from the PBR Team spoke with TSJV representatives daily over the telephone, and
9 they met in person to negotiate the proposed lease in Vancouver, Washington and Salt Lake
10 City, Utah nearly every other week. (Schiller Decl. ¶ 4; Coleman Dep. 68:16-22.) The
11 Port's legal counsel, Mr. Hepler, also traveled to Salt Lake City for negotiations and drafting
12 of the proposed lease. (Hepler Decl. ¶ 2.) The PBR Team did not complete their
13 negotiations with TSJV on the proposed lease until about a week before the July 23 public
14 vote. (Coleman Dep. 67:1-68:3, 70:12-17.)

15 For the TSJV lease, the monetary terms are numerous, including base rent and
16 various other fees. Base rent was eventually set at \$30,000-\$50,000 per month during the
17 permitting contingency period, then 5.32 cents per square foot per month. (Lease ¶ 1.D.)
18 The other charges included two wharfage rates, the land lease, rail maintenance fees, rail
19 usage fees, and costs for improving or building structures. (Coleman Dep. 69:19-70:11;
20 Lease ¶¶ 1.E, 1.F, 4.A-H, 5.A-H, and Ex. O.) Usually a change to one of the monetary terms
21 would affect the other terms. (See Holtby Decl. ¶ 3.) Wharfage fees are assessed against all
22 cargo passing or conveyed over, into, or under wharves. (Schiller Decl. ¶ 5, Ex. P at 26.)
23 Wharfage fees are calculated based on the wharfage rate assigned to a particular commodity
24 and the volume of capacity. (*Id.*; see Lease at Ex. O ¶ 2(a).) Dockage fees are assessed
25 against ocean vessels for berthing at a wharf, piling structure, pier, bulkhead, bank, or for
26 mooring to a vessel so berthed. (Schiller Decl. ¶ 5, Ex. P at 23; Lease ¶ 9.B(9).) Dockage

1 fees are calculated based on the length of the vessel and the amount of time it sits along the
2 berth. (Schiller Decl. ¶ 5.) Rail fees have two components: (1) rail maintenance, calculated
3 based on prior actual costs and anticipated improvements; and (2) rail usage, access, or
4 infrastructure, based on the number of cars but subject to volume or use discounts (e.g.
5 higher volume of cars may be given a lower rate per car). (Holtby Decl. ¶ 5; Lease ¶ 1.F,
6 5.C-5.D.)

7 In addition to direct pricing terms, there are many components of the Port's real estate
8 deal that must be known and analyzed to determine its ultimate price. (Holtby Decl. ¶ 3.)
9 For example, the Port must assess standard lease terms, such as the amount of property to be
10 leased, the market value of any existing feature or amenities of the site, and the length of the
11 term. (*Id.*) The Port must also consider any required investments or improvements by the
12 Port, the Port's expected return on its investment in the short and long term, the projected
13 flow of potential revenue streams, and whether the lease represents the highest return on
14 investment to the Port for that location. (*Id.*) The Port must also determine whether the lease
15 price is feasible by considering the financial strength of the tenant, the stability of the
16 tenant's business industry, any tenant risks that must be mitigated, and the direct and indirect
17 economic benefits for the local community (including family-wage jobs). (*Id.*)

18 Consistent with the Port's usual process, the Commissioners have no involvement
19 with the negotiations of a lease. (Oliver Dep. 20:2-7; Baker Dep 10:15-17.) Instead, Port
20 staff occasionally provides updates to the Commissioners on the status of negotiations by
21 delivering summary documents to the Commission in emails or as part of their Board
22 packets. (Marler Decl. ¶ 3.) These written documents are available from the Port through a
23 public records request, but are subject to redactions for applicable statutory exemptions
24 allowed under the Public Records Act, Chapter 42.56 RCW. (*Id.*)

25 CEO Coleman also provides verbal updates to the Commissioners via one-on-one
26 communications, which do not implicate the OPMA. (Coleman Dep. at 11:5-12:11.) CEO

1 Coleman engages in these one-on-one conversations to gauge the interest of each
2 Commissioner on a particular project so he does not ask his staff to undertake the substantial
3 work necessary to negotiate a project that has no chance of approval by the Commission. (*Id.*
4 27:19-28:23, 58:14-60:7.) Once a proposed lease is close to being considered by the
5 Commission, Port staff will provide the first few pages of the lease to the Commissioners and
6 discuss the price-related elements with them in executive session. (*Id.* 32:10-33:9.) The
7 Commissioners review the rest of the lease on their own, and often engage in individual
8 investigation on a particular project, such as by speaking with the public or consultants,
9 researching the issue, or visiting proposed tenants. (*Id.*; *see, e.g.*, Oliver Dep. 137:3-17;
10 Baker Dep. 63:17-64:14; Asai Ex. 17 at 4.) These actions by individual commissioners do
11 not implicate the OPMA.

12 **II. The Commission considered whether to lease to TSJV in a months-long public**
13 **process.**

14 During the three-month period while the Port's staff negotiated and drafted the
15 proposed lease, the Commission repeatedly provided opportunities for the public to provide
16 and receive information about the proposed lease with TSJV, including five public
17 workshops in May, June, and July 2013. (Coleman Ex. J at 4.) The Commission took public
18 comment at each one of these five workshops. (*Id.*) The Commission had no obligation to
19 take comment at the workshop, and its practice is normally not to do so at workshops, but the
20 Commission invited the public's participation at each step. (*See, e.g.*, Knutsen, Ex. D at 5.)
21 The Commission also sought public comment in writing. (Allan Decl. ¶ 16, Ex. F.)

22 As a result of repeated public comments and inquiries regarding safety, the
23 Commission held a workshop on safety on June 11. (Knutsen Ex. C at 5-6.) On June 27,
24 representatives from Tesoro, Savage, and BNSF Railway presented during the workshop
25 regarding safety. (*Id.*, Ex. D at 7-11.) TSJV presented a PowerPoint and discussed the crude
26 oil market, the companies' safety records, and the proposed job growth from the project.

1 (*Id.*; Allan Ex. E.) Fifteen members of the public, including Riverkeeper, commented or
2 asked questions during the June 27 workshop. (Knutsen Ex. D at 6-7, 9-11.)

3 The Port held a final public workshop on the evening of July 22 to provide
4 information to the public about the project, provide an overview of the proposed lease terms,
5 and then receive public comment. (Coleman Dep. 163:25-164:10.) The workshop was held
6 in the evening to ensure that members of the public who could not attend day sessions could
7 make this one. Several days prior, the Port publicly circulated an agenda for the workshop
8 and for the July 23 regular meeting of the Commission. (Allan Ex. B, item E-3.) The public
9 notice for the workshop included a statement that “[i]mmediately following the workshop,
10 the Commission will recess into a special executive session for the purpose of discussing real
11 estate matters, pursuant to RCW 42.30.110(c). No final action will be taken during the
12 workshop or special executive session.” (Allan Ex. A at 11; Knutsen Ex. F at 1.)

13 At the July 22 public workshop, Port staff presented the proposed terms of the lease.
14 They noted the potential for 80-120 direct jobs from the project, 2,700 total jobs, \$100
15 million in private investment, and the environmental provisos in the lease. (Coleman Ex. H
16 at 11-20, 32.) Again, though the Commission does not normally take public comment at
17 workshops, it allowed everyone who wanted to speak (approximately 30 members of the
18 public, including Riverkeeper) to provide comment on July 22. (Knutsen Ex. E at 4-10.)

19 The following morning, July 23, the Commission considered the lease to TSJV in its
20 regular meeting. (Knutsen Ex. F.) During the public meeting, Port staff presented an
21 overview of the lease to the Commission and the public. Mr. Shuck explained that the lease
22 contains “contingency requirements and periods related to the permitting and approval
23 processes which are required to be obtained for the permitted use, prior to the construction
24 and operation of the facility.” (*Id.* at 4.) Commissioner Oliver noted that the previous
25 evening’s workshop had received public comment from “some 30 to 40 people . . . in broad
26 opposition to this project.” (*Id.* at 5.) The Commission then took public comment from an

1 additional 10 people, the majority of whom supported approval of the lease. (*Id.* at 6-8.) The
2 Commissioners deliberated publicly and voted unanimously to approve the lease. (*Id.* at 8-
3 10.)

4 **III. The Port conducts executive sessions in accordance with the OPMA and advice**
5 **from counsel.**

6 The OPMA expressly permits government agencies to hold executive sessions on
7 fourteen specified bases. RCW 42.30.110(1)(a-n). The Port uses executive session as a
8 mechanism to provide limited information to the Commission, under the supervision of its
9 management and legal counsel (Schwabe, Williamson & Wyatt), pursuant to the specific
10 topics identified in the OPMA, such as to consider the minimum price for the lease or sale of
11 public property, to discuss litigation matters, and to discuss the performance of an employee.
12 (Coleman Dep. 35:23-36:9.) Generally the Commissioners, the Port's CEO, leadership team,
13 and legal counsel attend every executive session. (Coleman Dep. 36:10-37:3.) Additional
14 Port staff or third parties may also attend when relevant. (*Id.* 37:4-38:4.)

15 The Port's leadership team meets once a week with its legal counsel to discuss,
16 among other things, the upcoming agenda for each Commission meeting. (*Id.* 34:9-35:1.)
17 The leadership team is familiar with the guidelines of the OPMA and the Port's values of
18 transparency, openness, and respect. (*Id.* 46:2-14.)

19 During leadership meetings, the team identifies items to be discussed with the
20 Commission in public session or in executive session, such as when the staff needs guidance
21 from the Commissioners about setting minimum price for the lease of real estate. (*Id.* 34:9-
22 35:1, 44:1-17.) Sometimes members of the leadership team may propose topics to discuss
23 with the Commission during either executive session or public meeting, which the Port's
24 CEO and legal counsel will review for OPMA compliance. (*Id.* 75:1-20.) Many proposed
25 topics are not ultimately submitted to the Commission. (*Id.*)
26

1 Typically, the Port provides information in written form to the Commission that it
2 does not discuss orally with the Commission. For example, the leadership team may provide
3 documents to the Commissioners to give them an update on negotiations, but those
4 documents are not discussed with the Commission in public meeting or executive session.
5 (*Id.* 75:1-20, 77:20-25.) Also, the Port often provides background written material to the
6 Commission to read in advance of executive session, but the Port and Commission limit the
7 discussion in executive session to the portions of the material that fall within a designated
8 topic under OPMA. (*Id.* 39:11-40:18.) Thus, the existence of a written document associated
9 with a Commission meeting is not conclusive or necessarily indicative of what was discussed
10 during the meeting.

11 In determining whether to bring a topic to executive session under RCW
12 42.30.110(1)(c), the team discusses whether competitive sensitivities exist and the likelihood
13 the Port would obtain a decreased price if the topic were discussed publicly. (*Id.* 44:22-
14 46:1.) Then the Port's CEO and legal counsel go through the proposed topics for executive
15 session to determine whether they fall within the OPMA. (*Id.* 35:2-9, 38:14-39:3.) The
16 Commissioners rely on counsel to advise them and ensure their discussions comply with the
17 OPMA. (Oliver Dep. 39:2-40:7, 40:24-41:2, 54:14-55:5; Wolfe Dep. 120:22-121:13; Baker
18 Dep. 21:2-7, 21:18-22:7; Asai Exs. 6-7.)

19 The Port interprets the OPMA's executive session topics narrowly. (Coleman Dep.
20 24:15-25:4, 50:17-25.) For the "minimum price" provision, the Port views two categories of
21 information as appropriate: (1) information that would give the customer an advantage in
22 negotiating a lower price; and (2) information that would give a competitor an opportunity to
23 negotiate with the Port's customer, thus creating a bidding process that would decrease the
24 Port's price. (*Id.* 50:17-25.) Public disclosure of the lowest price could give a competitor an
25 opportunity to steal an entire project from the Port. (*See id.* 114:14-115:24.)
26

1 The Port provides public notice that it will hold any meeting, public or executive
2 session, usually the week before the meeting. (Coleman Dep. 43:19-25; Allan Ex. A.) If the
3 Commission plans to hold an executive session, the Port will give the President of the Board
4 the topic and statutory provision under the OPMA that will be discussed in executive session
5 so he or she can make the appropriate announcement. (Coleman Dep. 41:6-21.)

6 **IV. The Port held executive sessions relating to the proposed lease terms that could**
7 **affect price.**

8 The Port conducted all of its executive sessions in accordance with its narrow
9 interpretation of the “minimum price” provision under the OPMA. (*Id.* 174:18-175:11.) The
10 Port is confident that all of the executive sessions at issue complied with the OPMA. (*Id.*
11 174:18-175:20.)

12 **A. March 26, 2013.**

13 The Port held an executive session on March 26, 2013. (Knutsen Ex. G.) At the time
14 of the March 26 executive session, the Port staff was negotiating rates with TSJV,
15 negotiating an exclusive dealing agreement with TSJV, and creating a draft lease. (Coleman
16 Dep. 95:1-8.)

17 During the executive session, the Port discussed the proposed project, as well as
18 another real estate matter and litigation issue. (*Id.* 94:22-25, 95:14-25.) As relevant to TSJV,
19 the Port staff presented information to the Commission about the current status of the price-
20 related lease terms, such as the base rate, wharfage fees, dockage fees, and rail fees. (*Id.*
21 96:5-16, 96:21-24, 98:12-23.) The Port staff also discussed the proposed schedule for the
22 exclusivity agreement (e.g. how long exclusivity should exist). (*Id.* 96:17-20, 97:9-25.) All
23 these topics related to the price at which the real estate would be offered for lease because if
24 made public, the disclosure would lead to a likelihood of decreased price. (*Id.* 114:14-
25 115:24, 144:9-19; Coleman Decl. ¶ 4.)

1 B. April 9, 2013

2 The Port held an executive session on April 9, 2013 while CEO Coleman was in
3 Korea. (Knutson Ex. H; Coleman Dep. 99:14-20.) The Port cancelled the public portion of
4 the Commission meeting that day, with proper notice, because the Port had no business to be
5 taken in public. (Coleman Dep. 99:21-100:10; Allan Ex. A at 4.) Eleven members of the
6 Port staff attended the meeting, plus the three Commissioners, two of the Port's attorneys,
7 and representatives from TSJV and BNSF. (Coleman Dep. 102:4-18.) The attendees,
8 including legal counsel, believed the executive session comported with the minimum price
9 topic. (Coleman Dep. 174:18-175:11; Krout Decl. ¶ 3; Lowe Decl. ¶¶ 5-7; *see also* Marler
10 Decl. ¶ 2; Schiller Decl. ¶¶ 8-9.)

11 The Port held the April 9 executive session to inform the Commission of several key
12 elements of the lease that determine the price of the facility, such as the rate structures,
13 acreages, facilities, and rail infrastructure. (Coleman Dep. 100:11-23, 101:12-102:3.) The
14 Commissioners were very interested in discussing the project with the public and in giving
15 the public an opportunity to comment. (*Id.* 114:14-115:24, 115:25-116:15, 129:5-130:13.)
16 However, at that time, the Port was negotiating with TSJV about the minimum price for
17 several elements of the lease and had not yet agreed to exclusivity. (*Id.* 114:14-115:24,
18 144:9-19.) Several other ports were interested in the project and would have likely competed
19 for TSJV's business if the project had been disclosed publicly prior to the exclusive dealing
20 agreement being executed. (*Id.* 114:14-115:24.) Such competition would have, at minimum,
21 led to decreased price for the real estate.

22 Some April 9 attendees have limited recollection of what occurred during the
23 meeting. (*Id.* 102:22-103:3, 104:5-7; Allan Decl. ¶ 2; Boyden Decl. ¶ 3; Hepler Decl. ¶ 3;
24 Lowe Decl. ¶¶ 7-8; Marler Decl. ¶ 5; Krout Decl. ¶ 4; Schiller Decl. ¶ 10.) But interviews of
25 the attendees, as well as notes taken by two Port attorneys in attendance, demonstrate that the
26 April 9 executive session discussed the economic terms of the proposed project, including the

1 size of vessels, the number of barrels stored onsite and in tanks, the number of cars per train,
2 the impacts and coordination of underground pipes with other terminals, and the use of rail
3 tracks. (Coleman Dep. 102:22-103:21; Krout Decl. ¶ 5; Hepler Decl. ¶ 4, Ex. M; Lowe Ex.
4 N.)³

5 The April 9 session began with a presentation by Curtis Shuck, then Senior Sales
6 Director for the Port, on the status of lease negotiations. (Coleman Dep. 105:9-106:18;
7 Shuck Decl. ¶ 2-3.) Shuck then presented on the safety risk issues and how that would affect
8 the utilization of the Port's facilities as part of the brief review of the elements of the "May
9 2012 Six Hats" document, which highlighted the factors going into the Port's consideration
10 of the lease and its terms. (Coleman Dep. 106:19-108:13.) Shuck introduced everyone in the
11 room. (*Id.* 109:4-12; Shuck Decl. ¶ 3.)

12 Shuck also explained the volumes of oil transport proposed and how it would affect
13 the Terminal 5 railtrack loop, and that the Port had selected TSJV based on its ability to feed
14 its own refinery rather than sell crude oil on the open market, which directly impacts the
15 price TSJV was willing to pay for the lease. (Coleman Dep. 109:13-110:19, 121:25-123:14;
16 Shuck Decl. ¶ 3; *see also* Hepler Ex. M.) As part of his presentation, Shuck handed out a
17 PowerPoint to the Commissioners and discussed some of the slides orally. (Coleman Dep.
18 111:12-112:2, 118:23-119:11, 119:21-120:17.) Shuck did not discuss all of the slides. (*Id.*
19 120:23-121:24.) The Port also provided other documents to the Commissioners that were not
20 discussed. (*Id.* 141:20-143:10.)

21 Next, TSJV gave a presentation, with Phil Anderson presenting for Tesoro and Curt
22 Dowd presenting for Savage. (*Id.* 112:3-20.) As best the Port can determine, the TSJV
23 representatives discussed information with the Commission regarding: insurance needs;
24 capacity, including the number of barrels, tanks, trains, and vessels; TSJV's oil through-puts
25

26 ³ Exhibits M and N will be filed separately under seal.

1 and volumes; anticipated number of jobs; number of acres to be leased. (*Id.* 131:21-134:1;
2 Shuck Decl. ¶ 4; Hepler Ex. M.)

3 TSJV provided a written copy of a PowerPoint presentation to the Port. Coleman
4 Dep. 123:15-24, 124:4-21,126:3-25; *see* Knutsen Ex. K.) Riverkeeper’s challenge to the
5 April 9 session rests on the presumption that the entire presentation was discussed in
6 executive session. However, there is evidence that TSJV did *not* give the entire presentation.
7 (Coleman Dep. 123:15-24, 124:4-21,126:3-25.) For example, Riverkeeper relies on an email
8 from Curtis Shuck providing a “recap of the highlights and next steps” following the April 9
9 meeting. (Knutsen Ex. I.) But Mr. Shuck, as a good salesman, typically provides his
10 subjective opinions, rather than an objective summary of meetings. (Coleman Decl. ¶ 10; *see*
11 Shuck Decl. ¶ 7.)

12 Indeed, many of the attendees do not recall seeing a PowerPoint presentation. (Oliver
13 Dep. 97:6-24, 100:7-101:15; Wolfe Dep. 80:7-14, 82:9-83:3, 85:17-86:14; Baker Dep. 38:18-
14 24, 42:10-43:1; Allan Decl. ¶ 3; Boyden Decl. ¶ 4; Brooks Decl. ¶ 5; Lowe Decl. ¶ 8; Marler
15 Decl. ¶ 6; Westrand Decl. ¶ 4; Shuck Decl. ¶ 5.) Others recall that representatives from
16 TSJV gave a presentation, but do not recall TSJV discussing the entire PowerPoint in
17 executive session, or believe that the presentation they recall is from the public workshop on
18 June 27, where TSJV gave a similar presentation. (Mattix Decl. ¶¶ 2-3; Schiller Decl. ¶ 11;
19 Hepler Decl. ¶ 5.) Other attendees have a written copy of the presentation, which indicates it
20 was only handed out. (Krout Decl. ¶ 6; Allan Decl. ¶ 4.)

21 The Port’s attorneys also took contemporaneous notes during the proceedings on
22 April 9 and those notes do not reflect all of the information in the PowerPoint. (Hepler Ex.
23 M; Lowe Ex. N.) The attorneys’ notes only reflect economic terms that would be
24 permissible to discuss in executive session. (*Id.*)

25 The session ended with Shuck reminding the Commission of the potential impact on
26 other tenants on the Terminal 5 loop track and discussing whether it would adversely affect

1 those tenants' operations. (Coleman Dep. 113:15-114:13, 172:14-173:8.) After the session
2 ended, TSJV invited the Commissioners to tour Tesoro's crude oil transfer facility attached
3 to the Anacortes refinery. (*Id.* 116:23-117:11.) The Port's counsel spoke to Shuck about
4 how to conduct the tours in compliance with the OPMA. (*Id.* 117:25-118:19.) The
5 Commissioners toured the facility separately. (*Id.* 117:12-24.)

6 Each of the topics discussed in this session, including topics discussed with TSJV,
7 related to the Commissioners' consideration of the price at which property would be leased to
8 TSJV. The attendees believed the executive session comported with the minimum price
9 requirement. (*See, e.g., id.* 174:18-175:11; Krout Decl. ¶ 3; Lowe Decl. ¶ 2-7; Marler Decl. ¶
10 2.) Two attorneys were present during the executive session, and the Commissioners relied
11 on their attorneys' judgment in conducting the session. (Knutsen Ex. H; Asai Ex. 6-7.)

12 **C. July 9, 2013**

13 The Port held an executive session on July 9, 2013 for real estate, national security,
14 and potential litigation matters. (Knutsen Ex. P; Coleman Dep. 156:5-10.) As relevant to the
15 TSJV lease, the only discussion was TSJV's formation of a limited liability company (Tesoro
16 Savage Petroleum Terminal, LLC) to operate the facility and the associated financial risks
17 with that kind of entity. (Coleman Dep. 156:11-22.) A new entity's financial risks affect the
18 Commissioners' consideration of the price for the lease to TSJV because a tenant with higher
19 financial risk may require a higher lease rate or other conditions to mitigate the risk. (*Id.*
20 25:5-17, 47:23-48:20, 50:3-16; Holtby Decl. ¶ 3.)

21 **D. July 16-17, 2013**

22 The Port held executive sessions on July 16 and 17, 2013 to discuss real estate
23 matters and potential litigation. (Knutsen Ex. Q; Coleman Dep. 157:15-24.) During these
24 executive sessions, the Port presented some of the specific proposed TSJV lease terms to the
25 Commissioners, namely, the base rent, prices per barrel, wharfage fees, dockage fees,
26 insurance, responsibility for portions of the construction, and the acreage of the facility.

1 (Coleman Dep. 149:14-150:9, 157:25-158:22; *see* Knutsen Ex. O.) The Port also discussed
2 what type of crude would flow through the facility and its risks, timelines for TSJV to begin
3 and complete construction, the length of the operating term, and whether extensions would
4 be allowed. (Coleman Dep. 157:25-158:22, 160:7-161:17, 162:3-22.)

5 Port staff hoped to have a final draft lease by the time of the July 16 and 17 sessions,
6 but it was not available. (*Id.* 156:23-157:14.) So Port staff provided a preliminary draft to
7 the Commissioners in advance of the meeting, but did not discuss the draft in executive
8 session. (*Id.* 158:25-160:3.) This session explicitly discussed the monetary terms of the
9 lease to TSJV.

10 **E. July 22, 2013**

11 At the conclusion of the public portion of the workshop, near 10:00 p.m.,
12 Commissioner Oliver misspoke, and said that the Commission “would be recessing into
13 executive session for the purpose of discussing what the Commission had heard and advised
14 that the commission would be in executive session for at least 15 minutes.” (Knutsen Ex. F
15 at 10.) But as stated in the minutes, “Executive session was held from 9:57 p.m. to 10:41
16 p.m. to discuss real estate matters pursuant to RCW 42.30.110(1)(c).” (*Id.*)

17 Commissioner Oliver misspoke when he said the purpose of the executive session
18 was to discuss public comments generally. (Asai Ex. 7 at ¶ 6.) Commissioner Oliver knew
19 the Port intended the executive session to discuss whether terms needed to be modified that
20 would affect the price for the proposed TSJV lease. (*Id.* ¶ 5; Coleman Dep. 164:14-165:3.)
21 The executive session on July 22 in fact discussed solely whether the proposed lease terms
22 should be modified prior to the Commission’s deliberation and decision. (Coleman Dep.
23 164:14-165:9; Oliver Dep. 115:20-116:7, 121:18-123:5, 125:13-24; Wolfe Dep. 107:14-
24 109:7, 113:24-114:23; Baker Dep. 56:7-17, 57:16-58:5; Allan Decl. ¶ 9; Boyden Decl. ¶ 6;
25 Lowe Decl. ¶ 9; Marler Decl. ¶ 7; Brooks Decl. ¶ 7; Mattix Decl. ¶ 4; Shuck Decl. ¶ 9.)
26

1 During the executive session, CEO Coleman stated that the Port heard many
2 comments about safety concerns and asked the Commission if they needed any other lease
3 terms before the Commission voted on the lease the next morning. (Coleman Dep. 167:11-
4 24.) As a result of the discussion, the Port added a term to the proposed lease requiring TSJV
5 to submit its final Facility Operation and Safety Plan to the Port for approval prior to
6 beginning operations. (Coleman Dep. 67:1-12, 164:14-165:3, 167:25-168:15; Coleman Ex. J
7 at 5; Knutsen Ex. T at 5; Lease ¶ 30.) The Port understood that this change would affect the
8 pricing and value of the lease because it was an extraordinary right. (Coleman Dep. 164:14-
9 165:3; Lowe Decl. ¶¶ 5, 7, 9.) No other topics were discussed during the July 22 executive
10 session. (Coleman Dep. 165:19-22.) The Commission did not discuss, deliberate, or vote on
11 whether to approve the TSJV lease during executive session. (Coleman Decl. ¶ 14; Allan
12 Decl. ¶ 10; Boyden Decl. ¶ 7; Lowe Decl. ¶ 9; Schiller Decl. ¶ 14; Marler Decl. ¶ 8; Brooks
13 Decl. ¶ 8; Mattix Decl. ¶ 5; Shuck Decl. ¶ 10; Estuesta Decl. ¶ 5; Jacobs Decl. ¶ 4; Smith
14 Decl. ¶¶ 4-6; Wagner Decl. ¶ 4.⁴)

15 Commissioner Oliver also misstated the duration of the executive session because the
16 meeting lasted far longer than he expected. (Asai Ex. 7 ¶ 7.) Commissioner Oliver was
17 exhausted from being awake early that day to drive to and from the Seattle airport to greet his
18 daughter. (*Id.* ¶ 6; Asai Ex. 17 at 13.) The July 22 meeting was also a bit of an anomaly
19 because it was late in the evening, stressful, and took a while to accommodate all of the
20 public in attendance. (Coleman Dep. 165:19-166:22.) The Port scheduled an evening
21 session to accommodate members of the public who were unable to attend daytime sessions.

22 Following the executive session, none of the session attendees knew how the
23 following day's vote would go. (Coleman Dep. 166:23-167:10; Asai Ex. 17 at 3, 12-14, 22;
24 Coleman Decl. ¶ 15; Allan Decl. ¶ 12; Boyden Decl. ¶ 8; Lowe Decl. ¶ 10; Smith Decl. ¶ 8;

25
26 ⁴ The declarations of Jeff Estuesta, Addison Jacobs, Alastair Smith, and Theresa
Wagner were filed on December 6, 2013 in support of the Port's motion for summary

1 Wagner Decl. ¶ 5; Estuesta Decl. ¶ 6; Schiller Decl. ¶ 14; Marler Decl. ¶ 8; Brooks Decl. ¶
2 9; Mattix Decl. ¶ 6; Shuck Decl. ¶ 10.) Commissioner Wolfe did not know even how he
3 would vote on the lease. (Asai Ex. 17 at 22; Coleman Decl. ¶ 15.) Though the session was
4 erroneously announced, it discussed issues that directly affected the price for the lease.

5 **F. July 23, 2013.**

6 Prior to the public meeting on July 23, the Port held an executive session to discuss
7 potential litigation and the consideration of price for the lease of property. (Coleman Dep.
8 169:7-17.) As relevant to the TSJV lease, the Port reviewed only the new clause that had
9 been proposed during the July 22 executive session. (*Id.* 170:18-171:24, 172:6-10.)

10 **V. When procedural concerns were raised, the Port addressed and cured them.**

11 After the lease was approved, the Port was faced with questions about the July 22
12 executive session, including the appropriateness of the announcement that the executive
13 session would take “at least” 15 minutes, rather than giving an exact end time, and the
14 appropriateness of a statement indicating public comment would be considered in the
15 session. Initially, these concerns were raised with the Port via newspaper articles, not by
16 Riverkeeper. (Asai Ex. 11 at 2-6.) Indeed, the only action Riverkeeper took between July 23
17 and filing this lawsuit on October 2 was to send out a press release on July 23 that never
18 mentioned the OPMA, and provide a statement to *The Columbian* as part of its article
19 highlighting the potential OPMA violations in the announcement of the executive session on
20 July 22. (*Id.* at 1, 6; Ex. 9 at 13-14.)

21 In response to these concerns, the Port took two corrective actions. First, the Port
22 improved its procedures for announcing executive sessions by developing an Executive
23 Session Reference Guide for the Commissioners’ use. (Coleman Dep. 173:13-174:9;
24 Knutsen Ex. T at 4; Coleman Ex. J at 3.) The Reference Guide provides a citation to the
25 relevant statutory provision for each executive session as well as a space for announcing its

26

judgment.

1 end time. (Coleman Ex. I.) The Commission implemented the Reference Guide at its next
2 meeting on August 13. (Coleman Decl. ¶¶ 16-18.) The Port's Internal Auditor and Director
3 of Finance then contacted the State Auditor's office to discuss the issues and the new
4 procedure, providing a copy of the Executive Session Reference Guide. (Estuesta Decl. ¶ 7;
5 Coleman Decl. ¶ 19.) The State Auditor's Office had no questions or concerns. (*Id.*;
6 Coleman Exs. K-L.)

7 Next, the Port re-opened the lease for public comment and a new vote by the
8 Commission on October 22. (Coleman Decl. ¶¶ 20-21.) Although the lease was fully
9 debated and approved in public on July 23, an extra level of transparency was consistent with
10 the Port's values. (Coleman Ex. J at 3.) In announcing the new vote the Port stated that the
11 Commission would proceed on the assumption that the July 23 vote had not been effective.
12 (Knutsen Ex. T at 5; Coleman Decl. ¶ 20.) The Commissioners and Port staff did not know
13 how the new vote would turn out. (Asai Ex. 17 at 6, 16, 25; Coleman Decl. ¶ 22; Boyden
14 Decl. ¶ 8; Lowe Decl. ¶ 12 ; Wagner Decl. ¶ 6; Estuesta Decl. ¶ 8; Marler Decl. ¶ 9.)

15 On October 22, the Commission moved forward on the assumption, without making
16 any legal conclusions, that the earlier vote was "not effective" and "[i]f the lease is not
17 approved, the process stops." (Coleman Ex. J at 3.) The Commission took public comment
18 from 35 separate individuals, for nearly two hours. (Knutsen Ex. T at 7-16.) Following the
19 public comments, the Commissioners deliberated in open session and voted unanimously to
20 approve the lease. (*Id.* 17-19.)

21 **VI. This Court previously granted summary judgment to the Port on the majority of**
22 **plaintiffs' claims.**

23 Riverkeeper filed this lawsuit on October 2, 2013, bringing four OPMA claims
24 relating to the July 22 executive session. Riverkeeper's Amended Complaint alleged the Port
25 violated the OPMA on July 22 by: (1) improperly deliberating beyond the appropriate scope
26 in executive session; (2) approving the lease during executive session; (3) failing to announce

1 a definite end time for the executive session; and (4) failing to announce a valid purpose for
2 the executive session. (Am. Compl. ¶¶ 50-60). Riverkeeper also brought two claims
3 alleging violations of the State Environmental Policy Act. (*Id.* ¶¶ 61-64.)

4 On December 6, 2013, the Port filed a motion for summary judgment. (D.E. # 15.)
5 During the hearing on January 10, 2014, this Court concluded that the Port took corrective
6 actions, including public votes on July 23 and October 22, 2013, and adoption of a revised
7 executive session announcement procedure on August 13, 2013, to render moot all of
8 plaintiffs' requests for injunctive relief under the OPMA. (Asai Ex. 14 at 5-6; 3/27/14 Order
9 ¶ 2.) This Court granted summary judgment to the Port "as to plaintiffs' requests for
10 injunctive relief on their First, Second, Third, and Fourth Causes of Action pertaining to any
11 OPMA violations." (3/27/14 Order ¶ 2.) This Court also granted summary judgment to the
12 Port as to plaintiffs' request for a declaration that the Port's approval of the TSJV lease is
13 null and void. (*Id.* ¶ 3.) As to the "remainder of plaintiffs' First, Second, Third, and Fourth
14 Causes of Action," this Court declined ruling on summary judgment and granted plaintiffs'
15 request for a CR 56(f) continuance to conduct discovery on those claims. (*Id.* ¶ 4.) The
16 Court dismissed Riverkeeper's environmental claims, which were certified for judgment
17 pursuant to CR 54(b) and are presently on appeal.

18 Riverkeeper amended its complaint on November 20, 2014 to expand its First Cause
19 of Action alleging the Commission deliberated on topics outside the scope of the OPMA in
20 nine executive sessions between February and July 2013. (Second Am. Compl. ¶¶ 27, 53-
21 55.)

22 In its Motion for Summary Judgment, Riverkeeper abandons its Second Cause of
23 Action alleging that the lease was approved in executive session. The remaining claims are
24 thus:

- 25 • The First Cause of Action, alleging deliberation beyond the limits of the
26 OPMA, RCW 42.30.110(1)(c) (Second Am. Compl. ¶¶ 53-55);

- 1 • The Third Cause of Action, alleging that Commissioner Oliver improperly
2 announced the duration of the July 22 session (*id.* ¶¶ 58-60);
- 3 • The Fourth Cause of Action, alleging Commissioner Oliver improperly
4 announced the purpose of the July 22 session (*id.* ¶¶ 61-63).

5 **VII. Parallel proceedings determined that the Commissioners did not violate the**
6 **OPMA.**

7 During discovery, Riverkeeper filed the entire transcripts from the Commissioners'
8 depositions with the Court. (1/23/15 Zultoski Decl. in Support of Pls.' Mot. to Compel, Exs.
9 3-5.) The local newspaper then uploaded those transcripts to its website as part of a three-
10 part story regarding this litigation. (Asai Ex., 12 at 1, 4-6.) Shortly thereafter, a local citizen
11 filed petitions to recall Commissioners Wolfe and Oliver. (*Id.*, Ex. 5; see *In re the Petition to*
12 *Recall Brian Wolfe, Port of Vancouver Commissioner*, Clark Cnty. Super. Ct. No. 15-2-
13 01538-2; *In Re the Petition to Recall Gerald Oliver, Port of Vancouver Commissioner*, Clark
14 Cnty. Super. Ct. No. 15-2-01691-5.)

15 Following the hearing on the sufficiency of the recall charges against Commissioner
16 Wolfe, including the court's review of relevant deposition testimony, Judge Lewis held that
17 the allegations against the Commissioner were legally and factually insufficient to support a
18 recall. (*In re Wolfe*, 6/16/15 Findings of Fact and Conclusions of Law, Ex. 8 at 1-2, 9-11.)
19 In making that determination, Judge Lewis found that: (1) holding an executive session is
20 permitted if the subject discussed falls within one of the authorized bases in the OPMA; (2)
21 receiving information from a private company in executive session is permissible if it occurs
22 in the context of an authorized exception under the OPMA; (3) an executive session may
23 consider public input and testimony; and (4) multiple votes on an issue are permitted so long
24 as they comply with Washington law, such as a second vote to resolve an issue involving an
25 announcement of executive session. (*Id.* at 3-7.) Judge Lewis's Order also found that
26 Commissioner Wolfe's testimony of executive session showed "subjects were discussed only

1 as part of a consideration of the terms and conditions to be established in the lease, which
2 would affect the lease's ultimate price," and there was no evidence of illegal or improper
3 discussions "in the context of the executive sessions." (*Id.* at 8.) Following this ruling, the
4 citizen withdrew his parallel petition against Commissioner Oliver. (Asai Ex. 13.)

5 LEGAL STANDARDS

6 Summary judgment is appropriate only when, after reviewing all facts and reasonable
7 inferences in the light most favorable to the nonmoving party, there are no genuine issues of
8 material fact, and the moving party is entitled to judgment as a matter of law. CR 56; *Pierce*
9 *County v. State*, 159 Wn.2d 16, 27, 148 P.3d 1002, 1009 (2006). When weighing the
10 evidence, summary judgment is appropriate if "reasonable persons could reach but one
11 conclusion" in light of all the evidence. *Indoor Billboard/Washington, Inc. v. Integra*
12 *Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10, 15 (2007). The function of
13 summary judgment "is to avoid a useless trial; and a trial is not only not useless but
14 absolutely necessary where there is a genuine issue as to any material fact." *Bates v. Bowles*
15 *White & Co.*, 56 Wn.2d 374, 379, 353 P.2d 663, 666 (1960). Summary judgment cannot be
16 granted "where a real doubt exists as to decisive factual issues." *Bartlett v. N. Pac. Ry. Co.*,
17 74 Wn.2d 881, 883, 447 P.2d 735, 737 (1968).

18 The OPMA is designed to ensure that public agency actions "be taken openly and that
19 their deliberations be conducted openly." RCW 42.30.010. The OPMA requirements,
20 however, may not be construed to "prevent a governing body from holding an executive
21 session during a regular or special meeting" on specific topics. RCW 42.30.110(1).

22 ARGUMENT AND AUTHORITY

23 Riverkeeper is not entitled to summary judgment because it cannot establish that the
24 Port exceeded the scope of the OPMA during executive sessions held between March and
25 July 2013. The record shows that the Port complied with its interpretation of the "minimum
26 price" exemption under the OPMA. The Port's interpretation of the statute is consistent with

1 the plain text and a common sense understanding of the statutory language. And in seeking
2 summary judgment, Riverkeeper relies on facts that either demonstrate no violation of
3 OPMA or are hotly disputed as to any potentially improper conduct. Riverkeeper also fails
4 to establish legitimate grounds to overturn this Court's prior summary judgment, and
5 therefore cannot resurrect its unsuccessful request to declare the TSJV lease null and void.
6 As a result, this Court should deny Riverkeeper's motion for summary judgment in its
7 entirety. Instead the Court should grant the Port's pending motion for summary judgment on
8 mootness grounds, now that Riverkeeper has been given the opportunity to obtain full
9 discovery.

10 **I. "Minimum price" in RCW 42.30.110(1)(c) does not limit executive session**
11 **discussion to numerical lease terms.**

12 The underpinning of Riverkeeper's motion is a definition of "minimum price" that is
13 contrary to the plain text and purpose of the OPMA. The relevant OPMA section provides
14 that a governing body may, during executive session, "consider the minimum price at which
15 real estate will be offered for sale or lease when public knowledge regarding such
16 consideration would cause a likelihood of decreased price." RCW 42.30.110(1)(c). No court
17 has interpreted the scope of this exemption. The Port interprets this exemption narrowly,
18 only allowing discussion of key deal information that either: (1) would give the Port's
19 customer a negotiating advantage that would lower the Port's minimum price on the lease; or
20 (2) would give a competitor an opportunity to negotiate with the Port's customer, that would
21 then result in driving down the price. (Coleman Dep. 24:15-25:4, 50:17-25.)

22 Riverkeeper, in contrast, alleges that seven of the Port's executive sessions violated
23 OPMA based on its interpretation that the "minimum price" exemption permits discussion of
24 only "the lowest price, or the floor" for which the property could be offered. (Pls.' Mot. 17,
25 19-28.) Riverkeeper argues that the statute does not allow discussion of any non-monetary
26 terms or even a range of possible prices before deciding on the minimum. Riverkeeper's

1 argument should be rejected because it ignores the essential role of components of a lease
2 that drive price. Riverkeeper's interpretation would create an unworkable situation where a
3 public body could not privately discuss the crucial deal points which result in and define
4 price. Riverkeeper's interpretation would place public bodies at an undue disadvantage in
5 obtaining the greatest benefit for the public when selling or leasing public property. This
6 result is contrary to public policy and would undermine the Port's ability to carry out its
7 statutory mandate to support economic development in the community. *See* RCW
8 53.04.010(1).

9 Courts should interpret statutes in accordance with their plain meaning. *State, Dep't*
10 *of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4, 9 (2002). When
11 interpreting statutes, "[t]he court's fundamental objective is to ascertain and carry out the
12 Legislature's intent, and if the statute's meaning is plain on its face, then the court must give
13 effect to that plain meaning as an expression of legislative intent." *Id.* Plain meaning may be
14 gleaned "from all that the Legislature has said in the statute and related statutes which
15 disclose legislative intent about the provision in question." *Id.* at 11. But as part of its
16 analysis, the court "must remain careful to avoid unlikely, absurd or strained results."
17 *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82, 84 (2005) (internal quotation
18 omitted).

19 Although "price" is not defined by the statute, dictionary definitions, which this Court
20 may consult, *S. Martinelli & Co., Inc. v. Wash. State Dep't of Revenue*, 80 Wn. App. 930,
21 938, 912 P.2d 521, 525 (1996), define price beyond a mere number. The dictionary defines
22 "price" as "[t]he amount of money or other consideration asked for or given in exchange for
23 something else; the cost at which something is bought or sold," Black's Law Dictionary
24 (10th ed. 2014), or simply as "[t]he consideration given for the purchase of a thing." Black's
25 Law Dictionary 1353 (4th ed. 1951).

1 In other state statutes, price refers broadly to an object's total value, not its mere
2 monetary label. RCW 82.45.030(1), the real estate excise tax statute, defines "selling price"
3 in an arm's-length transaction as "the total consideration paid or contracted to be paid." And
4 total consideration means "money or *anything of value*, paid or delivered or contracted to be
5 paid or delivered in return for the sale. . . ." RCW 82.45.030(3) (emphasis added.) The retail
6 tax statute also defines "selling price" or "sales price" "the total amount of consideration. . .
7 ." RCW 82.08.010(1)(a)(i). These definitions were adopted in their basic form well before
8 the OPMA became law in 1971. *See Thys v. State*, 31 Wn.2d 739, 751, 199 P.2d 68, 75
9 (1948) (construing 1939 Wash. Laws ch. 225, p. 989, § 7, Rem.Rev.Stat. (Sup.) § 8370-17,
10 which defined selling price as "consideration"). "The legislature is presumed to be aware of
11 its own enactments. . . ." *ATU Legislative Council of Wash. State v. State*, 145 Wn.2d 544,
12 552, 40 P.3d 656, 660 (2002). Thus the Court may presume that the Legislature was aware
13 of the meaning of price in the real estate context when it enacted the OPMA in 1971. The
14 Legislature could have chosen different language, but did not. Both the common meaning of
15 the term "price" in the statute and the plain meaning of "price" support the Port's
16 interpretation of the term to include factors that affect the total consideration for the property.

17 This Court should also consider the purpose of the real estate exemption in construing
18 its scope. At least one open meeting commentator has explained that the purpose of holding
19 executive sessions regarding real property negotiations is "obvious" because "[n]o purchase
20 would ever be made for less than the maximum amount the public body would pay if the
21 public (including the seller) could attend the session at which that maximum was set, and the
22 same is true for minimum sale prices and lease terms and the like." Schwing, *Open Meeting*
23 *Laws*, § 7.76, 416-418 (1994), as quoted in *Shapiro v. San Diego City Council*, 96 Cal. App.
24 4th 904, 914n.5, 117 Cal. Rptr. 2d 631, 639 (2002). Similarly in *Port of Seattle v. Rio*, the
25 Washington Court of Appeals held that the exemption for considering the acquisition of real
26 estate permitted discussions about the amount of compensation offered for a condemned

1 property in executive session to “preserve the negotiating power of a public agency.
2 condemnor at the bargaining table.” 16 Wn. App. 718, 724-25, 559 P.2d 18, 23 (1977). The
3 court noted that although the OPMA requires openness in public deliberations, “not all issues
4 need be discussed in public,” particularly where it would disadvantage the public body in
5 litigation. *Id.* at 723-24.

6 Thus, contrary to Riverkeeper’s interpretation, the minimum price exemption is not
7 limited to abstract discussions of the monetary floor without reference to the issues which
8 drive the price. Reading the “minimum price” exemption to include the key price-related
9 terms of a lease (e.g. the base rent, acreage leased, the wharfage or dockage fees, the
10 proposed use, any insurance requirement, duration of lease, etc.) or deal terms that directly
11 affect the minimum price that would be offered (e.g., the tenant’s financial viability or risk,
12 other risks that must be mitigated through the lease price, opportunity and feasibility costs,
13 etc.), effectuates the purposes of the statute and reflects the reality of real estate transactions.
14 It also ensures that a public body is not given an unfair disadvantage in negotiations relating
15 to real estate. This protects the value of the public resources entrusted to the Port and other
16 entities. As *Port of Seattle* recognized in the context of attorney-client privilege, a public
17 agency “should neither be given an advantage, nor placed at a disadvantage” by the OPMA.
18 16 Wn. App. at 724. The same is true here; the Port should not be placed at an unfair
19 disadvantage in attempting to obtain the maximum value for publicly-owned land.

20 While Riverkeeper places great weight on the absence of the phrase “matters
21 affecting” from the “minimum price” exemption, *Port of Seattle* held that the port
22 commission’s discussion and approval of a settlement offer for condemned property in
23 executive session was proper under OPMA’s real estate exemption, even though that
24 exemption does not include the “matters affecting” language. The court held that the OPMA
25 established “[t]he right to hold an executive session when the issue to come before the
26 commission in the acquisition of real property. *Id.* at 724 n.2 & 726 (citing RCW

1 42.30.110(1)(b) (“To consider the selection of a site or the acquisition of real estate by lease
2 or purchase when public knowledge regarding such consideration would cause a likelihood
3 of increased price.”)). The court recognized the importance of confidential consideration of
4 real estate matters, stating “the protection of the attorney-client privilege on matters
5 pertaining to the acquisition of real property . . . is *essential*.” *Id.* at 724 (emphasis added).

6 Riverkeeper also reads the word “consider” out of the statute. Section .110(1)(c)
7 states that public bodies may meet in executive session to “consider” minimum price. If, as
8 Riverkeeper would have it, the exception allows only statements of the final minimum price,
9 there is no space for consideration of at what price the real estate will be offered. “When we
10 read a statute, we must read it as a whole and give effect to all language used.” *State v.*
11 *Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686, 688 (2008). Riverkeeper’s position must be rejected
12 for failing to abide by this basic rule.

13 Consistent with these realities, Judge Lewis found that Commissioner Wolfe had not
14 violated OPMA by discussing price-related, but not strictly monetary, lease terms in
15 executive session. (6/16/15 Order, Asai Ex. 8.) In his Order, Judge Lewis specifically stated
16 that the “subjects were discussed only as part of a consideration of the terms and conditions
17 to be established in the lease, which would affect the lease’s ultimate price. No evidence was
18 provided that the subject matter was discussed illegally or improperly in the context of the
19 executive sessions.” (*Id.* ¶ 25.) This Court should follow Judge Lewis’s reasoning.

20 The Port’s definition also comports with a common-sense understanding that
21 minimum price cannot be determined in a vacuum. A public body could never substantively
22 discuss the minimum price that it would offer for a lease without knowing the crucial
23 elements of the deal exchanged for the price. While Riverkeeper asserts that only “the lowest
24 price, or the floor” may be discussed in executive session, Riverkeeper does not even attempt
25 to articulate how its restrictive definition could work in practice. For example, Riverkeeper
26 does not explain whether a public body could explain why a price was set, or if it could

1 discuss how variables specific to the market, customer, or project could affect the proposed
2 price. Presumably, Riverkeeper wants to restrain the Port to only state monetary numbers in
3 executive session, but no explanation or discussion of the factors that drove the price. That is
4 not how real estate transactions function. In practice, the Commission needs to know the
5 proposed tenant's requirements and associated costs, the tenant's financial or environmental
6 risks, and whether the tenant brings value (such as highly sought after jobs) that increases its
7 desirability and effectively lowers the minimum price. (*See, e.g.*, Coleman Dep. 47:23-
8 48:20, 49:9-15, 50:3-16, 91:7-21.) Thus, the Port's interpretation of the statute is consistent
9 with the statutory text, OPMA's purposes, and the practical realities of real estate
10 negotiations. In contrast, Riverkeeper's definition would lead to absurd or strained results
11 and should be rejected.

12 **II. Summary judgment should be denied because the Port has evidence showing the**
13 **executive sessions complied with the OPMA.**

14 To obtain summary judgment, Riverkeeper must establish as a matter of law that the
15 Commission held a meeting "where that body took action in violation of the OPMA[.]"
16 *Eugster v. City of Spokane*, 118 Wn. App. 383, 424, 76 P.3d 741, 763 (2003) ("*Eugster II*").
17 Riverkeeper cannot meet its burden because there is evidence showing the seven executive
18 sessions at issue complied with the OPMA. This evidence precludes summary judgment in
19 Riverkeeper's favor.

20 Here, the deposition testimony of all three Commissioners, the Port's CR 30(b)(6)
21 designee, and declarations from the attendees of the Port's executive sessions tend to show
22 that the discussions in executive session were limited to their announced purpose, the
23 discussion of real estate matters under RCW 42.30.110(1)(c). (*See, e.g.*, Asai Ex. 17 at 3, 5,
24 12-15, 22-23, 25; Allan Decl. ¶¶ 2-15; Boyden Decl. ¶ 6; Brooks Decl. ¶¶ 3-8; Coleman
25 Decl. ¶¶ 9-10, 13-14, Exs. K & L; Krout Decl. ¶ 3; Lowe Decl. ¶¶ 2-7; Marler Decl. ¶¶ 2, 5-
26 8; Mattix Decl. ¶ 4; *see also* Knutsen Ex. B.) The Port conducted all of its executive sessions

1 in accordance with its narrow interpretation of the “minimum price” provision of the OPMA.
2 (Coleman Dep. 174:18-175:11.) And the Port’s staff and counsel confirm that if the Port
3 discussed publicly the information it provided to the Commission during executive session,
4 the value obtained by the public for the lease would have been lowered, either from
5 competitive offers from other ports or through its customer learning confidential information.
6 (*Id.*; Lowe Decl. ¶ 5.) At minimum, Riverkeeper’s motion should be denied because it fails
7 to establish the absence of disputed material facts.

8 **A. Riverkeeper has not shown any OPMA violation on March 26, July 9,
9 July 16, July 17, or July 23.**

10 For five of the seven executive sessions at issue, the record is entirely absent of any
11 facts, let alone undisputed facts, showing that the Port violated the OPMA. Riverkeeper
12 concedes as much by resting its challenge to these sessions solely on its strained reading of
13 the statute. Riverkeeper’s purported support for establishing OPMA violations during five
14 executive sessions is that: (1) on March 26, the Port allegedly discussed “various details
15 about an exclusivity agreement with Tesoro-Savage”; (2) on July 9, the Port discussed
16 TSJV’s new entity; and (3) on July 16, July 17, and July 23, the Port discussed the proposed
17 lease terms. (Pls.’ Mot. 20, 24-26, 28-29.) Record evidence, however, shows that all of the
18 discussions during these executive sessions were limited to issues that, if made public, would
19 have likely caused a decrease in the lease price terms.

20 During the March 26 executive session, the Port staff presented information to the
21 Commission about the current status of the price-related lease terms, such as the lease rate,
22 wharfage fees, dockage fees, and rail fees. (Coleman Dep. 96:5-16, 96:21-24, 98:12-23.)
23 Riverkeeper concedes “these issues arguably could be within the scope of the OPMA
24 exception.” (Pls.’ Mot. 20.) Port staff also discussed the proposed duration for the
25 exclusivity agreement it planned to enter with its tenant. (Coleman Decl. 96:17-20, 97:9-25.)
26 The exclusivity agreement was necessary to ensure that a competing port did not offer a

1 lower price to the tenant, which would have reduced the Port's minimum price for the lease.
2 (*Id.* 114:14-115:24, 144:9-19.) The duration of exclusivity would also affect the Port's
3 potential price for lease because the length of the period exclusivity affects when the Port
4 could lease the space to others, and therefore the Port's future income for that space.
5 (Coleman Decl. ¶ 4; Holtby Decl. ¶ 3.) If a proposed tenant were disclosed prior to an
6 agreement of exclusivity, a competitor could swoop in and take the Port's opportunity.

7 During the executive session on July 9, the Port discussed TSJV's formation of a
8 separate LLC and its associated risks. (Coleman Dep. 156:11-22.) In setting price, the Port
9 considers a tenant's financial stability and whether a new entity requires a higher lease price
10 to compensate for the risk. (*Id.* 25:5-17, 47:23-48:20, 50:3-16.) For example, for a start-up
11 company that has never been in business or has no financial records, the Port will need to
12 consider whether the potential revenues from the new company can offset the risk. (*Id.*
13 25:18-26:8.) The financial risk may also result in the Port requiring a higher lease price.
14 (*Id.*) These financial concerns are consistent with Commissioner Wolfe's recollection that
15 the Commission discussed concerns related to whether the new TSJV entity "was merely a
16 shell without adequate assets," even though Commissioner Wolfe could not recall discussing
17 the issue in executive session. (Wolfe Dep. 66:7-67:3.) Indeed, the Port addressed the
18 Commission's concerns about TSJV's entity status by requiring TSJV to carry a \$15 million
19 general liability insurance policy and an additional \$25 million of pollution liability
20 insurance. (*Id.*; see Lease ¶¶ 1.K, 1.L, 15.B, 15.C.)

21 Riverkeeper also implies in a footnote that the Commission improperly discussed the
22 oil rail disaster in Lac-Mégantic, Quebec during the July 9 executive session. (Pls.' Mot. 25
23 n.10.) However, according to Commissioner Wolfe's testimony, the Commission discussed
24 the incident in Lac-Mégantic during public meetings, not during executive session. (Wolfe
25 Dep. 56:16-57:10, 61:11-14, 68:23-69:6.) Riverkeeper presents no evidence, much less
26 undisputed evidence, that such a discussion occurred on July 9, nor explains why that

1 discussion would have been improper. This Court should therefore ignore Riverkeeper's
2 unsupported contention.

3 During the July 16 and 17 executive sessions, Port staff presented, in detail, the
4 proposed price-related lease terms to the Commissioners, including the base rent, prices per
5 barrel, wharfage fees, dockage fees, insurance amounts, responsibility for construction costs,
6 and the acreage of the facility. (Coleman Dep. 149:14-150:9, 157:25-158:22.) The Port also
7 discussed key deal components that would affect the price-related terms, namely, the risks
8 for the type of crude oil in the facility, timelines for construction, the length of the operating
9 term, and whether extensions would be allowed. (*Id.* 157:25-158:22, 160:7-161:17, 162:3-
10 22.) Each of these topics was crucial to the Port's setting of a minimum price on the various
11 aspects of the lease, and would likely adversely affect the Port's price if disclosed publicly.

12 Similarly, during the executive session on July 23, the Commission reviewed a new
13 lease term that had been proposed during the July 22 executive session relating to the Port's
14 approval of the safety plan. (*Id.* 170:18-171:24, 171:19-172:10.) This new clause, if
15 discussed publicly, would have likely decreased the Port's minimum price because it was an
16 extraordinary condition and the Port was not certain TSJV would agree to the new condition
17 without renegotiating the pricing terms. (*Id.* 164:14-165:3; Lease ¶ 30.)

18 Although Riverkeeper contends that the Port "went through a number of typed-up
19 questions related to concerns of Commissioner Wolfe" during the July 16 and 17 executive
20 sessions and discussed more than the new lease term on July 23, it lacks evidence to support
21 these assertions, or any violation of the OPMA. (*See* Pls.' Mot. 26, 29.) Commissioner
22 Wolfe testified that he did not receive answers to his questions in executive session. (Wolfe
23 Dep. 118:5-119:3.) The Port similarly testified that the only discussion related to: (1) the
24 size of tanks and the associated risk; (2) the risk of fumes and how to require TSJV to
25 minimize that as part of the lease; (3) whether the Port could require certain railcars to
26 minimize risk; and (4) whether there were deficiencies in the Marine Safety and Fire

1 Administration that the Port needed to require revenue to supplement. (Coleman Dep. 162:3-
2 22.) These risks would all affect the minimum price the Port would offer on the lease. (*Id.*
3 47:23-48:20, 49:9-15, 50:3-16.)

4 As to July 23, Riverkeeper relies on an isolated snippet of Commissioner Oliver's
5 testimony to claim that the session was much more extensive. (Pls.' Mot at 29.) The record
6 shows, however, that Commissioner Oliver could not remember the July 23 executive session
7 except that the lease was discussed. (Oliver Dep. 131:1-132:11.) Commissioner Oliver also
8 speculated that the executive session included a complete review of all the clauses, but the
9 Port clarified that it only discussed the new clause regarding the approval of the safety plan
10 proposed on July 22. (*Id.*; Coleman Dep. 170:25-171:12, 171:19-172:5.)

11 Riverkeeper has not met its burden to show any violation of the OPMA on March 26,
12 July 9, July 16, July 17, or July 23.

13 **B. Material factual disputes regarding what occurred on April 9 preclude**
14 **summary judgment regarding this meeting.**

15 The April 9 executive session was different from the other sessions, but the evidence
16 does not compel a finding that it violated the OPMA. During this meeting, while the Port's
17 CEO was out of the country, representatives from TSJV handed out a PowerPoint
18 presentation to the Commissioners providing background on their companies and the
19 proposed project. TSJV discussed the potential project with the Commissioners, but
20 substantial evidence indicates that TSJV did not present its entire PowerPoint. (Coleman,
21 Dep. 126:1-25.) Riverkeeper, however, relies on emails and other documents to speculate
22 about the discussions in executive session, and asks this Court to assume from this second-
23 hand evidence that the discussions violated the OPMA. That is insufficient to establish
24 Riverkeeper's version of the facts is undisputed. To the contrary, record evidence shows that
25 the attendees are confident the meeting complied with the OPMA and that the PowerPoint
26

1 was not discussed in its entirety. Riverkeeper is therefore not entitled to summary judgment
2 as to the April 9 meeting.

3 At the outset, the mere presence of TSJV and BNSF representatives at the Port's
4 executive session is not a violation of the OPMA. The definition of a non-public meeting is
5 one that does not permit "all persons" to attend. RCW 42.30.030. Many of the exceptions
6 for executive session reflect areas where it is reasonable for the governing body to involve
7 third parties and rely on their confidential input, such as national security, contract
8 negotiations, employee evaluations, or potential litigation. RCW 42.30.110(1)(a),(d), (g), (i);
9 *see* Municipal Research and Services Center, *The Open Public Meetings Act* (June 2014),
10 *available at* [http://mrsc.org/getmedia/275E74FC-9D43-4868-8987-](http://mrsc.org/getmedia/275E74FC-9D43-4868-8987-A626AD2CEA9F/opma14.aspx)
11 [A626AD2CEA9F/opma14.aspx](http://mrsc.org/getmedia/275E74FC-9D43-4868-8987-A626AD2CEA9F/opma14.aspx) ("Persons other than the members of the governing body
12 may attend the executive session at the invitation of that body. Those invited should have
13 some relationship to the matter being addressed in the closed session, or they should be
14 attending to otherwise provide assistance to the governing body."); State of Oregon,
15 Department of Justice, *Attorney General's Public Records and Meetings Manual* § 2.E.5, at
16 174 (2014) ("[N]othing prohibits the governing body from permitting other specified persons
17 to attend" an executive session). Accordingly, in *Port Townsend Pub. Co. v. Brown*, 18 Wn.
18 App. 80, 83-85, 567 P.2d 664, 666-67 (1977), Division II found no OPMA violation when
19 the Jefferson County Commission met in executive session with a federal funding official to
20 discuss the appointment or dismissal of a public employee.

21 Moreover, evidence shows that the contents of the executive session complied with
22 the "minimum price" exemption for considering the lease of public property. The April 9
23 executive session discussed lease terms that would directly affect price, such as the number
24 of barrels stored onsite or in tanks, the number of cars per train, the impacts and coordination
25 of underground pipes with other terminals, the use of rail tracks, and key elements of the
26 lease that determine the price of the facility, such as the rate structures, acreages, facilities,

1 and rail infrastructure. (Coleman Dep. 100:11-23, 101:12-102:3, 102:22-103:21; Krout Decl.
2 ¶ 5.) These terms drive price because the number of barrels and cars relate to the amount of
3 land, labor, and facilities necessary for that tenant, and other infrastructure costs. (*See*
4 Holtby Decl. ¶ 3.) The tenant's use of pipes and rail tracks also affect the expected rail fees
5 and the feasibility of the lease price, such as whether the Port's investments associated with
6 the tenant's use of pipes and rail tracks are supported by the revenue streams. (*Id.*)

7 The April 9 executive session also included discussion of the volumes proposed and
8 how it would affect the Port's Terminal 5 loop; an explanation of the Port's decision to select
9 TSJV based on its ability to feed its own refinery; insurance needs; TSJV's through-puts and
10 volumes; anticipated number of jobs; and the number of acres to be leased. (Coleman Dep.
11 109:13-110:19, 121:25-123:14, 131:21-134:1; Shuck Decl. ¶ 3-4; *see also* Hepler Ex. M.)
12 These terms affected the Port's feasibility and opportunity costs, such as whether the risks
13 from the tenant's business could be mitigated by insurance or revenues, how TSJV's use of
14 its own refinery decreased volatility and associated risk, and the economic benefits for the
15 community. (*See* Holtby Decl. ¶ 3.)

16 These elements of the proposed lease could not be discussed in public—as it would
17 have likely affected the minimum price of the lease—because TSJV had not publicly
18 announced the project, the Port was still negotiating the price with TSJV, and the parties had
19 not agreed to exclusivity yet. (*Id.* 114:14-115:24, 144:9-19.) In addition, several other ports
20 would have been able and interested in competing for TSJV's business if the project had
21 been disclosed publicly. (Coleman Dep. 114:14-115:24.) Thus, although Riverkeeper
22 asserts that the Port acted nefariously by holding an executive session prior to announcing the
23 project publicly on April 22, the lack of exclusivity and likelihood of competition is precisely
24 why the Port could not invite the public to the April 9 meeting.

25 The Commissioners' questions in executive session are also consistent with the
26 OPMA. The Commissioners asked about the costs of the facility, the creation of jobs in the

1 local community, how TSJV would be serving its refineries, the number of railcars, and
2 safety aspects of the facility and crude oil. All these subjects affected the price the Port
3 would be willing to offer to TSJV. (*Id.* 112:23-113:14, 134:2-137:1, 137:12-141:5.)

4 Notably, this executive session occurred while CEO Todd Coleman was out of the
5 country. (*Id.* 99:14-20.) Mr. Coleman was therefore not present to monitor the discussions
6 in executive session as he would typically do. (*Id.* 46:2-14.) Nevertheless, two attorneys for
7 the Port were present, and the Port's counsel is confident that the executive session complied
8 with the scope of OPMA. (Lowe Decl. ¶¶ 2-7; *see* Oliver Dep. 101:23-103:13.) In addition,
9 the lawyers' contemporaneous notes indicate that only permissible, economic terms were
10 discussed in executive session. (Hepler Ex. M; Lowe Ex. N.)

11 While the Port may not typically allow as much background information and
12 introductions in executive session as illustrated in TSJV's written PowerPoint (*see* Coleman
13 Dep. 174:18-175:18; Knutsen Ex. K), Riverkeeper cannot establish that every aspect of the
14 PowerPoint presentation was discussed in executive session or that the amount of
15 introductions and pleasantries exceeded the bounds of the OPMA. Indeed, although one
16 email (Knutsen Ex. I) states the presentation was given, it gives no details about what was
17 discussed. No meeting attendee remembers the full presentation being given. (Coleman
18 Dep. 126:1-25.) Many attendees do not recall TSJV's PowerPoint at all. (*See, e.g.*, Allan
19 Decl. ¶ 3; Boyden Decl. ¶ 4; Brooks Decl. ¶ 5; Lowe Decl. ¶ 8; Marler Decl. ¶ 6; Westrand
20 Decl. ¶ 4.)

21 The attendees' memory that only portions of the TSJV's presentation were discussed,
22 at best, is consistent with the Port's practice of providing documents to the Commission in
23 hard copy for their review without discussing the documents in executive session. (Coleman
24 Dep. 75:1-20, 77:20-25, 87:2-19, 141:20-143:10.) For example, on April 9, Curtis Shuck
25 handed out his PowerPoint to the Commissioners and only presented some of the slides. (*Id.*
26 111:12-112:2, 118:23-119:11, 119:21-120:17, 120:23-121:24.) The Port recalls that TSJV

1 also handed out a hard copy of its PowerPoint presentation to the Commission and discussed
2 only portions in executive session. (Coleman Dep. 123:15-24, 124:4-21, 126:3-25.) Thus, in
3 light of this evidence, Riverkeeper cannot even show that the potentially overbroad sections
4 of TSJV's PowerPoint were discussed in executive session. At minimum, the Port's
5 evidence creates factual issues that preclude the Court from entering summary judgment in
6 Riverkeeper's favor. *See, e.g., Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 459, 166
7 P.3d 807, 812 (2007) (reversing grant of summary judgment where evidence was in conflict
8 on key elements of claim).

9 Finally, the Commissioners' alleged excitement following the April 9 meeting does
10 not establish a violation. (*See* Pls.' Mot. 23.) First, the attendees uniformly agree that the
11 Commission did not take a vote or deliberate on the merits of the project in executive
12 session. (*See, e.g.,* Allan Decl. ¶¶ 7, 10, 15; Boyden Decl. ¶ 7; Lowe Decl. ¶ 9; Marler Decl.
13 ¶ 8; Mattix Decl. ¶ 5; Schiller Decl. ¶ 14; Shuck Decl. ¶ 6.) Second, even without a vote, the
14 Commissioners did not collectively express their excitement for the project. Commissioner
15 Wolfe testified that he was very interested in the project and believed they could not ignore
16 its potential, but he was not excited. (Wolfe Dep. 90:13-91:5.) Commissioner Oliver
17 characterized himself as "an enthusiastic proponent" of the project because he considers the
18 project the "greatest economic event of our lifetime" that will put people back to work.
19 (Oliver Dep. 108:17-109:20.) Commissioner Oliver shared his viewpoint publicly, but never
20 discussed it with the other Commissioners in executive session. (*Id.* 109:23-110:17.) In
21 addition, the Port explained that the Commissioners were interested in discussing the project
22 with the public and to give the public an opportunity to comment from, not excited for the
23 project itself. (Coleman Dep. 114:14-115:24, 115:25-116:15, 129:5-130:13.) Indeed, the
24 Port publicly announced the project shortly thereafter and held five workshops to provide
25 information to and receive comment from the public. (*See* Knutsen Exs. C-E.) The
26 workshops included a complete presentation by TSJV. (Allan Ex. E.)

1 C. **The Port admits its announcement on July 22 was a technical violation of**
2 **OPMA, but the contents of the executive session were appropriate.**

3 The Port already admitted, and then promptly fixed, the only OPMA violations during
4 the July 22 Commission meeting which related solely to Commissioner Oliver's
5 misstatements. In response to concerns raised by the public about Commissioner Oliver's
6 mistaken announcement on July 22, the Port immediately revised its executive session
7 announcement procedures by developing its Executive Session Reference Guide. (Coleman
8 Dep. 173:13-174:9; Knutsen Ex. T at 4.) The Commission implemented the Reference Guide
9 at its next meeting on August 13, more than six weeks before Riverkeeper filed this lawsuit.
10 (Coleman Decl. ¶¶ 16-17.) The Port contacted the State Auditor's office to discuss the issues
11 and the Port's new procedure, again before Riverkeeper filed suit. (Estuesta Decl. ¶ 7;
12 Coleman Decl. ¶ 19.) The Port also re-opened the lease for public comment and a new vote
13 by the Commission on October 22. (Coleman Decl. ¶ 20, Ex. J.) The Port then promptly
14 admitted the error to this Court during the hearing on the Port's summary judgment in
15 January 2014, in discovery, and in response to Riverkeeper's Second Amended Complaint.
16 (Asai Exs. 14-16.) Riverkeeper wastes ink and this Court's time by seeking to prove a
17 violation the Port admitted and fixed almost two years ago.

18 As to the substance of discussion during the July 22 executive session, Riverkeeper
19 cannot establish an OPMA violation. The record contains declarations or deposition
20 testimony from every participant in that executive session stating that the only discussion in
21 executive session related to the terms of the lease, or specifically, the addition of a term
22 requiring TSJV to submit its final safety plan to the Port for approval prior to beginning
23 operations. (Coleman Dep. 67:1-12, 164:14-165:9, 167:25-168:15; Oliver Dep. 115:20-
24 116:7, 121:18-123:5, 125:13-24; Wolfe Dep. 107:14-109:7, 113:24-114:23; Baker Dep. 56:7-
25 17, 57:16-58:5; Coleman Decl. ¶¶ 13-14; Allan Decl. ¶ 9; Boyden Decl. ¶ 6; Lowe Decl. ¶ 9;
26 Schiller Decl. ¶ 13; Marler Decl. ¶ 7; Brooks Decl. ¶ 7; Mattix Decl. ¶ 4; Shuck Decl. ¶ 9;

1 *see also* Coleman Ex. J at 5; Lease ¶ 30.) As part of that discussion, the Commission
2 considered whether they learned anything from the public discussion that would cause them
3 to revise the conditions in the lease that would affect its pricing. (Wolfe Dep. 140:21-
4 141:12; Coleman Dep. 167:11-24.) In response to public concerns about safety, the Port
5 added the term requiring approval of TSJV's safety plan. (Coleman Dep. 67:1-12, 164:14-
6 165:3, 167:25-168:15.) The Port understood that adding the approval clause would affect the
7 pricing of the lease because it was an "extraordinary" right requiring TSJV to agree to an
8 additional approval level beyond the permit requirements, which could result in direct costs
9 to TSJV for safety equipment or other costs that it would seek to offset in rent. (*See*
10 Coleman Dep. 164:14-165:3; Lowe Decl. ¶ 5; Lease ¶ 30.) No other topics were discussed
11 during the July 22 executive session. (Coleman Dep. 165:19-22.)

12 Riverkeeper baldly asserts that it was "particularly egregious and insulting for the
13 Board to have excluded the public from their deliberations on the public comments after so
14 many people came to this meeting after work on a Monday night to provide the Board with
15 public testimony," but the record does not support its accusation. (Pls.' Mot. 28.) All of the
16 attendees confirm that the Commission did not discuss, deliberate, or vote on whether to
17 approve the TSJV lease during the July 22 executive session. (Asai Ex. 17 at 22; Coleman
18 Decl. ¶ 14; Allan Decl. ¶ 10; Boyden Decl. ¶ 7; Lowe Decl. ¶ 9; Smith Decl. ¶¶ 4-6; Wagner
19 Decl. ¶ 4; Estuesta Decl. ¶ 5; Schiller Decl. ¶ 14; Marler Decl. ¶ 8; Brooks Decl. ¶ 8; Mattix
20 Decl. ¶ 5; Shuck Decl. ¶ 10; Jacobs Decl. ¶ 4.) In fact, none of the session attendees knew
21 how the following day's vote would go. (Coleman Dep. 166:23-167:10; Coleman Decl. ¶ 15;
22 Allan Decl. ¶ 12; Boyden Decl. ¶ 8; Lowe Decl. ¶ 10; Smith Decl. ¶ 8; Wagner Decl. ¶ 5;
23 Estuesta Decl. ¶ 6; Schiller Decl. ¶ 14; Marler Decl. ¶ 8; Brooks Decl. ¶ 9; Mattix Decl. ¶ 6;
24 Shuck Decl. ¶ 10.) Commissioner Wolfe even explained that the Commissioner's never
25 discuss their personal views on an issue in executive session, but instead just listen to each
26

1 other's questions to staff. (Wolfe Dep. 65:1-25.) Riverkeeper therefore cannot establish an
2 OPMA violation based on the discussion in executive session on July 22.

3 **III. Riverkeeper has no basis to seek reconsideration of this Court's mootness**
4 **decision.**

5 On January 10, 2014, this Court concluded that the Port's corrective actions rendered
6 moot Riverkeeper's requests for injunctive relief under OPMA and its request to declare the
7 TSJV lease null and void. (3/27/14 Order ¶¶ 2-3.) Riverkeeper seeks to reconsider this
8 aspect of the Court's summary judgment ruling, but fails to establish that it meets the
9 standards governing reconsideration and concedes that it "does not intend to pursue" its only
10 claim that could support the remedy it seeks. (*See* Pls.' Mot. 1 n.1, 31-37.) The OPMA
11 allows a court to invalidate only actions that are taken in violation of the OPMA, but
12 Riverkeeper has abandoned any claim that the lease approval decision was made in executive
13 session or was otherwise improper.

14 Riverkeeper cannot meet its burden for reconsideration because (1) Riverkeeper
15 cannot identify new evidence that was unavailable at the time of this Court's decision, and
16 (2) even considering Riverkeeper's purportedly new evidence, it does not affect this Court's
17 decision. This Court should therefore deny Riverkeeper's request for reconsideration as to
18 the validity of the TSJV lease and for injunctive relief.

19 **A. Riverkeeper cannot identify "newly discovered evidence" that was**
20 **unavailable at the time of this Court's summary judgment decision.**

21 Riverkeeper's alleged discovery of new and "more extensive OPMA violations" is
22 insufficient to warrant reconsideration of this Court's prior order. As described above,
23 Riverkeeper has not established that the Port violated the OPMA beyond the procedural
24 errors in the Port's announcement of the July 22 executive session that was promptly fixed.
25 And in any event, Riverkeeper's purported new evidence was available to Riverkeeper at the
26 time of this Court's prior summary judgment decision.

1 To obtain reconsideration based on “newly discovered evidence,” a party must show
2 that it could not have obtained the evidence earlier. *See, e.g., West v. Thurston County*, 144
3 Wn. App. 573, 580, 183 P.3d 346, 349 (2008); LR 7(b)(1) (requiring reconsideration on an
4 alleged different state of facts to show by affidavit “what order or decision was made on it
5 and what new facts are claimed to be shown; for failure to comply with this requirement, any
6 order made upon subsequent application may be set aside and sanctions imposed”). The
7 party seeking reconsideration must also state facts that explain why the information was
8 unavailable even with due diligence. *Vance v. Offices of Thurston Cnty. Comm’rs*, 117 Wn.
9 App. 660, 671, 71 P.3d 680, 685 (2003). Matters available from public records will not be
10 considered newly discovered because they are “at all times within the reach of the reach of
11 the complaining party, and it is because of a lack of diligence if he fails to discover them.”
12 *Starwich v. Ernst*, 100 Wn. 198, 207, 170 P. 584, 587 (1918).

13 *Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554, 560 (1990)—which
14 Riverkeeper cites as authority for its request to reconsider the Court’s grant of summary
15 judgment—is not to the contrary. (*See Pls.’ Mot.* 32). In *Coggle*, the trial court denied the
16 plaintiff’s request for a CR 56(f) continuance even though the plaintiff established that it
17 could not produce its new evidence at the time of the summary judgment hearing due to his
18 first attorney’s dilatory conduct and his new counsel’s inability to complete all the work in
19 time. 56 Wn. App. at 508. The Washington Court of Appeals held that the trial court abused
20 its discretion in denying a continuance because the plaintiff met his burden and the defendant
21 did not identify any prejudice from a short continuance. *Id.* The Court of Appeals expressly
22 stated, however, that the trial court’s abuse of discretion as to the continuance decision
23 distinguished that case from cases seeking reconsideration based on “evidence that could
24 have been discovered prior to the trial court’s ruling.” *Id.* at 509 n.3 (citations omitted).
25 Here, Riverkeeper obtained a CR 56(f) continuance but has nothing to show for it that would
26 justify reopening the issue of the validity of the lease.

1 In its motion to reconsider this Court’s mootness decision, Riverkeeper relies entirely
2 on documents that were available at the time of this Court’s summary judgment hearing.
3 (See Pls. Mot. 33-34, 37, citing Knutsen Exs. I, L, T.) In fact, Riverkeeper cites to emails
4 (Exs. I, L) and meeting minutes (Ex. T) that it obtained via public records requests or from
5 the Port’s website, as they do not bear the Port’s discovery production label. (Asai Decl. ¶
6 2.) Indeed, some of the evidence may have been obtained through public records requests
7 that the newspaper and other individuals not involved in this litigation—not Riverkeeper—
8 made to the Port. (Asai Ex. 10.)

9 **B. Riverkeeper’s purportedly new evidence does not affect this Court’s**
10 **mootness decision.**

11 Even if this Court considers Riverkeeper’s “new” evidence, Riverkeeper has not cited
12 *any* authority authorizing a court to nullify a public body’s final action taken in accordance
13 with the OPMA. This Court previously determined that the Port validly approved the TSJV
14 lease in accordance with OPMA procedures at open public meetings on July 23 and October
15 22. Riverkeeper does not challenge this finding. Thus, even if Riverkeeper identifies
16 procedural violations prior to July 22—which it cannot—those errors do not affect the Port’s
17 curative actions of deliberating and re-voting on the TSJV lease during a public meeting.

18 **1. Riverkeeper is not pursuing its OPMA claim alleging improper**
19 **approval of the lease, so it cannot nullify the lease.**

20 Riverkeeper abandoned its only available argument for overturning this Court’s
21 mootness finding when it decided to drop its Second Cause of Action alleging that the Port
22 approved the lease during executive session. (See Pls.’ Mot. 1 n.1.) Because the
23 Commissioners never reached agreement on the lease outside a proper meeting, Riverkeeper
24 has no basis to nullify the lease.

25 OPMA provides that “[n]o governing body of a public agency shall adopt any
26 ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the
public” RCW 42.30.060(1). Similarly, the minimum price provision provides that

1 “final action selling or leasing public property shall be taken in a meeting open to the
2 public.” RCW 42.30.110(1)(c). Riverkeeper no longer contends that the Port failed to
3 comply with these provisions. Therefore, the lease approval cannot fall within the limited
4 provision of the OPMA that states action taken at a non-public meeting “shall be null and
5 void.” RCW 42.30.060(1).

6 And even if an OPMA violation occurred in a prior meeting, subsequent actions taken
7 in compliance with the OPMA are not invalidated. *Org. to Preserve Agric. Lands v. Adams*
8 *County*, 128 Wn.2d 869, 884, 913 P.2d 793, 802 (1996) (“*OPAL*”). As the Washington
9 Supreme Court explained,

10 if the *final action* taken by the public agency is in accordance
11 with our open public meetings act requirements, then it would
12 appear to us that this action would be defensible even though
13 there may have been a failure to comply with the act earlier
14 during the governing body’s preliminary consideration of the
15 subject.

16 *Id.* at 883 (emphasis in original). Thus, a public body may retrace its steps to correct alleged
17 procedural errors by re-doing its action in compliance with the OPMA. *Henry v. Town of*
18 *Oakville*, 30 Wn. App. 240, 246, 633 P.2d 892, 896 (1981) (“The well-established rule is that
19 where a governing body takes an otherwise proper action later invalidated for procedural
20 reasons only, that body may retrace its steps and remedy the defect by re-enactment with the
21 proper formalities.”).

22 In a similar case, the Washington Court of Appeals rejected a plaintiff’s attempt to
23 nullify an ordinance adopted by the City of Spokane in a public meeting based on alleged
24 OPMA violations in prior meetings. *Eugster II*, 118 Wn. App. 422-23. The plaintiff alleged
25 the city had violated OPMA in connection with a number of meetings it held with third party
26 representatives. *Id.* But the court explained, relying on *OPAL*, that “meetings held in
violation of OPMA will not invalidate a later final action taken in compliance with the
statute.” *Id.* at 423. Thus, because the council adopted the challenged ordinance in a public

1 meeting, after public comments (including comments in opposition to the ordinance from the
2 plaintiff), “even if the challenged meetings violated OPMA, such violations will not nullify
3 the properly enacted ordinance.” *Id.*

4 Under *OPAL* and *Eugster II*, a public vote in accordance with OPMA eliminates any
5 challenge to the validity of the vote. The only possible exception is where the public body
6 merely makes a “summary approval of decisions made in numerous and detailed secret
7 meetings.” *OPAL*, 128 Wn.2d at 884; *Miller v. City of Tacoma*, 138 Wn.2d 318, 329-30, 979
8 P.2d 429, 435 (1999) (finding improper vote taken in executive session because “the council
9 members were balloted until a consensus was reached”). For example, if a public body “met
10 in secret and decided how it would vote” and then ratified that prior vote in a public meeting,
11 “that formal vote would be invalid.” *Clark v. City of Lakewood*, 259 F.3d 996, 1014 n.10
12 (9th Cir. 2001).

13 To nullify the lease here, Riverkeeper must establish that the Port approved the TSJV
14 lease in executive session. Riverkeeper concedes it cannot prove any improper approval of
15 the lease. (*See* Pls. Mot. 1 n.1.) Moreover, the attendees at the Port’s executive sessions
16 uniformly confirm that no vote or approval took place outside a public meeting. (Asai Ex. 17
17 at 3, 5, 12-15, 22-23, 25; Coleman Decl. ¶ 14; Allan Decl. ¶¶ 7, 10, 15; Boyden Decl. ¶ 7;
18 Brooks Decl. ¶ 8; Lowe Decl. ¶ 9; Marler Decl. ¶ 8; Mattix Decl. ¶ 5; Schiller Decl. ¶ 14.)
19 So even assuming some of the executive sessions were improper, there is no *action* taken
20 during the executive sessions to nullify.

21 **2. This Court correctly found that the Port retraced its steps and**
22 **Riverkeeper’s new arguments do not justify reconsideration.**

23 Riverkeeper has not identified any new facts or legal authority to overturn this
24 Court’s prior decision. In accordance with the applicable authorities, this Court correctly
25 held that despite the “technical violations in the announcement of the [July 22] meeting and
26 its duration and its scope and whether the terms of that lease which included price were

1 impermissibly broad,” the violations were “made moot as a result of the do-over or the
2 retracing of the steps, both on July 23rd and/or October 22nd.” (Asai Ex. 14 at 5.) This
3 Court therefore presumed OPMA violations occurred prior to July 23, but still found no basis
4 to nullify the lease in light of the subsequent public votes. So even if this Court assumes
5 other technical violations predated July 22, those alleged violations would not affect the re-
6 vote on October 22 at a full public meeting in accordance with the OPMA.

7 For the most part, Riverkeeper merely repeats its unsuccessful arguments made at
8 summary judgment, which is not sufficient for reconsideration. *Sligar v. Odell*, 156 Wn.
9 App. 720, 734, 233 P.3d 914, 921 (2010). Riverkeeper also makes three arguably new, but
10 equally unsuccessful, arguments to seek reconsideration of the Court’s mootness decision:
11 (1) that the Port “could not approve a proposed lease that was the product of the numerous
12 null and void actions taken behind closed doors”; (2) Riverkeeper was not provided a full
13 opportunity to express its views on the lease; and (3) the Port treated its “non-compliant
14 action as continuing in effect.” (Pls.’ Mot. 32-37.)

15 First, as described above, the Port’s public votes wiped the slate clean from any
16 alleged OPMA violations. Thus, unlike in *Mason County v. Public Employment Relations*
17 *Commission*, 54 Wn. App. 36, 38, 771 P.2d 1185, 1186 (1989), cited by Riverkeeper, the
18 Port never ratified an agreement reached in improper meetings. There was no agreement or
19 approval of the lease in the meetings Riverkeeper challenges, a fact that Riverkeeper
20 concedes. In *Mason County*, the county’s bargaining representatives met with union
21 representatives outside of a public meeting to negotiate a future labor agreement. *Id.* at 37-
22 38. Two of the county commissioners attended the last two bargaining sessions, and
23 ultimately signed the agreement in a separate closed meeting after it had been ratified by the
24 union. *Id.* at 38. None of these meetings had been announced to the public or even the third
25 county commissioner. *Id.* at 38-39. As a result, the trial court found the “actions taken at
26 those sessions were void.” *Id.* 39. On appeal, the court held that OPMA applies to collective

1 bargaining sessions in which the public body’s decision-making representatives participate,
2 and that a public body “may not ratify the proposed agreement *reached at meetings*
3 *conducted in violation of the Act* because the decisions resulting from those sessions and the
4 ultimate formulation of the proposed agreement are void.” *Id.* at 38 (emphasis added); *see*
5 *also Clark*, 259 F.3d at 1012 (holding that while task force violated OPMA by closing the
6 majority of its meetings to the public, “the remedy is not declaring the Ordinance null and
7 void, but declaring the *actions the Task Force conducted behind closed doors* null and void)
8 (emphasis added).

9 *Mason County* gives no basis to nullify the lease. Had the Port reached any
10 agreements during executive session, they would be void and could not be summarily
11 approved in a later public meeting. But as Riverkeeper concedes, the Port never approved
12 the lease in executive session. *Mason County* does not, as Riverkeeper suggests, provide a
13 basis for the court to nullify actions taken at open meetings merely because the matter was
14 discussed in executive session prior to its adoption in public. *OPAL* and *Eugster II* make
15 clear that a public body’s action taken in public cannot be invalidated based on prior
16 meetings about the project, even if those meetings exceeded the limits of OPMA.

17 Second, contrary to its contention, Riverkeeper was given multiple opportunities to
18 fully express its views about the TSJV lease with the Commission. Riverkeeper’s argument
19 would have no legal merit even if it were true, but the facts show Riverkeeper took advantage
20 of the Port’s public forums, participated in all five public workshops about the lease, and
21 provided written comments to the Commission. (Knutsen Ex. C-E; Allan Decl. ¶ 16, Ex. F.)
22 Executive session, in contrast, is not the appropriate forum for the public to provide its
23 opinions to the Commission.

24 The only information initially withheld from Riverkeeper and the public about the
25 proposed lease was the competitively-sensitive proposed lease terms that the Port continued
26 to negotiate with TSJV. (*See, e.g., Coleman* Dep. 67:1-68:3, 70:12-17.) All of this

1 information (except for confidential trade secrets) was eventually shared with the public
2 during the public workshop period. (Coleman Decl. ¶ 24; Oliver Dep. 100:12-101:2.) Even
3 TSJV provided a presentation to the public that went beyond its presentation to the
4 Commission in executive session. (Allan Ex. E.)

5 Riverkeeper cites to *Brookwood Area Homeowners Ass'n, Inc. v. Anchorage*, 702
6 P.2d 1317 (Alaska 1985), for the proposition that the content of the executive sessions
7 prejudiced Riverkeeper's ability to meaningfully comment on the project. (Pls.' Mot. 36.)
8 *Brookwood* is distinguishable. There, the municipal assembly met privately with a developer
9 to discuss its application for rezoning that had been rejected and was set for a public meeting
10 one week after the meeting. *Id.* at 1319. During the meeting, the developer provided
11 information about the project and the assembly members asked a number of questions. *Id.* at
12 1320. Some of the members testified that they reached agreement with the developer to
13 reduce its proposal during the meeting. *Id.* At the public hearing, the members admitted
14 they attended the private meeting and then the developer gave its presentation, followed by
15 public comments. *Id.* at 1321. The court determined that the private meeting was a
16 "meeting" under Alaska's open meetings act that should have been open to the public, and
17 could not be deemed harmless merely because the public was able to give testimony at the
18 public hearing the following week—since the agreement made in private was not
19 substantially reconsidered in public. *Id.* at 1323-26.

20 *Brookwood* is like *Mason County* and *Miller*, and unlike this case, because the board
21 in each case reached an unlawful secret agreement which was then rubber-stamped in public.
22 Nothing of the sort happened here. Unlike in *Brookwood*, the Port did not reach agreement
23 on the lease during a private meeting, it voted on the lease in a public meeting, and it then
24 fully reconsidered the vote in a subsequent meeting. Thus even under *Brookwood*,
25 Riverkeeper has not established a basis to invalidate the lease.
26

1 Finally, the Port fully treated its initial vote as ineffective so the Commission could
2 entirely reconsider whether to approve the TSJV lease in October. That the Port was
3 confident that its use of executive session on July 22 was appropriate does not change the
4 legal effect of the Port's determination that the prior vote was ineffective. The October 22
5 Commission meeting agenda included an action item entitled "Approve the Ground Lease
6 Agreement Between the Port of Vancouver USA and Tesoro Savage Petroleum Terminal
7 LLC." (Allan Ex. D at 4.) The agenda item re-opened the merits of the lease. (*Id.*) In
8 presenting the agenda item to the Commission, CEO Coleman acknowledged the procedural
9 issues regarding the announcement of the executive session on July 22, and stated that the
10 Port was "[m]oving forward under the assumption that the earlier vote was not effective."
11 (Coleman Ex. J at 3.) He also stated that "at this point, we do not have a lease." (Coleman
12 Decl. ¶ 20.) The Commission then took public comment anew and openly deliberated over
13 whether to enter into the lease without holding any executive session. (Knutson Ex. T at 1, 7-
14 17.)

15 The Port's staff, including CEO Coleman, did not know how the October 22 vote
16 would turn out. (Coleman Decl. ¶ 22; Lowe Decl. ¶ 12; Marler Decl. ¶ 9.) Although
17 Commissioner Oliver referred to the second vote as a "re-approval," that was only his
18 opinion of his vote and he knew a "no" vote would stop the process. (Oliver Dep. 132:12-
19 133:14; Asai Ex. 17 at 16.) Commissioner Oliver was also a well-known "enthusiastic
20 proponent" of the project. (Oliver Dep. 108:17-109:20.) Commissioners Baker and Wolfe
21 were unsure prior to the re-vote whether the lease would be approved. (Asai Ex. 17 at 6, 25.)
22 Commissioners Wolfe and Baker also understood that a "no" from the Commission would
23 end the project. (*Id.*; Baker Dep. 58:17-59:18.) As a result, the Commission fully and
24 adequately re-did its entire deliberation process and cured any prior procedural error.
25
26

1 IV. The Court should grant the Port's pending summary judgment motion on
2 mootness grounds.

3 Riverkeeper had its CR 56(f) opportunity for discovery and failed to uncover
4 evidence to overcome the Port's showing that all of Riverkeeper's claims are moot. This
5 Court already determined correctly that Riverkeeper's requests for injunctive relief and to
6 nullify the lease are moot. All that remains are Riverkeeper's claims for declaratory
7 judgment and attorney fees, but they too are mooted by the Port's corrective actions taken
8 nearly two years ago. As a result, this Court should grant the remainder of the Port's pending
9 motion for summary judgment (D.E. # 15).⁵

10 Under the OPMA, where a public body abandons its improper procedure and corrects
11 its action, any claims for declaratory as well as injunctive relief are moot. *Eugster v. City of*
12 *Spokane*, 110 Wn. App. 212, 228-29, 39 P.3d 380, 387 (2002) ("*Eugster I*"). *Eugster I* held
13 that "[t]he trial court correctly exercised discretion when denying injunctive and declaratory
14 relief" because "no continuing justiciable controversy existed" as of the date of the show
15 cause hearing. *Id.* at 228. Specifically, the court held that because the council abandoned its
16 improper selection process by conceding it needed correction and substituted a new process
17 in accordance with the OPMA, there was no evidence that the improper procedure would be
18 used in the future. *Id.* at 228-29. The court affirmed the dismissal of the declaratory relief
19 claims. *Id.*

20 Like in *Eugster I*, the Port expressly acknowledged its mistake in the announcement
21 of the July 22 executive session, proactively developed new announcement procedures,
22 sought input from the State Auditor's Office about the procedures, and implemented the new
23 process at the Commission's next meeting all before Riverkeeper filed suit. (Coleman Decl.
24 ¶¶ 16-21.) The Port continues to use those new procedures and has thrice received

25 _____
26 ⁵ The Port refers the Court to the Port's prior pleadings and evidence filed in support
of its summary judgment.

1 confirmation from the State Auditor's Office that the procedures are proper. (*Id.* ¶ 18.)
2 Indeed, the State Auditor examined the Port's OPMA compliance for both 2013 and 2014
3 and concluded that the Port "complied with state laws and regulations and its own policies
4 and procedures in the areas we examined." (*Id.*, Exs. K-L.) Other than Commissioner
5 Oliver's misstatement on July 22, there is no evidence that violations regarding the
6 announcement of executive sessions have occurred or are likely to recur. The Port corrected
7 the technical announcement violation, and any prior OPMA violations, by re-doing the
8 Commission's deliberation and vote on the TSJV lease during a public meeting on October
9 22. (Coleman Decl. ¶¶ 16-22.) Pursuant to *Eugster I*, the Port's corrective actions moot all
10 remaining claims for declaratory relief.

11 Moreover, Riverkeeper has not suggested that the Port violated OPMA after the
12 Port's re-vote in October 2013. Riverkeeper has had nearly unlimited access to the Port's
13 records through public record requests and opportunities to question the Commissioners, but
14 has not even alleged that the Port violated OPMA since its executive session on July 23,
15 nearly two years ago. Thus, Riverkeeper has no evidence that any OPMA violation is likely
16 to recur.

17 CONCLUSION

18 Riverkeeper has failed to establish that the Port violated OPMA during seven
19 executive sessions, let alone demonstrated the absence of material fact regarding the content
20 of discussions in those executive sessions. Riverkeeper has also failed to establish a basis to
21 reconsider this Court's decision finding that Riverkeeper's request to nullify the lease was
22 rendered moot by the Port's July 23 public vote and its October 22 re-vote on the TSJV lease.
23 Accordingly, Riverkeeper's motion for summary judgment should be dismissed in its
24 entirety. In addition, this Court should close the record and grant summary judgment to the
25 Port on the remaining declaratory judgment and attorney fees claim from the Port's pending
26 motion from December 2013.

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DATED this 10th day of July, 2015.

MARKOWITZ HERBOLD PC

By: /s/ Kristin M. Asai

David B. Markowitz, specially admitted
Lawson E. Fite, WSBA No. 44707
Kristin M. Asai, specially admitted
Of Attorneys for Defendants

459363

ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2015, I have made service of the foregoing DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT NO. 13-2-03431-3 on the party/ies listed below in the manner indicated:

Brian A. Knutsen
Kampmeier & Knutsen PLLC
833 SE Main Street, Suite 327
Mail Box No. 318
Portland, OR 97214

- U.S. Mail
- Facsimile
- Hand Delivery
- Overnight Courier
- Email - brian@kampmeierknutsen.com

Eric D. Lowney
Smith & Lowney, PLLC
2317 E John Street
Seattle, WA 98112
Attorneys for Plaintiffs

- U.S. Mail
- Facsimile
- Hand Delivery
- Overnight Courier
- Email - knoll@igc.org

Miles B. Johnson
Clean Water Attorney
Columbia Riverkeeper
111 Third Street
Hood River, OR 97031

- U.S. Mail
- Facsimile
- Hand Delivery
- Overnight Courier
- Email - miles@columbiariverkeeper.org

DATED this 10th day of July, 2015.

/s/ Kristin M. Asai
Kristin M. Asai, *specialy admitted*
Of Attorneys for Defendants

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

COLUMBIA RIVERKEEPER; SIERRA)
CLUB; and NORTHWEST)
ENVIRONMENTAL DEFENSE CENTER,)
)
Plaintiffs,)

vs.)

No. 13-2-03431-3)

PORT OF VANCOUVER USA; JERRY)
OLIVER, Port of Vancouver USA)
Board of Commissioners)
President; BRIAN WOLFE, Port)
of Vancouver USA Board of)
Commissioners Vice President;)
and NANCY I. BAKER, Port of)
Vancouver USA Board of)
Commissioners Secretary,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS FROM CD
RULING

HELD BEFORE THE HONORABLE
DAVID E. GREGERSON

* * *

July 24, 2015

1200 Franklin Street

Vancouver, Washington

SINEAD R. WILDER, RPR, CSR, CCR
Court Reporter

1 APPEARANCES:

2 For the Plaintiffs:

3 MR. BRIAN A. KNUTSEN
4 Kampmeier @ Knutsen PLLC
5 Mail Box 318
6 833 SE Main Street
7 Suite 327
8 Portland, OR 97214
9 503-841-6515
10 brian@kampmeierknutsen.com

11 MR. MILES B. JOHNSON
12 Columbia Riverkeeper
13 111 3rd Street
14 Hood River, OR 97301
15 541-272-0027
16 miles.b.johnson@gmail.com

17 For the Defendants:

18 MR. DAVID B. MARKOWITZ
19 Markowitz Herbold PC
20 1211 SW Fifth Avenue
21 Suite 3000
22 Portland, OR 97204
23 503-295-3085
24 davidmarkowitz@markowitzherbold.com

25 MS. KRISTIN ASAI
Markowitz Herbold PC
1211 SW Fifth Avenue
Suite 3000
Portland, OR 97204
503-295-3085
kristinasai@markowitzherbold.com

MR. LAWSON E. FITE
Markowitz Herbold PC
1211 SW Fifth Avenue
Suite 3000
Portland, OR 97204
503-295-3085
lawsonfite@markowitzherbold.com

Also Present: (Not disclosed)

1	INDEX	
2	EXAMINATION BY	PAGE NO.
3	Ruling	4
4		
5	EXHIBITS	
6	(None)	
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
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1 VANCOUVER, WASHINGTON; FRIDAY, JULY 24, 2015

2 2:40 p.m.

3 * * *

4 RULING

5 THE COURT: I first wish to start by
6 thanking counsel for the briefing and the argument.
7 Very interesting issues.

8 And obviously, it's not lost upon the Court
9 that this is a very significant decision to the
10 community in many, many regards.

11 I'm going to start first with the request on
12 summary judgment for the invalidation of the lease.

13 The Court concludes that it had previously
14 ruled on the prior argument in summary judgment that
15 mootness applied, which made that argument
16 unpersuasive. The basic idea being that by correcting
17 whatever defects, if there were any, at the October
18 meeting, and putting it appropriately on the agenda,
19 that the final action as to the lease taken on that
20 date was not in violation of open public meetings, and
21 therefore, does not constitute any sort of basis for
22 this Court to invalidate or otherwise abrogate the
23 lease that was entered into.

24 The question before the Court is whether,
25 today, having conducted some discovery, whether

1 there's some new information which would justify
2 changing that ruling.

3 This Court can conclude that, regardless of
4 whatever factual information has come up, it does not
5 change the Court's analysis, which the Court deems to
6 be consistent with the OPAL case and other cases like
7 it, which establish what appears to be a
8 well-established rule, that any sort of violations can
9 be cured by retracing the steps and going through the
10 appropriate procedures.

11 I can see the wisdom in that line of cases
12 in that, without the ability to do that, an agency
13 would conceivably be hamstrung into perpetuity and
14 never being able to make any sort of decision under
15 those circumstances.

16 So the Court will affirm its previous ruling
17 in summary judgment, denying any sort of invalidation
18 or declaration regarding the legality or invalidity of
19 the -- of the lease.

20 The next question comes about with respect
21 to the executive session meetings. Both sides are
22 basically moving for cross-judgment -- cross-motions
23 for summary judgment.

24 Counsel are well aware of the standards
25 under Rule 56, namely that whether there are any

1 genuine issues of material fact, and whether a moving
2 party is entitled to judgment is a matter of law on
3 those issues.

4 The Court will note that the briefing has
5 been extensive with respect to proposed
6 interpretations of RCW 42.30.110 (1)(c). And I've
7 looked at some of the cases cited by counsel, which
8 are not directly on point, but which sort of dance
9 around the issue.

10 I've looked at this language so many times,
11 I feel like I can recite it in my sleep.

12 I looked at the contrast between the
13 language under (b) that pertains to selection or
14 acquisition of real estate or lease, meaning the buyer
15 or lessor -- excuse me, buyer or lessee, that a public
16 agency would be in the shoes of.

17 Or under paragraph (c), the opposite, where
18 the agency would be the grantor or lessor of that
19 property.

20 There's some similarities in the language,
21 and then there are also some discrepancies between
22 those two clauses, as well. And that's really where
23 the rubber hits the road in this case.

24 Without some clear guidance from the
25 appellate courts up above, we are, I think, to some

1 extent, in an area of first impression, at least for
2 me. And I think both sides have acknowledged the
3 absence of that clear and controlling authority on the
4 specific statute.

5 As I look at the language, particularly of
6 (c), in a dream world, if I were a legislator, I would
7 have drafted this with some -- some more clarity. And
8 I'm stuck trying to interpret the language and the
9 intent, and how it fits with the entire statute as a
10 whole.

11 The argument, I think it's fair to say, from
12 Riverkeeper's side is that minimum price --
13 consideration of minimum price should be interpreted
14 quite narrowly, so that whatever was discussed in
15 those seven sessions ran afoul of the executive
16 session exception to the Open Public Meetings Act.

17 The argument made by the Port of Vancouver
18 is what I'll call either a more expansive
19 interpretation, or what they would call is a more
20 practical interpretation. Which means that the only
21 way to really be able to do business is to consider a
22 multitude of factors, which -- I believe the verb was
23 drive price.

24 And the more I thought of this and looked at
25 the briefing back and forth, it really occurs to me

1 that the -- the method of establishing something like
2 price, and the unfortunate reality, is the legislature
3 gave us this one clause with one word that fails to
4 take into account in a transaction of this size and
5 complexity and scope the multitude of possible factors
6 that play into the decision-making of this agency
7 body.

8 And the notion of price taken by itself in a
9 vacuum really means nothing. Price to me is a
10 function of a prior equation. It's the result that
11 you get when you include variables, such as A, B, C
12 and D. And then you get to this notion of price.

13 It also is compelling to me that the section
14 has the second sentence, which is really the qualifier
15 and I think those two need to be read together. It
16 says, However, final action selling or leasing public
17 property shall be taken in a meeting open to the
18 public.

19 So as I look at that language and try to
20 apply it to this particular context, I think there is
21 understood to be a necessary degree of latitude on the
22 part of the Port to be able to discuss in executive
23 session many things which go into the price of a
24 particular transaction.

25 Like I say, price by itself means nothing.

1 The term, who the tenant is, what the proposed use is,
2 all of those things are so essential to an ultimate
3 determination of price, that it strikes me as trying
4 to either unscramble an egg or unhomogenize milk.

5 So it's the conclusion of this Court that
6 the interpretation generally offered by the Port by
7 these arguments is sustained.

8 However, I will find the following: The
9 Port has conceded that, I believe, the July 22nd
10 executive session was not in compliance with the Open
11 Public Meetings Act. The Court will grant summary
12 judgment in the favor of the plaintiffs on the
13 July 22nd meeting.

14 With respect to the April 9 meeting, the
15 Court concludes that there is a factual dispute which
16 precludes summary judgment for either party, given the
17 fact that factual inferences must be construed most in
18 favor to the nonmoving party.

19 So, basically, each side has the benefit of
20 some doubt there. And the Court is unable to conclude
21 that there's no genuine issue of material fact, and
22 that one side is entitled to judgment as a matter of
23 law.

24 With respect to the other meetings, the
25 Court is satisfied, based on the record provided to

1 it, that the parameters set forth were within the
2 parameters of the statute that governs addressing
3 issues in executive session to consider minimum price
4 for which the real estate, in this case, would be
5 offered for sale or, in this case, leased to the
6 Tesoro-Savage Joint Venture.

7 I recognize that it's a very, very tough
8 issue. It's likely that a reviewing Court would see
9 this differently, and I recognize that. I'm just
10 trying to make my best read and my best shot at it,
11 given the case authorities that exist in Washington,
12 and the briefing and argument of the parties.

13 I don't know if you have a proposed order
14 today, or there are any questions. My hunch is you're
15 probably going to need some time to craft a
16 custom-made order based on my ruling, which has some
17 variations and complexities. It's not an absolute one
18 way or the other.

19 Second of all, are there any questions or
20 clarifications which either side needs of the Court's
21 ruling today?

22 MR. KNUTSEN: Yes, Your Honor. I think
23 we'll need clarification on the scope of the Court's
24 determination regarding the July 22nd meeting.

25 It's my reading of the defendants' briefing

1 that they conceded that there were violations with
2 respect to the announcement of the executive session.
3 But they have not conceded that there were violations
4 with respect to the discussions at executive session.

5 And so I think we need a little
6 clarification on the scope of the Court's order with
7 respect to what violations it's finding with respect
8 to that meeting.

9 THE COURT: Well, certainly, the -- the
10 announcement and the time parameters, I think, were
11 conceded to be in violation.

12 The -- the remaining issue -- the
13 defendants' position is that Mr. Oliver misspoke,
14 because he was tired, in terms of what was being
15 considered.

16 I don't know that I can make a judgment one
17 way or the other as to whether there was any more
18 substantive violations of that.

19 The limit of the Court's ruling is that
20 there was at least one violation of the Open Public
21 Meetings Act on that date. And that would be the --
22 the announcement of the timing, I guess, is the -- is
23 that the best way to word that?

24 With respect to any other violations, I
25 think the Court's ruling would be similar to the

1 April 9 ruling, in that there exists a factual dispute
2 which prevents summary judgment for either side at
3 this time. There may be more violations from that
4 meeting.

5 Any other questions or clarifications?

6 MR. MARKOWITZ: Your Honor, if it would
7 satisfy counsel, we'll prepare a first draft of a
8 proposed order, and circulate it for discussion.

9 THE COURT: Do you want to have a -- do you
10 want to have a date set right now as a hard target, as
11 a backstop for presentation? And that way, if you
12 can't work it out, then we've got something right on
13 calendar to -- to have (unintelligible) on the final
14 wording of the order.

15 MR. MARKOWITZ: All right.

16 THE COURT: Do we have a civil docket date
17 approximately three weeks out?

18 THE CLERK: We have one on August 21st. We
19 don't have one on the 14th.

20 THE COURT: August 21st. Is that acceptable
21 for counsel? 9 a.m.?

22 MR. MARKOWITZ: One of us will be here.

23 THE COURT: Okay. If you reach -- if you
24 reach agreement on the form of the order before that
25 time, simply sign off and bring it to us ex parte.

1 And that will excuse any attendance at that particular
2 civil motion docket.

3 One additional matter I'll add to the -- to
4 the ruling of the Court is that the Court did not give
5 weight or consideration to the ruling in the recall
6 petition matter. That was not a part of the Court's
7 overall analysis, just so you know.

8 Okay?

9 MR. MARKOWITZ: Your Honor, with the -- if I
10 may -- with the Court's denial of
11 cross-summary-judgment motions as to the April and
12 July 22nd meetings, we have an issue of fact which
13 needs to be resolved in a bench trial.

14 I assume, if we could get that scheduled,
15 that would be beneficial for all of the parties. I'm
16 guessing we're looking at a day.

17 THE COURT: I would suggest, then, that the
18 parties -- that either side submit a trial setting
19 notice, which is required by our rules. And then we
20 will get to work on that.

21 I will also strongly encourage -- there was
22 at least some mention at some point about a settlement
23 conference or a mediation.

24 Given the Court's rulings previously, and
25 the Court's rulings today, I don't know if that helps

1 narrow some of the issues. You'll need some time to
2 talk to your clients about that.

3 But we have several retired judges who would
4 be excellent mediators for those remaining issues.
5 And that may be a way to get those resolved.

6 I'm not ordering those at this time. But
7 I'm certainly suggesting that counsel consider those
8 after consultation with your clients.

9 It's been requested -- we get quite a volume
10 of materials. I'm going to give back at least the
11 notebooks, which I think came back from the Port side.

12 UNIDENTIFIED SPEAKER: We're overloaded with
13 notebooks. We don't have any room to store any more
14 notebooks.

15 THE COURT: So I appreciate the bench
16 copies. But we're going to give these notebooks back
17 to you. And I'd ask you to take those today.

18 MS. ASAI: Okay.

19 THE COURT: Thank you.

20 (The proceeding concluded at 2:53 p.m.)

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I, Sinead R. Wilder, a Certified Court

Reporter for Washington, pursuant to RCW 5.28.010

authorized to administer oaths and affirmations in and

for the State of Washington, do hereby certify that

after having listened to an official audio recording

of the proceedings having occurred at the time and

place set forth in the caption hereof, that thereafter

my notes were reduced to typewriting under my

direction pursuant to Washington Administrative Code

308-14-135, the transcript preparation format

guidelines; and that the foregoing transcript, pages 1

to 14, both inclusive, constitutes a full, true and

accurate record of all such testimony adduced and oral

proceedings had on the official audio recording, to

the best of my ability, and of the whole thereof.

Witness my hand and CCR stamp at Vancouver,

Washington, this 10th of August, 2015.

SINEAD R. WILDER
Certified Court Reporter
Certificate No. 3227

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SEP 28 2015

MARKOWITZ HERBOLD

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SEP 23 2015

Scott G. Weber, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

COLUMBIA RIVERKEEPER; SIERRA CLUB; and NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Plaintiffs,

vs.

PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver USA Board of Commissioners President; BRIAN WOLFE, Port of Vancouver USA Board of Commissioners Vice President; and NANCY I. BAKER, Port of Vancouver USA Board of Commissioners Secretary,

Defendants.

No. 13-2-03431-3

[PROPOSED] ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

THIS MATTER came for hearing on July 24, 2015 before the Court, the Honorable David E. Gregerson, on plaintiffs' Motion for Summary Judgment filed on June 12, 2015 as to Plaintiffs' First, Third, and Fourth Causes of Action, as amended, and on Defendants' renewed Motion for Summary Judgment, originally filed on December 6, 2013, as to Plaintiffs' First, Second, Third, and Fourth Causes of Action. Plaintiffs were represented by Brian A. Knutsen and Miles Johnson, and Defendants were represented by David Markowitz, Lawson Fite, and Kristin Asai. The Court heard oral argument of counsel and considered the following documents and other evidence:

- 1 1. Defendants' Motion for Summary Judgment and supporting declarations filed on
- 2 December 6, 2013;
- 3 2. Plaintiffs' Response to Defendants' Motion for Summary Judgment and supporting
- 4 declarations filed on December 31, 2013;
- 5 3. Defendants' Reply in Support of Motion for Summary Judgment and supporting
- 6 declarations filed on January 7, 2014;
- 7 4. Plaintiffs' Motion for Summary Judgment;
- 8 5. Third Declaration of Brian A. Knutsen;
- 9 6. Declaration of Donald Steinke;
- 10 7. Declaration of Marla Nelson;
- 11 8. Declaration of Linda McClain;
- 12 9. Defendants' Opposition to Plaintiffs' Motion for Summary Judgment;
- 13 10. Declaration of Kristin Asai;
- 14 11. Declaration of Michelle Allan;
- 15 12. Declaration of Patty Boyden;
- 16 13. Declaration of Katy Brooks;
- 17 14. Declaration of Todd Coleman;
- 18 15. Declaration of David Hepler;
- 19 16. Declaration of Kathy Holtby;
- 20 17. Declaration of Todd Krout;
- 21 18. Declaration of Alicia Lowe;
- 22 19. Declaration of Julianna Marler;
- 23 20. Declaration of Mary Mattix;
- 24 21. Declaration of Mike Schiller;
- 25 22. Declaration of Curtis Shuck;
- 26 ///

1 23. Plaintiffs' Reply in Support of Motion for Summary Judgment; and

2 24. Fourth Declaration of Brian A. Knutsen.

3 The Court, being fully advised, hereby enters the following ORDER:

- 4 1. As stated in its Order of March 26, 2014, the Court granted Defendants' Motion
5 for Summary Judgment against Plaintiffs' claims for injunctive relief and
6 Plaintiffs' claims for a declaration that the lease at issue is null and void.
7 Plaintiffs' Motion for Summary Judgment requested that the Court reconsider its
8 earlier ruling. The Court declines to reconsider its earlier ruling and affirms its
9 prior finding that the corrective actions taken by Defendants, including the public
10 votes on July 23 and October 22, 2013, and adoption of a revised executive
11 session announcement procedure beginning on August 13, 2013, render moot
12 Plaintiffs' requests for injunctive relief under the Open Public Meetings Act
13 ("OPMA") and Plaintiffs' request for a declaration that the lease is null and void.
14 Plaintiffs' Motion for Summary Judgment, construed as a motion for
15 reconsideration, is DENIED as to Plaintiffs' claims for injunctive relief and for a
16 declaration that the lease is null and void for the alleged OPMA violations.
- 17 2. The Court concludes that RCW 42.30.110(1)(c), which allows the Port to consider
18 the minimum price at which real estate will be offered for sale or lease when
19 public knowledge regarding such consideration would cause a likelihood of
20 decreased price, permits the Port to discuss in executive session various factors
21 which go into the price of a particular transaction. The Court finds that factors
22 other than a bare numeric term are essential to an ultimate determination of price,
23 and that the statute includes a necessary degree of latitude beyond the bare
24 numeric terms. The Court therefore sustains the interpretation of RCW
25 42.30.110(1)(c) generally proffered by Defendants as a permissible construction
26 of the statute. Specifically, the Court sustains Defendants' interpretation of RCW

1 42.30.110(1)(c) to allow executive sessions to discuss two categories of
2 information: (1) information that would give the customer an advantage in
3 negotiating a lower price; and (2) information that would give a competitor an
4 opportunity to negotiate with the Port's customer, thus creating a bidding process
5 that would decrease the Port's price.

6 3. The Court finds, with respect to Plaintiffs' First Cause of Action, that there are no
7 disputes of material fact regarding the executive sessions held on March 26, July
8 9, July 16, July 17, and July 23, 2013. The Court further finds that the undisputed
9 factual record shows that each of these five sessions complied with RCW
10 42.30.110(1)(c), as interpreted by the Court. Accordingly, Plaintiffs' Motion for
11 Summary Judgment is DENIED and summary judgment is GRANTED to
12 Defendants as to the executive sessions held on March 26, July 9, July 16, July
13 17, and July 23, 2013, as alleged in Plaintiffs' First Cause of Action;

14 4. The Court further finds, with respect to Plaintiffs' First Cause of Action, that
15 genuine issues of material fact preclude summary judgment to any party as to
16 whether Defendants violated the OPMA during the executive sessions held on
17 April 9 and July 22, 2013. Plaintiffs' Motion for Summary Judgment on their
18 First Cause of Action is DENIED as to the executive sessions held on April 9 and
19 July 22, 2013;

20 5. With respect to Plaintiffs' Second Cause of Action, Plaintiffs represented to the
21 Court in their Motion for Summary Judgment that they are no longer pursuing this
22 claim. Defendants' Motion for Summary Judgment is therefore GRANTED as to
23 Plaintiffs' Second Cause of Action.

24 6. The Court finds, with respect to Plaintiffs' Third and Fourth Causes of Action,
25 that there are no genuine issues of material fact and Defendants concede that
26 Commissioner Oliver's announcement of the executive session on July 22, 2013

1 violated the OPMA. Plaintiffs' Motion for Summary Judgment is GRANTED as
2 to Plaintiffs' Third and Fourth Causes of Action seeking a declaration that
3 defendants violated the OPMA by improperly announcing the executive session
4 on July 22, 2013. Under Plaintiffs' Third Cause of Action, the Court declares that
5 Commissioner Oliver violated RCW 42.30.110(2) by failing to announce a
6 definite end time for the July 22, 2013 executive session. Under Plaintiffs' Fourth
7 Cause of Action, the Court declares that Commissioner Oliver violated RCW
8 42.30.110(2) when he stated that the purpose of the July 22, 2013 executive
9 session was to review public comments.

- 10 7. As stated at the July 24 hearing, the scope of RCW 42.30.110(1)(c) is a question
11 of first impression for this Court and a question on which there is no direct
12 appellate authority. The parties have stipulated, and the Court certifies and
13 orders, pursuant to RAP 2.3(b)(4), that the Court's rulings outlined in paragraph 2
14 involve a controlling question of law as to which there is substantial ground for a
15 difference of opinion and immediate review of the order may materially advance
16 the ultimate termination of the litigation.
- 17 8. The parties stipulate, and the Court orders, that all trial court proceedings and
18 deadlines are hereby STAYED pending the resolution of Plaintiffs' request for
19 discretionary appellate review.

20 IT IS SO ORDERED.

21 DATED this 23 day of Sept, 2015.

23 /s/ David E. Gregerson

24 Hon. David E. Gregerson
25 Superior Court Judge
26 Clark County Superior Court

///

1 Presented by, and stipulated as to paragraphs 7-8:

2
3 By: 
4 David B. Markowitz, *pecially admitted*
5 Lawson E. Fite, WSBA #44707
6 Kristin M. Asai, *pecially admitted*
7 MARKOWITZ HERBOLD, P.C.
8 Of Attorneys for Defendants

9 Agreed as to form, notice of presentation waived, and stipulated as to paragraphs 7-8:

10
11 By: 
12 Brian A. Knutsen, WSBA #38806
13 KAMPMEIER & KNUTSEN, PLLC.
14 Miles Johnson, *pecially admitted*
15 COLUMBIA RIVERKEEPER
16 Of Attorneys for Plaintiffs

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