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No. 70606-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a Washington non-profit corporation,

Appellant,

v.

SAN JUAN COUNTY, a Washington municipal corporation and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is a case about local government transparency and accountability. The fundamental issue is whether local government committees comprised of San Juan County Council members violated the unambiguous language of the Open Public Meeting Act ("OPMA"), RCW 42.30, by acting on behalf of the County Council when they held private meetings without public notice. The purpose of the private meeting was to discuss and winnow policies and draft legislation regarding land use, budget, and general governance subjects. The meetings were numerous and held over a several year period.

Appellant initiated this case to hold San Juan County accountable for its pervasive and repeated violations of the OPMA. As a result of the egregious facts of this case, the voters of San Juan County removed the three Council members at the heart of this dispute, changed the Council from a six to a three member governing body, and passed a charter amendment to explicitly clarify that all Council and Council committee meetings must comply with the OPMA. The voters recognized the complete failure of local government transparency, and now this Court should similarly hold San Juan County accountable for its OPMA violations.

The Trial Court was presented with a scenario evidencing a myriad of secret meetings held by four separate committees ("the Subcommittees") composed of members of the San Juan Council ("the

Council") over several years. When challenging the legality of the secret Subcommittee meetings Appellant relied upon express language of the OPMA that applies its provisions to meetings of committees comprised of members of a governing body, a position acknowledged in writing to the County Council by the San Juan County Office of Prosecuting Attorney before this litigation commenced.

The Trial Court essentially blessed the County's secret meetings, losing itself in fragments of statutory language and ignoring that the OPMA is to be liberally construed to achieve its central purpose of compelling that local government meetings be "open." The Trial Court seemed impressed by late submitted, self-serving, conclusionary declarations signed by Council Members that, despite the admitted conduct in convening and attending a great number of secret meetings, the key Committee created to address to address adoption of a new Critical Areas Ordinance ("CAO"), was not "one of ours." In other words, the County used an "it is not what we did but what we tell you" approach.

The result is a perversion that pushes the public outside in the cold while elected public officials to decide for themselves when to let public into the dimly lit and locked meeting room.

The Trial Court's reasons for denying relief deviate from the OPMA and sound jurisprudence. For instance, the Trial Court desired "Washington case law" explicitly applying the OPMA to meetings of committees composed of less than a majority of the Governing Body – the

full County Council – and that the County must have "knowledge" that its actions violate the law.[1] Neither proposition is supported. A public official's knowledge of an OPMA violation is only necessary for assessment of a civil penalty, which is not an issue in this matter. *See* RCW 42.30.120(1). In addition, the language of a statute can be enforced without need of a "case on all points." Further, the courts are directed to look at what other jurisdictions have done in terms of interpreting and applying Open Public Meetings laws upon which Washington's OPMA is based.

Finding no case law of the type it desired, the Trial Court approved the County's actions on the erroneous basis that the OPMA does not apply to any committees comprised of less than a quorum of the six-person County Council.[2] In so ruling, it ignored the evidence that some meetings of the Subcommittees were attended by four Councilmembers and the OPMA statutory language that a committee acting on behalf of the governing body is subject to the OPMA.

The un-refuted record discloses that each of the Subcommittees is a governing body under the OPMA regardless of whether it is comprised of a quorum of the Council. If not, the Subcommittees acted on behalf of the Council. Either way, the OPMA mandates that the committee meetings must be open. A quorum of each subcommittee took "action," outside of the public eye, in that their decision-making was intended to

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[1] Clerk's Papers ("CP") at 819 and 821-22 (Summary Judgment at 4 and 6-7).
[2] CP at 822 and 827-28 (Summary Judgment at 7 and 12-13).

and did streamline the Council's "final action" on legislation or other policy matter subject to public comment and scrutiny under the OPMA.

If the law allows the County to be "immune" from the OPMA by holding subcommittee meetings with half of the full Council in attendance, other governmental entities can easily work around the prohibition against secret meetings by limiting subcommittees' size to one less than a quorum of the Council as a whole. Such an absurd result is not allowed by the plain provisions of the OPMA and is contrary to public policy.

II. THE COUNTY COUNCIL'S FAILURE TO FOLLOW THE OPMA AND ITS REFUSAL TO STAND BEHIND ADVICE PROVIDED BY ITS LEGAL COUNSEL

The Critical Areas Ordinance ("the CAO") Subcommittee met in secret to discuss issues related to the adoption of a new CAO, a matter of major importance.[3] Yet, the CAO Subcommittee meetings were closed to the public.[4] A County Council Member illustrated that devious fact during a County Council meeting:

> ***[Council Member Stephens]: And I think on the CAO process if we didn't have – if we didn't have the coordination committee, which is a subcommittee, we wouldn't have made any progress.***
>
> ***[Council Member Miller]: Please don't use that example.***[5]

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[3] CP 320, 421-22 (Palmer Decl. Ex. C at p. 15:23–16:18; Ex. D at p. 97:9–98:20).

[4] CP 500 (Palmer Decl. at Ex. U); CP 333 (Palmer Decl., Ex. C at p. 49:11–15).

[5] CP 187-236 (Petersen Decl. Ex P, at 10:18–22).

The other Subcommittees met in secret on matters of General Governance Solid Waste and the Budget. The Subcommittee meetings were not noticed and not open to the public. The County admitted this in its Answer.[6] In addition, the County did not dispute that four Councilmembers (a quorum of the Council as a whole) were present at some meetings of the Subcommittees, or that four Council members participated in a series of telephone calls and emails on November 14, 2011, in which they discussed the wetland process for the CAO update.

When asked by the County to analyze the legality of these secret subcommittee meetings, its elected Prosecuting Attorney Randy Gaylord urged compliance with the OPMA requirements for subcommittee meetings when there are three members of the County Council present[7]:

> With an appropriate respect for caution and to protect the public interest and assure the validity of actions by the Council, we advise that no meetings of three council members should occur without complying with the notice and other requirements of the Open Public Meetings laws.

CP 450 (Palmer Decl. Ex. E at 2).

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[6] CP 64 (County Answer, at p. 3:12–15).

[7] On April 26, 2012, the San Juan County Prosecuting Attorney's office submitted a formal memorandum to the County Council and to the Charter Review Commission regarding meetings of three members of San Juan County Council. The memo specifically mentions and addresses the CAO Implementation Team, and the Budget, General Governance and Solid Waste Subcommittees. The Prosecuting Attorney's advice was based on a review of attorney general opinions, reported case law in Washington State and decisions of the supreme court of Wisconsin, a state with laws similar to Washington. CP 449-457 (Palmer Decl. Ex. E).

The County disregarded Prosecuting Attorney Gaylord's advice, and directed a deputy prosecuting attorney to argue to the Trial Court that the OPMA was not violated when the Subcommittees met in private.

III. SUMMARY OF ARGUMENT

The OPMA, RCW 42.30, was passed by the legislature in 1971 as a part of a nationwide effort to make government affairs more accessible.[8] The OPMA is intended, among other goals, to "unlock" the doors of government policy and law-making to the public and increase public trust in the decisions of elected officials.[9]

A *prima facie* case of an OPMA violation is established when (1) a governing body of a public agency – a "subagency" of a public agency or "committee thereof," created **or** acting on behalf of the governing body (2) holds a private meeting without notice, (3) in which "action" **or** "final action" occurred.[10]

The Trial Court's fundamental legal error is the determination that the only "governing body" and the only "public agency" subject to the Act is the full County Council. *See* CP 818 – 820 and 824 (Summary

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[8] Washington's OPMA was modeled on a California law known as the "Brown Act" and a similar Florida statute. *See* Cal. Governmental Code 54950-61 and 11120 *et seq.*; Fla. Stat. 286.011 *et seq*. Decisions from those jurisdictions provide guidance in interpreting Washington law. *E.g., Anaya v. Graham*, 89 Wn. App. 588, 592, 950 P.2d 16 (1998).

[9] *See Town of Palm Beach v. Gradison*, 296 So.2d 473, 475 (Fla. 1974); 19 Government-In-The-Sunshine Manual at 48 (ed.1997). Washington's law is modeled on "sunshine" laws of California and Florida.

[10] *Eugster v. City of Spokane,* 110 Wn. App. 212, 222, 39 P.3d 380 (2002) ("*Eugster I*") (where there is no claim for personal civil penalties, the plaintiff must submit evidence showing "(1) that a 'member' of a governing body (2) attended a 'meeting' of that body (3) where 'action' was taken in violation of the OPMA); *Feature Realty Inc. v. Spokane*, 331 F.3d 1082, 1088 (9th Cir. 2003)(an OPMA violation occurs if "action" or "final action" is taken and the meeting must be open to the public unless an exception applies).

Judgment Decision, pp. 3-5, 9).[11] The decision on this pure question of law is contrary to law: a meeting of the majority of the Council is not required to trigger the OPMA.[12]

Addressing the language of the law, RCW 42.30.010 states:

> The legislature finds and declares that all public commissions, boards, councils, ***committees, subcommittees***, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

(Emphasis added).

The OPMA not only requires meetings of the Council to be open, but the OPMA also requires committee and subcommittee meetings to be open when acting on their own accord **and/or** on behalf of the Council. *See* RCW 42.30.010; RCW 42.30.020(1), (2).[13]

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[11] The Court's reliance on the trilogy of *Eugster* cases regarding the definition of a "governing body" is misplaced because **none** of the *Eugster* cases involved challenges to actions of a committee. *Eugster I*, 110 Wn. App. at 222-24 (addressing the issue whether a "meeting" occurred); *Eugster v. City of Spokane*, 118 Wn. App. 383, 422-23, 76 P.3d 741 (2003) ("*Eugster II*") (addressing discussion between the "City" and investors in a parking garage); *Eugster v. City of Spokane*, 128 Wn. App. 1, 7, 114 P.3d 1200 (2005) ("*Eugster III*") (addressing a secret ballot conducted by the Council as a whole).

[12] *Clark v. City of Lakewood*, 259 F.3d 996, 1012-1013 (9th Cir. 2001) (the OPMA applied to a subcommittee of the Lakewood City Council even though less than a majority of the Council and less than a majority of the Planning Advisory Board members were on the subcommittee); *Loeffelholtz v. Citizens for Leaders with Ethics and Accountability,* 119 Wn. App. 665, 701, 82 P.3d 119 (2004),("*C.L.E.A.N.*") (the OPMA does not apply "[i]f the body or committee lacks a quorum," but the OPMA applies when a quorum of a ***committee*** – not just a quorum of the broader governing body – takes action).

[13] *See, e.g.*, CP 691-695 (Palmer Decl. Ex. BH (concluding that how a committee is created is less important to the OPMA than what the committee actually does)).

There are other errors, not all which this Court may need to address if the fundamental error is corrected on appeal.

First, the Trial Court erroneously ruled that the Subcommittees did not, and could not take "final action," because they did not constitute a quorum of the Council as a whole and thus there was no violation because the OPMA applies only in circumstances where final action occurs (ignoring evidence of Subcommittee meetings at which four Council members were present).

Regardless of whether three or four Council members were present, when a quorum of the CAO Subcommittee (and the other subcommittees) met and took action by discussing the CAO and other policy matters later taken up by the Full Council, such activity is sufficient by itself to invoke application of the OPMA.

As the court in *Eugster I* stated:

> "Action" is defined as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3). " 'Final action' means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance." *Id.*
>
> The clear language of the statute defines action as "the transaction of the official business of a public agency by a governing body." RCW 42.30.020(3). The statute then

> goes on to give a nonexclusive list of examples, including final action. ***Action does not require final action. In addition to final actions, the list of examples includes discussions, deliberations, consideration, and review. The governing body members need merely "communicate about issues that may or will come Before the Board for a vote***." *Wood,* 107 Wash.App. at 565, 27 P.3d 1208.
>
> In *Organization to Preserve Agr. Lands v. Adams County,* 128 Wash.2d 869, 883 n. 2, 913 P.2d 793 (1996), the court noted the plain language of the OPMA does not distinguish between "action" and discussions short of action **because the definition of action includes "discussion."** In *Miller v. City of Tacoma,* 138 Wash.2d 318, 326-27, 979 P.2d 429 (1999), the court also rejected an argument that action requires final action. Instead, the court held that all actions, including final actions, must be done in a meeting open to the public. *Id.*

Eugster I, 110 Wn. App. at 225 (emphasis added).

Second, the Trial Court erroneously failed to hold the County to the requirements of the OPMA when it excused the actions of the Subcommittees based on strained legal arguments unsupported by the language of the OPMA and un-rebutted substantial evidence in the record that the Subcommittees, including the CAO Subcommittee, acted on behalf of the Full Council.

The Trial Court's misapplication of the OPMA should not be condoned by this Court. What occurred in numerous subcommittee meetings over an extended period of time was not mere "informal

gathering" by members of the Council. Nor were the Subcommittees simply providing "advice or information" to the Council.[14] The purpose of the Subcommittees was to parse out work that the Council as a whole was undertaking to help it make certain public policy decisions more quickly (and presumably largely out of the scrutiny of groups such as Appellant). *See* allegations, Amended Complaint, ¶ 10, which the County admitted in its Answer.[15] The County conceded[16] that the CAO Subcommittee discussed, considered, reviewed, evaluated scientific data, policy materials, and took input from a wide variety of sources to further the drafting of the Critical Areas Ordinance.

The Subcommittees, in short, were not merely "advising" the Council – they presented it with a narrowed, if not single, policy proposal that had been culled from various ideas and options discussed out of the public's view in Subcommittee meetings and at which outside contractors and staff were in attendance. Gaylord Memorandum, CP 449-457. *See also* admission to allegations of Amended Complaint, ¶ 63 and ¶ 65.[17] Those members of the Council who did not participate in the secret committee meetings were influenced by the weight of opinions of those committee members who participated in the secret meetings and narrowed

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[14] *See* CP 78 (County Summary Judgment Memorandum at 5:12-14).

[15] CP 24 (CAPR Amended Complaint at 3:13-23); CP 62-71 (County Answer at 3:1-11).

[16] The Prosecuting Attorney's April 12, 2012, memorandum admits the existence and work of the Subcommittees, and application to the OPMA to its activities, as did members of the County Council who sat on the CAO Subcommittee. *E.g.*, CP 294-297 (Palmer Decl. Ex. B at p.13:13–16:5); CP 449-457 (Gaylord Memorandum at 13:21-14:7).

[17] CP 34-35 (CAPR Amended Complaint); CP 68-69 (County Answer at 7:17-8:11).

the policy options. Thus, some Council members were left in the dark as was the public, while others were "in the know," as noted by Prosecuting Attorney Gaylord.[18]

Third, the Trial Court wrongfully ignored evidence submitted by Citizens Alliance for Property Rights Legal Fund ("CAPR") in response to the summary judgment motion[19] that shows four of six Council members (Pratt, Fralick, Peterson, and Miller) held a series of telephone and email exchanges on November 14, 2011, in which they discussed the wetland process for the CAO update. Such serial conversations constitute a "meeting" under the OPMA.

Fourth, the Trial Court erred when it failed to take all facts plead by CAPR as true, let alone in the light most favorable to Plaintiffs as the non-moving party. The Trial Court's approach to the facts and application of the facts to the law is so contradictory that it is hard to grasp. It "assumed" facts on the one hand, for example, that the Committees acted on behalf of the Council,[20] but on the other hand it found facts in dispute as established in favor of the County, for example, that the Committees were somehow *sui generis*.[21]

This inconsistent approach need not be fully sorted out by this Court. This Court can rule on the pure question of law that the OPMA not

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[18] CP 456 (Palmer Decl. Ex. E at p. 7).

[19] CP 94-186 (CAPR Response to Summary Judgment Motion) ; CP 483-486 (Palmer Decl., Ex. P).

[20] CP at 817-18 (Summary Judgment Decision at 2-3).

[21] CP at 823 (Summary Judgment Decision at 8).

only applies to the full Council with a quorum but also to committees composed of Council members when a quorum of committee members attend a committee meeting. This Court can also rule that the Trial Court's decision improperly interchanges the terms "action" and "final action." Rulings on these questions of law arguably make any factual dispute immaterial.

Fifth, although the County did not make any arguments addressing CAPR's allegations concerning meetings of the other subcommittees, the Trial Court also dismissed those claims, notwithstanding evidence that such meetings also included four Council members, which is a quorum of the Council itself.[22]

IV. ASSIGNMENTS OF ERROR

A. The Trial Court erred by entering a summary judgment order of dismissal and ruling that CAPR's Open Public Meetings Act claims were without merit because: (1) a quorum of the County Council was not present at the CAO Subcommittee meeting (or other Subcommittee meetings), notwithstanding the fact that a quorum of the Subcommittees was present at each meeting; (2) the Subcommittee meetings are not subject to the OPMA; and (3) no "final action" took place at the Subcommittee meetings on behalf of the governing body, notwithstanding that the OPMA does not require "final action" for it to apply to the work of committees.

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[22] The County's summary judgment motion was focused solely on the CAO Subcommittee. CP 74-93. Yet, in its Complaint, CAPR sought a declaration not only as to the legality of meetings of the CAO Subcommittee, but also meetings of the General Government , Budget and Solid Waste Subcommittees. All of these committees are subject to OPMA requirements, and all of these committees violated the Act by participating in meetings that were not noticed, not open to the public and after which minutes were not prepared. The Trial Court – like the County in its summary judgment motion – did not address any of CAPR's allegations concerning the various other Subcommittees, yet it dismissed the Complaint as a whole on summary judgment and denied CAPR's Motion for Reconsideration which pointed out this error of the Court, among others. CP 829 – 843 (Original Motion to Reconsider); CP 888 – 902 (Amended Motion to Reconsider).

B. The Trial Court erred by entering a summary judgment order of dismissal, ruling that there was no genuine issue of material fact regarding that the meetings of various San Juan County Subcommittees that took place over a two year period without public notice ever included a quorum of the Full Council.

C. The Trial Court erred in entering its order denying plaintiff's motion for reconsideration, in ruling that its summary judgment order of dismissal was not contrary to law and that substantial justice has been done.

D. The Trial Court erred in entering a summary judgment order of dismissal, because there are genuine issue of material fact as to (1) creation of the CAO Subcommittee, (2) creation of the other Subcommittees, and, possibly (3) if the CAO Subcommittee acted on behalf of the County Council.

E. The Trial Court erred in entering its order denying Plaintiff's motion to strike declarations submitted by the County on reply in support of its motion for summary judgment when the declarations are inconsistent with sworn deposition testimony of the same witnesses and purport to show intentions of the Council as a whole even though declarations from each Councilmember were not submitted and the mental processes of the Council are not cognizable.

F. The Trial Court erred in entering its order granting in part the County's motion to strike excerpts of deposition testimony submitted as exhibits in support of Plaintiff's response to the county's summary judgment, where such testimony speaks for itself, is not hearsay or legal conclusion, and was not objected to by the County during the deposition.

G. The Trial Court erred by not viewing the facts in a light most favorable to the non-moving party, here the plaintiff CAPR, when CAPR presented evidence that (1) the OPMA was violated by serial discussion of four Council members, (2) the OPMA was violated by the CAO Subcommittee when it held numerous secret meetings where action occurred, and (3) the OPMA was violated by other Subcommittees of the Council.

V. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether the OPMA applies to subcommittee meetings composed of at least three members of the County Council and requires such meetings to be noticed and open to the public. (Assignments of Error A, B, C, and G).

2. Whether the OPMA applies to meetings of subcommittees composed of at least three members of the County Council, where a quorum of the subcommittee is present. (Assignments of Error A, B, C, and G).

3. Whether the OPMA applies to meetings of subcommittees composed of three of the six County Council members and where some subcommittee meetings were attended by four County Council members. (Assignments of Error A, B, C, and G).

4. Whether a meeting occurred under the OPMA for the CAO Subcommittee which a quorum of the County Council attended. (Assignment of Error B).

5. Whether the OPMA applies to meetings of Subcommittees composed of at least three members of the County Council where information, reports and policies concerning legislation to come before the Council as a whole are reviewed, discussed and winnowed prior to presentation to the Council for "final action." (Assignments of Error A, B, C, and G).

6. Whether the San Juan County Subcommittees and the three individual Councilmembers who comprised their membership violated the Open Public Meetings Act by meeting and taking action directly and on behalf of the San Juan County Council without (a) notice to the public of the meetings, and/or (b) making allowance for the public to attend the meetings. (Assignments of Error A, B, C, and G).

7. Whether the Court wrongfully granted summary judgment dismissal of all claims where there is a genuine issue of material fact as to who created the CAO Subcommittee and whether the CAO Subcommittee acted on behalf of the County Council. (Assignment of Error D and G).

8. Whether the County may collaterally attack sworn deposition testimony of its own witnesses via "explanatory" declarations on reply to support its Motion for Summary Judgment. (Assignment of Error E and G).

9. Whether sworn deposition testimony concerning a County witness's understanding of the circumstances surrounding the CAO Subcommittee's work and timing thereof speaks for itself and should have been considered in ruling on the Motion for Summary Judgment because it is relevant, not hearsay, and not a legal conclusion. (Assignment of Error F).

10. Whether Appellant is Entitled to an Award of Attorneys' Fees and Costs Under the Open Public Meetings Act as the Prevailing Party if this Court Reverses the Trial Court. (Assignments of Error A, B and C).

VI. STATEMENT OF THE CASE

A. Identification of Parties

Appellant Citizens Alliance for Property Rights Legal Fund ("CAPR") is a Washington non-profit corporation. Its members actively participate in the public process involving enactment of new laws in San Juan County, including consideration of a new San Juan County Critical Areas Ordinance.

Respondent San Juan County is a home rule county located in Friday Harbor, Washington. At all times relevant to this case, the County was governed by the six-member San Juan County Council.[23]

The San Juan County CAO Subcommittee, the General Governance Subcommittee, the Budget Subcommittee and the Solid

[23] In November 2012, San Juan County voters changed the Council from a six to a three member governing body. The new three member Council was sworn in on May 13, 2013.

Waste Subcommittee are subcommittees of the Council because they are comprised of members of the Council.

B. Creation and Purpose of the CAO Subcommittee and the Other Subcommittees

In late 2009 or early 2010, the CAO Subcommittee[24] was created to meet and discuss issues related to the adoption of a new Critical Areas Ordinance ("CAO")[25] and shoreline management plan ("SMP").[26] It was created so that a smaller group of Council members could discuss the policy and procedural details of the CAO and SMP update before presenting the fruits of such meetings to the Council as a whole.

The CAO Subcommittee officially included three Council members (Council members Fralick, Miller and Pratt) from October 2010 until approximately April 26, 2012. A quorum of the Subcommittee was present at each of the Subcommittee meetings.[27] The Council and especially Councilmembers Fralick and Pratt were motivated to adopt a new CAO prior to leaving office by the end of 2012.[28]

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[24] The CAO Subcommittee had numerous names including the following: CAO/SMP Implementation Committee, CAO/SMP Implementation Team, CAO Committee Steering Committee, CAO Facilitation Group, and Pete's Implementation Team. CP 252, 275, 277, 311, 364, 381, 423-24, 440-41, 464-54, 472-73, 474-75, 476-77, 494-95 (Palmer Decl. Ex. B Fralick Dep.; Palmer Decl. Ex. A Pratt Dep.; Palmer Decl. Ex. C Miller Dep.; Palmer Decl. Ex. D Hale Dep. ("Ex. D Ex. D Hale Dep."); Palmer Decl. Exs. I, K, L, M, and S).

[25] CP 254, 286, 289 (Palmer Decl. Ex. B Fralick Dep. 7:16–24; Palmer Decl. Ex. A Pratt Dep. 22:18–23; 74:1–9).

[26] CP 353, 515-18 (Palmer Decl. Ex. C Miller Dep. 77:2–4; Palmer Decl. Ex. X).

[27] CP 300, 421-22 (Palmer Decl. Ex. D Hale Dep. 97:9–98:20; Palmer Decl. Ex. C Miller Dep. 16:13–18).

[28] In San Juan County, a subcommittee of the Council typically has three Council members on it. However, the evidence shows that some of the subcommittee meetings at issue in the case were attended by four Council members. CP 348-349 (Palmer Decl. Ex. C Miller Dep. 67:24–68:9).

The express purpose for creating the CAO Subcommittee was to act on behalf of the Council by gathering information and making decisions to narrow choices before presenting a policy option for "official" consideration to the Council.[29] As stated by Ms. Shireene Hale,[30] working with the three-member CAO Subcommittee was easier than with the six-member Council:

> Q. In general terms isn't it easier to work with three people than six?
>
> A. Certainly.[31]

The CAO Subcommittee had multiple purposes and would discuss issues prior to presenting them to the Council:

> One of the purposes was to make sure we provided the Council with whatever they needed to make decisions. For the most part to facilitate us all working together to get through the process.[32]

Similarly, Council Member Fralick described the CAO Subcommittee's purpose as "to help with the implementation interface between the County Council and planning staff."[33] The CAO Subcommittee also did the "pick and shovel work" for the Council:

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[29] *E.g.*, *see* CP 395-96, 413-14, 415, 433, 329, 339-40, 369, 487-90, 501-03 (Palmer Decl. Ex. D Hale Dep. 57:22–58:10; 79:14–80:16; 86:7–19; 128:8–24; Palmer Decl. Ex. C Miller Dep. 44:2–7; 55:23–56:11; 115:4–20; Palmer Decl. Exs. Q, and V).

[30] Ms. Shireene Hale is a planning coordinator and the Deputy Director of Community Development and Planning for Defendant San Juan County. CP 373 (Palmer Decl. Ex. D Hale Dep. 4:18–20).

[31] CP 415, 299 (Palmer Decl. Ex. D Hale Dep. 86:7–19. *See also* Palmer Decl. Ex. B Fralick Dep. 21:1–6).

[32] CP 380, 319 (Palmer Decl. Ex. D Hale Dep. 3:1–11. *See also* Palmer Decl. Ex. C Miller Dep. 13:16–22).

[33] CP 289, 341 (Palmer Decl. Ex. B Fralick Dep. 7:17–24. *See also* Palmer Decl. Ex. C Miller Dep. 58:10–14).

> Q. And I guess what I'm getting at is my understanding of the committee, the details, the pick and shovel work, so to speak, kind of went to the committee first and it would deal with staff and then it would go back to the County Council for additional policy direction?
>
> A. I think that's an accurate statement.[34]

There was a dispute as to who created the CAO Subcommittee. Ms. Hale testified the Council created it.[35] In contrast, Council Member Pratt stated the former County Administrator Pete Rose created it.[36] Even if Mr. Rose created the CAO Subcommittee, Mr. Rose reported directly to the Council, and the Council went along willingly with the creation of it, even if it was not conventionally formed by the Council.[37] Additionally, the Council formally adopted a San Juan County Critical Area Regulations Update & Participation Plan, which included the approval of creation of the CAO Subcommittee.[38]

Councilmembers submitted identical declarations in reply to CAPR's opposition to the County's motion, making four points: (1) as a Councilmember, I did not create the CAO Committee, (2) it was "never my intent to bring the CAO Implementation Team into being," (3) I did not delegate any authority for the CAO Committee to act on behalf of the

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[34] CP 436, 550-57, 304-05 (Palmer Decl. Ex. D Hale Dep. 144:9–14; Palmer Decl. Ex. AH. *See also* Palmer Decl. Ex. B Fralick Dep. 29:3–30:1).

[35] CP 379 (Palmer Decl. Ex. D Hale Dep. 34:23–25).

[36] CP 253 (Palmer Decl. Ex. A Pratt Dep. 21:7–13).

[37] CP 253-54, 374-75 (Palmer Decl. Ex. A Pratt Dep. 21:7–22:17; Palmer Decl. Ex. D Hale Dep. 6:23–7:6).

[38] CP 355-56, 519-25 (Palmer Decl. Ex. C Miller Dep. 81:3–82:2; Palmer Decl. Ex. Y).

Full Council, and (4) I reserved my "individual power" as a Council member to "to discuss, deliberate and decide every aspect of the substance and process of adopted land use ordinances." *See e.g.,* Fralick Declaration CP 761-62.

CAPR does not view the dispute as to creation of the CAO Subcommittee as material because the OPMA applies to committees acting on behalf of a governing body. Also, the Trial Court appeared to reach and decide the substantive legal arguments, although the possible taint of the Councilmember declarations on the Trial Court's thinking cannot be assessed.

More fundamentally, Appellant is unwilling to insult the intelligence of the members of the former Council by presuming committees composed of members of the County Council had any purpose other than to act on behalf of the entity to which they were elected and on public business. For instance, Mr. Fralick admitted the CAO Committee did the "pick and shovel work" for the Full Council on the proposed CAO.

The Trial Court, however, determined the dispute was material to the issues before it, as it ruled the Subcommittees must be created by ordinance or other law to be subject to the OPMA. This in and of itself requires reversal of the Order Granting Summary Judgment to the extent the Trial Court determined it to be material fact because the facts must be viewed in a light most favorable to the non-moving party, and there is a

factual dispute as to creation of the CAO Subcommittee.[39] CR 56(c); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002); *Ruff v. County of King*, 703, 887 P.2d 886 (1995). Again, however, requirements of the OPMA are not dependent on how a subcommittee is created – just that it acted on behalf of the Council.

C. Council Subcommittee Meetings Took Place Without Notice and Conducted Business by Taking Action.

The CAO Subcommittee met approximately once per week since its creation. It held at least 25 physical meetings and numerous "virtual" meetings via phone conference between late 2010 and 2012.[40] Each of those private meetings were held at irregular times, often in private conference rooms that do not promote public access, and lasted approximately thirty minutes to two hours.[41] The meetings were called by Council members on the CAO Subcommittee and by staff.[42] During meetings, the CAO Subcommittee took action including reviewing and discarding public comments[43] – in meetings that were neither noticed nor open to the public.[44] Minutes of the meetings were not recorded.[45]

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[39] *See* Argument, *infra*, at p.18.

[40] CP 94 – 186 (Appendix A-4 in CAPR Summary Judgment Response); *See* CP 384-85, 303 (Palmer Decl. Ex. D Hale Dep. 39:15–40:2; Palmer Decl. Ex. B Fralick Dep. 28:3–8).

[41] CP 447, 298 (Palmer Decl. Ex. D Hale Dep. 162:16–21; Palmer Decl. Ex. B Fralick Dep. 20:10–25).

[42] CP 388, 391, 290-91, 362-63 (Palmer Decl. Ex. D Hale Dep. 43:14–20; 46:8–16; Palmer Decl. Ex. B Fralick Dep. 8:22–9:2; Palmer Decl. Ex. C Miller Dep. 96:14–97:4).

[43] CP 428, 534-36 (Palmer Decl. Ex. D Hale Dep. 104:16–20; Palmer Decl. Ex. AC).

[44] CP 420, 293-95, 449-457 (Palmer Decl. Ex. D Hale Dep. 93:13–22; Palmer Decl. Ex. B Fralick Dep. 11:2–8; 13:13–14:3; Palmer Decl. Ex. E).

[45] *E.g.*, CP 64 (County Answer at 3:12-15).

In CAO Subcommittee meetings, the Council members studied issues related to the proposed CAO ordinance, calling in outside contractors[46] and staff,[47] and deliberating on provisions of the proposed ordinance outside of the view of the public.[48] The CAO Subcommittee needed their legal advisor present because it discussed more than just scheduling issues but, importantly, did not go into Executive Session[49]:

> Q. Now, my understanding is that staff from the office of the prosecuting -- San Juan County prosecuting attorney attended numerous CAO Implementation Team meetings. Was that your memory?
>
> A. Yes.
>
> Q. Why was it necessary for the County's legal advisor to attend if, as you say, the emphasis was on just schedule?
>
> A. That wasn't the only thing we talked about. That's one of the things we talked about.
>
> Q. Oh, it wasn't. What else did you talk about then?
>
> A. Well, as I stated before, we would have talked about, you know, brainstorming on different ways to approach things.[50]

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[46] CP 385-86, 390, 393-94, 324-25, 304-09, 487-90 (Palmer Decl. Ex. D Hale Dep. 40:19–41:7; 45:8–23; 55:25–56:21; Palmer Decl. Ex. C Miller Dep. 27:9–28:17. *See* Palmer Decl. Ex. B Fralick Dep. 30:18–34:14; Palmer Decl. Ex. Q).

[47] CP 260-61 (Palmer Decl. Ex. A Pratt Dep. 32:22–33:11).

[48] CP 331-33, 499-500, 380-83, 449-57, 267 (Palmer Decl. Ex. C Miller Dep. 47:10–49:14; Palmer Decl. Ex. U; Palmer Decl. Ex. D Hale Dep. 35:1–11; 36:24–25; 37:7–38:5; Palmer Decl. Ex. E. *E.g.*, Palmer Decl. Ex. A Pratt Dep. 42:14–18).

[49] *See* CP 602 (Palmer Decl. Ex. AM at 34:25-26, Defendants' Response to Plaintiff's Second Set of Interrogatories and Requests for Production ("The County did not attempt to change such meetings into executive session meetings.")).

[50] CP 392, 365-66 (Palmer Decl. Ex. D Hale Dep. 53:7–20; Palmer Decl. Ex. C Miller Dep. 107:13–108:18).

Besides scheduling matters[51] and personnel recommendations,[52] the CAO Subcommittee discussed major policy issues – including Best Available Science,[53] wetland amendments,[54] alternative wetland buffer approach,[55] alternative water quality buffer sizing procedure,[56] impacts to critical areas,[57] reasonable use exceptions,[58] "hot button issues,"[59] "key issues,"[60] mitigation requirements,[61] risk analysis,[62] site specific buffers,[63] and Best Management Practices.[64] For example, during discussions regarding fish and wildlife conservation areas, the CAO Subcommittee gave policy level guidance to staff on what they wanted to see:

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[51] CP 290-91, 298-300, 284-85, 323, 497-98 (Palmer Decl. Ex. B Fralick Dep. 8:22–9:7; 20:3–9; 21:7–22:2; Palmer Decl. Ex. A Pratt Dep. 72:2–73:8; Palmer Decl. Ex. C Miller Dep. 25:10–25; Palmer Decl. Ex. T).

[52] CP 272-74, 466-71 (Palmer Decl. Ex. A Pratt Dep. 51:16–53:19; Palmer Decl. Ex. J).

[53] CP 398-400, 256, 279-83, 321, 354, 478-79, 480-82, 491-93, 515-18 (Palmer Decl. Ex. D Hale Dep. 63:17–65:9; Palmer Decl. Ex. A Pratt Dep. 24:3–5; 64:24–67:17; 67:25–68:20; Palmer Decl. Ex. C Miller Dep. 20:9–19; 79:16–20. *See* Palmer Decl. Exs. R, N, O and X); CP 187 – 236 (Peterson Decl. Ex. B).

[54] CP 416, 439, 270-71, 361, 462-63, 501-03, 561-62 (Palmer Decl. Ex. D Hale Dep. 87:4–12; 148:2–10; Palmer Decl. Ex. A Pratt Dep. 49:14–50:11; Palmer Decl. Ex. C Miller Dep. 94:8–21; Palmer Decl. Exs. H, V, and AJ).

[55] CP 408-13, 425-27, 255-56, 264-65, 350-52, 458-59, 515-18, 534-36 (Palmer Decl. Ex. D Hale Dep. 74:17–79:1; 101:24–103:15; Palmer Decl. Ex. A Pratt Dep. 23:9–24:2; 39:10–40:8; Palmer Decl. Ex. C Miller Dep. 72:10–73:14; 75:1–7. Palmer Decl. Exs. F, X, and AC).

[56] CP 434, 336-38, 548-49, 501-03 (Palmer Decl. Ex. D Hale Dep. 129:6–21; Palmer Decl. Ex. C Miller Dep. 52:5–54:17; Palmer Decl. Exs. AG, and V).

[57] CP 430-31, 542-44 (Palmer Decl. Ex. D Hale Dep. 108:9–109:14; Palmer Decl. Ex. AE).

[58] CP 437-38, 558-60 (Palmer Decl. Ex. D Hale Dep. 145:16–146:1; Palmer Decl. Ex. AI).

[59] CP 440, 563-64 (Palmer Decl. Ex. D Hale Dep. 151:16–17. *See* Palmer Decl. Ex. AK).

[60] CP 268-70, 460-61, 329-30, 487-90 (Palmer Decl. Ex. A Pratt Dep. 47:6–49:3; Palmer Decl. Ex. G. *See* Palmer Decl. Ex. C Miller Dep. 35:16–36:3; Palmer Decl. Ex. Q).

[61] CP 256 (Palmer Decl. Ex. A Pratt Dep. 24:14–23).

[62] CP 277-78, 476-77 (Palmer Decl. Ex. A Pratt Dep. 62:16–63:8. *See* Palmer Decl. Ex. M).

[63] CP 256, 344-46, 504-14 (Palmer Decl. Ex. A Pratt Dep. 24:9–13; Palmer Decl. Ex. C Miller Dep. 63:3–65:19; Palmer Decl. Ex. W).

[64] CP 403-04, 491-93 (Palmer Decl. Ex. D Hale Dep. 68:6–69:12; Palmer Decl. Ex. R).

> Q. Did you vet your approach for fish and wildlife conservation areas with the CAO Implementation Team?
>
> A. When they discussed the comparison of the existing regulations with the requirements, they gave us guidance, policy level guidance on what they wanted to see. I don't recall discussing -- once we prepared the first hearing draft for the Planning Commission, I don't recall discussing it with the implementation team.

D. Plaintiff's Legal Action and Court Decisions

On October 15, 2012, CAPR filed a timely Complaint for Violations of the Open Public Meetings Act, RCW 42.30 and for Injunction to Restrain Violations of State Law.[65] The County admitted in its Answer that subcommittee meetings took place, admitted the meetings occurred without public notice, admitted the meetings were not open to the public, and admitted the meetings purposes were "bringing forward and discussing, ideas and policies prior to meetings of the entire Council."[66] However, contrary to the Gaylord Memo, the County took the position that the OPMA did not apply to subcommittee meetings where such

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[65] CP 22-43 (Amended Complaint). An Amended Complaint was filed on November 2, 2012. CAPR non-suited its injunction action. CP 44-46. Thereafter, CAPR dismissed its claim against the individual Councilmembers and waived civil penalties.

[66] CP 63-65 (County Answer); *see also* CP 187 – 236 (Petersen Decl. Ex. A, Council Minutes of January 4, 2011; Ex. C, Council Meeting Minutes from April 26, 2011; Ex. D. Council Minutes from May 10, 2011; Ex. E, Council Minutes of May 17, 2011; Ex. F, Council Minutes of May 24, 2011; Ex. G, Council Minutes of July 26, 2011; Ex. H, Council Minutes of Oct. 18, 2011; Ex. I, Council Minutes of October 25, 2011; Council Minutes of Nov. 1, 2011; Ex. K, Council Minutes Dec. 13, 2011; Ex. L, Council Minutes of Feb. 28, 2012; Ex. M, Council Minutes of March 13, 2012; Ex. N, Council Minutes of April 17, 2012; Ex. O, Council Minutes of April 24, 2012).

meetings did not include a quorum of the Council as a whole and moved for summary judgment.

The County's motion was solely directed at allegations concerning the CAO Subcommittee and was silent regarding CAPR's allegations regarding the various other subcommittees. CP 74-93. Moreover, the County did not support its motion with any declarations or evidence. *Id.* Yet, when CAPR submitted its response brief supported by a declaration of counsel attaching County witness deposition testimony excerpts, the County attempted to disavow statements made concerning the CAO update and its timing via a motion to strike. CP 756-758. The Trial Court apparently agreed with the County's arguments that the deposition testimony should be stricken as hearsay and/or legal conclusion and granted the motion in part.

Then, the County filed self-serving, contradictory declarations of Council members to "clarify" their deposition testimony to support its reply brief, raising new arguments and presenting new "facts" for the first time. CP 759-768; CP 1006-1007. *See also*, p.18, *infra*. Although CAPR moved to strike the declarations, CP 776-785, the Trial Court denied the motion on its determination that the declarations were "not inconsistent" with deposition testimony.[67] The County did not refute evidence presented by CAPR that four Council members were present at some of the challenged subcommittee meetings.

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[67] *See* CP 816 – 828 (Summary Judgment Decision); CP 854 – 857 (Order on Summary Judgment).

Following briefing and oral argument, the Trial Court ruled in favor of the County and summarily dismissed all of CAPR's claims as a matter of law. CP 816 – 828 (Summary Judgment Decision). CAPR filed timely a Motion for Reconsideration pursuant to CR 59(a), because substantial justice had not been done, and because the Court committed numerous errors of law. CP 829 – 843 (original); CP 888 – 902 (amended). The Trial Court denied the Motion for Reconsideration. CP 934 – 970. CAPR filed the present appeal. CP 971 – 1005.

VII. ARGUMENT

A. Standard of Review

An appellate court reviews an order of summary judgment *de novo*.[68] Summary judgment is appropriate only when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is of such a nature that it affects the outcome of the litigation."[69] Factual issues may be decided as a matter of law when reasonable minds could reach but one conclusion or when the factual dispute is so remote it is not material.[70]

The moving party under CR 56 bears the initial burden of showing the absence of an issue of material fact and an entitlement to judgment as a matter of law. The moving party can satisfy this initial burden by

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[68] *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

[69] *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

[70] *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990) (quoting *Trane Co. v. Brown-Johnston, Inc.*, 48 Wn. App. 511, 513, 739 P.2d 737 (1987)).

demonstrating the absence of evidence supporting the nonmoving party's case.[71] The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue for trial.[72] The reviewing court considers the facts and inferences from the facts in the light most favorable to the nonmoving party.[73]

B. The County's Motion Was in the Nature of a Motion for Judgment on the Pleadings. It Failed to Make Required Showings for Dispositive Relief and the Trial Court Misapplied the Standard of Review.

The County's motion for summary judgment was actually one for judgment on the pleadings. *See* CR 12(c).[74] It was not supported by any declarations, but only attacked allegations in CAPR's complaint. The County ignored the following facts in the Complaint, presumed to be true:

> (1) evidence that the creation and purpose of the Subcommittees was to act on behalf of the Council and streamline the choices presented to the Council as a whole in the light of an open hearing; (2) that meetings of the Subcommittees were not noticed or open to the public; and (3) that members of these secretive committees have influence over

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[71] *Kendall v. Douglas, Grant, Lincoln, & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 9, 820 P.2d 497 (1991).

[72] *Id.*

[73] *Jones v. Allstate Ins. Co.,* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

[74] A CR 12(c) motion for judgment on the pleadings is treated identically to a CR 12(b)(6) motion to dismiss for failure to state a claim. *Suleiman v. Lasher,* 48 Wn. App. 73, 376, 739 P.2d 712 (1987) (citing Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, Civil Procedure 294-95 (1985)). Like a CR 12(b)(6) motion, the purpose is to determine if a plaintiff can prove any set of facts that would justify relief. *Id.* at 376 (citing *Halvorson v. Dahl,* 89 Wn.2d 673, 574 P.2d 1190 (1978)). All facts alleged in the plaintiff's complaint are presumed to be true. *Rodriguez v. Loudeye Corp.,* 144 Wn. App. 709, 717, 189 P.3d 168 (2008) (citing *Cutler v. Phillips Petroleum Co.,* 124 Wn.2d 749, 755, 881 P.2d 216 (1994), *cert. denied,* 515 U.S. 1169 (1995)).

> fellow Council members, acting as a negative quorum.

CP 25, 32, 34-35 (Amended Complaint at ¶¶ 13, 44-50, 60-65)

In a motion for judgment on the pleadings, the moving party admits all facts pled by the non-moving party.[75] In other words, the Trial Court was required to take all allegations in the Complaint as ***true***.[76] Dismissal pursuant to a CR 12(c) motion is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery, considering even hypothetical facts outside the record.[77] The County failed to make this showing.

In the County's summary judgment motion, it claimed that CAPR presented "no facts" to support its contentions (CP 74 – 93, County Summary Judgment Memorandum; CP 817, Summary Judgment Decision at 2), yet the County sidestepped its obligations to bring forward facts to support its own motion. Once it was faced with deposition excerpts from its own witnesses, submitted by CAPR in response to the County's motion, it desperately drafted declarations in an attempt to explain – after the fact – the witnesses' sworn testimony. The County submitted these self-serving, contradictory declarations for the first time on reply. Notably, the County did not object to the deposition questions nor did it

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[75] *Pearson v. Vandermay*, 67 Wn.2d 222, 230, 407 P.2d 143 (1965); *Hodgson*, 49 Wn.2d at 136.

[76] *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

[77] *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *Gaspar v. Peshastin Hi-Up Growers,* 131 Wn. App. 630, 634, 128 P.3d 627 (2006).

seek to clarify or correct its witnesses' testimony with follow-up questions during the depositions.

Although a defendant may move for summary judgment either with supporting affidavits, or by pointing out to the trial court that the plaintiff lacks sufficient evidence to support its case, when a defendant chooses the latter alternative, it "must identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact."[78] The County did not do so.

Moreover, because the County did not brief issues related to any governing body other than the CAO Subcommittee, it waived such arguments.[79] Simply, the County failed to even attempt to meet its initial burden on summary judgment regarding each of the claims. Accordingly, the burden did not and could not shift to CAPR where the County did not meet the required initial showings that there is no genuine issue of material fact or that the plaintiff lacks competent evidence to support an essential element of its claims concerning the other Subcommittees.[80]

In response to the summary judgment motion, CAPR presented evidence that a meeting of the County Council took place, consistent with

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[78] *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 22, 851 P.2d 689 (1993) (citing *White v. Kent Medical Center, Inc.,* 61 Wn. App. 163, 170, 810 P.2d 4, 9 (1991); *Baldwin v. Sisters of Providence in Washington*, Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989)).

[79] *See, e.g., Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (where briefing failed to devote any argument to a specific challenge, the issue is deemed waived); *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court will not address arguments not developed or supported in the brief).

[80] *See LaPlante v. State,* 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

the allegations in its Amended Complaint, based in part on a November 14, 2011, email chain that constitutes CAO deliberations, discussions and considerations, which are "action" under the Act, as interpreted and applied by Washington courts. The County did not dispute this evidence until faced with CAPR's Motion for Reconsideration.[81] Even then it did so without any supporting affidavits or testimony.

Taking the facts as set forth in the Amended Complaint as true, the Trial Court should have denied the motion and should have ruled that violations of the OPMA were established as a matter of law by CAPR. This Court should reverse the Trial Court's rulings and should affirmatively rule that, as a matter of law, CAPR has established that the Respondents violated the Act.

In the alternative, even if the County's motion was treated as a true motion for summary judgment, it should have been denied as a matter of law. Because summary dismissal is disfavored, a court must resolve all reasonable inferences against the moving party and may only grant the motion if reasonable persons could reach but one conclusion.[82] Even applying the more lenient summary judgment standard, the Trial Court failed to resolve all factual inferences against the County. Rather, the Court gave the ***moving party*** the benefit of the doubt that none of the

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[81] *Cf.* CP 94 – 186 (CAPR MSJ Response at Appendix A-4); *and* CP 836 (CAPR Motion for Reconsideration at 8); *and* CP 895 (CAPR Amended Motion for Reconsideration at 8-9); *and* CP 910 – 913 (CAPR Reply re Motion for Reconsideration at 8-11); *with* CP 864 – 868(County Response to Motion for Reconsideration at 7-11).

[82] *LaPlante v. State,* 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 566, 27 P.3d 1208 (2001); *Eugster 1*, 110 Wn. App. at 222-24*; Ellis v. City of Seattle,* 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

committees took "action," and that they did not "act on behalf" of the Council; it also effectively ruled that the Council did not create the committees.[83] This was error of law and contrary to substantial evidence in the record.

Only if the Trial Court correctly determined that the County met its initial burden on summary judgment – which CAPR asserts it did not – would the burden shift to the non-moving party. Appellants contend that no burden shifting should have occurred because the County failed to establish that, taking facts as pled by CAPR as true, it was entitled to judgment as a matter of law.

If such burden shifting occurred, the "evidence" presented by the County on reply at most establishes that genuine issues of material fact preclude summary judgment. In this regard, the Trial Court's ruling appears to be based on issues which, given the importance placed on them by the Trial Court, present genuine issues of material fact that preclude summary judgment. These include, but are not limited to, the questions of whether (1) the CAO Subcommittee was created by the Council, (2) it "took action," and/or (3) it "acted on behalf" of the Council. The question of whether a "meeting" in which "action" took place is a genuine issue of material fact, which precludes summary judgment.[84]

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[83] As stated in the earliest Attorney General Office's Guidance on the OPMA, in AGO 1971 No. 33, where a committee has been created, it is within the definition of "public agency," and subject to the OPMA. The Trial Court's decision on summary judgment at page 3 (CP 818) confirms that the Subcommittees were created by the Council.

[84] *Wood*, 107 Wn. App. at 566; *Eugster I*, 110 Wn. App. at 222-24.

C. Overview of the Open Public Meetings Act

The OPMA mandates that "All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030. The purpose of the OPMA is remedial and it "shall be liberally construed." RCW 42.30.910.

"Public agency" is defined as:

> (b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;
>
> (c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;

RCW 42.30.020(1).

San Juan County is a "public agency" under the OPMA. The evidence shows that the CAO Subcommittee and the various Subcommittees are a "public agency" and/or "subagency" under the OPMA.

"Governing body" means "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). The evidence shows that the County

Council itself, the CAO Subcommittee, and the various Subcommittees are "governing bodies" for the OPMA.

As noted *infra*, pp.8-9, "meeting" means all occasions at which "action" is taken. RCW 42.30.020(4). "Action" is defined as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, **and** final actions." RCW 42.30.020(3) (emphasis supplied).

The term action is not limited to only "final action." Under the rules of statutory construction, only if the specific words exhaust the class designated by the enumeration do general words take a meaning beyond the class. The class of items that constitute "action" under the Act is not exhausted by the enumeration because the statute states, "including but not limited to." RCW 42.30.020(4). Thus, any one of the items listed in the statute constitutes "action," including, but not limited to, "final action." "Action" and "Final action" are not synonymous. *See Eugster I*, 110 Wn. App. at 223-25; *Feature Realty v. Spokane*, 331 F.3d 1082, 1088 (9th Cir. 2003)

Governing bodies must provide notice of meetings. RCW 42.30.070. Special Meetings – those held outside of the regular published schedule for the agency – must be published at least 24 hours in advance of the Special Meeting and must state the date, time and location of the

Meeting. RCW 42.30.080. Governing bodies must prepare and provide for minutes of all regular and special meetings.[85] RCW 42.32.030.

D. Meetings of the County Subcommittees are Subject to the OPMA Because a Quorum of the Subcommittees Were in Attendance and Action Took Place.

The Trial Court took the erroneous legal position that because three members of the CAO Subcommittee did not comprise a quorum of the Council as a whole, the CAO Subcommittee was not subject to the OPMA and/or it could not take "action" within the meaning of the Act.

The Trial Court did not address the fact that four members of the Council – a quorum of the Council as a whole – were in attendance at meetings of the Subcommittees, including the November 14, 2011 CAO Subcommittee meeting. And the Trial Court missed that the OPMA does not only require meetings of the Council to be open, but it also requires those meetings of committees acting on their own accord and/or on behalf of the Council as a whole to be open. RCW 42.30.010; RCW 42.30.020(1), (2).[86]

The Trial Court failed to grasp that a meeting of a committee composed of some but not all members of a governing body is subject to the OPMA in one of two independent ways: (1) if created by the

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[85] The law requires that notes be taken at all open meetings, both regular and special. RCW 42.32.030. The notes should then be approved as minutes at the following meeting. *Id.*

[86] *See, e.g.*, CP 691-95 (Palmer Decl. Ex. BH, "Informal" Attorney General of Washington Opinion signed by Timothy Ford and dated March 21, 2008 (***concluding that how a committee is created is less important to the OPMA than what the committee actually does***)).

governing body, or (2) if the committee acts on behalf of the governing body. The requirements of the OPMA are to be broadly construed, given the purposes of the OPMA, which include permitting the public to observe the steps employed to reach a governmental decision.[87]

It is undisputed that a quorum of each the Subcommittees was present at all of the secret meetings. And some subcommittee meetings were attended by four Council members, which is a quorum of the Council as a whole. *See infra*, p.5, p.11. The Subcommittees took "action" as defined by the OPMA at the secret meetings and acted on behalf of the Council to implement the CAO/SMP update and streamline its decision-making on other basic government functions.

As discussed at pp.10, 11, 20-23, *infra*, the Council members on the CAO Subcommittee had robust discussions[88] pertaining to the CAO Subcommittee business – including reviewing and discarding public comments[89] – in meetings that were neither noticed nor open to the public as required by the OPMA.[90] "Action" was taken when three members of the Council met as a Subcommittee.

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[87] *Eugster v. City of Spokane,* 128 Wn. App. 1, 7, 114 P.3d 1200 (2005) , *review denied,* 156 Wn.2d 1014, 132 P.3d 146 (2006) (citing *Cathcart v. Andersen,* 85 Wn.2d 102, 107, 530 P.2d 313 (1975)).

[88] CP 300-01, 261-62, 266, 458-59, 365 (Palmer Decl. Ex. B Fralick Dep. 22:15–23:12; Palmer Decl. Ex. A Pratt Dep. 33:22–34:15; 41:18–23; Palmer Decl. Ex. F. *See* Palmer Decl. Ex. C Miller Dep. 107:1–12).

[89] CP 428, 534-36 (Palmer Decl. Ex. D Hale Dep. 104:16–20; Palmer Decl. Ex. AC).

[90] CP 420, 293-95, 449-57 (Palmer Decl. Ex. D Hale Dep. 93:13–22; Palmer Decl. Ex. B Fralick Dep. 11:2–8; 13:13–14:3; Palmer Decl. Ex. E).

The law requires that discussions and deliberations among a quorum of the members of a three-person committee, whether in a meeting room, on the telephone or over email, must be open to the public for viewing and participation.[91] That was not the case here.

Important decision-making took place behind closed doors over many months before policy matters were ever presented in the light of day to the Council and the public. The County acted as if it turned back the clock more than 40 years, reverting to secretive decision-making long since prohibited in Washington State and across the nation.

The County in its summary judgment motion did not address cure. While not before this Court, CAPR observes that the process as to the CAO Ordnance as vetted by the CAO Subcommittee is so tainted it cannot be cured. CAPR advises this Court that reaching cure is probably unnecessary for reasons set out immediately below.

The Western Washington Growth Managements Hearing Board recently issued an opinion finding the County's CAO is non-complaint in many respects with the Growth Management Act (RCW Chapter 36.70A) and has remanded the CAO back for more review and decision-making.

The three Council members on the CAO Subcommittee set the stage for matters coming before the Council for a vote and thus engaged in "action" on behalf of the whole Council by meeting without notice to the

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[91] *Wood*, 107 Wn. App. at 563 ("Washington broadly defines "meeting" as "meetings at which action is taken," regardless of the particular means used to conduct it," citing The Washington Attorney General's *Open Records & Open Meetings Deskbook,* 1.3A.

public behind the scenes, and then influencing the votes (directly or indirectly) of the Council.[92] As recognized by one court with respect to the reasons behind open public meetings:

> During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Wood, supra, 107 Wn. App. 550, 562 n.3 (quoting *Bd. of Pub. Instruction v. Doran,* 224 So.2d 693, 699 (Fla.1969)). Justice Sanders of the Washington Supreme Court similarly observed:

> No doubt disclosure is sometimes embarrassing to public servants who would prefer to act behind a veil of secrecy for reasons of political expediency; however, secrecy is precisely what the Open Public Meetings Act (OPMA), chapter 42.30 RCW, was designed to prevent.

In re Recall of Lakewood City Council Members, 144 Wn.2d 583, 588, 30 P.3d 474 (2001) (Sanders, J., dissenting).

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[92] CP 187 – 236 (Petersen Decl. Ex. P at 10:18–21).

A Florida court aptly described the purpose of its analogous Sunshine Law, which is "to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So.2d 857, 860 (Fla. 3d DCA 1994) (quoting *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla.1974)).[93] Yet, this is precisely what occurred in San Juan County with respect to its CAO, by virtue of the secret CAO Subcommittee meetings.

As observed by another court, "***Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors***." *Gradison*, 296 So.2d at 477 (emphasis added). "When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the state." *Id.* Interestingly, this is the same advice that Prosecuting Attorney Gaylord gave to the Council here because the Council had not been complying with the OPMA.

In *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla.1974)), much like the facts in CAPR's lawsuit here, a citizen's planning committee conducted its activities at nonpublic meetings and was

[93] Like Washington, the Florida courts have repeatedly stated that it is the entire decision-making process to which the Sunshine Law applies and not merely to a formal assemblage of a public body at which voting to ratify an official decision is carried out; thus, the statute extends to discussions and deliberations as well as to formal action taken by a public body. *See Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 699 (Fla. 1969), in which the court recognized the right of the public to be present and heard during all phases of enactments by public boards and commissioners; *Krause v. Reno*, 366 So.2d 1244 (3 D.C.A. Fla., 1979).

instrumental in the formulation of a comprehensive zoning plan that was perfunctorily adopted as a zoning ordinance by the town council at a public meeting. *Id.* at 477. The comprehensive plan was approved in substantially the same form as that which had been submitted. *Id.* The court held that the zoning ordinance, which was the summary approval of the recommendation of the planning committee's secret meetings, was void *ab initio*. *Id.*

Explaining the purpose of Florida's Sunshine Act, on which the Washington OPMA was based, the Florida Attorney General stated:

> Accordingly, the law is applicable to any gathering where two or more members of a public board or commission discuss some matter on which foreseeable action will be taken by the board or commission.[94]

It would be difficult to find a clearer directive demonstrating the CAO Subcommittee meetings were illegal. The Trial Court, however, wanted "Washington case law." This is an erroneous approach. A court is required to look at interpretations of the OPMA because it was modeled on other states' "Sunshine" laws, such as Florida.

In sum, the CAO Subcommittee and the General Governance, Budget and Solid Waste Subcommittees were specifically intended by the County Council to perform government functions in order to "lighten its load." The purpose of the Subcommittees was to streamline matters to be presented to the Council after discussions were privately held and policy

[94] Fla. Attorney General Advisory Legal Opinion: AGO 83-95 (December 7, 1983).

options winnowed beforehand. Members of the San Juan County Council conceded that during the course of Subcommittee meetings, "ideas and policies are brought forth, discussed, narrowed and discarded, and approaches are formulated for making presentations of subcommittee work to the entire Council."[95] A quorum of the Subcommittees was in attendance at the meetings and, at times, four Council members participated in secret, non-noticed Subcommittee meetings. If the OPMA does not apply under these circumstances, once again, public officials have taken transparent government away from the People.

E. Three Council Members Meeting as a Subcommittee of the Six-Member Governing Body Presents the Possibility of Undue Influence on the County Council as a Whole Because of the Committee Members' Ability to Constitute a "Negative Quorum."

Given the four-member requirement for positive action at the Council level and that it comprises only six members, a negative vote of three council members can prevent or "block" a proposal before the Council, acting as a "negative quorum." Under these unique circumstances, the OPMA must be applied since (1) convening a later held public hearing cannot undo the harm, and (2) the members of the Committee can simply state they voted independently on the final action with no recourse for the public, all in derogation of the strong policies favoring open government.

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[95] *See* CP 452, 250-52, 342-43 (Palmer Decl. Ex. E Gaylord Memo, p.3.; Palmer Decl. Ex. A Pratt Dep. 17:18–19:9; Palmer Decl. Ex. C Miller Dep. 59:17–60:23).

The possibility of a "negative quorum" is not fanciful in San Juan County. Prosecuting Attorney Randall in a December 2011 email to the County Council, quoted in this April 26, 2012, memorandum recognized it as real concern:

> One unintended consequence of the subcommittee approach that should be considered is that it has the ability to create imbalances and voting blocks on the Council that has the effect of weakening the influence of those who are not members of a subcommittee. If a Council member does not have the chance to influence policy at the formative stage, the die may be cast before they even get to speak. This is the downside of the subcommittee system composed of three members when it only takes one more member to make a decision.[96]

Simply, a subcommittee meeting at which three of the six Council members attend can have the ability to influence decision-making at the full Council by blocking a majority vote, whether intentionally or unintentionally.[97] Three Council members can, in a subcommittee meeting, determine the outcome of a proposal, whether that potential is the affirmative power to pass, or the negative power to defeat.[98]

Such actions results in coercive power of subcommittee members over other County Council members who do not share the same

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[96] *See* CP 453 (Palmer Decl. Ex. E Gaylord Memo at 4).

[97] CP 187 – 236 (Petersen Decl. Ex. P 3:3–21:13).

[98] CP 441-45, 329-30, 358, 487-90, 526, 563-67 (Palmer Decl. Ex. D Hale Dep. 152:18–153:8; 153:16–156:16; Palmer Decl. Ex. C Miller Dep. 44:2–17; 46:2–16; 88:7–23; Palmer Decl. Exs. Q, Z, AK, and AL).

information base as those participating in such subcommittee meetings.[99] As admitted by Ms. Hale, the CAO Subcommittee dealt with "behind the scene details" on behalf of the Council:

> Q. Well, if -- if it's all for the full Council, what was the purpose of the CAO Implementation Team? Did you need 20-some meetings just to discuss schedules?
>
> A. No, obviously it wasn't just schedules that were discussed. The problem -- one of the problems we were facing is that this was a very complex --
>
> Q. Right.
>
> A. -- time-consuming update and the Council -- the full Council didn't have enough time on their schedule to deal with all of the details, and this group was trying to take care of some of the behind the scenes details so that the Council -- the full Council could focus on making policy decisions and having substantive discussions and giving the staff direction on what they wanted to see.[100]

Accordingly, the three Council members on the CAO Subcommittee set the policy stage for matters coming before the Council for a vote and thus engaged in "action" on behalf of the whole Council by meeting without notice to the public behind the scenes and then influencing the votes (directly or indirectly) of the Council.[101]

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[99] CP 187 – 236 (Petersen Decl. Ex. P 3:3–21:13).

[100] CP 407-08 (Palmer Decl. Ex. D Hale Dep. 73:17-74:6).

[101] CP 187 – 236 (Petersen Decl. Ex. P 10:18–21.)

The CAO Subcommittee process led to adoption in early December 2012, of Ordinance Nos. 26-2012, 27-2012, 28-2012, and 29-2012 ("the New CAO").[102] The three members of the CAO Subcommittee voted as a block to approve the new CAO in the form and content they designed after holding the numerous secret meetings.[103]

F. The Trial Court Should Have Stricken Self-Serving Contradictory Declarations Submitted by the County on Reply

The County chose not to submit any supporting declarations with its summary judgment motion. Then, when faced with voluminous deposition testimony excerpts filed to support CAPR's responsive briefing, the County collaterally attacked sworn deposition testimony of its own witnesses via six "explanatory" declarations on reply.[104] The Court erred in considering these declarations that purport to reveal the "mental processes" of all six Council members.[105]

The declarations submitted by Councilmembers contain identical assertions, which contradict not only their deposition testimony but also exhibits in the record and admissions made by the County in its Answer.

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[102] CP 679-90 (Palmer Decl. Exs. BD; BE; BF; BG).

[103] CP 679-90 (Palmer Decl. Exs. BD; BE; BF; BG).

[104] The County filed: (1) Declaration of Richard Fralick, CP 761; (2) Declaration of Patty Miller, CP 763; (3) Declaration of Lisa Brown, CP 771; (4) Declaration of Lovell Pratt, CP 765; (5) Declaration of Howie Rosenfeld, CP 769; and (6) Declaration of Rich Peterson, CP 1006-1007.

[105] Notably, only five of the six Council members submitted declarations in this regard and could not have been considered evidence related to the Council's actions as a whole. Moreover, declarations that purport to speak to a decision-making body's "reasons, intents, motives or beliefs," – i.e., the mental processes thereof – are not admissible. *See Winkleman v. Marvik*, 126 Wn. App. 655, 661, 109 P.3d 47 (2005) (juror declaration to impeach verdict based on mental processes of the jury inadmissible).

Paragraphs 3-6 of each of the declarations are carbon-copy, conclusory, self-serving assertions that the Council did not create the CAO Subcommittee, nor did the Council delegate any decision-making authority to the CAO Subcommittee. Although CAPR filed a motion to strike the declarations because they: (1) were untimely; (2) are self-serving declarations that contradict unequivocal deposition testimony; and (3) contradict admissions in the County's Answer, the Trial Court improperly denied the motion.

The County belatedly attempted to offer alleged "evidence" on reply.[106] CR 56(c) states, in relevant part, "The motion ***and any supporting affidavits***, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than five calendar days prior to the hearing." (Emphasis added).

The Trial Court should have stricken the declarations because they contradict previously deposition testimony. As the court held in *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989):

> When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter

[106] *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991)("Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond").

> create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

Courts recognize that recantation testimony is seldom reliable.[107]

As set forth at p.18, *supra*, the County's witnesses (Ms. Hale and Mr. Pratt) disagreed about which body or person created the CAO Subcommittee, either the Council or the Council County Administrator. The evidence also shows that the Council adopted a San Juan County Critical Area Regulations Update & Participation Plan, which included approving creation of the CAO Subcommittee.[108] Further, County witnesses conceded in depositions that during committee meetings, "ideas and policies are brought forth, discussed, narrowed and discarded, and approaches are formulated for making presentations of subcommittee work to the entire Council."[109]

The belatedly submitted declarations not only contradict this deposition testimony but also contradict the County's admissions in its Answer. These members of the Council did not informally "gather." The Subcommittees were created to parse out policy and procedural work that the Council as a whole was undertaking in order to help it make certain public policy decisions more quickly (and out of the scrutiny of groups such as CAPR). *See* allegations, Amended Complaint, ¶ 10, which the County admitted in its Answer.[110] *See* Amended Complaint, ¶ 15, and

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[107] *See State v. Macon,* 128 Wn.2d 784, 801-02, 911 P.2d 1004 (1996).

[108] CP 355-56, 519-25 (Palmer Decl. Ex. C Miller Dep. 81:3–82:2; Palmer Decl. Ex. Y).

[109] *See* CP 452, 250-52, 342-43 (Palmer Decl. Ex. E Gaylord Memo, p.3.; Palmer Decl. Ex. A Pratt Dep. 17:18–19:9; Palmer Decl. Ex. C Miller Dep. 59:17–60:23).

[110] CP 24 (Amended Complaint); CP 64 (County Answer)

Answer which admits "... that some subcommittee meetings have not been noticed or open to the public."[111] *See also* admission to allegations of Amended Complaint, ¶ 41.[112] *See also* admissions to ¶¶ 70-71 of the Amended Complaint.[113] Paragraphs 10 of the Answer to Plaintiff's Amended Complaint[114] states:

> 10. Admit that meetings of the general governance subcommittee, budget subcommittee and solid waste subcommittee have occurred. Admit the purpose of those subcommittees includes bringing forward and discussing, ideas and policies prior to meetings of the entire Council.[115]

Where self-serving, contradictory declarations are introduced without explanation to disavow former deposition testimony, as here, the proper remedy is to grant the opposing party's motion to strike.[116] The Trial Court abused its discretion in its ruling denying the motion. At the very least, the County created genuine issues of material fact that should have precluded summary judgment in its favor.[117]

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[111] CP 26 (Amended Complaint).

[112] CP 31 (Amended Complaint).

[113] CP 35-36 (Amended Complaint).

[114] CP 64 (County Answer).

[115] *See also* CP 187 – 236 (Petersen Decl. Ex. A, Council Minutes of January 4, 2011; Ex. C, Council Meeting Minutes from April 26, 2011; Ex. D. Council Minutes from May 10, 2011; Ex. E, Council Minutes of May 17, 2011; Ex. F, Council Minutes of May 24, 2011; Ex. G, Council Minutes of July 26, 2011; Ex. H, Council Minutes of Oct. 18, 2011; Ex. I, Council Minutes of October 25, 2011; Council Minutes of Nov. 1, 2011; Ex. K, Council Minutes Dec. 13, 2011; Ex. L, Council Minutes of Feb. 28, 2012; Ex. M, Council Minutes of March 13, 2012; Ex. N, Council Minutes of April 17, 2012; Ex. O, Council Minutes of April 24, 2012).

[116] *See, e.g., Marshall,* 56 Wn. App. at 185.

[117] *E.g., Balise v. Underwood,* 62 Wn.2d 195, 381 P.2d 966 (1963)(citing 6 Moore's F. Prac. (2d ed.) ¶ 56.15(4), pp. 2139, 2141; 3 Barron & Holtzoff, F. Prac. and Proc. § 1234, p. 134).

G. The Trial Court Should Not Have Stricken Excerpts of Sworn Deposition Testimony Authenticated in CAPR Counsel's Deposition.

Despite the Trial Court's ***denial*** of CAPR's motion to strike the County's contradictory declarations submitted to support its reply brief, the Trial Court inexplicably ***granted*** the County's motion to strike portions of sworn deposition testimony authenticated in CAPR's counsel's deposition and submitted in response to the summary judgment motion. The County's motion was procedurally[118] and legally deficient.

The declarations submitted to support CAPR's brief in opposition to the summary judgment motion fully comply with CR 56(e). The rule requires that such a statement: (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.[119] The authenticating declarations include no inadmissible facts, supposition or opinion; the statements merely address the authenticity of the exhibits attached thereto.[120] As CAPR pointed out

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[118] The County filed an "Objection and Motion to Strike Portions of Declarations Offered by Plaintiff" on April 12, 2013, without a note for motion, and without establishing a hearing date for the motion. CP 756 – 758. It apparently desired the Trial Court to hear the motion on the date of the summary judgment hearing, but it did not timely file the motion (Local Court Rule 6(d) requires a motion to be filed nine days prior to the date specified for hearing), nor did it move for an order shortening time, per Local Court Rule 9(m).

The County failed to specify the "objectionable" portions of the Palmer Decl. that it asserted should be stricken. The motion cited only one page (page 97) of Exhibit D to the Declaration, in which Shireene Hale testified regarding a desire to complete the critical areas ordinance update while the then-current chair of the Council retained her position. The County did not designate individual paragraphs of the Palmer Decl., nor any other Exhibit to the Declaration, as containing matters it believed should be stricken.

[119] *E.g., Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

[120] *See International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745-46, 87 P.3d 774 (2004) ("Underlying CR 56(e) is the requirement that documents the

to the Trial Court, the deposition testimony attached to the declaration speaks for itself.

The Palmer Declaration did not include any statement regarding the issues to which the deposition testimony may – or may not – pertain. *See* CP 237 – 696 (Palmer Decl.). Nor did he state that the testimony of Ms. Hale on page 97 of CP 237 – 696, Palmer Decl. Exhibit D, quoted in the County's motion at p.2, CP 75, is the "intent of the legislative body that passed a certain act." *Id.*

To the extent the County asserted that Mr. Palmer's statements were hearsay, legal conclusions and/or irrelevant, their arguments are unsupported by any authority and should have been summarily denied.[121] However, a simple review of the declaration can only support a determination that Mr. Palmer did not testify regarding any out of court statements, and that his declaration contains no legal conclusions. The Trial Court should have concluded that the statements in his declaration are relevant to the question of the authenticity of the attached exhibits, which is the only question to be resolved with respect to the motion.[122]

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parties submit must be authenticated to be admissible. Because the proponent seeking to admit a document must make only a prima facie showing of authenticity, the rule's requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact-finder to find in favor of authenticity").

[121] *See Cowiche Canyon Conservancy v. Boslev*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court need not address arguments unsupported by citation to relevant authority).

[122] *See Grimwood*, 110 Wn.2d at 359.

H. Appellants Should be Awarded Attorney Fees as the Prevailing Party in this OPMA Litigation.

The Trial Court's rulings should be reversed. CAPR has established OPMA violations as a matter of law and should be determined to be the prevailing party under the Act. The matter should be remanded to the Trial Court to determine reasonable attorney's fees and costs pursuant to RCW 42.30.120(2) and entry of a declaration invalidating the CAO, Ordinance Nos. 26-2012, 27-2012, 28-2012, and 29-2012.

An award of reasonable attorney fees is mandatory for violations of the OPMA. RCW 42.30.120(2). Courts must award costs, including reasonable attorney fees, to any person who prevails against a public agency in any action based on meetings that are improper under the OPMA.[123]

An award must be made. The Trial Court's role will be in determining the reasonableness of the amount awarded to CAPR.[124]

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[123] *Eugster I*, 110 Wn. App. at 228.

[124] *See Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 700, 151 P.3d 1038 (2007).

VIII. CONCLUSION

This Court should reverse the decisions of the Trial Court.

RESPECTFULLY SUBMITTED this 28th day of October, 2013.

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2013, I caused the original and one copy of the document to which this certificate is attached to be filed via Priority U.S. Mail to:

Clerk of Court
Court of Appeals, Division I
600 University Street
Seattle, WA 98101-4170
(206) 389-2613, fax

I further certify that on this 28th day of October, 2013, I caused a copy of the document to which this certificate is attached to be delivered to the following via email and Priority U.S. Mail:

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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 28th day of October, 2013.

Christy Reynolds
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Legal Assistant