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No. 90500-2

BEFORE THE WASHINGTON STATE SUPREME COURT

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

Petitioner/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 ANSWER TO AMICUS CURIAE BRIEFS
OF WSAMA AND STATE OF WASHINGTON**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 A. The CAO Committee Acted “on Behalf of” the San
 Juan County Council.....3

 B. The County Did Not “Cure” Its Secret Meetings.10

 C. Less Than a Majority of the Governing Body on a
 Committee Can Violate the OPMA and Makes
 Violations Likely to Reoccur.....13

 D. It is Not Burdensome to Follow the Law.....14

III. CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

<i>Cathcart v. Andersen</i> , 85 Wn.2d 102, 530 P.2d 313 (1975).....	9, 10
<i>Clare v. City of Lakewood</i> , 259 F.3d 996, 1012-13 (9 th Cir. 2001).....	5
<i>Eugster v. City of Spokane</i> , 110 Wn. App. 212, 223-25, 39 P.3d 380 (2002).....	6, 11, 13
<i>Eugster v. City of Spokane</i> , 128 Wn. App. 1, 7, 114 P.3d 1200 (2005)	11
<i>Feature Realty, Inc. v. City of Spokane</i> , 331 F.3d 1082, 1091 (9th Cir. 2003).....	11
<i>Gendler v. Batiste</i> , 174 Wn.2d 244, 255, 274 P.3d 346 (2012).....	14
<i>OPAL v. Adams County</i> , 128 Wn.2d 869, 883, 913 P.2d 793 (1996).....	11, 12
<i>Public Hospital Dist. No. 1 of King County v. Univ. of Wash.</i> , ___ Wn. App. ___, 327 P.3d 1281, 1286 (Wash.App. Div. I 2014).....	3
<i>Refai v. Central Washington University</i> , 49 Wn. App. 1, 742 P.2d 137 (1987).....	9, 10
<i>State ex rel. Lynch v. Conta</i> , 71 Wis.2d 662, 239 N.W.2d 313 (1976)	8
<i>State ex rel. Newspapers, Inc. v. Showers</i> , 135 Wis.2d 77, 398 N.W.2d 154 (1987)	7
<i>Wood v. Battle Ground School District</i> , 107 Wn. App. 550, 566, 27 P.3d 1208 (2001)	5

Statutes

RCW 42.30.010	5
RCW 42.30.020(2).....	4
RCW 42.30.030	1
RCW 42.30.910	1

Other Authorities

Attorney General Opinion 1986-16	3, 4
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I. INTRODUCTION

Citizens Alliance for Property Rights (“CAPR”) as a general proposition agrees with the Washington State Association of Municipal Attorneys (“WSAMA”) and the State of Washington that not all gatherings are “committee meetings” subject to the Open Public Meetings Act (“OPMA”). It further agrees with WSAMA and the State that a committee of less than a quorum of the governing body can be subject to the OPMA. That position undermines San Juan County’s core allegation that the OPMA only applies to meetings where a “quorum” is present.¹

CAPR does not agree that the law requires a “careful balance” between transparency and the effective operation of government. For one, the OPMA is liberally construed to effectuate its purpose. RCW 42.30.910. Two, the purpose of the OPMA is broad and highly favors transparency. RCW 42.30.030. Three, issuance of a notice of a meeting and allowing the public to sit and listen is hardly an imposition which prevents “effective governance,” particularly given the purpose of the OPMA to bring government deliberations into the light.

¹ If the County’s position is accepted, it means that any group of legislators (county, municipality or special boards) with more than three members can create subcommittees that can exclude the public from any meetings. The governing body can then rotate in other members (as happened in San Juan County with the multi-year Critical Areas Ordinance Committee) and create a likeminded majority that can conspire to take action as a voting block, all out of the public eye. *See, infra*, pp.6-7.

II. ARGUMENT

While there are gatherings where publically elected or appointed officials are not “acting on behalf” of the governing body nor are exerting power or influence over it, that is not the situation here. This case involves the Critical Area Ordinance Committee (“the CAO Committee”) and other committees, including General Governance, Solid Waste and Budget, acting on behalf of the San Juan County Council, holding private meetings without public notice.²

WSAMA’s and the State’s reference to the CAO Committee as an “informal group” does not square with the facts. There was nothing “informal” about this entity comprised of three members of the Governing Body, the County Administrator (with co-equal power to the Council), whose sessions were attended by Staff members, contracted scientific experts, and, on occasion, officials from the State agencies and the County’s attorney.

The CAO Committee was listed on the County’s official chart of the process for adopting its new Critical Areas Ordinance. (San Juan County Critical Area Regulations Updates and Participation Plan).³ It met on a regular basis over an 18-month period, again at times with legal

² WSAMA and the State discuss only the CAO Committee.

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

counsel present (CP 300, 365-66, 392,421-22, 602). It did not meet with a “department head” *per se*, but convened itself for its own purposes. Its actions were different in kind, not just degree, from a group driving to look at a newly constructed public facility, attending a ribbon cutting ceremony or a Chamber of Commerce lunch. Essentially, it was a designated “work group” acting on behalf of the County Council. Simply, if it looks like a duck, quacks like a duck and walks like a duck, it is a duck.

A. The CAO Committee Acted “on Behalf of” the San Juan County Council.

The two amicus briefs addressed here emphasize Attorney General Opinion (“AGO”) 1986-16. That AGO addressed general questions on the applicability of the OPMA. The application of that AGO to the specific facts here is inappropriate because the AGO itself does not analyze a particular factual situation. It is written in general terms to address two alternatives concerning whether a committee “acts on behalf of” a governing body. The AGO determines a narrower definition should apply such that a committee is subject to the Act when it exerts power or influence on the governing body. Even though not contradictory to CAPR’s arguments (*see, infra*, pp.3-6), the AGO is not binding on this Court.⁴

⁴ *Public Hospital Dist. No. 1 of King County v. Univ. of Wash.*, ___ Wn. App. ___, 327 P.3d 1281, 1286 (Wash.App. Div. I 2014).

A committee is subject to the OPMA “when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.”⁵ RCW 42.30.020(2). At issue here is whether the CAO Committee generically “acted on behalf of” the San Juan County Council. “[A] committee acts on behalf of the governing body when it exercises actual or *de facto* decision-making authority for the governing body. This is in contrast to the situation where the committee simply provides advice or information to the governing body.” AGO 1986 No.16 at 11.

Turning to specifics, members of the San Juan County Council conceded that during the course of CAO 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,” leaving the rest on the “cutting room floor.”⁶ In the words of its own committee members, the CAO Committee chose to accept or reject options and decided to accept certain facts while rejecting others.

The CAO Committee sifted through data, deliberated on options, and selected hand-picked information to present to the Council, all under

⁵ The State of Washington argues that the CAO Committee did not take public comment and thus the OPMA does not apply – the irony of this statement is not lost on CAPR. Amicus Br. of State of Washington at 8-9.

⁶ 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 watchful eye of the County's Prosecuting Attorney's staff.⁷ The full County Council does not even know what information was not presented to it. The members of the CAO Committee did not informally "gather information." The CAO Committee was created to parse out policy and procedural work that the Council as a whole was undertaking in order to help the Council make certain public policy decisions more quickly (and out of public scrutiny).⁸ This is not the "mere passive receipt of information," but rather, the obvious "collective intent to deliberate and/or to discuss board business," subject to the OPMA. *See Wood v. Battle Ground School District*, 107 Wn. App. 550, 566, 27 P.3d 1208 (2001).

WSAMA correctly notes that in Nevada:

a sub-committee is subject to its Open Meetings Law if its recommendation to a parent body is more than mere fact-finding because the sub-committee has to choose or accept options, or decide to accept certain facts while rejecting others, or if it has to make any type of choice in order to create a recommendation, then it has participated in the decision-making process and is subject to the OML.

⁷ In delegating its authority, the Council gave the CAO Committee the right to decide what is good for the Council to know and what is not good for the Council to know. The Council did not insist on remaining informed so that it could retain control over the instrument it created – in direct defiance of the stated intent of the OPMA. *See* RCW 42.30.010.

⁸ *See* Admissions of County at ¶¶ 10, 15, 41 and 70-71 of the Amended Complaint; *see also* *Clare v. City of Lakewood*, 259 F.3d 996, 1012-13 (9th Cir. 2001).

Amicus Br. of WSAMA at 6. This passage describes exactly what occurred here where the CAO Committee considered a significant amount of information that was never presented to the Council as a whole. It made discretionary decisions as to what would be offered and what would remain secret. Just like Nevada, Washington law requires that the CAO Committee be subject to the OPMA. *See Eugster v. City of Spokane*, 110 Wn. App. 212, 223-25, 39 P.3d 380 (2002) (“*Eugster I*”) (discussion and deliberation must occur openly).

Contrary to the State’s assertions (Amicus Br. of State at 12), the CAO Committee was not merely an advisory committee – it had *de facto* decision-making power for the Council. The CAO Committee had broad authority to direct policy. According to the County in its Answer to the Amicus Curiae Brief of Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government filed with the Court of Appeals, the CAO Subcommittee was required to meet and give direction to the County Administrator and Planning Director because, by San Juan County Charter, the full County Council was precluded from doing so. *See*

County Answer to Amicus Curiae Brief, p.2.⁹ The process was set up so that the CAO Subcommittee had to act on behalf of the full Council.

San Juan County was unique because of the even number of Council members (six). With a six-member Council it takes four votes to pass anything. With six, three can block anything from passing.

The reality of this potential occurring, which would render the requirements of open public meetings meaningless, was addressed in *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 398 N.W.2d 154 (1987). There, four members of an eleven-member governing body met privately to discuss potential budget measures. Even though less than a quorum of the body, the Wisconsin Supreme Court ruled that the Open Meeting Law applied, recognizing that four members could block the parent body's course of action regarding the proposal discussed in private by voting as a "block." *Id.* at 80. Because the purpose of the meeting was to engage in government business, *i.e.*, the discussion of the capital and operating budgets, and because the number of commissioners at the meeting were sufficient in number to block any proposed budgets, the Open Meeting Law applied.

As here, the lower court determined that the Commissioner's meeting was not a "meeting" because a quorum was not present, the

⁹ Appendix A-5 to Petition for Review.

Commissioners who met lacked the capacity to conduct business, spend money, or establish policy, and because the right of government officials to speak and confer privately outweighed the public's right to know how government decisions are reached - the same argument advanced by Amici here. The Wisconsin Supreme Court disagreed, viewing the reality of what occurs in such a circumstance, rather than merely counting bodies in attendance at committee meetings:

It is a short step from the initial and predictable ability to frustrate all action to thereafter control it, through the shift of one member of the unorganized other half. In committees with an even number of members, this "negative quorum" has the automatic potential of control that, like quorums elsewhere, dictates that it publicly engage in the public's business. *Id.* at 91 (quoting *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 239 N.W.2d 313 (1976)).

The sound reasoning, which the Division II of the Court of Appeals rejected, is the determination that:

Whenever members of a governmental body meet to engage in government business, be it discussion, decision or information gathering, the Open Meeting Law applies if the number of members present are sufficient to determine the parent body's course of action regarding the proposal discussed at the meeting. Because the purpose of the meeting was to engage in government business, i.e. the discussion of the capital and operating budgets, and

because the number of commissioners at the meeting were sufficient in number to block any proposed budgets, the Open Meeting Law applied.

Id. at 80.¹⁰

San Juan County had an Administrator with equal power to the Council. Under the original San Juan County Charter, the Administrator was a co-equal branch of government except that it was an appointed rather than an elected position. To fire the Administrator it was necessary to have four votes. This is relevant because the Administrator (Pete Rose) was included in the subcommittee groups, including the CAO Committee. He also attended and participated in every Council meeting as an equal but non-voting member. The three subcommittee members of the Council could consensually agree to direct the Administrator. In this case the Administrator could act without fear of being fired because there would not be a fourth vote to fire him.

The CAO Committee's authority was more akin to the authority exercised by the Washington Law School Faculty in *Cathcart* rather than the Faculty Senate Executive Committee in *Refai*. Compare *Cathcart v. Andersen*, 85 Wn.2d 102, 530 P.2d 313 (1975) with *Refai v. Central Washington University*, 49 Wn. App. 1, 742 P.2d 137 (1987).

¹⁰ The County's legal advisor, Prosecuting Attorney Randy Gaylord, accepted the logic of the Wisconsin case. See April 16, 2012 Memo, pp.7-8, CP 449-457 (Palmer Decl., Ex. E)

In *Refai*, a terminated faculty member claimed the termination was invalid under the OPMA because the Faculty Senate Executive Committee met in closed session to prepare a draft layoff plan. The Court of Appeals held there was no violation because the Committee was not a “governing body.” The *Refai* court reasoned that to be a “governing body,” the Committee must be a “policy or rulemaking body.” *Refai*, 49 Wn. App. at 12. Here, the CAO Committee had absolute power in determining the course of Growth Management Act (“GMA”) policy through its ability to present information of its choosing to the Council relating to the new CAO without revealing options that it had already discarded. This is similar to the faculty’s actions in *Cathcart*. *Cathcart*, 85 Wn.2d at 106. Drafting these alternatives for the full Council gave the CAO Committee considerable power to direct policy and make decisions to narrow down the options which the Council would consider and on which it would ultimately vote. *Refai*, 49 Wn. App. at 12. While it executed GMA policy, the CAO Committee was acting on behalf of the Council while privately betraying the public’s trust in government.

B. The County Did Not “Cure” Its Secret Meetings.

It is of interest that after arguing that the CAO Committee is not subject to the OPMA, the State nonetheless discusses “cure.” There is no “cure” for the OPMA violations, however. Public deliberation of policy

choices is an important part of the governmental process and should be open to the scrutiny of the people. Delegation of authority to a committee to plan or set policy circumvents the Legislature's intent to ensure that all deliberations and actions by a public body be carried out in open meetings. The Council knew that the CAO Committee was meeting in private but the Council accepted the work without question and without asking about information that was not brought forth. Indeed, the subcommittee did not keep records or minutes or make reports of the subcommittee meetings, so the information that was considered and discarded was lost. At no time did the Council recommend "re-starting" the process so that all prior decision making was before the public in an open forum.

The numerous CAO Committee meetings held in secret where the County's policy and approach to its Critical Areas Ordinance was formulated cannot be cured simply by a noticed meeting of the Council as a whole.¹¹ The Act requires consideration of the overall process of the adoption of the critical areas ordinances to determine compliance.¹² Neither the Council, nor the public, received information regarding the substance of what was considered during the 25 CAO Committee

¹¹ *E.g.*, *OPAL v. Adams County*, 128 Wn.2d 869, 883, 913 P.2d 793 (1996) (subsequent action should be invalidated when the prior OPMA violations substantially tainted the subsequent ratification); *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1091 (9th Cir. 2003); *Clark*, 259 F.3d at 1014 n.10; *Eugster v. City of Spokane*, 110 Wn. App. 212, 228-29, 39 P.3d 380 (2002) (*Eugster 1*).

¹² *See, e.g.*, *Eugster v. City of Spokane*, 128 Wn. App. 1, 7, 114 P.3d 1200 (2005) (*Eugster 3*).

meetings. As a result, this avoided meaningful comment on the proposed discarded alternatives to the officially proposed version of the Critical Areas Ordinance. By that, meaningful future public comment was constrained.

None of the prior deliberations in subcommittee sessions were ever brought to light such that the policy of the OPMA was achieved. *Pro forma* “rubber stamped” action does not satisfy the requirements of the OPMA.¹³ The County’s Critical Area Ordinance adoption process cannot be cured after the fact; the Ordinance should be nullified¹⁴ and the County must start over with a full, open discussion of all considerations that are relevant to a proposed critical areas ordinance.

Even when the Prosecuting Attorney advised that the secret meetings should cease, the CAO Committee did not open the meetings or re-start the deliberative process. They eventually simply ceased convening meetings. The County did not remedy the lack of transparency from the start of the CAO Committee’s work to adopt the ordinance. It continued the process in mid-stream, using all of the work already completed in secret.

¹³ *OPAL*, 128 Wn.2d at 869, 883.

¹⁴ *See* CAPR Reply Brief, pp.19-24; CAPR Supplemental Brief, pp.16-19.

Relief should be granted for past violations of the OPMA, even assuming, *arguendo*, that the Council's subsequent action on the Critical Area Ordinance was properly noticed and open to the public. In *Eugster I*, the court discussed the fact that even though subsequent compliance with the OPMA mooted certain issues, the plaintiff would be entitled to attorney fees if the Trial Court determined on remand that a proscribed meeting had taken place. *Eugster I*, 110 Wn. App. at 228. Such is the case here. Government must suffer the consequences of violating the law, just as other parties to litigation.

C. Less Than a Majority of the Governing Body on a Committee Can Violate the OPMA and Makes Violations Likely to Reoccur.

If the lower court decisions are permitted to stand, a loophole is created. Any group of legislators with more than three members can create subcommittees that can exclude the public from any of the subcommittee's meetings. As in this case, the subcommittee can rotate in other legislators or policy makers to create a likeminded majority that can conspire to take action as a voting block, all out of the public eye. See N.1, *infra*. This most definitely is not permitted by the OPMA. If it was, the purpose of the Act would be eviscerated.

D. It is Not Burdensome to Follow the Law.

No one is arguing that subcommittees cannot be helpful in many ways and facilitate good government decision-making. CAPR asserts the law that obligates San Juan County to allow the public and the press to witness their work. Administratively, all that is required is a public notice and that a secretary be appointed to keep minutes and post the same. Minutes would serve continuity purposes for committee work. In any event, burden is not a legal justification to avoid requirements of the law. *See Gendler v. Batiste*, 174 Wn.2d 244, 255, 274 P.3d 346 (2012) (WSP accident reports must be unconditionally provided pursuant to PRA request, no matter the burden in doing so).

III. CONCLUSION

Washington's OPMA was passed to give citizens the opportunity to remain informed about the operation of their government. In a time where there is rampant suspicion about government motives, the OPMA is to be liberally construed in an effort to increase public trust in elected officials. The secret meetings of the San Juan County Subcommittees violate the OPMA.

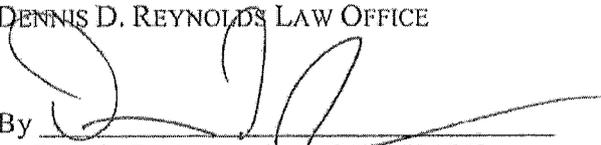
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RESPECTFULLY SUBMITTED this 11th day of February, 2015.

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CERTIFICATE OF SERVICE

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Declared under penalty of perjury under the laws of the State of
 Washington at Bainbridge Island, Washington this 11th day of February,
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 Christy A. Reynolds
 Legal Assistant

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Subject: CAPR v. San Juan County, Case No. 90500-2

RE: *Citizens Alliance for Property Rights Legal Fund v. San Juan County*
Washington State Supreme Court No. 90500-2

Dear Clerk: Attached for filing in the above-captioned matter please find "Appellant's Answer to Amicus Curiae Briefs of WSAMA and the State of Washington." Hard copies are being mailed to all counsel as well. Thank you.

Christy

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