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SUPREME COURT No. 90500-2

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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.

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**SUPPLEMENTAL BRIEF OF APPELLANT  
CITIZENS ALLIANCE**

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 ORIGINAL

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## I. INTRODUCTION

This appeal seeks to restore sunshine to the work of committees and subcommittees composed entirely of members of a governing body. The Open Public Meetings Act (“OPMA”), after all, states: “The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.” *See* RCW 42.30.010. As set out herein, the subcommittees in question formulated policy positions in secret to present to the governing body, thereby depriving the public of any involvement until a public hearing was held on proposed legislation or policies formulated in private.

This Court is asked to decide whether agencies can conduct their business, including formulating a proposed ordinance, behind closed doors and circumvent the OPMA through use of subcommittees. The Court should hold that they cannot, and reverse Division I’s April 28, 2014 published opinion (**Appendix A-1**), reported at 181 Wn. App 538, 326 P. 3rd 730(2014). That decision affirmed the dismissal by summary judgment of Appellant Citizens Alliance for Property Rights Legal Fund’s (“CAPR”) claims against Respondent San Juan County (the “County”) for violations of the OPMA when it adopted a Critical Areas Ordinance worked up by the “CAO Subcommittee.”<sup>1</sup>

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<sup>1</sup> While San Juan County had other committees deal with general governance, solid waste and budget matters, CAPR does not request invalidation of actions relating to that work but seeks a declaration that the OPMA was violated regarding the actions of these subcommittees. San Juan County admitted “that meetings of the general governance subcommittee, budget subcommittee and solid waste subcommittee have occurred” and that “the purpose of those subcommittees includes bringing forward and discussing, ideas

## II. ISSUES ACCEPTED FOR REVIEW

- A. Whether the Open Public Meetings Act (“OPMA”) applies to subcommittee meetings composed of at least three members of the San Juan County Council where such subcommittees are comprised of three of six San Juan County Councilmembers and where at least one subcommittee meeting was attended by four County Council members.
- B. Whether the OPMA applies to meetings of subcommittees where a quorum of the subcommittee is present.
- C. Whether the OPMA applies to meetings of subcommittees where information, reports and policies concerning legislation or other matters to come before the Council as a whole are reviewed, discussed and narrowed down prior to presentation to the Council for “final action.”
- D. Whether the OPMA applies to meetings of subcommittees that took action directly and on behalf of the San Juan County Council without (a) notice to the public of the meetings, and/or (b) allowance of the public to attend the meetings, and where the Council accepted the work of the subcommittees without disclosure of the fact or substance of such work to the public.
- E. Whether the Court of Appeals erred in upholding the Trial Court’s Summary Judgment Order of Dismissal where there are genuine issues of material fact regarding the creation, purpose and actions of the subcommittees.
- F. Whether Petitioner is entitled to attorney fees as the prevailing party under the OPMA if this Court accepts review and reverses the Court of Appeals.

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and policies prior to meetings of the entire Council.” CP 64 ¶ 10 (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). For the CAO Subcommittee, CAPR seeks to invalidate its work, which in this matter, is the Critical Areas Ordinance it formulated.

### III. SUMMARY OF ARGUMENT

The Court of Appeals' ruling allows agencies subject to the OPMA to avoid the OPMA's requirement of open government by creating subcommittees to vet and formulate important policy decisions in private, and then "curing" the failure to perform that work openly by ceremonially adopting the subcommittees' work at a properly noticed public meeting of the governing body as a whole. With due respect, the focus should be on compliance, not any alleged "cure." The Trial Court's dispositive order, affirmed on appeal, ruled the OPMA only applies to a quorum of a governing body, not to subcommittees. This ruling violates the unambiguous provisions of the OPMA, applying the Act to committees, its broad policies supporting open government, and the rule to construe the OPMA liberally to serve its purposes. The holding should be reversed on this pure question of law<sup>2</sup>, and judgment entered in CAPR's favor.

To add insult to injury, the ruling *in dicta*<sup>3</sup> accepted at face value self-serving declarations from San Juan County Councilmembers denying

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<sup>2</sup> Summary judgment in favor of the non-moving party is appropriate where "the Court can determine that the non-moving party is entitled to a judgment as a matter of law and if there is no procedural prejudice to the moving party. No procedural prejudice results if the court finds that the parties had the opportunity to present and did present all of the applicable facts concerning the parameters of their positions." *See, e.g. Wash. Ass'n of Child Car Agencies v. Thompson*, 34 Wash.App. 225, 234, 660 P.2d 1124 (1983).

<sup>3</sup> The Trial Court opinion contains some contradictions. The Superior Court accepted that (1) the CAO Committee discussed, considered, reviewed and evaluated matters related to a proposed Critical Areas Ordinance at the meetings at issue, (2) the Committee was established by the County Council, and (3) the County Council directed the team to act on its behalf. CP 817 – 818. But the Superior Court concluded that the OPMA was not violated on the grounds that the Committee was not a "full quorum" of the County Council. Then, in seeming contradiction of this analysis, the Superior Court found that there was "no evidence" that the Council created the Committee or that the Committee acted for the Council. CP 818. The Trial Court also stated that he was "presuming" that

that the subcommittees in question were (1) created by the County Council or (2) acted on its behalf. This view was contrary to other evidence and at the least warranted a trial.<sup>4</sup> The Trial Court's ruling instead condoned the County's strategy to govern behind closed doors, reasoning that no violation occurred because the County announced its ultimate decision in public. This is form with no substance. The ruling does nothing to accomplish open government concerning the development of policies and regulations so that the public has a full and fair opportunity to participate in the entirety of the public process. The ruling is contrary to the plain language of the Act, including the current definition of a governing body and impermissibly limits the scope of the OPMA.

#### IV. STATEMENT OF THE CASE

The Legislature passed the OPMA, RCW Ch. 42.30, in 1971 when a nationwide effort was underway to make government affairs more accessible.<sup>5</sup> The Act was designed to increase public trust in the decisions of elected officials by opening all deliberations regarding government

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the CAO Subcommittee was created by the Full Council or acted on its behalf; hence, the reference to "dicta."

<sup>4</sup> The trial court erred because the contradictory declarations raised genuine issues of material fact on three questions that precluded summary judgment and failed to construe the facts in a manner favorable to the non-moving party, CAPR. *Wood v. Battleground School Dist.*, 107 Wn. App. 550, 566, 27 P.3d 1208 (2001). The three questions are (1) whether a meeting occurred at which a quorum was present; (2) whether the CAO subcommittee was created by the full Council; or (3) whether the Committee acted on its behalf. On summary judgment, all reasonable inferences in CAPR's favor should have been made. *Wood*, 107 Wn. App. at 566; *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). These standards supported denial of judgment to the County.

<sup>5</sup> See Amended Petition for Review 2-14 for a complete history of the OPMA.

policy and law-making to the public.<sup>6</sup> The OPMA addresses critical matters of open government and has daily application to the activities of local policy-makers, as explained by the Municipal Research Services of Washington:

Codified in chapter 42.30 RCW, the Act applies to all city and town councils, to all county councils and boards of county commissioners, and to the governing bodies of special purpose districts, **as well as to many subordinate city, county, and special purpose district commissions, boards, and committees. It requires, basically, that all “meetings” of such bodies be open to the public and that all “action” taken by such bodies be done at meetings that are open to the public.** The terms “meetings” and “action” are defined broadly in the Act and, consequently, **the Act can have daily significance for cities, counties, and special purpose districts even when no formal meetings are being conducted.**<sup>7</sup>

(Emphasis added). The Act applies to meetings of subcommittees and subcommittees when acting on their own accord and/or on behalf of the Council. *See* RCW 42.30.010; RCW 42.30.020(1), (2). It encompasses “action” – including deliberations. RCW 42.30.020(3).<sup>8</sup>

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<sup>6</sup>*See Town of Palm Beach v. Gradison*, 296 So.2d 473, 475 (Fla. 1974). Washington’s law is modeled on “sunshine” laws of California and Florida. Decisions from those jurisdictions provide interpretation guidance. *E.g.*, *Anaya v. Graham*, 89 Wn. App. 588, 592, 950 P.2d 16 (1998).

<sup>7</sup> The Open Public Meetings Act: How it Applies to Washington Cities, Counties and Special Purposes Districts, Municipal Research Services of Washington, Report No. 60 (revised June 2014) at p.1. (Appendix A-4 to Amended Petition for Review).

<sup>8</sup> *Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380 (2002) (“*Eugster I*”); *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).

The parties do not dispute that San Juan County is subject to the OPMA. At issue in this case are the secret meetings and actions taken by multiple Council subcommittees, including but not limited to the CAO Subcommittee. These subcommittees met outside of the public eye and deliberated on public policy matters in order to streamline proceedings before the Council as a whole. 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 in support of review, the CAO Subcommittee was required to meet and give direction to the County Administrator because the charter precluded the full County Council from doing so. *See* County Answer to Amicus Curiae Brief, p.2.<sup>9</sup> Thus, apparently the County's process required the CAO Subcommittee to act for the full Council.<sup>10</sup>

The Council accepted the work of the CAO Subcommittee, which included secret deliberations and consensus on concepts based on scientific data, policy materials, and input from a variety of sources used in drafting a version of the CAO to present to the Council itself.<sup>11</sup> The Council relied on this work by the subcommittee performed in complete

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<sup>9</sup> Appendix A-5, Amended Petition.

<sup>10</sup> CAPR asserts that at least some meetings of the CAO Subcommittee occurred at which a quorum of the County Council was present. Evidence submitted by CAPR shows that 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, or at the least present a question of disputed material fact. *See* Note 4, *supra*.

<sup>11</sup> *See* CP 62-71.

privacy in meetings closed to the public. The County never disclosed the substance of the Subcommittee's secret work. In December, 2012, the County adopted Ordinance Nos. 26-2012, 27-2012, 28-2012, and 29-2012 ("the New CAO"). The three members of the CAO Subcommittee voted as a block to approve the New CAO in the form and content that they had developed in the secret meetings.<sup>12</sup>

The County admitted that subcommittee meetings took place without advance notice and closed to the public. It attempted to excuse this deviation from Washington's requirement of open government by explaining that this occurred for the purpose of "bringing forward and discussing ideas and policies prior to meetings of the entire Council."<sup>13</sup> The motivating factor was convenience.<sup>14</sup> The County asserted that the OPMA does not apply to subcommittee meetings where such meetings do not include a quorum of the Council as a whole.

CAPR presented evidence regarding the creation of the CAO Subcommittee in opposition to the County's summary judgment motion.<sup>15</sup> The County attempted to counter this evidence with self-serving, contradictory declarations of Councilmembers to "clarify" their own

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<sup>12</sup> CP 679-90 (Palmer Decl. Exs. BD; BE; BF; BG).

<sup>13</sup> CP 62-71. A Councilmember stated all but perhaps one Committee recommendation on the New CAO was accepted by the Full Council: "[Council Member Pratt]: I can only think of one instance where a recommendation of the subcommittee wasn't acted on by the council and I - ." Peterson Decl. Ex. P, 20:18-20.

<sup>14</sup> **Appendix A-1**, at pp. 3-4.

<sup>15</sup> *E.g.*, 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); CP 353, 515-18 (Palmer Decl. Ex. C Miller Dep. 77:2-4; Palmer Decl. Ex. X)..

deposition testimony, claiming for the first time that the full Council did not “create” the CAO Subcommittee and it did not act on its behalf.<sup>16</sup> Yet, the Trial Court summarily dismissed CAPR’s claims, ignoring the conduct of the CAO Committee and instead relying upon the “It is what I tell you, not what we did” approach urged by the County.

The motivating factor was convenience.<sup>17</sup> As stated by the lead planner for the CAO Update, working with the three-member CAO Subcommittee was easier than the six-member Council: “Q. In general terms isn’t it easier to work with three people than six? A. Certainly.”<sup>18</sup> In an open record colloquy, a Councilmember reaffirmed this:

[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..<sup>19</sup>

The Court of Appeals affirmed despite plain guidance in an Attorney General Opinion cited by the County, which states, “[A] *‘committee thereof’ includes committees composed solely of a minority of the members of the governing body ....*” Wash AGO 1986 No. 16, p.4 (emphasis added).<sup>20</sup> As stated in the earliest Attorney General Office’s

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<sup>16</sup> CP 759-768.

<sup>17</sup> **Appendix A-1**, at pp. 3-4.

<sup>18</sup> CP 415, 299 (Palmer Decl. Ex. D Hale Dep. 86:7–19. *See also* Palmer Decl. Ex. B Fralick Dep. 21:1–6). Testimony of Shireene Hale. Ms. Hale is a planning coordinator and the Deputy Director of Community Development and Planning for the Defendant San Juan County. CP 373 (Palmer Decl. Ex. D Hale Dep. 4:18-20).

<sup>19</sup> Petersen Decl. Ex P, Transcript of an excerpt of the January 31, 2012, San Juan County Council meeting at 10:18–22.

<sup>20</sup> The AGO also notes at p. 4 that “a committee is a body of persons.” This definition would apply equally to any group, be it called a committee or some other name such as

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 Court of Appeals ruled that only where the County Council has specifically authorized the subcommittee to act on its behalf are the deliberations of a subcommittee subject to the OPMA. The COA quoted testimony of Representative Hine,<sup>21</sup> but failed to refer to his testimony that meetings of subcommittees are subject to the OPMA where policy, testimony or comments are made on the behalf of the governing body even if not specifically authorized. *See* House Journal, 48<sup>th</sup> Legislature (1983) at 1294. The Court of Appeals incorrectly supported its conclusion by relying on part, but not all, of this testimony.

The Trial Court and the Court of Appeals relied on outdated interpretations of an older version of the statute.<sup>22</sup> Prior to July 1983, the “governing body” definition was limited to a “board, commission, committee, council, or other policy or rule-making body of a public agency.”<sup>23</sup> The old definition “was not designed to cover groups which meet to collect information and make recommendations, but have no authority to make final decisions.”<sup>24</sup> After the definition expanded to

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board or council.... *There is nothing in the definition that restricts the composition of the group to members of the governing body...*” (emphasis added).

<sup>21</sup> Appendix A-1, at pp. 9-15.

<sup>22</sup> CP 823.

<sup>23</sup> *Refai v. Central Washington University*, 49 Wn.App. 1, 11, 742 P.2d 137 (Div. 3 1987), citing Laws of 1982, 1st Ex. Sess., ch. 43, §10, p.1307.

<sup>24</sup> *Id.*, 49 Wn.App. at 14.

include any committee which acts on behalf of a governing body, the law changed such that advisory groups also must meet openly.<sup>25</sup> In other words, a committee or subcommittee acts on behalf of a governing body even if it has no authority to directly adopt policies. Such a subcommittee like the one at issue in this case is subject to the OPMA.

## V. ARGUMENT

### A. The Court Should Reverse and Hold that the OPMA Applies to a Subcommittee Whose Membership Is Composed of Less Than A Quorum of the Governing Body.

When it enacted the OPMA, the Legislature banished the days of closed-door, behind the scenes negotiations where government presents its rules and decisions to citizens after their adoption as a *fait accompli*.<sup>26</sup> The Legislature intended to “unlock” the doors of government policy and law-making to the public, and increase public trust in the decisions of elected officials, among other goals.<sup>27</sup>

Division I correctly recognized in 2001 that the Act outlawed government decision-making away from the public eye,<sup>28</sup> but failed to properly appreciate operative OPMA language that explicitly applies its

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<sup>25</sup> *Id.*; see also *Clark v. City of Lakewood*, 259 F.3d 996, 1013 (9th Cir. 2001) (the definition of “governing body” is no longer limited to groups that make policy or rules).

<sup>26</sup> See *Eugster v. City of Spokane*, 128 Wn. App.1, 7, 114 P.3d 1200 (2005) (*Eugster 3*).

<sup>27</sup> See *Town of Palm Beach v. Gradison*, 296 So.2d 473, 475 (Fla. 1974). Washington’s law is modeled on “sunshine” laws of California and Florida. 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).

<sup>28</sup> *Wood v. Battleground School Dist.*, 107 Wn. App.550, 562 n.3, 27 P.3d 1208 (2001) (quoting *Bd. of Pub. Instruction v. Doran*, 224 So.2d 693, 699 (Fla.1969)).

terms to “committees.” Addressing the unambiguous 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 . . .

(Emphasis added).<sup>29</sup>

The OPMA not only requires open meetings of the Council, but requires committee and subcommittee meetings to be open when created by a governing body **and/or** on its behalf. See RCW 42.30.010; RCW 42.30.020(1), (2).<sup>30</sup>

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 (even though the CAO Subcommittee had a full quorum of the participating members). But 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 New Critical Areas Ordinance (“CAO”) and other policy matters later taken up by the full Council, this activity invoked application of the OPMA. The Court of Appeals in *Eugster I* concluded that “action”

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<sup>29</sup> 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. *Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380 (2002) (“*Eugster I*”).

<sup>30</sup> 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)).

includes deliberating, discussing, consideration and reviewing. *Eugster I*, 110 Wn. App. at 225 citing RCW 42.30.020(3). It also noted that “[a]ction does not require final action,” explaining that “the list of examples includes discussions, deliberations, consideration, and review.” *Id.* It concluded that governing body members need merely “communicate about issues that may or will come *before the Board for a vote.*” *Id.* citing *Wood*, 107 Wash.App. at 565, 27 P.3d 1208. *See also Clark v. City of Lakewood*, 359 F.3d 996, 1012-1013 (9<sup>th</sup> Cir.2001), holding the OPMA applies 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.

The CAO Subcommittee discussed major policy issues – including Best Available Science,<sup>31</sup> wetland amendments,<sup>32</sup> alternative wetland buffer approach,<sup>33</sup> alternative water quality buffer sizing procedure,<sup>34</sup> impacts to critical areas,<sup>35</sup> reasonable use exceptions,<sup>36</sup> “hot button issues,”<sup>37</sup> “key

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<sup>31</sup> 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).

<sup>32</sup> 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).

<sup>33</sup> 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).

<sup>34</sup> 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).

<sup>35</sup> CP 430-31, 542-44 (Palmer Decl. Ex. D Hale Dep. 108:9-109:14; Palmer Decl. Ex. AE).

<sup>36</sup> CP 437-38, 558-60 (Palmer Decl. Ex. D Hale Dep. 145:16-146:1; Palmer Decl. Ex. AI).

issues,”<sup>38</sup> mitigation requirements,<sup>39</sup> risk analysis,<sup>40</sup> site specific buffers,<sup>41</sup> and Best Management Practices.<sup>42</sup> 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).

By accepting the proposition that the County is immune from the OPMA unless a quorum of the six-member Council is physically present at and participating in a meeting,<sup>43</sup> the lower courts impermissibly read out of the Act its application to subcommittees who work and take action that the full governing body subsequently adopts without question or discussion.<sup>44</sup> This is impermissible.

The subject matter of the County’s actions in committee is not trivial. San Juan County considered adoption of its new CAO to be a major matter. Proper regulation of critical areas is a central purpose of the Growth Management Act, RCW 36.70A (“GMA”). Such work must be done in an open fashion with full public participation.<sup>45</sup> A CAO update

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<sup>37</sup> CP 440, 563-64 (Palmer Decl. Ex. D Hale Dep. 151:16–17. *See* Palmer Decl. Ex. AK).

<sup>38</sup> 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).

<sup>39</sup> CP 256 (Palmer Decl. Ex. A Pratt Dep. 24:14–23).

<sup>40</sup> CP 277-78, 476-77 (Palmer Decl. Ex. A Pratt Dep. 62:16–63:8. *See* Palmer Decl. Ex. M).

<sup>41</sup> 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).

<sup>42</sup> CP 403-04, 491-93 (Palmer Decl. Ex. D Hale Dep. 68:6–69:12; Palmer Decl. Ex. R).

<sup>43</sup> *See* Opinion, p.1, p.7.

<sup>44</sup> RCW 42.30.010; RCW 42.30.020(1)(2). *See infra*, N.13.

<sup>45</sup> Every municipality in this state is required by law to regularly update its Critical Areas Ordinance. *See* RCW 36.70A.130. In addition, municipalities must update their

cannot be hidden from view by assigning the task to a subcommittee that is – if the opinion is correct – not subject to the OPMA. If the Court of Appeals’ decision were permitted to stand, any governing body could create a subcommittee to do the “pick and shovel” work without scrutiny of the public. This is directly contrary to the transparency and broad public participation polices of the GMA and the OPMA.

The Court of Appeals’ decision and narrow construction of OPMA undermines the broad public purpose of the Act and is inconsistent with precedent in this State. *See Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999); *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 482, 611 P.2d 396 (1980); *Eugster v. City of Spokane*, 128 Wn. App. 1, 7, 114 P.3d 1200 (2005); *Cathcart v. Andersen*, 85 Wn.2d 102, 107, 530 P.2d 313 (1975), *rev. denied*, 156 Wn.2d 1014 (2006).

This Court should not condone the County actions but instead, protect the requirement of open government. “Streamlining” actions taken outside of the public’s view that are then presented for “final action” by the governing body without disclosure of the subcommittee’s work violates the OPMA, even if well-intentioned. A decision by this Court so ruling is necessary to restore the right of the public to observe all aspects of the development of governmental policy.

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shoreline master programs. *See* RCW 90.58.080. The GMA is a law which imposes a high standard of public participation, RCW 36.70A.130, as is the SMA. RCW 90.58.130.

**B. Appellant is Entitled to Judgment in Its Favor That the OPMA Applies to Subcommittees and to a Meaningful Remedy for the County’s Violations of the OPMA.**

The numerous meetings the CAO Subcommittee 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.<sup>46</sup> The Act requires consideration of the overall process of the adoption of the critical areas ordinances to determine compliance.<sup>47</sup> Neither the Council, nor the public, received information that the subcommittee considered during its 25 subcommittee meetings. They were not even told what the substance of such information entailed. As a result, this avoided meaningful comment on the proposed CAO. The ordinance should be invalidated.

None of the prior deliberations in subcommittee sessions were ever brought to light such that the policy of the OPMA was achieved. Pro forma “rubberstamped” action does not satisfy the requirements of the OPMA.<sup>48</sup> The County’s CAO adoption process cannot be cured after the fact; the County must start over with a full, open discussion of all considerations that are relevant to a proposed critical areas ordinance.<sup>49</sup>

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<sup>46</sup> *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*).

<sup>47</sup> *See, e.g., Eugster v. City of Spokane*, 128 Wn. App. 1, 7, 114 P.3d 1200 (2005) (*Eugster 3*).

<sup>48</sup> *OPAL*, 128 Wn.2d at 883.

<sup>49</sup> Under *OPAL*, 128 Wn.2d 869, the public’s “right to know” will not be satisfied by a *pro forma* or rubberstamped action by a commission or council.

Even when the Prosecuting Attorney advised the secret meetings should cease, the CAO Implementation Team did not open the meetings or re-start the deliberative process. They simply ceased convening the meetings. The County did not remedy the lack of transparency from the start of its work to adopt the ordinance. It continued the process in mid-stream based on all of the work already completed in private. This failed to satisfy the OPMA. The CAO must be invalidated and the County must adopt a new one with proper, open procedures required by law.

Relief should be granted for past violations of the OPMA, even assuming, *arguendo*, that the Council's subsequent action on the CAO 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 in the case, 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. This Court should reverse and remand to the Trial Court for consideration of an award of reasonable fees and costs to Appellant.

**C. The Case Is Not Moot Because An Actual Controversy Continues to Exist and Issues of Substantial Public Interest Concerning Open Government and Meaningful Public Participation Remain.**

The County incorrectly asserts that the matter is moot because voters approved Proposition 3, which “ensures” that future gatherings of

three Council members comply with the OPMA, and Proposition 1, reducing the number of Councilmembers to three. This case is not moot. A moot case is one in which a party seeks to determine an abstract question that does not rest upon existing facts or rights.<sup>50</sup> In other words, one in which resolution of a controversy will not make a difference to the litigants.<sup>51</sup> CAPR presents an actual controversy in which it seeks a legal remedy. CAPR's right to participate in, and observe, government in a meaningful manner in San Juan County was denied because it was excluded from more than 25 meetings over a period of many months where data, studies, proposals and expert testimony was considered, evaluated and winnowed down by a subcommittee that subsequently brought its conclusions and decisions in an abbreviated manner to the light of a public forum. CAPR states a claim under the OPMA and seeks damages.

Further, this Court should note that the CAO adopted by the County in violation of the OPMA was appealed to the Growth Management Hearings Board.<sup>52</sup> Although the Board reviewed the CAO for compliance with public participation requirements of the GMA, it did not review any issues concerning compliance with the OPMA, an issue over which it lacks jurisdiction.<sup>53</sup> The requirements under each act are distinct. The CAO is on remand from the Board with directions to make it

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<sup>50</sup> *Hansen v. West Coast Wholesale Drug Co.*, 47 Wn.2d 825, 827, 289 P.2d 718 (1955).

<sup>51</sup> *Rosling v. Seattle Bldg. & Constr. Trades Council*, 62 Wn.2d 905, 907-08, 385 P.2d 29 (1963), *cert. denied*, 376 U.S. 971 (1964).

<sup>52</sup> *Friends of San Juan, et al. v. San Juan County*, WWGMHB No. 13-2-0012c (2013).

<sup>53</sup> WAC 242-03-025.

even more restrictive.<sup>54</sup> Accordingly, the illegal work of the County via its CAO Subcommittee is “alive and well” in San Juan County in the tainted ordinance. The great weight of courts have concluded that subsequent action should be invalidated when the prior OPMA violations substantially tainted any subsequent action. *See Opal v. Adams County*, 128 Wn.2d 869, 883, 913 P.2d 793 (1996).

Issues concerning compliance with the OPMA are likely to recur, not only in San Juan County, but across the state of Washington. Whether secret committee meetings will recur in the County is irrelevant, and the County’s opinion that they will not does not satisfy the County’s burden to establish mootness. This case concerns the legality of what *did* happen when the CAO Subcommittee performed the heavy lifting outside of the public’s eye and then presented narrowed down alternatives to the Council without reference to its secret meetings. The six-member council relied on the Subcommittee’s secret work.<sup>55</sup> A decision whether this was legal is not moot.

A decision from this Court will inform public officers and elected officials of the full scope and application of the OPMA, an act vital to the public trust. Reversal of the Court of Appeals’ decision is necessary to

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<sup>54</sup> [http://www.co.san-juan.wa.us/CDP/docs/CAO\\_Implementation/2014-8-20\\_GMHB\\_FDO.pdf](http://www.co.san-juan.wa.us/CDP/docs/CAO_Implementation/2014-8-20_GMHB_FDO.pdf)

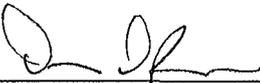
<sup>55</sup> The County’s position has been, “don’t look at what actually happened, but only at what we tell you happened,” *e.g.*, the 23 meetings of the CAO Subcommittee were “mere gatherings” where nothing of substance occurred. If that is the standard under the OPMA, any government action is beyond purview. The role of the courts is to stand between government and its citizens and apply the law and public policy to the actual facts. Here, this did not happen.

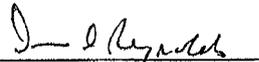
assure citizens of the state that open public meeting requirements will, in fact, be honored.

## VI. CONCLUSION

This Court should reverse the summary judgment dismissing CAPR's claims, hold that the OPMA applies to the subcommittees in question, and direct that judgment should be entered for CAPR on that issue. CAPR should also rule that the CAO subcommittee was created by a full Council or acted on its behalf, or remand these questions for trial, along with the issue of whether one or more meetings occurred with a quorum of the full Council present. The Court also should award CAPR its reasonable attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December, 2014.

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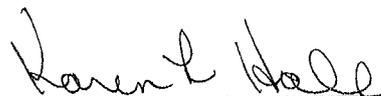
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of December, 2014, I caused a copy of the document to which this certificate is attached to be delivered this date, in the manner indicated, to the parties listed below:

<p>Randall K. Gaylord, Pros. Attorney (WSBA #16080)          Amy S. Vira, Deputy Pros. Attorney (WSBA #34197)          San Juan County Prosecutors Office          350 Court Street / P.O. Box 760          Friday Harbor, WA 98250-0760          (360) 378-4101, tel / (360) 378-3180, fax          randallg@sanjuanco.com          amyv@sanjuanco.com, elizabethh@sanjuanco.com  <i>Attorneys for Defendants</i></p>	<p><input type="checkbox"/> <i>Legal Messenger</i>  <input type="checkbox"/> <i>Hand Delivered</i>  <input type="checkbox"/> <i>Facsimile</i>  <input checked="" type="checkbox"/> <i>First Class Mail</i>  <input checked="" type="checkbox"/> <i>Express Mail, Next Day</i>  <input type="checkbox"/> <i>Email</i></p>
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<p>Daniel B. Heid, WSBA #8217, Auburn City Attorney          Steven L. Gross, WSBA #24658, Ass't City Attorney          25 West Main Street          Auburn, WA 98001-4998          (253) 931-3030, tel          dheid@auburnwa.gov; sgross@auburnwa.gov  <i>Attorneys for Washington State Association of Municipal Attorneys</i></p>	<p><input type="checkbox"/> <i>Legal Messenger</i>  <input type="checkbox"/> <i>Hand Delivered</i>  <input type="checkbox"/> <i>Facsimile</i>  <input type="checkbox"/> <i>First Class Mail</i>  <input type="checkbox"/> <i>Express Mail, Next Day</i>  <input checked="" type="checkbox"/> <i>Email</i></p>

Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 5<sup>th</sup> day of December, 2014.


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 Karen L. Hall

2014 APR 28 AM 10:30

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CITIZENS ALLIANCE FOR	)	
PROPERTY RIGHTS LEGAL FUND,	)	
A Washington non-profit corporation,	)	No. 70606-3-1
	)	
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	
SAN JUAN COUNTY, a Washington	)	PUBLISHED OPINION
and the SAN JUAN COUNTY CRITICAL	)	
AREA ORDINANCE/SHORELINE	)	
MASTER PROGRAM IMPLEMENTA-	)	
TION COMMITTEE, a subcommittee	)	
of the San Juan County Council,	)	
	)	
Respondents.	)	FILED: <u>April 28, 2014</u>

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SPEARMAN, C.J. — The central issue in this case is whether members of the San Juan County Council (the Council) violated the Open Public Meetings Act (OPMA) by attending a series of closed meetings as part of a working group known as the San Juan County Critical Area Ordinance/Shoreline Master Program Implementation Committee (CAO Team).<sup>1</sup> Citizens Alliance for Property Rights Legal Fund (CAPR) appeals the trial court's summary judgment dismissal of its lawsuit against San Juan County (the County) and the CAO subcommittee,

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<sup>1</sup> This group is referred to by several different names in the record, including CAO/SMP Implementation Committee, CAO/SMP Implementation Team, CAO Facilitation Group, and Pete's Implementation Team. For simplicity, it is referred to herein as the "CAO Team."

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arguing that the trial court misinterpreted and misapplied several key provisions of OPMA and erroneously ruled that there were no genuine issues of material fact. Finding no error, we affirm.

### FACTS

In 2010, San Juan County began the process of updating its Critical Area Ordinances pursuant to the Growth Management Act, chapter 36.70A RCW. The CAO Team, which included members of the County executive staff as well as three of San Juan County's six councilmembers, was formed to facilitate and coordinate the County's efforts in this regard. The CAO Team did not open its meetings to the public.

In April 2012, San Juan County Prosecuting Attorney Randall Gaylord issued a memorandum advising the Council that "no meetings of three council members should occur without complying with the notice and other requirements of the Open Public Meetings laws." Clerk's Papers (CP) at 452. Gaylord acknowledged that the law in this regard is uncertain, but opined that "[e]ven if the law is not clear, the better approach is to err on the side of following the Open Public Meetings Act." CP at 452. The Council members followed Gaylord's advice and immediately discontinued this practice.<sup>2</sup>

Ten months later, the Council adopted four critical areas ordinances. Prior to adoption, the Council held approximately 75 public meetings to discuss the

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<sup>2</sup> In November 2012, the voters of the County changed the Council from a six to a three member governing body, effective May 2013.

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critical areas ordinance and provide opportunity for public comment. More than 30 of these meetings occurred after the CAO Team stopped meeting in April 2012.

In October 2012, CAPR filed a complaint against the County, the CAO Team, and Councilmembers Richard Fralick, Patty Miller, and Lovel Pratt, alleging that the CAO Team meetings violated the OPMA. CAPR requested (1) nullification of all actions taken in violation of OPMA; (2) civil penalties against each member that committed knowing violations of OPMA; (2) an award of costs and attorney fees; and (4) injunctions enjoining future violations of OPMA and the Growth Management Act. In an Amended Complaint filed in November 2012, CAPR non-suited its Growth Management Act injunction action, dismissed its claim against the individual Council members, and waived civil penalties.

The County moved for summary judgment, arguing that CAPR lacked sufficient evidence to support its case. CAPR submitted voluminous evidence in response.<sup>3</sup> In a letter decision, the trial court concluded that CAPR had failed to show that there was an issue of material fact regarding whether the CAO Team meetings violated the OPMA, and granted summary judgment to the County. The

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<sup>3</sup> CAPR argues that the trial court should have treated the County's summary judgment motion as a motion for judgment on the pleadings under CR 12(c) because the County only attacked allegations in CAPR's complaint and failed to submit affidavits or identify portions of the record which demonstrate the absence of a genuine issue of material fact. This argument lacks merit. Even assuming for the sake of argument that the County's motion was functionally a motion for judgment on the pleadings, it was converted to a motion for summary judgment when CAPR submitted evidence in response. CR 12(c); P.E. Systems, LLC v. CPI Corp., 176 Wn.2d 198, 206, 289 P.3d 638 (2012). We also note that both parties had a reasonable opportunity to present materials relevant to a summary judgment motion within the CR 56(c) time for response.

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trial court also denied CAPR's subsequent motion for reconsideration.<sup>4</sup> CAPR appeals.<sup>5</sup>

### DISCUSSION

This court reviews an appeal from summary judgment de novo. Bostains v. Food Express, Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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). All facts and reasonable inferences are construed in the light most favorable to the nonmoving party. Shoulberg v. Public Utility Dist. No. 1 of Jefferson Cy., 169 Wn.App. 173, 177, 280 P.3d 491 (2012), rev. denied, 175 Wn.2d 1024 (2012).

"[A] party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case." Guile v. Ballard Community Hosp., 70 Wn. App. 18, 21, 851 P.2d 689 (1993). "After the moving party meets its initial burden to show an absence of

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<sup>4</sup> CAPR contends that the trial court erred in dismissing CAPR's complaint in its entirety, including its claims against the San Juan County Council's Budget Subcommittee, General Governance Subcommittee, and Solid Waste Subcommittee, because the County's motion for summary judgment only sought dismissal of allegations against the CAO Team. This argument lacks merit. CAPR's allegations and arguments focused solely on the CAO Team. CAPR made some passing references to the other subcommittees in its amended complaint and response to the County's motion for summary judgment, but did not name those subcommittees as defendants, include them in its claim for relief, or provide evidence and argument in support of its assertion that they violated OPMA.

<sup>5</sup> Allied Daily Newspapers of Washington, Washington Newspapers Publishers Association, and Washington Coalition for Open Government also filed an amicus brief.

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material fact, the inquiry shifts to the party with the burden of proof at trial. . . .” West v. Thurston Cy., 169 Wn.App. 862, 866, 282 P.3d 1150 (2012) rev. denied, 176 Wn.2d 1012 (2013), citing Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). “If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff:” Young, 112 Wn.2d at 225. “If, at this point, the plaintiff ‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’ then the trial court should grant the motion.” Young, 112 Wn.2d at 225, quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

#### Email exchange

“[T]he OPMA is a comprehensive statute, the purpose of which is to ensure that governmental actions take place in public.” Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1086 (9th Cir. 2003). OPMA contains a strongly worded statement of purpose: “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.” RCW 42.30.010. The statute mandates liberal construction to further its policies and purpose. RCW 42.30.910.

To enforce OPMA's civil penalty provision, plaintiffs must show (1) that a member of a governing body (2) attended a meeting of that body (3) where action was taken in violation of OPMA and (4) the member had knowledge that the meeting violated OPMA. Wood v. Battle Ground Sch. Dist., 107 Wn. App. 500, 558, 27 P.3d 1208 (2001). Where, as here, plaintiffs are not seeking to enforce the civil penalties provision, the fourth factor is inapplicable.<sup>6</sup>

OPMA provides that "[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030. A "governing body" is "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). A "public agency" is "[a]ny county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington." See RCW 42.30.020(1)(a). "Meeting" is defined as "meetings at

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<sup>6</sup> There is some confusion in the case law regarding the proper standard to avoid summary judgment dismissal of an OPMA claim that does not involve civil penalties. In Eugster v. City of Spokane, 110 Wn. App. 212, 222, 39 P.3d 380 (2002), Division Three cited Wood in stating that "[to] defeat summary judgment dismissal of an OPMA claim, 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, and (4) that the member had 'knowledge' that the meeting violated OPMA." Wood, 107 Wn. App. at 558. However, the Wood court was specifically addressing a request to impose civil penalties under RCW 42.30.120(1), which requires a showing that the member knowingly violated OPMA. The other three remedies available under OPMA do not require proof of knowledge. See RCW 42.30.060(1) (nullification of action); RCW 42.30.120(2) (attorney fee award); RCW 42.30.130 (Injunction). Thus, it is not appropriate to graft a knowledge requirement onto the test for overcoming summary judgment where civil penalties are not at issue.

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which action is taken." See RCW 42.30.020(4). "Action" means "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." See RCW 42.30.020(3).

Clearly, the Council is the "governing body" of a "public agency." However, under Washington case law, a gathering that includes less than a majority of the governing body does not violate OPMA. Wood, 107 Wn. App. at 564, citing In re Recall of Beasley, 128 Wn.2d 419, 427, 27 P.3d 878 (1996) and In re Recall of Roberts, 115 Wn.2d 551, 554, 799 P.2d 734 (1990). At all times relevant to this case, the Council had six members. Therefore, a gathering that includes three councilmembers does not constitute a "meeting" of the Council for OPMA purposes, regardless of whether "action" is taken.

CAPR contends that on November 14, 2011, four of six councilmembers held a "meeting" in violation of OPMA by participating in an email and telephone exchange in which they discussed CAO Team matters. The trial court properly rejected this argument, both on the merits and because CAPR first advanced the argument in its motion for reconsideration. "[T]he OPMA does not require the contemporaneous physical presence of [members of the governing body] in order to constitute a meeting." Eugster, 110 Wn. App. at 224. An exchange of emails can constitute a "meeting" for OPMA purposes. Wood, 107 Wn. App. at 564. However, "the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'" Wood, 107 Wn. App. at 564. Viewed in the light most

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favorable to CAPR, the record shows that at most three councilmembers (Richard Fralick, Lovel Pratt, and Rich Peterson) participated in the active discussion of issues by phone or email. The fourth councilmember, Patty Miller, received a copy of the email, but there is no evidence that she responded or actively participated in the discussion.

CAPR also vaguely asserts that four Council members were present at other "meetings of the subcommittees" but fails to back up this claim with argument or citations to the record. We need not consider it. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(5).

#### Negative Quorum

CAPR argues that this court should create a new rule and hold that a "meeting" occurs for the purposes of OPMA when the number of members present is sufficient to block action when the matter discussed comes up for a vote before the governing body, thereby constituting a "negative quorum." In support, CAPR cites a Wisconsin case, State ex rel. Newspapers, Inc. v. Showers, 135 Wis.2d 77, 398 N.W.2d 154 (1987). In Showers, four members of an eleven member body met to discuss budget measures. Showers, 135 Wis.2d at 80. Passing the budget measure required a two-thirds vote, meaning that eight out of eleven members had to approve the change. Id. The Wisconsin Supreme Court held that Wisconsin's Open Meeting Law applied because four members could block the parent body's course of action regarding the proposal discussed at the meeting by voting together. Id. at 80. Prior to May 2013, the Council had

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six members, with at least four votes necessary to pass ordinances. Therefore, applying the reasoning of Showers, CAPR contends that a gathering of three councilmembers constitutes a “negative quorum” to which OPMA requirements should apply.

No Washington cases directly address the reasoning of the Showers case. San Juan County Prosecutor Randall Gaylord cited Showers in his April 2012 memorandum advising the Council that OPMA requirements should be followed when three of six councilmembers gather to discuss County business. Given the OPMA’s mandate for liberal construction, this argument is not frivolous. Nevertheless, we decline to follow Showers. As an out-of-state case, it is not binding on this court. Moreover, it would carve out a significant exception to well-established Washington precedent holding that OPMA does not apply where a majority of the governing body is not present. See Beasley, 128 Wn.2d at 427 (in recall action, no meeting of majority of school board); Roberts, 115 Wn.2d at 554 (in recall action, no meeting of majority of town councilmembers). We also note that, effective May 2013, San Juan County voters reduced the size of the Council from six members to three, thereby eliminating the possibility that the negative quorum issue could arise again in San Juan County.

#### Governing Body

CAPR next argues that it does not matter if a majority of the Council was not present at CAO Team meetings, because the CAO Team itself was a “governing body” subject to OPMA requirements. The term “governing body”

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includes "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency," as well as "any committee thereof when the committee acts of behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). According to CAPR, the CAO Team was a "governing body" because it was a "committee" of the Council that "acted on behalf of" the Council.<sup>7</sup> Therefore, CAPR contends that a "meeting" occurred for OPMA's purposes each time the CAO Team met and "acted on behalf of" the Council, regardless of how many councilmembers were present.

The OPMA does not define the phrase "acts on behalf of."<sup>8</sup> OPMA defines "action" 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). Applying common law principles of agency, amici argue that a committee "acts on behalf of" a governing body when it takes "action" as defined in RCW 42.30.020(3) on behalf of the principal and under the principal's control. CAPR and amici thus argue that the CAO Team "acted on

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<sup>7</sup> Because CAPR did not allege that the CAO Team ever conducted hearings or took testimony or public comment, that portion of RCW 42.30.020(2) is not at issue.

<sup>8</sup> OPMA as originally passed in 1971 did not contain this phrase. The previous definition of "governing body" was "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency." Former RCW 42.30.020 (1971). The statute was amended in 1983 to add the phrase "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(3).

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behalf of" the Council because it took "action" by conducting ordinance-related deliberations, discussions, considerations, and other business subject to the Council's control.

There is no Washington case law directly addressing the circumstances under which a committee "acts on behalf of" a governing body.<sup>9</sup> However, a 1986 Attorney General Opinion (AGO)<sup>10</sup> specifically analyzed this question. The AGO stated that there are two possible interpretations of the phrase "acts on behalf of." First, "a committee might act on behalf of the governing body whenever it performs a specified function in the interest of the governing body." AGO at 5. Under this broad definition, a committee would be subject to the OPMA whenever it meets and takes "action," just as governing bodies do. This is the interpretation CAPR and amici urge us to adopt. Second, "a committee might act on behalf of the governing body only when it exerts power or influence or produces an effect as the representative of the governing body." Id. Under this narrower definition, "a committee acts on behalf of the governing body only when it exercises actual or de facto decision making authority for the governing body." Id. This is the interpretation the County urges us to adopt.

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<sup>9</sup> In Clark v. City of Lakewood, 259 F.3d 996, 1013 (9th Cir. 2001), the Ninth Circuit held that OPMA applied to a task force that took public testimony, held hearings, and acted on behalf of the governing body. The court concluded that these activities placed it "squarely within the ambit of RCW 42.30.020(2) without addressing the circumstances under which a committee "acts on behalf of" a governing body.

<sup>10</sup> AGO 1986 No. 16.

The AGO acknowledged that the statutory mandate for liberal construction supports the broad definition, but nevertheless concluded that “the narrower construction correctly reflects the intent of the legislature.” Id. First, the AGO noted that the phrase “when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment” would be superfluous if all committees were subject to the OPMA. The AGO observed that if the legislature intended a broad interpretation of the phrase “acts on behalf of,” it would have used the word “action” instead of “acts” and added the words “or any committee thereof” to the definition of “governing body,” thereby subjecting a committee to the OPMA on the same basis as the governing body itself – when “action” is taken. Id. at 6. Second, the AGO carefully examined the legislative history of the 1983 amendments to the definition of “governing body,” which suggest that the Legislature did not intend OPMA to apply to committees that “do nothing more than deliberate the making of policy or rules.” AGO at 6.

Mr. Isaacson: “What are the requirements with respect to giving formal notice?”

Ms. Hine: “It’s the intent of the legislation, we believe, subject to the deliberations of the governing body, that this apply only to deliberations of the governing body or subcommittees which the governing body specifically authorizes to act on its behalf, or which policy, testimony, or comments are made in its behalf. In other words, it’s when making policy or rules, not for general comments or any kind of informal type meeting they may have. Those would not require the official formal notice. AGO at 7.

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Thus, based on the narrower definition, the AGO concluded that "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 at 7. Advisory committees would not be subject to OPMA. Id. at 8. We find the AGO persuasive, and adopt its reasoning.

CAPR and amici argue that the trial court erred in relying on Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 82 P.3d 1199 (2004) and concluding that the CAO Team could not have "acted on behalf of" the Council because there is no evidence it had policy or rule making authority. In Loeffelholz, the plaintiff argued that election workers were a "governing body" because the county canvassing board delegated its authority to them. The court, citing Refai v. Central Washington Univ., 49 Wn. App. 1, 13, 742 P.2d 137 (1987), held that the election workers could not be a "governing body" unless they had "policy-making or rule-making authority." Loeffelholz, 119 Wn. App. at 704. According to CAPR and amici, Loeffelholz is incorrect because Refai was based on the old definition of "governing body," which was limited to a "board, commission, committee, council, or other policy or rule-making body of a public agency. . . ." Former RCW 42.30.020(2) (1983). The Refai court acknowledged in dicta that a "stronger case" can be made for advisory bodies to be subject to OPMA under the new definition of "governing body." Id. at 14, n.5. To the extent that a committee might exercise de facto decision making authority without being formally designated as

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a policy or rule-making body, this argument does not lack merit. Ultimately, however, it is irrelevant, because the trial court correctly relied on the 1986 AGO and concluded there is no evidence that the CAO Committee exercised actual or de facto decision making authority.

First, CAPR submitted no admissible evidence that the Council created the CAO Team or delegated its decision making authority<sup>11</sup>. CAPR claims that the County's public participation plan proves that the Council created the CAO Team. This is incorrect. The plan merely includes a list of individuals responsible for establishing the CAO Team, including the County administrator, the County prosecutor, three members of the Council, and several other individuals. CAPR also points to the testimony of San Juan County Planning Coordinator Shireene Hale, who testified that the Council "would have created it." CP at 380. But the trial court properly granted the County's motion to strike this statement as hearsay, as there was no showing that she had personal knowledge to testify to this belief. Furthermore, Council member Lovel Pratt testified that the County Administrator created the CAO Team, and five Council Members submitted

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<sup>11</sup> CAPR's assertion that the trial court "determined that the Council created the CAO Subcommittee" is plainly incorrect. Appellant's Reply Brief at 10. The trial court simply stated that it "can further assume, for the sake of argument, and without deciding, that the committee was established by the county council, as opposed to the county administrator. In point of fact, there appears to be no competent evidence in the record to indicate that the committee was established by the county council. . . ." CP at 818. The trial court then stated that its decision would be the same regardless of whether the council or the county administrator created the team.

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declarations stating that they took no action to create the Team or to delegate authority to the Team.<sup>12</sup>

The trial court further concluded that even assuming for the sake of argument that the County could direct the CAO Team to act on its behalf, there is no evidence in the record indicating that it did so. CAPR contends that it did, pointing to County Prosecutor Randall Gaylord's memo, in which he stated that "[d]uring the course of committee meetings, ideas and policies are brought forward, discussed, narrowed and discarded and approaches are formulated for making presentations of subcommittee work to the entire Council." CP at 453. CAPR also cites County planner Shireene Hale's statement that "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." CP at 409. Even viewed in the light most favorable to CAPR, these statements do not provide evidence that the CAO Team exercised actual or de facto decision making authority. Rather, they describe an advisory or information role.

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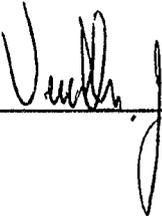
<sup>12</sup> CAPR contends that the trial court erred in granting the County's motion to strike Hale's statement and denying its motion to strike the declarations of the County Council members. We disagree. The County properly requested that the Court strike all inadmissible hearsay from CAPR's declarations, and Hale's statement was clearly hearsay. CAPR's assertion that the County's motion to strike was not timely is particularly unconvincing, where the record shows that CAPR requested and was granted a motion to shorten time in order to file its own motion to strike, and the court considered the County's motion to strike at the same time. VRP (4/19/2013) at 3-4. The trial court also properly denied CAPR's motion to strike the Council members' statements, as they did not conflict with previous testimony.

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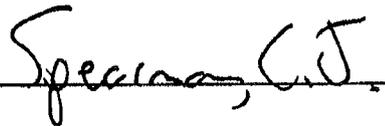
In sum, we adopt the reasoning of the 1986 AGO and hold that a committee "acts on behalf of" a governing body when it exercises actual or de facto decision making authority. Because CAPR submitted no evidence that a majority of the Council attended CAO Team gatherings or that the CAO Team exercised actual or de facto decision making authority, no "meeting" occurred for OPMA purposes, and summary judgment was appropriate. Because CAPR is not the prevailing party, it is not entitled to an award of attorney fees.

Affirmed.

WE CONCUR:



A handwritten signature in black ink, appearing to be "V. Smith", written over a horizontal line.



A handwritten signature in black ink, appearing to be "Speer, C.J.", written over a horizontal line.



A handwritten signature in black ink, appearing to be "Leach, J.", written over a horizontal line.

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No. 90500-2

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Attached for filing you will find (1) Supplemental Brief of Appellant Citizens Alliance, and (2) Appendix to Supplemental Brief.

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