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

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

Plaintiffs-Petitioners,

v.

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

Defendants-Respondents.

**PLAINTIFFS-PETITIONERS' REPLY IN SUPPORT OF MOTION
FOR DISCRETIONARY REVIEW**

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I. INTRODUCTION.

The Port of Vancouver USA (“Port”) and its Board of Commissioners (“Board” or “Commissioners”) admit the proposal to build the nation’s largest “crude-by-rail” terminal on the banks of the Columbia River near downtown Vancouver, Washington is controversial and carries significant regional implications. *See* Answer to Statement of Grounds for Direct Review, p. 1.¹ If built, several trains, each over a mile long and carrying over one hundred tankers full of explosive oil, would traverse the State daily through cities, small communities, and important ecosystems.

The Legislature enacted the Open Public Meetings Act (“OPMA”) to guarantee public access to all stages of government deliberations on important projects such as this oil terminal. The Commissioners undermined the statute and the public’s trust by repeatedly meeting in secret while planning this project. This Court should grant the Motion for Discretionary Review (“Motion”) to ensure prompt and final resolution of the issues of statewide importance identified therein.

The parties and the superior court all agree that immediate review of the superior court’s interpretation of OPMA’s “minimum price”

¹ The Port made similar concessions in opposing a separate petition for review pending before the Court involving claims from the same case. Answer to Petition for Review, Supreme Court No. 92335-3, p. 1.

exception is appropriate. Combined Appendix (“Riverkeeper’s Appx.”), p. 5; Opposition to Motion for Discretionary Review (“Opp’n to Motion”), pp. 12–13. Such review is likely to promote judicial efficiency and the ultimate termination of this matter by avoiding an unnecessary trial applying the superior court’s questionable interpretation of OPMA.

The Court should also accept review of the other two issues identified in the Motion: (1) the superior court’s refusal to declare that seven private Board meetings violated OPMA; and (2) the superior court’s determination that, regardless of any OPMA violations, the Board’s public votes approving a lease for the terminal render requests for injunctive relief moot. *See* Motion, pp. 1–2. Contrary to the Port’s arguments, appellate review of these issues concurrent with review of the “minimum price” interpretation would greatly promote judicial efficiency by reducing the likelihood of further appeals.

II. ARGUMENT.

Riverkeeper’s Motion seeks to secure the expeditious and efficient resolution of this litigation as intended by the Rules of Civil Procedure and the Rules of Appellate Procedure. *See* CR 1; *and Tapps Brewing Co., Inc. v. McClung*, No. 31959-4-II, 2005 Wash. App. LEXIS 158, at *16 (Wash. App. Jan. 25, 2005) (“The purpose of discretionary review under RAP 2.3(b)(4) is to narrow and advance the litigation in order to avoid a useless

trial.”). The Court should reject the Commissioners’ request to accept review of some but not all issues identified in the Motion, which would likely result in further appeals and delay the ultimate resolution of this litigation. *See, e.g., State v. McNeal*, 156 Wn. App. 340, 356 (2010) (reviewing an issue that was not certified by the lower court under RAP 2.3(b)(4) to avoid an unnecessary additional appeal).

A. Immediate Review of the Superior Court’s Interpretation of OPMA’s “Minimum Price” Exception is Warranted.

The parties and the superior court agree that immediate review of the superior court’s interpretation of OPMA’s “minimum price” exception is warranted under RAP 2.3(b)(4). Riverkeeper’s Appx., p. 5. Such review is appropriate to avoid an unnecessary trial on whether two of the seven private Board meetings at issue complied with the superior court’s questionable interpretation of OPMA.

Central to this lawsuit is the scope of an exception to OPMA that allows for executive sessions to “consider the minimum price at which real estate will be offered for...lease when public knowledge regarding such consideration would cause a likelihood of decreased price.” *See* RCW 42.30.110(1)(c). The Port admits that it discussed nearly every conceivable aspect of the proposed crude-by-rail terminal at seven Board meetings from which the public was excluded. *See, e.g.,* Riverkeeper’s

Appx., pp. 32, 34–36, 38–44, 47–51. The Commissioners contend that all of these extensive closed-door deliberations were permissible under OPMA’s minimum price exception. *Id.* at 152–53, 158–59.

The superior court adopted a broad interpretation of that provision that allows private deliberations on topics well-beyond price, while recognizing that it is “likely that a reviewing Court would see this differently.” *See id.* at 3–4, 16. The court then ruled that some meetings were permissible, but that a trial is needed to determine whether other meetings fit within its suspect interpretation of the exemption. *Id.* at 4.

This case presents the very type of procedural posture that RAP 2.3(b)(4) is intended to address. Absent review, the parties will proceed to trial on whether two of seven meetings fit within the superior court’s interpretation of OPMA’s minimum price exception—an interpretation the superior court recognizes is likely to be seen differently on appeal. If a different interpretation is adopted on appeal, the trial will have been a wasted effort, either because the trial will have been unnecessary based upon the undisputed content of the meetings or because a second trial may be necessary to apply the interpretation announced on appeal.

Despite agreeing that review of this issue is appropriate, the Port faults Riverkeeper for “cit[ing] no statute [in the Motion] authorizing direct review in this Court.” Opp’n to Motion, p. 13. This confuses the

purpose of the statement of grounds for direct review with that of the motion for discretionary review. *See* RAP 17.3(c). Riverkeeper's statement of grounds for direct review fully explains how the issues presented herein are of urgent and statewide importance and require prompt and ultimate determination as required by RAP 4.2(b)–(c).

The Court should accept immediate review of the superior court's interpretation of OPMA's minimum price exception under RAP 2.3(b)(4) to advance the termination of this litigation.

B. Immediate Review of the Superior Court's Refusal to Declare that Seven Meetings Violated OPMA is Warranted.

The Court should also accept review of the superior court's refusal to determine that seven private Board meetings violated OPMA. The Port's extensive and unrefuted admissions establish that the Board excluded the public from discussions on essentially every aspect of the project. This issue is therefore fully developed and ripe for review. Moreover, review of this issue will provide the Court with useful context for interpreting OPMA's minimum price exception. Review should be accepted to reduce the likelihood of further appeals and to otherwise promote the ultimate termination of this litigation.

The Court should reject the Port's disingenuous contention that the parties' stipulation for interlocutory review prevents this Court from

accepting review of issues not expressly included in the stipulation. *See* Opp'n to Motion, pp. 10, 14. Riverkeeper suggested a broader stipulation under RAP 2.3(b)(4), which counsel for the Port rejected but represented:

...[Riverkeeper] will need to move the Court of Appeals to accept discretionary review, so this stipulation is without prejudice to any request you might make to expand the scope at that level.

Suppl. Appx., p. 1.² Regardless, this Court has discretion to accept review of issues not stipulated by the parties or certified by the superior court under RAP 2.3(b)(4) in furtherance of the rule's underlying policy of judicial efficiency. *See McNeal*, 156 Wn. App. at 356.

The Court should also reject the Port's contention that it would be more efficient to construe OPMA's minimum price exception in a vacuum and then remand the case to the superior court to apply that interpretation to the record. *See* Opp'n to Motion, pp. 19–20. As the Board notes, Riverkeeper conducted “substantial discovery” on the content of the Board's meetings. *Id.* at 8. The Port admitted through a CR 30(b)(6) deposition that the private Board meetings covered virtually every aspect of the project. *See, e.g.,* Riverkeeper's Appx., pp. 32, 34–36, 38–44, 47–

² The Court should similarly reject the Port's unexplained suggestion that the stipulation precludes direct review by the Court. *See* Opp'n to Motion, p. 10. Riverkeeper had not decided whether to seek direct review at the time of the stipulation and the document is therefore silent as to where the motion for discretionary review would be filed. Riverkeeper Appx., p. 5.

51. Riverkeeper's summary judgment motion was based almost entirely on these unrefuted admissions. Defendants-Respondents' Appendix, pp. 67–76 (citing Third Knutsen Decl., Ex. A).

As explained in the Motion, the Port's only assertion of disputed facts on the cross-motions for summary judgment related to a small portion of a single meeting—specifically, which PowerPoint slides were orally discussed at the April 9, 2013, meeting. Motion, pp. 16–17. The Port, nonetheless, argues that this purported factual dispute prevents the Court from considering whether the majority of the April 9 meeting that is not in dispute and the entirety of the other six meetings violated OPMA. *See* Opp'n to Motion, p. 19. There is no basis for such a position. Moreover, Riverkeeper has stated that it does not contest the Board's representation as to which PowerPoint slides were discussed at the April 9 meeting. Motion, pp. 16–17. Thus, to the extent there were any disputed facts, Riverkeeper has resolved them by accepting the Port's description.

The Court should accept review of the superior court's denial of Riverkeeper's motion for a determination that seven meetings violated OPMA in an effort to further the expeditious resolution of this matter. In the unlikely event that the Court were to find that there are actually disputed facts material to whether one or more of the meetings violated OPMA, the Court could then remand those issues for trial.

C. **Immediate Review of the Superior Court’s Mootness Ruling is Warranted.**

Finally, the Court should accept review of the superior court’s mootness decision to promote the ultimate termination of this litigation. The Port’s contention that the decision is in accordance with established authorities is incorrect. *See* Opp’n to Motion, pp. 15–16. Rather, the facts presented here are unprecedented.

The Port held a series of private meetings at which it negotiated and formulated the lease at issue. At one such meeting before the project was publically announced, oil executives promoting the project provided presentations and answered the Commissioners’ questions on a variety of their concerns. Riverkeeper’s Appx., pp. 34–43, 81–82, 154–57. As Port staff noted, “[a]ll three Commissioners walked away [from that meeting] excited about moving forward....” *Id.* at 84. Other closed meetings covered similar topics, including the key terms of the lease and safety and environmental issues raised by the public and the Board. *Id.* at 47–51. The Board even excluded the public from a meeting the evening before approving the lease to discuss the public’s concerns. *Id.* at 49–50. That private meeting resulted in a final revision to the lease in a supposed effort to address certain safety risks and a decision by the Board that it “had enough information” and was “ready to go forward.” *Id.* at 49–50, 109–

110. No court has held, under similar circumstances, that a mere public vote cures the OPMA violations and renders injunctive relief moot.

The Port relies on *Henry v. Town of Oakville* for the proposition that, “where a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defect by re-enactment with the proper formalities.” 30 Wn. App. 240, 246 (1981). The only violation alleged in *Henry* was a failure to provide advanced written notice of a meeting at which ordinances were enacted. *Id.* at 242–43. The town subsequently ratified the ordinances at another meeting, presumably with proper notice. *Id.* at 242–43, 246–47. There was no suggestion that the ordinances themselves were deliberated upon and developed at meetings that violated OPMA. Rather, the only alleged defect was remedied by providing the proper notice. *Henry* does not support the Port’s position that merely holding a public vote renders moot requests for injunctive relief where the action itself was negotiated and formulated at a series of meetings that violated OPMA. *See Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1091 (9th Cir. 2003) (public approval of actions was “a far cry” from retracing the steps and remedying the defects “required under Washington law”).

The other cases relied upon by the Port similarly do not support its remarkable position that merely holding a public vote renders injunctive

relief for OPMA violations moot, regardless of the nature and extent of the violations. *See Org. to Pres. Agric. Lands v. Adams Cnty.*, 128 Wn.2d 869, 881–84 (1996) (single telephone call discussing who would move for a vote on a permit did not require invalidation of the permit); *and Eugster v. City of Spokane*, 118 Wn. App. 383, 422–24 (2003) (vacatur of ordinances not required for unproven allegations that council members met with financial institutes). To the contrary, courts have held that an action cannot be ratified by a public vote where the action was itself the product of meetings held in violation of OMPA. *See Mason Cnty. v. Pub. Emp't Relations Comm'n*, 54 Wn. App. 36 (1989). Such is the case here, where the lease finally presented to the Board was formulated at meetings that violated OPMA, including a meeting the night before the public vote that resulted in final revisions to the lease and a collective decision to move forward with the vote. Riverkeeper's Appx., pp. 49–50, 109–110.

The Court should accept review of this issue because there are substantial grounds for a difference of opinion with the superior court's ruling. *See* RAP 2.3(b)(4). Review will promote efficiency by reducing the likelihood of additional appeals. *See McNeal*, 156 Wn. App. at 356.

III. CONCLUSION.

Riverkeeper respectfully requests that the Court accept discretionary review of the issues identified in the Motion.

RESPECTFULLY SUBMITTED this 7th day of December, 2015.

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*Attorneys for Plaintiffs-Petitioners
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Northwest Environmental Defense Center*

CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the State of Washington, that I am co-counsel for Plaintiffs-Petitioners Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center and that on December 7, 2015, I caused the foregoing Plaintiffs-Petitioners' Reply in Support of Motion for Discretionary Review to be served on the following in the manner indicated:

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s/ Brian A. Knutsen
Brian A. Knutsen, WSBA No. 38806

**SUPPLEMENTAL
APPENDIX
to
Plaintiffs-Petitioners'
Reply in Support of
Motion for
Discretionary Review**

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Communication from counsel for Defendants-Respondents
to counsel for Plaintiffs-Petitioners (Sept. 14, 2015).....1

RE: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al.

Kristin Asai <kristinasai@markowitzherbold.com>

Mon 9/14/2015 1:59 PM

To: Brian Knutsen <brian@kampmeierknutsen.com>;

Cc: 'knoll lowney' (knoll@igc.org) <knoll@igc.org>; Miles Johnson <miles@columbiariverkeeper.org>; Lawson Fite <lawsonfite@markowitzherbold.com>; David Markowitz <davidmarkowitz@markowitzherbold.com>; Lynn Gutbezahl <lynngutbezahl@markowitzherbold.com>;

2 attachments (100 KB)

Proposed Order (clean).doc; Proposed Order (redline).doc;

Hi Brian:

The Port consents to discretionary review as to Judge Gregerson's ruling in paragraph 2, but not the other rulings because they will not materially advance the ultimate termination of the litigation, as required by RAP 2.3(b)(4). As a result, the Port does not agree to plaintiffs' revisions in paragraph 7. Otherwise, plaintiffs' revisions are fine. As you know, plaintiffs will need to move the Court of Appeals to accept discretionary review, so this stipulation is without prejudice to any request you might make to expand the scope at that level.

We attach a redline and a clean copy that accepts all of plaintiffs' changes except for paragraph 7. Let me know if you want to discuss.

Kristin M. Asai | Lawyer

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Cc: David Markowitz; Kristin Asai; Lynn Gutbezahl; lawsonfite@gmail.com; Miles Johnson; 'knoll lowney' (knoll@igc.org)
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Subject: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., No. 92455-4

Clerk of the Court,

Please accept for filing in the matter of Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., No. 92455-4, the attached Plaintiffs-Petitioners' Reply in Support of Motion for Discretionary Review and the Supplemental Appendix thereto. Please let me know if you have any difficulty accessing the attached documents.

Thank you, Brian.

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