

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Supreme Court No. 92455-4

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

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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.

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**PETITIONERS' ANSWER TO BRIEFS OF AMICI CURIAE**

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## **I. INTRODUCTION.**

The amicus curiae briefs filed by the Washington Public Ports Association (“Ports Association”) and the University of Washington (“University”) generally repeat arguments already made by Respondents the Port of Vancouver USA (“Port”) and its Board of Commissions (“Board” or “Commissioners”). Petitioners Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center (collectively, “Riverkeeper”) do not repeat arguments already made in their briefing, but instead provide this concise answer responding only to two issues that depart somewhat from the Port’s brief.

The Ports Association argues that the Open Public Meetings Act’s (“OPMA”) allowance for executive sessions to “consider the minimum price at which real estate will be offered for... lease” should be construed to allow private meetings to discuss essentially any aspect of a lease. While that position is consistent with that of the Port, the Ports Association offers a new, but misguided, basis therefor. The Ports Association argues that “minimum price” should be construed to mean any “consideration” involved in the real estate transaction because the phrase “such consideration” is used later in the relevant statutory provision. This argument is inconsistent with the plain language of the statute and its legislative history.

The Ports Association and the University argue that limiting executive sessions to discussions on the minimum price for a lease would unduly “hamstring” agencies. They contend that such an interpretation would create an absurd result that this Court should fix through an expansive interpretation of the exception to OPMA’s open government mandates. These arguments ignore OPMA’s limited applicability to governing bodies only and the essentially unfettered ability of agency staff to meet in private to negotiate complex lease terms. The Court should reject these efforts to undermine the legislature’s deliberate balancing of the public’s interests in access to government decision making and in obtaining a fair price for public property.

## **II. ARGUMENT.**

### **A. The Ports Association Applies the Wrong Definition for “Consideration” as Used in the Minimum Price Provision.**

The Ports Association argues that OPMA’s minimum price exception allows for private meetings to discuss not only money, but also any “additional things of value” exchanged in a real estate transaction. Ports Association Br. 9–12. In doing so, the Ports Association relies upon an inapplicable dictionary definition of the word “consideration.”

The relevant OPMA provision allows the Board to go into executive session:

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

RCW 42.30.110(1)(c). The Ports Association contends that this provision was not intended to limit private discussions to “price” because the statute uses both the term “price” and the term “consideration.” Ports Association Br. 9. The Ports Association thus urges the Court to apply definitions of the word “consideration” used in contract law: “Additional things of value to be provided under the terms of a contract;” “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promise.” *Id.* at 10.

This is not the intended definition of “consideration.” Rather, “such consideration” is a reference to the phrase “to consider” which appears at the beginning of OPMA’s minimum price provision— “consideration” is used as the noun referring back to the verb “consider.” An examination of OPMA’s provision on executive sessions for acquisitions of property makes this apparent. *See Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–12, 43 P.3d 4, 9–10 (2002) (plain meaning is discerned from an examination of the relevant provision and related provisions in the same act). That provision allows private meetings:

To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding **such consideration** would cause a likelihood of increased price.

RCW 42.30.110(1)(b) (emphasis added). The phrase “such consideration” is used in an identical manner as OPMA’s minimum price provision for the disposition of public property. However, no words for “price” precede the phrase “such consideration.” Rather, the noun “such consideration” is a reference to the immediately prior use of the same word in verb form: to “consider.”

The legislative history confirms the Ports Association’s mistake. OPMA first provided for executive sessions on the sale or lease of public property when the statute was amended in 1979:

Nothing contained in this chapter shall be construed to prevent a governing body from holding executive sessions during a regular or special meeting... ; to consider the selection of a site or the acquisition of real estate by lease or purchase, when publicity regarding such consideration would cause a likelihood of increased price; [or] to consider the disposition of real estate by lease or sale, when publicity regarding such consideration would cause a likelihood of decreased price... If executive sessions are held to discuss the disposition by sale or lease of real estate, the discussion shall be limited to the minimum selling or leasing price.

1979 Wash. Reg. Sess. Laws ch. 42, pp. 217–18 (underlined text added by the 1979 amendments) (Petitioners’ Br., Appendix, pp. 15–16). The phrase

“such consideration” was not a reference to price or something else of value because no such terms preceded “such consideration.”

OPMA’s provisions for executive sessions were amended to the current form in 1985. The revisions to the “minimum price” provision were considered “nontechnical, modifications of existing law” that “left intact” the “authorization to discuss, in executive session, the minimum price at which public property may be sold or leased.” House Comm. on State Gov’t, House Bill Report on Substitute S.B. 3386, at 2, 49th Legislature, Regular Session (1985) (Petitioners’ Br., Appendix, p. 23).

The word “consideration” was thus never intended to mean anything “of value to be provided under the terms of a contract.” Rather, “such consideration,” as used in OPMA’s minimum price provision, is a noun referring to the verb “to consider.”

Moreover, even if the Ports Association was correct as to the intended definition of “consideration”—which it is plainly not—this argument would not support an expansive interpretation of the OPMA exception. Under the Ports Association’s construction, “such consideration” would be a reference to the specific and narrow form of “consideration” described previously in the statutory provision—*i.e.*, the minimum price at which real estate will be offered. This would not

support an interpretation under which a governing body could hold private meetings to discuss *all* consideration exchanged between parties to a lease.

**B. The Court Should Not Expand OPMA’s Minimum Price Provision to Ease Unsubstantiated Burdens in Complying with Open Government Requirements.**

OPMA’s minimum price exception is narrow, but not absurd or unworkable. Rather, the exception’s narrow scope reflects the legislature’s intentional, deliberate choice in balancing the public’s interest in government transparency with the public’s interest in obtaining fair compensation for the sale or lease of public land. *See* Petitioners’ Reply Br. 9–11. Public institutions like the Port and the University may prefer a different balance, but that hardly makes the legislature’s choice absurd. The Court should reject the invitation from the Ports Association and the University to reexamine the legislature’s determination about the value of open government with respect to deliberations on the sale or lease of publicly owned property. *Cf. Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892, 900 (2011) (the canon of avoiding absurd results must be applied sparingly, and never when a result is conceivable, because the canon “raises separation of powers concerns”).

A narrow application of the minimum price exception is entirely practical given the limited scope of OPMA’s open government mandates. OPMA allows a governing body like the Board to play a policymaking

role—privately identifying the minimum price at which public property will be leased or sold—without compromising agency staff’s ability to discretely evaluate and negotiate complex lease terms. *See* RCW 42.30.030 (OPMA only requires meetings of the “governing body” to be open to the public).

The limits imposed on the Port by OPMA are not only feasible, but judicious, in light of the Port’s actual procedures for negotiating real estate deals. Commissioner Wolfe explained that Port staff, not the Board, negotiates lease terms and prices. CP 1456 (Tr. 11:9–13, 12:1–13). The Port similarly testified that staff keeps the Board informed about such negotiations through one-on-one meetings. CP 1174 (Tr. 30:21–31:12). A plain language interpretation of OPMA’s minimum price exemption neither stifles the Port’s ability to negotiate complex leases nor results in the Board being kept uninformed about the status of those negotiations. It merely prevents the Board from deliberating, as a whole and in secret, about a vast range of project considerations such as human safety and environmental health.

The Court should “narrowly confine[]” the minimum price exception consistent with the legislature’s mandate for liberal construction of OPMA to further open government. *See Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429, 433 (1999) (citing RCW 42.30.910). Such

a construction is completely workable, and the Court should therefore decline to adopt a broader interpretation based upon a strained reading of OPMA's minimum price provision.

### III. CONCLUSION.

For the foregoing reasons and those described in its prior briefing, Riverkeeper respectfully requests that the Court reverse the decision of the trial court and remand for further proceedings.

RESPECTFULLY SUBMITTED this 1st day of February, 2017.

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## CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the State of Washington, that on February 1, 2017, I caused the foregoing to be served in the manner indicated:

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