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SUPREME COURT OF THE STATE OF WASHINGTON

COLUMBIA RIVERKEEPER, et al.,

Appellants,

v.

PORT OF VANCOUVER, et al.

Respondents.

AMICUS CURIAE MEMORANDUM OF
ALLIED DAILY NEWSPAPERS OF WASHINGTON,
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION
and WASHINGTON COALITION OF OPEN GOVERNMENT

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I. INTRODUCTION

At the heart of the Open Public Meetings Act (OPMA), Chap. 42.30 RCW, is a mandate for elected bodies to conduct the public's business openly unless a specific exception applies. One such exception, RCW 42.30.110(1)(c), allows governing bodies to meet privately to consider what "minimum price" to offer in leasing public property, if public consideration would likely decrease the price. This Court has made clear that unless an action is explicitly specified in such an OPMA exception, it must be done in a public meeting. That rule should govern here.

The trial court erroneously decided, however, that a governing body can privately discuss not just minimum price - the only consideration specified in RCW 42.30.110(1)(c) - but any number of factors that might affect a lease price. The court agreed with the Port of Vancouver that a majority of elected commissioners can hold a series of private meetings about a controversial project to discuss anything bearing the slightest connection to pricing, including safety and environmental concerns expressed by the public. In reaching that conclusion, the trial court reasoned that the OPMA is flawed, stating "the Legislature gave us this one clause with one word [price] that fails

to take into account in a transaction of this size and complexity and scope the multitude of possible factors that play into” decision-making, and effectively rewrote RCW 42.30.110(1)(c) to comport with the excessive scope of the meetings at issue.

This is dangerously wrong thinking. This Court has consistently declined to usurp the role of the Legislature, as it is asked to do here. Moreover, under RCW 42.30.910, open-meeting requirements must be construed liberally and exceptions must be interpreted narrowly to protect the public interest in open government. The trial court’s interpretation flips that rule on its head, placing the government’s interest in secrecy above the public’s interest in knowing as much as possible about how, when and why government decisions are made, contrary to OPMA’s purpose of fostering informed public participation. It also defies common sense, resting on the false assumption that the governing body itself must figure out the nuances of complex lease negotiations when its true role is simply ensuring that staff-negotiated transactions comport with the governing body’s policies. In fact, a narrow reading of RCW 42.30.110(1)(c) is quite practical, as it places no restrictions whatsoever on the executives actually negotiating deals

and merely limits what a majority of commissioners can do when communicating together as a body.

In order to protect the integrity of the OPMA, and in accordance with the fundamental rule that only actions explicitly specified in RCW 42.30.110(1) may occur outside a public meeting, this Court should reverse summary judgment for the Port and hold that governing bodies may not discuss all aspects of a proposed lease project in private.

II. INTEREST AND IDENTITY OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. The Washington Newspaper Publishers Association (WNPA) represents 100 community newspapers and 20 affiliated groups statewide. The Washington Coalition for Open Government is a nonprofit group dedicated to promoting the right to know about government.

These organizations (“Amici”) regularly advocate for public access to government records and proceedings in order to inform the public about matters of public concern, including controversial projects such as the oil-rail lease in this case. Their members attend meetings of elected councils, commissions and boards to learn about policy decisions and the considerations behind those decisions. Amici serve

as a voice for the general public regarding access to meetings and enforcement of sunshine laws in this state.

Amici are interested in this case because it affects the public's right to know how, why and when ports and other agencies make decisions affecting the daily lives of citizens. They want to preserve the vitality of the OPMA so that citizens can learn about and participate in important decisions. Amici are concerned that if the trial court decision is affirmed, port commissions and other governing bodies will use closed meetings to decide virtually all the details of controversial leases and not just the minimum price, and the strict rule announced by this Court in *Miller v. Tacoma* will be eroded.

III. DISCUSSION

A. **Narrowly Interpreting RCW 42.30.110(1)(c) is Not Onerous or Impractical.**

Under RCW 42.30.030, "All meetings of the governing body of a public agency shall be open and public." A "governing body" includes the board, council or other policymaking body of a public agency, such as the Port of Vancouver Commission. RCW 42.30.020(2). A "meeting" is where "action" is taken. RCW 42.30.020(4). "Action" includes deliberation, discussion, consideration, review and evaluation of public business as well as final

action. RCW 42.30.020(3). The OPMA applies only to meetings where a majority of the governing body is present. *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 442-43 (2015). Only action “explicitly specified” in RCW 42.30.110(1), which lists exceptions to open-meeting requirements, may take place in a closed meeting (“executive session”). *Miller v. City of Tacoma*, 138 Wn.2d 318, 327 (1999).

With respect to leasing of public property, a commission can meet privately 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). Consideration of a minimum price is all that is explicitly authorized. The exception does not say, nor even imply, that “key deal factors” (including, by the trial court’s logic, non-price terms such as safety planning) may be batted around by a governing body in a closed meeting. Interpreting open-meeting exceptions narrowly, as required by RCW 42.30.910, means that RCW 42.30.110(1)(c) is limited to exactly what it says – considering what “minimum price” to offer for a real estate lease or sale. *Miller*, 138 Wn.2d at 327 (“only the

action explicitly specified by the exception may take place in executive session”).

This is not the practical problem that it’s made out to be. The OPMA places no restriction whatsoever on the agency executives who actually negotiate deals with lessees. Staff negotiators are free to consider, outside the public’s presence, any factors they want to. Any number of staff members may meet privately with each other or with potential lessees to talk about anything under the sun. Importantly, the OPMA does not prevent the agency staff from meeting with commissioners individually or providing written information to them. *Citizens Alliance*, 184 Wn.2d at 442-43 (only a majority acting together must be open). The only restriction is on what happens when most of the commissioners sit in the same room or communicate with each other with a collective intent to “meet.” *Wood v. Battle Ground School District*, 107 Wn.App. 550, 564-65 (2001) (an email exchange may constitute a “meeting” under the OPMA). Such collective discussions about leases must be public, *except* when considering a minimum price if public consideration would decrease the price. If commissioners want to learn about any and all factors or developments that may influence a lease price, the OPMA allows several ways to do it - they

can read staff memos privately, talk individually with staff members privately, or talk with each other *in public*. This standard is entirely workable and consistent with the legislative intent to foster public participation in policymaking.

RCW 42.30.110(1)(c) clearly contemplates that the governing body's only role in *private* negotiations is to set a pricing floor, i.e., the bottom line needed to serve the public's interests. That is a policy question suited to an elected body, whereas analysis of pricing factors is an administrative task for the executive branch. Indeed, the Legislature had no reason to expect a governing body itself to work out the nuances of complex transactions. That is why RCW 42.30.110(1)(c) contemplates commission action at the beginning (privately considering a "minimum price" to offer) and at the end of the negotiation process (publicly taking "final action...leasing property"), not at every step of the way.

This case illustrates that it is the agency staff – not the governing body – that analyzes the various factors influencing price and negotiates the lease terms. Brief of Resp., p. 9 ("the Commission has no involvement with the negotiations of a lease"). In fact, there is no suggestion that the commission actually adjusted the "minimum

price” for the lease in any of the closed meetings at issue. The meetings dealt largely with the “status” of terms *already negotiated by staff* and other information already known by the potential lessee, such as its formation of a limited liability company and the type of crude oil it would use. Brief of Resp., pp. 9-12. The same information could have been communicated confidentially in writing under RCW 42.56.260(1)(c), the 2015 law referenced by the Port (Brief of Resp., p. 31), without requiring a majority of commissioners to meet secretly. It also could have been discussed publicly without driving down the price.

The needless secrecy is best illustrated by the July 23, 2013 meeting, where commissioners shut the public out to discuss a new requirement for a safety plan shortly before going into a public session to approve the lease. Obviously the price could not drop at that late stage, moments before final approval, simply because commissioners publicly discussed the terms. RCW 42.30.110(1)(c).

In sum, there is simply no reason that a *governing body itself* must privately discuss all the factors influencing lease prices in order for the agency to negotiate a good deal for the public. RCW 42.30.110(1)(c) allows the governing body to play its policymaking

role effectively without constraining the ability of the agency as a whole to discretely evaluate pricing factors when negotiating complex deals. Thus, a narrow interpretation of the minimum-price exception is not only compelled by law and logic, but entirely workable.

B. Only the Legislature Can Fix Perceived Flaws.

In concluding that RCW 42.30.110(1)(c) must encompass more than consideration of price, the trial court criticized the statute, referring to “the unfortunate reality” that “the legislature gave us this one clause with one word that fails to take into account...the multitude of possible factors that play into” complex transactions. RP 54 (July 24, 2015). The trial court said “price by itself means nothing,” and that non-price terms such as “who the tenant is” and “what the proposed use is” are “so essential to an ultimate determination of price” that requiring commissioners to discuss them openly is like “trying to either unscramble an egg or unhomogenize milk.” Thus, the trial court was unsatisfied with the Legislature’s language and effectively rewrote it to resolve the perceived deficiencies.

But the job of courts is to interpret, not fix, legislation – even when it may seem illogical or harsh (not the case here). As this Court said in *State v. Groom*, 133 Wn.2d 679, 689 (1997):

We also note that however much members of this court may think that a statute should be rewritten, it is imperative that we not rewrite statutes to express what we think the law should be. We simply have no such authority.

It is for the Legislature to decide whether governing bodies may discuss “key deal factors” and not just a pricing floor in closed meetings concerning leases. Because the trial court overstepped its bounds in stretching RCW 42.30.110(1)(c) beyond what is “explicitly specified,” it must be reversed. *Groom*, 133 Wn.2d at 689; *Miller*, 138 Wn.2d at 327.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse summary judgment for the Port of Vancouver and apply the rule of *Miller v. Tacoma* that only action explicitly specified in RCW 42.30.110(1) may occur in a closed meeting of a governing body.

Dated this 30th day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 30, 2016, I served a copy of the Motion for Leave to File an Amicus Curiae Memorandum and related memorandum by electronic mail, per agreement, to:

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Subject: amicus filing in Columbia Riverkeeper v. Port of Vancouver, No. 92455-4

Dear Clerk and Counsel,

Please find attached for filing and service in *Columbia Riverkeeper v. Port of Vancouver*, Case No. 92455-4, an Amicus Curiae Memorandum of Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government with related motion. A certificate of service is attached to the brief.

This filing is submitted by Katherine George, WSBA #36288, phone number 425 802-1052, email kathy@johnstongeorge.com.

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