

No. 92455-4

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

vs.

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,

Respondents.

AMICUS BRIEF OF THE UNIVERSITY OF WASHINGTON

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I. INTRODUCTION

The University of Washington, as amicus curiae, asks this Court to interpret the Washington Open Public Meetings Act (OPMA), RCW ch. 42.30, to authorize, at a minimum, executive session discussion of *all* consideration to be received by a public agency in a real estate transaction. Though the OPMA provides a broad mandate for open public meetings, the statute recognizes the harm that would come from requiring public discussion of “the minimum price at which real estate will be offered for sale or lease when public knowledge . . . would cause a likelihood of decreased price.” RCW 42.30.110(1)(c). Petitioners’ interpretation of the statutory term “price” as “the least amount of money to be accepted” by an agency is inconsistent with the plain language, the legislative history, and the purpose of the OPMA. Authorizing agencies to confidentially discuss all consideration and not just an “amount of money,” still allows the public to scrutinize public real estate transactions, because agencies must discuss openly the “final action selling or leasing public property.” RCW 42.30.110(1)(c). This Court should adopt an interpretation that furthers the Legislature’s intent to balance the public’s right to open meetings and the need to protect the bargaining power of public agencies.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Founded in 1861, the University of Washington is the state's oldest and largest university. Originally located in downtown Seattle, the University moved to its current location in the University District in 1895. The University still owns the site of its original campus, now called the "Metropolitan Tract" and developed as commercial property. All told, the University owns over 7,000 acres of land across the state and leases over 1,500,000 square feet of space for multiple purposes in a variety of locations.

The University's Board of Regents consists of ten members, appointed by the governor. RCW 28B.20.100. The Board of Regents is vested with "full control of the university and its property of various kinds . . . ," RCW 28B.20.130(1), including specifically the Metropolitan Tract. RCW 28B.20.381-.398. The Legislature has granted the Board of Regents the power "to lease the [Metropolitan Tract], or any part thereof or any improvement thereon for a term of not more than eighty years." RCW 28B.20.382(2).

The Board of Regents has delegated authority to the University President to execute leases of the University's real property up to 20 years and other transactions relating to real property that have an anticipated value of less than \$15 million. For

transactions that exceed delegated authority, the University President and staff are required to obtain Board of Regents approval of the transaction terms. Many such terms are critical components of the consideration the University will receive, such as the length of a lease, indemnification requirements, limitations on use of leased space, exchanges in kind and others.

As a “public agency” under RCW 42.30.020(1), the Board of Regents is subject to the requirements of the OPMA, *see Cathcart v. Andersen*, 10 Wn. App. 429, 517 P.2d 980 (1974), *aff’d*, 85 Wn.2d 102, 530 P.2d 313 (1975), and accordingly the University has a substantial interest in the issue and arguments presented by this appeal. Though the University takes no position on the application of the OPMA to the specific facts of this case, the University believes that additional argument is necessary and will benefit the Court because petitioners’ interpretation of the OPMA ignores the practicalities of leasing public property and, if adopted by this Court, would undermine the purpose of the OPMA’s executive session provisions by undercutting the negotiating power of public agencies when selling or leasing public property, and preventing the public agency from receiving optimal value in the transaction.

III. ISSUE ADDRESSED BY AMICUS CURIAE

Whether RCW 42.30.110(1)(c), which exempts from public meeting requirements discussions concerning “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,” allows a public agency to discuss in executive session – at a minimum – any terms of consideration a public agency will accept for the sale or lease of public property?

IV. STATEMENT OF THE CASE

The University adopts sections B-E of the Petitioners’ Statement of the Case (Petitioners’ Br. at 7-23) and the entirety of the Port’s Restatement of the Case. (*See* Resp. Br. at 4-18)

V. ARGUMENT

A. The Legislature did not intend to hamstring public agencies by limiting executive session discussion to “the least amount of money to be accepted.”

The Legislature authorized public agencies to discuss in executive session “the minimum price” at which public property will be sold or leased when public discussion “would cause a likelihood of decreased price”:

Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting . . .

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. However, final action selling or leasing public property shall be taken in a meeting open to the public[.]

RCW 42.30.110(1)(c); see *Port of Seattle v. Rio*, 16 Wn. App. 718, 723-24, 559 P.2d 18 (1977) (recognizing that under OPMA “not all issues need be discussed in public”).

This exemption from public discussion is not limited, as petitioners contend, to discussing “the *least amount of money* to be accepted” for a proposed real estate transaction. (Petitioners’ Br. at 27 (emphasis added)) That interpretation ignores the language and the purpose of RCW 42.30.110(1)(c) – to avoid placing public agencies at a competitive disadvantage by disclosure of the consideration it will accept for the sale or lease of property – and is unworkable given the realities of negotiating complex real estate transactions.

In any transaction involving the sale or lease of real property, the “minimum price” for which a public agency may be willing to sell or lease property necessarily includes transactional terms other than the “amount of money to be accepted,” *e.g.*, the length of the lease term or the size of the leasehold. It is impossible for the governing body of a public agency to judge whether a “minimum price” is

appropriate without discussing these and other non-monetary terms that are key elements of consideration in all commercial real estate negotiations. This Court should reject petitioners' reading of the OPMA and should instead interpret the statute's language so that at the very least public agencies may discuss in executive session any term of consideration a public agency would be willing to accept for the sale or lease of public property.

The principles of statutory interpretation are well established. "When interpreting a statute, the court's fundamental objective is to ascertain and give effect to the legislature's intent." *Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 405, ¶20, 377 P.3d 199 (2016). "When possible, the court derives legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Lenander*, 186 Wn.2d at 403, ¶15. "If, after this inquiry, the statute remains ambiguous or unclear, it is appropriate to resort to aids of construction and legislative history." *Lenander*, 186 Wn.2d at 405, ¶20. Both the ordinary definition of "price" and legislative history confirm that RCW 42.30.110(1)(c) is intended to allow a

governmental body to consider in private session the consideration, in addition to the dollar amount, it expects to receive in exchange for the sale or lease of public property.

- 1. Common definitions of “price” indicate that the undefined term includes all elements of consideration a public entity may seek for its real property.**

The plain language of RCW 42.30.110(1)(c) authorizes agencies to discuss in executive session all components of consideration. As the Port correctly notes (Resp. Br. at 21-22), dictionaries define “price” not just as an “amount of money,” but as *all* consideration exchanged. *See, e.g.,* Black’s Law Dictionary (10th ed. 2014) (“The amount of money *or other consideration* asked for or given in exchange for something else; the cost at which something is bought or sold.”) (emphasis added); *see also,* Webster’s Third New Int’l Dictionary Unabridged 1798 (2002) (defining “price” as “the *terms or consideration* for the sake of which something is done or undertaken”) (emphasis added) (cited at Petitioners’ Op. Br. 29). These dictionary definitions should guide the Court’s interpretation of the undefined statutory term “price” in the OPMA. *See Grant County Prosecuting Attorney v. Jasman*, 183 Wn.2d 633, 643, ¶17, 354 P.3d 846 (2015) (“In interpreting the ordinary meaning of a word, a nontechnical word may be given its dictionary definition.”) (internal quotation omitted).

Many terms, in addition to a dollar amount, comprise the overall consideration that a seller may be willing to accept for real property and only by evaluating the *totality* of a transaction can an agency determine the appropriate consideration for public property. The Appraisal Institute, whose professionals strive to monetize real property in determining “value,” has adopted a definition of “price” that does not limit the term to dollars, noting that all consideration is reflected in “the amount asked, offered or paid for a property.” Appraisal Institute, *The Dictionary of Real Estate Appraisal* 175 (6th Ed. 2015). It is noteworthy that, by contrast, the Appraisal Institute defines “value” as a “monetary” sum. *Id.* at 243-44. The term “price” in RCW 42.30.110(1)(c) should similarly not be limited to “the amount of money to be accepted,” but must necessarily include all terms of consideration a public entity seeks to receive for a sale or lease of its real property.

Reading these common definitions of “price” together with the statutory condition for executive session – public discussion “would cause a likelihood of decreased price” – the Legislature plainly intended to keep confidential discussion of all the key terms of consideration an agency would be willing to accept in a sale or lease transaction.

2. The OPMA’s drafters sought to prevent placing public agencies at a competitive disadvantage by making public their negotiating strategy.

The legislative history of the OPMA likewise supports an interpretation that authorizes discussion of more than just an “amount of money.” When it first enacted RCW 42.30.110(1)(c), the Legislature recognized that when “sale and lease prices are discussed at . . . open meetings, the potential buyers are aware of a minimum price” causing “public agencies [to] receive low sale and lease prices,” which the Legislature stressed was “a disservice to the public.” House Bill Analysis SHB 248 (1979) (Petitioners’ Br. App’x at 21)

The discussion on the floor of the Senate confirmed the House staff’s analysis of the bill. Senator Bruce Wilson, who proposed the language of the executive session provision, emphasized the public agency should discuss in open meetings “the decision to sell or lease and the reasons for it and what property might be sold or leased and so on,” but that “the details of the proposed negotiation with respect to the price could be conducted in executive session.” Transcript of Senate Floor Proceedings at 7 (March 2, 1979) (Petitioners’ Br. App’x. at 34).

Senator Wilson confirmed that the purpose of this provision was to allow public agencies to discuss confidentially “how high or how low they are willing to go . . . in terms of negotiation with the other entity” because otherwise the other party would know “the limits the public body is willing to go”:

. . . of course it is not in the public interest for the other party to the transaction to know what are the limits the public body is willing to go. What this bill then is trying to accomplish is to say that the public body could hold a[n] . . . executive session when it is considering the sale or lease of property, but executive session would be limited to deciding how high or how low they are willing to go on – in terms of negotiation with the other entity that is concerned.

Transcript of Senate Floor Proceedings at 7 (March 2, 1979)
(Petitioners’ Br. App’x. at 34).

The Legislature thus intended to allow public agencies to negotiate without undermining their own bargaining power by disclosing in open meetings their negotiating strategy, *i.e.*, “how high or how low they are willing to go” on any term of consideration, including non-monetary terms such as the length of a lease or the size of a leasehold. Even if one limits the terms of negotiation to the “amount of money” exchanged, an agency inevitably must discuss the other elements of consideration when deciding how little or how much money it is willing to accept.

Under petitioners' interpretation of the OPMA, agencies could not protect critical negotiating information such as the non-monetary terms most important to the agency and the concessions or trade-offs on non-monetary terms it is willing to accept. This information can be just as important to negotiations, if not more, than the bottom-line amount of money an agency is willing to accept.

3. Petitioners' definition of "minimum price" as the "minimum amount of dollars" would put public agencies at a severe disadvantage in negotiating the sale or lease of public property.

The Court should reject petitioners' attempt to define the term "minimum price" as "the least amount of money to be accepted" by the agency (Petitioners' Br. at 27) because it is inconsistent with the definition of "price," and would undermine the purpose of this exemption of the OPMA. Public agencies, which have a fiduciary responsibility to safeguard the public's property, should not be put at a competitive disadvantage when negotiating the sale or lease of real property.

While the dollars per square foot are certainly an important component of the total consideration that an agency would receive upon the lease of property, the duration of the lease, limitations on the use of the property, responsibility for improvements, management fees, the terms of indemnity and other lease terms are

equally critical. Petitioners' construction of the OPMA would allow potential lessees and competing lessors to learn an agency's "bottom line" on every term for the potential sale or lease of public property all of which are critical components of the overall "price," as that term is properly construed.

Potential lessees would be at a negotiating advantage and public agencies severely hampered were their "bottom line" terms publicly available, *e.g.*, the minimum length of a lease an agency was willing to accept. Similarly, were competing lessors privy to an agency's minimally acceptable lease or sale terms, they could, in subtle ways, undercut the agency, effectively making the agency bid against itself. This Court should not encourage a "bidding process" that decreases the value to taxpayers when public property is leased or sold.

If an agency's staff cannot confidentially seek guidance from its governing body on *all* important terms of consideration in a real estate transaction, the public will suffer the precise harm RCW 42.30.110(1)(c) is intended to prevent. (*See* Petitioners' Op. Br. at 2 (acknowledging "public's interest in obtaining fair value for public property")) Petitioners' interpretation of the statute fails to correctly balance the need to protect the bargaining power of public agencies

and the public's right to open meetings, ignoring the disclosure the statute mandates by requiring the "final action selling or leasing public property . . . be taken in a meeting open to the public." RCW 42.30.110(1)(c). That statutory provision provides the public the opportunity to review any proposed transaction before an agency commits to it and is consistent with the notion that an agency's governing board should, at minimum, be able to discuss in executive session all elements of consideration at issue during negotiations.

Petitioners also ignore that agency staff often have delegated authority to execute transactions that do not exceed a specified monetary threshold, and thus consult the governing body only for transactions that exceed that threshold. (*See, e.g.*, Resp. Br. at 6-7 (discussing delegated authority of Port's Executive Director/CEO)) The practical consequence of petitioners' interpretation is that public agencies will not be able to seek confidential input from their governing boards on "bottom line" deal terms during negotiations of the most important and sensitive transactions – precisely when it is most needed and can make the greatest difference. Agency staff will be forced into the dilemma of either undercutting the public's bargaining power by consulting their governing body in open session, or negotiating a transaction without input from the governing body.

This Court should not interpret a statute in a way that leads to such an absurd result, even where, as here, the statute contains a broad mandate in favor of public disclosure with exemptions narrowly construed. *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004) (Public Records Act).

“A public agency should neither be given an advantage, nor placed at a disadvantage in litigation” because of the OPMA. *Port of Seattle v. Rio*, 16 Wn. App. 718, 724, 559 P.2d 18 (1977). Nor should a public agency be advantaged or disadvantaged during real estate transactions because of the OPMA. This Court has repeatedly recognized that when public entities exercise their proprietary power to contract they should be able to do so on the same terms as private entities. *See Burns v. City of Seattle*, 161 Wn.2d 129, 155, ¶51, 164 P.3d 475 (2007) (when contracting in a proprietary capacity “a municipality stands on the same footing as a similarly situated private party”); *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 590, ¶13, 269 P.3d 1017 (2012) (“when a city takes proprietary action, its business powers are viewed almost the same as a private individual’s”). This Court should reject petitioners’ interpretation of the OPMA, under which public agencies would put themselves at a

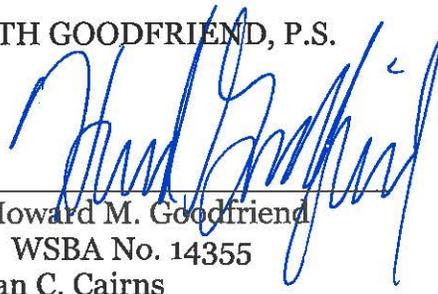
competitive disadvantage that no private party would ever countenance.

VI. CONCLUSION

This Court should interpret the OPMA to authorize, at a minimum, executive session discussion of all terms of consideration a public agency will accept in the sale or lease of public real property.

Dated this 30th day of December, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 30, 2016, I arranged for service of the foregoing Amicus Brief of the University of Washington, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 30th day of December,
2016.



Patricia Miller

SMITH GOODFRIEND, PS

December 30, 2016 - 3:45 PM

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