

SUPREME COURT NO. 92455-4

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

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

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,

Respondents.

**BRIEF OF *AMICUS CURIAE*
WASHINGTON PUBLIC PORTS ASSOCIATION**

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I. INTRODUCTION

The Washington Public Ports Association (“WPPA”), as *amicus curiae*, urges this Court to affirm the Trial Court’s holding that RCW 42.30.110(1)(c)¹ permits elected public officials to discuss with their staffs, in executive session, all the factors and considerations that inform the discussion of the appropriate minimum lease price. If adopted, Petitioners’ erroneous interpretation of RCW 42.30.110(1)(c) will harm the public interest, is unworkable in practice, is inconsistent with the plain language of that provision, and is contrary to a 2015 amendment to the Washington Public Records Act at RCW 42.56.260 which addressed the same public policy considerations found here.

In the most fundamental sense, Washington port districts are a tool that enables local communities to manage community assets in the best interests of the citizens. In carrying out this responsibility, port districts are governed by their part-time elected public officials.² Realistically, these part-time elected public officials do not, and are not expected to, have particular expertise in

¹ Chapter 42.30 RCW – the Open Public Meetings Act Chapter (the “OPMA”).

² Chapter 53.12 RCW.

complex commercial real estate leasing where the determination of price necessarily involves weighing such factors as risk, term, public cost and potential public benefit. Rather, they must rely on the agencies' professional staff to provide honest, thoughtful, and confidential analysis both in writing and in executive session. RCW 42.30.110(1)(c) and RCW 42.56.260 recognize this reality. In short, these statutory provisions recognize the obvious – that the public interest is best served when the part-time elected public officials can receive confidential written analysis from their professional staff and discuss all key aspects of a proposed lease of public real estate with their staff and each other in executive session.

This policy, codified in these two statutes, encourages frank analysis and discussion from staffs and allows elected public officials to openly discuss their opinions and ask important questions that have a direct bearing on the final price for the lease of public property. If such discussions were required to be held in public, they would result in a material disadvantage to the public interest and a material advantage to the potential tenant and/or to competing landowners within and outside the State of Washington. Private land owners formulate their positions for real estate

negotiations in private and so should governments. To do otherwise will cause incalculable harm to the public interest.

The current statutes have correctly balanced the competing public interests in leasing public real property. Public agencies formulate their positions for real estate negotiations in private to protect the public interest. That interest is further protected when the final decisions are made in public and thereafter the public records related to the transaction are available for public review.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Authorized by RCW 53.06.030 in 1961, the WPPA's purpose is "to promote and encourage port development along sound economic lines."³ WPPA membership is comprised of sixty-nine (69) dues paying Washington port districts located throughout the State. Each of the sixty-nine member port districts is a Washington municipal government created, organized, and operated pursuant to Title 53 RCW. The WPPA and its members have a very strong interest in supporting economic development in their respective districts, which, for many member port districts, includes leasing significant real estate assets.

³ RCW 53.06.030(3).

As in the present case, the lease transactions entered into by public port districts are a complicated balance of public interests, involve a variety of factors and risks that ultimately bear upon price, are often with sophisticated commercial or industrial counterparties, and are often crafted to accomplish public policy objectives such as development of transportation infrastructure, economic development, job creation, or redevelopment of marginal lands. If adopted by this Court, the Petitioners' unsupported myopic reading would significantly hinder port districts' ability to fulfill their statutory purposes, resulting in a significant negative impact on the citizens of their districts and upon the economy of the State of Washington.

III. ISSUES

A. Does the OPMA Permit Executive Session Discussion of a Lease's Non-Monetary Compensation in Order to Protect the Public's Interest?

B. Do the Dictionary Definitions of "Price" and "Compensation" Necessarily Include Non-Monetary Compensation Given by a Tenant in a Lease?

C. Must RCW 42.30.110(1)(c) be Read in Conjunction and Harmony with RCW 42.56.260 and RCW 42.56.280?

D. Does Petitioners' Interpretation of RCW 42.30.110(1)(c) Lead to the Impermissible Absurd Result of Insuring the Public Always Receives the Minimally Acceptable Deal in Real Estate Transactions?

IV. ARGUMENT

A. Washington's "Sunshine Laws" Recognize that Some Discussions Must Occur in Private in Order to Protect the Public's Interests.

Washington's Legislature adopted the OPMA and the PRA with the specific purpose of insuring that governmental agencies acted transparently to protect the public interest. Notably, the OPMA and the PRA contain the exact same precatory language:

The people of this state do not yield their sovereignty to the agencies which serve them. 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. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010 and RCW 42.56.030.

These statutes recognize that, in most circumstances, conducting governmental business in the open protects the public interest by allowing the public access to the decision-making process. The OPMA and the PRA work in harmony to accomplish this purpose.

In some instances, however, the Legislature recognized that conducting governmental business in the open would actually hinder the public interest. Therefore, the Legislature adopted

explicit exemptions to the OPMA and the PRA. In the OPMA, the Legislature provides for executive sessions to consider the selection of a site for acquisition or lease where public knowledge would cause a likelihood of increased price,⁴ to discuss certain financial and commercial information,⁵ to discuss issues relating to performance of a public employee,⁶ and to discuss pending litigation.⁷

In the PRA, the Legislature limited the requirement to disclose contents of real estate appraisals, documents concerning the selection of a site for acquisition or lease where public knowledge would cause a likelihood of increased price,⁸ financial, commercial and proprietary information where the release would produce a public loss or a private gain,⁹ preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended,¹⁰

⁴ RCW 42.30.110(1)(b).

⁵ RCW 42.30.110(1)(e).

⁶ RCW 42.30.110(1)(g).

⁷ RCW 42.30.110(1)(i).

⁸ RCW 42.56.260(1)(b).

⁹ RCW 42.56.270.

¹⁰ RCW 42.56.280.

and documents relevant to a lawsuit that would not otherwise be available to another party under the applicable discovery rules.¹¹

While recognizing the need for exemptions in the OPMA and the PRA, the Legislature also provides further protection of the public interest. In the PRA, a number of the exemptions are temporary in nature with required disclosure of documents after the underlying transaction is completed. See RCW 42.56.260, RCW 42.56.280, and *West, et. al. v. Port of Olympia, et. al.*, 146 Wn. App. 108 (2008) (Preliminary lease drafts, notes, recommendations that were exempt from disclosure under RCW 42.56.280 were subject to disclosure when the underlying action was completed). Likewise, the OPMA requires final actions, including the approval of real property leases, to be undertaken in an open public meeting. RCW 42.30.110(1)(c). These common sense exemptions, and the limits imposed on these exemptions, permit the government to achieve balance in its core purposes, protecting the public interests and conducting government business in the open.

The Legislature recently addressed the very issue of the public interest and real estate transactions when, in 2015, it

¹¹ RCW 52.56.290.

amended the PRA to provide clear protection for real estate transaction related documents:

(1) ...the following documents relating to an agency's real estate transactions are exempt from public inspection and copying under this chapter:

...

(c) Documents prepared for the purpose of considering the minimum price of real estate that will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price, including records prepared for executive session pursuant to RCW 42.30.110(1)(c).

RCW 42.56.260(1)(c).

The public interest, when it comes to a government's real estate dealings, is to insure that the government, considering all the relevant factors and governmental interests, charges the appropriate price. Private landlords weigh and evaluate a number of interrelated terms bearing on price. Unlike a private landlord, governments do and should consider additional factors such as the proposed lease's effect on economic development, job creation, infrastructure development, and tax benefits. In short, common sense tells us that the monetary "price" is interdependent with the analysis of the proposed lease's non-monetary benefits and burdens.

B. The Plain Dictionary Definition of Price Includes Non-Monetary Consideration; Therefore, Elected Officials are Directly Authorized to Discuss Non-Monetary Consideration which, Along with Monetary Rent, Constitutes the “Price” of a Lease.

Recognizing that real estate negotiations where the government is forced to disclose all of its key transactional positions would harm the public interest, the Legislature authorized executive session:

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.

RCW 42.30.110(1)(c) (emphasis added). The “price” and “consideration” addressed in this exemption cannot mean a discussion of monetary consideration in isolation, but must necessarily entail a broader discussion of the proposed lease’s non-monetary consideration.

Key to interpreting RCW 42.30.110(1)(c) is the use of both the terms “price” and “consideration.” The Legislature uses the term “such consideration” to refer to its immediately prior use of “price”, indicating such terms are interchangeable in this exemption. Not surprisingly, this interchangeable use of “price” and “such

consideration” aligns directly with the dictionary definition of “price” and includes both monetary and non-monetary consideration.

When interpreting a statute, the Court gives undefined words “their common law or ordinary meaning” by “first look[ing] at the dictionary definition.” *AllianceOne Receivables Management, Inc. v. Lewis*, 180 Wn.2d 389, 395-396 (2014). Black’s Law Dictionary defines “Price” as:

The amount of money or other consideration asked for or given in exchange for something else...

Black’s Law Dictionary, 8th Edition, B. Garner (2004) at Pg. 1226 (emphasis added). Black’s Law Dictionary defines “Other Consideration” as:

Additional things of value to be provided under the terms of a contract...

Id. at Pg. 326 (emphasis added). Lastly, Black’s Law Dictionary defines “Consideration” as:

Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee...

Id. at Pg. 324 (emphasis added).

This Court’s review should end right here, as the plain dictionary definition of “price” and “consideration” unquestionably includes both “money” and “additional things of value” provided

under a lease, recognizing that a wide range of non-monetary consideration is included in the “price” of a lease. A number of non-monetary lease terms can induce a port district to grant a lease and/or have a direct impact on the monetary price a port is willing to accept for a lease. Here is just a brief, and not an exhaustive list.

- i. The lease term (i.e. a port may lower an annual lease rate in exchange for a longer lease term);
- ii. Jobs and the quality of jobs expected to be created by a tenant and how the creation of those jobs would foster the port’s economic development mission;
- iii. The effect that a lease may have on the value of adjoining property;
- iv. The tenants construction or tenant improvement plans for the port’s property;
- v. Credit worthiness of the prospective tenant (i.e. an economically stable tenant poses less risk of default, thus perhaps warranting a lower annual lease rate);
- vi. Opportunities for enhanced revenue to a port, such as throughput guarantees (i.e. if a port receives monetary compensation based on the volume of product shipped through the leasehold). A port may award a lower base lease rate in exchange for a higher guaranteed minimum throughput);
- vii. Maintenance, repair and/or construction obligations assumed by a tenant (i.e. a port may accept a lower annual lease rate if the tenant assumes certain maintenance or repair obligations, thereby improving the underlying property’s value);
- viii. Indemnification and insurance provisions (i.e. a port may accept a lower annual lease rate if the tenant provides high limit insurance policies or conversely demand a higher lease rate if the tenant provides a lower value policy);
- ix. An evaluation by the port of the environmental risks, if any, associated with the proposed activity;

- x. The leasehold excise tax benefits that will accrue to the State and local governments;
- xi. The extent to which the tenant will support overall economic development in the port district or indeed throughout the State, and;
- xii. The competitive nature of the lease transaction (i.e. a port may accept a lower annual lease rate if a desirable tenant has other choices outside the district or outside the state).

The Petitioners' myopic "monetary price only" view is simply not supported by the plain dictionary definition of "price" and "consideration" used in RCW 42.30.110(1)(c). Petitioners' interpretation is equally impractical, as it is impossible to have a meaningful discussion of monetary "price" without also discussing a proposed lease's extensive non-monetary considerations.

C. The OPMA Must be Harmonized with the PRA. When Read Together, These Statutes Confirm that Governments, Including Port Districts, May Discuss the Broad Range of Lease Terms that Impact Price During Executive Session.

Petitioners argue that this Court must interpret the OPMA in exclusion while ignoring any other related statutes.¹² This is error.

It is well established that:

Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other.

¹² Petitioners' Reply Brief at 11-12.

US West Communications, Inc. v. Washington Utilities and Transportation Commission, 134 Wn.2d 74, 118 (1997) (citing *Bour v. Johnson*, 122 Wn.3d 829, 835 (1993)).

That the OPMA and the PRA relate to the “same subject matter” is without dispute given their identical legislative declarations. RCW 42.30.010 and RCW 42.56.030. If the similarity in purpose were not clear enough, the 2015 amendment to the PRA specifically exempting documents discussing “price” in real estate transactions directly references the corollary provision in the OPMA central to this case, i.e. RCW 42.30.110(1)(c). See RCW 42.56.260. Accordingly, the OPMA and PRA must be harmonized to give effect to both statutes.

As occurred here, it has long been the practice of port districts’ staff (and other municipal entities) to keep their part-time elected officials apprised of lease negotiations while holding internal analysis documents exempt from public disclosure under the PRA, releasing those documents only after the lease is executed or abandoned. See RCW 42.56.280. In 2015, the Legislature strengthened this practice by adopting RCW 42.56.260, which exempts from public disclosure:

Documents prepared for the purpose of considering the minimum price of real estate that will be offered for...lease when public knowledge regarding such consideration would cause a likelihood of a decreased price, including records prepared for executive session pursuant to RCW 42.30.110(1)(c).

RCW 42.56.260(1)(b)(emphasis added). Like the “deliberative process” exemption, this protection ends when the lease is finalized or abandoned. RCW 42.56.260(2). By adopting this provision, the Legislature directly recognized the tie between the PRA and the OPMA.

That the Legislature adopted RCW 42.56.260 to protect a wide range of real estate transactional documents during active negotiations is further supported by floor comments made to the Legislature during debate on the bill.¹³ Petitioners argue that the Court cannot consider these comments because they were made by the City of Kent and not a legislative member. This is incorrect.

This Court has recognized that floor comments from non-legislative members are indicative, though not conclusive, of the Legislature’s intent in adopting a statute. See *Hama Hama Company v. Shorelines Hearings Board*, 85 Wn.2d 441, 451 (1975)

¹³ For a detailed analysis of those comments, see Brief of Respondents at Pgs. 31-33.

(Noting that extrinsic evidence including floor comments would be indicative, though not absolute, evidence of intent); *Cockle v. Dept. of Labor and Industries*, 142 Wn.2d 801, 809-811 (2001) (Court examined Dept. of Labor & Industries “explanatory comments” on Industrial Insurance Act to determine Legislative intent).

Accordingly, the comments that RCW 42.56.260 was adopted to protect “offers, counter offers, restrictive covenants, and other real estate documents”¹⁴ indicates the Legislature’s recognition that a number of terms and conditions can and do constitute the “price” of a lease and directly impact the monetary rent paid.

D. Petitioners’ Interpretation of the OPMA would Limit Governments’ Ability to Utilize their Real Estate Assets in a Manner that Optimizes the Public Interest. This is an Impermissible and Absurd Result.

The courts have a duty to avoid absurd results when interpreting a statute. *Estate of Bunch v. McGraw Residential Center*, 174 Wn.2d 425 (2012). Petitioners’ interpretation of the OPMA would critically hinder governments’, including port districts’, ability to utilize their real estate holdings for their statutory purposes, which is a patently absurd and unintended result that the Court must avoid.

¹⁴ *Id.* at Pg. 31.

It is clear that public agency employees, like the staff at the Port of Vancouver USA, could prepare a detailed and confidential written analysis of a proposed lease using the financial, commercial and proprietary information exemption at RCW 42.56.270 or the deliberative process exemption found at RCW 42.56.280. This analysis could have a real estate appraisal attached pursuant to RCW 42.56.260. One would hope that the memo would contain the unvarnished opinions of all aspects of the proposed transaction. It is uncontested that this completed memo could be presented to the elected officials in executive session per RCW 42.56.260(1)(c). Petitioners' reading would then lead to the absurd result that the elected officials could only inquire about the "price" and not have any discussion between themselves or with the employees concerning the contents of the memo or how the employees weighed all the relevant factors to arrive at the recommended "price."

In other words, Petitioners' reading of RCW 42.30.110(1)(c) would allow employees to "put it in writing" but not "talk about it" with the elected officials. This makes no sense, makes elected officials less effective, and does not serve any public interest. Moreover, the Hobson's choice presented to elected officials by this

reading is apparent – either: (i) remain uninformed and without the ability to learn from and guide the staff, or; (ii) create a private benefit and public loss by holding discussions in public.

When analyzing this case, one must set aside the controversial nature of the proposed project¹⁵ and focus instead on the applicable law in the context of governments functioning within the confines and intents of those laws. In doing so, it is noteworthy that port districts have an important economic development role in Washington that would be significantly crippled under Petitioners' interpretation. Key to this economic development role is insuring that ports, to the maximum extent possible, advance the public interest when leasing publicly owned property.¹⁶

Complex multi-layered real estate transactions involve long term commitments, the payment of significant money, allocation of risk, weighing of public benefits and potential liabilities, and other interrelated issues and provisions.¹⁷ The OPMA, in conjunction

¹⁵ Including the climate change and environmental concerns, which now rest squarely before the Energy Facility Siting Evaluation Committee.

¹⁶ To that end, ports are authorized to lease "all lands...owned and controlled" by the port "for such purposes and upon such terms as the port commission deems proper." RCW 53.08.080.

¹⁷ Indeed, here Petitioners have asked that public policy considerations now being debated nationally and globally be determined and taken into account.

with the corollary PRA provisions discussed *infra*, essentially functions as a two-way street between the elected officials and the governments' staff to insure that the public interest is protected and advanced during negotiations of a real estate transaction. The part-time elected officials receive the advantage of relying on unvarnished expert advice from staff. Each elected official can receive the same information, can hear the other elected officials questions and staff responses, and can themselves ask questions, all without publicly revealing their concerns, strategy, or minimally acceptable terms to the potential tenant or competing landowners. At the same time, the professional staff can understand the elected officials' individual and common concerns, questions, and interests so that the staff can tailor negotiations along those lines. This allows staff to insure they are on track to negotiate a real estate transaction that will further the public interest as defined by the elected officials without losing all negotiating leverage.

Most importantly,¹⁸ in order to maintain the relative bargaining power on both sides, thereby protecting the public interest, these discussions between elected officials and staff must

¹⁸ As the Legislature recognized by adopting RCW 42.30.110(1)(c), RCW 42.56.280, and RCW 42.56.260.

occur outside of the public eye. If any elected body, including port commissions, had to discuss the non-monetary lease compensation and public policy considerations with its staff in public during lease negotiations, it would guarantee that the prospective tenant and competing landowners would always receive an advantage leading to the minimally acceptable non-monetary compensation and public interest terms in every lease. This minimizes, not maximizes, the public interest.

To offer an analogy, consider an attorney consulting with a public entity client regarding settlement negotiations for an ongoing commercial lawsuit. The negotiations could necessarily involve interrelated issues such as statements of liability, future forbearance, release of liability, indemnification, and monetary and non-monetary compensation. No one would argue that holding such discussions publicly would be a good idea, benefit the public entity, or advance the public interest. Public discussion of the minimum terms on which a public entity is willing to lease public property is an equally poor idea.

V. CONCLUSION

Petitioners urge this Court to adopt an absurd reading of the OPMA which: (i) contradicts the Black's Law Dictionary definition of

“price” as including non-monetary compensation; (ii) ignores the complementary interplay of the PRA, and; (iii) would significantly harm the public interest by guaranteeing that port districts (and other governmental entities) always receive the minimally acceptable terms in real estate transactions. The WPPA respectfully requests that this Court reject this absurd reading of the OPMA and, instead, adopt a plain language reading of RCW 42.30.110(1)(c) recognizing that by using the terms “price” and “other consideration” the Legislature clearly encompassed both monetary and non-monetary compensation. This will preserve the ability of locally-elected officials to act in the public interest in stewarding public real property assets.

Respectfully submitted this 29th day of December, 2016.

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DECLARATION OF SERVICE

I, Frank J. Chmelik, declare under penalty of perjury under the laws of the State of Washington that I am one of the attorneys for *Amicus Curiae* Washington Public Ports Association, and that on December 29th, 2016, I caused the foregoing BRIEF OF *AMICUS CURIAE* WASHINGTON PUBLIC PORTS ASSOCIATION to be served on the following parties, in the manner indicated:

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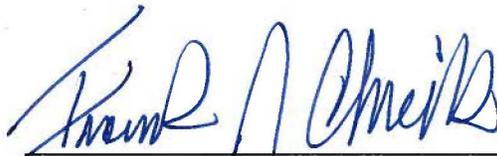
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