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IN THE SUPREME COURT
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Supreme Court No. 92455-4

(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.

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION.

The Open Public Meetings Act (“OPMA”) includes an exception that allows governing bodies to exclude the public from meetings to “consider the minimum price at which real estate will be offered for... lease.” RCW 42.30.110(1)(c). The legislative directives of OPMA require that such exceptions be narrowly construed. *E.g.*, *Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429, 433 (1999). The Port of Vancouver USA (“Port”) nonetheless contends that this exception allowed it to exclude the public throughout its planning of the nation’s largest crude-by-rail oil terminal to discuss all of the “key deal terms”—which the Port apparently construes to mean every aspect of the project. That interpretation is inconsistent with the plain language of the statute, the Court’s precedents requiring that OPMA exceptions be construed narrowly, and the legislative history of the “minimum price” provision.

OPMA was enacted in recognition of the public’s inalienable right to be present during all deliberations by officials on decisions that will affect the public. *See Cathcart v. Andersen*, 85 Wn.2d 102, 108, 530 P.2d 313, 316–17 (1975). The approval of a lease for the construction of this oil terminal on the banks of the Columbia River is one of the most significant decisions the Board of Commissioners (“Board” or “Commissioners”) will make during their tenure with the Port. The project will have significant

impacts on people living in the Vancouver metropolitan area and throughout the region that will see dramatic increases in the number of oil trains moving through their communities. The Board violated OPMA and undermined public trust by repeatedly excluding the public from deliberations on this project before approving the lease.

The trial court adopted the interpretation of OPMA's "minimum price" provision that the Board proffered below, holding that the Board may exclude the public to discuss any:

(1) information that would give the customer an advantage in negotiating a lower price; and (2) information that would give a competitor an opportunity to negotiate with the Port's customer, thus creating a bidding process that would decrease the Port's price.

Clerk's Papers ("CP") 2721–22. The Board has now abandoned that interpretation, and instead argues that it may hold private meetings to "discuss the key deal terms that drive the minimum price for the lease." Respondents' Brief ("Resps.' Br.") 3.

The Board's new interpretation suffers from the same deficiency as that adopted by the trial court. Instead of limiting private deliberations to the minimum price that property will be offered as prescribed by OPMA, the Board argues that it may exclude the public from discussions on any aspect of a proposal that could affect the price, regardless of whether the price is even being considered. As demonstrated by the testimony of

Commissioner Baker, every aspect of a real estate transaction could affect the price and would therefore be a permissible topic for executive session under the Board's interpretation. *See* CP 1507 (Tr. 61:13–25). The Court should reject the Board's invitation to rewrite OPMA's allowance for executive sessions to "consider the minimum price" in a manner that would allow private discussions on all "key deal terms."

The Port argues that OPMA must allow for some discussion on the reasons why a particular price is warranted—otherwise, "public bodies would be forced to propose random numbers untethered to the key elements of the deal." Resps.' Br. 23. The most reasonable interpretation of the statute is one that limits discussions to the minimum price at which property is to be offered. However, to the extent any broader interpretation is warranted to allow for some discussion of the reasons supporting a particular price, those discussions should nonetheless be confined to actual deliberations on the minimum price at which real estate will be offered.

This appeal does not involve private meetings convened by the Board to deliberate on the minimum lease price during which there were some focused discussions on the reasons supporting a price. In fact, it is undisputed that Port staff—not the Board—establishes and negotiates the price based upon a determination of the fair market value. CP 1456 (Tr. 11:9–13, 12:1–13); *and see* CP 1174 (Tr. 30:21–31:12); *and* CP 1416 (Tr.

22:19–23:9). The Board does not do any independent investigation on the price, but instead simply asks staff whether they conducted an assessment of the fair market value. CP 1456 (Tr. 12:8–13). None of the meetings at issue included any deliberations whatsoever on what the minimum lease price should be. In fact, the price components of the lease were rarely even mentioned at the Board’s extensive private meetings on the project.

Those meetings violated OPMA. Plaintiffs-Petitioners Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center (collectively, “Riverkeeper”) respectfully request the Court reverse the decision of the trial court and remand for further proceedings

II. ARGUMENT.

A. OPMA Does Not Allow the Board to Exclude the Public Whenever it Wants to Discuss any Key Deal Terms.

OPMA 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 Board contends this allows private meetings on all “key deal terms” that could affect price when public discussion would cause a likelihood of decreased price. Resps.’ Br. 3. Given the breadth of issues discussed at its executive sessions, the Board apparently interprets this to encompass nearly every aspect of a real estate

transaction. *See* Petitioners' Opening Brief ("Pets.' Br.") 12–20. Neither the plain language of the statute nor the legislative history suggests that the legislature intended "minimum price" to mean all "key deal terms."

1. **The plain language of OPMA limits private discussions to the minimum price, not all key deal terms.**

The plain language of OPMA allows the Board to go into executive session only to "consider the minimum price at which real estate will be offered for... lease." RCW 43.30.110(1)(c). The Court should reject the Board's request to rewrite this provision to allow executive sessions to consider all "key deal terms."

OPMA provides direction on how it is to be interpreted. Specifically, the statute states that its "purposes are... remedial and shall be liberally construed," RCW 42.30.910, which carries with it a "concomitant intent that its exceptions be narrowly confined." *Miller*, 138 Wn.2d at 324 (quotation omitted). This guides interpretation of OPMA's provisions for executive sessions. *See id.* at 327–28.

The Board does not seriously refute that "minimum price" as used in OPMA refers to the least attainable monetary value at which real estate will be offered. Resps.' Br. 21–22. Instead, the Board contends that "to consider" the minimum price necessarily encapsulates everything that may

affect the price. *Id.* at 23. The Court should reject this effort to dramatically increase the scope of OPMA’s minimum price exception.

The Board notes that “consider” is defined in the dictionary to mean “think about with a degree of care or caution.” Resps.’ Br. 22 (quotation omitted). The legislature narrowly confined what could be considered, or thought about with a degree of care or caution, to one subject—the minimum price at which property will be offered. This does not allow for private discussions on everything that could affect the price.

For example, the Court in *Miller* addressed OPMA’s provision allowing executive sessions to “evaluate the qualifications of an applicant for public employment.” 138 Wn.2d at 326 (quotation omitted). The dictionary definition of “evaluate” is “to examine and judge concerning the worth, quality, significance, amount, degree, or condition of.” *Id.* at 328 (quotation omitted). “[T]he verb ‘evaluate’ applies to the applicant’s qualifications.” *Id.* The Court thus interpreted the exception “narrowly and in accordance with the purposes of [OPMA]” to allow executive sessions only to “discuss and consider the worth, quality and significance of the applicants’ *qualifications*, [in which] individual council members could express their opinions on such matters.” *Id.* (emphasis in original).

OPMA’s minimum price provision should be interpreted similarly. The verb “consider” applies to “the minimum price at which real estate

may be offered.” The statute thus allows the Board to go into executive session to “think about with a degree of care or caution” only the minimum price—not all “key deal terms” that could affect the price.

A fundamental problem with the Board’s argument is that it seeks to hold executive sessions to discuss all of the so-called “key deal terms” whenever it wants to shield its discussions from the public—irrespective of whether the Board is actually deliberating on the minimum price. This provision should be interpreted consistent with the plain language to narrowly allow private discussions only on the minimum price. However, to the extent a broader construction is warranted to allow discussions on the reasons supporting a particular price, those meetings should still be confined to deliberations focused on setting the minimum price. The Court should reject the Board’s contention that “to consider the minimum price” means to consider all key deal terms that may affect price, regardless of whether the minimum price is actually being considered.

In an effort to support its interpretation, the Board points to OPMA language specifying that “final action selling or leasing public property shall be taken in a meeting open to the public.” Resps.’ Br. 26–27. The Board contends that this “creates a boundary” that allows it to discuss in executive session any topic that may affect the price so long as it does not

enter into a final agreement to lease property. *Id.* at 27. The Court rejected a nearly identical argument in *Miller*.

OPMA's provision allowing executive sessions to evaluate an applicant's qualifications at issue in *Miller* similarly provides that certain final actions must occur at open meetings. 138 Wn.2d at 326; *compare* RCW 42.30.110(1)(c) and RCW 42.30.110(1)(g). It was argued in *Miller* that such language implicitly allows other actions to occur in executive sessions. 138 Wn.2d at 326–27. That “argument... involves an inherent misreading of the operation of [OPMA] and its exceptions... [and] reverses the fundamental premise of the act that all ‘action’ must be taken at meetings open to the public.” *Id.* OPMA defines meetings that must be open to the public as those “at which action is taken” and “action” is defined broadly to include “deliberations and discussions.” RCW 42.30.020(3)–(4). The Court thus held that the OPMA exception only allows an executive session to “evaluate the qualifications of applicants” and that anything more “violated the act.” *Miller*, 138 Wn.2d at 327.

Similarly, the provision at issue here allows executive sessions only to “consider the minimum price at which real estate will be offered for... lease.” RCW 42.30.110(1)(c). The Court should reject the Board's contention that it may exclude the public from deliberations on all “key deal terms” so long as it does not approve a final lease agreement.

2. **The legislative history does not suggest an intent to allow broad private discussions on all key deal terms, but rather shows an intent to narrowly limit discussions to the minimum price.**

OPMA’s legislative history demonstrates an intent to narrowly limit discussions in executive sessions to the minimum price. The Court should reject the Board’s argument that recent testimony by a regulated entity (*i.e.*, not a legislator) on a different statute is somehow informative as to the legislature’s intent in amending OPMA in 1979 and 1985.

Executive sessions on the disposition of real estate were first authorized in 1979. Petitioners’ Appendix (“Pets.’ App.”) 15–16. The legislature did not intend to allow broad discussions on all “key deal terms.” Rather, the legislative history demonstrates an intent to make the exception as narrow as possible, resulting in language explicitly limiting private discussions to the minimum selling or leasing price.

In 1979, House Bill 248 initially proposed to allow broader executive sessions—not only on the minimum price, but also on whether to dispose of property. *Id.* at 20. The Senate Committee on Local Government proposed amending the bill to limit the executive sessions to port districts in an effort “to keep things as tight as possible and make the exemptions to the [OPMA] as limited as possible.” *Id.* at 35. Senator Wilson moved for adoption of that amendment, but explained that he did

not object to its defeat so long as a floor amendment was adopted. *Id.* at 30, 35. The enacted bill did not limit executive sessions to port districts, but instead adopted Senator Wilson's floor amendment which provided that "the discussion shall be limited to the minimum selling or leasing price." *Id.* at 15–16, 25, 37–38. Senator Wilson explained the amendment limited executive sessions "to deciding how high or how low they are willing to go" and that "[a]ll other aspects relating to the sale or lease... would have to be conducted in an open meeting." *Id.* at 34. The 1979 legislature did not authorize private discussions on all non-monetary "key deal terms," but instead made the OPMA exemption "as limited as possible" by allowing discussions only on the minimum price.

The Board seems to recognize such an intent in acknowledging that the 1979 amendments expressly limited private discussions to the minimum price. Resps.' Br. 30. The Board is mistaken, however, in arguing that the 1985 OPMA amendments were intended to broaden executive sessions on the disposition of public property.

Prior to the 1985 amendments, OPMA addressed executive sessions on the sale or lease of property in two sentences: one authorized the executive sessions "to consider the disposition of real estate..." the other sentence limited the private meetings to "discussion... [on] the

minimum selling or leasing price.” *Pets.*’ App. 15–16. The sentences were separated by language pertaining to other types of executive sessions. *Id.*

The 1985 amendments added categories of executive sessions and reorganized the descriptions of all executive sessions from a single section to subsections. *Id.* at 18–19. The two sentences discussed above were combined into a single sentence in a new subsection that includes both the authorization and the limitation, allowing executive sessions to “consider the minimum price at which real estate will be offered...” *Id.* The legislative history indicates that this was a non-substantive amendment to existing law. *See id.* at 23–24; *see also id.* at 26–27. The legislature did not intend to allow broader discussions, but rather used the terms “discuss” and “consider” interchangeably. *See id.* at 22–23 (the bill “left intact” the “authorization to discuss, in executive session, the minimum price”).

In a final effort to support its misguided interpretation of OPMA, the Port points to testimony from a representative of the City of Kent provided to the legislature in 2015, in support of bill to amend the Public Records Act. *Resps.*’ Br. 31–32. These arguments lack merit.

First, the Court should be “wary about expecting to find reliable interpretative help outside the record of the statute being construed.” *See Doe v. Chao*, 540 U.S. 614, 626–27 (2004); *and see N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529–30 n.21 (1982) (criticizing use of legislative

history of one statute to construe another). Legislative history on an amendment to the Public Records Act in 2015, should not be used to infer the legislature's intent behind its amendments to OPMA in 1979 and 1985. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (“the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one”) (quotation omitted)).

Second, the testimony relied upon by the Port was not that of a legislator, but a representative of the City of Kent—an entity regulated by OPMA and the Public Records Act. *See Resps.’ Br.* at 31–32. There is no indication that the legislature relied on that testimony when it amended the Public Records Act in 2015. Such testimony therefore should not be “accord[ed] any significance” even when construing the Public Records Act. *See Kelly v. Robinson*, 479 U.S. 36, 50 n.13 (1986); *and see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001) (“We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal...”).

In sum, the legislative history of OPMA indicates an intent to craft the exemption for executive sessions on the disposition of property as narrowly as possible. The legislature did so by limiting the private meetings to discussions on the minimum price.

B. The Trial Court Erred in Holding that Five of the Board's Private Meetings Complied with OPMA.

The trial court erred in granting summary judgment to the Port on five meetings. For these private meetings to have complied with OPMA, two conditions must be satisfied. First, the Board must have limited its consideration to “the minimum price at which the real estate will be offered for... lease.” RCW 42.30.110(1)(c). The meetings violated OPMA because it is undisputed that they covered broad topics well beyond price. Second, even when discussions are limited to the minimum price, executive sessions are allowed only when “public knowledge regarding such consideration would cause a likelihood of decreased price.” *Id.* The parties did not move on that issue or submit sufficient evidence for a determination thereon—summary judgment therefore should not have been entered finding that the meetings complied with OPMA.

1. The Board violated OPMA by not limiting its private discussions to the minimum lease price or even to the “key deal terms” that affect price.

It is undisputed that the Board did not limit its discussions in executive sessions to the minimum price at which the property would be offered for lease. These meetings therefore violated OPMA. Moreover, the private meetings did not even comply with the standard urged by the Board. The Board’s representation that it merely discussed “price in

tandem with the key deal terms that drive price” is a gross misrepresentation of the undisputed facts in this case. *See* Resps.’ Br. 33.

The Board discussed nearly every aspect of the proposed oil terminal in its private meetings. Those meetings included very little mention of the “price” components of the lease and they did not include any discussion of how the concerns and issues discussed affect the price. This is not surprising given that Port staff establishes and negotiates the price based upon its own determination of the fair market value and the Board merely asks the staff whether it engaged in that process without any independent investigation. CP 1456 (Tr. 11:9–13, 12:1–13); *and see* CP 1174 (Tr. 30:21–31:12); *and* CP 1416 (Tr. 22:19–23:9).

a. **The Board’s March 26, 2013, meeting violated OPMA.**

During its private meeting on March 26, 2013, the Board discussed entering an agreement to negotiate exclusively with Tesoro-Savage for the oil terminal—a topic beyond even the Board’s interpretation of OPMA under which it can discuss the “key deal terms” that affect the lease price.

The Port explained that, “as of March 26th we would have still been negotiating on the different rates. And by we I mean the Port staff and the Tesoro-Savage joint venture... We were also, I believe,

negotiating on the exclusivity opinion...” CR 1190 (Tr. 95:3–7). In describing the discussions in the executive session, the Port testified:

...we were presenting to the Commissioners the current status of the terms, and again, related to that host of the lease rate, the warfage, the dockage, the rail fees. And one of the next steps was the Exclusivity Agreement...

Id. (Tr. 96:7–11). With respect to the exclusivity agreement, the Port discussed the “schedule component of how long [the Port] should allow that exclusivity...” *Id.* (Tr. 96:19–20),

Riverkeeper does not concede, as the Board contends, that the presentation of rates at this meeting complied with OPMA. Resps.’ Br. 35. Rather, this entire meeting was unlawful because it was not convened to allow the Board to deliberate on the minimum price, nor did any such discussions occur. Port staff merely provided an update on the status of the lease negotiations, including the monetary terms. Riverkeeper’s decision to not address that portion of the meeting should not be construed as an agreement with the Board that those private discussions were lawful.

Riverkeeper has focused on the discussions at this meeting pertaining to the exclusivity agreement because they are well beyond any interpretation of the “minimum price” at which property will be leased. These topics are not even within the Board’s newly fabricated standard allowing discussion of all “key deal terms.” The Board has instead insisted

that it needed to keep these discussions private because, if disclosed, “a competitor port could swoop in and take the Port’s opportunity.” CP 1574. OPMA does not allow the Board to exclude the public from discussions that have nothing to do with setting the minimum price simply because it is worried about competition from other public ports.

The Board also suggests that the exclusivity agreement could affect the price because it affects when the Port could lease the property to others. Resps.’ Br. 35. This demonstrates the breadth of the Board’s interpretation of the “minimum price” provision. Even if the exclusivity agreement could somehow affect the lease price, the discussions violated OPMA because they were not limited to the minimum price, nor were they part of deliberations by the Board to set the minimum price. Rather, Port staff negotiated and executed the exclusivity agreement. *See* CP 1173 (Tr. 26:19–27:2); CP 2544. Port staff also determined and negotiated the lease price on its own. *E.g.*, CP 1456 (Tr. 11:9–13, 12:1–13). This private Board meeting therefore had nothing to do with setting the minimum lease price.

b. The Board’s July 9, 2013, meeting violated OPMA.

The Board violated OPMA when it excluded the public from deliberations on the oil terminal on July 9, 2013. This meeting included no discussion whatsoever of any price components of the lease.

This executive session “continued discussion around the formation of the new entity, the LLC that [Tesoro-Savage] would operate under and the risks associated with that.” CP 1205 (Tr. 156:15–17). The Board was concerned about whether the Tesoro-Savage “joint venture was merely a shell without adequate assets to do the cleanup....” CP 1470 (Tr. 66:7–20). These deliberations were not limited to the minimum lease price, nor was there any discussion of “key deal terms” that would be permissible under the Port’s expansive interpretation of the minimum price provision.

The Board nonetheless argues that the meeting was lawful because the Port required a high lease rate and imposed insurance requirements to mitigate the risks associated with development of the oil terminal by a new corporate entity. Resps.’ Br. 36. However, this meeting did not actually include discussions on the insurance requirements or the lease rate. Moreover, contrary to the Board’s suggestion, a requirement to carry insurance is not part of the lease value paid to the Port. *See id.* This meeting violated OPMA because it was not limited to deliberations on the minimum lease price and did not even include a discussion of the price.

c. **The Board’s July 16 and 17, 2013, meetings violated OPMA.**

The Board’s private deliberations on July 16 and 17, 2013, covered nearly every aspect of the project. These meetings violated OPMA.

It is undisputed that these meetings included discussions on the type of crude oil that would be handled and the differences associated therewith, the facility layout, timelines for the lease and facility operation, construction deadlines, insurance requirements, and the “risk associated with any of the potential crude oil that could be handled...” CP 1205–06 (Tr. 157:25–158:22, 161:9–11). There were discussions on the lease’s environmental provisions (*e.g.* post-lease remediation) and safety provisions (*e.g.*, operations and safety plan). *See* CP 1361–62; *and* CP 1206 (Tr. 161:7–17). The Board also discussed concerns raised by Commissioner Wolfe related to “the size of the tanks and the risks associated with the tanks,” such as those from gases, and the Port’s ability to require “later generation rail cars.” CP 1207 (Tr. 162:7–22).

The Board again argues that Riverkeeper concedes that discussions on certain rates at these meetings were permissible. Resps.’ Br. 37. This is incorrect. The discussion on rates consisted of Port staff presenting the Board with the various rates that had been negotiated by the staff using a document describing the “Ground Lease Highlights.” *See* CP 1206 (Tr. 160:4–161:6); CP 1357–63. There were no deliberations on what the minimum price should be—that is determined independently by Port staff. *E.g.*, CP 1456 (Tr. 11:9–13, 12:1–13). This entire meeting was therefore

unlawful and Riverkeeper's decision to focus on the other extensive topics discussed should not be construed to suggest otherwise.

The Board contends that its discussions on every other aspect of this project were permissible because such matters could affect the lease price. Resps.' Br. 37. This argument should be rejected as inconsistent with OPMA's narrow allowance for executive sessions to consider only the minimum price. Acceptance of the Port's position would read out of OPMA any limitation on discussions that can occur behind closed doors when leasing public property. Particularly disconcerting is concealment of deliberations on concerns raised by an elected Commissioner on issues of public safety, such as the type of rail cars that will be used to carry explosive oil through downtown Vancouver. *See* CP 1207 (Tr. 162:7-22). OPMA seeks to ensure officials remain accountable to their constituents by providing access to such deliberations. *See* RCW 42.30.010.

d. The Board's July 23, 2013, meeting violated OPMA.

The final executive session at issue occurred on July 23, 2013, immediately before the Board voted to approve the lease. *See* CP 1259, 1268. This meeting did not include any consideration whatsoever of the lease price or rates and therefore violated OPMA.

During this meeting, the Board reviewed a newly added lease term that allows the Port to “approve the operation and safety plan before [Tesoro-Savage] could go into operation.” CP 1209 (Tr. 170:18–23). The term was drafted in response to the Board’s private deliberations the previous evening on public comments and concerns about the project. CP 1207–09 (Tr. 164:20–165:14, 167:11–24, 168:16–22, 170:18–23).

The Board argues that this private meeting was permissible because it “was not certain that Tesoro-Savage would agree to [the new term] without renegotiating all of the pricing terms.” Resps.’ Br. 38. The Port does not even suggest that these private discussions involved the Board considering the lease price. This meeting therefore violated OPMA.

2. The Board did not establish that disclosure would likely reduce the lease price.

In addition to limiting discussions to the “minimum price,” OPMA also limits executive sessions to circumstances where public disclosure would cause a likelihood of decreased price. RCW 42.30.110(1)(c). The trial court erred in determining on summary judgment that the Board complied with OPMA because no party moved for summary judgment on the issue of whether there was a likelihood of decreased price.

As an initial matter, the Board is wrong in asserting that the sufficiency of evidence supporting the trial court’s summary judgment

ruling is beyond the issues accepted for review by the Court. Riverkeeper was required to provide “a concise statement of the issues presented for review.” RAP 17.3(b)(4). Riverkeeper did so by identifying the trial court’s refusal to determine that numerous meetings violated OPMA and the determination instead that five meetings complied with OPMA. *See* Motion for Discretionary Review 1–2 (Nov. 6, 2015). The Court granted review “as to the five meetings on which the Superior Court granted summary judgment of dismissal.” Order (March 31, 2016).

In reviewing that summary judgment decision de novo, the Court will affirm only if there are no genuine issues of material fact and the Board is entitled to judgment as a matter of law. *See Wilkinson v. Chiwawa Cmty. Ass’n*, 180 Wn.2d 241, 249, 327 P.3d 614, 618 (2014). Review of the issue accepted by the Court therefore encompasses whether there are genuine issues of material fact that preclude the judgment entered by the trial court. Riverkeeper was not required to include in its motion for review a dress rehearsal of all the arguments it will make as to why the trial court erred in determining the Board complied with OPMA.

The Port is also incorrect in arguing that the trial court could hold that the Board complied with OPMA in ruling on Riverkeeper’s motion. *See Resps.’ Br.* 40–41. While summary judgment may be entered in favor of a nonmoving party, the judgment must be limited to the issue raised in

the motion. *See* CR 56(c) (“judgment *sought* shall be rendered” (emphasis added)). “The need for such a limitation is obvious. Apart from considerations of simple fairness, allowing a summary judgment motion by any party to bring up for review every claim and defense asserted by every other party would be tantamount to shifting the well-accepted burden of proof on summary judgment motions.” *Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 430, 676 N.E.2d 1178 (1996) (limiting ability to grant judgment to nonmoving parties to issues addressed in the motion).

Two separate elements must both be satisfied for the Board’s private meetings to have complied with OPMA: (1) they must be limited to consideration of the minimum price and (2) public disclosure must pose a likelihood of decreased price. *See* RCW 42.30.110(1)(c). Riverkeeper moved for summary judgment only on the first requirement—arguing that the Board “violated OPMA... by excluding the public from... meetings where a wide range of topics were addressed beyond the minimum price...” CP 1131. To the extent applicable standards were satisfied, summary judgment could be entered in favor of the Board on the issue of whether the meetings were limited to the “minimum price.” The trial court erred, however, in finding that the meetings complied with OPMA because no party moved for summary judgment on the issue of whether public disclosure would have caused a likelihood of decreased price.

Riverkeeper was therefore not on notice that the trial court may rule on that issue or given an opportunity to demonstrate disputed facts.

Further, the material the Board now points to supposedly demonstrating that public disclosure would have resulted in a likelihood of decreased price does not even address most of the meetings at issue. *See Resps.* Br. 43. This “evidence” consists of Todd Colman opining that public disclosure of the exclusivity agreement discussed on March 26, 2013, would have reduced the price and vague opinions from three other witnesses relating to meetings held April 9, and July 22, 2013, which are not at issue here. CP 2544; CP 1610–12; CP 1614–15; CP 1628–29.

There was no evidence before the trial court whatsoever on the “likelihood of decreased price” with respect to the private meetings held July 9, July 16, July 17, and July 23, 2013. For example, it is difficult to see how public disclosure of the deliberations at the July 23, 2013, meeting could reduce the lease price. Those private discussions were on the new lease term requiring Port approval of an operations and safety plan. CP 1209 (Tr. 170:18-23). Immediately after the private meeting, the Commissioners held a public meeting explaining that their safety concerns were addressed, emphasizing the new requirement for approval of an operations and safety plan. CP 1259, 1266–68. There is no apparent reason for the public to have been excluded from similar deliberations.

Moreover, the Board's declarations lack foundation demonstrating that the witnesses are competent to provide conclusory opinions such as "the Port only discusses topics in executive session that fit within an executive session category." See CP 1628; and see *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359–61, 753 P.2d 517, 518–20 (1988). In sum, summary judgment should not have been entered finding that the Board's meetings complied with OPMA because the parties had not moved or submitted evidence on whether public disclosure would have caused a likelihood of decreased price.

3. **The Board misrepresents its intent in submitting inadmissible legal opinions and hearsay.**

The Board submitted impermissible legal opinions and hearsay from its general counsel, Alicia Lowe, instructing the trial court on how it should interpret OPMA. See CP 1602–03 (Decl. ¶¶ 5–7); and *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054, 1078 (1993). The Board now represents that it was actually submitting this evidence on injunctive relief issues to demonstrate that the Board's violations would not recur if the trial court rejected the Board's interpretation of OPMA. Resps.' Br. 45. This is another flagrant misrepresentation of the record. Nowhere in its briefing does the Board suggest such a purpose or argument. See CP 1583–91.

Instead, the Board cited Ms. Lowe's declaration in an effort to convince the trial court that the private meetings complied with OPMA—even asserting that "the Port's counsel is confident that the executive session complied with the scope of OPMA." CP 1579. The Board's counsel at oral argument emphasized Ms. Lowe's "assessment" of OPMA's minimum price provision, urging that it be adopted given "her years of experience, including... as the head of the legal committee of the Port's association..." Report of Proceedings 29:14–31:20. The representation that Ms. Lowe's legal opinions and hearsay testimony were submitted for a purpose other than to convince the trial court of the correctness of the Board's OPMA interpretation is entirely disingenuous. The trial court should not have considered these opinions in granting summary judgment.

III. CONCLUSION.

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

RESPECTFULLY SUBMITTED this 28th day of October, 2016.

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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 I am co-counsel for Plaintiffs-Petitioners Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center and that on October 28, 2016, I caused the foregoing Petitioners' Reply Brief to be served on the following in the manner indicated:

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Please accept for filing in the matter of Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., Supreme Court No. 92455-4, Petitioners' Reply Brief attached hereto.

Thank you, Brian.

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