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SUPREME COURT
h/h

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.

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I. INTRODUCTION

The mission of the Port of Vancouver USA (“Port”) is to provide economic benefit to the community through leadership, stewardship, and partnership. As part of that mission, the Port is equally dedicated to providing transparency to the public about its economic plans. That commitment to transparency is why the Port publicly announced its plan to seek proposals from potential tenants who wanted to build a crude-by-rail terminal on the Port’s property, and then engaged the public through a series of workshops to discuss nearly every aspect of the project. After months of dialogue with the public about the proposed project, the Port’s Board of Commissioners (“Commission”) deliberated and voted publicly to approve a contingent lease that granted Tesoro-Savage Joint Venture¹ the ability to construct an energy facility on the Port’s property if it obtained the necessary approvals, including a certification from the Energy Facilities Site Evaluation Council.²

During the six-month period before the Commission publicly voted on the contingent lease, the Port and its staff worked diligently to

¹ The full name of the entity is now Tesoro Savage Petroleum Terminal, LLC, which does business as Vancouver Energy. “Tesoro-Savage” refers to this entity throughout this brief.

² This Court held oral argument on Riverkeeper’s companion appeal regarding the lease approval on June 23, 2016. *See Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al.*, Supreme Court Case No. 92335-3.

determine and negotiate the key deal terms for the contingent lease, including the numerous price components. Due to the magnitude of the proposed lease, the Port needed to know a number of key deal terms—both monetary and non-monetary—that are crucial to setting the price, such as where the project would be located on the Port’s property, the wharfage and dockage rates for the site, the risks for the project and the tenant, and the expected return on investment, to name a few. In discussing these factors and determining how it would affect the price of the lease, Port staff provided updates to the Commission in executive session so that the confidential price details were not made publicly available to the Port’s competitors or the proposed tenant. If the Port prematurely released this type of competitively sensitive information, it could reduce the Port’s potential price on the lease, and defeat the Port’s obligation to obtain the best price for its taxpayers.

The confidentiality of five of these competitively sensitive discussions are the focus of the present appeal by Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center (collectively “Riverkeeper”). Riverkeeper contends that the Port violated the Open Public Meetings Act (“OPMA”), RCW Ch. 42.30, because the Commission met in executive session on five occasions to discuss with the Port’s lease negotiators and legal counsel the key deal terms that affected

the Port's price on the proposed lease.³ Riverkeeper believes that the OPMA permits a public entity to convene an executive session to discuss the absolute price floor it is willing to accept on the lease and nothing more.

But the OPMA provision allows public entities, like the Port, to consider in executive session the key deal factors that drive the minimum price for a proposed lease or sale of public property. Construing the OPMA provision in that fashion makes sense in light of the reality of complex real estate transactions. The Port understood that the OPMA limited its discussions in executive session to factors that drive the price, and it complied with that law in each of the five meetings at issue. This Court should therefore affirm the Superior Court's grant of summary judgment in the Port's favor.

II. RESTATEMENT OF THE QUESTIONS FOR REVIEW

A. Under RCW 42.30.110(1)(c), may a public entity discuss the key deal terms that drive the minimum price for the lease or sale of real estate when public knowledge regarding such discussions would cause a likelihood of decreased price?

³ Riverkeeper's brief also discusses two meetings on April 9, 2013 and July 22, 2013, however, this Court did not grant review as to those meetings, so they are not relevant to the present appeal and remain pending for determination at trial. This Court may therefore ignore any references to these meetings as part of its analysis.

B. Did the Port comply with the OPMA during five executive sessions where it discussed the key deal terms that would affect the minimum price on the Port's proposed lease when public knowledge regarding such discussions would cause a likelihood of decreased price?

III. RESTATEMENT OF THE CASE

A. Legal Framework

1. **The OPMA expressly permits public bodies to discuss certain matters in executive session.**

The OPMA is designed to ensure that public entity actions “be taken openly and that their deliberations be conducted openly.” RCW 42.30.010. By requiring open deliberations, the OPMA enables the public to observe all steps in the “making of governmental decisions.” *Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380, 384 (2002).

The OPMA does not, however, give the public the right to observe every discussion by a public entity. Instead, the OPMA makes clear that it may not be construed to “prevent a governing body from holding an executive session during a regular or special meeting” on specific topics. RCW 42.30.110(1). These topics include national security, real estate acquisitions and sales, negotiations on publicly bid contracts, complaints against public officers, and litigation. RCW 42.30.110(1)(a), (b), (c), (d), (f), (i). Executive sessions are permitted so the public entities may “consider confidential matters they are not privileged or desirous to

disclose,” so long as the final action based on deliberations in executive session is taken in an open meeting. Wash. Att’y Gen. Op. 1955-57 No. 179 (1955); *see also* Wash. Att’y Gen. Op. 1998 No. 15 (1998) (“The discussions at executive sessions are intended to be private.”). Thus, while exceptions to open government provisions should be strictly construed, the OPMA should not be construed to disadvantage a public entity in confidential communications. *See Port of Seattle v. Rio*, 16 Wn. App. 718, 724, 559 P.2d 18, 22 (1977) (noting that the right of a public entity privately to consult legal counsel is properly excepted from the right-to-know acts, and a public entity “should neither be given an advantage, nor placed at a disadvantage in litigation”). As the Court of Appeals described it, under the OPMA “not all issues need be discussed in public.” *Id.* at 723–24.

B. Factual and Procedural Background

1. The Port publicly announced its proposed project and created a team to analyze the proposals.

By the end of 2012, the Port’s staff publicly sought proposals from companies interested in developing petroleum-by-rail facilities on the Port’s property. (Clerk’s Papers (“CP”) at 1795–96, 2544.) The Port’s staff developed a statement of interest for the project and publicly sought proposals from companies interested in developing petroleum facilities on

the Port's property. (CP 1180, 2594.) At least four companies provided proposals to the Port for a project. (CP 1450, 2544.) The Commission did not, and did not need to, provide approval to the Port staff to pursue the proposed project because these preliminary steps were within the authority of the Port's Executive Director/CEO and the staff that he designates. (CP 1182-83, 1773-74.)

A team of the Port's staff members from a broad range of departments, including business development, environmental, engineering, finance, project management, marketing and sales, communications, and operations, analyzed the proposals and prepared a ranking sheet. (CP 1186-88, 1631, 2544.) After evaluating the proposals, the Port's team selected Tesoro-Savage as the potential tenant. (CP 1631.) The team then brought its recommendation to the Port's executive leadership, who agreed with the selection and directed the team to begin preliminary negotiations with Tesoro-Savage. (CP 1631, 2544.)

The Port's staff then met to discuss responsibilities for developing the proposed lease. (CP 1632.) The Port designated lead negotiators for the lease, however, all members of the team participated when the negotiations on a specific lease term or description related to their department or expertise (*e.g.* environmental, engineering). (CP 1618,

1632.) The Port's legal counsel was responsible for drafting the lease.
(CP 1597.)

The Port's Executive Director/CEO, using authority granted to him in 2009 by the Commission, then negotiated and directed the execution of an exclusive dealing agreement with Tesoro-Savage. (CP 1773-74, 2544, 2549-53.) Once the exclusive dealing agreement was executed, the Port announced the project and proposed tenant to the public. (CP 1838-39.) The Port believed that public disclosure prior to obtaining exclusivity would have affected the Port's price on the lease due to competition from other interested ports. (See CP 1195, 1202.)

2. The Port's staff spent months negotiating the complex lease terms with the proposed tenant.

For the next several months, the Port's staff negotiated with Tesoro-Savage on the proposed lease terms, including the numerous monetary terms. (CP 1804-07.) For example, the proposed lease included terms relating to base rent, wharfage rates, the land lease, rail maintenance fees, rail usage fees, and costs for improving or building structures. (CP 1806-07.) In addition to direct pricing terms, the proposed lease had many components that had to be identified and analyzed to determine its ultimate price, such as: the amount of property to be leased; the market value of any existing feature or amenities of the site; the duration of the lease; any required investments or improvements by the Port; the Port's

expected return on its investment in the short and long term, and whether the lease represents the highest return to the Port for that location; the projected flow of potential revenue streams; the feasibility of the lease rate, including the financial strength of the tenant, the stability of the tenant's business industry, and any tenant risks that must be mitigated; and the direct and indirect economic benefits for the local community (including family-wage jobs). (CP 244-45, 1618-20, 1806-07.) Due to the complexity of the proposed lease, a change to one of the monetary terms usually affected the other terms. (CP 1618-20.) The proposed lease was 63 pages long (429 pages with exhibits) and included 42 separate substantive paragraphs. (CP 2053-2483.)

The Port's negotiations with Tesoro-Savage were extensive. (CP 1183, 1632.) Indeed, the staff did not complete their negotiations on the proposed lease until shortly before the July 23 public vote, and continued to finalize the terms up until the evening before the vote. (CP 1183-84.)

The breadth of negotiations and lease terms were driven by the significant economic value of the lease to the Port and the community. The lease was worth upwards of \$200 million to the Port, and would result in hundreds of construction jobs and other permanent jobs for the community. (CP 1033.) The project would be the Port's largest single revenue generator. (CP 1170.)

3. During the negotiations, the Port's staff provided updates to the Commission on key deal terms that affected price.

Because the Commission has no involvement with the negotiations of a lease, Port staff occasionally provided updates to the Commission on the status of negotiations by delivering summary documents to them or providing verbal updates via one-on-one communications. (CP 1004, 1169, 1079, 1614–15.) Once a proposed lease is close to being considered by the Commission, Port staff provide the first few pages of the lease to the Commission and discuss the price-related elements with them in executive session. (CP 1174.)

As relevant to the present appeal, the Port held five executive sessions between March and July 2013 to consider matters affecting the minimum price on the Port's proposed lease with Tesoro-Savage. (CP 1219–22.) During these executive sessions, Port staff presented information to the Commission related to the price at which the real estate would be offered for lease because if made public, the disclosure would likely decrease the price of the lease. (CP 1818–22, 1869–75, 1882–85.) Specifically, Port staff discussed: the current status of the price-related lease terms, such as the base rate, wharfage fees, dockage fees, and rail fees; a proposed schedule for exclusivity with the tenant and associated rate structures, including acreages, facilities, rail infrastructure, and other

essential deal terms; and financial risks related to the tenant. (*Id.*) The Port conducted all of its executive sessions in accordance with the law and its narrow interpretation of the “minimum price” provision under the OPMA. (CP 1887–88.)

a. The March 26, 2013 executive session discussed price-related lease terms.

During the March 26 executive session, Port staff presented the current status of the price-related lease terms, such as the base rate, wharfage fees, dockage fees, and rail fees. (CP 1190–91.) The Port staff also discussed the proposed schedule for the exclusivity agreement (*e.g.* how long exclusivity should exist). (CP 1190.) The Port believed these topics related to the price at which the real estate would be offered for lease because if made public, the information would lead to a likelihood of decreased price for the Port. (CP 1195, 1202, 2544.)

b. The July 9, 2013 executive session discussed price-related lease terms.

The Port held an executive session on July 9, 2013 for real estate, national security, and potential litigation matters. (CP 1205, 1365.) As relevant here, the Port discussed Tesoro-Savage’s formation of a limited liability company to operate the facility and the associated financial risks with that kind of entity. (CP 1205.) A new entity’s financial risks affect the Commission’s consideration of price because a tenant with higher

financial risk may require a higher lease rate or other conditions to mitigate the risk. (CP 1172–73, 1178–79, 1618–20.)

c. The July 16 and 17, 2013 executive sessions discussed price-related lease terms.

The Port held executive sessions on July 16 and 17, 2013 to discuss real estate matters and potential litigation. (CP 1205, 1375–76.) During these executive sessions, the Port presented some of the specific proposed lease terms to the Commission, namely, the base rent, prices per barrel, wharfage fees, dockage fees, insurance, responsibility for portions of the construction, and the acreage of the facility. (CP at 1203–06, 1357–63, 1598.)

The Port also discussed what type of crude would flow through the facility and its risks, timelines for Tesoro-Savage to begin and complete construction, the length of the operating term, and whether extensions would be allowed, which the Port believed would lead to a likelihood of decreased price for the Port. (CP 1205–07, 2544–45.) The construction timelines had direct financial implications because different rent periods applied before, during, and after construction. (CP 2058–59.) The length of the operating terms also directly affected the Port’s return on investment because the Port needed to invest in infrastructure to support the lease. (CP 1619–20; *see also* CP 1170–71.)

d. The July 23, 2013 executive session discussed price-related lease terms.

Prior to the public meeting on July 23, the Port held an executive session to discuss potential litigation and the consideration of lease price. (CP 187, 1208.) The Port reviewed a new lease term that had been proposed during the prior evening requiring the Port to approve a safety and operation plan proposed by Tesoro-Savage. (CP 1209, 1877-78.) Because the Port discussed proposing a new condition on the tenant, the new term could decrease the Port's price on the lease and needed to be discussed outside of the public. (CP 1877-78.)

4. During the Port's negotiations, it engaged the public to exchange information about the project.

While Port staff negotiated the lease terms, the Commission provided opportunities to exchange information with the public about the proposed lease, including five public workshops in May, June, and July 2013. (CP 1227-57.) The workshops included discussions on safety, the environmental review process, the crude oil market, the tenant's safety records, and the proposed job growth from the project. (CP 1227-57, 2594.) Although the Commission had no obligation to take comment at the workshops, it invited the public's participation at each step. (See CP 1227-57.) Riverkeeper attended each workshop and provided public comment. (CP 1229, 1242-44, 1251, 1253-54.)

The Commission held a final public workshop on the evening of July 22, 2013 to provide information about the project, offer an overview of the proposed lease terms, and receive public comment. (CP 1247–57.) The workshop was held in the evening to ensure that members of the public who could not attend day sessions could make this one. (CP 1247)

The following morning, July 23, the Commission considered the proposed lease in its regular meeting. (CP 1259, 1262–68.) Port staff presented an overview of the lease to the Commission and the public, including the contingency requirements related to environmental permitting and approval. (CP 1262–63.) The Commission acknowledged the public comments from 30-40 people the previous night and took public comment from an additional 10 people. (CP 1263–66.) The Commissioners then deliberated publicly and voted unanimously to approve the lease. (CP 1266–68.)

5. The Superior Court concluded that the Port's executive sessions complied with the OPMA.

After the approval of the lease, Riverkeeper challenged the Port's use of executive session alleging that the Port violated the OPMA by: (1) improperly deliberating on topics outside the scope of the OPMA during executive sessions between February and July 2013; (2) approving the

lease during executive session;⁴ (3) failing to announce a definite end time for the executive session on July 22, 2013; and (4) failing to announce a valid purpose for the executive session on July 22, 2013. (CP 968–69.) The Port conceded the announcement of the executive session on July 22 violated the OPMA, but argued that any injunctive relief was moot because the Port cured the procedural error during its new vote in October. (*See, e.g.*, CP 1985–87.) The Superior Court twice agreed. (CP 948, 2732.)

As relevant here, Riverkeeper moved for summary judgment seeking a declaration that seven executive sessions at issue violated the OPMA. (CP 1119, 1131.) The Port opposed the motion, arguing that no evidence in the record showed that the Port exceeded the scope of the OPMA during five of the executive sessions, and that factual issues precluded summary judgment for at least one executive session. (CP 1545–46.) The Superior Court agreed. (CP 2721–22.) The Superior Court held that the Port’s discussions during the five executive sessions at issue here complied with the “minimum price” provision of the OPMA. (CP 2721–22.) For the remaining two executive sessions, the court agreed

⁴ At summary judgment, Riverkeeper decided to not pursue this claim. (CP 1119, n.1.)

with the Port that disputed facts precluded summary judgment. (CP 2722.)

In interpreting the OPMA, the Superior Court noted that “the notion of price taken by itself in a vacuum really means nothing.” (Transcript of Proceedings (“TP”) 54:22–23.) The Superior Court explained that price “is a function of a prior equation,” such that variables including the term of the lease, the identity of the tenant, and the proposed use for the lease are “essential to an ultimate determination of price.” (TP 54:23–55:21.) As a result, the Superior Court sustained the Port’s interpretation and use of the “minimum price” provision, namely, that the Port may convene in executive session to discuss: (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. (CP 2721–22.)

Riverkeeper’s present appeal challenges these findings. Due to the lack of appellate authority interpreting the “minimum price” provision of the OPMA, the parties stipulated to discretionary review of that finding. (CP 2723.) This Court granted review “only as to the five Port of Vancouver executive session meetings on which the Superior Court granted summary judgment of dismissal.” (4/1/2016 Am. Order.)

IV. SUMMARY OF ARGUMENT

The Port conducted executive sessions within the scope of the OPMA. Thus, the Superior Court correctly entered summary judgment in favor of the Port. The relevant provision of the OPMA, RCW 42.30.110(1)(c), permits public bodies 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.” That provision necessarily authorizes a public body to discuss the key deal factors that drive price, not merely a monetary number in a vacuum.

The OPMA’s plain language demonstrates that the Legislature understood the importance of protecting confidential price discussions from the public during the crucial negotiation phases. And in enacting the provision for executive sessions to discuss real estate leasing or sales, the Legislature intended to prevent sweetheart deals where the entire sale was negotiated and agreed to prior to any public knowledge. The Legislature never meant to hinder public entities from engaging in crucial discussions about key deal terms that drive price.

Price also means nothing when discussed in a vacuum. If the lease negotiators can only discuss the monetary price term with the policy-making body in executive session, the policymakers have no means to determine whether the price is appropriate or too low for the proposed

lease without discussing the value exchanged for the price, such as the length of the lease term, the risks for the proposed tenant, and other economic impacts to the property. If the key deal terms that drive price must instead be discussed publicly, then the purpose of protecting a public entity's negotiating power will be extinguished. Any competitor or proposed tenant could attend a public meeting and obtain the information necessary to undercut the public entity's price.

The Port's interpretation of the statute is consistent with the plain text and a common sense understanding of the statutory language. In contrast, Riverkeeper's request to restrict a discussion of price to only "the least amount of money that public property will be offered for sale or for lease"—meaning only a monetary number—is not supported by the statutory text, context, or legislative purpose and should be rejected. (*See* Pet'rs' Br. at 30.) This Court should therefore hold that the "minimum price" provision permits discussion of the key deal terms that determine the price on a proposed lease or sale of public real estate when disclosure of such information would likely cause a decrease in the price for the real property. Because the Port conducted the five executive sessions at issue in this appeal in accordance with the law, this Court should affirm the Superior Court.

Riverkeeper's evidentiary arguments also fail. First, they are not properly before this Court because they were not raised in Riverkeeper's petition for review or accepted for review by this Court. Second, even if this Court considers these arguments, they do not affect the Superior Court's decision because the record showed that the Port intended to and did limit the discussions in executive session to matters that could negatively affect the minimum price on the proposed lease. The judgment of the Superior Court should be affirmed.

V. STANDARD OF REVIEW

The Superior Court held that no genuine disputes of material fact existed and that judgment was appropriate as a matter of law. Orders on summary judgment are reviewed *de novo*, "engaging in the same inquiry as the trial court and viewing the facts, as well as the reasonable inferences from those facts, in the light most favorable to respondents, the nonmoving parties." *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82, 84 (2005). This Court will affirm a trial court's order granting summary judgment "if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614, 618 (2014).

The statutory interpretation issues in this appeal are issues of law reviewed *de novo*. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 624, 278 P.3d 173, 176 (2012). In interpreting a statute, this Court's fundamental objective is to ascertain and carry out the legislature's intent. *Id.*

Courts should interpret statutes in accordance with their plain meaning. *State, Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4, 9 (2002). When determining a statute's plain meaning, a court should consider "the ordinary meaning of words, the basic rules of grammar, and the statutory context to conclude what the legislature has provided for in the statute and related statutes." *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 435-36, 359 P.3d 753, 757 (2015). A court may consider other matters, including legislative history, if "the statute remains susceptible to more than one reasonable meaning" after completing this plain-meaning analysis. *Id.*

As part of its analysis, the court "must remain careful to avoid unlikely, absurd or strained results." *Berrocal*, 155 Wn.2d at 590 (internal quotation omitted). Undefined terms in a statute should be given their common law or ordinary meanings in the context of the statute, "not in isolation or subject to all possible meanings found in a dictionary." *Citizens All. for Prop. Rights Legal Fund*, 184 Wn.2d at 437. This Court

should adopt the interpretation that best advances the legislative purpose.

Id.

VI. ARGUMENT

A. **The plain meaning of “to consider the minimum price” in the OPMA authorizes a public entity to consider the key deal factors that affect price.**

The plain text of the “minimum price” provision of the OPMA anticipates consideration of topics beyond the mere monetary floor. The relevant OPMA section provides that a governing body may, during executive session, “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 parties agree that the term “minimum price” is not defined in the OPMA. This Court may therefore consult dictionaries to determine the plain meaning of the statutory term, provided that the ordinary definition furthers the statute’s purpose. *Gorre v. City of Tacoma*, 184 Wn. 2d 30, 37, 357 P.3d 625, 628 (2015). Here, the definitions that best promote the purpose of executive sessions define price beyond a mere number.

1. “To consider the minimum price” means to carefully determine the smallest acceptable or attainable value for the public property.

The dictionary definitions of the pertinent statutory terms demonstrate that “to consider the minimum price” authorizes discussion of price-dependent terms, not only a pronouncement of a final monetary number. “Price” is defined as “genuine and inherent *value*,” “the *quantity* of one thing that is exchanged or demanded in barter or sale for another,” “the amount of money given or set as the amount to be given as a consideration for the sale of a specified thing,” and “the *terms or consideration* for the sake of which something is done or undertaken.” WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1798 (2002) (emphasis added)⁵. Defining “price” as money is but one option in the proposed definitions, whereas the other definitions incorporate additional consideration exchanged as part of a transaction.

Other dictionaries similarly define “price” more broadly. For example, “price” is also understood as “[t]he amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold,” BLACK’S LAW DICTIONARY 1380 (10th ed. 2014), or simply as “something which one ordinarily accepts voluntarily in exchange for something else,” BLACK’S LAW DICTIONARY

⁵ Riverkeeper relies on this definition. (Pet’rs’ Br. at 29.)

1353 (rev. 4th ed. 1968). Thus, the common theme in the ordinary definitions of price is the value exchanged for something, not simply a monetary number.

An ordinary understanding of “price” can also be paired with the plain meaning of “minimum.” “Minimum” means “of, relating to, or constituting a minimum; least attainable or possible.” WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1438 (2002). “Minimum” is also understood as “[o]f, relating to, or constituting the smallest acceptable or possible quantity in a given case.” BLACK’S LAW DICTIONARY 1146 (10th ed. 2014). When reading the two terms in context, the plain meaning of “minimum price” is the least attainable or acceptable value given in exchange for real estate that will be offered for sale or lease.

This Court should also give weight to the word “consider” in the “minimum price” provision which describes the type of communications that can be made in executive session. The word “consider” means “think about with a degree of care or caution.” WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 483 (2002). Accordingly, the plain meaning of “to consider the minimum price” allows public entities to carefully think about the least attainable or acceptable value given in exchange for public property that will be offered for sale or lease.

Careful consideration encapsulates those things that necessarily affect price. In other words, the plain meaning of the statute ensures that public entities may carefully understand the crucial elements of the deal that it is receiving or providing in exchange for the price. For example, if a member of the public body proposes a particular price for lease or sale, the other members must be allowed to discuss the reasons for that price and why it is or is not appropriate under the circumstances.

Yet if this Court accepts Riverkeeper's interpretation and limits public entities to only a pronouncement of the final monetary number on the proposed lease, a public entity would not be able to carefully discuss the price at which it will offer its property. Under Riverkeeper's standard, public entities would be prevented from discussing any logic or reasoning for their price. In essence, public bodies would be forced to propose random numbers untethered to the key elements of the deal. Not only does Riverkeeper's interpretation run contrary to the text's plain meaning, but it would also lead to such absurd results that it must be rejected. *See Berrocal*, 155 Wn.2d at 590 (noting a court "must remain careful to avoid unlikely, absurd or strained results").

A common sense definition of "to consider the minimum price" is consistent with this Court's requirement that undefined terms in a statute be given their common law or ordinary meanings in context with the

legislative purpose of the statute, “not in isolation or subject to all possible meanings found in a dictionary.” *Citizens All. for Prop. Rights Legal Fund.*, 184 Wn.2d at 437. Here, while the OPMA is intended to require public bodies to take actions openly, the statutory purpose of the executive session statute, RCW 42.30.110, is to allow a governing body to discuss specific confidential topics in executive session. The OPMA is not intended to prohibit public entities from making informed pricing decisions in executive session.

While exceptions to the OPMA’s requirements should be strictly construed, the bases for executive session should not be so restricted to thwart the purpose of allowing confidential discussions on real estate matters. As at least one open meeting commentator has explained, the purpose of holding executive sessions regarding real property negotiations is “obvious” because “[n]o purchase would ever be made for less than the maximum amount the public body would pay if the public (including the seller) could attend the session at which that maximum was set, and the same is true for minimum sale prices and lease terms and the like.” Schwing, *Open Meeting Laws*, § 7.76, 416-418 (1994), as quoted in *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 914 n.5, 117 Cal. Rptr. 2d 631, 639 (2002).

A common sense definition of consideration of price is thus consistent with the plain language of the statute and its purpose in allowing confidential discussions on real estate pricing. The OPMA should be construed to ensure that a public entity is not unfairly disadvantaged in its real estate negotiations by either (a) prohibiting meaningful pricing discussions by limiting executive sessions to only monetary numbers, or (b) forcing a public entity to discuss publicly the key deal terms that determine its price, which would leave the public entity competitively vulnerable. Protecting the competitive-sensitivity of these key terms in turn protects the value of the public resources entrusted to the public entities, and enables them to comply with the duty to maximize the public value for their property.

2. Riverkeeper's more restricted definition does not comport with the language or purpose of the OPMA.

Riverkeeper places great weight on the differences in language of the "acquisition of real estate" provision, RCW 42.30.110(1)(b), with the "minimum price" provision, but those differences do not make Riverkeeper's proposed interpretation reasonable. First, the acquisition provision applies to situations where the public entity is interested in property owned by another party. In that situation, both the fact that the public entity is interested in the property and the proposed price for the

property must be shielded from the public, as even disclosure that a public entity were considering that property could increase the price.

In contrast, when a public entity proposes to lease or sell its own property, the fact of the property's availability is already known and only the terms of the proposed lease or sale that affect the public entity's minimum acceptable price must be kept confidential. These realities explain why the OPMA provides for discussion of the consideration of the property in executive session for acquisitions, but not for the lease or sale of public property. (*See* Pet'rs' App. at 31) (noting the OPMA acquisition provision prevents speculators from discovering where a new school building will go). These differences in language do not reasonably lead to the conclusion that a public entity can only discuss monetary numbers in executive session for leasing decisions.

Second, the "minimum price" provision, unlike the "acquisition" provision, includes express language that "final action selling or leasing public property shall be taken in a meeting open to the public." RCW 42.30.110(1)(c). "Final action" is defined as "a collective positive or negative decision, or an actual vote by a majority of the members of a governing body" RCW 42.30.020(3). That language makes clear that a public entity may discuss the factors that drive the public entity's pricing decision on the proposed lease or sale in executive session, so long

as the final deliberation and decision about whether to enter the lease are made in public. The requirement that final action be taken publicly therefore creates a boundary for a public entity's discussions while in executive session, and in turn leaves room for discussions on topics that drive price so long as they do not cross that boundary, *i.e.* reach a final decision on whether to enter an agreement to lease the property.

For a complex real estate transaction, a public entity must be able to discuss the various terms, considerations, and risks associated with the transaction to carefully and adequately determine the appropriate price. Thus, contrary to Riverkeeper's argument, the "minimum price" provision cannot be limited to abstract monetary numbers without reference to the specific issues which drive the price. To further the purpose of the statute while recognizing the reality of real estate transactions, this Court should construe the "minimum price" provision to include the key monetary deal terms that comprise the price (*e.g.* the base rent, acreage leased, wharfage, or dockage fees) and the key deal terms that directly affect the acceptable minimum price (*e.g.*, the proposed use, any insurance requirement, duration of lease, the tenant's financial viability or risk, other risks that must be mitigated through the lease price, opportunity and feasibility costs, etc.). A public entity must be allowed to consider these key terms to

carefully determine the appropriate price and follow its obligation to maximize the value for public property.

B. The Legislature was concerned with sweetheart deals, not in prohibiting discussion of price-related deal terms.

Construing the “minimum price” provision to allow for discussion of key terms that drive price is consistent with the Legislature’s intent to enable a public entity to publicly dispose of its property without disclosing the minimum acceptable terms for the lease or sale. The relevant bill analyses for the OPMA amendment allowing for leasing discussions in executive session show that the Legislature desired to prevent public entities from being forced to disclose information that would result in the entities receiving “low sale and lease prices” because the potential buyer knows the entities’ minimum acceptable price. (Pet’rs’ App. at 21.) By proposing the amendment, the Legislature intended to exempt “the negotiations for the sale or purchase of property where there would be a likelihood that the public discussion could increase the price.” (*Id.* at 31.)

Based on testimony prior to the passage of the relevant OPMA amendment, it is also clear that the Legislature wanted to prevent “sweetheart deals” where the deal was finalized in executive session without any public deliberation, but not prevent legitimate discussions relating to the price of the proposed lease. As Senator Bruce Wilson testified, the proposed amendment allowed a public body to hold an

executive session “when it is considering the sale or lease of property, but [it] 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,” and the “decision to sell or lease and the reasons for it and what property might be sold or leased and so on would have to be conducted in open meeting and only the details of the proposed negotiation with respect to the price could be conducted in executive session.” (*Id.* at 34–35.)

Senator R. Ted Bottinger further explained that the amendment would “prevent sweetheart deals, where they go into executive session, decide to sell or lease, decide the price, and then that’s the first time that anybody knows about it.” (*Id.* at 37.) The Legislature therefore wanted to ensure that a public body was not disadvantaged in its real estate negotiations, while also giving members of the public a chance to make an offer on the property. (*Id.*)

Nothing in the legislative history evidences an intent to restrict a public body from discussing the key deal terms that determine the minimum acceptable price on a lease or sale. Indeed, Senator Wilson’s statement that executive sessions should be limited to “how high or low” to go in negotiations recognizes that the high or low end of non-monetary components of a lease should also be protected. For example, a public entity should be allowed to discuss how many conditions or concessions it

is willing to accept in the negotiations that determine the ultimate lease price. The legislative history demonstrates that the Legislature understood the danger public entities face when forced to discuss the minimum deal terms publicly and the need to protect those communications.

Even so, the prior version of the executive session statute is arguably narrower than its current form as it relates to the lease or sale of real estate. As initially passed, the OPMA provided that a public body could hold an executive session “to consider the disposition of real estate by lease or sale when publicity regarding such consideration would cause a likelihood of decreased price.” (Pet’rs’ App. at 15.) However, the OPMA expressly stated that “[i]f executive sessions are held to discuss the disposition by sale or lease of real estate, the discussion *shall be limited to* the minimum selling or leasing price.” (*Id.* at 15–16) (emphasis added). When the Legislature amended the statute in 1985, it omitted the express limitation for discussions related to minimum selling price and replaced it with the current language permitting an executive session “to consider the minimum price at which real estate will be offered for sale or lease.” (*Id.* at 18.) Thus, by amending the language to permit public entities to consider the minimum price, rather than limit discussions to the minimum selling price itself, the Legislature allowed for a broader scope of discussions.

Recent amendments to Washington’s public records law further underline the legislative purpose of protecting competitively sensitive discussions that affect price. In 2015, the Legislature passed House Bill 1431, which amended the Public Records Act to protect documents prepared for executive sessions convened under the “minimum price” provision of the OPMA. Certification of Enrollment, H.B. 1431, 64th Legislature, at 2 (2015).⁶ Because “discussion and consideration of real estate values can be sensitive information when negotiating the price of a real estate transaction,” the Legislature proposed a bill to protect the documents prepared during these discussions from public disclosure, such as “offers, counter offers, restrictive covenants, and other real estate documents.” House Bill Report, H.B. 1431, 64th Legislature, at 2 (2015).⁷

During hearing on the proposed bill, representatives from the City of Kent testified in support of the bill and explained that the intent of the bill was “marrying” the language in the Public Records Act with the executive sessions for real estate transactions under the OPMA. Transcript of House State Government Committee Meeting, Tr. 8:8-19,

⁶ Attached as Exhibit 1 to the Declaration of Kristin Asai in Support of Respondents’ Motion for Judicial Notice.

⁷ Attached as Exhibit 2 to the Declaration of Kristin Asai in Support of Respondents’ Motion for Judicial Notice.

(February 4, 2015).⁸ In explaining the need to bring the public records exemptions in line with the OPMA, the representative stated:

Essentially right now, under the [OPMA], city staff and city counsel can break into executive session to discuss *all the various factors that come into play with the purchase or sale or lease of real estate . . .* special covenants, conditions, easements, offers, counteroffers, all of which need to be discussed and – and considered as a real estate purchase or sale comes together.

Those discussions are protected right now under the [OPMA]. But the documents that might underlie -- emails and drafts, offers and counteroffers -- are not protected. So the idea is that -- that we want to protect those underlying documents from being disclosed and affecting the price to sell or lease property.

Id., Tr. 9:24-10:15 (emphasis added). The Legislature passed the amendment as proposed. *See* Certification of Enrollment, H.B. 1431, at 1.

The Legislature’s action in protecting documents prepared for discussion at executive sessions on real estate matters is further proof that the “minimum price” provision is not limited to a discussion of the monetary number alone. By protecting offers, counter offers, restrictive covenants, and other real estate documents from public disclosure, the Legislature understood that the key deal terms outlined in offers and

⁸ Attached as Exhibit 3 to the Declaration of Kristin Asai in Support of Respondents’ Motion for Judicial Notice. Respondents include the entire transcript for the hearing for the sake of completeness, and have underlined the relevant portions.

counteroffers are vital to a discussion of the minimum price that a public entity is willing to accept for a lease or sale of public property. Similarly, if a real estate deal includes restrictive covenants or other conditions, those terms would affect the acceptable price for the deal and also require protection.

Simply put, a public entity must know the acceptable or necessary terms for a real estate deal before it can appreciate the minimum price. Both the OPMA and the Public Records Act understand this reality. This Court should therefore uphold the Superior Court's interpretation of the "minimum price" provision and authorize public entities to discuss the key deal terms that directly affect the price of the lease or sale of public property.

C. The Port complied with the OPMA by limiting its discussions to the key deal terms that impact the minimum price on the lease.

Because the "minimum price" provision permits discussions of price in tandem with the key deal terms that drive price, the Port complied with the OPMA during the five executive sessions at issue. Contrary to Riverkeeper's argument, the Commission did not deliberate about the project itself during executive session. Instead, the Port informed the Commission about key terms of the proposed lease that would negatively affect the Port's minimum acceptable value on the lease.

The Port has historically viewed—and thus acted in accordance with—a narrow construction of the “minimum price” provision. The Port’s practice is to use its executive staff and general counsel to serve as gatekeepers to ensure that only topics properly within the scope of the applicable executive session provision are discussed in executive session. (CP 1175–77, 1185.) Before discussing a topic in executive session, the Port’s executive staff discusses whether competitive sensitivities exist and the likelihood the Port would obtain a decreased minimum price on a proposed lease if the topic were discussed publicly. (CP 1177–78.) The Port engages in this analysis because it only discusses information in executive session that would either: (1) give the Port’s customer a negotiating advantage that would lower the Port’s minimum price on the lease; or (2) give a competitor an opportunity to negotiate with the Port’s customer, which would result in driving down the price. (CP 1172, 1179.)

For each of the five executive sessions at issue in this appeal, the testimony of all three Commissioners, the Port’s CR 30(b)(6) designee, and the other attendees show that the discussions in executive session were within the bounds of the OPMA. (*See, e.g.*, CP 1218–22, 1601–03, 1614–15, 1628, 1887–88, 2036–37.) This Court should therefore affirm the dismissal of Riverkeeper’s claims for violations of the OPMA.

1. The March 26, 2013 executive session was limited to key price-related deal terms.

During the March 26 executive session, the Port staff presented the following information to the Commission:

- the current status of the lease rate;
- the current status of wharfage fees, dockage fees, and rail fees; and
- the proposed duration for the exclusivity agreement it planned to enter with its tenant.

(CP 1190–91.)

As to the price-based terms, Riverkeeper effectively concedes that discussion of these terms was appropriate as it makes no argument that they violated the OPMA. (*See* Pet'rs' Br. at 41.)

As to the exclusivity agreement, the duration of exclusivity could affect the Port's potential price on the lease because the length of the exclusive period affects when the Port could lease the space to others and the Port's future income for that space. (CP 1618–20, 2544.) In addition, the Port could not publicly disclose its discussions on the duration for exclusivity because if disclosed, a competing port could attempt to offer a lower price to the tenant and provide a basis for the tenant to reduce the Port's minimum price for the lease. (CP 1195, 1202.) The discussions

were therefore directly tied to the Port's minimum acceptable price for the lease.

2. The July 9, 2013 executive session was limited to key price-related deal terms.

During the executive session on July 9, the Port staff presented the following information to the Commission:

- Tesoro-Savage's formation of a separate LLC and its associated risks.

(CP 1205.)

This topic is tied to minimum price because the Port considers a tenant's financial stability in setting the appropriate price, and a new entity could require a higher lease price to compensate for additional risk. (CP 1172-73, 1178-79.) In particular, the Commission was concerned whether the new entity "was merely a shell without adequate assets." (CP 1054.) As one way to address those concerns, the Port required Tesoro-Savage to carry a \$15 million general liability insurance policy and an additional \$25 million of pollution liability insurance, which are part of the value of the lease. (*Id.*; *see also* CP 247-48, 278-80.) The Port also required a substantial lease rate to mitigate the risk. (*See* CP 2058-60.)

3. The July 16 and 17, 2013 executive sessions were limited to key price-related deal terms.

During the July 16 and 17 executive sessions, the Port staff presented the following information to the Commission:

- the proposed base rent;
- prices per barrel;
- wharfage, dockage, and rail fees;
- insurance requirements;
- responsibility for construction costs;
- proposed acreage of the facility;
- the risks and volume for the type of crude oil in the facility;
- timelines for construction; and
- the length of the operating term and whether extensions would be allowed.

(CP 1203–07.)

Again, Riverkeeper appears to concede that discussion of the base rent, price per barrel, and associated fees was appropriate as it makes no argument regarding these topics. (*See* Pet’rs’ Br. at 42–43.)

For the remaining topics, these key deal terms directly affected how the Port would set its minimum price on the lease. For example, greater risks require higher insurance requirements and a higher minimum lease price to balance the risks. (*See* CP 1618–20.) The time for construction and length of the lease also directly affect the price because different timeframes warranted higher base rent prices and affected the Port’s return on investment. (CP 1619–20, 2058–59.) The Port needed to understand these key lease components to determine the appropriate lease

price, and public disclosure of the Port's consideration of these terms could have adversely affected the Port's price on the lease.

4. The July 23, 2013 executive session was limited to key price-related deal terms.

During the July 23 executive session, the Port staff presented the following information to the Commission:

- A proposed lease term that had been requested during the July 22 executive session relating to the Port's approval of the tenant's Operations and Safety plan prior to construction.

(CP 1882–85.)

This topic was appropriate for discussion in executive session because the Port was considering adding an extraordinary condition to the lease that the Port was not certain Tesoro-Savage would agree to without renegotiating all of the pricing terms. (CP 1877–88.) As such, the Port believed the new term and its potential effect on the lease price could not be discussed publicly, due to concern that it would decrease the Port's price on the lease.

The undisputed evidence shows that during each of the five executive sessions, the Port discussed the minimum price for which it would offer its property, both in monetary terms or non-monetary terms that directly affect the ultimate price. This Court should therefore hold

that the Port complied with the OPMA, and affirm the Superior Court's summary judgment in favor of the Port.

D. This Court should reject Riverkeeper's evidentiary assignments of error because they are not properly before this Court and did not affect the Superior Court's summary judgment decision.

1. This Court did not grant review on Riverkeeper's evidentiary assignments of error.

The scope of this Court's review is narrow and does not include Riverkeeper's new evidentiary objections. Generally, this Court will not consider issues unless they were raised in the petition for review and accepted for review by this Court. *Young for Young v. Key Pharm., Inc.*, 130 Wn.2d 160, 166 n.3, 922 P.2d 59, 62 (1996); *see also* RAP 13.7(b).

In its motion for discretionary review, Riverkeeper raised three potential issues for review: (1) the Superior Court's legal interpretation of the OPMA; (2) the Superior Court's determination that the Port's meetings were lawful; and (3) the Superior Court's mootness finding related to Riverkeeper's requests for injunctive relief and to have the lease declared null and void. (11/6/15 Mot. for Discretionary Review at 1-2.) Riverkeeper's motion never mentioned its present evidentiary objections.

This Court then granted review "only as to the five Port of Vancouver executive session meetings on which the Superior Court granted summary judgment of dismissal." (4/1/2016 Am. Order.)

Accordingly, Riverkeeper's complaints about the admissibility of certain testimony is not properly before this Court, and it need not review these issues.

2. The Port presented admissible evidence that the discussions would likely cause a decrease in price.

Even if this Court considers Riverkeeper's argument that the Port failed to establish "competent evidence demonstrating that disclosure of its discussions would have likely reduced the price," the argument fails because the Port presented admissible evidence that it believed its discussions in executive session would likely lead to a decrease in the price of the lease.

First of all, Riverkeeper's argument confuses the applicable summary judgment standard for its evidentiary argument. Summary judgment may be entered in favor of a nonmoving party if the facts are not in dispute and the nonmoving party is entitled to judgment as a matter of law. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752, 755 (1992). That is what happened here.

Riverkeeper moved for summary judgment based on the content of the Port's executive sessions seeking a finding that the Port violated the OPMA. (CP 1119.) The Port opposed that motion. (CP 1539-94.) As Riverkeeper admits, the Port did not affirmatively move for summary

judgment on the content of the five executive sessions at issue. (Pet'rs' Br. at 45; CP at 1592-93.) After a hearing on the record, the Superior Court found that no factual dispute existed as to five of the executive sessions and the Port was entitled to summary judgment that it had not violated the OPMA. (CP 2733; TP 56:13–20.) Riverkeeper is therefore mistaken when it argues that it was “not required to produce evidence” showing that public disclosure of the content of the executive sessions would not have decreased the price of the lease. (*See* Pet'rs' Br. at 45.) Instead, as the party affirmatively moving for summary judgment, Riverkeeper was required—and failed—to present evidence showing that the Port violated the OPMA during each of the executive sessions.

Moreover, the Port *did* submit admissible evidence showing that public disclosure of the information discussed during executive session would likely cause a decrease in the Port's price on the lease. The Port submitted declarations from the Port's executive team who were personally involved in the negotiations and had substantial experience with the Port's real estate deals. (*See* CP 1610-12, 1615, 2544.) Those declarations constitute proper and admissible testimony.

A court may rely on affidavits and declarations at summary judgment if they are “made on personal knowledge” and “set forth such facts as would be admissible in evidence.” CR 56(e). In addition, a lay

witness may testify to his or her personal observations and opinions or inferences that are “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge.” ER 701. A lay witness may give opinion testimony that is based on work experience without crossing into expert testimony. *See, e.g. State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d 960, 963 (2002) (permitting police officer to give opinion based upon personal observation and experience); *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 124–25, 847 P.2d 945, 950 (1993) (permitting lay opinion about customs in construction industry). Thus, if the testimony is the witness’s inference, rationally based on his or her own perception of an event, it is admissible. *State v. King*, 135 Wn. App. 662, 673, 145 P.3d 1224, 1228 (2006).

Here, the testimony from the Port’s witnesses was based on their own perceptions during the meetings at issue, their knowledge of the negotiations, and their experience with the Port in handling real estate deals. Specifically, Todd Coleman, as Executive Director/CEO of the Port, in his deposition and declaration, described his experience with real estate deals, his authority to enter exclusive dealing agreements, and the reason he discussed the duration of a proposed exclusivity agreement with

Tesoro-Savage in executive session, namely that he believed it could result in a lower price if publicly disclosed due to the likelihood of competing ports. (CP 1173–74, 1778–83, 1787–91, 2544.) Other members of the Port’s executive team described their personal observations in executive session and why certain topics could not be discussed publicly due to the likelihood that they would have affected the lease price. (CP 1610–11, 1614–15, 1628.) None of these witnesses needed specialized training or expertise to give their testimony. They stated facts based on their personal observations and rational inferences based on that knowledge, which is appropriate lay witness testimony.

To the extent that Riverkeeper attempts to argue that the Port must affirmatively show that its discussions *would have* resulted in a decrease in price, this Court has rejected a similar argument regarding executive sessions convened to discuss pending or potential litigation. *See In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586, 30 P.3d 474, 476 (2001). Like the “minimum price” provision, which permits real estate discussions when they are likely to decrease the price, the OPMA’s litigation provision permits discussions with counsel only when public disclosure is likely to cause adverse legal or financial consequences. RCW 42.30.110(1)(i). This Court, however, rejected a petitioner’s argument that a public body exceeded the OPMA when it held discussions

with legal counsel about joining a lawsuit that allegedly had no adverse consequences for the city. *In re Recall of Lakewood City Council Members*, 144 Wn.2d at 586. This Court instead held that an executive session under the litigation provision is unavailable only when from an objective standard the public body should know that the discussion is benign and unlikely to result in adverse consequences. *Id.* at 586–87. To hold otherwise would “put public officials in the untenable position of determining before hand whether the disclosure of discussion with counsel is or is not likely to cause adverse legal consequence.” *Id.* at 586.

If this Court extends the same reasoning here, the Port may convene an executive session under the “minimum price” provision unless it objectively should have known that the discussions would *not* adversely affect the price. Here, the Port’s evidence shows that its staff believed that public disclosure of the lease discussions would result in competition and decreased price. (*See, e.g.*, CP 1610, 1732, 1771–73, 1778–83, 1787–94.) The Port is not required to show that the discussion of key deal terms indeed would have decreased the Port’s lease price. This Court should therefore reject Riverkeeper’s argument that the Port failed to present admissible evidence of the likelihood of decreased price.

3. The Port did not present inadmissible opinion testimony from its general counsel on the ultimate legal issue.

The Port presented testimony from its general counsel to prove the objective reasonableness of the Port's interpretation and its adherence to counsel's advice, not as an opinion on the ultimate legal issue of whether the Port violated the OPMA. Again, lay witnesses are permitted to give testimony about matters within their personal knowledge and personal observations. ER 701.

Here, the Port's general counsel provided testimony about her interpretation of the OPMA and the extent of her investigation on this interpretation to show that the Port follows its counsel's advice, that the Port's belief that it was acting within the law was objectively reasonable, and that future violations of the OPMA are unlikely to recur if the Superior Court disagreed with the Port's interpretation. (*See* CP 1602.) This evidence was crucial at summary judgment because Riverkeeper was trying to resurrect its request for injunctive relief. (CP 1148–56.) The Port was not offering the evidence to show that the Port's interpretation was legally correct, but that it was objectively reasonable. The Port's general counsel was also present at the meetings at issue and is permitted to testify about her personal observations. Accordingly, this Court should

reject Riverkeeper's arguments that the Port's counsel provided inadmissible expert opinion, and affirm the Superior Court's decision.

E. The Court should award RAP 14.3 costs.

RAP 14.2 provides that a substantially prevailing party on review is entitled to costs. RAP 14.3 enumerates the eligible costs. Because the Court should find in favor of the Port, it should award the Port's eligible costs, which the Port will submit in its cost bill pursuant to RAP 14.4.

VII. CONCLUSION

The Superior Court correctly granted summary judgment in favor of the Port finding that five executive sessions complied with the OPMA. The judgment of the Superior Court should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of September,
2016.

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By: *s/ Kristin M. Asai*

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DECLARATION OF SERVICE

I, Kristin M. Asai, declare under penalty of perjury under the laws of the State of Washington that I am an attorney employed by Markowitz Herbold PC and that on September 30, 2016, I caused as indicated below pursuant to counsels' agreement **BRIEF OF RESPONDENTS**, to the following counsel for parties at the addresses shown below:

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Subject: RE: Supreme Court No. 92455-4: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al.

Received 9/30/16.

Supreme Court Clerk's Office

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From: Lynn Gutbezahl [mailto:lynngutbezahl@markowitzherbold.com]
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: David Markowitz <davidmarkowitz@markowitzherbold.com>; Kristin Asai <kristinasai@markowitzherbold.com>; 'knoll lowney' (knoll@igc.org) <knoll@igc.org>; Miles Johnson <miles@columbiariverkeeper.org>; brian@kampmeierknutsen.com; Anna Joyce <annajoyce@markowitzherbold.com>; jessie.c.sherwood@gmail.com
Subject: Supreme Court No. 92455-4: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al.

Dear Court Clerk:

Attached for filing is Respondents' Brief in the matter titled: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., Supreme Court No. 92455-4.

Thank you for your assistance.

Respectfully submitted,

Lynn A. Gutbezahl | Legal Assistant

Markowitz Herbold PC

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