No. 90500-2

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,
a Washington nonprofit corporation,

Petitioner,

v.

SAN JUAN COUNTY, a Washington municipal corporation, and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council,

Respondents.

On Petition for Review from Division I
of the Washington State Court of Appeals

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER'S MOTION FOR RECONSIDERATION

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INTRODUCTION

Pursuant to Rule 12.4(i), Amici Curiae Pacific Legal Foundation and Building Industry Association of Washington submit this brief in support of Citizens' Alliance for Property Rights Legal Fund's motion for reconsideration of the October 1, 2015, Opinion. Reconsideration is both warranted and necessary because the majority opinion decided an issue of first impression in a manner that frustrates the public's interest in transparent government as enshrined in the Open Public Meetings Act of 1971, Ch. 42.30 RCW (OPMA).

ARGUMENT

In this case of first impression, a majority of the Court interpreted the OPMA to excuse a legislatively created committee—one tasked with the sole responsibility for "[d]etermin[ing] content and format of science syntheses, evaluation of reg[ulations] and recommendations," and consisting of three members of a six-member county council[1]—from the Act's open meetings requirements. In reaching that conclusion, the majority opinion failed to acknowledge that the San Juan County Council adopted two resolutions establishing the CAO Implementation Team and delegating to it legislative tasks. The Opinion also failed to give any significance to the fact that the

[1] San Juan County Resolution (SJCR) 26-1201, at 3, 5; SJCR 32-2011, Ex. A at 1, 3.

committee included enough council members to determine the County's critical areas policy. As construed by the majority, the OPMA operates to perpetuate the very evil it was intended to cure—the Opinion creates a roadmap for government bodies to meet behind closed doors to deliberate on matters of public importance. The public deserves a government that operates in the light of day. At the very least, the facts of this case warrant a trial, not summary dismissal.

I

THE MAJORITY OPINION MISAPPREHENDS AND/OR OVERLOOKS KEY FACTS AND LAW THAT SHOULD PRECLUDE SUMMARY DISMISSAL

The majority opinion mistakenly concludes that there was insufficient evidence that the CAO Implementation Team engaged in an "act" to survive San Juan County's motion for summary judgment. That conclusion fundamentally misapprehends the legal and factual context in this OPMA dispute and conflicts with the Act's purpose.

The OPMA declares that all meetings of a governing body "shall be open and public." RCW 42.30.030. That command applies equally to committees tasked with actual or de facto authority to act on behalf of the governing body. RCW 42.30.020(2). The stated purpose of public access is to hold government accountable to the people:

> The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010; *see also Cathcart v. Andersen*, 85 Wn.2d 102, 107, 530 P.2d 313 (1975) (The purpose of the Act is to permit the public to observe the steps employed to reach a governmental decision.). Courts are directed to construe the Act liberally and in favor of open government. RCW 42.30.910; *Eugster v. City of Spokane*, 128 Wn. App. 1, 7, 114 P.3d 1200 (2005).

The fact that the CAO Implementation Team met in secret for two years in order to "[d]etermine content and format of science syntheses, evaluation of reg[ulations] and recommendations," and kept no records of its meetings, is inherently suspicious. "There is rarely any purpose to a non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors." *Sacramento Newspaper Guild v. Sacramento Cnty. Bd. of Supervisors*, 69 Cal. Rptr. 480, 487, 263 Cal. App. 2d 41 (Cal.

App. 1968). Such meetings "permit[] crystallization of secret decisions to a point just short of ceremonial acceptance." *Id.* That problem is made worse when a voting bloc sufficient in number to determine the issues discussed meets in private because "the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision." *State ex rel. Lynch v. Conta*, 239 N.W.2d 313, 330-31 (Wis. 1976). The "possibility that a decision could be influenced" in a secret meeting of a voting bloc militates strongly in favor of compliance with open government requirements. *Id.* at 331.

San Juan County's decision to delegate matters of public interest to a committee that meets behind closed doors is an obvious and deliberate effort to evade both the spirit and letter of the law. The record in this case plainly shows that the Council established the CAO Implementation Team and directed it to determine the content and format of the County's synthesis of the best available science. As Justice Yu notes in her dissenting opinion:

> Approximately four months after the Council determined it needed a revised participation plan, it formally adopted one. The first step of that plan reads, "Establish CAO Update Implementation Team." SJCR 26–2010, at 3 (boldface omitted). The CAO Team was designated as solely responsible for "[d]etermin[ing] content and format of science syntheses, evaluation of reg[ulations] and recommendations." Id. at 5, 341 P.3d 995. In August 2011, the Council passed a resolution updating and replacing the earlier plan. The first task was listed as "Establish [critical areas

> ordinance/shoreline master program] Update Implementation Team." SJCR 32–2011, Ex. A at 1. The CAO Team was designated as the party solely responsible for having completed the task of "[d]etermin[ing] content and format of science syntheses." Id. at 3, 341 P.3d 995.
>
> This context cannot be ignored. It was the Council, not the county administrator, that determined it needed an updated participation plan in order to fulfill its mandatory duty to update its critical areas ordinance using best available science. The Council passed a formal resolution ratifying the CAO Team's role in that plan. Unlike an outside group, such as a citizens' committee, the CAO Team was not merely given an opportunity to provide input—it was delegated specific, essential tasks, without which the Council "wouldn't have made any progress." CP at 230. Its task was not merely to develop a plan for synthesizing best available science but to actually formulate that synthesis, which required discarding specific approaches. And unlike many other parties with designated roles in the participation plan (for example, the Department of Commerce and the county prosecuting attorney), the CAO Team did not exist before or after the Council's ordinance update process. The Council is the entity that brought the CAO Team into being, and the CAO Team was therefore a committee of the Council.

Concurring and Dissenting Opinion at 6.

Based on those facts, there can be no question that the committee acted on behalf of the County Council. Determining which studies will be included in the science synthesis is an essential legislative function, required of San Juan County by the Growth Management Act, Ch. 36.70A RCW (GMA). In both *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005), and *Swinomish Indian Tribal Cmty. v.*

W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 166 P.3d 1198 (2007), this Court interpreted the GMA's "best available science" provision as requiring a county to create a record showing that it engaged in a reasoned process of considering the conclusions and recommendations contained in its "best available science" when developing critical area regulations. *See also* RCW 36.70A.172(1). A County's "best available science synthesis" is the record of that "reasoned process" and is relied on in any legal challenge to the critical areas ordinance. *See, e.g., Yakima Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 685, 688-98, 279 P.3d 434 (2012). With the exception of the final ordinance itself, it is hard to imagine a more critical decisionmaking step taken during the development of a critical areas update.

Indeed, in a parallel litigation challenging the legal sufficiency of San Juan County's CAO, the County stated that identifying and selecting the science contained in its 530-page science synthesis was "the first step in updating the critical area ordinances."[2] *Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, No. 72235-2-I, 2015 WL 4730204, at *4 (Wash. Ct. App. Aug. 10, 2015). As the County argued in its briefing, the process of determining which studies would be included in the synthesis was a substantive, deliberative act:

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[2] *Common Sense Alliance v. Growth Mgmt. Hngs. Bd.*, Wash. S. Ct. No. 92251-9 (pending on cross-petitions for review).

> [A] single document known as the "BAS Synthesis" was written to summarize and describe the BAS that would be included in the County's review and revision of its critical areas regulations. The BAS Synthesis was based on a review of over 1,900 books, papers, and reports, including many provided by the public in response to the County's call for submittals.

San Juan County Resp. Br. at 4-5. The public interest enshrined in the OPMA and GMA demands that critical legislative tasks like the creation of the legislative record must be open to the public.[3]

The fact that the committee did not keep any records and its members claim not to recall what they did during any of the committee's 20 meetings should not excuse it from our sunshine laws. To the contrary, it raises a material issue of fact that must survive a defense motion for summary judgment:

> Our ability to evaluate what the CAO Team did at any particular meeting is hampered by the fact that its meetings were not recorded or transcribed and that CAO team members generally stated they did not recall the specific events of any particular meeting or the specific discussions held on any

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[3] Like the OPMA, the GMA's public participation provisions provide another testament to the Legislature's commitment to broad transparency in general and in the particular context of GMA planning. The GMA requires an "enhanced public participation process." *Lora Petso v. City of Edmonds*, CPSGMBH Case No. 09-3-0005, Final Decision and Order (August 17, 2009), at 7. Indeed, public participation is the "bedrock of GMA planning." *Id.*; *see also Better Brinnon Coalition v. Jefferson Cnty.*, WWGMBH Case No. 03-2-0007, Amended Final Decision and Order (Nov. 3, 2003), at 7 ("[T]he GMA's public participation requirements are founded in a belief that the best decisions are made with full public knowledge and participation.").

> particular topic. *E.g.*, CP at 258, 267, 367, 385–86. This lack of documentation and institutional amnesia only emphasizes the importance of public oversight under the OPMA. Nevertheless, there is sufficient evidence to create a genuine issue of material fact. We know the CAO Team met over 20 times, and we know it played a key role in formulating the best available science synthesis adopted by the Council. The full extent and influence of this role is a question of fact.

Concurring and Dissenting Opinion at 9.

The majority opinion should be reconsidered to address these facts. The failure to do so will only encourage other cities and counties faced with broad opposition on matters of public interest to create committees and direct them to do unpopular pick-and-shovel work behind closed doors.

II

MEETINGS OF A NEGATIVE QUORUM CAN DETERMINE LEGISLATION AND MUST BE SUBJECT TO THE OPMA

The majority opinion also misapprehends the "negative quorum" argument in a manner that threatens the integrity of the OPMA. Read literally, the Opinion holds that a voting bloc of council members with sufficient numbers to defeat and therefore decide the outcome of pending legislation can meet in private to deliberate and form opinions on pending legislation. Under this formulation of our sunshine laws, there is no public oversight to assure that the "discussions" do not cross the line and become "deliberations" or "decisions." Allowing such meetings to continue in secret

is contrary to the most basic understanding of how power is held accountable in Washington state. *See* Wash. Const. Art. I, § 1 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.").

The majority opinion focuses on the most common definition of the word "quorum" without addressing the facts of the case. A quorum is usually equal to a simple majority. *See* Bryan Garner, ed., *Black's Law Dictionary*, 1263 (Deluxe 7th ed. 1999) (defining a "quorum" as the "minimum number of members (usu. a majority) who must be present for a body to transact business or take a vote"). A quorum of seven, for example, is four. Thus, the number of members needed to take action on normal business will be four members. In that circumstance, the number of members needed to block action will likewise be four. But if the governing body has an even number of members, as is the case in San Juan County, there is no simple majority. By charter rule, a super-majority of four council members is required to approve new business—but a measure can be blocked by just three members. "It is a short step from the initial and predictable ability to frustrate all action to thereafter control it, through the shift of one member of the unorganized other half." *Conta*, 239 N.W.2d at 331. Such power to determine policy with

less than a majority is referred to as a "negative quorum," because the voting bloc, like a quorum, "has the automatic potential of control." *Conta*, 239 N.W.2d at 331.

The concept of a "negative quorum" is not as unusual as the majority opinion suggests. Indeed, several states—including Alabama, Alaska, Arkansas, Florida, Illinois, Minnesota, Texas, Virginia, and Wisconsin—recognize that meetings of less than an outright majority of members of the governing body can constitute a meeting subject to sunshine laws. *See* Tex. Att'y Gen. Op. 0060 (1999) (citing *Finlan v. City of Dallas*, 888 F. Supp. 779 (N.D. Tex. 1995)); *Moberg v. Independent Sch. Dist.*, 336 N.W.2d 510, 517 (Minn. 1983); *Wolfson v. Florida*, 344 So.2d 611, 614 (Fla. Dist. Ct. App. 1977); *Mayor of El Dorado v. El Dorado Broadcasting Co.*, 544 S.W.2d 206, 207 (Ark. 1976); *Hough v. Stembridge*, 278 So.2d 288, 289 (Fla. Dist. Ct. App. 1973); *Slagle v. Ross*, 125 So.3d 117, 125 (Ala. 2012) (recognizing circumstances where meetings of less than a majority of governing body can constitute a meeting subject to law); *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 471-77 (W.D. Tex. 2001) (same); *City of Fairbanks v. Shechter*, No. 4FA-91-0029 Civ. (Alaska 4th Jud. Dist., July 8, 1992) (trial court order enjoining secret meetings including less than a majority of governing body); *People ex rel. Defamis v.*

Barr, 414 N.E.2d 731, 735 (Ill. 1980) (affirming trial court order holding that a secret meeting of less than a majority of a governing body violated open meetings law without deciding the precise number that would be needed to be exempt from the open meetings requirement); *see also* Va. Code Ann. § 2.1-341; Ill. Ann. Stat. ch. 102, para. 41.02; C. Robert Heath & Emily Willms Rogers, *Did the Attorney General Shine Light on the Confusion in Texas' Sunshine Law? Interpreting Open Meetings Act Provision § 551.143*, 7 Tex. Tech Admin. L.J. 97, 109 (2006); Margaret S. DeWind, *The Wisconsin Supreme Court Lets the Sun Shine in:* State v. Showers *and the Wisconsin Open Meeting Law*, 1988 Wis. L. Rev. 827, 856.

This Court's prior decision in *Matter of Recall of Beasley*, 128 Wn.2d 419, 426, 908 P.2d 878 (1996), is readily distinguishable from the facts of this case and does not dictate a black-letter rule precluding a negative quorum, because that case involved a school board comprised of five members—a number that supports a clear majority quorum rule.

Ultimately, the decision whether or not to extend sunshine protections to meetings of a negative quorum goes directly to the policy underlying the OPMA. If the Act is only aimed at preventing the private passage of laws, then there is no need to apply its protections to a negative quorum. But if the Act is intended to prevent private meetings in which the officials—who have

the power to control action by voting against, as well as for, proposals—deliberate and decide on pending legislation, then a meeting of a negative quorum must fall within the purview of the law. As stated above, the express policy of the OPMA is the latter. RCW 42.30.010. Thus, a meeting of a negative quorum to deliberate on pending legislation must be open to the public.

CONCLUSION

For the reasons stated above, Amici Curiae respectfully join Petitioner Citizens' Alliance for Property Rights Legal Fund in requesting that the Court reconsider its October 1, 2015, Opinion.

DATED: October 23, 2015.

Respectfully submitted,

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