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No. 481855-II

COURT OF APPEALS, DIVISION TWO,
OF THE STATE OF WASHINGTON

JOHN LEY, et al.,

Appellants,

v.

CLARK COUNTY PUBLIC TRANSPORTATION
BENEFIT AREA, a Washington Public Transportation
Benefit Area, et al.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellants seek to invalidate the composition of C-TRAN's Board of Directors ("Board"); to nullify every action the Board has taken since January 13, 2015; and to impose a \$100 penalty on the individual C-TRAN Board members. Appellants allege violations of Washington's Open Public Meetings Act ("OPMA") and RCW 36.57A.055, a statute under the Public Transportation Benefit Area ("PTBA") Act. Appellants' claims raise two primary issues related to the OPMA: (1) whether a statutorily created group of individuals, called the Board Composition Review Committee ("BCRC"), is subject to the OPMA and (2) whether C-TRAN—the PTBA in Clark County—and its Board members can be held liable for the alleged OPMA violation by the BCRC, which is distinct from C-TRAN.

The BCRC meets ever four years to determine the composition of C-TRAN's Board. This quadrennial review, mandated by RCW 36.57A.055, calls for a meeting of individuals separate from C-TRAN's Board, although the BCRC may be composed of elected officials also serving in a separate capacity on the Board. In November 2014, after a year-and-a-half-long process, the BCRC voted in a publicly televised meeting to change C-TRAN's Board composition, removing a seat from Clark County and providing an extra seat to the smaller cities in the county. The appellants, upset with the outcome of this process, sued the BCRC, C-TRAN, C-TRAN's individual Board members, and C-TRAN's

CEO (Jeff Hamm)¹ in April 2015 claiming a violation of the OPMA and RCW 36.57A.055.

The BCRC is not subject to the OPMA, because it fails to fit any of the statutory definitions of “public agency” under the OPMA. Nor did C-TRAN’s individual Board members² violate the OPMA, because they never attended any meeting held in violation of the OPMA. For his part, Mr. Hamm fully complied with RCW 36.57A.055’s notice requirements, and, because he is not a member of a governing body, he cannot violate the OPMA. Finally, with respect to appellants’ statutory and constitutional writ claims, the BCRC’s year and half long process satisfied RCW 36.57A.055. A statutory writ of review claim is improper because the BCRC’s decision is not judicial, and appellants cannot demonstrate any protectable interest under RCW 36.57A.055 sufficient to grant standing for a constitutional writ.

Appellants fail to identify any basis for reversal on appeal. Thus, the Court should affirm the trial court’s dismissal of all claims.³

¹ Appellants also sued the C-TRAN Board of Directors as a standalone defendant but do not appeal its dismissal from this action. Therefore, appellants concede that its dismissal was proper.

² This brief is not being filed on behalf of respondents Mielke, Madore, or the BCRC.

³ Although appellants sought attorneys’ fees in their First Amended Complaint for their OPMA claims, they have not specifically requested any attorneys’ fees under RAP 18.1 on appeal. Accordingly, appellants are precluded from seeking attorneys’ fees on appeal. *See* RAP 18.1(b) (request must be made in separate section in opening brief).

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Whether C-TRAN and the Board members lack standing to defend against claims that have direct and immediate impact upon them, including nullifying all actions taken by C-TRAN and invalidating its current Board composition.
2. Whether the OPMA applies to the BCRC, a statutorily created group that comes together every four years to determine the composition of C-TRAN's Board and then disbands.
3. Whether members of C-TRAN's Board members knowingly violated the OPMA by attending properly noticed C-TRAN meetings.
4. Whether C-TRAN's CEO, who is not a member of C-TRAN's governing body, violated the OPMA or RCW 36.57A.055 when he provided twenty days' notice of the BCRC meeting.
5. Whether appellants properly stated a claim for either a statutory or constitutional writ of review when RCW 36.57A.055 does not require express findings, when no judicial was taken, and when appellants cannot demonstrate any protectable interest under RCW 36.57A.055.

III. COUNTERSTATEMENT OF THE CASE

A. C-TRAN and the BCRC Act Independently of Each Other.

C-TRAN is a PTBA, defined by RCW 36.57A.010(7) as a "municipal corporation of the state of Washington created pursuant to"

Chapter 36.57A RCW. The Legislature has granted C-TRAN “all powers which are necessary to carry out the purposes of the [PTBA],” including the capacity to “sue and be sued in its corporate capacity in all courts and in all proceedings.” RCW 36.57A.080.

In order to create a PTBA, the Legislature set forth a multi-step process:

(1) The relevant county legislative authority must convene a conference to evaluate “the need for and the desirability” of having a PTBA. RCW 35.57A.020.

(2) If such a conference finds it “desirable to establish” a PTBA, then it has to first fix a date for a public hearing. *Id.*

(3) Once the date is fixed, the notice of that hearing must “be published once a week for at least four consecutive weeks in one or more newspapers of general circulation,” and the notice must also contain several specific things, including a map and “the time and place of the hearing and the fact that any changes in the boundaries of the [PTBA] will be considered at such time and place.” *Id.*

(4) After such notice and hearing, the conference has the authority to make changes to “the boundaries of the PTBA,” but only after a second hearing and notice are given. *Id.*

(5) At the conclusion of the hearing, the conference is required to “adopt a resolution fixing the boundaries of the proposed [PTBA], declaring that the formation of the proposed [PTBA] area will be

conducive to the welfare and benefit of the persons and property therein.”

Id.

(6) “Within thirty days of the adoption of such conference resolution,” the county legislative authority has the authority to “disapprove and terminate” the newly formed PTBA, but only after passing a resolution containing specific “legislative findings.” *Id.*

After a PTBA is established, the statute requires the creation of a “governing body” within sixty days by “the county legislative authority and the elected representatives of each city within” the PTBA. RCW 36.57A.050. The governing body “shall consist of elected officials selected by and serving at the pleasure of the governing bodies of component cities within the area and the county legislative authority.” *Id.* Also within this sixty-day period, the composition of the PTBA can be “disapprove[d]” by “the county legislative authority and each city remaining in the [PTBA].” *Id.* Each PTBA must also have an employee labor organization “nonvoting member.” *Id.* Once this process is complete, the PTBA is operational.

In addition, the Legislature directed a specific group of individuals to meet every four years to review the composition of the PTBA’s governing body. RCW 36.57A.055. This group has no continuing existence and no designated staff. Rather, it is a legislatively created quadrennial gathering of a group of individuals. *See id.* This is the so-called “BCRC.”

The statute creating the BCRC, entitled “Governing body--Periodic review of composition,” states in relevant part:

After a [PTBA] has been in existence for four years, members of the county legislative authority and the elected representative of each city within the boundaries of the [PTBA] shall review the composition of the governing body of the benefit area and change the composition of the governing body if the change is deemed appropriate. The review shall be at a meeting of the designated representatives of the component county and cities, and the majority of those present shall constitute a quorum at such meeting. Twenty days notice of the meeting shall be given by the chief administrative officer of the public transportation benefit area authority. After the initial review, a review shall be held every four years.

RCW 36.57A.055.

In sharp contrast to the procedure for creating PTBAs such as C-TRAN, the Legislature provided for a simple “Twenty days notice,” and it is undisputed that twenty days’ notice was given with respect to the meeting at issue in this lawsuit. *See* CP 5-6. The Legislature did not designate the BCRC as a municipal corporation, provide it with the capacity to sue or be sued, require any specific form of notice for its meetings, require it to adopt any legislative findings, or establish a multi-step process for it to take any action. Instead, the Legislature authorized the BCRC to do just one thing: adjust the composition of the C-TRAN Board of Directors on a quadrennial basis when such adjustment is deemed appropriate. Thus, labelling the BCRC a “committee” is a misnomer, as that term suggests that the BCRC does work on behalf of, or makes recommendations to, C-TRAN. It does not. Indeed, C-TRAN

lacks any authority to reject the BCRC's decision regarding the composition of its Board.

B. The BCRC Undertakes Its Statutory Duty.

On June 11, 2013, the BCRC began its statutorily prescribed review of the composition of C-TRAN's Board. Its first order of business was to elect a Chair (Clark County Commissioner Steve Stuart) and a Vice-Chair (City of Battle Ground Mayor Lisa Walters). *See* CP 46-51.⁴ At this meeting, the BCRC received information regarding how to determine whether or not to change the composition of C-TRAN's Board. *See* CP at 61-80. After discussion of what the Board make-up should be and what factors should be taken into account in considering whether to change the make-up of the C-TRAN Board, the meeting adjourned. *See* CP 49-51.

The BCRC met again on July 9, 2013. *See* CP 82-87, 89-102. During this meeting, the BCRC discussed how it should make its decision. CP 82-87, 94. The BCRC also discussed the "block veto" provision of C-

⁴ The facts stated here are all subject to judicial notice and were before the trial court. In ruling on a motion to dismiss, a court may consider public documents that are properly the subject of judicial notice. *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187, 192 (1977). A document or fact is subject to judicial notice if it is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). In addition, videos, as well as links to these agendas and minutes, are publicly available as a courtesy on C-TRAN's website because the BCRC does not have its own website. *See* <http://www.c-tran.com/about-c-tran/c-tran-board-information/board-meeting-documents>.

TRAN's bylaws and how that provision might be impacted by a change to the C-TRAN Board. *See* CP 82-87.⁵

The next BCRC meeting was on August 13, 2013. *See* CP 104-131. Mr. Hamm presented additional information for the BCRC to consider in evaluating whether to change the composition of the C-TRAN Board, including information regarding the prior use of the "block veto" provision of C-TRAN's bylaws. *See* CP 122-131. The BCRC then discussed the "block veto" as well as some potential changes to the composition of the C-TRAN Board. *See* CP 108-113. Without any action being taken, the meeting was adjourned.

On September 10, 2013, the BCRC met again. *See* CP 133-155. After the BCRC heard citizen comment, Mr. Hamm presented a staff report. CP 134, CP 153-155. He laid out several options before the BCRC regarding the composition of C-TRAN's Board and provided a legal memorandum discussing how certain changes would impact the C-TRAN bylaws in effect at that time. *See* CP 153-155. After this presentation, the BCRC discussed a possible lawsuit to determine the impact any change to the composition of the C-TRAN Board would have

⁵ The "block veto" refers to a former provision in C-TRAN's bylaws that gave the City of Vancouver and Clark County, which each had three representatives on the C-TRAN Board at the time the BCRC commenced its duties, the power to veto any action taken by the Board. Eventually, litigation was filed regarding whether this "block veto" would survive changes in the number of Vancouver or Clark County representatives on the C-TRAN Board, and the court found that it would not. *See generally* Dkt. for *Clark County Bd. of Commissioners v. City of Camas, et. al.*, No. 13-2-04050-0 (Clark County Superior Court) (Gregerson, J.).

on the “block veto” provision. *See* CP 135-140. The meeting was then adjourned.

On October 8, 2013, the BCRC met yet again. *See* CP 157-173. After citizen communications, the BCRC continued discussing the composition of the C-TRAN Board. *See* CP 158-163. After this discussion, the meeting was adjourned.

During its December 11, 2013, meeting, the BCRC continued its discussion of the various options it was considering with respect to the composition of C-TRAN’s board. *See* CP176-199. Ultimately, the BCRC voted to adjourn the meeting and to postpone any action until the declaratory judgment lawsuit involving the “block veto” was resolved. CP 179-180.

C. The Conclusion of the BCRC Process.

On September 30, 2014, the Clark County Superior Court decided the “block veto” lawsuit. *See* CP 212-17. The Court ruled: “If the C-TRAN Board composition changes to anything less than three for either City of Vancouver or Clark County, the entire Bylaw 4.5.1 [“block veto” provision] is rendered invalid at that time.” *See* CP 215.

On or around October 9, 2014, C-TRAN posted a notice on its website alerting the public that the BCRC would meet on November 18, 2014, at the Vancouver Library in the Columbia Room at 4:00 p.m. *See* CP 5. A similar notice was published in *The Columbian*, a newspaper of general circulation in Clark County. *See* CP 6. On or around November 12, 2014, C-TRAN again posted the notice on its website, this time with

an agenda. *See* CP 6. All of these admitted notices more than satisfied the twenty days' notice required by RCW 36.57A.055.

On November 18, 2014, the BCRC met for the last time in the current cycle, completing its statutorily prescribed role. *See* CP 201-17, 219-39⁶. Ten individuals participated in the meeting: (1) City of Ridgefield Mayor Ron Onslow (Chair Pro Tem), (2) City of Washougal Mayor Sean Guard, (3) City of Vancouver Mayor Tim Leavitt, (4) City of Camas Mayor Scott Higgins, (5) Town of Yacolt Mayor Jeff Carothers; (6) Clark County Commissioner David Madore, (7) Clark County Commissioner Tom Mielke, (8) Clark County Commissioner Ed Barnes; (9) City of Battle Ground Mayor Shane Bowman, and (10) City of La Center Mayor Jim Irish. CP 219. After a discussion lasting over an hour, the BCRC voted to change the composition of the C-TRAN Board. *See* CP 219-239. As appellants characterized it, the "BCRC voted to eliminate one of Clark County's seats," resulting "in a change to the internal voting rules of the C-TRAN Board of Directors. In particular, the actions of the C-TRAN BCRC reconfigured the level of participation of the City of Vancouver and Clark County in C-TRAN's governance." CP 7. Shortly after the BCRC's decision, Clark County passed a motion authorizing the

⁶ The minutes at CP 219-39 have not yet been adopted by the BCRC because it will not meet again until June 2, 2018. These minutes, however, contain a verbatim transcript of the BCRC's discussion regarding the composition of C-TRAN's Board. A video of this meeting is also available at http://www.cvtv.org/vid_link/3553; *see also* <http://www.c-tran.com/about-c-tran/c-tran-board-information/board-meeting-documents/itemlist/category/21-2014-board-meetings>.

filing of a lawsuit to seek injunctive and declaratory relief regarding virtually the same claims at issue in this case. *See* CP 241-42. But Clark County did not file suit.

D. C-TRAN's January 2015 Meeting.

On January 13, 2015, C-TRAN held its admittedly properly noticed regularly scheduled meeting. *See* CP 244-291. At the outset of the meeting, former Board member (and respondent) Madore submitted two letters, one signed by all three Clark County Councilors,⁷ and one prepared by a Seattle-based law firm, claiming that C-TRAN was in violation of the OPMA and failing to comply with RCW 36.57A.055 as a result of the November 18, 2014 meeting of the BCRC. *See* CP 260-63. The Board refused to seat Clark County Councilor Tom Mielke (a subsequently added defendant), given the change in the composition of the Board. *See* CP 244, 247. After noting the letters, the C-TRAN Board voted to amend C-TRAN's bylaws consistent with the Court's Order regarding the "block veto" and the BCRC's decision. *See* CP 20-21.⁸

E. Appellants' Complaint.

On April 22, 2015, appellants filed this action. They amended it to add two new defendants on June 22, 2015. *See* CP 2. Appellants sought a

⁷ During the time period at issue in this case, Clark County changed the name associated with its elected representatives from "Commissioner" to "Councilor." Mr. Madore no longer serves as a C-TRAN Board member.

⁸ None of the appellants provided citizen comment at the January 13 meeting or at any C-TRAN meeting held thereafter raising any of the issues involved in this lawsuit.

declaration that (1) the November 18, 2014 meeting of the BCRC violated the OPMA’s “special meeting notice requirements” set forth in RCW 42.30.080; (2) the BCRC’s action is null and void under the OPMA, and the current C-TRAN Board “is not presently legally constituted”; (3) all actions undertaken by the C-TRAN Board “from January 13, 2015 to the present are null and void”; and (4) Mr. Hamm violated the OPMA and RCW 36.57A.055’s notice provision. CP 8-9. Appellants also asked the court to impose a \$100 penalty upon the C-TRAN Board members—including the nonvoting member and one person who has not been a Board member since 2014—for “their knowing violation of [the] OPMA.” CP 9. Finally, appellants sought either a statutory or constitutional writ finding that the BCRC violated RCW 36.57A.055 based on its failure “to provide any findings or explanations justifying a change in the composition of the C-TRAN Board of Directors, the nature of such a change and that such change would be appropriate.” CP 9.

F. Motion to Dismiss the Complaint.

Respondents C-TRAN, C-TRAN Board of Directors, Greg Anderson, Jack Burkman, Bart Hansen, Jim Irish, Lyle Lamb, Jennifer McDaniel, Anne McEnerny-Ogle, John Shreves, Jeanne Stewart, David Madore⁹, and Jeff Hamm filed a motion to dismiss the claims against them on July 30, 2015. They did not move to dismiss the claims against either the BCRC or Mr. Mielke. CP 21 n. 2 (“This Motion is not brought on

⁹ Undersigned counsel no longer represents Mr. Madore.

behalf of defendants Mielke . . . or the BCRC”); CP 485 (“Moreover, defendants’ motion does not seek any affirmative relief on behalf of the BCRC”). Ms. Freeman subsequently joined the motion. Appellants sought a continuance, which the trial court granted, setting oral argument for September 4, 2015. CP 329. After hearing extensive oral argument on the motion to dismiss, the trial court granted the motion, dismissing appellants’ case against the moving parties. *See generally* VRP Defs.’ Mot. to Dismiss; CP 499-502.

Appellants timely filed a notice of appeal. CP 503.

IV. SUMMARY OF ARGUMENT

The trial court properly granted the motion to dismiss. First, C-TRAN and its individual Board members have standing to challenge whether the OPMA applies to the BCRC and whether the BCRC complied with RCW 36.57A.05,5 because of the relief appellants seek through these claims. Appellants seek to declare all of C-TRAN’s actions since January 13, 2015 “null and void” and to invalidate C-TRAN’s current Board composition. This direct and immediate impact on C-TRAN and its Board members gives them standing to challenge appellants’ claims.

Second, the OPMA does not apply to the BCRC because the BCRC does not meet any of the statutory definitions of “public agency” under the OPMA. The BCRC is a group that comes together every four years to determine the composition of C-TRAN’s Board and lacks the capacity to sue or be sued.

Third, the claims against the individual Board members and Mr.

Hamm were properly dismissed. Appellants failed to establish that either the Board members or Mr. Hamm attended a meeting in violation of the OPMA, a prerequisite for individual liability under the OPMA. Indeed, to state appellants' claim is to reject it. If appellants were correct that the BCRC violated the OPMA and that C-TRAN's current Board is improperly constituted, that would mean that C-TRAN has no governing body. As a result, neither C-TRAN nor the individual Board members could violate the OPMA, because they are not a governing body under the OPMA. As to Mr. Hamm, appellants fail to identify any provision in the OPMA that Mr. Hamm violated. Instead, they attempt to graft the OPMA onto RCW 36.57A.055's notice requirements. They fail to identify any authority for finding that an agency employee, who is not part of the governing body, can be liable under the OPMA.

Fourth, appellants' claims for either a statutory or constitutional writ are improper because the BCRC fully complied with RCW 36.57A.055. Nothing in RCW 36.57A.055 requires specific findings or resolutions, in contrast to other provisions in Chapter 36.57A RCW. Appellants also cannot establish the necessary jurisdictional elements for a statutory writ of review or standing for a constitutional writ of review.

V. ARGUMENT

A. Standard of Review.

Whether the trial court properly granted a motion to dismiss under CR 12(b)(6) is reviewed de novo. *Worthington v. WestNET*, 182 Wn.2d 500, 505, 341 P.3d 995 (2015). "A CR 12(b)(6) motion may be granted

only where there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim.” *Id.* On a CR 12(b)(6) motion, “factual allegations are taken as true, but legal issues are subject to full judicial analysis.” *Ironworkers Dist. Council of the Pac. NW v. Woodland Park Zoo Planning & Dev.*, 87 Wn. App. 676, 684 n.1, 942 P.2d 1054 (1997). In other words, while this Court must accept plaintiffs’ factual allegations, it cannot accept their legal conclusions.

B. C-TRAN, the Board Members, and Mr. Hamm Have Standing Because the Claims Against the BCRC Impact C-TRAN, the Board Members, and Mr. Hamm.

At the outset, appellants argue that C-TRAN and the individual Board members lack standing to address whether the BCRC is subject to the OPMA and whether it complied with RCW 36.57A.055.

Standing is a doctrine related to the court’s power to grant affirmative relief. A defendant who is in a case only because of the alleged act or omission of another party, whether named in the case or not, can seek dismissal by establishing that the other party did nothing contrary to law. *Cf. Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 424, 865 P.2d 536 (1994) (holding that a guarantor of a debt could not assert a counterclaim in place of the principal debtor *but could raise “defensively the claims of the principal debtor”* (emphasis added)).

Here, C-TRAN and its individual Board members are in this case only because of the alleged acts or omissions of the BCRC. *See* CP 1-11 (First Am. Compl.) (alleging that the sole basis for violation of the OPMA was the BCRC’s conduct on November 18, 2014). All of the claims in this case revolve around appellants’ assertion that the BCRC did not comply with the OPMA or with RCW 36.57A.055. And based on these claims, appellants seek to declare null and void all actions taken by C-TRAN since January 1, 2015, to invalidate its current Board composition, and to impose a \$100 penalty upon the individual Board members. CP 10. This creates a “distinct and personal interest in the outcome of the case.” *See* Opening Br. at 13 (quoting *Pac. Marine Ins. Co. v. State ex. Rel. Dep’t of Rev.*, 181 Wn. App. 730, 739, 329 P.3d 101 (2014) (internal quotations omitted)). Accordingly, C-TRAN and the individual Board members are asserting their own interests and not those of the BCRC.

Under appellants’ view, only the BCRC can raise the question of whether it is subject to the OPMA or whether it violated RCW 36.57A.055. In other words, appellants assert that C-TRAN and its Board members cannot defend themselves in this lawsuit or do anything to prevent nullification of C-TRAN’s own actions since January 1, 2015. Rather, they must wait for the BCRC to appear to make the very same arguments. This assertion is nonsensical—the more so because the BCRC is not an entity that *can* appear and argue on its own behalf.¹⁰ *Cf. Vovos v.*

¹⁰ The BCRC lacks the ability to sue or be sued, meaning that these issues will never be properly contested if respondents are unable to argue them. “If a person

Grant, 87 Wn.2d 697, 699, 555 P.2d 1343 (1976) (“A person has standing to challenge a court order or other court action if his protectable interest is adversely affected thereby.”); *Casey v. Chapman*, 123 Wn. App. 670, 676, 98 P.3d 1246 (2004) (“Parties whose financial interests are affected by the outcome of a declaratory judgment action have standing.”). Nor can appellants point to any authority supporting their novel theory of standing.

It is well settled that not all governmental bodies created by statute have the capacity to sue or be sued. For example, in *Roth v. Drainage Improvement District No. 5*, 64 Wn.2d 586, 589, 392 P.2d 1012 (1964), the Supreme Court dismissed an action against a drainage improvement district because it was “not a municipal corporation or quasi-municipal corporation and does not have the capacity to sue or be sued.” *See also Foothills Dev. Co. v. Clark County Bd. of Comm’s*, 46 Wn. App. 369, 376-77, 730 P.2d 1369 (1986). In assessing whether the BCRC has the legal capacity to be sued, courts “must examine the enactment providing for [its] establishment.” *Id.* at 376. The statute creating the BCRC demonstrates only the PTBA (i.e., C-TRAN) is amenable to suit. *Compare* RCW 36.55A.080 (PTBAs can “sue or be sued”) *with* RCW 36.55A.055 (containing no similar provision). As the court in *Foothills* said, “If the Legislature had intended to give the [BCRC] this authority, it could have included such authority” in Chapter 36.57A RCW. *Foothills* at 377. It did

or entity lacks capacity to sue or be sued, it cannot be a party in a court action.”
14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 11:7, at 386 (2d ed. 2009).

not. Accordingly, the BCRC cannot appear in this action to raise these defenses.

In addition, respondents' motion to dismiss did not seek any affirmative relief on behalf of the BCRC or Mr. Mielke. CP 21 n. 2 ("This Motion is not brought on behalf of defendants Mielke . . . or the BCRC"); CP 485 ("Moreover, defendants' motion does not seek any affirmative relief on behalf of the BCRC"). Thus, it cannot be said that any respondent is attempting to assert someone else's legal rights. *See, e.g., West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008) (private citizen not allowed to assert breach of contract claim against county's lawyers). Appellants' standing argument must be rejected.

In sum, respondents have standing to challenge whether the OPMA applies to the BCRC and whether the BCRC complied with RCW 36.57A.055, because these claims have a direct and immediate effect upon C-TRAN and the individual Board members. In particular, the OPMA claim would nullify and render void all actions taken by the C-TRAN Board and would invalidate its current Board composition. The RCW 36.57A.055 claim would similarly invalidate C-TRAN's current Board composition. These direct and immediate harms are sufficient to establish standing to defend against these claims.

C. The OPMA Does Not Apply to the BCRC.

All of appellants' claims on appeal related to the OPMA fail as a matter of law because they rest on the false assumption that the OPMA applies to the BCRC. It does not. The BCRC is not a "public agency"

under the OPMA, nor is it a “governing body” of C-TRAN. It is a group that comes together every four years to determine the composition of C-TRAN’s Board. Once it accomplishes that task, it goes away. The Legislature did not provide it with any mechanism for raising funds or hiring staff, or provide it with any authority other than determining the composition of C-TRAN’s Board. As a result, the OPMA does not apply to the BCRC.

Under the OPMA, “all meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.” RCW 42.30.030. Only meetings of the “governing body of a public agency” are required to be open and comply with the notice provisions of the OPMA. Because the BCRC is not a “public agency” (or a “governing body” for that matter), the OPMA does not apply.¹¹

Four types of entities fall within the definition of “public agency” under the OPMA:

- (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;

¹¹ Appellants erroneously claim that “there is no dispute that the members of the BCRC qualify as a governing body.” To the contrary, the BCRC cannot constitute a governing body under RCW 42.30.020(2) because that term must be tied to a public agency, and the BCRC is not a public agency.

(b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;

(c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;

(d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

RCW 42.30.010(1).

Appellants present three arguments for applying the OPMA to the BCRC, arguing the BCRC is (1) a political subdivision under subsection (b), (2) a state agency under subsection (a), and/or (3) a subagency of C-TRAN under subsection (c). The Court should reject all of these arguments; the plain language of the OPMA does not encompass the BCRC.

1. The BCRC is not a political subdivision under subsection (b).

Appellants argue, without citing any authority, that the BCRC is a “political subdivision” under the OPMA—not because it actually is a “political subdivision,” but rather because it is a “quasi-municipal corporation.” *See* Opening Br. at 18-19. Appellants’ tortured argument requires rewriting the OPMA and is based on the flawed assumption that

the BCRC can somehow be transmogrified to fit the definition of a “quasi-municipal corporation.”

“In order to ascertain the meaning of the OPMA, we look first to its language. If the language is not ambiguous, we give effect to its plain meaning.” *West v. State*, 162 Wn. App. 120, 130, 252 P.3d 406 (2011) (citations omitted); *accord Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 435, 359 P.3d 743 (2015) (“[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.”). “A statute is ambiguous if it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.” *West*, 162 Wn. App. at 130 (quotation omitted).

There is no dispute that, under the OPMA’s plain terms, the definition of “public agency” does not include “quasi-municipal corporations.” *See, e.g.*, RCW 42.30.020(1)(b). By contrast, other statutes that promote similar goals of open government expressly include quasi-municipal corporation within the relevant definitions. For example, Washington’s Public Disclosure Act’s definition of “agency” expressly includes “quasi-municipal corporation[s].” RCW 42.17A.005(2); *see also Telford v. Thurston County Bd. of Comm’rs*, 95 Wn. App. 149, 156-57, 979 P.2d 886 (1999) (discussing former PDA). Likewise, Washington’s Public Records Act definition of “agency” expressly includes “quasi-municipal corporation[s].” RCW 42.56.010(1); *see also* 4.96.010(2) (defining “local governmental agency” to include “quasi-municipal

corporation”). Thus, when the Legislature wants to subject “quasi-municipal corporations” to public disclosure requirements, it knows how to do so.

“Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. We therefore presume the absence of such language [in a statute] was intentional.” *Delgado*, 148 Wn.2d at 728; *Five Corners*, 173 Wn.2d at 313. Further, “[w]hen determining a statute’s plain meaning, [courts] 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 Alliance*, 184 Wn.2d at 435 (quotation omitted). The fact that the OPMA does not include quasi-municipal corporations is conclusive evidence of the Legislature’s intent that they are not subject to the OPMA. Thus, even if the BCRC could somehow be considered a “quasi-municipal corporation,” under its plain terms the OPMA would not apply to it. This reflects legislative design.

In any event, the BCRC is not a “quasi-municipal corporation.” Indeed, the PTBA statute makes clear that only the PTBA is considered a municipal corporation. RCW 36.57A.080. In *Woods v. Bailet*, the court defined a “quasi-municipal corporation” as a body “*politic and corporate*, created for the sole purpose of performing one or more municipal functions.” 116 Wn. App. 658, 663, 67 P.3d 511 (2003) (emphasis added; quotation omitted). The court noted that a “quasi-municipal corporation is merely a public corporation *created by a municipality* for a limited public

purpose.” *Id.* at 664 (emphasis added; citation omitted). Here, the BCRC was not created by a municipality. Rather, it was created by a state statute that expressly did not give it any attributes of a corporation, municipal or otherwise. *Compare* RCW 36.57A.055 (not endowing group with right to sue or be sued) *with* RCW 36.57A.080 (endowing PTBA with right to sue and be sued).¹²

Appellants attempt to avoid the plain language of the OPMA under the guise of liberal construction. *See* Opening Br. at 16. To be sure, the OPMA must be liberally construed to advance its purposes. *See* RCW 42.30.910. But the fact that this Court must liberally construe the OPMA does not mean it is at liberty to rewrite the OPMA. *Salts v. Estes*, 133 Wn.2d 160, 162, 943 P.2d 275 (1997) (“What the Legislature has not seen fit to do—change the wording of the statute—we decline to do by judicial proclamation in the guise of liberal construction.”); *Silverstreak, Inc. v. Wash. State Dep’t of Labor & Indus.*, 125 Wn. App. 202, 104 P.3d 699 (2005) (refusing to “rewrite the statute” under the guise of “liberal construction.”).

Accordingly, the BCRC does not fit within the definition of “political subdivision” as that term is used in RCW 42.30.020(1)(b).

2. The BCRC is not a state agency.

¹² The BCRC does not function like any political subdivision under Washington law. *See, e.g.*, RCW 52.12.011 (defining fire protection districts as political subdivisions of the State); RCW 38.52.010(14) (defining “political subdivision” as “any county, city or town”); RCW 89.30.121 (“Reclamation districts created under this chapter shall be political subdivisions of the state . . .”).

Appellants accept the proposition that, in order to be an “other state agency” under the OPMA, the entity in question must serve “a statewide function.” Opening Br. at 20 (quoting *West v. State of Washington*, 162 Wn. App. 120, 132, 252 P.3d 406 (2011)). Nevertheless, appellants claim that the BCRC, which determines only the make-up of the Clark County PTBA, somehow serves a “statewide function.”¹³ This cannot be.

Appellants rely on *West*, but *West* presented an entirely different situation. There, the court was faced with the question of whether the Washington Association of County Officials (“WACO”) was an “other state agency” under the OPMA. *West*, 162 Wn. App. at 132. In concluding that it was an “other state agency,” the court relied on the fact that “WACO’s function is the *statewide coordination of county administrative programs*, declared by the Legislature to be a public purpose.” *Id.* at 133 (citation and quotation omitted) (emphasis added).

Here, the BCRC plays no role outside of Clark County. It determines the make-up of C-TRAN’s Board, not the board of some non-

¹³ The fact that the BCRC is created by state statute is insufficient to make it a state agency. See *West*, 162 Wn. App. 132 (“RCW 42.30.020[1](a) requires that an enabling statute exist prior to or be enacted simultaneously with the creation of an entity *carrying out a statewide public function*.” (emphasis added)). For instance, C-TRAN is statutorily created to the same degree that the BCRC is statutorily created, yet C-TRAN is not a state agency. See *Plumbers and Steamfitters Union Local 598 v. Wash. Pub. Power Supply Sys.*, 44 Wn. App. 906, 911, 724 P.2d 1030 (1986) (“A municipal corporation is not an ‘agency’ as defined in the APA . . . because it is not a ‘state agency[.]’ Rather it is a ‘local agency.’” (internal citation omitted)).

existent statewide PTBA. If the Legislature had created a single group under section .055 to determine the make-up of all PTBAs throughout the State, then appellants' argument might have some force. But the Legislature did not create any such group. Given that the BCRC's decision impacts Clark County alone, it simply cannot be said that the BCRC performs any statewide function.¹⁴

Perhaps realizing the weaknesses in their statutory argument, appellants next assert that this Court should employ a "functional equivalency" test to determine whether the BCRC is subject to the OPMA. *See* Opening Br. at 20-22. This is wrong for two reasons.

First, no reported case has ever sanctioned the use of the "functional equivalency" test to determine whether the OPMA applies. The most plaintiffs have is an Attorney General Opinion that employs this test in the context of the OPMA. That Attorney General Opinion is unhelpful to plaintiffs because it ultimately concluded that the Small Business Export Finance Assistance Center was *not* subject to the OPMA. *See* 1991 Att'y Gen. No. 5 at 8 ("We conclude that the Legislature kept the state out of the Center's operation to a degree sufficient to render the [OPMA] inapplicable.").

Second, the "functional equivalency" test has no application here. It is used by courts to determine whether a *private organization* that

¹⁴ Appellants' own arguments contradict their theory. They argue that the BCRC is a "political subdivision" because it "has limited functions and powers, [which it] exercises . . . on a local basis." Opening Br. at 20 (emphasis added).

performs a public function is subject to the Public Records Act. *See, e.g., Telford*, 95 Wn. App. at 166; *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192, 181 P.3d 881 (2008); *see also Worthington v. WestNET*, 182 Wn.2d 500, 508, 341 P.3d 995 (2015). Indeed, the Washington Supreme Court recently called into question the propriety of using this test in the context of the PRA. *Worthington*, 182 Wn.2d at 508. In so doing, it noted: “*Telford* and *Clark* involve private organizations that perform public functions, which subjects them to the PRA. The particular four factors from *Telford* are *irrelevant in this case because if WestNET were an agency at all*, it undisputedly would be considered public rather than private.” *Id.* at 508 n.6 (emphasis added). Here, there is no dispute that the BCRC performs a public function. Thus, there is no need to engage in any free-wheeling and fact-intensive balancing test to determine whether the OPMA applies to a private organization. All this Court needs to do is determine whether the BCRC fits within any of the statutory definitions set forth in the OPMA.

Because the BCRC does not perform a statewide function, but rather a local one, it does not fall within the definition of “other state agency” in RCW 42.30.020(1)(a).

3. The BCRC is not a subagency of C-TRAN.

Nor is the BCRC a subagency of C-TRAN. First, C-TRAN did not create the BCRC; rather, the Legislature did so, giving it a *single purpose*: to periodically review the composition of C-TRAN’s Board. The BCRC also is not a governing body of C-TRAN that acts on behalf of C-TRAN.

The OPMA defines a “governing body” as

a multimember board, commission, committee, council or other *policy or rule-making body* of a public agency, or any committee thereof when the committee *acts on behalf of the governing body*, conducts hearings, or takes testimony or public comment.

RCW 42.30.020(2) (emphasis added). The Washington Supreme Court recently interpreted “committee thereof” to mean an entity ‘created by [the] governing body pursuant to its executive authority’”, and “acts on behalf of” to “refer[] to situations where a committee exercises actual or de facto decision-making authority for the governing body.” *Citizens Alliance*, 184 Wn.2d at 439-40.

Here, the BCRC was created by statute, RCW 36.57A.055, not C-TRAN’s governing body, and it is completely independent of C-TRAN. Its sole purpose is to determine the composition of the C-TRAN Board of Directors. C-TRAN’s “governing body,” as that term is used in the OPMA, is C-TRAN’s Board of Directors.

Given its independence, the BCRC cannot be considered a “subagency” of C-TRAN in any sense of the word. Nor can it be seen as acting “on behalf” of C-TRAN, because it does not make policy or rules for C-TRAN and does not even make recommendations to C-TRAN. *Citizens Alliance*, 184 Wn.2d at 452; *Salmon for All v. Dep’t of Fisheries*, 118 Wn.2d 270, 278, 821 P.2d 1211 (1992) (“The plain language of the statute applies the term ‘governing body’ to the *internal authority of the agency only*, not an entity outside the public agency, or one to which an

agency send representatives.”) (emphasis added). Indeed, section .055 itself notes that the BCRC is not a “governing body” of C-TRAN because its sole function is to review *C-TRAN*’s “governing body.” In this respect, it controls C-TRAN and not the other way around, as would be required to find that the BCRC was a subagency of C-TRAN.

The Ninth Circuit’s decision in *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001), is instructive. In *Lakewood*, the court addressed whether the Lakewood Adult Entertainment Task Force (“Task Force”) fell within the purview of the OPMA. In concluding that it did, the court focused on the Task Force’s creation and activities vis-à-vis the public agencies it served, noting: “The Task Force was created as a committee of the Planning Advisory Board (a ‘governing body’) and it took testimony and public comments, conducted hearings and acted on behalf of the Board and City Council (both ‘public agencies’).” 259 F.3d at 1013. In contrast, the BCRC does not act on behalf of C-TRAN; it acts independently of C-TRAN.

In *Citizens Alliance*, the Washington Supreme Court held that an informal group of county officials and employees that met occasionally to discuss implementing a county ordinance was not subject to the OPMA. 184 Wn.2d 432. The Court reasoned that the group was not a committee of the county, because the county’s governing body did not create it. *Id.* at 449-50. Nor was the group acting on behalf of the county, because the group had no decision-making authority for the county. *Id.* at 450-52. The same is true here.

Under the statutory regime, the BCRC does not make recommendations to C-TRAN about C-TRAN's Board of Directors. *Cf. Lakewood*, 259 F.3d at 1002 (“Task Force submitted its report and recommendations to the Planning Advisory Board,” which then makes “recommendation to the [Lakewood] City Council[.]”). Instead, it determines the make-up of C-TRAN's Board, and that decision is final. C-TRAN lacks authority to reject the BCRC's decision on the make-up of the C-TRAN Board. The BCRC does not exercise “actual or de facto decision-making authority” for C-TRAN, because the BCRC's decision-making authority is conferred by statute and separate and apart from C-TRAN's authority. Moreover, the BCRC was created by the Legislature, not C-TRAN. *Cf. Citizens Alliance*, 184 Wn.2d 449-50; *Lakewood*, 259 F.3d at 1001 (noting Planning Advisory Board “formed a subcommittee,” i.e., the Task Force). The members of the C-TRAN Board of Directors and the BCRC do not necessarily overlap; by statute each constituent jurisdiction within the PTBA gets a vote regarding the composition of the Board, and C-TRAN lacks the authority to appoint any members to the BCRC. *Cf. Lakewood*, 259 F.3d at 1002 (noting Lakewood Planning Advisory Board “made five formal appointments to the Task Force.”). Therefore, the BCRC cannot be considered a “subagency” of C-TRAN for purposes of subsection (c).

To be sure, RCW 36.57A.055 expressly empowers C-TRAN's Executive Director to notice the BCRC's meetings. But the fact that C-TRAN helps coordinate the BCRC's meetings does not demonstrate that

the BCRC is a “subagency” of C-TRAN. Indeed, the dictionary defines “sub” in the context of “subagency” as “under” or “subordinate.” *Webster’s Ninth New Collegiate Dictionary*, p. 1172 (1990). Appellants do not contest that the BCRC’s decision is binding on C-TRAN and that C-TRAN cannot direct the BCRC’s actions. This alone defeats any claim that the BCRC is somehow a “subagency” as that term is defined in RCW 42.30.020(1)(c).

The BCRC is also not a subagency of C-TRAN under Subsection (c) because none of the meetings included any C-TRAN Board members acting as such. Every person who attended the BCRC meeting did so as a representative of his or her individual jurisdiction and not as a C-TRAN Board member. Indeed, there is no requirement under Chapter 36.57A RCW that the individuals serving on the BCRC correspond to any of the individuals serving on the C-TRAN Board.

4. The judiciary may not rewrite the OPMA.

Appellants argued below that the BCRC could hold meetings “by conference call or in the men’s room” if it is not subject to the OPMA. Opening Br. at 9 (quoting VRP 23). But appellants’ argument is misplaced. The question is whether the OPMA, by its terms, applies to the BCRC, not whether the OPMA should be rewritten for policy reasons to encompass the BCRC. “[P]olicy decisions are the province of the Legislature, not this court.” *State, Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 17 n.7, 43 P.3d 4 (2002); *see also Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (“This court should resist the

temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that ‘the drafting of a statute is a legislative, not a judicial, function.’” (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (internal quotation omitted)). “The specter of judicial activism is unloosed and roams free when a court declares, ‘This is what the Legislature meant to do or should have done.’” *Roberts v. Dudley*, 140 Wn.2d 58, 79, 933 P.2d 901 (Talmadge J., concurring). Indeed, this Court has stated that, in the context of the Public Records Act, which broadly favors disclosure, “We note that only the legislature can amend or expand its definition of a ‘public record.’ It is not for the courts to do so because ‘[w]e cannot make laws. We can only apply the laws which the legislature makes to the facts in a particular case.’” *Id.* at 184 n. 25 (alteration in original) (quoting *Fix v. Fix*, 33 Wn.2d 229, 231, 204 P.2d 1066 (1949)). Consequently, appellants’ parade of horrors avoids addressing the issue before the Court—namely, whether the BCRC meets the statutory definition of a public agency under the OPMA. It does not.

Moreover, appellants do not allege that a secret meeting actually occurred here. The BCRC’s meeting was publicly noticed, held in a public library, attended by the public, and publicly televised. What actually transpired in this case cannot be characterized as “secret” under any definition of that term.

Finally, the idea that public officials may not always fall within the OPMA’s purview, or that decisions may be made without being subject to

the OPMA, is neither novel nor startling. For instance, the OPMA does not apply to agencies where decisions are made by a single person. *Salmon for All*, 118 Wn.2d at 277. Nor does it apply to all groups of officials. In *Citizens Alliance*, the Supreme Court recently held that an informal group of county officials and employees meeting to discuss implementation of a county ordinance was not subject to the OPMA because it did not meet the requisite definitions. 184 Wn.2d at 432.

Here, likewise, the BCRC does not fit within any of the statutory definitions of public agency under the OPMA, and it is not subject to the OPMA.

D. Appellants Failed to Properly Allege a Claim under the OPMA Against C-TRAN, the Individual Board Members, or Mr. Hamm.

Even if the OPMA applied to the BCRC, and even if the BCRC violated the OPMA (neither of which is true), appellants cannot state any claims against C-TRAN, the individual Board members, or Mr. Hamm.

1. Claims against C-TRAN and the individual Board members.

Appellants failed to properly allege a claim against either C-TRAN or its individual Board members. Indeed, appellants did not allege, and do not argue, that any C-TRAN meeting that these individuals participated in was improperly noticed under the OPMA. *See* CP 1-8; Opening Br. at 24-25. Appellants' only argument is to point out that, under RCW 42.30.060, the actions of the BCRC can be voided if the BCRC violated the OPMA.

See Opening Br. at 25-26 (discussing *Future Reality, Inc. v. City of Spokane*, 331 F.3d 1082 (9th Cir. 2003)). That is beside the point.

Appellants confuse the remedy of nullification with what constitutes an actual violation of the OPMA. They are two different concepts. *City of Lakewood*, 259 F.3d at 1014. In *City of Lakewood*, the court held that only “actions taken in closed meetings” violated the OPMA. *Id.* “The statute, however, does not require that subsequent actions taken in compliance with the Act also be held null and void.” *Id.* (discussing *Org. to Preserve Agricultural Lands (OPAL) v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996)). In other words, there is no “fruit of the poisonous tree” analogue in the OPMA context. *Id.* Where action taken at a closed meeting results in a related action being taken at an open meeting, only the actions at the closed meeting violate the OPMA—not the action at the open meeting. *Id.*

Lakewood forecloses appellants’ already tenuous argument that C-TRAN Board members violated the OPMA either at a meeting they did not attend or at a meeting that, by all accounts, fully complied with the requirements of the OPMA. Thus, appellants’ claim that C-TRAN and the individual Board members can be found to have violated the OPMA in 2015 because of “the BCRC’s failure to comply with the OPMA in its November 2014 meeting,” Opening Br. at 25, has no basis in the law.

To enforce the OPMA’s civil penalty provision against the individual Board members, appellants “must show (1) that a ‘member’ of a governing body (2) attended a ‘meeting’ of that body (3) where ‘action’

was taken in violation of the OPMA, and (4) the member had ‘knowledge’ that the meeting violated the OPMA.” *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (2001). Appellants can point to no legal authority supporting their continuing-violation theory of OPMA liability. Here, it is undisputed that none of the individual members of the C-TRAN Board participated in the BCRC meeting in his or her capacity as a C-TRAN Board member.¹⁵ The BCRC is comprised of representatives of constituent jurisdictions of C-TRAN, RCW 36.57A.055, not the C-TRAN Board.

Put simply, appellants allege that the BCRC—not C-TRAN or its governing body—violated the OPMA on November 18, 2014. Yet appellants seek to hold a different organization—C-TRAN—with a different governing body—the individual C-TRAN Board members—liable for the BCRC’s alleged OPMA violation. Appellants provide no authority to support this transference of liability from the BCRC to C-TRAN. As a result, appellants’ novel and unsupported legal theory fails as a matter of law.

Even if appellants’ theory of the case were correct and a continuing violation of the OPMA somehow existed, neither the individual

¹⁵ Before the trial court, appellants halfheartedly argued that three individual Board members had also attended the BCRC meeting. Such an agreement has no merit, however, because the sole basis alleged for finding these three members liable under the OPMA was their participation in C-TRAN Board meetings, not their attendance at the BCRC meeting. Regardless, appellants have abandoned this argument on appeal.

Board members nor C-TRAN may be held liable under the OPMA. Under appellants' theory, C-TRAN's Board is not properly constituted and, as a result, there is no current "governing body" as that term is defined under the OPMA.¹⁶ If no "governing body" exists, then no "meeting" under the OPMA can occur.¹⁷ If no "meeting" can occur under the OPMA, then there can be no "action" taken.¹⁸ If all of this is true, it necessarily means no violation of the OPMA can occur. The contradiction inherent in appellants' legal theory underscores why their OPMA claims against the individuals and C-TRAN must be dismissed.¹⁹

Even if all of appellants' factual allegations are taken as true, there are no legal grounds that would permit this Court to conclude that either C-TRAN or any C-TRAN Board member violated the OPMA by participating in any meeting during 2015.

¹⁶ The OPMA defines a "governing body" as "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2).

¹⁷ The OPMA defines a "meeting" as "meetings at which action is taken." RCW 42.30.020(4).

¹⁸ The OPMA defines "action" as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3).

¹⁹ Appellants fail to address this argument in their opening brief despite having the contradiction pointed out below.

2. Claims against Mr. Hamm.

Appellants similarly failed to allege a valid claim against Mr. Hamm. Appellants sought a declaration that Mr. Hamm violated (1) the OPMA and (2) his notice obligations under RCW 36.57A.055. Opening Br. at 26-27; CP 9. Both claims fail.

With respect to the OPMA, even if the OPMA applied to the BCRC and Mr. Hamm did not properly notice the November 18, 2014 meeting of the BCRC under the “special meeting” requirements of the OPMA,²⁰ appellants’ claim would fail. A violation of the OPMA occurs only when “(1) a ‘member’ of a governing body (2) attended a ‘meeting’ of that body (3) where ‘action’ was taken in violation of the OPMA, and (4) the member had ‘knowledge’ that the meeting violated the OPMA.” *Wood*, 107 Wn. App. at 558; *see also Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380 (2002). There is no legal basis to bring a claim against a non-member such as Mr. Hamm.

Appellants’ claim against Mr. Hamm resembles the one rejected in *Wood*. In that case, suit was brought against “members-elect” of a school board who were alleged to have conducted business in violation of the OPMA prior to being sworn into office. 107 Wn. App. at 555-57. The primary question was whether these “members-elect” were “members” of the governing body of the school board that could take “action” for the purposes of the OPMA. The court held that they were not, holding

²⁰ If the OPMA applied to the BCRC, the November 18, 2014 meeting would be considered a “regular meeting” rather than a “special meeting” under the OPMA. But it is not necessary to reach that question in order to decide this appeal.

“nothing [in the OPMA] suggests that members-elect have the power to transact a governing body’s official business before they are sworn in. Thus, they are not ‘members’ of a governing body with authority to take ‘action.’” *Id.* at 561.²¹ Mr. Hamm’s case is even more compelling because, unlike the “members-elect” in *Wood* who could eventually vote and take action at future meetings, Mr. Hamm will never have authority to vote, control, or dictate any of the actions of the BCRC (or C-TRAN). With respect to the BCRC, Mr. Hamm has only the ministerial task of noticing the meeting consistent with the requirements of RCW 36.57A.055.

Seeking a declaration that Mr. Hamm failed to follow his ministerial obligations is akin to seeking a declaration that a county clerk (or any other municipal clerk) violated the OPMA for failing to properly notice a meeting. The OPMA does not create individual liability for government officials for failing to properly notice a meeting under the OPMA.

²¹ It is also highly doubtful that any claim for declaratory relief for simply failing to properly notice a meeting could ever succeed under the OPMA. This is so for two reasons. *First*, it is not the improper notice of meeting that constitutes a violation of the OPMA; rather, it is the taking of action by a governing body at an improperly noticed meeting that constitutes a violation of the OPMA. *Second*, the OPMA’s statutory structure does not allow for free-floating declaratory judgments to be issued on mere technical points. Instead, it contains only four possible remedies for violations of its requirements. *See, e.g.*, RCW 42.30.060(1) (nullification of action); RCW 42.30.120(1) (civil penalty of \$100); RCW 42.30.120(2) (attorney fee award); and, RCW 43.30.130 (injunction). The declaratory judgment act does not create freestanding rights in the absence of rights under a statute, the constitution, or the common law. *Wash. Fed. of State Emp. v. state Pers. Bd.*, 23 Wn. App. 142, 148, 594 P.2d 1375 (1979).

As to RCW 36.57A.055, Mr. Hamm fully complied with the plain language of the statute.²² RCW 36.57A.055 contains the following notice provision: “Twenty days notice of the meeting shall be given by the chief administrative officer of the [PTBA].” The statute does not dictate the form of the notice, the substance of the notice, or to whom the notice must be given. It just says, “Twenty days notice.”

In sharp contrast, other portions of Chapter 36.57A RCW provide specific notice requirements that set forth the form, substance, and the particular people to whom notice must be given. For example, RCW 36.57A.030 is highly specific on these points:

Notice of such hearing *shall be published* once a week for at least four consecutive weeks in one or more newspapers of general circulation within the area. The notice *shall contain* a description and map of the boundaries of the proposed [PTBA] and *shall state* the time and place of the hearing and the fact that any changes in the boundaries of the [PTBA] area will be considered at such time and place.

(emphasis added); *see also* RCW 36.57A.020 (“upon *thirty days prior written notice addressed to the legislative body* of each city within the county and *with thirty days public notice*”) (emphasis added). That the Legislature used specific language in one section of the statute regarding notice, while not using the same or similar language in another section

²² Appellants mistakenly claim that “the trial court did not reach the issue of whether the notice provided by Mr. Hamm was sufficient to comply with his obligations under RCW 36.57A.055 and/or the OPMA.” Opening Br. at 27. The trial court granted the motion to dismiss, in part, because “Mr. Hamm complied with the notice requirements of RCW 36.57A.055 and is not a member of any ‘governing body’ with the ability to take any ‘action’ as those terms are defined in the OPMA.” CP 507. Appellants do not challenge this determination.

regarding notice, is conclusive evidence that the Legislature did not intend to require any specific form of notice, to dictate the substance of the notice, or to direct to whom the notice must be given under RCW 36.57A.055. *See Citizens Alliance*, 184 Wn.2d at 440 (“When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings.”).

In any case, appellants’ own complaint alleges that Mr. Hamm posted notice of the BCRC meeting on C-TRAN’s website and in *The Columbian* at least *thirty to forty days* before the meeting occurred. *See* CP 5-6. Thus, any claim that Mr. Hamm violated RCW 36.57A.055’s “notice” provision is baseless. If anything, Mr. Hamm went above and beyond what the statute required by providing two different types of notice well in advance of the November 18, 2014 meeting.²³

Mr. Hamm did not, indeed could not, violate the OPMA, and he more than complied with RCW 36.57A.055’s notice requirement. Therefore, the claims against Mr. Hamm were properly dismissed.

²³ Appellants also lack standing to seek a declaration that Mr. Hamm failed to comply with RCW 36.57A.055 independent of the OPMA. To establish a procedural injury, “a party must (1) identify a constitutional or statutory procedural right that the government has violated, (2) demonstrate a reasonable probability that the deprivation of the procedural right will threaten a concrete interest of the party’s, and (3) show that the party’s interest is one protected by the statute or constitution.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 303, 268 P.3d 892 (2011). Even if appellants could show that they had a procedural right under RCW 36.57A.055, they cannot identify any “concrete interest” impacted by the alleged violation or that such interest is the one contemplated for protection by the statute.

E. Appellants Fail to Properly State a Claim for Either a Statutory or Constitutional Writ of Review.

Appellants' claims for a statutory writ of review and a constitutional writ of review were properly dismissed. First and foremost, appellants' claims lack merit. RCW 36.57A.055 does not require any specific findings or explanations, as alleged by appellants. But, appellants' claims for statutory and constitutional writs were also procedurally improper. The trial court lacked jurisdiction to hear the statutory writ of review claim. As for their constitutional writ of review, appellants lack standing. The Court may affirm the trial court on one or more of these bases.

1. RCW 36.57A.055 does not require any specific findings or explanations.

Appellants claim, without authority or reasoning, that RCW 36.57A.055 requires the BCRC to adopt some form of specific findings or provide some explanation that the changes it made to the composition of the C-TRAN Board were "appropriate." Opening Br. at 28-29; CP 7, 9-10. Their complaint contains greater detail on this claim than their opening brief. In their First Amended Complaint, they alleged that the BCRC failed to "make any verbal or written findings" or provide any "explanations justifying" the change. CP 7, 9.

Nothing in section .055 requires any "verbal or written findings" or any oral or written "explanations justifying" for any changes that the BCRC makes to the composition of the C-TRAN Board. Indeed, the fact that appellants could not settle in their complaint on a specific form of

finding they believe complies with section .055, and that they fail to address this question at all in their opening brief, highlights why this claim fails as a matter of law.

In relevant part, RCW 36.57A.055 provides:

After a public transportation benefit area has been in existence for four years, members of the county legislative authority and the elected representative of each city within the boundaries of the public transportation benefit area shall review the composition of the governing body of the benefit area and *change the composition of the governing body if the change is deemed appropriate.*

(emphasis added). Section .055 does not use the words “written findings,” “verbal findings,” or “explanations.” Nor does it set forth any particular standards or criteria that the BCRC is required to use in determining whether the composition of the C-TRAN Board should be changed.²⁴ All the statute requires is the group collectively “deem[]” such change “appropriate.” There cannot be any dispute here that the BCRC deemed a change appropriate: It changed the composition of the C-TRAN Board after discussions stretching over a year and a half. Based on the plain language of the statute, the BCRC complied with RCW 36.57A.055.

Even if the statutory language were ambiguous (which it is not), accepting appellants’ legal theory would require this Court to write formal requirements into the statute where the Legislature specifically chose not

²⁴ The Legislature appears to have recognized as much. Several legislators sought to amend RCW 36.57A.055 to include specific criteria that the quadrennial review group should consider when evaluating whether a change should be made to the composition of a PTBA. *See* CP 293-96. Those efforts failed.

to do so. This would be improper. Numerous canons of statutory construction demonstrate why plaintiffs' reading of section .055 is wrong.

First, statutes must be read in context. *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (“In ascertaining legislative purpose, statutes which stand *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.”) (quotation marks omitted). Thus, section .055 must be read in the context of the remainder of Chapter 36.57A RCW.

Numerous other sections in Chapter 36.57A RCW articulate specific procedures that serve as prerequisites for taking certain actions. For example, RCW 36.57A.030 requires any changes to the boundaries of the PTBA to be supported by a formal “resolution,” which must “declar[e] that the formation of the proposed public transportation area will be conducive to the welfare and benefit of the persons and property therein.” That same statutory section also allows the “county legislative authority” to disapprove of the conference resolution, but to do so the “county legislative authority” must adopt a “resolution” and make a specific “legislative finding that the proposed benefit area includes portions of the county which could not reasonably be expected to benefit or excludes portions of the county which could be reasonably be expected to benefit from its creation[.]” RCW 36.57A.030. Section .055, by contrast, does not contain any formal requirements. This must be presumed to be by legislative design.

To take another example, RCW 36.57A.050 requires a “resolution” to increase per-diem allocations. Similarly, RCW 36.57A.140(1)(a) and (1)(c) require a “resolution” in order to annex territory contiguous to the PTBA, and subsection (3) specifically tells the PTBA what must be contained in the required resolution. Also, RCW 36.57A.160(1) allows a PTBA to be dissolved only after a “resolution” is passed. That there are no such requirements in RCW 36.57A.055 demonstrates the Legislature purposefully chose not to impose them. Yet appellants claim that the statute requires some kind of formal findings or adoption of a specific resolution.

Second, appellants’ view would run afoul of the requirement to create a “harmonious, total statutory scheme,” *Hallauer*, 143 Wn.2d at 146, and, in particular, of the rule that “when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.” *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000). If the Legislature wanted the BCRC to make specific written or verbal findings to explain its decision to change the composition of the C-TRAN Board, it would have written such requirements into section .055 as it did in other parts of the statute. That the Legislature did not do this is fatal to appellants’ claim.

Third, a statute may be compared to other statutes to demonstrate the Legislature knew how to achieve a particular result but chose not to in a given instance. *Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Assocs., P.L.L.C.*, 168 Wn.2d 421, 435-36, 228 P.3d

1260 (2010); *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 312-13, 268 P.3d 892 (2011). “Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. We therefore presume the absence of such language [in a statute] was intentional.” *State v. Delgado*, 148 Wn.2d 723, 728, 63 P.3d 792 (2003).

When the Legislature wants to require a board, committee, council, agency, or other group to make a specific, on-the-record finding, it knows exactly how to do so. *See, e.g.*, RCW 26.44.030(11)(a) (“At the completion of the investigation, the department shall make a finding that the report of child abuse or neglect is founded or unfounded.”); RCW 36.93.100 (“If a review of a proposal is requested, the board shall make a finding as prescribed in RCW 36.93.150 within one hundred twenty days after the filing of such a request for review.”); RCW 41.26.120 (“[I]n any order granting a duty disability retirement allowance, the disability board shall make a finding that the disability was incurred in line of duty.”); RCW 70.285.040 (“The department shall consider the committee’s recommendations and make a finding as to whether alternative brake friction material is available or unavailable.”); *see also* RCW 31.12.408; RCW 35.79.030(2)(d); RCW 36.58A.030; RCW 36.70A.130; RCW 39.102.070; RCW 39.104.030; RCW 47.01.400; RCW 52.02.070; RCW 52.04.090; RCW 70.76.030; RCW 77.55.161.

The absence of comparable language in RCW 36.57A.055 is conclusive evidence that requiring any such specific finding of

“appropriateness” in a specific form would run counter to what the Legislature intended. *See Columbia Physical Therapy*, 168 Wn.2d at 435-36; *Five Corners*, 173 Wn.2d at 312-13. After all, “[t]he primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.” *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) (quotation omitted).

In sum, the trial court’s determination that the BCRC complied with RCW 36.57A.055 must be affirmed.

2. A statutory writ of review is improper here because the BCRC did not exercise judicial authority.

Appellants failed to properly allege a claim for statutory review under RCW 7.16.040. RCW 7.16.040 provides a statutory avenue to review agency action *only* where an inferior tribunal, board, or officer “exercising judicial functions” has exceeded its jurisdiction or otherwise acted unlawfully. *State ex rel. Hood v. State Pers. Bd.*, 82 Wn.2d 306, 399, 511 P.2d 52 (1973). The statutory writ process may not be used to obtain judicial review of legislative, executive, or ministerial acts of an agency. *Wash. Fed’n of State Emps. v. State Pers. Bd.*, 23 Wn. App. 142, 145, 594 P.2d 1375 (1979). To state a claim under RCW 7.16.040, a “petitioner must show: (1) that an inferior tribunal (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate remedy at law.” *Wash. Pub. Employees Ass’n v. Wash. Personnel Resources Bd.*, 91 Wn. App. 640, 646, 59 P.2d 143 (1998) (citing *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d

1204 (1992)).” “If any of the factors is absent, then there is no jurisdiction for superior court review.” *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 140, 231 P.3d 840 (2010).

Appellants fail to discuss any of these required elements, and they cannot meet them. Appellants never alleged, and they have not argued, that the BCRC exercised any form of judicial or quasi-judicial function.²⁵ Accordingly, appellants’ claim for statutory writ of review of the BCRC’s decision fails as a matter of law, and the superior court actually lacked jurisdiction to hear the claim. The Court may affirm the trial court on this alternative basis under RAP 2.5(a) (“A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the argument.”); *cf.* RAP 2.5(a)(1) & (2) (allowing party to raise “lack of trial court jurisdiction” and “failure to establish facts upon which relief can be granted” for first time on appeal).

3. Appellants’ claim for a constitutional writ of review fails for lack of standing.

To seek a constitutional writ of review, appellants “must establish standing to challenge the governmental action.” *Newman*, 156 Wn. App. at 142. Courts apply a “two part test in determining whether a person or entity has standing to seek a constitutional writ of [review]”: (1) “the

²⁵ Indeed, it is in their best interest to argue that the BCRC did not exercise judicial or quasi-judicial functions, because the OPMA does not apply to quasi-judicial functions. RCW 42.30.140(2) (“PROVIDED, That this chapter shall not apply to: . . . (2) That portion of a meeting of a quasi-judicial body . . .”).

interest that the petitioner seeks to protect must be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question””; and (2) “the petitioner must allege an ‘injury in fact’, *i.e.*, that he or she will be ‘specifically and perceptibly harmed by the proposed action.’” *Id.* (citations omitted).

Appellants failed to allege any cognizable interest in the BCRC’s decision that is arguably protected by RCW 36.57A.055. Instead, they simply generally allege a broad interest as “a citizen of Washington with an interest in the actions and conduct of C-TRAN as it relates to the management and administration of C-TRAN affairs” CP 3. Even assuming this claimed interest was within the zone of interest, appellants fail the second standing prong, because they have alleged no “injury in fact.”

To the extent appellants rely on taxpayer standing, they fail to meet the necessary requirements because they failed to “request that the attorney general take action.” *Huff v. Wyman*, 184 Wn.2d 643, 649, 361 P.3d 727 (2015).

Consequently, appellants lack standing to seek a constitutional writ of review.

VI. CONCLUSION

C-TRAN and its individual Board members have standing to address whether the OPMA applies to the BCRC and whether the BCRC complied with RCW 36.57A.055. These claims would have direct and immediate impact on C-TRAN and its Board members, and that gives

them a sufficient interest in the outcome of this litigation. Appellants' OPMA claims must fail. The BCRC does not meet any of the statutory definitions of "public agency" under the OPMA; the individual Board members never attended any meeting in violation of the OPMA; and Mr. Hamm is not capable of violating the OPMA because he is not a member of a governing body. In addition, the BCRC's year-and-a-half-long process fully complied with RCW 36.57A.055. Even if it did not, appellants fail to establish the necessary elements for a statutory writ of review and lack standing to seek a constitutional writ of review. Consequently, respondents ask the Court to affirm the trial court's order of dismissal.

Respectfully submitted this 7th day of March, 2016.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that, on the date below, I served a copy of the foregoing document by email, per agreement of the parties, to:

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Signed this 7th day of March, 2016, at Seattle, King County, Washington.



Benita Gould