

69641-6

69641-6

No. 69641-6-I

---

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE**

---

AMALGAMATED TRANSIT UNION LOCAL 1576,  
INTERNATIONAL ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS DISTRICT 160, and LANCE NORTON,

Appellants,

v.

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT  
AREA, d/b/a COMMUNITY TRANSIT,

Respondent.

2019 FEB 19 PM 12:54  
~~COURT OF APPEALS  
STATE OF WASHINGTON~~  
 FILED

---

**APPELLANTS' OPENING BRIEF**

---

Frank Freed Subit & Thomas, LLP  
 Clifford Freed, WSBA # 14348  
 Jillian M. Cutler, WSBA # 39305  
 705 Second Avenue, Suite 1200  
 Seattle, Washington 98104  
 (206) 682-6711

**ORIGINAL**

**TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	ASSIGNMENT OF ERRORS .....	2
III.	STATEMENT OF THE CASE .....	2
	A. Engrossed Substitute House Bill 2986 .....	2
	B. The Community Transit Board .....	5
	C. Procedural Background .....	8
IV.	ARGUMENT.....	9
	A. Governing Legal Standards.....	9
	B. RCW 36.57A.050 Grants the Community Transit Board Chair Discretion to Include the Nonvoting Member in Executive Sessions Addressing Personnel Matters .....	10
	C. Section 3.3(c) of the Community Transit Bylaws Irreconcilably Conflicts with RCW 36.57A.050 and is Void.....	13
	D. Mr. Norton and the Unions Have Standing to Challenge Section 3.3(c) of the Community Transit Bylaws.....	18
	1. Mr. Norton Has Standing to Bring this Action.....	19
	2. The Unions Have Standing to Bring this Action...	19
V.	CONCLUSION.....	22

**TABLE OF AUTHORITIES**

**Cases - Washington**

*American Legion Post #149 v. Washington State Dept. of Health,*  
164 Wn.2d 570, 192 P.3d 306 (2008)..... 20

*City of Kent v. Jenkins,*  
99 Wn. App. 287, 992 P.2d 1045 (2000)..... 11

*Dep't of Ecology v. Campbell & Gwinn LLC,*  
146 Wn.2d 1, 43 P.3d 4 (2002)..... 10

*Entertainment Industry Coalition v. Tacoma-Pierce County,*  
153 Wn.2d 657, 105 P.3d 985 (2005) ..... 14, 18

*Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,*  
150 Wn.2d 791, 83 P.3d 419 (2004) ..... 18

*HJS Development, Inc. v. Pierce County,*  
148 Wn.2d 451, 61 P.3d 1141 (2003)..... 14

*Hubbard v. Spokane County,*  
146 Wn.2d 699, 50 P.3d 602 (2002) ..... 9

*In re Marriage of Kovacs,*  
121 Wn.2d 795, 854 P.2d 629 (1993)..... 10, 11

*Mukilteo Citizens for Simple Gov't v. City of Mukilteo,*  
174 Wn.2d 41, 272 P.3d 227 (2012)..... 20

*Nelson v. Schnautz,*  
141 Wn. App. 466, 170 P.3d 69 (2007)..... 10

*Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health,*  
151 Wn.2d 428, 90 P.3d 37 (2004)..... 10, 13,  
15, 18

*State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.,*  
135 Wn.2d 618, 957 P.2d 691 (1998)..... 9

**Statutes - Washington**

RCW 7.24 .....	18
RCW 36.57A.010(7).....	3
RCW 36.57A.010(8).....	3
RCW 36.57A.050.....	<i>passim</i>
RCW 36.57A.090.....	3
RCW 41.56.....	6
Engrossed Substitute House Bill 2986.....	<i>passim</i>

**Other**

Video feed of Jan. 25, 2010 House Local Government & Housing Committee Hearing.....	12
Video feed of Feb. 23, 2010 Senate Government Operations & Elections Committee Hearing.....	13

## I. INTRODUCTION

Three years ago, the Washington State Legislature enacted Engrossed Substitute House Bill 2986, codified at RCW 36.57A.050, which expanded the governing boards of certain public transportation agencies to include a nonvoting labor representative. In so doing, the Legislature determined that public transportation systems, their unionized employees, and the public would benefit if the labor community had a permanent voice on these governing boards. The Legislature expressly addressed the nonvoting labor representative's participation in executive sessions in two ways. First, it imposed a narrow, categorical ban prohibiting the nonvoting member from attending executive sessions addressing labor negotiations. Second, it granted board chairs the discretion to decide whether to include the nonvoting labor representatives in all other executive sessions.

Snohomish County Public Transportation Benefit Area Corporation ("Community Transit") amended its bylaws in response to the law. Section 3.3(c) of those bylaws imposes a categorical ban prohibiting the nonvoting labor representative from attending executive sessions addressing not only labor negotiations, but personnel matters as well. Appellants Amalgamated Transit Union Local No. 1576 ("ATU 1576"), International Association of Machinists and Aerospace Workers District

160 (“IAM 160”), and Lance Norton seek a declaratory judgment that, by eliminating the Board Chair’s statutorily-granted discretion to include the nonvoting labor representative in executive sessions addressing personnel matters, Section 3.3(c) of Community Transit’s bylaws conflicts directly with RCW 36.57A.050 and is void.

## **II. ASSIGNMENT OF ERROR**

The Superior Court erroneously granted Community Transit’s motion for summary judgment and erroneously denied Plaintiffs’ summary judgment motion. This appeal presents the following issue of law for review:

Does Section 3.3(c) of Community Transit’s bylaws, which prohibits the Board’s nonvoting labor representative from attending any executive session held for the purpose of discussing Community Transit personnel matters, conflict with RCW 36.57A.050, which expressly grants the Board Chair the discretion to include the nonvoting labor representative in those sessions?

## **III. STATEMENT OF THE CASE**

### **A. Engrossed Substitute House Bill 2986.**

In April 2010, Washington State Legislature enacted Engrossed Substitute House Bill 2986 (“ESHB 2986”), entitled “An act relating to requiring the appointment of nonvoting labor members to public

transportation governing bodies.” CP 12. As the title suggests, the law was enacted to require that nonvoting members, selected by the labor organizations representing employees within the local public transportation system, be appointed to the governing bodies of certain public transportation systems, including public transportation benefit area authorities.<sup>1</sup> *Id.* The Act went into effect on June 10, 2010. CP 11.

A public transportation benefit area (“PTBA”) is a municipal corporation created to provide regional transportation service to all or a portion of a county or multiple counties. *See* RCW 36.57A.010(7); RCW 36.57A.050. PTBAs are governed by “public transportation benefit area authorities.” *See* RCW 36.57A.010(8). These authorities are authorized to construct, own, and operate a regional transportation system within their jurisdictional boundaries. *See* RCW 36.57A.090. Prior to the enactment of ESHB 2986, single-county PTBA authorities consisted of up to nine members who were elected representatives of the cities or counties participating in the PTBA. CP 15.

---

<sup>1</sup> ESHB 2986 also requires metropolitan transit commissions and county transportation authorities to appoint nonvoting labor representatives to their boards. CP 12-15. Community Transit is a public benefit transportation area. PBTAs are addressed in Section 3 of the Act. *See* CP 15-17. The statutory language addressing the scope of the nonvoting member’s participation in executive sessions is identical in all three sections.

Section 3 of ESHB 2986 amended RCW 36.57A.050 to require the appointment of “one nonvoting member of the public transportation benefit area authority” who is “recommended by the labor organization representing the public transportation employees within the local public transportation system.” CP 15-16; RCW 36.57A.050. The Act provides that if the public transportation employees are represented by more than one labor organization, “all such labor organizations shall select the nonvoting member by majority vote.” *Id.* However, PTBA authorities that have no employees represented by a labor union are not required to appoint a nonvoting member to their governing bodies. *Id.*

The Act mandates that the “nonvoting member shall comply with all governing bylaws and policies of the authority.” *Id.* The law addresses the nonvoting member’s participation in executive sessions in two ways. First, it imposes a narrow, categorical ban prohibiting the nonvoting member from attending executive sessions addressing labor negotiations. Second, it grants the chair or cochair of the authority the discretion to decide whether to include the nonvoting member in any other executive sessions. RCW 36.57A.050 states: “The chair or cochairs of the authority shall exclude the nonvoting member from attending any executive session held for the purpose of discussing negotiations with labor organizations.

The chair or cochairs may exclude the nonvoting member from attending any other executive session.” *Id.*<sup>2</sup>

**B. The Community Transit Board.**

Defendant Community Transit is the public transportation benefit area for Snohomish County. Prior to the enactment of ESHB 2986, the Community Transit Board consisted of nine elected officials representing the cities and counties within the service area. CP 38 at ¶ 4. Community Transit actively opposed passage of ESHB 2986 and its requirement that a nonvoting member be appointed to the Board to represent the labor community. CP 39 at ¶ 5. *See also* CP 21-22.

---

<sup>2</sup> The pertinent part of RCW 36.57A.050, as amended, states in full:

There is one nonvoting member of the public transportation benefit area authority. The nonvoting member is recommended by the labor organization representing the public transportation employees within the local public transportation system. If the public transportation employees are represented by more than one labor organization, all such labor organizations shall select the nonvoting member by majority vote. The nonvoting member shall comply with all governing bylaws and policies of the authority. The chair or cochairs of the authority shall exclude the nonvoting member from attending any executive session held for the purpose of discussing negotiations with labor organizations. The chair or cochairs may exclude the nonvoting member from attending any other executive session. The requirement that a nonvoting member be appointed to the governing body of a public transportation benefit area authority does not apply to an authority that has no employees represented by a labor union.

(Emphasis supplied).

Community Transit employees are represented by Amalgamated Transit Union Local No. 1576 (“ATU 1576”) and International Association of Machinists and Aerospace Workers District 160 (“IAM 160”). CP 73 at ¶¶ 3.1, 3.2. In August 2010, ATU 1576 and IAM 160 selected Lance Norton as the nonvoting member of the Community Transit Board. CP 39 at ¶ 6. Mr. Norton worked as a coach operator for King County Metro Transit (“Metro”) for 23 years. CP 38 at ¶ 2. Mr. Norton served on the Executive Board of Amalgamated Transit Union Local No. 587 (“ATU 587”) for 15 years. *Id.* He was President of that Union from 2000 until 2009. *Id.* Mr. Norton is currently retired from Metro and ATU 587. *Id.* He has never been an officer of ATU 1576 or IAM 160. CP 38 at ¶ 3.<sup>3</sup> Mr. Norton is the only member of the Community Transit Board who has worked as a transit employee or represented union members in personnel matters under a labor contract. CP 40 at ¶ 9.<sup>4</sup>

The Community Transit Board conducts monthly board meetings. CP 39 at ¶ 8. Following the public portion of each meeting, the board

---

<sup>3</sup> Mr. Norton is the father of ATU 1576 President Kathleen Custer.

<sup>4</sup> While Mr. Norton is the labor community’s representative on the Community Transit Board pursuant to RCW 36.57A.050, he is not an agent of either union or a “bargaining representative” under RCW 41.56.

members meet in a closed executive session. *Id.* Section 3.3(c) of Community Transit's bylaws states:

Executive Sessions (Meetings). The Board may hold executive sessions if such sessions are not otherwise prohibited by State Statutes. The Chairperson or the Acting Chairperson shall exclude the nonvoting member of the Board from attending any executive session held for the purpose of discussing negotiations with labor negotiations or matters relating to the personnel of Community Transit. The Chairperson or Acting Chairperson shall allow the nonvoting member to attend an executive session, if he or she finds that the attendance by the nonvoting member at the executive session would be in the best interest of the Corporation or not be detrimental to its operations. The decision of the Chairperson or Acting Chairperson shall be final and binding. If the non-voting member attends an executive session of the Board of Directors, such non-voting member shall not disclose any information obtained in such executive session to anyone and shall not use such information to further the interest, either directly or indirectly, of any collective bargaining unit or employee(s) of the Corporation.

CP 47 at § 3.3(c) (emphasis supplied). Thus, the second sentence of Section 3.3(c) goes beyond the language of RCW 36.57A.050 to ban the nonvoting member from executive sessions addressing not just labor negotiations, but personnel matters as well. Mr. Norton has attended the public portion of the Board's monthly meetings since he joined the Board in approximately September 2010. CP 39 at ¶ 8. However, he has been excluded from all but one executive session, which was held to discuss a potential real estate purchase. *Id.* He has never participated in an

executive session addressing a Community Transit personnel matter. *Id.* Mr. Norton is the only board member who is excluded from executive sessions. *Id.* Community Transit's blanket prohibition on Mr. Norton's attendance at executive sessions held for the purpose of discussing personnel matters directly limits and interferes with his ability to fulfill his statutory duty to act as the labor representative on the Board. CP 40 at ¶ 10.

**C. Procedural Background.**

Plaintiffs filed this action in Snohomish County Superior Court on October 27, 2011 seeking a declaratory judgment that Section 3.3(c) of the Community Transit Board bylaws irreconcilably conflicts with RCW 36.57A.050 and is void. CP 72-76. Community Transit filed its Answer and Affirmative Defenses on January 23, 2012. CP 66-69.

The parties submitted cross motions for summary judgment on October 18, 2012. The Superior Court held oral argument on November 16, 2012. At the conclusion of the argument, the Court denied Plaintiffs' motion for summary judgment and granted Defendant's motion. CP 5-7. The Minute Entry of the Superior Court proceedings and findings states: "The Court notes that the Chair having discretion on a case-by-case basis in personnel matters is highly problematic; and would lead to charges of

arbitrariness; there is no way to make a distinction of who can participate.” CP 7.

On December 4, 2012, Plaintiffs filed a notice of appeal to this Court. CP 1-2.

#### IV. ARGUMENT

##### A. Governing Legal Standards.

This Court reviews a lower court’s grant of summary judgment and questions of statutory interpretation de novo. *Hubbard v. Spokane County*, 146 Wn. 2d 699, 707, 50 P.3d 602 (2002).

Under CR 56(c), summary judgment must be entered where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>5</sup> Cases involving statutory interpretation are particularly appropriate for resolution by a summary judgment. *See, e.g., State ex rel. Public Disclosure Comm’n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 623, 957 P.2d 691 (1998). Courts are guided by the rules of statutory construction: (1) a statute that is clear on its face is not subject to judicial interpretation; (2) an ambiguity will be deemed to exist if the statute is subject to more than one reasonable interpretation; (3) if a statute is subject to interpretation, it will be construed in a manner that best

---

<sup>5</sup> The parties agreed this case should be resolved by cross motions for summary judgment. CP 8 at ¶ 2.

fulfills the legislative purpose and intent; and (4) in determining the legislative purpose and intent the court may look beyond the language of the Act to its legislative history. *In re Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993).

**B. RCW 36.57A.050 Grants the Community Transit Board Chair Discretion to Include the Nonvoting Member in Executive Sessions Addressing Personnel Matters.**

The text of RCW 36.57A.050 is unambiguous. It expressly states: “The chair or cochairs of the authority *shall* exclude the nonvoting member from attending any executive session held for the purpose of discussing negotiations with labor organizations. The chair or cochair *may* exclude the nonvoting member from attending any other executive session.” RCW 36.57A.050 (emphasis supplied).

It is well established that the use of “shall” in a statute indicates a mandatory obligation, while the use of “may” indicates that the provision is permissive and not binding. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn. 2d 428, 437, 90 P.3d 37 (2004). The text of RCW 36.57A.050 is clear on its face and does not require construction. *Dep’t of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court must “assume that the legislature means exactly what it says.” *Nelson v. Schnautz*, 141 Wn. App. 466, 475, 170

P.3d 69 (2007) (citing *City of Kent v. Jenkins*, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000)).

RCW 36.57A.050 creates a narrow prohibition on the nonvoting labor representative's participation in executive sessions: the nonvoting member is prohibited *only* from attending executive sessions pertaining to negotiations with labor organizations. In sharp contrast to Section 3.3(c) of the Community Transit bylaws, RCW 36.57A.050 gives the Board's Chair discretion to permit the nonvoting labor representative to attend executive sessions pertaining to all other topics, including those related to personnel matters. By eliminating that discretion – and with it the possibility that the nonvoting labor representative could participate in executive sessions addressing personnel matters – the Community Transit bylaws create an irreconcilable conflict with state law.

The stated purpose of ESHB 2986 was to expand the governing bodies of public transportation systems such as Community Transit to include a nonvoting labor representative. The Washington Legislature determined that these governing bodies would benefit from the unique knowledge, experience, and perspective of a labor representative. CP 26.

In determining legislative intent, Washington courts pay particular attention to the statements of prime drafters and sponsors of the legislation at issue. *Kovacs*, 121 Wn.2d at 807-08. The prime House sponsor,

Representative Jeff Simpson, spoke directly of the intent and purpose of the ESHB 2986 in the House Local Government & Housing Committee. He testified, “Unfortunately, in some cases there are managers who are just simply unwilling to listen to their partners in the labor community, and so I feel that this bill is necessary to allow them to provide their input.” [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2010011271](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2010011271) (live video feed of Jan. 25, 2010 House Local Government & Housing Committee Hearing) at 1:03:56 (last visited Feb. 15, 2013); CP 33. Representative Simpson further stated, “If you have a transit board that is made up of ... various people, you need to include somebody from the people that are actually working on a day-to-day basis with the customers, and seeing the problems, so that they can have an equal voice with regard to the services that the agency provides.” *Id.* at 1:15:10; CP 33-34. Since the labor representative cannot vote, that person necessarily makes his contribution by having the opportunity to participate in board discussions and educate and influence other board members. Preserving the Chair’s discretion to include the nonvoting labor representative in executive sessions that address personnel matters furthers the Act’s purpose by ensuring that the nonvoting labor representative remains available as a resource for the Board, and a voice for the labor community, should the Chair choose to elicit his input.

Community Transit was one of a handful of transit agencies that actively opposed the passage of ESHB 2986. CP 39 at ¶ 5; CP 22. Those transit agencies also lobbied unsuccessfully for language that would have banned the nonvoting labor representative from all executive sessions. CP 21. The prime Senate sponsor, Joe McDermott, specifically rejected that proposal in the February 25, 2010 Senate Government Operations & Elections Committee hearing. [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2010021170](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2010021170) (video feed of Feb. 23, 2010 Senate Government Operations & Elections Committee Hearing) at 1:28:30 (last visited Feb. 15, 2013); CP 36-37. A subsequent floor amendment taking the same approach was not adopted. CP 29. Instead, the Washington Legislature decided to prohibit the nonvoting member from attending executive sessions related *only* to labor negotiations and to give the Chair discretion to permit the nonvoting member to attend any other executive session. Having unsuccessfully opposed ESHB 2986, Community Transit may not use its bylaws to circumvent the law. It must comply with RCW 36.57.050 as written.

**C. Section 3.3(c) of the Community Transit Bylaws Irreconcilably Conflicts with RCW 36.57A.050 and is Void.**

A municipal regulation or ordinance that conflicts with state law is invalid. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of*

*Health*, 151 Wn. 2d 428, 433, 90 P.3d 37 (2004) (en banc). Here, the bylaws of a municipal corporation are analogous to a municipal ordinance. Section 3.3(c) of the Community Transit bylaws stands in direct conflict with RCW 36.75A.050. “A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits.” *Id.* “When two provisions are contradictory, they cannot coexist.” *Id.* If the two provisions cannot be harmonized, the municipal regulation must yield to state law. *Id.* (citing *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 482, 61 P.3d 1141 (2003)).

Section 3.3(c) of Community Transit’s bylaws cannot be reconciled with state law. RCW 36.57A.050 expressly grants the Chair discretion to decide whether to include the nonvoting member in any executive sessions that do not address labor negotiations, including those addressing personnel matters. The bylaws eliminate that discretion. The two cannot coexist. Section 3.3(c) of the bylaws must yield to state law and is void.

The Washington Supreme Court has repeatedly held that where a state statute expressly grants decision-making authority to a particular party and a local regulation eliminates that discretion, the local regulation is invalid. In *Entertainment Industry Coalition v. Tacoma-Pierce County*, 153 Wn.2d 657, 105 P.3d 985 (2005) (en banc), the Washington Supreme

Court held that a county resolution banning smoking in all public establishments irreconcilably conflicted with a state law that granted business owners the discretion to decide whether to designate smoking areas. Specifically, the law permitted smoking in certain public areas, providing that a “smoking area may be designated in a public place by the owner . . . .” *Id.* at 664. The Court reasoned, “the resolution, by imposing a complete smoking ban, prohibits what is permitted by state law: the ability of certain business owners and lessees to designate smoking and nonsmoking locations in their establishments.” *Id.* Similarly, by imposing a complete ban on the nonvoting member attending executive sessions addressing personnel matters, the Community Transit bylaws prohibit what RCW 36.57A.050 permits: the ability of the Chair to decide whether to include the nonvoting member in those sessions.

In *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004), the Washington Supreme Court invalidated a county Board of Health regulation mandating fluoridation of the water supply on the ground that state law grants water districts – not the Board of Health – the authority to decide whether to fluoridate the water supply. In determining that the Board of Health’s regulation irreconcilably conflicted with state law, the Court found: “The regulation ordering fluoridation takes away any decision-making power

from water districts with respect to the content of their water systems, and the express statutory authority granted to water districts pursuant to [the state statute] would be rendered meaningless.” *Id.* at 433-34. Here, RCW 36.57A.050 gives the Chair the discretion to decide whether to include the labor representative in executive sessions pertaining to personnel matters. A bylaw provision forcing the Chair to exclude the nonvoting member from these sessions renders RCW 36.57A.050’s express grant of discretion to the Chair meaningless.

The Superior Court accepted Community Transit’s argument that the Board’s decision to enact bylaws requiring the Chair to categorically exclude the nonvoting member from executive sessions addressing personnel matters was necessary to avoid arbitrary and capricious decisions by the Chair. CP 7. The Superior Court erred for at least two reasons. First, it erroneously equated discretion with arbitrariness. A public officer can certainly exercise discretion without acting arbitrarily and capriciously. RCW 36.57A.050 contemplates that the Board Chair will decide on a case-by-case basis whether including the nonvoting labor representative in an executive session addressing a personnel matter would serve the interests of Community Transit and the labor community. In exercising that discretion, the Chair must evaluate the information available to him at the time and make a decision about the nonvoting

member's participation based on that information. In contrast, it is the Community Transit Board that acted arbitrarily when it made the decision to categorically exclude the nonvoting member from all executive sessions addressing personnel matters without regard to the issues to be addressed or the circumstances of the executive session in question.

Second, Plaintiffs do not dispute that the Board has the authority to give the Chair some guidance regarding how to decide whether or not to include the nonvoting member in an executive session, *as long as that guidance does not conflict with state law*. Indeed, Plaintiffs have not challenged the portion of Section 3.3(c) that directs:

The Chairperson or Acting Chairperson may allow the nonvoting member to attend an executive session, if he or she finds that the attendance by the nonvoting member at the executive session would be in the best interest of the Corporation or not be detrimental to its operations. The decision of the Chairperson or Acting Chairperson shall be final and binding.

CP 47. This provision is entirely consistent with RCW 36.57A.050. It provides guidance to the Chair about whether to include the nonvoting member in any given executive session, while still preserving the Chair's statutorily-granted discretion to make the ultimate decision. Therefore, it does not create a direct conflict with state law.

However, there *is* a direct conflict with state law when the Community Transit Board adopts bylaws that eliminate the Chair's

discretion altogether. Pursuant to RCW 36.57A.050, the *only* executive sessions from which the Chair is *required* to exclude the nonvoting labor representative are those addressing labor negotiations. The law expressly grants the Chair discretion to decide whether to include the nonvoting member in any other executive sessions. While the Board may properly *guide* the Chair's discretion, it cannot *eliminate* that discretion without running afoul of state law. *Parkland Light & Water Co.* and *Entertainment Industry Coalition* teach that eliminating the Chair's statutorily-granted discretion creates a direct conflict with state law and invalidates Section 3.3(c) of the bylaws.

**D. Mr. Norton and the Unions Have Standing to Challenge Section 3.3(c) of the Community Transit Bylaws.**

To have standing under the Uniform Declaratory Judgments Act ("UDJA"), RCW 7.24, a party must be: (1) "arguably within the zone of interests to be protected or regulated by the statute" in question; and (2) have suffered an "injury in fact, either economic or otherwise." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) ("*Grant County II*") (en banc) (internal citations omitted). Mr. Norton and the unions easily meet this test.

1. Mr. Norton Has Standing to Bring this Action.

Mr. Norton has standing to challenge Section 3.3(c) of the Community Transit bylaws. First, Mr. Norton is within the zone of interest protected and regulated by RCW 36.57A.050. He was selected for, and is serving in, the very position the statute was enacted to create. The statute directly regulates his conduct and participation on the Board. RCW 36.57A.050 precludes him from participating in executive sessions addressing labor negotiations, but permits him to attend any other executive sessions at the Chair's discretion.

Second, Mr. Norton has suffered an injury in fact. Mr. Norton was selected by ATU 1576 and IAM 160 as their representative on the Community Transit Board. Under RCW 36.57A.050, Mr. Norton has the opportunity to participate in executive sessions regarding Community Transit personnel matters at the Chair's discretion. Section 3.3(c) eliminates that possibility. Mr. Norton's ability to participate in the governance of Community Transit, influence fellow board members, and fulfill his statutorily-mandated duty to represent the interests of the labor community is directly curtailed by Section 3.3(c)'s blanket prohibition.

2. The Unions Have Standing to Bring this Action.

ATU 1576 and IAM 160 also have standing to bring this declaratory judgment action. The unions fall squarely within the zone of

interest protected by RCW 36.57A.050. The very purpose of the statute was to create a new nonvoting position on PTBA authorities so that the labor community would have representatives of their choosing on the authorities. Pursuant to the statute, ATU 1576 and IAM 160 selected Mr. Norton as their representative.

The unions have suffered an injury in fact as a result of Section 3.3(c) of the Community Transit bylaws. Section 3.3(c) eliminates the Chair's discretion to include Mr. Norton in executive sessions addressing personnel matters. The elimination of that discretion – and with it the possibility that Mr. Norton could participate in those sessions – dramatically diminishes the quality of the unions' representation on the Board.

The unions also have standing to bring this declaratory judgment action in their representational capacity. “An organization has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit.” *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012) (quoting *American*

*Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 593-94, 192 P.3d 306 (2008) (en banc)).

In this case, the members of both labor unions have standing to sue in their own right. The individual members' interest in the legislation, and the injury they experience when their Board representative is denied any opportunity to participate in executive sessions addressing personnel matters, are the same as that of the unions: the nonvoting member's ability to voice their interests and concerns is severely limited. The interest ATU 1576 and IAM 160 seek to protect – maintaining the Chair's discretion to permit the nonvoting member in executive sessions regarding personnel matters – is germane to the unions' purpose of representing Community Transit employees and their interests in labor matters. Finally, the relief requested in this lawsuit does not require the participation of individual members. Plaintiffs have brought a facial challenge seeking to invalidate Section 3.3(c) of Community Transit's bylaws.

Community Transit argued to the Superior Court that the Chair or Acting Chair of the Board are the only parties affected by Section 3.3(c) and, therefore, the only parties with standing to bring this lawsuit. Community Transit is wrong on both counts. While it is the Chair's discretion that is eliminated by Section 3.3(c), Mr. Norton and the unions have suffered a direct injury as a result of that elimination. The very

purpose of ESHB 2986 was to ensure that the labor community had a representative of their choosing on the Community Transit Board in order to inform and influence the Board with respect to labor issues. Mr. Norton is that representative. By imposing a categorical ban on Mr. Norton's participation in executive sessions addressing personnel matters, which is not contemplated or authorized by RCW 36.57A.050, Section 3.3(c) permanently limits his ability to represent the unions on the Board.

## **V. CONCLUSION**

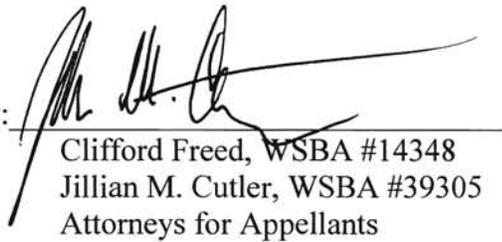
When the Washington Legislature enacted EHSB 2986, and expanded the governing boards of certain public transportation agencies to include a nonvoting labor representative, it recognized that the transit systems, their employees, and the public would benefit from giving the labor community an institutional voice on those governing boards. Community Transit opposed the legislation and then lobbied for language banning the nonvoting member from all executive sessions. That effort failed. EHSB 2986 is now Washington law and Community Transit is bound by it. Community Transit may not circumvent the law by enacting bylaws that strip the Board Chair of his statutorily-granted authority to include the nonvoting labor representative in executive sessions addressing personnel matters. Section 3.3(c) of Community Transit's bylaws creates a direct conflict with RCW 36.57A.050 and is void.

This Court should reverse the Superior Court's decision and should order the grant of summary judgment to ATU 1576, IAM 160, and Mr. Norton.

Respectfully submitted this 19th day of February 2013.

FRANK FREED SUBIT & THOMAS LLP

By:



Clifford Freed, WSBA #14348  
Jillian M. Cutler, WSBA #39305  
Attorneys for Appellants