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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 39041-8-II

CITIZENS FOR ACCOUNTABLE GOVERNMENT IN EGLON AND
HANSVILLE,

Appellants,

v.

KITSAP COUNTY, et al.,

Respondents.

RESPONDENTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. INTRODUCTION1

II. STATEMENT OF THE CASE.....2

 A. Factual Background2

 B. Procedural History.....6

III. SUMMARY OF ARGUMENT8

IV. ARGUMENT.....9

 A. Standard of Review.....9

 B. CAGEH’s Claims Are Against the County – It has Failed to State a Claim Against the Individual Defendants.....12

 C. The Individual Defendants Are Not Liable for Failing to Comply With the Bylaws.....15

 D. CAGEH Has No Claim Against the Individuals for Open Public Meetings Act Violations16

 E. CAGEH’s Requests for Declaratory Judgment and Injunctive Relief Fail Because There is No Justiciable Controversy and Even If There Were, the Individual Defendants Are Not Necessary Parties20

 F. CAGEH Cannot Establish a Prima Facie Case For an Injunction, and Individual Defendants Do Not Have to be Joined to be Bound by an Injunction29

G.	The Trial Court’s Deferral of CAGEH’s Motions to Dismiss the Affirmative Defenses Was Completely Within the Court’s Discretion and Should Be Affirmed.....	31
H.	The Respondents Are Entitled to Attorney Fees; CAGEH Is Not.....	40
I.	There Are Significant Public Policy Reasons Supporting the Early Dismissal of the Individuals	42
IV.	CONCLUSION.....	44

TABLE OF AUTHORITIES

Table of Cases

<i>All Star Gas Inc. of Washington v. Bechard</i> , 100 Wn. App. 732, 998 P.2d 367 (2000).....	30, 31
<i>Bainbridge Citizens United v. Wash. State Dept. of Natural Resources</i> , 147 Wn. App. 365, 198 P.3d 1033 (2008).....	21
<i>Better Financial Solutions, Inc. v. Caicos Corp.</i> , 117 Wn. App. 899, 73 P.3d 424 (2003).....	17
<i>Bravo v. Dolssen Co.</i> , 125 Wn.2d 745, 888 P.2d 147 (1995).....	10
<i>Bringle v. Lloyd</i> , 13 Wn. App. 844, 537 P.2d 1060 (1975).....	11
<i>Brower v. Ackerley</i> , 88 Wn. App. 87, 943 P.2d 1141 (1997).....	17
<i>Broyles v. Thurston County</i> , 147 Wn. App. 409, 195 P.3d 985 (2008).....	14, 15
<i>Chemical Bank v. Washington Public Power Supply System</i> , 102 Wn.2d 874, 691 P.2d 515 (1984).....	27
<i>Chemical Bank v. WPPSS</i> , 102 Wn.2d 874, 691 P.2d 525 (1984) <i>cert. denied</i> , 471 U.S. 1065 (1985).....	24
<i>County of Spokane v. Local No. 1553</i> , 76 Wn. App. 765, 888 P.2d 735 (1995).....	30
<i>Culpepper v. Snohomish County Dept of Planning and Community Development</i> , 59 Wn. App. 166, 796 P.2d 1285 (1990).....	14
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wash.2d 749, 881 P.2d 216 (1994).....	10, 11
<i>Dep't. of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 11, 43 P.3d 4 (2002).....	39

<i>Diversified Indus. Dev. Corp. v. Ripley</i> , 82 Wn.2d 811, 514 P.2d 137 (1973).....	22
<i>Emmerson v. Weilep</i> , 126 Wn. App. 930, 110 P.3d 214 (2005).....	39, 40
<i>Eugster v. City of Spokane</i> , 118 Wn. App. 383, 76 P.3d 741 (2003)	19
<i>Eugster v. City of Spokane</i> , 110 Wash.App. 212, 39 P.3d 380.....	19
<i>Foothills Development Co. v. Clark County</i> , 46 Wn. App. 369, 730 P.2d 1369 (1986).....	13, 14
<i>Glandon v. Searle</i> , 68 Wn.2d 199, 412 P.2d 116 (1966).....	30
<i>Gontmakher v. City of Bellevue</i> , 120 Wn. App. 365, 374, 85 P.3d 926 (2004).....	36, 41
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107, 744 P.2d 1032 (1988).....	11
<i>Havsy v. Flynn</i> , 88 Wn. App. 514, 945 P.2d 221 (1997).....	10, 11
<i>Henry v. Town of Oakville</i> , 30 Wn.App. 240, 663 P.2d 892 (1981).....	28
<i>In re Estate of Krueger</i> , 11 Wn.2d 329, 119 P.2d 312 (1941).....	30
<i>In re Duncan</i> , __ Wn.2d __, __ P.3d __, 2009 WL 3384632, at *2.....	10
<i>Judd v. American Tel. & Tel. Co.</i> , 152 Wn.2d 195, 204, 95 P.3d 337 (2004).....	37
<i>Kauzlarich v. Yarbrough</i> , 105 Wn. App. 632, 652, 20 P.3d 946 (2001) ...	35
<i>Kitsap County v. Smith</i> , 143 Wn. App. 893, 180 P.3d 834 (2008).....	10
<i>Lilly v. Lynch</i> , 88 Wn. App. 306, 945 P.2d 727 (1997).....	11
<i>Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now</i> , 119 Wn. App. 665, 701, 82 P.3d 1199 (2004).....	19
<i>Lyle v. Haskins</i> , 24 Wn.2d 883, 168 P.2d 797 (1946)	31

<i>Matire v. Borjessan</i> , 19 Wn. App. 556, 577 P.2d 596 (1978)	28
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wash.2d 677, 132 P.3d 115 (2006)	10
<i>Nolan v. Snohomish County</i> , 59 Wn. App. 876, 802 P.2d 792 (1990)	13
<i>O’Keefe v. Murphy</i> , 860 F. Supp. 748 (E.D. Wash. 1994)	35
<i>O’Keefe v. Van Boening</i> , 82 F.3d 322 (9 th Cir. 1996).....	35
<i>Olympia v. Nickert</i> , 118 Wash. 407, 203 P. 946 (1922)	2
<i>Parsons v. Comcast of California/Colorado/Washington I, Inc.</i> , 150 Wn. App. 721, 208 P.3d 1261 (2009).....	11
<i>Port of Longview v. International Raw Materials, Ltd. (IRM)</i> , 96 Wn. App. 431, 979 P.2d 917 (1999).....	38, 39
<i>Primark v. Burien Garden Assoc.</i> , 63 Wn. App. 900, 823 P.2d 1116 (1992).....	26, 27, 28
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 370, 166 P.3d 667 (2007).....	12
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997)	25
<i>Right-Price Recreation, LLC v. Connells Prairie Community Council</i> , 146 Wn.2d 370, 46 P.3d 780 (2002).....	41, 43
<i>Save Columbia CU Committee v. Columbia Community Credit Union</i> , 150 Wn. App. 176, 206 P.3d 1272 (2009).....	11
<i>Seattle v. Pearson</i> , 15 Wash. 575, 46 P. 1053 (1896).....	2
<i>Segaline v. Dept. of L&I</i> , 144 Wn. App. 312, 323, 182 P.3d 480	36, 41
<i>Skimming v. Boxer</i> , 119 Wn. App. 748, 82 P.2d 707 (2004).....	37, 38
<i>Spokane v. Knight</i> , 96 Wash. 403, 165 P. 105 (1917)	2
<i>State v. Larson</i> , 49 Wn.2d 239, 299 P.2d 568 (1956).....	2

<i>State v. Rohrich</i> , 149 Wash.2d 647, 71 P.3d 638 (2003).....	10
<i>Stratton v. U.S. Bulk Carriers, Inc.</i> , 3 Wn. App. 790, 478 P.2d 253 (1970).....	16, 17
<i>Superior Asphalt and Concrete Co. v. Wash. Dept. of Labor & Industries</i> , 121 Wn. App. 601, 89 P.2d 316 (2004).....	22
<i>Thorgaard Plumbing & Heating Co. v. King County</i> , 71 Wn.2d 126, 426 P.2d 828 (1967).....	35
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).....	22
<i>Town of Forks v. Fletcher</i> , 33 Wn. App. 104, 105, 652 P.2d 16 (1982).....	2
<i>Town of Ruston v. City of Tacoma</i> , 90 Wn. App. 75, 951 P.2d 805 (1998).....	26, 27
<i>Treyz v. Pierce County</i> , 118 Wn. App. 458, 76 P.3d 292 (2003)	29
<i>Wash. Fed'n of State Employees v. State</i> , 107 Wn. App. 241, 26 P.3d 1003 (2001).....	10
<i>Williams v. Poulsbo Rural Telephone Ass'n</i> , 87 Wn.2d 636, 55 P.2d 1173 (1976).....	24, 25
<i>Wood v. Battle Ground Sch. Dist.</i> , 107 Wn. App. 550, 27 P.3d 1208 (2001).....	19

Statutes

Chapter 4.24 RCW.....	9
RCW 4.24.500	31, 33, 37
RCW 4.24.510	7, 8, 33, 34, 36, 37, 40, 41, 44

RCW 4.24.520	33
Chapter 4.96 RCW.....	4, 12
Chapter 7.24 RCW.....	16
RCW 7.24.010	20
RCW 7.24.020	21
RCW 7.24.060	21
RCW 7.24.110	23
RCW 36.01.010	13, 14
RCW 36.01.020	13
RCW 36.01.030	13
Chapter 42.30 RCW.....	14
RCW 42.30.020	19
RCW 42.30.020(2).....	18
RCW 42.30.020(3).....	18, 19
RCW 42.30.020(4).....	19
RCW 42.30.030	19
RCW 59.12	38, 39

Regulations & Rules

County Regulations

Kitsap County Code Ch. 4.144	12
------------------------------------	----

Kitsap County Resolution 125-2007.....	2, 3, 24
Kitsap County Resolution 203-2008.....	4, 12

Court Rules

CR 12(b)(6).....	6, 9, 10, 14, 15, 43
CR 12(b)(7).....	14
CR 65(d).....	30
RAP 18.1.....	41

Other Authorities

6 E. McQuillian, <i>Municipal Corporations</i> § 22.19, at 333 (3d ed. 1980)....	2
42 U.S.C. § 1983.....	35
BLACK’S LAW DICTIONARY, at 823 Fifth Ed. (1979).....	35
K. Tegland, 5 Wash.Prac. § 50 at 95 (2d ed. 1982).....	2
Michael Johnston, <i>A Better SLAPP Trap: Washington State’s Enhanced Statutory Protection for Targets of “Strategic Lawsuits Against Public Participation,”</i> 38 Gonz. L. Rev 263, 284-85 (2003)	43
State Attorney General Opinion No. 16 (1986).....	18

I. INTRODUCTION

Respondents Kitsap County and the Individual Defendants jointly file this Response to Appellant Citizens for Accountable Government in Eglon and Hanville's (*hereafter* "CAGEH") Opening Brief.

This action was filed against Kitsap County (County) and forty-one (41) volunteer community members (the "Individual Defendants") alleging various claims concerning governmental conduct. This case arises from local political issues, dealing with community planning and traffic measures, which unfortunately divided and polarized the local community. Such issues are properly considered in the local legislative forum, and are not justiciable controversies. There is no basis for personally naming the members of a community advisory committee in a lawsuit. Moreover, there are significant public policy reasons why community volunteers, indemnified by the County, should not be personally named in a lawsuit concerning their volunteer community activities.

Even if there are legitimate legal issues to be decided here, the only proper defendant is Kitsap County. The trial court properly dismissed the 41 individuals from the lawsuit. The trial court also properly exercised its discretion in deferring ruling on CAGEH's motions to dismiss Defendants' affirmative defenses. This appeal must be denied.

II. STATEMENT OF THE CASE¹

A. Factual Background

The 41 named individuals are volunteer members of a citizens advisory group that assists the County in land use planning and other community issues. This group, known as the “Greater Hansville Area Advisory Council” (“GHAAC”), represents a broad range of citizens in the northern part of the County. In June, 2007, the Kitsap County Board of County Commissioners (BOCC) formally recognized the GHAAC to serve as a citizens advisory committee through adoption of Kitsap County Resolution 125-2007.² CP 97-107.

CAGEH portrays the GHAAC to be a “super-governmental” body wielding legislative and regulatory powers. This is not so. The GHAAC, as its name suggests, is a group that serves merely an *advisory* role to the County. It does not have legislative or regulatory authority, and it consists solely of unpaid volunteers from the community. The existence of the

¹ The record in this case is more extensive than a typical appeal of the granting of a CR 12(b)(6) motion. The Respondents’ motion to dismiss the Individual Defendants is based solely on the pleadings. CAGEH’s motions to dismiss the affirmative defenses, however, introduced declarations and facts that go beyond the face of the pleadings. Since both the granting of Respondents’ motions and the denials of CAGEH’s motions are issues on review, the statement of the case includes information from the entire record.

² The Court may take judicial notice of local ordinances and resolutions. *See Town of Forks v. Fletcher*, 33 Wn. App. 104, 105, 652 P.2d 16 (1982)(citing *Olympia v. Nickert*, 118 Wash. 407, 203 P. 946 (1922); *Spokane v. Knight*, 96 Wash. 403, 165 P. 105 (1917); *Seattle v. Pearson*, 15 Wash. 575, 46 P. 1053 (1896); K. Tegland, 5 Wash.Prac. § 50, at 95 (2d ed. 1982); *State v. Larson*, 49 Wn.2d 239, 299 P.2d 568 (1956); 6 E. McQuillin, *Municipal Corporations* § 22.19, at 333 (3d ed. 1980)).

GHAAC does not preclude any citizen from participating in county hearings, public meetings or otherwise voicing his or her opinion on County matters.

The structure of the GHAAC was established prior to its becoming an “official” county advisory committee. CP 97. That structure was endorsed by the BOCC upon its adoption of Resolution 125-2007, when the GHAAC became a county entity. CP 97-107. The GHAAC was structured to represent various geographic areas and organizations within the region. CP 101. The GHAAC bylaws state:

The Kitsap County Board of Commissioners recognizes that, in forming the GHAAC, every identifiable organization and geographic area located within the Greater Hansville Area was invited to participate in the GHAAC. *Those individual organizations and geographic areas agreeing to membership in the GHAAC shall be confirmed by the Board of County Commissioners.* Each organization and each geographic area shall appoint its own representative to the GHAAC.³ CP 101.

Although the members of the GHAAC are volunteers, the County indemnifies those member activities conducted in the course of the volunteer work. After this lawsuit was filed naming the 41 Individual

³ There is at least one other Kitsap County community advisory committee structured in this manner. Others involve individual appointments of members by one or more county commissioner, in his or her sole discretion. In practical terms, there is little difference between a commissioner appointing a member versus confirming a member suggested by the GHAAC – both are *discretionary political appointments*. There are no laws that control the exercise of this discretion or mandating any specific appointments to such advisory groups.

Defendants personally, the County adopted Resolution 203-2008 explicitly indemnifying and defending volunteers who may be sued for their county-related activities.⁴ CP 160-161. Thus, the volunteers are treated as employees or elected officials, and the County assumes liability for their actions conducted within the scope of their volunteer duties.

Although the Complaint did not specifically reference the facts that gave rise to the CAGEH's displeasure at the GHAAC, it apparently began when the County installed traffic control devices (speed tables) on roads in the Hansville area. CP 135, 141, 146. After the speed tables were installed, County personnel and members of the GHAAC were subject to extensive criticism by a select group of citizens. CP 139-140. This criticism took the form of multiple and persistent emails to county commissioners, staff and volunteers (Supp. CP 421-453); copious and duplicative public disclosure requests (Supp. CP 286, 395-419); and several web sites that criticize specific County personnel, the GHAAC and other individuals (CP 138-139; 151-152). Kitsap County attempted to facilitate community discussions on the speed tables, and formed several community groups to address the issues in the community. Supp. CP 422-427. Unfortunately, the issues were not settled to everyone's satisfaction and there remain some very disgruntled individuals who have taken their

⁴ *See also*, Chapter 4.96 RCW.

dissatisfaction to an entirely new level by filing this lawsuit.

In its Opening Brief, CAGEH provides detail of another event “triggering” this lawsuit.⁵ In the heat of the “controversy” regarding the speed tables, an elderly member of the GHAAC, Mr. Knutson, sent an email stating that he was resigning from the advisory group. Thereafter, Mrs. Laurie Wiegenstein inquired about being appointed to the committee, but was not appointed. Mr. Knutson’s “resignation” was not accepted, he reconsidered and stayed on the GHAAC before the next meeting was held. CP 140. CAGEH and the Wiegensteins⁶ apparently believe that because Mrs. Wiegenstein was not appointed, they have a cause of action entitling them to sue 41 individuals.

While Respondents recognize CAGEH and its members have rights to free speech, it does not parlay into a right to sue without specific cause. Here, CAGEH not only named the 41 individual volunteers in the suit, it aggressively pursued the case against the individuals. Supp. CP 284, 290-386. As each individual was served with a complaint, he or she was also served with Interrogatories and Requests for Production. Within the first

⁵ In their opening brief, CAGEH cites an email exchange between Mr. Wiegenstein and a county staff person, Anne Blair. CAGEH’s Opening Brief at 14-15. Mr. Wiegenstein suggested that Ms. Blair speak with the GHAAC members to reconsider this “action,” and demanded a response within a few days. Ms. Blair declined to interfere, which CAGEH says is “evidence” that the County has no role or interest in the GHAAC’s activities.

⁶ Mr. Wiegenstein is CAGEH’s counsel and Mrs. Wiegenstein is an officer of CAGEH.

week that the suit was filed, the County was served with two discovery requests, much of it duplicating the numerous public disclosure requests the County had already responded to. Supp. CP 283-386. The discovery served on the individuals was quite broad, oppressive, requesting personal information that would not normally be subject to public disclosure. Supp. CP 330-386.

B. *Procedural History.*

In October, 2008, CAGEH filed an action against Kitsap County and 41 Individual Defendants for Declaratory Judgment and Injunctive relief, asserting a number of governmental violations. CP 1-15. Kitsap County and two of the Defendants, Mr. and Mrs. Foritano filed answers that included several affirmative defenses. CP 16-31. Soon after the lawsuit commenced, Respondents jointly moved to dismiss the 41 Individual Defendants as not being proper parties to the lawsuit.⁷ CP 86-96. The motion was based on the facts that the Individual Defendants were not proper parties to this lawsuit and only Kitsap County need be named. A CR 12(b)(6) motion was merited on the face of the pleadings, and was also the speediest way to remove these volunteers from the stress of having been named in a lawsuit.

⁷ While only eight Defendants were served, no further answers were filed after the CR 12(b)(6) motion was filed. Attorneys for the parties conferred and agreed that no other parties would be served until after the motion was decided.

CAGEH filed two motions to dismiss Respondents' affirmative defenses of misjoinder and Anti-SLAPP immunity under RCW 4.24.510. CP 32-85. All three motions were consolidated for hearing. At the hearing, the trial court asked CAGEH's attorney what the real issues were in this case.⁸ CP 175. Counsel acknowledged that the road issues initially provoked CAGEH's concerns, but begged off answering in any more detail, claiming he would have to consult with his clients. CP 176. The trial court later issued a ruling dismissing the 41 Individual Defendants from six of the seven causes of action, leaving only the cause of action alleging that the Individual Defendants had failed to comply with its bylaws. CP 169. In his letter ruling, Judge Steiner stated that the issues concerning dismissal of the affirmative defenses would be deferred. CP 169. The Defendants jointly moved for reconsideration on this issue, showing that CAGEH had not demonstrated a justiciable controversy or a prima facie case against the Individual Defendants on *any* cause of action. CP 173-181. CAGEH refiled, without change, its two motions to dismiss the affirmative defenses. CP 184-226. The trial court agreed with Respondents, and dismissed the individuals entirely from the lawsuit, leaving Kitsap County as the sole defendant. CP 260.

Shortly after Judge Steiner issued his ruling, but before the order

⁸ Judge Steiner asked something to the effect of "What is the real beef in this case?"

was entered, CAGEH unexpectedly moved to dismiss the remaining case against the County. CP 261. CAGEH then sought this Court's review of the dismissal of the individuals and the trial court's deferred ruling regarding its motions to dismiss Respondents' affirmative defenses. CP 269.

III. SUMMARY OF ARGUMENT

Kitsap County is the only proper defendant in this case and should have been the only party named. As agents of Kitsap County who are indemnified by the County, there was no reason to have the 41 volunteers named, and the trial court properly dismissed them from the action. The 41 volunteers have no liability for failing to comply with the bylaws or for alleged Open Public Meetings Act violations, any such liability would fall on the County as an entity. CAGEH made no showing of a proper justiciable controversy required for a court to issue a declaratory judgment act, nor did it make a showing that it met the requirements for injunctive relief. The court's dismissal of the individuals was proper.

The trial court did not abuse its discretion by failing to rule on CAGEH's motions to dismiss the affirmative defenses. If anything, the court should have granted the Respondents their attorney fees and costs (and even damages) under RCW 4.24.510 as the evidence shows that the individuals are immune from liability under the statute. Finally, this Court

should consider the significant public policy reasons for providing a prompt and summary dismissal in cases such as this. When such a case cannot be promptly dismissed, the action, even when ultimately dismissed, will have chilling effects on community involvement.

IV. ARGUMENT

A. *Standard of Review*

CAGEH seeks review of four trial court rulings: (1) the granting of Respondents' motion to dismiss the Individual Defendants to all but one cause of action; (2) the granting of Respondents' motion for reconsideration dismissing the Individual Defendants from the remaining cause of action; (3) the court's deferral of CAGEH's motion to dismiss the affirmative defense of improper joinder; and (4) the court's deferral of CAGEH's motion to dismiss the affirmative defense of immunity under Chapter 4.24 RCW. Because this appeal involves several differing court actions (or inaction), there is no a single standard of review to be applied to the case.

1. Denial of Review of Declaratory Judgment. While the motions to dismiss the Individual Defendants were brought pursuant to CR 12(b)(6), the arguments were that the claims against them were not subject to a declaratory judgment action. This Court reviews a trial court's refusal to consider a declaratory judgment action for abuse of discretion. *Kitsap*

County v. Smith, 143 Wn. App. 893, 902, 180 P.3d 834 (2008)(citing *Wash. Fed'n of State Employees v. State*, 107 Wn. App. 241, 244, 26 P.3d 1003 (2001)). A trial court abuses discretion only “if its decision is manifestly unreasonable or is based on “untenable grounds, or for untenable reasons.” *In re Duncan*, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3384632, at *2 (Oct. 22, 2009)(quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)) “A trial court's decision is manifestly unreasonable if it “adopts a view that ‘no reasonable person would take.’” *Duncan, supra* at *2. (quoting *Mayer*, 156 Wn.2d at 684 and *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). “A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.” *Duncan, supra* at *2.

2. *Granting a CR 12(b)(6) Motion.* This court reviews orders granting a motion under CR 12(b)(6) *de novo*. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994)). In assessing factual allegations, the plaintiff's allegations are presumed to be true. *Id.* A complaint is subject to dismissal under CR 12(b)(6), “[W]hen it appears beyond doubt that the plaintiff cannot prove any set of facts that would (a) be consistent with the complaint and (b) warrant relief.” *Havsy v. Flynn*, 88 Wn. App. 514, 518, 945 P.2d 221 (1997)(citing *Bravo v. Dolssen Co.*,

125 Wn.2d 745, 888 P.2d 147 (1995); *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1988)). While the standard for granting a motion to dismiss on a CR 12(b)(6) motion is high, there are occasions where the granting of a CR 12(b)(6) motion is appropriate. *See, e.g., Parsons v. Comcast of California/Colorado/ Washington I, Inc.*, 150 Wn. App. 721, 725-726, 208 P.3d 1261 (2009); *Save Columbia CU v. Committee v. Columbia Community Credit Union*, 150 Wn. App. 176, 186, 206 P.3d 1272 (2009); *Cutler*, 124 Wn.2d 749; *Havsy*, 88 Wn. App. 514. This, too, is such a case.

3. *Granting the Motion for Reconsideration.* The granting or denial of a motion for reconsideration “is within the sound discretion of the trial court and will be overturned only upon an abuse of discretion.” *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997)(citing *Bringle v. Lloyd*, 13 Wn. App. 844, 848, 537 P.2d 1060 (1975)). Again, this is a high burden to show that the trial court’s decision was made on untenable grounds.

4. *Deferring the Motions to Dismiss Affirmative Defenses.* CAGEH challenges Judge Steiner’s refusal to rule on its motions to dismiss the affirmative defenses, which he deferred. A “deferral” of ruling on a motion is not an appealable action, but for sake of argument, we will address it as if it was a denial. CAGEH misstates the standard of review

regarding the deferral of rulings on its motions. CAGEH incorrectly asserts that this Court reviews the *denial* of its motions to dismiss the affirmative defenses *de novo*. This Court reviews the denial of a motion to dismiss under the same abuse of discretion standard that it reviews the granting of a motion for reconsideration or the denial of a declaratory judgment action. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 370, 166 P.3d 667 (2007)(“We review a trial court’s denial of a motion to dismiss for abuse of discretion.”). Thus, this Court reviews whether Judge Steiner’s unwillingness to rule on those motions was “untenable” and something that no reasonable person would do. Again, this is a burden CAGEH cannot shoulder.

B. *CAGEH’s Claims Are Against the County – It Has Failed to State a Claim Against the Individual Defendants*

The actions complained of here are allegations against Kitsap County and/or a county entity, the GHAAC. As noted, under state law, county ordinance, and county resolution, Kitsap County defends and indemnifies both its employees and volunteers. Chapter 4.96 RCW; Kitsap County Code Ch. 4.144; and Kitsap County Resolution 203-2008. It is the County that is ultimately responsible for actions taken under its name, including actions by its volunteers. There is absolutely no need to name each of these individual volunteers separately.

RCW 36.01.010 provides:

The several counties in this state shall have capacity as bodies corporate, to sue and be sued in the manner prescribed by law; to purchase and hold lands; to make such contracts, and to purchase and hold such personal property, as may be necessary to their corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county.

RCW 36.01.020 further provides:

The name of a county, designated by law, is its corporate name, and it must be known and designated thereby in all actions and proceedings touching its corporate rights, property, and duties.

In *Nolan v. Snohomish County*, 59 Wn. App. 876, 802 P.2d 792 (1990), plaintiffs sought writs of review and/or mandamus of a County action. The trial court dismissed the action because the members of the county council were not named as parties. The Court of Appeals reversed, finding that the council functioned solely as a review body, and that complete relief could be obtained without naming the council. Here, the Individual Defendants are volunteers on a county advisory committee. The GHAAC functions solely as an advisory body. Any actions of the advisory committee are the responsibility of the County, and individuals need not, and should not, be named individually. As in *Nolan*, CAGEH could have obtained complete relief without naming the individual members.

Similarly, in *Foothills Development Co. v. Clark County*, 46 Wn.

App. 369, 730 P.2d 1369 (1986), this Court upheld the dismissal of individually-named county commissioners in an action seeking a writ of review, declaratory judgment and damages. In *Foothills*, the plaintiff named the individual commissioners but did not name the county within the statute of limitations period. In that case, defendants sought CR 12(b)(6) and 12(b)(7) motions to dismiss, which were granted by the trial court. Upon review, this Court held the individual members of the board of commissioners, and board itself, were properly dismissed from the lawsuit, and the county was the only entity that should have been named.⁹

More recently, this Court had an opportunity to evaluate whether a County must be named in a suit naming a separately elected official. *Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008). In *Broyles*, Thurston County argued it could not be held liable for the acts of its elected prosecuting attorney, and that no agency relationship existed between the county and the prosecuting attorney. This Court disagreed:

A county is a municipal corporation authorized by law to exercise powers the state grants to it. RCW 36.01.010. The county is no single person or entity. Rather, it exercises its powers through various commissioners, officers and agents. RCW 36.01.030.

⁹ See also, *Culpepper v. Snohomish County Dept of Planning and Community Development*, 59 Wn. App. 166, 173, 796 P.2d 1285 (1990), where the court found that the County itself should have been the only party named in the suit (“[T]he only parties to this case are Culpepper and Snohomish County.”)

Broyles, 147 Wn. App. at 428. This Court went on to note: “[W]hen a county officer . . . exercises the county’s powers, the officer’s actions are those of the county itself.” *Id.* Unlike the situation in *Broyles*, here the County has consistently argued that it is the only proper party to the case.

Kitsap County expressly denies it has violated any law with respect to the creation or proceedings of the GHAAC. But even assuming all of the allegations in the Complaint as true, the Court has a clear basis for dismissal of the Individual Defendants under CR 12(b)(6).

C. The Individual Defendants Are Not Liable for Failing to Comply with the Bylaws

CAGEH assigns error to the Superior Court’s dismissal of the sixth cause of action: failure to comply with bylaws. CAGEH claims it is entitled to declaratory relief on this cause of action on the basis that the GHAAC made appointments of members contrary to the wording of its bylaws. As described in more detail below, such a claim is not subject to a declaratory judgment action because it does not present a justiciable controversy. CAGEH has no rights at stake in political appointments to an advisory committee. Moreover, the claim is directed at the GHAAC, a county entity. As described above, the county is the only proper party in such a claim, not the individuals of the advisory committee. Kitsap County is responsible for this group and under a duty to defend its actions

– there is no cause of action against the Individual Defendants, and no reason to name them individually.

D. CAGEH has No Claim Against the Individuals for Open Public Meetings Act Violations.

While CAGEH asserted a violation of the Open Public Meetings Act (OPMA, Ch. 42.30 RCW) in its Complaint, it was done so “on information and belief.” However, in its 5-page response to the Respondents’ motions to dismiss, CAGEH did not brief, argue, or even mention this allegation or cite to the OPMA. CP 108-112. Instead, CAGEH’s response focused solely on the alleged bylaw violations and the Anti-SLAPP defense. CAGEH’s complete lack of argument below on this issue below in itself shows that the trial court did not err and that Respondents met their burden of proof for dismissal.

A contention not advanced below cannot be urged for the first time on appeal for the purpose of reversing the judgment appealed from. The trial court is the proper forum for the initial assertion of all the contentions of the parties so that the parties may, in light of the contentions advanced, make their record and so that the trial court may have an opportunity to rule upon the contentions advanced. . . . *If the issue is impliedly withdrawn, the party entitled to the benefit of the issue in effect waives the necessity of proof of that issue by the opposing party.* Generally, waiver is not dependent upon the waiving party’s subjective intent not to waive. His conduct, if inconsistent with any such intent, controls.

Stratton v. U.S. Bulk Carriers, Inc., 3 Wn. App. 790, 793-94, 478 P.2d 253 (1970) (emphasis added, internal citations omitted). *Stratton* involved an

appeal of a plaintiff's judgment in a personal injury case. On appeal, defendant/appellant claimed it owed no duty to the plaintiff. The court found this argument had been waived because defendant failed to argue this particular point of law in the trial court. The court noted the defendant/appellant had confined the issues in its memorandum to whether it had breached a duty:

By thus confining the issues on liability to those stated, the memorandum necessarily implied that the only controverted issues on liability were those that had to do with the breach of duties, the existence of which was assumed to be owing.

Stratton, 3 Wn. App. at 795. The court affirmed the judgment because defendant/appellant had impliedly waived argument on this issue by not addressing it before the trial court. *See also, Brower v. Ackerley*, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997) (“An issue not briefed or argued in the trial court will not be considered on appeal.”); *Better Financial Solutions, Inc. v. Caicos Corp.*, 117 Wn. App. 899, 912-13, 73 P.3d 424 (2003)(While plaintiff had asserted cause of action for breach of contract, it did not argue this theory to the trial court and thus the court would not consider it on appeal). Thus, CAGEH waived argument regarding the dismissal of the OPMA claim by not advancing, briefing or arguing its contention in the court below.

Even if CAGEH is allowed to make argument on this issue on

appeal, the individual GHAAC members should not be subject to an OPMA claim for a variety of reasons. It is arguable that the GHAAC, as an advisory group, is not subject to the OPMA. The OPMA applies to “actions,” defined as the “transaction of official business of a public agency by a *governing body*. . .” RCW 42.30.020(3) (emphasis supplied).

A “governing body” is defined as:

[T]he 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).

An advisory committee does not make policy or promulgate rules on behalf of the county. It cannot take “action” as defined by the OPMA. This cause of action can *only* be asserted against entities that are subject to the OPMA. As the State Attorney General has explained: Opinion No. 16 (1986):

[W]e conclude that a committee acts on behalf of the governing body when it exercises actual or de facto decisionmaking authority for the governing body. In our opinion such advisory committees do not act on behalf of the governing body and are therefore not subject to the [OPMA].

State Attorney General Opinion No. 16 (1986).

CAGEH has alleged that the “executive committee” of the GHAAC has met in violation of the OPMA. But the OPMA applies only when

there is a quorum of the governing body of a policy or rule-making body at a meeting where action is taken, as defined by the Act.¹⁰ *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*, 119 Wn. App. 665, 701, 82 P.3d 1199 (2004). A quorum of the GHAAC is 51% of the *entire* membership. Even for those bodies that are subject to the act, when members meet in groups that do not constitute a quorum, they are not subject to the OPMA.¹¹

As described above, Kitsap County has fully indemnified the GHAAC volunteers for their actions as a county advisory committee. Even assuming that the GHAAC is subject to the OPMA, and CAGEH is entitled to make arguments it waived below, the County would be responsible for any civil penalties against GHAAC members who *knowingly* violated the OPMA. Finally, there is dangerous precedent to be set if the Court were to allow such actions against individual members of *volunteer* community groups. Without some protection, any disgruntled

¹⁰ RCW 42.30.020; .030. Under the OPMA, a “meeting” is one in which “action” is taken. RCW 42.30.020(4). “Action” is defined as the transaction of official business – which can only occur if a quorum is present RCW 42.30.020(3).

¹¹ The cases CAGEH cites do not support its OPMA claim. In *Eugster v. City of Spokane*, 118 Wn. App. 383, 76 P.3d 741 (2003), the Court stated: “A ‘meeting’ takes place when a majority of the governing body meets and takes ‘action.’ Mr. Eugster’s declarations and exhibits do not raise a reasonable inference that a majority of the City Council held meetings and took action in knowing violation of OPMA at the alleged meetings.” *Id.* At 424 (citing *Eugster v. City of Spokane*, 110 Wn. App. 212, 222-23, 39 P.3d 380; *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (2001) and RCW 42.30.020(4)).

citizen or attorney could bring an action “on information and belief” subjecting individual volunteers to lawsuits. That would certainly create an unwarranted chilling effect on those who volunteer in their community.

E. CAGEH’s Requests For Declaratory Judgment and Injunctive Relief Fail Because There Is No Justiciable Controversy and Even If There Were, the Individual Defendants Are Not Necessary Parties.

CAGEH sought both declaratory and injunctive relief against the County and the 41 Individual Defendants. While the County conceded that CAGEH could litigate the claims against the County, the County maintains that personally naming the volunteers was neither necessary nor proper. There simply is no cause of action against the individual members of the advisory committee.

1. *Declaratory Judgment.* Washington has adopted the Uniform Declaratory Judgments Act (UDJA), codified in Chapter 7.24 RCW:

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.

RCW 7.24.010. Those who are entitled to bring declaratory judgment actions are described under the UDJA as:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of

rights, status or other legal relations thereunder.

RCW 7.24.020. Finally, the UDJA makes it clear that it is within the discretion of a trial court whether or not to hear a declaratory judgment matter:

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

RCW 7.24.060.

This Court recently had the occasion of determining whether an action is subject to the UDJA in *Bainbridge Citizens United v. Wash. State Dept. of Natural Resources*, 147 Wn. App. 365, 198 P.3d 1033 (2008). In that case, a citizens group attempted to compel a state agency to take specific action through a declaratory judgment action. This Court upheld the trial court's dismissal of the action, finding that "because [Plaintiff] does not question the construction or validity of a law, the action falls outside the scope of the UDJA." *Bainbridge Citizens*, 147 Wn. App. at 374.

It is well-settled law that in order to exercise jurisdiction over the matter, there must be a justiciable controversy:

(1) which is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical,

speculative, or moot disagreement;

(2) between parties having genuine and opposing interests;

(3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic; and

(4) a judicial determination of which will be final and conclusive.

Superior Asphalt and Concrete Co. v. Wash. Dept. of Labor & Industries, 121 Wn. App. 601, 606, 89 P.2d 316 (2004)(citing *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973) and *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)).

A plaintiff must be able to demonstrate that all of these elements are present to show that a justiciable controversy exists. “Unless all these elements are present, the reviewing court steps into the prohibited area of advisory opinions.” *Superior Asphalt*, 121 Wn. App. at 606.¹²

Before the trial court, CAGEH failed to allege any actual, concrete, or substantial harm to itself or its members resulting from GHAAC members’ alleged failure to follow bylaws, and utterly failed to even mention claims regarding the OPMA.¹³ Respondents argued on reconsideration, that CAGEH did not make a showing of a justiciable controversy. CP 175. Indeed, this issue became even more apparent after

¹² A court may consider a matter that is not justiciable if it finds that the action involves a matter of important public interest.

¹³ The apparent “harm” shown in CAGEH’s Opening Brief is a frustration that Mrs. Wiegenstein was not appointed to the GHAAC and frustration that emails were not immediately answered.

the Court's initial hearing on Defendants' Motion to Dismiss. At the hearing, CAGEH's counsel, Mr. Wiegenstein could not answer the Court's question as to the underlying reasons for (i.e., "the beef") of this controversy. He did admit that the roots of the discontent stemmed from the installation of speed tables in the local roads. CAGEH filed a judicial action against GHAAC members stemming from its members' disagreement with the installation of speed bumps and appointment of members to the advisory committee. These are legislative and political decisions – not justiciable controversies.

Even if the Court were to find a justiciable controversy exists, CAGEH's claims against the Individual Defendants fail because they are not necessary parties to the action. RCW 7.24.110 requires that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." CAGEH claims the members' interests affected by the relief CAGEH seeks would be that they must follow bylaws.¹⁴ But CAGEH seeks relief from alleged *government action*. While CAGEH challenges GHAAC as a public entity, it also claims that "The GHAAC itself is merely a group of private individuals on

¹⁴ CAGEH's Opening Brief at 12.

whom respondent County chose to bestow special status and benefits. They have no separate legal existence.”¹⁵ CAGEH cannot have it both ways. If this is a group of private individuals, then no cause of action lies against either the individuals or the County.¹⁶ If it is an agent of the County, as clearly demonstrated in Resolution 125-2007, then the County is the only proper party.

CAGEH cites to *Williams v. Poulsbo Rural Telephone Ass'n*, 87 Wn.2d 636, 55 P.2d 1173 (1976)(overruled on other grounds by *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 691 P.2d 515 (1984)) for support that the individual GHAAC members are necessary parties to a declaratory judgment action. But *Williams* actually supports Respondents’ argument that the individuals are represented by the County and not necessary parties. In *Williams*, a beneficiary of a pension trust sought declaratory and injunctive relief. The pension trust had been assumed by another telephone company (United) and was administered by trustees. The Supreme Court held that all of the other beneficiaries, as well as United, should have been named for a complete and just determination of the matter. However, the Supreme Court noted

¹⁵ CAGEH’s Opening Brief at 13.

¹⁶ CAGEH also claims that the “County plays no role in selecting the GHAAC members.” *Id.* Resolution 125-2007 and the bylaws contradict this allegation.

there was no need to personally name the individual trustees because they were represented by United:

[A]ssuming for the moment that United were a party, it is likewise unnecessary to join the United Plan trustees in order to render plaintiff's requested declaratory judgment. In essence the United Plan is completely controlled and directed by United through the Retirement Benefit Committee. ***In this situation, the trustees are not necessary parties if, and as long as, United is a party to the lawsuit.*** United has the authority to control the actions of both the Retirement Benefit Committee and the trustees, who have no personal interest at stake and can safely follow any judgment. Thus, the interests of the United Plan trustees, and of the Retirement Benefit Committee for that matter, will not be inequitably affected by a declaratory judgment involving plaintiff's rights under the United Plan.

Id. at 645 (emphasis added). The same holds true here. The GHAAC is an agent of the County. Indeed, CAGEH would have absolutely no grounds for challenging the GHAAC if it were not an arm of the County, which is why only the County is a necessary party to its claims.

CAGEH's reliance on *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997) is similarly misplaced. It is clear that *Riss* was limited to its facts, where the court was evaluating the joint and several liability of *some* individual association members. The decision is based solely on the structure of that particular association and the acts of its members. ("Although a community association may have some business-like characteristics, *the nature of this homeowners association* is far removed from that of associations organized for trade or profit." *Id.* at 683

(emphasis supplied)). Again, CAGEH cannot have it both ways – it cannot challenge the GHAAC on its “governmental” actions but at the same time claim that no association exists.

Below, CAGEH claimed the individuals were necessary parties because a declaratory judgment is often employed to determine a person’s legal status, and is often employed to determine a person’s membership status in business or other organizations. CP 110. But CAGEH has never questioned the legal status of the GHAAC members, nor did it need the court to determine membership status, as that information is public and has been provided to CAGEH and its members. Supp. CP 391-391. Instead, it is asking that the Court declare that the members failed to follow the bylaws. CP 13. Since the GHAAC is a county agency, it is the County’s ultimate responsibility for the GHAAC’s actions.

Washington Courts have held that parties are not required to be joined in an action for declaratory judgment when other parties represent their interests. *Town of Ruston v City of Tacoma*, 90 Wn. App 75, 82, 951 P.2d 805 (1998); *Primark v. Burien Garden Assoc.*, 63 Wn. App. 900, 906-07, 823 P.2d 1116 (1992).

Town of Ruston is precisely on point. *Ruston* involved a declaratory judgment action over a dispute between the town of Ruston and the city of Tacoma. There, Tacoma argued that the citizens of both jurisdictions had

a vested interest in the proceedings and should have been joined. The Court rejected this argument, finding that “both municipalities represent the interests of their citizens and were already parties.” *Ruston*, 90 Wn. App. at 82. The same is true here – because the GHAAC is a county organization, its interests, as well as responsibility for its actions, lies with the County.¹⁷ CAGEH distinguishes *Ruston* on the flimsiest grounds, claiming that because Tacoma was arguing that the parties should be joined, it is inapposite. But the reasoning of this Court in *Ruston* applies squarely to this matter.

CAGEH’s reasoning that each individual must be named in order to be “bound” is both illogical and disingenuous. CAGEH named the County as a defendant, but did not find it necessary to name the individual county commissioners or any other county employee.¹⁸ Even more telling is the fact that CAGEH dismissed the action after the individuals had been dismissed, choosing to pursue an appeal against the individuals rather than

¹⁷ See also *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 887-88, 691 P.2d 525 (1984) *cert. denied*, 471 U.S. 1065 (1985)(A party is not necessary if it has a designated representative); *accord Primark*, 63 Wn. App. at 906-07 (sub-lessee did not need to be joined in a dispute over a lease because the “interested parties have a designated representative”).

¹⁸ Significantly, although the Complaint is riddled with allegations concerning one commissioner, Steve Bauer, he was not personally named in the Complaint. CP 6 -10.

reach the merits of its claims against the County and the GHAAC.¹⁹ CAGEH could have obtained complete relief against the County, but instead chose to drop those claims and pursue an appeal against the individual GHAAC members.

Again, since the County has fully indemnified the GHAAC members and represents their interests, the members are not necessary parties. Additionally, the GHAAC members have no legal or financial interest in this lawsuit. A party “must show a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future contingent interest, and the party must show that a benefit will accrue it by the relief granted.” *Primark*, 63 Wn. App. at 907; *see also, Matire v. Borjessan*, 19 Wn. App. 556, 560, 577 P.2d 596 (1978) (Joinder in a declaratory judgment action is not necessary when the party has only a collateral interest in the matter being litigated). Moreover, in those cases holding that a party must be joined in a declaratory judgment action, the party generally had a financial interest²⁰ or an employment

¹⁹ In the Complaint, CAGEH requests the Court to declare “all decisions and actions taken by the GHAAC . . . are void and of not [sic] force and effect.” CP 13. Such a remedy has no practical effect however, because the GHAAC is nothing more than an *advisory* body.

²⁰ *Henry v Town of Oakville*, 30 Wn. App. 240, 663 P.2d 892 (1981) (holding that when an ordinance was declared invalid, the bondholders should have been joined)

interest²¹ in the outcome. In this case, the GHAAC members are not paid, and have no special legal status. They are simply volunteers on a citizen advisory committee. Even if CAGEH were to be successful in having the GHAAC declared invalid, the members' personal legal and financial interests would not be affected in any way by no longer being members. In sum, because CAGEH failed to show a justiciable controversy, and the individuals are not a necessary party to the action, the Individual Defendants were properly dismissed.

F. CAGEH Cannot Establish a Prima Facie Case For an Injunction, and Individual Defendants Do Not Have to be Joined to be Bound by an Injunction.

CAGEH cannot show it meets the elements for justiciable declaratory judgment action against the Individual Defendants, nor can it establish a prima facie case for an injunction. In its brief, CAGEH claims it is seeking, through injunctive relief against the individuals:

[A]n order directing them to stop representing themselves as the GHAAC and to stop representing that they have a special status or relationship with the County.²²

This is clearly not a justifiable, reasonable, or even rational request for relief. To obtain injunctive relief, a plaintiff must show he has a

²¹ *Treyz v. Pierce County*, 118 Wn. App. 458, 76 P.3d 292 (2003)(District court judges who stood to lose their positions were necessary parties in litigation challenging a county re-districting ordinance)

²² CAGEH's Opening Brief at 18.

clear legal or equitable right, that he has a well grounded fear of immediate invasion of that right by the one against whom the injunction is sought, and that the acts complained of are either resulting in or will result in actual and substantial injury to him.

County of Spokane v. Local No. 1553, 76 Wn. App. 765, 888 P.2d 735 (1995). CAGEH has not, and can not, show that any of its rights, as an organization or as the members of the organization, have been violated. Even if all of CAGEH's allegations are taken as true, it cannot demonstrate how these facts have harmed them in any way.

CAGEH claims that it must join the individuals to ensure that any judgment received is binding on them.²³ Contrary to CAGEH's claim, CR 65(d) specifically states that injunctions are "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, *and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.*" Clearly, under the rule, an injunction may be binding upon more than the parties to the action, particularly in cases such as this, where the individuals are acting as agents of the County. *See All Star Gas Inc. of*

²³ In support of this assertion, CAGEH cites to *Glandon v. Searle*, 68 Wn.2d 199, 412 P.2d 116 (1966). *Glandon*, however, did not involve a request for an injunction, but rather dealt with a declaratory judgment action dealing with the rights of a third party probate claimant and has no applicability to the case at hand. *In re Estate of Krueger*, 11 Wn.2d 329, 119 P.2d 312 (1941), also cited by CAGEH, involved neither an injunctive or declaratory action. Rather, it was an action regarding whether an executor's final report was final and binding on subsequent claims by creditors. It, too, has no application in this case.

Washington v. Bechard, 100 Wn. App. 732, 998 P.2d 367 (2000); *Lyle v. Haskins*, 24 Wn.2d 883, 168 P.2d 797 (1946). To hold otherwise would mean that injunction orders against a county would need to include every county official, employee and agent, and perhaps every citizen, to be binding. Such a result would be an absurd and unwieldy situation, and this Court rejected that approach in *Ruston*. The GHAAC acts as an agent of the County and is in active participation with the County; therefore, its members would be bound by an injunction and do not have to be joined as parties. For the same reasons a declaratory judgment action cannot lie against the individuals, nor can an injunction action. This Court should dismiss the Individual Defendants from the case entirely.

G. The Trial Court's Deferral of CAGEH's Motions to Dismiss the Affirmative Defenses was Completely Within the Court's Discretion and Should Be Affirmed.

CAGEH assigns error to the trial court's decision to defer ruling on its motions to dismiss the affirmative defenses of misjoinder and immunity under the "Anti-SLAPP" statute (RCW 4.24.500 *et seq.*). While it is questionable whether these assignments of error are properly before this

court, as there was no trial court ruling on the issues, we assume for argument that they would be treated as denials of CAGEH's motions. As noted above, the standard of review for this Court on the trial court's action is quite high. There must be a showing that Judge Steiner abused his discretion and made his ruling on untenable and unreasonable grounds. As that showing cannot be made, this appeal must be denied

The majority of argument in CAGEH's appeal addresses the Anti-SLAPP affirmative defense, arguing that this affirmative defense should have been dismissed and, incredibly, claiming that CAGEH should have been awarded attorney fees under the statute.

The Anti-SLAPP affirmative defense was not unwarranted given the facts in this case. The Anti-SLAPP statutes are intended to shield voluntary communication with governments. This lawsuit is directed at 41 people who have volunteered their time to collectively act as a resource to, *and to communicate with*, the local government. The volunteer actions should be lauded, certainly not subject the members of GHAAC to personal lawsuits.

Kitsap County is well aware of the fact that CAGEH 's members are unhappy with some legislative decisions made by the County. Their unhappiness, however, is not an issue for the Court, and no basis for a lawsuit against individual volunteers who are members of a community

advisory group. CAGEH's action of dismissing the case against the real party in interest, the County, and pursuing it against the individuals, is even more illuminating that this is a SLAPP suit. In order to prevent such abuse of the judicial system, the state legislature has adopted specific statutes prohibiting this type of action. RCW 4.24.500 - .520. This is the "Anti-SLAPP" (Strategic Lawsuit Against Public Participation) legislation. RCW 4.24.510 specifically states:

A person who *communicates* a complaint *or information* to any branch or agency of federal, state, or *local government*, . . . *is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.* (emphasis added).

CAGEH argues that the Anti-SLAPP statute can only apply if three elements are established:

- (1) the plaintiff is suing the defendant to impose civil liability,
- (2) the claims based [sic] on a communication by the defendant to a government body, and
- (3) the plaintiff seeks money damages on those claims.²⁴

Even assuming CAGEH's characterization of the elements for a Anti-SLAPP defense is correct, Respondents meet those *all* of elements here, as described below.

²⁴ CAGEH's Opening Brief at 20.

First, CAGEH argues that the terms “civil liability” and “damages” are synonymous. It then claims that since it is not seeking an award of damages the Anti-SLAPP defense cannot apply. CAGEH claims that it is “only” seeking a declaratory judgment and injunctive relief, but that it must name the individuals in order for them to be bound.

The statute provides broader protection than CAGEH indicates: RCW 4.24.510 provides immunity from all *civil liability*. CAGEH is clearly seeking to impose civil liability on the 41 Individual Defendants. CAGEH states as much in its own pleadings:

Here, CAGEH seeks injunctive relief against the Individual GHAAC members: an order directing them to stop representing themselves as the GHAAC and to stop representing that they have a special status or relationship with the County.²⁵

Black's Law Dictionary defines the term “liability” (in part) as:

The word is a broad legal term. It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent or likely. It has been defined to mean: all character of debts and obligations; amenability or responsibility; an obligation one is bound in law or justice to perform; an obligation which may or may not ripen into a debt; any kind of debt or liability, either absolute or contingent, express or implied; condition of being actually or potentially subject to an obligation; condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden; condition which creates a duty to perform an act immediately or in the future; duty to pay money or perform some other service; duty which must at

²⁵ CAGEH's Opening Brief at 18.

least eventually be performed; estate tax; every kind or legal obligation, responsibility or duty . . .

BLACK'S LAW DICTIONARY, at 823, Fifth Ed. (1979) (internal citations omitted). *See also Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 136, 426 P.2d 828 (1967)(“As stated in Ballentine's Law Dictionary, it is one's liability, his obligation, his duty. In fact, ‘responsibility’ is virtually synonymous with ‘liability.’”). Further, in *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 652, 20 P.3d 946 (2001), this Court has held that the Anti-SLAPP statutes apply to *all civil claims*.²⁶

Considering that CAGEH is asking for injunctive and declaratory relief, directed specifically to the individuals, as well as attorney fees, and, for the first time on appeal, for possible civil penalties against the individuals, a court could only conclude it is requesting the court to impose civil liability on the individual members.

CAGEH's representation of the second element for an Anti-SLAPP defense is also met here. By virtue of its advisory group status, the

²⁶ CAGEH's reliance on *O'Keefe v. Murphy*, 860 F. Supp. 748 (E.D. Wash. 1994) reversed on other grounds in *O'Keefe v. Van Boening*, 82 F.3d 322 (9th Cir. 1996) is completely misplaced. *O'Keefe* involved claims of qualified immunity under a 42 U.S.C. § 1983 claim, not Anti-SLAPP immunity. It has no application here.

GHAAC communicates with the local government.²⁷ Communication is the defining function of an advisory committee, and it is this very communication that CAGEH protests. Indeed, even before this Court, CAGEH acknowledges this function:

[T]he role of the GHAAC and its members, pursuant to the County Resolution, are [sic] to speak for all of the citizens of the area, and – in intent, and in practice – to filter and spin what the County was told (and not told) about public opinion in the area on matters relating to County government and decision-making.²⁸

CAGEH’s Complaint also states: “[Defendant] Kitsap County has treated the GHAAC as a special political *voice*, giving such great deference that the County has acted as a rubber stamp, *taking action requested and recommended by GHAAC.*”²⁹ This lawsuit turns on the actions of the GHAAC, a county organization. CAGEH sued the individuals solely because of their volunteer membership in the GHAAC. CAGEH’s lawsuit is based on the GHAAC’s role of communicating and advising the local government, the County. As this Court noted recently in *Segaline*, 144 Wn. App. 312, “RCW 4.24.510 allows immunity for claims

²⁷ The fact that the GHAAC is part of the County does not preclude it from asserting an Anti-SLAPP defense. See *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 374, 85 P.3d 926 (2004)(holding that the City could assert a defense under RCW 4.24.510) and *Segaline v. Dept. of L & I*, 144 Wn. App. 312, 323, 182 P.3d 480 (2008)(holding that a state department may assert an Anti-SLAPP defense and citing *Gontmakher* with approval).

²⁸ CAGEH’s Opening Brief at 3-4.

²⁹ CP 7-8 (emphasis supplied).

based upon the communication to the agency . . .”(emphasis in original). The facts here meet CAGEH’s second element necessary for an Anti-SLAPP defense.

Finally, CAGEH mistakenly states the Anti-SLAPP statute applies only where monetary damages are sought. CAGEH claims this immunity only applies to tort claims, because the “purpose” section of RCW 4.24.500 references “claims for damages.” The purpose provision does not control. The statutory provision granting immunity set forth above references immunity for any “civil liability.” Moreover, CAGEH has asked for costs and attorney fees against the Individual Defendants, which certainly would take the form of money. And while the *purpose* section of the statute refers to civil action for damages, that is not what the *substantive* portion of the statute states. The substantive provisions control. *Judd v. Amercian Tel. & Tel. Co.*, 152 Wn.2d 195, 204, 95 P.3d 337 (2004)(While policy statements may aid in construing a statute, they are not operative rules of action). The Anti-SLAPP statute is intended to protect individuals from all “civil liability.” RCW 4.24.510. As noted above, “civil liability” is a very broad term.

In *Skimming v. Boxer*, 119 Wn. App. 748, 82 P.2d 707 (2004), the Court held the following elements, (different than as CAGEH portrays them), must be met to have an affirmative defense under the Anti-SLAPP

statute: (1) the communications must be to a public official; (2) the communications must be intended to influence government action or outcome; and (3) the civil action must be against a non-government individual or organization. *Id.* at 758. All three of the *Skimming* criteria are met here: (1) CAGEH is complaining about the individuals and the GHAAC's relationship (i.e., communication) with Kitsap County; (2) the very purpose of GHAAC is to communicate with the County; and (3) the volunteer members of the GHAAC are unnecessarily named in their individual capacities.

The cases cited by CAGEH in support of dismissing the affirmative defense are not applicable here. Those cases involved specific type of actions where affirmative defenses are limited. Ironically, both cases involved situations where the *plaintiff* was either a governmental entity, or a governmental employee, and the defendants were trying to avoid the lawsuit entirely by asserting the Anti-SLAPP defense.

Port of Longview v. International Raw Materials, Ltd. (IRM), 96 Wn. App. 431, 979 P.2d 917 (1999) involved an unlawful detainer action by the Port against IRM. The court noted: "An unlawful detainer action under RCW 59.12 is a summary proceeding designed to facilitate recovery of possession of leased property and, in such a proceeding, the primary issue is the right to possession." *Id.* at 436. The right to assert equitable

defenses under RCW 59.12 are severely proscribed. *Id.* at 437. The court found that the action was limited because the Port only sought the right to possession “pursuant to the limited summary proceeding under RCW 59.12.” *Id.* at 445.

In *Emmerson v. Weilep*, 126 Wn. App. 930, 110 P.3d 214 (2005), an Anti-SLAPP suit defense was asserted in response to a request for a protective order. In that case, Weilep made repeated complaints to a city inspector, Emmerson. Weilep became abusive in the process, finally filing a complaint about the inspector to the police. The inspector sought a protective order, which was granted temporarily, but denied on a permanent basis. Weilep appealed and asserted he was not subject to a protective order under the Anti-SLAPP statute. Again, the court held the defense was not applicable *on the facts at issue*. The court noted that an action for a protective order was not within the intent of the legislature when enacting the Anti-SLAPP statute. However, the court cited with approval *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) stating:

[A]lthough the plain meaning rule directs a court to construe and apply words according to the meaning that they are ordinarily given, the rule also permits the court to *consider underlying legislative purposes, background facts, and statutory context to determine its plain meaning,*

Emmerson, 110 P.3d at 217 (emphasis added).

Once this Court reviews the underlying legislative purpose of the statute and the background facts here, it will see that the Anti-SLAPP defense is appropriate in this case.

H. *The Respondents Are Entitled to Attorney Fees; CAGEH is Not.*

Incredibly, CAGEH has the temerity to ask this Court to award it attorney fees under the Anti-SLAPP statute. Respondents argued below for attorney fees under RCW 4.24.510 (Anti-SLAPP). The issue became moot when Judge Steiner dismissed the individual defendants from the action.³⁰

CAGEH alleged civil causes of action against the 41 volunteers for their action in communicating with the County, and before this court is asking for the imposition of civil penalties. CAGEH also asks the court to order those individual volunteers to take certain actions (or refrain from action), and has, both below and in this Court asked for an award of costs and attorneys fees. Moreover, naming the individual volunteers as

³⁰ CAGEH states that “defendants had specifically maintained their SLAPP defense in the case even after the claims against the individual GHAAC members themselves had been dismissed with prejudice.” CAGEH’s Opening Brief at 6. In support of this assertion, CAGEH cites to CP 261, which is its motion for voluntary dismissal. This assertion is quite remarkable in light of the fact that CAGEH moved to dismiss all claims *prior* to the order dismissing the individuals was entered. Moreover, Respondents did not contest CAGEH’s motion to dismiss. CP 262. In short, this statement by CAGEH is not accurate and not supported by anything in the record.

defendants has placed them each in the position of having to worry about their personal liability, safety and privacy. These are the very types of issues that the Legislature sought to prevent by enacting the Anti-SLAPP statutes. Most revealing about CAGEH's motives for pursuing this lawsuit is the fact that it voluntarily dismissed the case against the County and is appealing the dismissal of the individuals. This is a waste of judicial and County resources – both of which are funded by taxpayers.

RCW 4.24.510 provides:

A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars.

As shown above, the individuals are entitled to immunity under RCW 4.24.510. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 46 P.3d 780 (2002) (Court found a private nonprofit community council was entitled to immunity and attorney fees under RCW 4.24.510); *Segaline*, 144 Wn. App. 312 (This Court affirmed trial court's award of attorney fees and costs pursuant to RCW 4.24.510); *Gontmakher*, 120 Wn. App. 365 (Division 1 upheld trial court's award of attorney fees and expenses under RCW 4.24.510). Under RAP 18.1, this Court may award attorney fees and costs to the Respondents, and should do so here.

I. There Are Significant Public Policy Reasons Supporting the Early Dismissal of the Individuals.

Finally, there are serious and significant public policy reasons supporting the Court's dismissal of the individuals here. Governments, local, state, and federal, all rely on community input for their actions. The value of community volunteers who participate in these committees is incalculable. It is extremely rare that any governmental action pleases everyone, and there are always those who may disagree. But disagreement with local policy and legislative issues, including how members of an advisory committee are appointed, does not mean that advisory groups should be eliminated. That would be the practical effect of allowing such lawsuits against the individual members of an advisory group.

No doubt CAGEH's organization includes members who are very frustrated with the local government. However, they have chosen the wrong forum to voice their frustration. Theirs is a political issue – not a judicial issue. They are attacking a volunteer community group whose members have volunteered their own time and resources to help the community. They have used tactics to bully, scare, intimidate and embarrass these volunteers. Moreover, the mere filing of the lawsuit could have damaging effects on these individuals, such as impacting credit ratings, insurance issues, and/or title to property. CAGEH should not be

able to use the judicial process in such a manner.

This Court should recognize that a prompt dismissal of such actions is imperative to restricting the abuse of the judicial forum in cases such as this. As one commentator has noted, citing *Right-Price Recreation*, 146 Wn.2d at 384, even when a case is ultimately dismissed, the mere length of time that it may take to have the case dismissed takes its toll on the individuals named:

Thus, while the citizen groups ultimately prevailed on the merits, the developer likely had the perverse satisfaction of dragging the citizen groups through more than three years of litigation. The bitter comments individual targets in the case gave to the media reflect a sense of pyrrhic victory.

* * *

It all boils down to more time spent in litigation. Time is the SLAPP filer's ally; the longer the case survives, the more distressed the target will become. Accordingly, even though the SLAPP filer will inevitably lose, it may well have achieved its strategic goal of intimidating and punishing the target for its past opposition and possibly deterring it from future opposition.

Michael Johnston, *A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation,"* 38 Gonz. L. Rev 263, 284-85 (2003)(internal citations omitted).

Thus, it is imperative that a trial court has the ability to dismiss these types of claims at the earliest opportunity. Here, that was done under the Respondents' CR 12(b) motion. But CAGEH has been able to obtain satisfaction by appealing to this Court and having the case drag on for many months. CAGEH's actions fly in the face of the public policies

supporting community input and providing immunity for that input.

IV. CONCLUSION

The Court of Appeals should deny this appeal and affirm the dismissal of the 41 individual community advisory committee members. Furthermore, to ensure that such an action is not brought again, the Court should impose sanctions on CAGEH for filing, and needlessly extending this lawsuit by awarding Respondents attorney fees and costs under RCW 4.24.510.

Respectfully submitted this 16th day of November, 2009.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney


SHELLEY E. KNEIP, WSBA #22711
Attorney for Respondent Kitsap County

CERTIFICATE OF SERVICE

I, Tracy L. Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On November 16, 2009, I caused to be served in the manner noted a copy of the foregoing document upon the following:

John H. Wiegenstein Heller Wiegenstein, PLLC 144 Railroad Avenue, Suite 210 Edmonds, WA 98020 <input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: <input type="checkbox"/> Via E-mail: <input type="checkbox"/> Via Hand Delivery	Gerald A. Kearney Law Office of Gerald A. Kearney P.O. Box 1314 Kingston, WA 98346 <input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: <input type="checkbox"/> Via E-mail: <input type="checkbox"/> Via Hand Delivery
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED November 16, 2009, at Port Orchard, Washington.


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