No. 91978-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS, LLC,

Appellant

v.

THE CITY OF CLYDE HILL, WASHINGTON,

Respondent

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I
(Court of Appeals No. 71626-3-I)

ANSWER TO MEMORANDUM OF AMICUS WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

WSAMA's memorandum in support of review is premised on public policy grounds. WSAMA argues that if New Cingular is permitted to challenge Clyde Hill's illegal fine in a *de novo* declaratory judgment action, instead of by writ of review based on the administrative record, then the local administrative appeals process will be rendered "meaningless." The Court of Appeals considered this argument, and properly rejected it. *New Cingular Wireless PCS LLC v. City of Clyde Hill*, 187 Wn. App. 210, 218, 349 P.3d 53 (2015). WSAMA's fears are unfounded. Indeed, the rule WSAMA asks this Court to adopt would lead to unfairness and raise due process concerns in cases like this one—where a municipality's informal administrative appeals process is perfunctory and exclusive recourse to a writ of review would amount to no judicial review at all.

In the end, however, it doesn't really matter. WSAMA's arguments must be directed to the legislature, not this Court. The Washington constitution expressly confers the superior court with original jurisdiction over cases involving the legality of municipal fines, and the legislature has chosen not to impose "procedural requirements"—like it has with the APA and LUPA—that limit the exercise of the superior court's original jurisdiction to appellate review. Unlike these comprehensive statutes, the writ of review statute does not provide an exclusive means of review for

local administrative decisions. WSAMA fails to identify any grounds for review for the simple reason that the Court of Appeals' opinion was correct and consistent with existing law. The petition for review should be denied.

II. ANSWER TO AMICUS

A. WSAMA Fails To Identify Any Constitutional Or Statutory Limits On The Superior Court's Original Jurisdiction Over Cases Involving Municipal Fines Or Taxes; There Is None.

The Court of Appeals properly recognized that the superior court's jurisdiction over New Cingular's declaratory judgment action emanates directly from the text of the state constitution, which vests the court with "original jurisdiction" over cases involving the legality of any "municipal fine." WASH. CONST. Art. IV, § 6. "It is axiomatic that a judicial power vested in courts by the constitution may not be abrogated by statute." *James v. County of Kitsap*, 154 Wn.2d 574, 578-88, 115 P.3d 286 (2005).

The state legislature, however, can "prescribe procedures for the resolution of a particular type of dispute," and courts must insist on compliance with such "procedural requirements before they will exercise jurisdiction over the matter." *Id.* This is what the legislature did when it enacted the APA. Although the superior court still has original jurisdiction over challenges to agency action, the APA's "procedural requirements" confine that jurisdiction to appellate review. *See Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 360, 271 P.3d 268 (2012).

In rejecting Clyde Hill's strained effort to analogize the generic writ of review statute, Chapter 7.16 RCW, to the exclusive procedures found in comprehensive statutes like the APA, the Court of Appeals correctly held, "[n]o statute articulates specific procedures for getting into superior court with a challenge to the legality of a municipal fine." *New Cingular*, 187 Wn. App. at 217. WSAMA cannot identify any such statute either, nor does it argue—or cite any authority to show—that the legislature intended the writ statute to provide an *exclusive* means of review for challenges to municipal fines or taxes, or any quasi-judicial decision for that matter.

There is no such statute or authority. Indeed, WSAMA, like Clyde Hill, ignores the case law expressly recognizing that a party has a choice of "appealing" an adverse quasi-judicial decision by seeking a writ of review *or* challenging the underlying assessment *de novo* by filing a complaint for equitable or declaratory relief. *See Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013); *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007); *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 115, 70 P.3d 144 (2003).

When the legislature imposes "procedural requirements" limiting superior court jurisdiction, it does so specifically—and, critically, it has done so with respect to municipal administrative decisions, including land-use (RCW 36.70C.030 (LUPA)); diking and drainage district levies (RCW

85.18.100, RCW 85.32.170); plats (RCW 58.17.180); shoreline management (RCW 90.58.180 (SMA); orders of county commissioners (RCW 36.32.330); environmental impact (RCW 43.21C.075 (SEPA)); comprehensive plans (RCW 36.70A.290 - .300 (GMA)). The legislature has not done so for local decisions involving taxes or fines, nor can such an intent be implied from the writ statute itself—especially where, as here, doing so would conflict with the Article IV, § 6's express mandate.

Finally, there is no merit to WSAMA's suggestion that the Court of Appeals' opinion may allow parties to bypass the APA and LUPA. WSAMA Br. at 10. The opinion says no such thing. The APA and LUPA are examples where the legislature acted to impose express "procedural requirements" to limit superior court jurisdiction to appellate review. *Union Bay Pres. Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995); *James*, 154 Wn.2d at 588; *also Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003) (IIA appeals). The Court of Appeals recognized this specifically, and distinguished these comprehensive and exclusive statutory regimes from the generic and non-exclusive writ statute. *New Cingular*, 187 Wn. App. at 216-17 & n. 3. This red herring provides no basis for review either.

B. WSAMA's Policy Concerns Are Unfounded; Limiting Superior Court Jurisdiction Over Local Quasi-Judicial Decisions To Appellate Review Would Undermine The Administrative Process And Threaten Due Process.

At bottom, WSAMA asks this Court to accept review and impress new judicial gloss on the writ of review statute based on supposed public policy concerns. But absent some indicia in the text or legislative history of the statute, of which there is none, this Court cannot simply substitute its judgment for that of the drafters of the constitution or the legislature. And, even if it could, the rule WSAMA and Clyde Hill asks this Court to adopt—that a writ of review be the exclusive avenue for judicial review of all local quasi-judicial decisions—is unnecessary to further WSAMA's stated goal of a meaningful administrative process and would threaten to curtail the parties' full and fair access to the courts.

WSAMA argues that "[a]ppeals of all such decisions should be through an appellate process, *i.e.*, writs of review," based solely on the "administrative hearing record"—otherwise, WSAMA warns, parties will "disregard[] and disrepect[]" a municipality's administrative process and "the rich body of law on exhaustion." WSAMA Br. 3-8. Not so. In *Cost Management*—which recognized that an aggrieved taxpayer has a *choice* to challenge a city's illegal tax through a *de novo* lawsuit—this Court held that where, as here, a party chooses to invoke the superior court's original

trial jurisdiction, it still must first exhaust the city's administrative appeal process. *Cost Mgmt.*, 178 Wn.2d at 648; *see also IGI Res., Inc. v. City of Pasco*, 180 Wn. App. 638, 642, 325 P.3d 275 (2014) (same).

This prudential requirement ensures that the city's appeal process is meaningful. An aggrieved party has every incentive to press its case (and, if allowed, muster its witnesses and evidence) during the administrative process to avoid the need for costly judicial review—which, as WSAMA points out, is even more costly if the party chooses to (or had no choice but to) seek a *de novo* proceeding rather than a writ. WSAMA Br. at 4. At the same time, as the Court of Appeals noted, "[p]roviding an opportunity to correct error before resort to the courts is one of the purposes served by the doctrine of exhaustion." *New Cingular*, 187 Wn. App. at 217. If anything, the prospect of a *de novo* challenge in court should incentive municipalities to afford aggrieved parties a full and fair opportunity to present their case before an impartial decision-maker during the administrative process.

Indeed, the new rule WSAMA espouses—that all quasi-judicial decisions may be challenged only by writ—may encourage municipalities to afford parties even fewer procedural rights so as to effectively immunize their decisions from judicial review. As WSAMA repeatedly notes, in a writ of review proceeding the superior court sits in an appellate capacity, and ordinarily must base its review on the static administrative record, such

as it is, with no additional evidence. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 789-90, 903 P.2d 986 (1995); *Mary Kay*, 117 Wn. App. at 116 n. 7. "Findings of fact" are generally unassailable. RCW 7.16.120 (factual findings reviewed only for "substantial evidence").

Thus, where a municipality's administrative appeals process affords no opportunity for discovery, no formal hearing before an impartial hearing officer, and no sworn testimony or right to cross-examine, challenging a municipality's fine or fee by writ of review may be futile. That was the situation facing New Cingular. Clyde Hill's municipal code provided no opportunity for discovery and, contrary to WSAMA's mischaracterization of the record, the only "hearing" available to New Cingular was—in the city's own words—an "informal" one presided over by the mayor as the city's sole representative, at which the city presented no evidence and New Cingular had no right to call witnesses of its own. CP 230-233; CP 594.

Ironically, then, WSAMA's argument that a more truncated judicial review will encourage a more robust administrative appeals process is backwards—and risks leaving aggrieved parties, like New Cingular, with little recourse at either the administrative or judicial levels. A rule that limits judicial challenge of local quasi-judicial decisions to appellate review makes sense only if, as a corresponding measure, the municipality

affords parties adequate procedural rights and an opportunity to make a record at the administrative level. There cannot be one without the other.

The legislature understood this tradeoff when it imposed procedural limits on judicial review of administrative actions. For example, the APA allows the hearing officer to be disqualified for bias, prejudice or interest, RCW 34.05.435, gives the agency discretion to allow subpoenas, discovery and depositions, RCW 34.05.446, and requires the agency to afford parties "the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence" with all testimony "made under oath or affirmation," RCW 34.05.449 & .452. Similarly, under LUPA, while there are no procedural restraints imposed on the local administrative process, on review, the superior court may allow discovery and additional evidence if the parties did not have "an opportunity consistent with due process to make a record on the factual issues." RCW 36.70C.120.

The writ of review statute does not reflect any such tradeoff or concern for due process—because, unlike the APA, LUPA or the rest, the legislature never intended for it to provide an exclusive means of judicial review for local quasi-judicial decisions. It is but one option—and not an exclusive one—for invoking the superior court's jurisdiction. Of course, the legislature can enact the exclusive legislation WSAMA seeks, but it is unlikely to do so without insisting on the kinds of procedural safeguards

found in other comprehensive statutory schemes. Either way, it is the kind of policy choice that only the legislature is empowered to make—and it is that body, not this Court, to which WSAMA should direct its arguments. There are no grounds for review; the petition for review should be denied.

RESPECTFULLY SUBMITTED this 24th day of September, 2015.

LANE POWELL PC

By _____
Ryan P. McBride, WSBA No. 33280
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on September 24, 2015, I caused to be served a copy of the foregoing document to the following person(s) in the manner indicated below at the following address(es):

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Executed on the 24th day of September, 2015, at Seattle, Washington.

Kathryn Savaria

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Filing Attorney: Ryan P. McBride, WSBA No. 33280
Filing Party: Appellant New Cingular Wireless PCS, LLC
Document Name: Answer to Memorandum of Amicus Washington State Association of Municipal Attorneys in Support of Petition for Review

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