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Supreme Court Case No. 90405-7

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Court of Appeals, Division II, Case No. 43825-9-II

SUPREME COURT OF THE STATE OF WASHINGTON

GERALD G. RICHERT, et al.,

Plaintiffs/Respondents,

v.

CITY OF TACOMA,
Petitioner.

Received
Washington State Supreme Court

AUG 26 2014
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Ronald R. Carpenter
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AMICI CURIAE BRIEF OF THE ASSOCIATION OF WASHINGTON
CITIES AND THE WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS IN SUPPORT OF THE
CITY OF TACOMA'S PETITION FOR REVIEW

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I. IDENTITY OF AMICI CURIAE

Amici, Association of Washington Cities (hereinafter AWC) and Washington State Association of Municipal Attorneys (hereinafter WSAMA), are organizations representing officials of cities and towns across the State of Washington.

AWC is a non-partisan entity that represents Washington's cities and towns. Its mission is to service its members through advocacy, education and services. WSAMA is a not-for-profit corporation lawfully organized under the laws of the State of Washington, representing the attorneys for Washington's cities and towns.

II STATEMENT OF THE CASE

Amici adopt Statement of the Case submitted by the Petitioner, City of Tacoma (hereinafter "Tacoma").

III. ARGUMENT

This case involves a variety of important issues, and, because of the position taken by the Court of Appeals in upholding the trial court's decisions, it essentially involves issues of first impression that could affect every municipality in the state. This case also presents issues of substantial public interest that should be decided by the Supreme Court pursuant to RAP 13.4(b).

The Petitioner, as well as amicus city of Seattle and amicus Northwest Hydroelectric Association and Public Utility District No. 1 of

Snohomish County, have done a great job of presenting the issues relating to the underlying court case and its history/background, and the issues involving riparian rights, hydroelectric authority and summary judgment issues.

Amici would like to supplement these issues with concerns about how the underlying decisions could affect all municipalities across the state. It may be that not all municipalities provide hydroelectric power to their citizens, but practically every city and town in the state provides utilities, including most common among them, water utilities services, to their residents, businesses and commercial customers. The issues involved in the underlying cases could be applied to water utilities as well as they have been applied to hydroelectric utility rights. For that matter, as noted by the petitioner, the Court of Appeals has departed from the holdings of *Large v. Shively*, 186 Wash. 490, 58 P.2d 808 (1936) and the many cases following *Shively*. If Division Two's holding is going to be the law, conceivably any judgments would be vulnerable to attack and cases could be re-litigated by subsequent successors in interest. A departure of such a significant nature from past precedent and one that conceivably could affect anybody, deserves review by this Court.

However, more specific to the interests that could affect municipalities across the state, cities have the authority to operate waterworks, not only for generation of hydroelectric power, but also for

domestic water services. RCW 35.92.010 provides, in part, as follows:

A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate waterworks, including fire hydrants as an integral utility service incorporated within general rates, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: PROVIDED, That the rates charged must be uniform for the same class of customers or service. Such waterworks may include facilities for the generation of electricity as a by-product and such electricity may be used by the city or town or sold to an entity authorized by law to distribute electricity. Such electricity is a by-product when the electrical generation is subordinate to the primary purpose of water supply.

While not all cities and towns operate hydroelectric utilities, most do provide domestic water services. Cities and towns are required to plan for their utilities, including water utilities. RCW 36.70A.020 identifies the goals that municipalities are to include in the development and adoption of their comprehensive plans under growth management. This includes planning and developing regulations to address urban growth – encouraging development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner (RCW 36.70A.020 (1)). It also includes planning and developing regulations to address the environment – protecting the environment and enhancing the high quality of life in this state including air, water quality and the availability of water (RCW 36.70A.020 (10)).

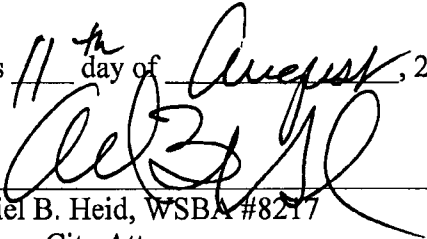
RCW 43.20.260 also requires that municipal water suppliers develop and approve water system plans that ensure water services can be provided for new industrial, commercial and residential uses, consistent with comprehensive plans and development regulations. Part and parcel with that obligation is the concept that municipal water suppliers have a duty to provide water services within their retail service area if service can be provided in a reasonable and timely manner and the supplier has an adequate, safe and reliable water capacity. *See also* WAC 246-290-106 – (Duty to provide service).

Along with that, it is worth noting that municipalities operating a domestic water utility, obviously, either obtain their water from ground sources or surface water sources. Surface water sources involve riparian rights, just as hydroelectric utilities do. The issues of the case at bar could, just as easily involve riparian rights connected to a water utility that are being challenged by property owners as they could those of a hydroelectric utility. Again, the issues involved in this case could affect essentially any municipality across the state and could jeopardize the variability of municipalities to provide the necessary water services needed for their citizens, businesses and commercial customers. These are important issues, and review is warranted pursuant to RAP 13.4(b)(1), (2), and (4).

IV. CONCLUSION

For all of these reasons, and those identified by Tacoma and by Amicus City of Seattle and Amicus Northwest Hydroelectric Association and Public Utility District No. 1 of Snohomish County, Washington, Amici, AWC and WSAMA respectfully request that Tacoma's Petition for Review be granted.

Respectfully submitted this 11th day of August, 2014.



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Subject: Amici Request - Gerald G. Richert v. City of Tacoma (Supreme Court No. 90405-7)

Dear Mr. Carpenter:

Attached hereto please find an electronic copy of the Motion for Leave to file Brief of Amici Curiae and proposed Brief of Amici, the Association of Washington Cities and the Washington State Association of Municipal Attorneys in the above-referenced case. I am also including an electronic copy of a cover letter. Also, in addition to mailing my pleadings to counsel of record, per the certificate of mailing (appended to the Motion), for their convenience, I am also cc'ing them with this e-mail.

Please let me know if you have any questions. Thank you.

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