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BY RONALD R. CARPENTER

No. 84824-6

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SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF TACOMA, a municipal corporation,

Appellant,

v.

CITY OF BONNEY LAKE, CITY OF FIRCREST, CITY OF
UNIVERSITY PLACE, CITY OF FEDERAL WAY, PIERCE COUNTY
and KING COUNTY,

Respondents.

Statement of Grounds for Direct Review

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ORIGINAL

I. NATURE OF THE CASE AND DECISION

This case arises out of Defendant local governments' attempts to avoid payment of an unexpected governmental responsibility through reliance on existing franchise agreements, resulting in an illegal tax to the City of Tacoma water utility ratepayers in violation of this Court's October 2008 decision in Lane v. City of Seattle, 164 Wn.2d 875, 194 P.3d 977 (2008).

In October 2008, the Supreme Court ruled in a unanimous decision that the costs of "providing fire hydrants is a governmental responsibility for which governments must pay." Lane, 164 Wn.2d at 880. Lane is a case about whether taxes or fees should be used to pay for local fire hydrants. In Lane, the City of Seattle was forced to sue its local government customers for shunning their legal responsibilities related to paying for local fire hydrant services provided by Seattle's water utility. Id. at 881. This Court held that "providing hydrants is a government responsibility for which the general government of the area must pay . . . Lake Forest Park must pay for the hydrants within its boundary." Id. at 890. Simply put, Lake Forest Park was receiving a service (fire hydrants and the infrastructure to make them operational) from Seattle's water utility ("SPU") for which it was not paying. SPU could not continue to provide the service without compensation, or else it would be in

violation of the state Accountancy Act (RCW 43.09.210). Consequently, Lake Forest Park was required by this Court to pay SPU for its costs. Id. at 889. In holding Lake Forest Park liable for SPU's fire hydrant service costs, this Court noted that to rule otherwise would result in "resident taxpayers of the providing city . . . paying for services of others." Id.

Fire hydrants must be paid for with tax dollars from the appropriate jurisdiction, not ratepayer funds. Following this Court's ruling, City of Tacoma removed the hydrant costs from its utility rates and billed the local governments for the cost of providing these services in their local communities. *See* Dec. of McCrea in Support of Tacoma's Motion for Partial Summary Judgment p. 5, ll.1-11 (CP 476). Some local governments (Tacoma, Puyallup, Ruston, and Lakewood) agreed to pay, while others refused. *See* Dec. of McCrea in Support of Tacoma's Motion for Partial Summary Judgment p. 5, ll. 11-13 (CP 476).

The Defendant local governments¹ argue that franchise agreements entered into with the City of Tacoma years before Lane was decided allow Defendants to avoid the impact of the Lane decision, even though that decision reversed years of ratemaking practice. The combination of Tacoma's compliance with Lane, in removing these costs from its rates,

¹ The City of Bonney Lake and King County have now paid their hydrant costs and have been dismissed from the suit.

and the reliance by the Defendants on these franchise agreements, as justification to not pay for the hydrant costs within their jurisdictions, results in Tacoma water utility ratepayers paying higher rates to cover the costs of the fire hydrants located within the Defendants' jurisdictions. In essence, Defendants' argument is that, through contract, their governmental responsibility can be passed to Tacoma water utility ratepayers, effectively imposing a tax on ratepayers that is contrary to law.

Tacoma filed a declaratory judgment action per Chapter 7.24 RCW to determine if the franchise agreements controlled and whether the methodology it used to calculate the cost should have included the costs of maintaining the infrastructure (oversized pipes, pumps, and water storage) necessary to generate sufficient water pressure to render the hydrants operational but not needed for other domestic water uses. The City of Tacoma argued that the Lane interpretation/expansion of governmental responsibility was not contemplated when the franchise agreements were entered into, and that therefore, the scope of the franchise agreements does not extend to the impact of a change in the law regarding payment of hydrant costs. Moreover, the Defendants' argument distorts the well-established meaning of indemnification clauses. Defendants argued that the franchise agreements encompassed this ruling despite the fact that it

altered years of practice between the parties relative to hydrant services and costs.

King County Superior Court Judge Douglass North understood that some local governments had paid, anticipated an appeal of the matter, and subsequently entered a brief written order agreeing with the Defendants. Judge North found the indemnification clauses of the franchise agreements precluded the City of Tacoma water utility from recovering its hydrant costs from the Defendants. Judge North also held that Tacoma was responsible for paying Federal Way's defense costs pursuant to the indemnification provisions. Judge North failed to rule on the question about what costs should be included in the hydrant services charged, and instead, dismissed the City of Tacoma's entire action with prejudice.

Pursuant to RAP 4.2, Appellant City of Tacoma seeks direct review of Judge North's decision. Direct review is appropriate in this case because the trial court decision directly conflicts with this Court's decision in Lane, and the case involves issues of broad public import that require prompt and ultimate determination.

II. ISSUES PRESENTED FOR REVIEW.

1. Did the trial court err in concluding, as a matter of law, that the indemnification language in the franchise agreements applied to payment of the utility's expenses for providing fire hydrant service to the jurisdictions granting the franchises?

2. If the indemnification provision of the franchise agreements were construed as requiring the utility to bear the expense of providing fire hydrant service to those jurisdictions, would that impermissibly impose a hidden tax on utility ratepayers by requiring them to bear general governmental expenses, thereby rendering that aspect of the indemnification provision contrary to public policy and unenforceable?

3. Whether the declaratory judgment act, as interpreted by this Court in Greyhound Corp. v. Division 1384, 44 Wn.2d 808, 271 P.2d 689 (1954), allows the trial court to dismiss defendants from an action prior to entering findings delineating the rights of the parties with respect to all questions posed?

III. GROUNDS FOR DIRECT REVIEW

Tacoma seeks direct review from the Supreme Court because the case involves a fundamental and urgent issue of broad public import that requires prompt and ultimate determination. RAP 4.2(a)(4).

A. This Is A Case Of Broad Public Import.

The City of Tacoma's water utility is the largest regional water supplier in Washington. It serves over 160,000 customers in both Pierce and King Counties. Like most Washington municipal water utilities, Tacoma has been required to obtain franchises from the local governments in order to provide domestic water service to its customers. All of the local government franchise agreements were entered into prior to this Court's ruling in Lane. Some of the local governments with franchise agreements have paid their hydrant service costs, while others have withheld payment. The tension created between Judge North's ruling and

this Court's decision in Lane has placed utilities in the untenable position of being unable to recover their costs of fire protection service from either (1) the ratepayers, or (2) the local jurisdictions that assert franchise indemnification or other contract claims.

As one commentator has pointed out, "[d]irect review [under RAP 4.2(a)(4)] has often been granted when the state or a municipality is a defendant." 2A K. Tegland, Wash. Prac., *Rules Practice*, RAP 4.2, comment 3 at 431 (6th ed. 2004). Since this case involves multiple governmental entities as defendants and affects the interests of hundreds of thousands of City of Tacoma water utility ratepayers and public taxpayers throughout the region, it is a case of broad public import.

B. This Is A Case Involving Ongoing, Significant Financial Obligations That Requires Prompt And Ultimate Determination By The State Supreme Court.

The annual cost of maintaining the fire hydrants in the Defendant local jurisdictions served by Tacoma is in excess of \$1.25 million. *See* Dec. of McCrea in Support of Tacoma's Motion for Partial Summary Judgment p. 5, ll. 12-15 (CP 476). Because the Defendants have not paid for these services since January 2009, the \$2+ million (and rising) of unbudgeted expenses have been passed on to Tacoma's water ratepayers. Local governments' use of their franchise agreements to force its responsibility to pay for local fire hydrant costs with tax dollars on to

ratepayers has doubtlessly been repeated throughout the state. Statewide, these unpaid funds are likely in the tens of millions of dollars and will continue to compound until a final ruling from this Court is obtained. Without these funds, water system operations, budgeting, and planning in the region have been put into jeopardy. These issues are urgent and require prompt and ultimate determination by the state's highest court because it is in the interest of all parties, ratepayers and taxpayers alike, to have these fundamental, important issues, affecting municipal budgets and financial planning, resolved as soon as possible.

C. This Case Is Similar To Numerous Cases Involving Municipal Taxation And Use Of Utility Revenues Wherein Direct Review Has Been Granted.

Direct review has been granted in numerous cases raising similar issues concerning municipal and utility finances. *See, e.g., Ford Motor Co. v. City of Seattle, Executive Services Dep't*, 160 Wn.2d 32, 156 P.3d 185 (2007) (on direct review, upholding cities' B&O tax imposed on auto manufacturer's wholesale sales to local dealers); Sheehan v. Central Puget Sound Regional Transit Authority, 155 Wn.2d 790, 123 P.3d 88 (2005) (on direct review, upholding motor vehicle excise tax levied and collected by regional transit and city monorail authorities); Okeson v. City of Seattle, 150 Wn.2d 540, 78 P.3d 1279 (2003) (on direct review, invalidating ordinance shifting street lighting expenses from city's general

fund to utility and its ratepayers); Covell v. City of Seattle, 127 Wn.2d 874, 905 P.2d 324 (1995) (on direct review, striking down ordinance imposing residential street utility charge); Margola Associates v. City of Seattle, 121 Wn.2d 625, 854 P.2d 23 (1993) (on direct review, reversing trial court ruling upholding validity of ordinance requiring registration and payment of fees for multiple dwelling units); R/L Associates v. City of Seattle, 113 Wn.2d 402, 780 P.2d 838 (1989) (on direct review, enjoining enforcement of parts of Housing Preservation Ordinance); San Telmo Associates v. City of Seattle, 108 Wn.2d 20, 735 P.2d 673 (1987) (on direct review, invalidating ordinance imposing fees on property owners to support low income housing costs) (superseded by statute); City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d 679, 743 P.2d 793 (1987) (on direct review, upholding validity of Tacoma City Light energy conservation program); and Lane v. City of Seattle, 164 Wn.2d 875, 194 P.3d 977 (2008). The issues raised in this case are no less important than the issues involved in those other cases in which the Supreme Court has granted direct review where questions of municipal finance were involved, and the need for prompt and ultimate resolution is no less pressing here.

V. CONCLUSION

For the foregoing reasons, the City of Tacoma requests that this Court accept direct review of this appeal.

DATED this 2nd day of September, 2010.

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Certificate of Service

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Pursuant to RCW 9A.72.085, I certify that on the 2nd day of September, 2010, I filed this Statement of Grounds for Direct Review electronically with the Supreme Court of the State of Washington and served it upon the parties herein as indicated below:

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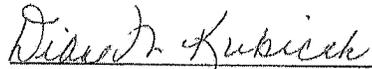
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated this 2nd day of September, 2010, in Tacoma,
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