

FEB 11 2016

Ronald R. Carpenter
Clerk

No. 91978-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS, LLC,

Respondent

v.

CITY OF CLYDE HILL

Petitioner

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I
(Court of Appeals No. 71626-3-1)

**RESPONDENT'S ANSWER TO MEMORANDUM OF AMICUS
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS IN SUPPORT OF CLYDE HILL**

Scott M. Edwards
WSBA No. 26455
Ryan P. McBride
WSBA No. 33280
*Attorneys for Appellant New
Cingular Wireless PCS, LLC*

LANE POWELL PC
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, Washington 98111-0402
Telephone: (206) 223-7000
Facsimile: (206) 223-7107



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ANSWER TO AMICUS MEMORANDUM

The amicus memorandum of the Washington State Association of Municipal Attorneys (“WSAMA”) repeats several arguments addressed in Clyde Hill’s Supplemental Brief. In an effort to avoid duplication, and without conceding the merit of any of those arguments, New Cingular respectfully refers the Court to its own Supplemental Brief. New Cingular therefore confines its Answer to the following additional points.

1. WSAMA concedes that Article IV, Section 6 of the Washington Constitution gives the superior court original trial jurisdiction over challenges to the legality of a “municipal fine.” It follows, as WSAMA recognizes, that the “only basis for which New Cingular Wireless could file a declaratory judgment action would be if it sought to challenge the legality of Clyde Hill’s municipal fine.” WSAMA Mem. at 13. Exactly. That is precisely what New Cingular did here.

2. WSAMA strangely claims, however, that New Cingular did not actually request the superior court to declare the fine unlawful. “Rather, New Cingular Wireless requested the superior court to *invalidate the notice of violation.*” *Id.* But the notice of violation was a “municipal fine.” It expressly identifies a “monetary penalty” that is “immediately due and owing.” CP 555-58. And, in seeking a declaratory judgment to invalidate the notice, New Cingular asked the superior court to declare the

fine unlawful. CP 4 (“fine is arbitrary, capricious, without basis in law, and violates Due Process”). That is the whole point of the suit.

3. WSAMA next suggests that New Cingular somehow waived its right to declaratory relief because it initially challenged Clyde Hill’s municipal fine through the administrative process. “It may be that New Cingular Wireless could have filed a declaratory judgment lawsuit challenging the legality of Clyde Hill’s municipal fine before electing to request and participate in the hearing before the Clyde Hill mayor. But it cannot file a complaint for a declaratory judgment after it has already participated in the city’s process” WSAMA Mem. at 12-13. WSAMA cites no authority to support this assertion—because it is simply wrong.

4. New Cingular had no choice but to pursue Clyde Hill’s administrative process *before* filing suit in court. This Court’s holding in *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013), is clear on this point. “A superior court’s original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply to the particular claim before the court.” *Id.* at 648. Only after it exhausted Clyde Hill’s administrative process could New Cingular seek relief in court. And only then did it have a choice between the superior court’s original trial or appellate jurisdiction.

5. New Cingular chose to invoke the superior court's original trial jurisdiction, not its appellate jurisdiction. Indeed, that is why, as WSAMA points out, New Cingular's complaint challenges the validity of Clyde Hill's municipal fine rather than the Mayor's post-hearing decision. WSAMA Mem. at 5 ("Plainly New Cingular Wireless is not trying to appeal that decision"). New Cingular's right to make that choice is well-settled. *See Cost Mgmt.*, 178 Wn.2d at 651 ("CMS chose to [file] suit in superior court. CMS could also have chosen (although it was not required to do so) to seek mandamus from the superior court"); *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 115-16, 70 P.3d 144 (2003) ("there are only two ways that Tacoma could invoke the superior court's original jurisdiction: first, by filing a complaint ... or second, by filing a writ.")¹

¹ WSAMA tries to distinguish *Cost Management* by pointing out that the case involved a challenge to a municipal tax, not a municipal fine. But the same constitutional provision gives the superior court original jurisdiction over both kinds of challenges. WASH. CONST. Art. IV, § 6 ("original jurisdiction in all cases which involve ... the legality of any tax ... or municipal fine"). Nor did the Court's discussion of jurisdiction turn on the fact that the city refused to complete its administrative process. The availability of administrative remedies, whether exhausted or excused, "has no bearing" on superior court jurisdiction. *Cost Mgmt.*, 178 Wn.2d at 648. Had the city completed its process, the taxpayer's choice would have been between an original action and a writ of review, rather than between an original action and a writ of mandamus. Indeed, if the superior court lacks original jurisdiction over administrative decisions, as WSAMA and Clyde Hill assert, then the taxpayer's only option in *Cost Management* would have been a writ of mandamus. This Court held otherwise.

6. At least WSAMA is right about *why* New Cingular chose to file a declaratory judgment action rather than seek a writ: so that the evidence is not confined to the “administrative record,” and the mayor’s self-interested decision is not entitled to deference. WSAMA Mem. at 6 (“it intends to present witnesses, documents and other evidence to the Court”). WSAMA suggests that New Cingular simply wants a second-bite at the apple because it shirked the city’s administrative process. WSAMA has it backwards. New Cingular needs a *de novo* proceeding so that it can have a first-bite at the apple. New Cingular availed itself of Clyde Hill’s administrative process, but it had no opportunity to discover or use the evidence it might need to show the illegality of the fine. It made what legal arguments it could, based on the information it had.

7. Clyde Hill issued its Notice of Violation alleging false and fraudulent conduct based solely on the fact that New Cingular overstated the amount of utility tax it owed and later sought a refund of its over-payments (for the benefit of its customers). CP 555-58. New Cingular did the only thing the Clyde Hill Municipal Code (CHMC) allowed and the City Administrator offered: the opportunity to submit a written protest and an informal hearing with the mayor. CHMC § 1.08.030; CP 594. There was never an opportunity for discovery or any other “process.”

8. WSAMA criticizes New Cingular for choosing to appear at the informal hearing by telephone, and not presenting any witnesses or documents. WSAMA Mem. at 6, 10. But what witnesses could New Cingular call? What evidence could it present? In its written protest, New Cingular argued that the “City cannot meet the false or fraudulent standard” because “[t]here has been, and can be, no showing that New Cingular acted with bad intent when it filed [the] returns.” CP 583. Only Clyde Hill, not New Cingular, would have information to show whether the fine was properly supported with evidence of fraudulent intent (it was not), and/or whether the fine was applied in an arbitrary or discriminatory manner in retaliation for New Cingular’s refund claim (it was). The city, of course, presented no evidence or witnesses at the informal hearing.

9. WSAMA goes so far as to claim that had New Cingular simply asked for the right to conduct discovery, cross-examine the city’s employees or, apparently, any additional procedures, “the City would have provided them.” WSAMA Mem. at 12; *id.* at 10 (“It did not give the City the opportunity to provide additional process, *which the City would have provided.*”). Ridiculous. This *post hoc* assertion of benevolence lacks any support in the record, and, worse yet, is a claim that Clyde Hill itself never made to the trial court or the Court of Appeals. Indeed, the suggestion that

New Cingular could have asked for discovery first appears in Clyde Hill's supplemental brief to this Court—also devoid of any citation to the record.

10. WSAMA similarly distorts the record and issues when it suggests that New Cingular waived a due process claim by not objecting to Clyde Hill's administrative process. New Cingular has never claimed the city's procedures violated due process. What New Cingular argued is that, where the legislature has enacted comprehensive statutory schemes that limit the superior court's jurisdiction over administrative matters to appellate review, like the APA and LUPA, those statutory schemes also confer corresponding procedural protections to ensure fairness. The writ of review statute reflects no similar legislative intent—because, unlike the APA and LUPA, it was never intended to provide an exclusive means of judicial review for challenges to local administrative decisions.

11. That is the controlling issue in this case. Did the legislature impose “procedural requirements” on challenges to the validity of a municipal fine so as to effectively confine the superior court's Article IV, Section 6 original jurisdiction to appellate review? *See James v. Kitsap Co.*, 154 Wn.2d 574, 115 P.3d 286 (2005). WSAMA argues repeatedly that judicial review of local administrative decisions “should be” confined to a statutory writ of review. WSAMA Mem. at 1, 3, 4, 7, 14, 15. But

WSAMA, like Clyde Hill, conspicuously fails to point to anything in the text or history of statute that reflects such intent.

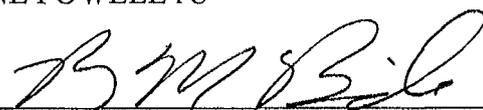
12. In the end, WSAMA's position is based on its perception that the Court of Appeals' decision is bad policy because it may subvert the local administrative process. WSAMA's fears are unfounded. A party must exhaust its administrative remedies and will always be highly motivated to prevail at that level to avoid the need for judicial proceedings—which are always more expensive, burdensome and time-consuming. But good or bad, the Court of Appeals' decision reflects the *only* policy the Washington courts can apply given Article IV, Section 6's clear grant of original trial jurisdiction in this case.

The decision of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of February, 2016.

LANE POWELL PC

By



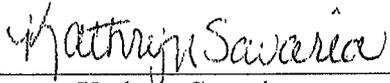
Ryan P. McBride, WSBA No. 33280
*Attorneys for Appellant New Cingular
Wireless PCS, LLC*

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on February 11, 2016, 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):

Greg A. Rubstello Ogden Murphy Wallace, P.L.L.C. 901 Fifth Avenue, Suite 3500 Seattle, WA 98101-3052 grubstello@omwlaw.com cmace@omwlaw.com	<input type="checkbox"/> by CM/ECF <input checked="" type="checkbox"/> by Electronic Mail <input checked="" type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
Stephanie E. Croll Stephanie E. Croll Law 23916 SE 46th Place Issaquah WA 98029 stephaniecrolllaw@outlook.com	<input type="checkbox"/> by CM/ECF <input checked="" type="checkbox"/> by Electronic Mail <input checked="" type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
Philip A. Talmadge Talmadge Fitzpatrick Tribe Third Floor, Suite C 2775 Harbor Avenue SW Seattle, WA 98126-2138 phil@tal-fitzlaw.com	<input type="checkbox"/> by CM/ECF <input checked="" type="checkbox"/> by Electronic Mail <input checked="" type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
Daniel B. Heid City Attorney City of Auburn 25 W Main Street Auburn, WA 98001-4998 E-Mail: dheid@ci.auburn.wa.us	<input type="checkbox"/> by CM/ECF <input checked="" type="checkbox"/> by Electronic Mail <input checked="" type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery

Executed on the 11th day of February, 2016, at Seattle, Washington.



 Kathryn Savaria

OFFICE RECEPTIONIST, CLERK

To: McBride, Ryan P.
Cc: grubstello@omwlaw.com; cmace@omwlaw.com; stephaniecrollaw@outlook.com; Talmadge, Philip A. Esq. (phil@tal-fitzlaw.com); Heid, Daniel B. Esq. (dheid@ci.auburn.wa.us); Docketing-SEA@LanePowell.com; Savaria, Kathryn
Subject: RE: No. 91978-0: New Cingular Wireless PCS, LLC v. City of Clyde Hill

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Cc: grubstello@omwlaw.com; cmace@omwlaw.com; stephaniecrollaw@outlook.com; Talmadge, Philip A. Esq. (phil@tal-fitzlaw.com) <phil@tal-fitzlaw.com>; Heid, Daniel B. Esq. (dheid@ci.auburn.wa.us) <dheid@ci.auburn.wa.us>; McBride, Ryan P. <McBrideR@LanePowell.com>; Docketing-SEA@LanePowell.com; Savaria, Kathryn <SavariaK@LanePowell.com>
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Attached for filing is the following pleading:

Case Name: New Cingular Wireless PCS, LLC v. City of Clyde Hill
Case Number: 91978-0
Attorney: Ryan P. McBride, WSBA No. 33280
Document: Respondent's Answer to Memorandum of Amicus Washington State Association of Municipal Attorneys In Support of Clyde Hill

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