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NO. 91978-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[No. 71626-3-I - Court of Appeals, Division I]

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NEW CINGULAR WIRELESS PCS, LLC

Appellant,

v.

CITY OF CLYDE HILL, WASHINGTON

Respondent.

FILED
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STATE OF WASHINGTON

MEMORANDUM OF AMICUS WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF CLYDE HILL'S PETITION FOR REVIEW

Attorney for Amicus, Washington State Association of Municipal Attorneys

Daniel B. Heid, WSBA # 8217
Auburn City Attorney
25 West Main Street
Auburn, WA 98001
Tel: (253) 931-3030
Fax: (253) 931-4007
dheid@auburnwa.gov

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Court Rules

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Washington State Association of Municipal Attorneys ("WSAMA"), is the organization of municipal attorneys representing the cities and towns across the state. It has an interest in this case because if Division One's decision is allowed to stand, it would subvert the appeal process for all of Washington's cities' and counties' quasi-judicial decisions. Contrary to the reasoning of the Court of Appeals, allowing parties to file a declaratory judgment action instead of a writ of review would gut local jurisdictions' administrative remedies. Also, contrary to the decision of the Court of Appeals, writs of review are not interchangeable with declaratory judgment actions.

II. COURT OF APPEALS DECISION

WSAMA asks this Court to grant the Petition of the City of Clyde Hill which is seeking Review of Division One's published decision in *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 187 Wn. App. 210, 349 P.3d 53 (2015).

III. STATEMENT OF THE CASE

WSAMA adopts the facts set forth by Petitioner, Clyde Hill.

IV. ARGUMENT WHY THIS COURT SHOULD TAKE REVIEW.

Cities and counties across the state engage in a variety of different actions that could trigger quasi-judicial decisions. Municipal code

provisions like those in Clyde Hill - which authorize the issuance of a notice of violation for a code violation by a code enforcement official or officer, then offer an administrative appeal to a hearing examiner, the mayor or other hearing officer, and an opportunity for judicial review in superior court - provide local jurisdictions with an efficient means of non-criminal code enforcement of municipal code provisions. This includes matters ranging from notices of violations relating to false statements made in connection with utility tax returns (as occurred in this case) to nuisance abatements, business licensing, pet licensing, and health & safety codes. These quasi-judicial decisions also include such various and diverse matters as appeals of assessed civil penalties; construction sales tax exemption refunds; applications for a multifamily tax exemptions; approvals or denials of an extension of a conditional certificate for multi-family tax exemptions; dangerous dog determinations; requests for expansion of hours for construction noise; street use permits; undergrounding of utilities; decisions regarding commute trip reduction programs; decisions regarding required public improvements and street use permits; utility billing appeals; tenant complaints against landlords regarding utility billing practices; relocation plans related to the closure of mobile home parks; decisions on landmark and heritage historical designations; administrative variances; civil service appeals; and building

code boards of appeals. By way of example, the city code for the City of Ephrata, Washington, provides, in its Chapter 1.22 of the EMC, procedures for the administrative enforcement of civil code violations established in EMC Ch. 1.04 Penalty. Other Washington cities also employ administrative enforcement procedures, including, for instance, Cheney, at CMC Chapter 1.27; Richland, at RMC Chapter 10.02; Tumwater, at TMC Ch. 1.10; Ellensburg, at EMC Chapter 1.80; and Auburn, at Chapter 1.25, which provide such procedures for civil enforcement of violations of its business licensing regulations, health and safety regulation, vehicle and traffic regulations, street, sidewalk and public works regulations, water, sewer and public utility regulations, and building and construction regulations.

In addition to the quasi-judicial decisions of cities such as those listed above, counties have unique quasi-judicial matters, such as court ordered parenting evaluations. (*See Reddy v. Karr*, 102 Wn. App. 742, 9 P.3d 927 (2000)) and county sheriff sex offender registration (RCW 9A.44.130). Any final decisions stemming from such matters need to be treated as quasi-judicial administrative decisions.

Appeals of all such decisions should be through an appellate process, *i.e.*, writs of review, not through a declaratory judgment lawsuit where the underlying decision is not given the efficacy of a judicial action.

The appeal process for quasi-judicial decisions should not be a new lawsuit, with potentially new arguments, new witnesses, new testimony and new issues. Rather, judicial review of quasi-judicial decisions should be based upon the record of that decision made at the administrative level by the local jurisdiction. The Court of Appeals decision here allows parties to circumvent the local government's administrative process, ultimately disregarding and disrespecting it and the rich body of law on exhaustion of administrative remedies that this Court has developed over the years. The cost of a *de novo* trial would likely be significantly more than an appellate review, and the Court of Appeals'decision will likely impact how cities and counties pursue enforcement of their quasi-judicial decisions in the future. Thus, all cities and counties in Washington will be significantly affected by the Court of Appeals' decision on a broad array of matters vital to the interests of the citizens of those local governments.

A. The Court of Appeals Decision Conflicts With Previous Decisions of This Court.

As Clyde Hill argues in its Petition, the Opinion conflicts with this Court's decision in *Reeder v. King County*, 57 Wn.2d 563, 358 P.2d 810 (1961), justifying review per RAP 13.4(b)(1). *Reeder* has never been overruled or made obsolete by the passage of any statute or court rule.

B. This Case Raises Issues of Substantial Public Interest.

This case involves issues of substantial public interest, conceivably affecting every county, city and town in this state, which issues should be determined by the Supreme Court. As such, review is warranted per RAP 13.4(b)(4).

The issues facing Clyde Hill could be faced by any county, city or town that may see a challenge to its quasi-judicial decisions.[1] The Court of Appeals mistakenly treated declaratory judgment actions and writs of review as the same, or as alternatives to each other. However, once a quasi-judicial decision has been made by a city or a county, any challenge to that decision should be an appeal, through an appellate process, not a separate, new, independent lawsuit. In this regard, the distinction between the two processes, the Uniform Declaratory Judgments Act per Chapter 7.24 RCW and Writs of Review or Certiorari in Chapter 7.16 RCW, is crucial. As noted by Clyde Hill, its city code states that the decision of the Mayor (the maker of the quasi-judicial decision) is final and binding.[2]

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[1] See the examples from Municipal Codes cited at page 2 of this memorandum.

[2] Clyde Hill Municipal Code (CHMC) 1.08.030. (Full text below.)

> 1.08.030 Responding to a notice of violation. Any person who receives a notice of violation shall respond within 15 days from the date the notice is served. The date of service is the date the notice of violation is either (A) served on the violator(s) personally, or by leaving a copy of the notice at the house of the violator's usual abode with some person of suitable age and discretion then resident therein, (B) deposited into the United States mail, postage prepaid, via first class and certified mail, return receipt requested, or (C) is otherwise received, whichever occurs first. When the last day of the period so computed is a Saturday, Sunday, or federal or city holiday, the period shall run

That may very well trigger an "appeal" to the Superior Court, but the appellant's path should not be through Chapter 7.24 RCW (the Uniform Declaratory Judgments Act). That chapter does not even mention the word "appeal." Nor does the chapter mention or refer to any quasi-judicial decisions. Whereas, the Writ of Review (Certiorari) statute, RCW 7.16.040,[3] clearly indicates its intention to provide "appellate review" - where an inferior tribunal, board or officer, exercising judicial functions, has (allegedly) exceeded its authority.

Under the facts here, New Cingular submitted to the quasi-judicial process of Clyde Hill, and, then, when it received a quasi-judicial decision with which it did not agree, New Cingular chose to file a new, separate

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until 5:00 p.m. on the next business day. Persons wishing to contest the notice of violation and people who do not wish to contest the notice of violation but wish to explain mitigating circumstances shall file a written request for a hearing within 15 days of the date the notice of violation is served and, upon the city's receipt of a timely request, a hearing shall be scheduled before the mayor. Failure to timely contest the notice of violation within 15 days of service results in the notice becoming the final and binding order of the city. At or after the appeal hearing, the mayor may (A) sustain the notice of violation; (B) withdraw the notice of violation; (C) continue the review to a date certain for receipt of additional information; or (D) modify the notice of violation, which may include an extension of the compliance date. The mayor shall issue a written decision within 10 days of the completion of the review and shall cause the same to be mailed by regular first class mail to the person(s) names on the notice of violation and, if possible, the complainant. The determination by the mayor shall be final, binding, and conclusive unless a judicial appeal is appropriately filed with the King County superior court. (Ord. 913 § 3, 2011)

[3] RCW 7.16.040 Grounds for granting writ.

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

and independent lawsuit. New Cingular's actions, which the Court of Appeals has ratified, have rendered the entire administrative appeals process meaningless. New Cingular chose not to present any witnesses, documents, or evidence of any kind at the administrative level. New Cingular did not even show up for the hearing. Instead, it had one of its many attorneys simply participate by phone. Then, after a less than satisfactory result in that hearing, it filed a declaratory judgment action in which it intends to present witnesses, documents and other evidence to the Court that it did not present to the City. New Cingular is now being rewarded for failing to participate in the administrative process by being allowed a new lawsuit; they are being given the proverbial second bite at the apple. But this apple has devastating effects on the administrative hearings conducted by all cities, towns and counties. The administrative hearing record is the record that should be addressed in any judicial review. That is not the case with New Cingular's declaratory judgment action, which opens the door to a new process involving a trial, with new witnesses and arguments. In New Cingular's complaint for declaratory judgment, neither the telephonic hearing (conducted at the request of New Cingular[4]) nor even the quasi-judicial decision coming out of that hearing is mentioned. [CP 596-598] It is clear New Cingular is not trying to appeal

[4] It is undisputed that the City offered New Cingular a full in-person hearing process and procedure.

that decision, or even give credence to the City's hearing and final decision in their new lawsuit.

In *Foss v Department of Corrections*, 82 Wn. App. 355, 362, 918 P.2d 521 (1996), the court drew a clear connection between a quasi-judicial decision and the availability of a writ of certiorari. In that case, the court concluded that since the decision was not judicial, no writ of certiorari would lie. Any party may obtain review by a statutory writ of certiorari if the agency is "exercising judicial functions." *Id. See also* RCW 7.16.040. The writ of certiorari is available only for review of actions "judicial" in nature. *Washington Federation of State Employees v. State Personnel Bd.*, 23 Wn. App. 142, 145-46, 594 P.2d 1375 (1979).

Our courts have developed a 4-part test for determining whether an administrative action is quasi-judicial. That test is:

> (1) whether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.

Id. See also Williams v. Seattle Sch. Dist. No. 1, 97 Wn. 2d 215, 218-19, 643 P.2d 426, 429 (1982).

Any appeal of a quasi-judicial decision should be based upon the record of that quasi-judicial decision. Thus, an appeal of Clyde Hill's

quasi-judicial decision deserves to be on the record, something that would not happen through New Cingular's declaratory judgment action. The appeal/review process found in Chapter 7.16 RCW is a legitimate mechanism for that purpose. The express purpose of a writ of review/certiorari is to afford judicial review whenever an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded jurisdictional authority. *See* RCW 7.16.040. That fits exactly with the facts of this case; and with this Court's prior decision in *Reeder v. King County,* 57 Wn.2d 563, 358 P.2d 810 (1961).

If the Court of Appeals' decision stands, any individual who wishes to challenge a quasi-judicial decision could do so without regard to any appeal at all, merely by filing a declaratory judgment action. That is contrary to Washington's common law and its statutory enactments, and is also inconsistent with the authority granted municipalities to make those quasi-judicial decisions. It deprives local government of the deference the quasi-judicial decisions should receive. A declaratory judgment action, a new and separate lawsuit, is not an appeal, and would not be bound by the record of the quasi-judicial decision being reviewed or challenged.[5]

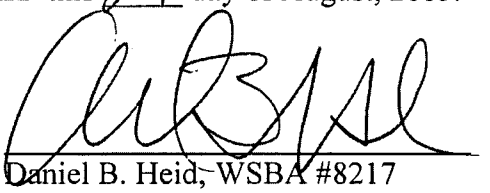
[5] It may be that if a challenge to an ordinance, contract or other document were raised unrelated to a quasi-judicial decision or an appeal from a quasi-judicial decision, use of a declaratory judgment action would be appropriate. But that is not the case here. Where the challenge is an appeal of a quasi-judicial decision, the process should be an appeal, not a new, independent lawsuit. Unfortunately, that is exactly what the decision of the Court of Appeals authorized.

Lastly, Amicus notes that the Court of Appeals decision attempts to carve out judicial review exceptions for the Land Use Petition Act (LUPA - RCW Chapter 36.70C) and the Administrative Procedures Act (APA - RCW Chapter 34.05), and Amicus respectfully asks if that can be squared with Court of Appeals' constitutional analysis of Article IV, Section 4 here. If a party can ignore the administrative process by participating minimally in it, then file a whole new declaratory judgment action in court, would it not also be true that a party can choose not to use the LUPA or APA appeal processes and similarly file a new lawsuit under Chapter 7.24 RCW? Again, appellate review of a quasi-judicial decision, whatever kind of decision it is, should be a review on the record, not a new lawsuit.

V CONCLUSION

For all the reasons set forth above, and those provided by Clyde Hill, WSAMA respectfully requests that this Court grant the Petition for Review and ultimately reverse the Court of Appeals' decision, clarifying and distinguishing writs of review from declaratory judgment actions, and reaffirming that writs of review are the tool to use when appealing a quasi-judicial decision.

RESPECTFULLY SUBMITTED this 27 day of August, 2015.



Daniel B. Heid, WSBA #8217
Attorney for Amicus, Washington State Association of Municipal Attorneys

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS, LLC, Appellant, v. CITY OF CLYDE HILL, WASHINGTON, Respondent.	Cause No. 91978-0 CERTIFICATE OF SERVICE (Court of Appeals No. 71626-3-I)

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the _____ day of August, 2015, I caused service of the Amicus Motion and memorandum of the Washington State Association of Municipal Attorneys on the attorneys of record herein via U.S. Mail, to the following addresses:

Greg Alan Rubstello
Ogden Murphy Wallace, PLLC
901 5th Avenue, Suite 3500
Seattle, WA 98164-2059

Stephanie Ellen Croll
Stephanie Croll Law
23916 SE 46th Place
Issaquah, WA 98029-7581

Philip Albert Talmadge
Talmadge/Fitzpatrick
2775 Harbor Avenue SW Seattle,
WA 98126-2138

Ryan P. McBride
Scott M. Edwards
Lane Powell PC
P.O. Box 91302
1420 5th Avenue, Suite 4200
Seattle, WA 98111-9402

Dated this 27 day of AUGUST 2015, at Auburn, Washington.

Gloria Cody

OFFICE RECEPTIONIST, CLERK

To: Dan Heid
Cc: Greg A. Rubstello; 'Phil Talmadge'; stephaniecrolllaw@outlook.com; 'mcbrider@lanepowell.com'; 'edwardss@lanepowell.com'
Subject: RE: Amicus Request - WSAMA - - New Cingular Wireless v. Clyde Hill (Supreme Court No. 91978-0

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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Greg A. Rubstello <grubstello@omwlaw.com>; 'Phil Talmadge' <phil@tal-fitzlaw.com>; stephaniecrolllaw@outlook.com; 'mcbrider@lanepowell.com' <mcbrider@lanepowell.com>; 'edwardss@lanepowell.com' <edwardss@lanepowell.com>
Subject: Amicus Request - WSAMA - - New Cingular Wireless v. Clyde Hill (Supreme Court No. 91978-0

Dear Mr. Carpenter:

Attached hereto please find an electronic copy of a Motion for Leave to file Brief of Amicus Curiae and a proposed Memorandum of Amicus Curiae of 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 our pleadings to counsel of record, per the certificate of mailing (appended to the Memorandum), for their convenience, I am also cc'ing them with this e-mail.

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

Daniel B. Heid
Auburn City Attorney
(253) 931-3030
dheid@auburnwa.gov

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