No. 91978-0

SUPREME COURT
OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS, LLC,

Respondent,

v.

CITY OF CLYDE HILL, WASHINGTON,

Petitioner.

CLYDE HILL'S RESPONSE TO AMICUS WSAMA'S MEMORANDUM

Greg Rubstello, WSBA #6271
Ogden Murphy Wallace PLLC
901 Fifth Avenue, Suite 3500
Seattle, WA 98164-2008
(206) 447-7000

Stephanie E. Croll, WSBA #18005
Stephanie Croll Law
23916 SE 46th Place
Issaquah, WA 98029-7581
(206) 949-6992

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioner City of Clyde Hill

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Codes, Rules and Regulations

A. INTRODUCTION

The memorandum of amicus curiae Washington State Association of Municipal Attorneys ("WSAMA") confirms the reasons set forth in the City of Clyde Hill's ("City") petition for review for this Court to grant review of the Court of Appeals' published decision. That decision upsets settled Washington law on municipal administrative processes, profoundly affecting how Washington's local governments handle a myriad of governmental matters. Review is appropriate here under RAP 13.4(b)(1), (2), (3), and (4).

B. STATEMENT OF THE CASE

As noted in the City's petition at 2-3, New Cingular Wireless PCS, LLC ("New Cingular") had an opportunity to present evidence at the administrative hearing before the Mayor but it *chose not to do so*, making the hearing a rather perfunctory affair that lasted for only 5 minutes. New Cingular's contention in its answer to the petition at 3 that it never had a chance for a formal hearing is belied by the ordinance governing such a hearing. CHMC § 1.08.030; WSAMA memo at 5 n.2, 7-8.[1]

C. ARGUMENT WHY REVIEW SHOULD BE GRANTED

[1] New Cingular repeats its refrain that the City's administrative process was "perfunctory" or lacking due process in its answer to WSAMA's memorandum at 1, 7. Its assertion is false, belied by the provisions of CHMC § 1.08.030. More to the point, *New Cingular chose* not to conduct discovery, or to submit meaningful pleadings in the City's administrative process. The City's procedures allowed for a full hearing, with witness testimony, but the company chose not to have such a hearing.

(1) The Court of Appeals Decision Profoundly Impacts All Municipal Administrative Processes Meriting Review under RAP 13.4(b)(4)

The City asserted in its petition at 19 that review was merited under RAP 13.4(b)(4) because of the impact of the Court of Appeals' decision on all Washington municipalities. WSAMA, an organization of all municipal attorneys in our state, *confirms* that concern.

WSAMA's memorandum confirms the profound adverse impact of the decision, if left to stand, on all cities and counties that have enacted local administrative procedures. *E.g.*, WSAMA memo. at 1-3, 5-9. The Court of Appeals' decision allows parties aggrieved by administrative decisions a ready basis by which they can avoid real participation in municipal administrative processes. Notwithstanding well-developed principles requiring serious participation in such processes,[2] like the doctrine of exhaustion of administrative remedies, a party can participate in the municipal administrative process in only the most rudimentary

[2] In *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2013), for example, this Court rejected developers' contention that they were not subject to LUPA and could invoke the courts' original jurisdiction under article IV, § 4 by filing a class action to challenge Growth Management Act impact fees. This Court stated that while LUPA could not oust the courts' original jurisdiction, nonetheless, "where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of the procedural requirements before they will exercise jurisdiction over the matter." *Id.* at 588. Here, the writ statute, RCW 7.16, prescribes the procedures for review of a quasi-judicial municipal decision. Substantial compliance means "actual compliance in respect to the substance essential to every real objective of the statute." *Id.* New Cingular's perfunctory involvement in the hearing before the City's Mayor and failure to seek review under RCW 7.16 hardly qualifies as "substantial compliance."

fashion and then, rather than going to the court on review of the administrative decision, it can wait 3 years, and file an entirely new declaratory judgment action in a superior court with discovery and an entirely new record, just as New Cingular did here. Uncertainty about the finality of the municipal administrative decision and delay will be the obvious result of the Court of Appeals' decision. If left unmodified, the decision here simply undercuts any local administrative process. Review under RAP 13.4(b)(4) is proper.

(2) The Court of Appeals Decision Misreads Article IV, § 6, Meriting Review under RAP 13.4(b)(3)

A second reason this Court should grant review is that the Court of Appeals misread the import of article IV, § 6 of the Washington Constitution, a significant constitutional law issue. RAP 13.4(b)(3).

The City noted in its petition at 5-11 that this case merits review under RAP 13.4(b)(3). In addressing this issue, New Cingular attempted to draw a distinction between original and appellate jurisdiction in Washington's superior courts. Answer at 4-9. But New Cingular does not offer a cogent analysis of why the Legislature's decision to confine superior court jurisdiction to appellate review only in some instances like worker compensation cases (IIA), land use matters (LUPA), or state administrative matters (APA) on the one hand is acceptable, but the

legislative determination that judicial review of local governments' quasi-judicial administrative decisions under RCW 7.16 on the other hand is not. Answer at 6 n.1.[3] Its assertion that "the APA and LUPA are comprehensive schemes imposing procedural requisites to superior court jurisdiction – making appellate jurisdiction the exclusive means of review" is no real distinction at all.[4] Judicial review under RCW 7.16 affords a litigant the same extensive procedural protections afforded a litigant in APA or LUPA[5] judicial review proceedings, as WSAMA notes. WSAMA memo. at 8-10. The procedures under RCW 7.16 gave New Cingular ample opportunity for judicial review and relief from any alleged improper City action.[6] New Cingular simply ignores the rich body of

---

[3] Cases like *City of Spokane v. J.R. Distributors, Inc.*, 90 Wn.2d 722, 585 P.2d 784 (1978) or *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 70 P.3d 144 (2003) do not help New Cingular. The City here did not prescribe the review mechanism as did Tacoma in the latter case. Here, the Legislature determined how judicial review would occur – RCW 7.16 – just as *J.R. Distributors* mandates.

[4] This Court in *Cost Management Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 646-47, 310 P.3d 804 (2013) specifically rejected the proposition that if the courts have jurisdiction over a specific type of claim, administrative jurisdiction over such a claim is ousted and exhaustion of administrative remedies is not required. *See id.* at 648 n.4. The courts have jurisdiction over the type of claim at issue here, but the claim can nevertheless be addressed in the City's administrative process, where New Cingular must exhaust the available remedies provided, and the decision can then be reviewed in due course by the courts under RCW 7.16.

[5] Ironically, prior to LUPA's enactment, judicial review of most land use decisions was accomplished under RCW 7.16. Pet at 10.

[6] Judicial review under RCW 7.16 is but one of three avenues recognized by Washington courts for review of administrative decisions – direct appeal authorized by statute, the statutory writ of RCW 7.16, and the constitutional or common law writ of article IV, § 6. *City of Des Moines v. Puget Sound Regional Council*, 97 Wn. App. 920,

RCW 7.16 case law in asserting that RCW 7.16 does not offer "real" review as is permitted under other statutes. Answer to WSAMA at 4-9.

The Court of Appeals' and New Cingular's analysis of article IV, § 6 is illogical. If the Legislature can "channel" certain decisions through an administrative process thereby limiting the constitutional original jurisdiction of the superior courts, as the Court of Appeals and New Cingular *concede*, there simply is no basis for saying that the Legislature's decision to allow judicial review of local quasi-judicial administrative decisions pursuant to RCW 7.16 is any less constitutionally sustainable than judicial review under the IIA, LUPA, or the APA. If the supposed distinction is that the Legislature must prescribe a *particular* process for a particular type of administrative process, that was not true of the APA where that statute governs judicial review of virtually every type of state quasi-judicial administrative decision. If, as New Cingular now explicitly contends, answer to WSAMA at 1, 4, the Legislature can limit superior court original jurisdiction by statute, that would be unconstitutional. If *the Constitution* prescribes original jurisdiction in the superior courts, the

---

925 n.6, 988 P.2d 993 (1999), *review denied*, 140 Wn.2d 1022 (2000). Review under the writ procedure is available if the lower tribunal acted illegally, beyond its jurisdiction, or erroneously, and there is no adequate remedy at law. RCW 7.16.040; *City of Seattle v. Holifield*, 170 Wn.2d 230, 240 P.3d 1162 (2010) (defining "acting illegally"). RCW 7.16.120 makes clear that the court can assess whether the administrative decision was factually supported. In sum, judicial review under RCW 7.16 is no less extensive than judicial review under the IIA, LUPA, or the APA.

Legislature lacks the authority to subtract from such original, constitutionally-prescribed jurisdiction by merely enacting a statute to the contrary.[7] New Cingular and the Court of Appeals improperly conflate the analysis of courts' jurisdiction and prudential doctrines like exhaustion, as will be noted *infra*.

This Court should grant review to address this significant question of the Legislature's constitutional authority under article IV, § 6. RAP 13.4(b)(3).

(3) The Court of Appeals Decision Upends Local Administrative Processes, Contrary to This Court's Decisions, and Merits Review under RAP 13.4(b)(1) and (2)

The City contended in its petition that the Court of Appeals decision was contrary to well-established Supreme Court and Court of Appeals authority both with regard to review under RCW 7.16 and regarding the applicable limitations periods for declaratory judgment action. New Cingular asserts that the Court of Appeals decision is not contrary to *Reeder v. King County*, 57 Wn.2d 563, 358 P.2d 810 (1961) or this Court's discussion of exhaustion of administrative remedies in *Cost*

[7] The Legislature cannot limit the courts' constitutional jurisdiction. *J.R. Distributors*, 90 Wn.2d at 727 ("That judicial power may not be abrogated or restricted by any legislative act."); *James*, 154 Wn.2d at 588 ("It is axiomatic that a judicial power vested in Courts by the Constitution may not be abrogated by statute.").

Management, supra. Similarly, it argues that a 3-year limitation period for its declaratory judgment action is in order. Answer at 10-15.

WSAMA is quite correct that *Reeder* cannot be squared with the Court of Appeals decision. WSAMA memo. at 4, 9. Moreover, the Court of Appeals decision is inconsistent with the entire rationale this Court has articulated for the doctrine of exhaustion of administrative remedies.

The critical import of this Court's decision in *Reeder* is that review under RCW 7.16 affords a litigant the appropriate relief from an adverse administrative decision, thereby obviating the need for a declaratory judgment action. RCW 7.16 "afforded the [litigants] all relief to which they may be entitled in this case." 57 Wn.2d at 564.

Just like the statutorily-prescribed judicial review procedures of the APA,[8] *Reeder* makes clear that RCW 7.16 qualifies as a legislatively-imposed means of securing judicial review of local quasi-judicial administrative decisions and constitutes an adequate remedy, obviating the need for declaratory relief.[9]

---

[8] *Evergreen Washington Healthcare Frontier, LLC v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 431, 287 P.2d 40 (2012), *review denied*, 178 Wn.2d 1028 (2013) (failure to exhaust the administrative remedies afforded by the APA bars a separate action), or LUPA, *James, supra*; *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 38 P.3d 1040 (2002) (citing *Reeder*).

[9] Contrary to the Court of Appeals' analysis, this Court in *Ronken v. Board of County Commissioners of Snohomish County*, 89 Wn.2d 304, 572 P.2d 1 (1997) did not overrule *Reeder*. Rather, this Court held that the mere existence of an alternate remedy did not foreclose declaratory relief *in the appropriate case*. *Id.* at 310. There, in a case

The core principle at stake in this case, overlooked by the Court of Appeals and ignored by New Cingular, is the integrity of the administrative process developed by local governments like the City. The Court made this point explicitly in *Cost Management*. In that case involving the exhaustion doctrine,[10] the primary issue was whether the relief a party seeks can be obtained through an available administrative remedy and, if so, the party must first seek that relief through the administrative process. 178 Wn.2d at 642. This Court rejected the proposition that the superior courts and the municipal agency had concurrent original jurisdiction. *Id.* at 645-46. This Court also emphasized that exhaustion was still required even where the courts had original jurisdiction over a controversy. *Id.* at 648 ("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

---

involving contracting of public works to private contractors, an administrative appeal process existed as to the awards of particular contracts. The plaintiffs were not involved with any particular contract and could not avail themselves of that administrative relief. They sought injunctive and declaratory relief for county contracting policies *generally*, something for which declaratory relief "was particularly well-suited." *Id.*

If *Reeder* was overruled by *Ronken*, that is a matter on which this Court should pronounce in any event.

[10] As WSAMA notes, the Court of Appeals' published decision is contrary to the reasons for the exhaustion doctrine articulated repeatedly in Washington law including protecting administrative autonomy and expertise, allowing the administrative agency to correct its own errors, and requiring parties to utilize the administrative process.

the court.") In other words, as a prudential matter,[11] the courts will not exercise their original jurisdiction under article IV, § 6 if the litigant has appropriate recourse for relief in the administrative process and subsequent opportunities for judicial review.

Here, New Cingular had such recourse by participation in the City's process, subject to judicial review under RCW 7.16. New Cingular *chose* not to participate seriously in the City's process and it ignored judicial review pursuant to RCW 7.16. It should not be rewarded for its willful refusal to avail itself of the City's administrative process by allowing it a declaratory judgment action that effectively sidesteps that administrative process.

This Court should grant review under RAP 13.4(b)(1) or (2).[12]

D. CONCLUSION

WSAMA's memorandum only confirms that the Court of Appeals decision merits review under RAP 13.4(b). This Court should reverse the

---

[11] This Court stated exhaustion is a "doctrine of judicial administration" applicable even where the courts have original jurisdiction under article IV, § 6. *Id.* at 648.

[12] Should this Court reach the issue, the Court of Appeals treatment of the applicable limitations period for a declaratory judgment action in this setting contravenes the principle that the limitation period for such an action should reflect the limitation period for an analogous action. Here, the relevant period should be the appeal period for review of an administrative decision – 21 days (LUPA) or 30 days (APA). Indeed in *Cost Management*, this Court noted that the limitation period for a writ of mandamus to compel an administrative decision generally is the same period of time as allowed for an appeal. 178 Wn.2d at 649-50.

Court of Appeals decision and uphold the trial court's dismissal of New Cingular's declaratory judgment action.

DATED this 29th day of September, 2015.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Greg Rubstello, WSBA #6271
Ogden Murphy Wallace PLLC
901 Fifth Avenue, Suite 3500
Seattle, WA 98164-2008
(206) 447-7000

Stephanie E. Croll, WSBA #18005
Stephanie Croll Law
23916 SE 46th Place
Issaquah, WA 98029-7581
(206) 949-6992

Attorneys for Petitioner
City of Clyde Hill

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the City of Clyde Hill's Response to Amicus WSAMA's Memorandum in Supreme Court Cause No. 91978-0 to the following parties:

Scott M. Edwards
Ryan McBride
Lane Powell, PC
1402 Fifth Avenue, Suite 4100
Seattle, WA 98101-7107

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

Greg Rubstello
Ogden Murphy Wallace PLLC
901 Fifth Avenue, Suite 3500
Seattle, WA 98164-2008

Original efiled with:
Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

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

Dated: September 29, 2015 at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

OFFICE RECEPTIONIST, CLERK

To: Matt Albers
Cc: grubstello@omwlaw.com; cmace@omwlaw.com; Stephanie Croll; edwardss@lanepowell.com; McBride, Ryan P.; kittled@lanepowell.com; mitchelll@lanepowell.com; Phil Talmadge
Subject: RE: New Cingular Wireless PCS, LLC v. The City of Clyde Hill, Washington

Received on 09-29-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Matt Albers [mailto:Matt@tal-fitzlaw.com]
Sent: Tuesday, September 29, 2015 3:12 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: grubstello@omwlaw.com; cmace@omwlaw.com; Stephanie Croll <stephaniecrolllaw@outlook.com>; edwardss@lanepowell.com; McBride, Ryan P. <McBrideR@LanePowell.com>; kittled@lanepowell.com; mitchelll@lanepowell.com; Phil Talmadge <phil@tal-fitzlaw.com>
Subject: New Cingular Wireless PCS, LLC v. The City of Clyde Hill, Washington

Good afternoon:

Attached please find the following document for filing with the Supreme Court:

Document to be filed: City of Clyde Hill's Response to WSAMA's Memorandum
Case Name: New Cingular Wireless PCS, LLC v. The City of Clyde Hill, Washington
Case Cause Number: 91978-0
Attorney Name and WSBA#: Philip A. Talmadge, WSBA #6973
Contact information: Matt J. Albers, (206) 574-6661, matt@tal-fitzlaw.com

Hard copies to the parties will follow by U.S. Mail. Thank you.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe PLLC
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
Phone: (206) 574-6661
E-mail: matt@tal-fitzlaw.com