

NO. 84824-6

IN THE 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.

CITY OF UNIVERSITY PLACE, CITY OF FEDERAL WAY, PIERCE
COUNTY, AND CITY OF FIRCREST'S ANSWER TO STATEMENT OF
GROUNDS FOR DIRECT REVIEW

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I. INTRODUCTION

The City of University Place, City of Federal Way, Pierce County, and City of Fircrest (hereinafter "Respondents") respectfully request that this Court deny the City of Tacoma's request for direct review of King County Superior Court Judge Douglass North's June 29, 2010, decision granting summary judgment in favor of the Respondents.

Tacoma's appeal meets none of the criteria for direct review set forth under Rule of Appellate Procedure 4.2. This case does not involve "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4). Rather, it presents a simple question of contract interpretation, which turns on the particular language of the Respondents' franchise agreements with Tacoma.

II. COUNTER STATEMENT OF THE CASE

A. *The Franchise Agreements*

The City of Tacoma has an enormous water system, Tacoma Public Utilities (TPU), which occupies much of Pierce County and sprawls into south King County. Tacoma's water mains run underneath the streets and other properties of University Place, Federal Way, Pierce County, and Fircrest pursuant to franchise agreements with each Respondent. Those

franchises create contractual relationships that set the terms by which TPU may operate in those jurisdictions.

Notably, each franchise contains a broad indemnity provision that requires the City to defend, indemnify, and hold each Respondent harmless for any cause of action arising from the franchises. See CP 333-34, Federal Way Franchise (“Franchisee agrees to indemnify and hold harmless and defend the City . . . from any and all claims, demands, losses, actions and liabilities . . . resulting from or connected with this Franchise . . . ”); CP 358, University Place Franchise (indemnity for “claims arising against [University Place] by virtue of [University Place’s] ownership or control of the rights-of-way or other public properties by virtue of [TPU’s] exercise of the rights granted herein, including payment of any monies to [University Place]”); CP 386, Pierce County Franchise (“[Tacoma] shall indemnify Pierce County against damages or losses, if any, that may result or arise out of the construction, installation, maintenance, condition, or operation of equipment and facilities, inclusive of appurtenances thereto, under this franchise.”).

B. Lane v. City of Seattle

In 2008, the Washington Supreme Court issued its seminal decision on the financing of fire hydrants, *Lane v. City of Seattle*, 164 Wn.2d 875,

194 P.3d 977 (2008). Among other holdings, the *Lane* Court ruled that individual jurisdictions, such as Lake Forest Park, had to compensate SPU for the cost of fire hydrants located within their corporate limits. Lake Forest Park lacked a franchise agreement with SPU. Notably for this case, the trial court dismissed from the lawsuit other jurisdictions with whom SPU did have franchise agreements, including the City of Shoreline and King County, because their franchise indemnity provisions precluded SPU from suing for the cost of fire hydrants. King County Superior Court Judge Michael Spearman ruled:

[B]oth King County's and Shoreline's franchise agreements include indemnification clauses [which] provide that SPU shall hold Shoreline and King County harmless from claims arising from exercising the rights granted under the franchise agreement. . . . Thus, even though Shoreline and King County may have otherwise been liable on Seattle's third party claims, the Court finds that such liability is precluded by the agreements both parties have entered into.

CP 420-21. No one appealed this part of Judge Spearman's ruling.

The *Lane* decision came on the heels of *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), in which the Washington Supreme Court ruled that street lights (an analog of fire hydrants), are a general government expense. After *Okeson*, Seattle Public Utilities (SPU) began paying for fire hydrants out of the general fund, but raised revenues to cover the expense through an increase in the utility tax on SPU. SPU, in

turn, raised rates to cover the utility tax. Even though, monetarily, this was the same result for ratepayers, the Supreme Court dismissed the plaintiffs' challenge without much discussion.

C. Tacoma's Lawsuit

After *Lane*, Tacoma ceased billing TPU ratepayers for the costs of hydrant services. At the end of 2008, TPU billed all the Respondents for the costs of the hydrants, connections to the main, the oversizing of mains, and the operation and maintenance of those mains. See, e.g., CP 619-20. The Respondents refused to pay, citing *Lane* and the indemnity provisions within their franchises. On June 12, 2009, Tacoma filed the instant lawsuit.¹

In April 2010, the Respondents moved for summary judgment on the grounds that the indemnity provisions precluded Tacoma's lawsuit, as well as its demand that the Respondents pay for fire hydrants. The Respondents raised two chief arguments. First, the indemnity provisions contained in Respondents' franchises precluded Tacoma from pursuing its action against Respondents. Second, Tacoma and the Respondents had the authority to negotiate and agree on what services would be provided at what

¹ King County and the City of Bonney Lake were named as defendants, but settled with Tacoma because of the small number of hydrants in each jurisdiction.

consideration. Part of the consideration Tacoma obtained was the right to operate in other jurisdictions and keep TPU's rate base.

In March 2010, King County Superior Court Judge Douglass North granted the Respondents' Motion for Summary judgment, ordering, "The indemnification provisions of the above-referenced individual franchise agreements preclude the City of Tacoma from advancing this action against Defendants City of Fircrest, City of University Place, City of Federal Way, and Pierce County." CP 730. Tacoma sought direct review in this Court.

III. ARGUMENT

A. Tacoma fails to establish that direct review is warranted under RAP 4.2.

The only ground for direct review Tacoma asserts is RAP 4.2(a)(4) , which provides for review only in "A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." The instant case, which raises a mere issue of contract interpretation, does not meet that standard.

The trial court decision will not have the illegal or undesirable impacts that Tacoma claims. Pursuant to *Lane* and other precedent, TPU has the authority to agree to indemnify Respondents, as well as to supply fire hydrant services, in consideration for operating its utility in Respondents' jurisdictions. It also has the authority to incur, and recoup,

business expenses resulting from its utility operations and contractual obligations. This case presents no broad principles of constitutional law or utility finance, and is readily distinguishable from other cases in which this Court has appropriately granted direct review.

B. The case involves a simple issue of contract interpretation, not an urgent issue of broad public import.

It is axiomatic that a municipality, especially when acting in its proprietary capacity as a utility provider, has the power to contract, and it is well-settled law that a franchise is a contract. *Burns v. City of Seattle*, 161 Wn.2d 129, 142, 164 P.3d 475 (2007). Moreover, a municipality is under no obligation to supply utilities outside its corporate limits but if it elects to do so, the relationship forged with the receiving jurisdiction is purely contractual. *People for Preservation & Dev. of Five Mile Prairie v. City of Spokane*, 51 Wn. App. 816, 821, 755 P.2d 836 (1988), citing *City of Colorado Springs v. Kitty Hawk Dev. Co.*, 392 P.2d 467, 471 (Colo. 1964). Furthermore, a jurisdiction cannot require a utility to enter into a franchise, nor can it force the utility to accept the terms of a franchise. *Burns*, 161 Wn.2d at 142. Thus, it is beyond question that Tacoma had full authority to enter, voluntarily, into franchise agreements with the Respondents, and to set the terms under which it would operate in each jurisdiction.

Pursuant to the contractual relationship created under the franchises, the Respondents allowed TPU to operate in their jurisdictions and to conduct a propriety business. This included the right to use Respondents' property and to sell water to customers, contributing to TPU's economy of scale and cash flow. In consideration, TPU provided fire flow and fire hydrant services and agreed to indemnify Respondents for any claims arising out of the franchises.

This case involves a simple question of how broadly to construe the contractual indemnity language. See *Cambridge Townhomes LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 893 (2009) (fundamental rules of contract construction apply to indemnity provisions). The Respondents assert that the indemnity provisions are broad enough to preclude the City from suing them for the costs of fire hydrants. See *MacLean Townhomes, LLC v. America 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 832-33, 138 P.3d 155 (2006) (broad indemnity clauses allowed by law). In fact, it is imperative that the indemnity provisions be construed as to preclude any payment for fire hydrants, because otherwise, TPU would be rendering no consideration to the Respondents. An absence of consideration would violate not only the common law of contracts, but also

state statute. RCW 43.09.210 (requiring true and full value for conveyances between governments).

Tacoma asserts, without any legal support, that the indemnity provision only bars third party tort claims and does not apply to the provision of hydrants. But on its face, the contractual language is not so limited. See *Cambridge Townhomes*, 166 Wn.2d at 487 (“any and all” language extends indemnity beyond tort claims). Moreover, contract consideration can exist in the form of an indemnity clause. *Discount Tire Co. v. State Dep’t of Revenue*, 121 Wn. App. 513, 528, 85 P.3d 400 (2004).

The trial courts in *Lane* and the instant case agreed that the contractual indemnity language precludes Tacoma from recouping the cost of fire hydrants from jurisdictions with which it has a franchise. The above-cited legal authority leaves no doubt that the trial court decision was both correct and uncontroversial. Such a simple matter of contract interpretation does not raise an issue of broad public import.

C. The trial court decision will not have illegal or undesirable impacts.

As noted, parties to a franchise have the power to craft reasonable terms for that franchise. Tacoma has the authority to supply fire hydrants as fair consideration for permission to occupy the streets. Tacoma also has the authority to incur, and recoup, business expenses including the costs of

entering into franchises with Respondents. The means by which TPU chooses to pay for these costs is ultimately in the discretion of TPU. However, there appears to be no legal reason, under *Lane* or any other precedent, why TPU could not include hydrants in its rates as a “cost of doing business.”

Tacoma mischaracterizes *Lane* as holding that “fire hydrants must be paid for with tax dollars from the appropriate jurisdiction, not ratepayer funds.” Brief at 3. Not so. Even though the *Lane* Court generally recognized that fire hydrants are a general government expense, it expressly approved of Seattle billing ratepayers for the increased utility tax. This was the case even though, monetarily, the result was no different for ratepayers.

D. This case is easily distinguishable from other utility finance cases in which this Court has appropriately granted direct review.

Tacoma cites a long line of utility finance cases in which this Court has granted direct review. None of these cases require direct review here. Each and every case cited in Section III.C of Tacoma’s brief involved broad principles of utility finance and constitutional law. All concerned a rate, tax, or financing scheme that had broad implications for a variety of jurisdictions. None concerned the simple construction of franchise agreements negotiated with a handful of jurisdictions. None involved an

uncontroversial issue of contract interpretation, which was already decided by an earlier trial court decision and not appealed by the parties.

IV. CONCLUSION

The City of Tacoma is entitled to appeal the trial court's order. However, because its appeal does not raise a matter of urgent public import, the proper venue for that appeal is the Court of Appeals, Division I. For the foregoing reasons, the Respondents respectfully request that the Supreme Court deny Tacoma's Petition for Direct Review.

RESPECTFULLY SUBMITTED this 17th day of September, 2010.

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CERTIFICATE OF SERVICE

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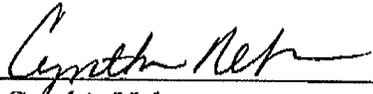
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Attached for filing is a copy of the City of University Place, City of Federal Way, Pierce County, and City of Fircrest Answer to Statement of Grounds for Direct Review; and Certificate of Service.

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