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STATE OF WASHINGTON

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NO. 87964-8

BY RONALD R. CARPENTER

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK

COST MANAGEMENT SERVICES, INC.,

Respondent,

v.

CITY OF LAKEWOOD and CHOI HALLADAY,

Petitioner.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE WASHINGTON
ASSOCIATION OF MUNICIPAL ATTORNEYS, IN SUPPORT OF
PETITIONER CITY OF LAKEWOOD AND CHOI HALLADAY.

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I. INTRODUCTION

The Washington State Association of Municipal Attorneys (WSAMA) joins in and fully supports the arguments raised in the City of Lakewood and Choi Halladay's Petition for Review. WSAMA urges this Court to accept review of the Court of Appeals' Opinion because it raises an issue of substantial public interest and involves a significant question of law under the Constitution of the State of Washington and this Court's jurisprudence. RAP 13.4(b)(1), (3), (4).

II. STATEMENT OF THE CASE

The Court of Appeals' decision in this case ("Opinion") has severe ramifications for cities in Washington: the Opinion improperly challenges municipal authority by ignoring a city's final determination; the Opinion disregards fundamental policy concerns that are the foundation of the exhaustion of administrative remedies doctrine; and the Opinion conflates the jurisdictional powers of the Superior Court with the exhaustion doctrine and sidesteps the traditional exhaustion exceptions. Simply because a court has "original jurisdiction" does not mean that administrative remedies do not need to be exhausted. Ignoring these considerations jeopardizes the public policies and practical realities of the

important administrative mechanisms that both cities and individuals rely on for uniform and consistent application of the law.

III. ARGUMENT

A. The Court of Appeals' decision raises issues of substantial public interest; review is therefore appropriate under RAP 13.4(b)(4).

1. The Court of Appeals' decision improperly ignores a city's determination that a tax is owed, thereby impermissibly challenging municipal authority.

The Court of Appeals ignores and confuses the determinative fact in this case: Lakewood's May 2009 Notice and Order makes a clear, final determination that Cost Management Services, Inc. ("CMS") is subject to the utility tax because it was doing business in Lakewood. CP 95-96. The Notice and Order specifically states:

Cost Management Services is engaged in or carrying on the business of selling brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption. As such, pursuant to Lakewood Municipal Code . . . 3.52.050(D), Cost Management Services is required to pay a utility tax to the City of Lakewood

*Id.*¹ Where an agency makes a final determination—absent an appeal—a party is barred from challenging the validity of the determination. *Spokane Cnty.*

¹ Lakewood Municipal Code 3.52.050(D) states: "Upon everyone engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption, a tax equal to 5.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due"

Fire Prot. Dist. No. 9 v. Spokane Cnty. Boundary Review Bd., 97 Wn.2d 922, 929, 652 P.2d 1356 (1982). CMS had the option to appeal the City's determination that it was subject to the tax within 10 days; however, CMS failed to exercise this right and may not now claim that it is entitled to a tax refund or immune from delinquent taxes owed to the city. CP 95-96.

The Court of Appeals states that the "Notice and Order did not constitute a denial of CMS's refund claim, but was, instead, a demand for payment of taxes." *Cost Management Services, Inc. v. City of Lakewood*, (Nos. 41509-7-II, 41509-8-II) (2012). This distinction improperly categorizes the Notice and Order while ignoring the affirmative determination that CMS was subject to Lakewood's utility tax. The Court of Appeals' failure to recognize this determination creates broad precedent that will have grave consequences for cities' administrative processes.

Additionally, the Opinion directly challenges and limits municipal authority and autonomy and affects the ability of cities to collect revenue. Cities have a broad statutory grant to vest appellate administrative hearing powers in a hearing examiner system. RCW 35A.63.170. The Court of Appeals' decision creates an end-around cities' administrative processes by rendering the hearing examiner system superfluous. If the Superior Court takes cases *without regard for the administrative process*, the authority and

credibility of cities and hearing examiners across the state will be circumscribed and sharply diminished.

In the current economic climate of recession and budgetary shortfalls, allowing a taxpayer to skip administrative processes, in favor of going to court, directly impacts the ability of cities to collect and maintain the intake of revenue. The Opinion allows any individual to file a suit in superior court to challenge taxes paid to a city as an overpayment without first appealing a tax through the hearing examiner system. If the Court of Appeals' decision stands without clarification by this Court, cities will be left in the lurch. Not only does the Opinion impact the authority of cities, but it also ignores a plethora of important policy justifications for maintaining and reinforcing the exhaustion of administrative remedies doctrine.

2. The Opinion thwarts and ignores strong public policy in favor of exhausting administrative remedies.

The exhaustion requirement reflects both practical and public policy concerns. Phillip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U. L. Rev. 695, 715 n.65 (1999) ("The courts reinforce the expertise of the administrative entity designed to address certain controversies and avoid the expenditure of judicial resources when the administrative body may effectively, and finally,

resolve the issue.”). The Court of Appeals’ decision ignores the strong bias toward requiring exhaustion and improperly fails to account for the important public policies underlying the exhaustion doctrine.

Washington courts repeatedly express the myriad policy reasons for applying the exhaustion doctrine: (1) insuring against the premature interruption of the administrative process; (2) allowing the agency to develop the necessary factual background on which to base a decision; (3) allowing the exercise of agency expertise; (4) providing a more efficient process and allowing the agency to correct its own mistake; and (5) ensuring that individuals are not encouraged to ignore administrative procedures by resorting to the courts. *Orion Corp. v. State*, 103 Wn.2d 441, 456-457, 693 P.2d 1369 (1985) (citing *South Hollywood Hills Citizens Ass'n v. King Cnty.*, 101 Wn.2d 68, 73-74, 677 P.2d 114 (1984)); *Harrington v. Spokane Cnty.*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005); *Phillips v. King Cnty.*, 87 Wn. App. 468, 479-80, 943 P.2d 306 (1997). The Court of Appeals thwarts these public policies by encouraging judicial activism when deference to the administrative agency is the favored and far more practical approach. See *Retail Store Emp. Union v. Wash. Surveying and Rating Bureau*, 87 Wn.2d 887, 906, 558 P.2d 215 (1976). All of these policy considerations apply to this case; they promote judicial economy and efficiency while

ensuring the effective and proper utilization of administrative procedures and determinations.

The Court of Appeals' decision fails to protect agencies and cities from unwarranted judicial interference. A city creates agencies for the explicit purpose of applying local laws and regulations in the first instance; therefore, the courts should not ordinarily interfere with an agency until it completes its action or clearly exceeds its jurisdiction. See *McKart v. United States*, 395 U.S. 185, 193 (1969). In fact, "judicial review may be hindered by a failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise." *Id.* at 194. The premature interruption of the administrative process allows unripe claims to pollute the courts with underdeveloped issues and actions. See *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 761, 265 P.3d 207 (2011) (comparing Washington's policy favoring exhaustion of administrative remedies favorably with the federal ripeness doctrine). The city agency with its defined regulatory mechanism, not the Superior Court, is the appropriate forum to develop the administrative record. See *id.* at 767.

There are additional dangers that come with judicial interference and interruption of the administrative process. The Court of Appeals failed to recognize that allowing cities to complete the administrative process is

much more efficient than resorting to the judicial system. If the administrative process had ultimately led to a finding that CMS was not subject to the tax, it would have precluded the need for CMS's lawsuit altogether, thereby preserving scant judicial resources. Allowing administrative issues to play out in court unnecessarily clogs the judicial system with cases previously requiring administrative exhaustion.

Most importantly, the Opinion blatantly encourages individuals to ignore administrative procedures. An individual skipping the administrative process undermines the credibility of cities and hearing examiners, creates uncertainty as to the proper forum to bring administrative claims and appeals, it increases costs to cities because they must prepare for both administrative hearings and litigation in superior court, and it denies the uniform application of cities' municipal codes. Beyond the practical and policy concerns raised by the Court of Appeals decision, the Opinion also implicates state constitutional questions and this Court's previous decisions.

B. The Court of Appeals' decision raises a significant question of law under the Constitution of the State of Washington and conflicts with this Court's jurisprudence; review is therefore appropriate under RAP 13.4(b)(1) and (3).

The original jurisdiction of Superior Courts under the Washington Constitution, Article IV, Section 6 and RCW 2.08.010 should not be

conflated with the exhaustion of administrative remedies doctrine. Stating that exhaustion is not required because of a court's "original jurisdiction," *Cost Management Services, Inc. v. City of Lakewood*, (Nos. 41509-7-II, 41509-8-II) (2012), ignores the doctrine's traditional and statutory exceptions.

1. **The Court of Appeals' decision improperly ignores the traditional exhaustion exceptions: inadequacy, futility, and irreparable harm.**

The traditional exhaustion exceptions do not include "original jurisdiction." The Washington Administrative Procedures Act specifically identifies three times when administrative remedies need not be exhausted, none of which apply here: if the remedies would be patently inadequate, futile, or irreparable harm would result. RCW 34.05.534(3). Washington Courts consistently recognize exceptions to the exhaustion requirement in circumstances where the policies are outweighed by considerations of fairness and practicality, i.e., where resort to administrative procedures would be futile. *Orion Corp.*, 103 Wn.2d at 457. (citing *Zylstra v. Piva*, 85 Wn.2d 743, 745, 539 P.2d 823 (1975)).

The futility exception to the exhaustion doctrine is premised upon the rationale that courts will not require vain and useless acts. Clearly, the administrative remedies which must be exhausted are only those which promise adequate and timely relief. If the available remedies are inadequate, or if they are vain and useless, they need not be pursued before judicial relief is sought.

Id. at 458 (citations omitted). CMS did not pursue any administrative remedy on the Notice and Order before filing in Superior Court. *Cost Management Services, Inc. v. City of Lakewood*, (Nos. 41509-7-II, 41509-8-II) (2012). CMS's failure to avail itself of administrative procedures does not fall under the traditional exceptions to the exhaustion requirement; CMS did not show that appealing to the hearing examiner the finding that it was subject to the utility tax would be futile, the remedy would be inadequate, or that irreparable harm would result. The Court of Appeals paid lip service to the possible inadequacy of the administrative procedures available to CMS, but, as mentioned above, ignored the determinative issue for which the administrative procedures are more than sufficient.

This Court briefly examined the issue of exhaustion and original jurisdiction in *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007). Relying on a party's citation to *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000), this Court stated in passing that the exhaustion doctrine does not apply when the Superior Court has original jurisdiction. *Qwest Corp.*, 161 Wn.2d at 371. The consequences of the Court's statements merit further review because Superior Courts have original jurisdiction over many matters—cases in equity, real property, the legality of any tax, inter alia; however, nothing in the State Constitution

stands for the proposition that "original jurisdiction" allows individuals to skip administrative processes. Wash. Const. art. I, § 6. Exhaustion of administrative remedies is a traditional doctrine that consistently conveys that "[a] party's failure to employ and exhaust available administrative remedies merits dismissal of its lawsuit as premature." *Cost Management Services, Inc. v. City of Lakewood*, (Nos. 41509-7-II, 41509-8-II) (2012). A new original jurisdiction exception is not necessary because the current exceptions fully comprehend both the practical and policy reasons for the exhaustion doctrine. The Court of Appeals' decision undermines administrative processes, creates a dangerous exception to the exhaustion requirement, and will result in grave, unintended consequences for cities across the state.

IV. CONCLUSION

For the foregoing reasons, WSAMA respectfully requests that the Supreme Court grant the Petition for Review filed by the City of Lakewood and Choi Halladay.

RESPECTFULLY SUBMITTED this 26th day of November 2012.

DIONNE & RORICK



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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

COST MANAGEMENT SERVICES,
INC.,

Supreme Court No. 87964-8

Respondent,

CERTIFICATE OF SERVICE

v.

CITY OF LAKEWOOD and CHOI
HALLADAY,

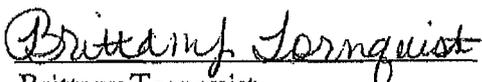
Petitioners.

I hereby declare that on November 26, 2012, I caused a copy of the Motion for Leave to File Brief of Amicus Curiae on Behalf of the Washington State Association of Municipal Attorneys, in Support of Petitioner; and (Attachment A) Brief of Amicus Curiae on Behalf of the Washington State Association of Municipal Attorneys, in Support of Petitioner to be served via Email on:

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Dated this 26th day of November, 2012.


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Re: Cost Management Services, Inc., v. City of Lakewood and Choi Halladay; No. 87964-8

Attached for filing is a copy of the Motion and Brief of Amicus Curiae on Behalf of the Washington State Association of Municipal Attorneys, In Support of Petitioner City of Lakewood and Choi Halladay. There are 3 pdf files totaling 19 pages.

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