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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

NEW CINGULAR WIRELESS PCS, LLC

Respondent,

v.

CITY OF CLYDE HILL, WASHINGTON,

Petitioner.

Washington State Supreme Court
Filed *E*

JAN 21 2016

Ronald R. Carpenter
Clerk *hjh*

MEMORANDUM OF AMICUS WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF
CLYDE HILL

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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. ISSUES ADDRESSED BY AMICUS

1. The Statutory Writ of Review is the appropriate means to appeal a local government’s quasi-judicial decision.

III. STATEMENT OF THE CASE

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

IV. ARGUMENT

- 1. Appeals of quasi-judicial decisions should be through a Statutory Writ of Review.**

The Supreme Court has previously held that the statutory writ of review, RCW 7.16.040, is the appropriate means to appeal a local government's quasi-judicial decision. *Reeder v. King County*, 57 Wn.2d

563, 358 P.2d 810 (1961). This Court should follow *Reeder*; it should follow precedent, which ensures certainty and conforms to the purposes of the Exhaustion of Administrative Remedies Doctrine. The exhaustion requirement permits state courts a “. . . meaningful opportunity to consider the allegations of legal error.” *Vasquez v. Hillery*, 474 U.S. 254, 257, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

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.¹ Final decisions stemming from such matters are quasi-judicial administrative decisions.

¹ 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 multifamily 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

Appeals of all such decisions should be through an appellate process, *i.e.*, writs of review, not through new, separate declaratory judgment lawsuits where the local jurisdictions' underlying decisions are not given the efficacy of judicial action. If judicial review of quasi-judicial decisions can be based upon a new, independent lawsuit, without regard to the record of the decision made at the administrative level by the local jurisdiction and without deference to the local decision-maker's expertise, then the authority of the local jurisdiction is subverted.

The Court of Appeals decision here allows any party to circumvent the local government's administrative process, ultimately disregarding and disrespecting that process *and* the rich body of law on exhaustion of administrative remedies that this Court has developed over the years. It is for these reasons WSAMA asks the Court to reverse the decision of the Court of Appeals.

The issues facing Clyde Hill could be faced by any county, city or town that experiences a challenge to its quasi-judicial decisions.² The

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).

² See the examples from Municipal Codes cited in footnote 1 at pages 2 and 3 of this Memorandum.

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; *and* that appeal should be on the record, not a separate, new, independent lawsuit. The distinction between the two processes, the Uniform Declaratory Judgments Act, Ch. 7.24 RCW, and Writs of Review or Certiorari, Ch. 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 at issue here) is final and binding.³ That may very well trigger an

³ 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 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)

“appeal” to the Superior Court, but the appellant’s path should not be through Ch. 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 7.16.040,⁴ clearly indicates its intention to provide “appellate review” - where an inferior tribunal, board or officer, exercising judicial functions, has (allegedly) exceeded its authority.

With its filing the declaratory judgment action, it is clear that New Cingular Wireless does not intend for the courts to give any credence or deference to the City’s final administrative decision. For instance, in its complaint for declaratory judgment, it mentions neither the hearing nor the quasi-judicial decision coming out of that hearing. [CP 596-598.] Under the facts here, New Cingular Wireless 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 Wireless did not “appeal” that decision, but instead chose to file a new, separate and independent lawsuit. Plainly New Cingular Wireless is not trying to appeal that decision, or even give credence to the City’s hearing and final decision. Rather, New

⁴ 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

Cingular Wireless is seeking to re-litigate the case before a different tribunal in an attempt to get a better result.

New Cingular Wireless's actions, which the Court of Appeals has ratified, have rendered the entire administrative appeals process meaningless – not only for Clyde Hill, but for all local jurisdictions in Washington.

New Cingular Wirelesses contention that the City did not provide it with sufficient process is weak and untenable. Under the facts of this case, evident that New Cingular Wireless *chose* not to present any witnesses, documents, or evidence of any kind at the administrative level. New Cingular Wireless 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 admits, and has clearly stated, that it intends to present witnesses, documents and other evidence to the Court that it did not even attempt to present to the City.

The Court of Appeals decision rewards New Cingular Wireless for failing to fully participate in Clyde Hill's administrative process by allowing New Cingular Wireless to file a new lawsuit. New Cingular Wireless is being given the proverbial second bite at the apple. But this

the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

apple has devastating effects on the administrative hearings conducted by all local jurisdictions in Washington. The administrative hearing record is the record that should be addressed in any judicial review of a local jurisdiction's final quasi-judicial decision. Unfortunately, the Court of Appeals has held that is no longer the case. By allowing New Cingular Wireless to file a declaratory judgment action, the Court of Appeals has sanctioned opening the door to a new process involving a trial, with new witnesses, documents and arguments. As set forth below, the Court of Appeals should have upheld the long-standing *appellate procedure* for quasi-judicial decisions, which have always been subject to appeal via a statutory writ as set forth in Ch. 7.16 RCW.

New Cingular Wireless never argued that the Clyde Hill administrative decision anything other than quasi-judicial. What New Cingular Wireless argued was that New Cingular Wireless had the option of challenging the administrative decision through either the writ of review or a declaratory judgment.⁵

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. The appeal process

⁵ As noted by Clyde Hill in its Petition for Review, it has never been disputed by anyone that the Clyde Hill's decision meets the definition of quasi-judicial. Petition for Review, page 7, note 8.

found in Ch. 7.16 RCW is a legitimate mechanism for that purpose. The express purpose of a writ of review 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). In *Reeder*, this Court distinguished declaratory judgments from writs of certiorari, holding as follows:

The Declaratory Judgments Act should be liberally interpreted in order to facilitate its socially desirable objective of providing remedies not previously countenanced by our law. However, a plaintiff is not entitled to relief by way of a declaratory judgment if, otherwise, he has a completely adequate remedy available to him. (Citations omitted.)

Although appellants did not have a right to appeal to the superior court, the writ of certiorari was available to them and would have afforded them all relief to which they may be entitled in this case. *State ex rel. Lyon v. Board of County Commissioners*, 1948, 31 Wn.2d 366, 196 P.2d 997; RCW 7.16.040.

Reeder v. King County, 57 Wn.2d at 564.

Here too, New Cingular Wireless had available to it the writ of certiorari, and this would have afforded it all relief to which it may be entitled.

The Court of Appeals decision is thus contrary to *Reeder*. If the Court of Appeals' decision stands, any individual who wishes to challenge

a quasi-judicial decision in Washington can now 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.⁶

2. Informal administrative hearings afford due process.

The new twist offered by New Cingular Wireless in its Supplemental Brief is that the procedure for the hearing before the Mayor was so rudimentary that its exhaustion was essentially unnecessary, and that only a declaratory judgment action in court could offer it true due process.

First, WSAMA wants to make it clear that even if administrative hearings in a city are "less formal" than that which would exist in a superior court setting (as is the case in most, if not all local jurisdictions), that does not mean the administrative hearings dispense with due process.

⁶ 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.

The record in this case supports the finding that it was New Cingular Wireless who wanted a telephonic appeal hearing based solely on its written objection. New Cingular Wireless offered no witnesses to testify or any new documentary evidence at the appeal hearing before the Clyde Hill mayor. CP 206 and 597. It never asked for, nor was it ever denied, the opportunity to conduct discovery, present and cross-examine witnesses, or offer exhibits in support of its position. New Cingular Wireless did not object to the City's administrative hearing at the time. It did not claim lack of due process at the time. CP 215-218 (letter from NCW opposing the fine); CP 230-233 (transcript of the Mayor's hearing). The record is devoid of a scintilla of evidence that New Cingular Wireless objected in any way to the City's administrative procedures at the time they were provided.

Now, however, on appeal, New Cingular Wireless abruptly asserts the hearing was inadequate. It claims the City did not provide it with the right to conduct discovery, call witnesses, or otherwise make a record consistent with due process. Certainly, as pointed out above, New Cingular Wireless did not raise these complaints at the time. It did not give the City the opportunity to provide additional process, *which the City would have provided.*

If the system did not work, it's because New Cingular Wireless did not use it properly, not because of anything the City did or did not do.

New Cingular Wireless contends that this Court's recent decision in *Cost Mgmt. Services, Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013), supports its position. It does not. New Cingular Wireless miss-cites *Cost Mgmt. Services* for the (supposed) proposition that tax payers have a *choice* of pursuing tax refund cases in the trial court or via administrative remedies. First, *Cost Mgmt. Services* did not address challenges to a municipal fine or some other type of quasi-judicial decision, as in the case before this Court, but a municipal tax refund action. Second, the Court only held that the taxpayer was *excused* from pursuing administrative remedies because the City of Lakewood had *failed to offer* them in that case. Again, that is not like this case, where the City of Clyde Hill *offered* an administrative remedy and New Cingular Wireless willingly followed through with it without any complaints or objections at the time. Finally, with regard to a portion of the tax payer's refund that was barred by a three year statute of limitation after it chose to file suit in superior court, the Court held that the tax payer could have chosen instead to file a *writ of mandamus to compel* the city to provide administrative remedies. But since the tax payer had chosen to file in court, the three year statute of limitations applied to their claim and they

could not then go back and file a writ of mandamus at that late date in an attempt to collect the funds barred by the statute. *Cost Mgmt. Services* simply does not address the issue here - which is - after administrative remedies are exhausted in a case regarding a municipal fine, is the appellant required to appeal the local jurisdiction's quasi-judicial decision via the writ statute, or can the administrative process be ignored in its entirety and the appellant be allowed to file a declaratory judgment action in superior court?

New Cingular Wireless also tries to persuade the Court to accept their position by making the unfounded claim that "cities may be incentivized to afford parties fewer procedural rights so as to effectively immunize their actions from judicial review." *Respondent's Supplemental Brief*, pp. 14-15. That is not a valid claim, as due process addresses the minimum procedures a local jurisdiction must provide. Here, New Cingular Wireless did not object to the City's procedures at the time, nor did it ask for more or different procedures. Had it done so, the City would have provided them. New Cingular Wireless waived this argument by participating, without any objection whatsoever, in the City's procedures.

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 declaratory judgment after it has already participated in the city's process as an end run around the administrative hearing in which it participated. Again, what we have here is New Cingular Wireless seeking to re-litigate the case before a different tribunal in an attempt to get a better result.

Furthermore, New Cingular Wireless would not be entitled to challenge the notice of violation issued by Clyde Hill through a declaratory judgment lawsuit any more than a criminal defendant would be entitled to file a declaratory judgment action in the Superior Court rather than responding to any enforcement action, criminal or infraction in a district or municipal court. 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. *See* Article IV, Section 6 of the Washington Constitution and RCW 2.08.010.⁷

Yet New Cingular Wireless's declaratory judgment Complaint did not request the superior court to declare the fine unlawful. Rather New Cingular Wireless requested the superior court to *invalidate the notice of violation*.⁸ Consequently a complaint for declaratory judgment in such a

⁷ Under both the Constitution This article of the State Constitution and the statute, the superior court has authority to determine the legality of any tax, impost, assessment, toll or municipal fine.

⁸ New Cingular Wireless's prayer for relief asks the court [f]or a declaratory judgment in favor of New Cingular invalidating the Notice of Violation. CP 5.

situation is not appropriate. Moreover, the fact that the actual challenge in the declaratory judgment action was to the notice of violation [not the legality of the fine] makes it all the more obvious that the appropriate remedy for such a challenge would be an appeal through the writ of review process.

The Court of Appeals decision in this case opens the door for alternative and divergent court decisions on the same issues, creating an environment where a party who does not receive a result that meets with his or her satisfaction may choose to disregard the first proceedings and initiate a new, separate declaratory judgment lawsuit. It must be asked what would follow if the result of the initial proceedings prompted one party to pursue an appeal through a writ of review, and the other to file a declaratory judgment lawsuit. Would the courts conclude that each is entitled to independent efficacy? Were the Court of Appeals decision to stand, the result may very well be a divergence in strategy and in opinions on the very same issues, and a multiplicity, or at least, an inconsistency in judicial action.

Under the facts of this case, where the parties engaged in quasi-judicial proceedings for which an appeal process exists, neither Article IV, Sec. 6, nor RCW 2.08.010, should not be a mechanism to allow one party

to avoid the results of the initial proceedings rather than seek an appeal on the record of those proceedings.

Consistent with *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005), the superior court's jurisdiction (original jurisdiction) can be through trial or appellate processes. In this case, particularly where new Cingular wireless engaged in the administrative hearing process, the exercise of jurisdiction by the superior court should be through an appellate process.

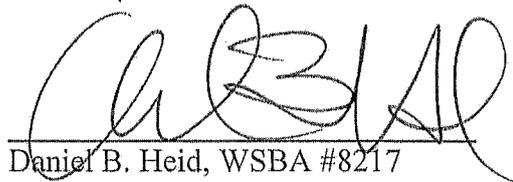
V CONCLUSION

New Cingular Wireless's position, and the Court of Appeals decision, make administrative hearings before a local jurisdiction in Washington a mere (meaningless) nuisance to be endured on the way to the declaratory judgment action as the actual review process. This is contrary to this Court's decision in *Reeder v. King County*. If this Court affirms the Court of Appeals decision, then it must expressly overrule *Reeder*. WSAMA respectfully requests the Court to overturn the Court of Appeals decision and reinstate the Superior Court Order. If New Cingular Wireless (or any party) can file a declaratory judgment action without regard to the administrative hearing process and without regard to the record of such hearing, the question must be asked why New Cingular

Wireless (or any party) would ever have to go through an administrative hearing process in the first place.

For all the reasons set forth above, and those provided by Clyde Hill, WSAMA respectfully requests that this Court 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 11th day of January, 2016.

A handwritten signature in black ink, appearing to read 'D. B. Heid', written over a horizontal line.

Daniel B. Heid, WSBA #8217
Attorney for Amicus, Washington
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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 11 day of January, 2016, 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:

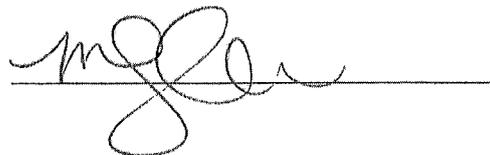
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Dated this 11 day of January 2016, at Auburn, Washington.



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Subject: WSAMA Amicus - Clyde Hill - New Cingular Wireless - Letter, Motion and Memorandum

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.

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