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No. 97910-3

(Court of Appeals No. 36334-1-III)

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**CONFEDERATED TRIBES AND BANDS  
OF THE YAKAMA NATION,**

**Petitioner,**

**v.**

**YAKIMA COUNTY, GRANITE NORTHWEST, INC., FRANK  
ROWLEY, and THE ROWLEY FAMILY TRUST,**

**Respondents.**

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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## **INTRODUCTION**

Yakima County's own code expressly requires a written decision to terminate a land use appeal. Under the statute of limitations applicable to written decisions the Yakama Nation's lawsuit was timely filed.

Whether the Yakima County Board of County Commissioners sat in a quasi-judicial capacity when it denied the Yakama Nation's request for an administrative appeal is not relevant or dispositive. Even if it were relevant, the Board did not sit in a quasi-judicial capacity when it affirmed the hearing examiner's decision during a public legislative agenda that lacked the hallmarks of an adjudicative process.

This Court should reverse the Division III Court of Appeals and affirm the Yakima County Superior Court's ruling that the statute of limitations applicable to land use appeals terminating in written decisions should apply in this case.

## **COUNTERSTATEMENT OF THE CASE**

Respondents' statement that the Conditional Use Permit Yakima County granted to Granite Northwest does not allow disturbance of burial grounds is inaccurate. Granite Northwest seeks to mine within an area the State of Washington has designated as Archaeological Site 45YA109, which includes a Yakama burial ground and a dedicated historical cemetery. CP 6-8; CP 65-90. Whether the County's mitigation measures are sufficient to protect the burial sites and other cultural resources that

Granite Northwest will likely blast with dynamite for its mine is one of the substantive challenges at issue in the underlying case.

## ARGUMENT

**A. The Yakima County Superior Court Correctly Held That The Yakima County Board of County Commissioners' Decision Was A Written Decision For Purposes Of Calculating The Appropriate Statute Of Limitations.**

LUPA provides that ordinances or resolutions passed “by a legislative body sitting in a quasi-judicial capacity” are issued “the date the body passes the ordinance or resolution.” RCW 36.70C.040(4)(b). However, Yakima County elected through the plain terms of its code to require a “written decision” to end its administrative appeals process for purposes of LUPA. YCC 16B.09.050(5) (“[t]he Board’s final written decision shall constitute a final administrative action for the purposes of Chapter 36.70C RCW”). Thus, by code prescription, the statute of limitations for “written decisions” found at RCW 36.70C.040(4)(a) governs land use appeals in Yakima County even if the county elects to issue its written decisions in the form of a resolution, whether that resolution arose from a quasi-judicial proceeding or not. In a case where a county has not required written decisions as the terminating point of an administrative appeals process, the quasi-judicial capacity test may be relevant or even dispositive. But that is not the case in Yakima County.

The Yakama Nation hereby incorporates all arguments raised in the Petition for Review. As demonstrated in the Petition for Review, the Yakima County Superior Court correctly held that the Yakima County

Board of County Commissioners (“Board”) issued a “written decision,” as Yakima County’s Code requires for purposes of calculating the appropriate statute of limitations under LUPA.

**B. The Yakima County Board Of County Commissioners Did Not Sit In A Quasi-Judicial Capacity On April 10, 2018.**

Contrary to Respondents’ assertions, the Yakama Nation did not waive any right to appeal the court of appeals’ faulty application of the four-part quasi-judicial-capacity test. Yakama Nation has maintained consistently throughout the case that the Board did not act in a quasi-judicial capacity and expressly reserved its argument that the court of appeals incorrectly applied the four-part test in its decision. *See* Pet’n. for Review at 17. Thus, there has been no waiver of Yakama Nation’s right to appeal the court of appeals’ flawed reasoning and conclusion on the quasi-judicial capacity issue.

The superior court correctly noted that it did not need to analyze the four-part test for determining whether the Board sat in a quasi-judicial capacity on April 10, 2018, and its subsequent discussion of the test was dicta.<sup>1</sup> “A statement is dicta when it is not necessary to the court's decision in a case.” *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914, 921–22 (2013) (*citing Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 8–9, 977 P.2d 570 (1999)). Because the superior court gave effect to Yakima County’s code

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<sup>1</sup> The superior court in its verbal explanation of its order noted that “in this case the written decision is the resolution” and this “is consistent with that language in the code that says the Board’s final written decision . . . shall constitute a final administrative action for purposes of 36.70C RCW.” Pet’r. App. at 72.

prescription for a “written decision” to terminate administrative appeals for purposes of LUPA, the superior court correctly determined that it did not need to reach the merits of the quasi-judicial issue. The superior court’s discussion of the same during the hearing on Respondents’ motion to dismiss was consequently mere dicta. The court of appeals only reached the merits of the quasi-judicial issue because it erroneously decided that it could ignore Yakima County’s code prescription for a “written decision,” and focused instead on whether the Board sat in a quasi-judicial capacity at its public meeting on April 10, 2018.<sup>2</sup>

To the extent this Court determines that the issue of quasi-judicial capacity is essential to the issues on appeal, the court of appeals’ application of the four-part quasi-judicial test is flawed and should be reversed.

The applicable law and standard used to distinguish between quasi-judicial actions and actions taken in some other governmental capacity establish that the Board did not act in a quasi-judicial capacity when it issued its final written decision. An agency action is quasi-judicial when the agency’s decision is adjudicatory in nature. *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967 (1999) (citing *Harris v. Hornbaker*, 98 Wn.2d 650, 659-60, 658 P.2d 1219 (1983)). Washington courts generally

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<sup>2</sup> See *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 231, 734 P.2d 533, 539 (1987) (noting that a trial court’s dicta provided further support for a ruling that the relation-back doctrine did not apply even though that support was unnecessary to its ruling), *discussing In re Estate of Boyd*, 5 Wa. App. 32, 36, 485 P.2d 469 (1971).

consider four factors to determine when a local agency's action is quasi-judicial:

- (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.

*Chausee v. Snohomish Cty. Council*, 38 Wn. App. 630, 634-35, 689 P.2d 1084 (1984) (citing *Williams v. Seattle School Dist. I*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982); see also *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992).

Under the four-part test, the Board's action was not adjudicatory in nature and did not result in a quasi-judicial decision. While courts are sometimes charged with affirming or declining to affirm a hearing examiner's decision, courts do so through a full judicial appeal on the record below. RCW 36.70C.020; 36.70C.030.

The Board affirmatively decided *not* to conduct a quasi-judicial proceeding here. In response to the Yakama Nation's Notice of Appeal requesting a quasi-judicial proceeding, the Board convened a public meeting to determine whether to hear the Yakama Nation's appeal. CP 24; CP 26; CP 256; CP 259. Under Yakima County Code, the Board had

two choices; the Board could: (1) simply affirm the hearing examiner's decision without accepting additional memoranda or hearing oral argument from the parties; or (2) hold a closed record appeal (i.e. quasi-judicial) hearing with oral arguments, briefing from the parties, a County staff report, and the production of the administrative hearing transcript and record. YCC 16B.09.050(1)(a)-(b) (2015); YCC 16B.09.055 (2015); Resp't. App. at 5-8. The Board rejected the Yakama Nation's closed record appeal request, and instead affirmed the hearing examiner through a procedural vote that was memorialized in a legislative resolution. CP 25-26. The superior court correctly held that the Board did not conduct a quasi-judicial closed record appeal. App. at 70-71.

Not only did the Board elect under Yakima County Code not to hold a closed-record appeal—i.e. it elected not to hold a quasi-judicial proceeding—but the only time the Board discussed the Yakama Nation's appeal request was at a public meeting that did not bear any hallmarks of an adjudicatory hearing. The Board's final decision was made as one decision in a list of agenda items at a public meeting. CP 259-62. The Board did not apply law to the facts presented before it in the administrative appeal. The Board did not entertain argument from either party. There was no apparent review of the administrative record by the Board, only evidence that the Board received the administrative record. CP 25-26. When questioned by the superior court, Yakima County conceded that the Board's decision not to hear the Yakama Nation's

appeal was made at a public meeting and did not rise to the level of a closed record hearing. Pet'r. App. at 44-45.

The court of appeals' ruling that the Board acted in a quasi-judicial capacity does not accurately reflect the record and contains unsupported conclusions. The court of appeals found that the Board conducted a closed-record appeal *despite* the Board's affirmative decision under Yakima County Code to affirm the hearing examiner's decision without accepting additional memoranda and hearing oral argument from the parties. Pet'r. App. at 15. The court of appeals also found that the Board's decision "...*implies* that the board determined that material and substantial evidence supported the hearing examiner's decision." *Id.* (emphasis added). There is no evidence in the record to support the implication. The court of appeals' decision was also premised on an uncited conclusion that the Board applied existing law to the facts, when there is again no record that the Board did anything more than approve the hearing examiner's final decision through a procedural vote during a routine public legislative meeting. Pet'r. App. at 16.

### **CONCLUSION**

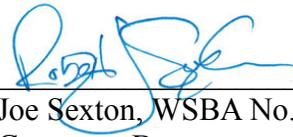
It is unnecessary to consider whether the Board sat in a quasi-judicial capacity because Yakima County's own code expressly requires a written decision to terminate a land use appeal. Under the statute of limitations applicable to written decisions the Yakama Nation's lawsuit was timely filed. Even if it were relevant, the Board did not sit in a quasi-

judicial capacity when it affirmed the hearing examiner's decision during a public legislative agenda that lacked any hallmarks of an adjudicative process. As the superior court noted in its ruling, the statute of limitations applicable to land use appeals terminating in written decisions should apply in this case. RCW 36.70C.040(4)(a).

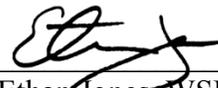
The Yakama Nation respectfully requests that this Court reverse the Division III Court of Appeals and affirm the Yakima County Superior Court's ruling that the Yakama Nation timely filed its LUPA proceeding.

April 2, 2020.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

On April 2, 2020 I caused to be electronically served upon the below named counsel of record a true and accurate copy of the foregoing document via the Appellate Court Web Portal and by separate email:

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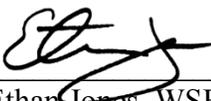
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