

CASE NO. A11-0067

**STATE OF MINNESOTA
IN SUPREME COURT**

City of Oak Park Heights,

Appellant,

vs.

County of Washington,

Respondent.

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

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STATEMENT OF THE LEGAL ISSUE

Minnesota law provides that local government bodies' quasi-judicial decisions are subject to certiorari review at the court of appeals in order to maintain the constitutionally required separation of powers and protect public resources. Should an exception to the certiorari requirement be created if the underlying activity a local government body was performing is a "proprietary activity" even though the nature and process of the challenged decision making was quasi-judicial?

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The League of Minnesota Cities (“League”) has a voluntary membership of 830 out of 854 Minnesota cities.¹ The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League’s mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities.

The League has a public interest in this case as a representative of cities throughout the state with quasi-judicial authority. All Minnesota cities have a public interest in preserving the requirement for certiorari review of their quasi-judicial decisions—a requirement that maintains the constitutionally required separation of powers and protects public resources. The League sought permission to participate as *amicus curiae* in this case because it’s concerned that the county of Washington (“County”) has been distracted by its private interest in avoiding the dismissal of its lawsuit and is shortsightedly arguing for a change in Minnesota law that will harm all local government bodies including towns, cities, counties, and school districts.

¹ The League certifies pursuant to Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the League made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE AND FACTS

The League concurs with the City of Oak Park Heights's ("City's") statement of the case and facts.

INTRODUCTION AND SUMMARY OF LEGAL ARGUMENT

The court of appeals in a published decision held that the district court could exercise subject matter jurisdiction over this appeal because the provision of municipal water and sewer services is a proprietary activity. The City claims that its decision to deny the County's refund request was quasi-judicial and is only subject to certiorari review at the court of appeals under this Court's precedent—precedent which has never recognized a proprietary-activities exception in the context of subject matter jurisdiction.

The court of appeals' new proprietary-activities exception will harm local government bodies throughout the state by causing many of their quasi-judicial decisions to receive less deference and be subject to a longer and more costly appeal process that's not based on a record review. The court of appeals' decision will have a significant, statewide impact because of the wide variety of governmental conduct that can be characterized as "proprietary activities" under the court of appeals' broad definition of this term.

Instead of focusing on the nature and process of the challenged decision making, the court of appeals erroneously focused on the underlying activities that the City was performing in order to justify creating an exception to this Court's precedent requiring certiorari review. It's possible that the court of appeals chose this erroneous approach out

of sympathy either for the County which missed the appeal deadline for certiorari review or out of sympathy for individuals that may have payment disputes with municipal utilities in the future. But when the court of appeals chose this approach, it created bad law and overstepped its authority as an error-correcting court. Indeed, this Court has already balanced the public policies at issue when local government bodies' quasi-judicial decisions are challenged and has consistently concluded that certiorari review is required even when it poses practical difficulties for those challenging the decisions.

The court of appeals also erred by concluding that *de novo* review in the district court wouldn't violate the constitutionally required separation of powers. The court of appeals concluded that there wasn't any governmental conduct at issue, in part, because the decision to deny the refund request wasn't a policy decision, and therefore, there was no separation-of-powers concern. But this Court has consistently held that separation-of-powers concerns arise not only from challenges to quasi-legislative decisions that involve policy decisions like the adoption of a zoning ordinance or a snowplowing policy but also from challenges to quasi-judicial decisions that involve discretionary administrative decisions like the termination of an employee or the denial of a claim for compensation.

The court of appeals also erroneously concluded that there wasn't any governmental conduct at issue because the provision of municipal water and sewer services has been characterized as proprietary activities in the past in different contexts. This simplistic conclusion was erroneous because it's based on a distinction that has largely been rejected in current law and because it fails to recognize the governmental nature of municipal water and sewer services.

This Court shouldn't change Minnesota law to adopt a proprietary-activities exception in the context of subject matter jurisdiction. The creation of such an exception would be bad public policy and would be based on a distinction that has proven unworkable in other contexts and that will entangle courts in second-guessing the factual findings of a separate branch of government. In short, it's the nature and process of the challenged decision making that should continue to determine whether certiorari review is required not the underlying activity that the local government body was performing.

LEGAL ARGUMENT

The League concurs with the City's legal arguments and won't repeat them here. Instead, this brief focuses on the statewide significance of this case and on why a balancing of the competing public policies favors maintaining the current certiorari requirement regardless of what underlying activity the local government body was performing.

I. This case will have a significant, statewide impact.

The case will have a significant, statewide impact. The creation of a proprietary-activities exception to the certiorari requirement will harm local government bodies throughout the state by causing their decisions in areas that can be characterized as "proprietary activities" to receive less deference and be subject to a longer and more costly appeal process that's not based on a record review even when those decisions meet this Court's test for quasi-judicial decisions. This is a case of first impression that will impact hundreds of local government bodies throughout our state that make quasi-judicial decisions in a variety of contexts.

The statewide significance of this appeal is demonstrated by the court of appeals' broad definition for what constitutes proprietary activities when determining subject matter jurisdiction.

[A]ctivities are considered proprietary not because the city seeks to make a profit but because the city voluntarily engages "in the same business which, when conducted by private persons, is operated for profit."

App. Add. A58 (quoting *Keever v. City of Mankato*, 113 Minn. 55, 61, 129 N.W. 158, 159 (1910))². Indeed, under this definition, almost any city service could be considered proprietary, because almost every city service has been or could be operated by a private person for profit including animal-control, park-and-recreation, firefighting, engineering, land-use, public-works, snowplowing, and police services to name a few.³ Quasi-judicial decisions in all of these areas would no longer be subject to certiorari review under the court of appeals' broad definition of proprietary activities. For example, one could use the court of appeals' decision to argue that a city's quasi-judicial decision to order the destruction of a "dangerous dog" under its animal ordinance or a city's quasi-judicial decision to temporarily exclude an individual from a public recreation center for violating the center's policies should both be subject to *de novo* review in district court. Indeed, plaintiffs will be motivated to try and characterize a wide variety of governmental

² *Keever* discussed the proprietary distinction a century ago in the tort-liability context—a context where the proprietary distinction has since been abandoned. See Appellant's Brief at 9-12.

³ In fact, the city of Foley recently made headlines when it decided to contract out certain police services to a private security company.
<http://www.sctimes.com/article/20111019/NEWS01/1009>.

conduct as proprietary activities in order to obtain a standard of review that is less deferential to the challenged quasi-judicial decision.

In addition, the court of appeals' decision directly conflicts with this Court's precedent which has consistently held that it's the nature and process of the decision making that determines whether a decision is quasi-judicial, and therefore, whether certiorari review is required.

The term "quasi judicial" indicates acts of the city officials which are presumably the product or result of investigation, consideration, and deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of their discretionary power. It is the performance of an administrative act which depends upon and requires the existence or nonexistence of certain facts which must be ascertained, and the investigation and determination of such facts cause the administrative act to be termed quasi judicial.

Oakman v. City of Eveleth, 163 Minn. 100, 108-109, 203 N.W. 514, 517 (1925); *City of Shorewood v. Metro. Waste Control Comm'n*, 533 N.W.2d 402, 404 (Minn. 1995) (estimation of contemplated annual sewage-disposal usage and the adjustment of previous estimates to conform to actual usage was quasi-judicial because it required "the exercise of a great deal of discretion and judgment and the finding of facts that are not always self-evident"); *Meath v. Harmful Substance Comp. Bd.*, 550 N.W.2d 275, 279 (Minn. 1996) (quasi-judicial decisions are marked "by an investigation into a disputed claim and a decision binding on the parties"). But under the court of appeals' decision, it will now be the underlying activity that a local government body was performing—and not the nature and process of its decision making—that will determine whether certiorari review is required. As a result, one could argue that public-employee termination decisions involving any underlying government activity that could be characterized as a

proprietary activity should no longer be subject to certiorari review. Such a result would be bad public policy and would conflict with this Court's precedent. See *Tischer v. Housing and Redevelopment Auth. of Cambridge*, 693 N.W.2d 426 (Minn. 2005) (HRA's termination of employee subject to certiorari review); *Dietz v. Dodge County*, 487 N.W.2d 237 (Minn. 1992) (county's termination of nursing-home employee subject to certiorari review); *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996) (county's termination of director of land-mapping office subject to certiorari review); *Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671 (Minn. 1990) (school district's termination of teacher subject to certiorari review).

In *Tischer*, for example one of the HRA's underlying activities was providing housing, in *Dietz* the county's underlying activity was providing nursing-home services, in *Willis* that county's underlying activity was providing land-use mapping services, and in *Dokmo*, the school district's underlying activity was providing education services. Again, the provision of all of these services could be characterized as proprietary activities under the court of appeals' broad definition of this term because private individuals also perform these services to make a profit. And if these services are proprietary activities, public-employee termination decisions in any of these contexts would no longer be subject to certiorari review under the court of appeals' proprietary-activities exception. This result would not only be inconsistent with this Court's precedent; it would also be bad public policy.

II. A balancing of the competing public policies favors maintaining the current certiorari requirement regardless of what underlying activity the local government body was performing.

Like most cases this Court considers, there are competing public policies at issue. A balancing of the competing public policies in this case, however, favors maintaining the current certiorari requirement regardless of what underlying activity the local government body was performing.

A. Separation of powers

The primary purpose for the certiorari requirement is to maintain the separation of powers mandated by the Minnesota Constitution. Minn. Const. Art 3, § 1. Because certiorari review requires judges to defer to a local government body's findings it prevents the judicial branch from usurping the administrative prerogatives of a separate branch of government and it minimizes judicial intrusion into administrative decision making. *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992).

The court of appeals concluded that there wasn't a separation-of-powers concern in this case because there wasn't any governmental conduct at issue. This conclusion appears to be based, in part, on the fact that the City's decision to deny the refund request wasn't a "policy" decision. App. Add. A60. But it's clear from this Court's precedent that—in addition to the separation-of-powers concerns that arise when challenges are made to quasi-legislative decisions that involve policy decisions like the adoption of a zoning ordinance or a snowplowing policy—a separation-of-powers concern also arises when challenges are made to quasi-judicial decisions that involve discretionary administrative decisions like the termination of an employee or the denial of a claim for

compensation. *See Tischer*, 693 N.W.2d at 429 (holding that the separation-of-powers doctrine requires that an administrative decision to terminate a public employee be subject to certiorari review); *Youngstown Mines Corp. v. Prout*, 124 N.W.2d 328, (1963) (holding that an administrative decision to deny a claim for compensation was subject to certiorari review); *Meath*, 550 N.W.2d at 279 (holding that the type of administrative decisions that are subject to certiorari review are “administrative decisions which are based on evidentiary facts and which resolve disputed claims of rights”).

The court of appeals also based its conclusion that there wasn't any governmental conduct at issue on the fact that the provision of municipal water and sewer services has been characterized as a proprietary activity in the past. App. Add. A58. But there are several reasons why this simplistic conclusion doesn't withstand review. First, the cases that the court of appeals relied on characterized municipal water and sewer services as proprietary activities in the context of tort and contract and simply didn't address whether such a characterization was appropriate in the context of subject matter jurisdiction. Second, the proprietary distinction was subsequently abandoned in both the tort and contract contexts. *See* Appellant's Brief at 9-12. Third, the cases the court of appeals relies on were decided decades before 1996 when this Court first began to develop its test for quasi-judicial decisions in *Meath v. Harmful Substance Compensation Bd.*, 550 N.W.2d 275 (Minn. 1996). And fourth, one of the main reasons for abandoning the proprietary distinction is equally applicable here—namely, the proprietary distinction is too simplistic to properly accommodate for the dual nature of many governmental

activities. *See* 18 McQuillin Mun. Corp. § 53.02.10 (discussing the governmental-proprietary distinction).

For example, a municipal water and sewer utility might be considered a proprietary activity based on a simplistic test that only focuses on whether a city charges a fee for a particular service or on whether a city is engaging in an activity that the private sector also engages in for profit. But such a conclusion ignores the fact that the provision of potable water is an essential public service throughout the world and that this public service is overwhelmingly performed by municipalities in Minnesota.⁴ Indeed, a closer review of the nature of municipal water and sewer services demonstrates that the provision of this essential public service should be considered governmental conduct.

First, a municipal water and sewer utility doesn't act like a private corporation. It isn't a separate corporate and legal entity, but instead, is simply a department of the city. A body of elected city councilmembers is the ultimate decision-maker regarding all utility matters not a private board of directors. Second, because a municipal water and sewer utility is part of the city, it's subject to all the requirements that apply to the city. For example, the Minnesota Government Data Practices Act classifies certain municipal utility data as private data and other utility data as public data. Minn. Stat. § 13.685 (municipal electric utility data); Minn. Stat. § 13.01, subd. 3; Minn. Stat. § 13.02, subd. 7 (municipal water and sewer data). When a city council discusses or makes decisions about its municipal water and sewer utility it must comply with the Open Meeting Law.

⁴ The Minnesota Department of Health has estimated that there are 726 municipal water utilities and 244 nonmunicipal utilities in Minnesota.
<http://www.health.state.mn.us/divs/eh/water/com/index.htm>

Minn. Stat. § 13D.01. The revenues generated from municipal water and sewer utilities are public funds that are subject to the requirements in state law for financial reporting and auditing. *See, e.g.*, Minn. Stat. § 412.02, subd. 3; Minn. Stat. § 412.141; Minn. Stat. § 412.151, subd. 2. Third, unlike a private corporation that conducts business to make a profit, state law provides that fees for municipal water and sewer services “shall be as nearly as possible proportionate to the cost of furnishing the service.” Minn. Stat. § 444.075, subd. 3. Fourth, cities are statutorily authorized to provide water and sewer services under their police powers. Minn. Stat. § 412.321; Minn. Stat. § 444.075. And finally, cities exercise regulatory functions to promote the public good while providing municipal water and sewer services. For example, Minnesota cities commonly adopt ordinances that require property owners to connect to municipal water and sewer services in order to protect the public health. *See State v. Waughtal*, No. 5-92-2400, 1993 WL 328750 at 3-4 (Minn. App. Aug. 31, 1993), *rev. denied* (Oct. 28, 1993) (unpublished decision) (holding that a township ordinance requiring certain property owners to hook up to the township water system was a valid exercise of police power). Amicus Add. ADD1.

In short, the court of appeals erroneously characterized the provision of municipal water and sewer services as a proprietary activity and erroneously concluded that a district court’s *de novo* review of a city’s discretionary, administrative decision wouldn’t violate the separation of powers. This Court should correct these errors because public policy favors maintaining the current certiorari requirement in order to maintain the separation of powers.

B. Protection of public resources

Maintaining the current certiorari requirement would also protect public resources. Certiorari review provides an efficient and less costly form of judicial review because it has a 60-day deadline for appeal, it bypasses district-court review, and it's based on a record review without a costly and time-consuming discovery process. *Dietz v. Dodge County*, 487 N.W.2d 237, 240 (Minn. 1992) (noting that certiorari provides an expedient and economical form of review). It logically follows that public resources would be best protected if all quasi-judicial decisions were subject to certiorari review without exception. Indeed, maintaining the current certiorari requirement would result in a savings of both cost and time not only for local government bodies but also for the individuals and businesses that challenge quasi-judicial decisions.

C. Consistent treatment of municipal utilities

Maintaining the current certiorari requirement would also ensure that municipal water and sewer utilities are treated consistently. It's inconsistent to treat municipal water and sewer utilities like private corporations when determining subject matter jurisdiction while simultaneously subjecting them to all the requirements applicable to cities like the Open Meeting Law, the Minnesota Government Data Practices Act, and financial-reporting and auditing requirements. In addition—as previously discussed—it's also inconsistent to treat municipal water and sewer utilities like a private corporation when they aren't structured like one and they don't operate like one.

D. Clarity for appeals of quasi-judicial decisions

Maintaining the current certiorari requirement would also help provide clarity for appeals of quasi-judicial decisions. Certiorari review is an exception to the general jurisdiction of district courts. By creating an exception to an exception, the court of appeals has created unnecessary confusion for parties and judges regarding where subject matter jurisdiction properly lies for appeals of quasi-judicial decisions. In addition, prior experience in other contexts demonstrates the difficulty that judges have faced when attempting to define and apply a distinction that's "inherently unsound and unworkable." *See* 2-35 Antieau on Local Gov't § 35.02 (2d ed.) (discussing the distinction between governmental and proprietary actions). Maintaining the current certiorari requirement would be good public policy because it would allow judges to avoid the difficulty of trying to apply an inherently unsound distinction and to avoid becoming entangled in second-guessing the administrative decisions of a separate branch of government.

E. Competing public policies

The County has argued that competing public policies weigh in favor of creating a proprietary-activities exception to the certiorari requirement. Essentially the County argues that if this Court doesn't adopt a proprietary-activities exception it will give cities a competitive advantage, insulate them from accountability, and allow the fox to guard the henhouse. *Response to Petition For Review* at 3, 5. However, none of these concerns is sufficient to outweigh the public policies that support maintaining the current certiorari requirement.

First, the League assumes that the “competitive” advantage to which the County refers is based on certiorari’s deferential standard of review and its shorter deadline for appeal. But because a valid separation-of-powers concern exists in this case any private interest in avoiding a perceived “competitive” advantage is necessarily outweighed by the public interest in complying with a constitutionally mandated requirement. Second, it’s clear that certiorari review doesn’t deprive the County of a remedy and thereby insulate the City from accountability; instead, the certiorari requirement merely “specifies an appropriate remedy.” *Willis v. County of Sherburne*, 555 N.W.2d 277, 282 n. 3 (Minn. 1996). And third, the County’s concern about the fox guarding the henhouse applies to all quasi-judicial decisions; it isn’t unique to quasi-judicial decisions involving “proprietary activities.”

The fact that cities and other local government bodies (including counties) frequently review challenges to their own discretionary administrative decisions arises from the fact that the state has delegated local government bodies the legislative power to adopt laws, the executive power to administer those laws, and the quasi-judicial power to investigate and resolve disputed claims. Indeed, in a teacher-termination case, this Court recognized that even though the consolidation of legislative, executive, and quasi-judicial power in a local government body could lead to abuse, it was still necessary to defer to a school board’s quasi-judicial findings because the need to maintain the separation of powers outweighed any concern about the potential for abuse, and further, that any abuse could be detected under a certiorari review at the court of appeals. *State ex. Rel. Ging v. Bd. of Educ.*, 7 N.W.2d 544, 571-572 (1942), *overruled in part on other grounds*. In

short, local government bodies' quasi-judicial decisions aren't insulated from accountability by the fact that "the fox is guarding the henhouse," but instead, their quasi-judicial decision are subject to review by the court of appeals and must comply with a variety of requirements in statutory and constitutional law.

CONCLUSION

This case will have a significant, statewide impact on local government bodies across the state that exercise quasi-judicial authority in a wide variety of contexts many of which could be characterized as "proprietary activities" under the court of appeals' broad definition of this term. This Court shouldn't change Minnesota law to adopt a proprietary-activities exception in the context of subject matter jurisdiction. The creation of such an exception would be bad public policy and would be based on a distinction that has proven unworkable in other contexts and that will entangle courts in second-guessing the factual findings of a separate branch of government. In short, it's the nature and process of the challenged decision making that should continue to determine whether certiorari review is required not the underlying activity that the local government body was performing. For all of these reasons, the League respectfully requests that this Court reverse the court of appeal's decision.

LEAGUE OF MINNESOTA CITIES

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