71626-3

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No. 71626-3-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS, LLC,

Plaintiff-Appellant

v.

THE CITY OF CLYDE HILL, WASHINGTON,

Defendant-Respondent

ON APPEAL FROM KING COUNTY SUPERIOR COURT
No. 13-2-16074-9 SEA
(Hon. Theresa B. Doyle)

REPLY BRIEF

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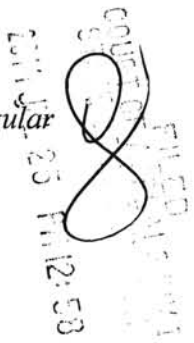

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I. INTRODUCTION

Clyde Hill defends its punitive fine against New Cingular as just desserts for New Cingular's allegedly fraudulent attempt to "shift financial responsibility for New Cingular's illegal conduct to the local governments who unknowingly received the alleged unlawful collections." Resp. Br. at 10. The city's effort to take the high road falls flat. New Cingular never knowingly collected taxes preempted by IFTA or filed false tax returns with the city. And when it reached a class action settlement to resolve that disputed issue, it was Clyde Hill's own residents who stood to benefit from any refund of overpaid taxes. In effect, Clyde Hill seeks to penalize New Cingular for seeking a refund of taxes the city was never entitled to keep.

It is, therefore, no surprise Clyde Hill fights so hard to prevent the superior court from determining the validity of the fine on the merits. But the superior court has no discretion in the matter. The Washington Constitution expressly gives the superior court original jurisdiction over cases involving the "validity of any ... municipal fine." The legislature has never limited that jurisdiction, and no such limitation can be implied from RCW 7.16 itself. New Cingular properly invoked the trial court's original trial jurisdiction by filing a declaratory judgment action, and it did so well within the analogous three year limitations period. The decision below

must be reversed, the judgment and award of attorneys' fees vacated, and the case remanded for *de novo* proceedings on the merits.

II. ARGUMENT

A. The Legislature Has Not Eliminated The Superior Court's Original *Trial* Jurisdiction Under Article IV, § 6 To Determine The Validity Of Clyde Hill's Municipal Fine.

The Washington Constitution expressly confers the superior court with original jurisdiction over this precise type of dispute: "cases at law which involve the ... legality of any ... municipal fine." WASH. CONST. Art. IV, § 6. Clyde Hill has abandoned any argument that its Municipal Code somehow limited that jurisdiction. Resp. Br. at 13 ("The City's code does not ... in any way, shape or form attempt to dictate how a claimant should pursue judicial review in Superior Court").[1] It had no choice. As New Cingular explained, Op. Br. at 15-17, and the Supreme Court has held, the "jurisdiction and duties of the superior court ... must be conferred by the constitution and by legislative authority[.]" *City of Spokane v. J-R Distribs., Inc.*, 90 Wn.2d 722, 729, 585 P.2d 784 (1978) (citation omitted).

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[1] Clyde Hill accuses New Cingular of knocking down a straw man argument it never made below. Resp. Br. at 41. But Clyde Hill repeatedly cited the Municipal Code's reference to "judicial appeal" in its motion for summary judgment. *See, e.g.*, CP 238 ("The City issued Plaintiff New Cingular a final and binding decision, subject to judicial appeal in superior court. *See* CMCH § 1.08.030 ... New Cingular had 30 days in which file a **judicial appeal** ... by application for a **statutory writ of review** ...." (emphasis in original)). Suffice it to say, the basis for Clyde Hill's argument below was as unclear and unsupported as it is on appeal.

Municipalities, which themselves derive all power from the constitution and the legislature, cannot prescribe or limit that jurisdiction. *Id.* at 727-29.

Unlike municipalities, the state legislature does have the power to provide an exclusive means of judicial review for certain cases; these statutes eliminate the superior court's original *trial* jurisdiction such that only its *appellate* jurisdiction remains. *James v. Kitsap County*, 154 Wn.2d 574, 588-89, 115 P.3d 286 (2005). The legislature did this, for example, when it enacted the Industrial Insurance Act ("IIA"). *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314-15, 76 P.3d 1183 (2003). It did it again with the APA. *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 359-60, 271 P.3d 268 (2012). And with LUPA, too. *James*, 154 Wn.2d at 588-89. At bottom, then, the only question left in this appeal is whether the legislature enacted a similar statute that divests the superior court of its original *trial* jurisdiction under Article IV, § 6 and RCW 2.08.010 to hear cases involving the "legality of any … municipal fine."

The answer is an unequivocal "no." Clyde Hill argues that, "[l]ike the APA and LUPA, the statutory writ procedures provide a mandatory means for appellate review of a quasi-judicial municipal decision." Resp. Br. at 27 (emphasis added). Clyde Hill does not, and cannot, cite a single authority to support that proposition. Not one. There is no statute—like the APA or LUPA or the IIA (and perhaps a dozen others)—that limits the

superior court's original jurisdiction over cases involving the legality of a municipal fine, and certainly none that makes the filing of a writ the "mandatory" means for judicial review.[2] Thus, while New Cingular could have invoked the superior court's *appellate* jurisdiction over the Mayor's Decision by seeking a writ, no Washington law foreclosed New Cingular's constitutional right to instead invoke the court's original *trial* jurisdiction over the legality of Clyde Hill's "municipal fine" by filing a complaint.

The only statute Clyde Hill identifies to support its argument that the legislature eliminated the superior court's original *trial* jurisdiction is RCW 7.16 itself. *See* Resp. Br. at 41 ("The procedures for invoking the Superior Court's jurisdiction are prescribed by statute in RCW 7.16."). But unlike the APA, LUPA, the IIA or other statutory schemes, RCW 7.16 does not provide an exclusive means of judicial review, nor does it trump the superior court's original jurisdiction where it already exists. Rather, a

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[2] Indeed, Clyde Hill repeatedly and disingenuously cites to APA and LUPA cases for the supposed—but otherwise unsupported—proposition that a writ provides the exclusive means of judicial review for any municipal action. *See James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005) (LUPA); *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000) (LUPA); *Wells Fargo Bank v. Dep't of Revenue*, 166 Wn. App. 342, 271 P.3d 268 (2012) (APA); *Banner Realty, Inc. v. Dep't of Revenue*, 48 Wn. App. 274, 738 P.2d 279 (1987) (APA). Of course, Clyde Hill's reliance on these cases simply proves the point. Unlike the APA or LUPA, there is no statutory scheme that provides an exclusive means of judicial review for cases involving municipal fines, nor any that limits the superior court's original trial jurisdiction in such cases.

statutory writ gives the superior court discretion to exercise limited *appellate* jurisdiction over quasi-judicial administrative decisions where there is no right of appeal. *See* RCW 7.16.040. Not surprisingly, no court has construed RCW 7.16's *grant* of appellate jurisdiction as an implicit *limitation* on the superior court's original trial jurisdiction.

Washington law says the opposite. Like cases involving the legality of a "municipal fine," Article IV, § 6 and RCW 2.08.010 also give the superior court original trial jurisdiction over cases involving the "legality of any tax." As New Cingular showed, Op. Br. at 11-12, in *Cost Mgmt. Servs. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013), *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007), and *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 70 P.3d 144 (2003), the courts held that a plaintiff could invoke the superior court's original *trial* jurisdiction to challenge the validity of a municipal tax rather than invoking its *appellate* jurisdiction via a writ. The same is true for challenges to a municipal fine. As the *Cost Management* court noted, "Superior Courts in this state have original jurisdiction over all kinds of matters where jurisdiction has not been exclusively vested elsewhere ...." 178 Wn.2d at 648.

Clyde Hill's effort to distinguish these cases is futile. Clyde Hill wishfully argues that *Mary Kay* is inapposite because "the court simply did not address" whether a superior court can exercise original *trial* jurisdiction

in a municipal tax case. Resp. Br. at 28-29. Really? That is exactly what the case was about, and the court's holding was unambiguous. After its own hearing examiner ruled that the City of Tacoma's tax was invalid, and all other administrative remedies were exhausted, the city sought to invoke the superior court's original *trial* jurisdiction so that it could obtain discovery and a trial *de novo*. 117 Wn. App. at 113. The court of appeals clearly held that the superior court *could have* exercised original jurisdiction over the issue because the city's claim involved the "legality of any tax" under Article IV, § 6 and RCW 2.08.010. *Id.* at 115.

The problem, however, was that the city failed to properly invoke the court's jurisdiction when it filed a "notice of appeal." *Mary Kay* states clearly what the city should have done: "Tacoma could invoke the superior court's original jurisdiction ... by filing a complaint, CR 3 ..." *Id.* at 115. The court also explained that, as an alternative, the city could have filed a writ, "[b]ut even if it had ... the superior court still would have been limited to a review on the record and not had original jurisdiction." *Id.* at 115-116 & n. 6. The import of *Mary Kay* is plain: to challenge the legality of a municipal tax or fine, a party can invoke the superior court's original *trial* jurisdiction to obtain *de novo* review "by filing a complaint." That is precisely what New Cingular did here. *Mary Kay* controls.

Similarly, Clyde Hill's argument that *Cost Management* overruled *Qwest* on this point is flat wrong. Resp. Br. at 24 n. 15 & 30. *Qwest* also recognized that a taxpayer could challenge a city's illegal tax by filing an original action in superior court. 161 Wn.2d at 371. The court suggested, however, that the exhaustion rule does not apply when the superior court has original jurisdiction. *Id.* On that discrete issue, *Cost Management* clarified that the "superior court's original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply to the particular claim before the court." 178 Wn.2d at 648. *Cost Management* did not reject, much less overrule, *Qwest*'s recognition that the superior court had original *trial* jurisdiction in a municipal tax case; on the contrary, it reaffirmed and followed that principle itself: "No one argues that ... there is a law vesting exclusive jurisdiction of municipal tax refund claims somewhere other than the superior court." *Id.* at 647.

This Court can also reject Clyde Hill's related suggestion that the exhaustion requirement somehow limits the superior court's jurisdiction. The two issues are distinct. *Cost Management* was crystal clear on this point as well: "The exhaustion doctrine has no bearing on the jurisdiction of the court in terms of the constitutional power of the court to hear a case." 178 Wn.2d at 648. Rather, even when jurisdiction exists, a superior court can consider, as a matter of "judicial administration" and "deference,"

whether an adequate administrative remedy exists that the claimant should try first[.]" *Id.* For example, in *Cost Management*, the court found exhaustion excused. *Id.* at 643-45. In *IGI Res., Inc. v. City of Pasco*, --- Wn. App. ---, 325 P.3d 275 (2014), the court found that it was not. *Id.* at 277. Critically, in both cases, the court had original *trial* jurisdiction over the taxpayer's claims under Article IV, § 6 and RCW 2.08.010. *Id.*

There is no dispute that New Cingular fully exhausted Clyde Hill's limited administrative process *before* it filed suit. Moreover, although irrelevant to the jurisdictional issue, New Cingular's election to file an original action rather than a writ of review did not render that process a "meaningless waste of time" or "superfluous." Resp. Br. at 28 & 32. New Cingular's protest still gave Clyde Hill the "first opportunity to … correct its errors" and "perhaps … obviat[e] judicial involvement." *IGI*, 325 P.3d at 277 (citation omitted). The Mayor simply refused to do so. Nor did New Cingular's election squander agency expertise or findings of fact developed during an adversarial proceeding; the Mayor's perfunctory "hearing" involved neither thing.[3] If anything, the lack of process explains

[3] Clyde Hill falsely implies that New Cingular could have sought a formal evidentiary hearing akin to the kind of process it would receive in a declaratory judgment action. Resp. Br. at 2-3 & 13. There was no option for a "formal hearing." Putting aside the fact that the Mayor was not an impartial decision-maker, New Cingular only had a right to file a written protest, which it did (CP 583-85), and a right to request an "informal

why New Cingular chose *de novo* review through a declaratory judgment action over the limited appellate review available through a writ.

B. The Possibility Of A Writ Of Review Did Not Preclude New Cingular From Filing A Declaratory Judgment Action.

Clyde Hill next argues that, even if no Washington statute limits the superior court's original trial jurisdiction in cases like this one, New Cingular's right to seek a writ of review precludes it from obtaining relief under the Declaratory Judgments Act. Resp. Br. at 38-41. But that is not the law anymore. "The rule previously followed [in] Washington ... that declaratory relief will not lie where any alternative remedy is available, was changed by court rule in 1967." *Ronken v. Board of County Comm'rs of Snohomish Co.*, 89 Wn.2d 304, 310, 572 P.2d 1 (1977) (citing CR 57 ("The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.")). Notably, *Ronken* rejected *Reeder v. King County*, 57 Wn.2d 563, 358 P.2d 810 (1961), upon which Clyde Hill relies (Resp. Br. at 30 & 40), on this very issue. *Id.*

Thus, the fact that New Cingular *could have* sought a writ of review has no effect on its right to a declaratory judgment. Washington law is clear on this point too: "[D]efendants' attempt to defend the conclusion that [plaintiff] was not entitled to seek declaratory relief because he could have

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hearing," which it did as well (CP 594; CP 230). Any appellate review of the Mayor's Decision would be tantamount to no review at all.

sought equivalent relief through a writ of review is not well taken. Such doctrine was overruled long ago[.]" *Donald v. City of Vancouver*, 43 Wn. App. 880, 883 n. 2, 719 P.2d 966 (1986); *also Scannell v. City of Seattle*, 97 Wn.2d 701, 703, 648 P.2d 435 (1982) (rejecting argument that plaintiff could not bring declaratory judgment action because writ of mandamus was exclusive remedy). Indeed, Washington courts frequently entertain actions seeking both declaratory relief and statutory/constitutional writs. *See, e.g.*, *Nollette v. Christianson*, 115 Wn.2d 594, 800 P.2d 359 (1990); *MT Development, LLC v. City of Renton*, 140 Wn. App. 422, 165 P.3d 427 (2007); *Burman v. State*, 50 Wn. App. 433, 749 P.2d 708 (1988).[4]

Here, again, Washington courts have concluded that the possibility of superior court appellate jurisdiction (through a writ or otherwise) trumps the right to bring a declaratory judgment action only where the legislature created an exclusive avenue for judicial review. As noted, the APA is one example. *Evergreen Wash. Healthcare Frontier LLC v. Dep't of Social & Health Servs.*, 171 Wn. App. 431, 452, 287 P.3d 40 (2012) ("declaratory

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[4] In fact, Clyde Hill has the rule backwards. Where the superior court exercises original trial jurisdiction over a controversy, it ordinarily cannot also issue a writ (*i.e.*, exercise its appellate jurisdiction) because, in that situation, the aggrieved party has an "adequate remedy of law." RCW 7.16.040 (writ of review shall be granted only where there is no "plain, speedy and adequate remedy of law"); *see, e.g.*, *Phillips v. City of Seattle*, 51 Wn. App. 415, 422, 754 P.2d 116 (1988) (trial court properly denied writ where plaintiff sought identical relief in original action).

judgment [is] not available if courts can review the challenged agency action under the APA"). LUPA is another. *Grandmaster Sheng–Yen Lu v. King County*, 110 Wn. App. 92, 106, 38 P.3d 1040 (2002) ("Because LUPA provides an adequate alternative means of review, declaratory relief is not proper."). There simply is no statute that limits the superior court's original *trial* jurisdiction over challenges to the legality of municipal fines.

C. New Cingular's Declaratory Judgment Action Was Filed Well Within The Analogous Three Year Limitations Period.

Clyde Hill argues at length that, had New Cingular sought a writ of review, it needed to do so within 30 days of the Mayor's Decision. Resp. Br. at 34-36. Maybe so. But the timeliness of a writ that New Cingular was not required to, and did not, seek is irrelevant. The only issue is whether New Cingular's declaratory judgment action was timely. It was. The Declaratory Judgments Act does not have a limitations period. Thus, Washington courts hold that a declaratory judgment action must be brought within a reasonable time, "determined by analogy to the time allowed for ... a similar [action] as prescribed by statute, rule of court, or other provision." *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 163, 293 P.3d 407 (2013) (citation omitted). If more than one analogous limitation period applies, the longer one should be used. *Id.* at 163.

As New Cingular explained, Op. Br. at 14, the most analogous limitations period is three years—which is "the correct time limit for seeking a refund of an illegal tax or fee" assessed by a municipality. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004) (citing RCW 4.16.080(3)); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992); *Hart v. Clark County*, 52 Wn. App. 113, 758 P.2d 515 (1988). Clyde Hill's sole argument against application of this limitations period is that New Cingular did not seek to "recover" money already paid. Resp. Br. at 4-5 & 37. But the fact that New Cingular brought a declaratory judgment action to *invalidate* an illegal fine *before* it was paid, instead of bringing a refund action to *recover* an illegal fine *after* it was paid, is a distinction without a difference; the nature of the action is exactly the same. The applicable limitations period is the same too.

This Court can reject Clyde Hill's argument that New Cingular's declaratory judgment action should be governed by the "same 30 day time limit" that would apply to a writ. *Id.* at 5 & 37. Once again, Clyde Hill ignores the difference between the superior court's original trial jurisdiction and its appellate jurisdiction. A writ of review requires the court to act only in an appellate capacity and, thus, it is analogous to an appeal; time limits are usually measured in days. A declaratory judgment action, on the other hand, requires the court to decide the issues *de novo* and, thus, it is

analogous—indeed, identical—to any ordinary cause of action; time limits are usually measured in years. *See Schreiner*, 173 Wn. App. at 160-64 (six-year breach of contract limitations period); *Thompson v. Wilson*, 142 Wn. App. 803, 813, 175 P.3d 1149 (2008) (RCW 4.16.130's two-year limitations period); *Cary v. Mason County*, 132 Wn. App. 495, 500-04, 132 P.3d 157 (2006) (RCW 84.86.060's up to one year limitation period).

In fact, the only cases where Washington courts have applied a 30-day deadline to declaratory judgment actions are pre-LUPA land use cases. *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995); *Summit-Waller Citizens Ass'n v. Pierce County*, 77 Wn. App. 384, 895 P.2d 405 (1995); *Concerned Organized Women v. Arlington*, 69 Wn. App. 209, 847 P.2d 963 (1993); *Federal Way v. King County*, 62 Wn. App. 530, 815 P.2d 790 (1991). And they did so not by analogy, but for policy reasons (later reflected in LUPA itself). "The consistent policy in this state is to review decisions affecting use of land expeditiously so that legal uncertainties can be promptly resolved and land development not unnecessarily slowed or defeated by litigation-based delays." *Federal Way*, 62 Wn. App. at 538; *Brutsche*, 78 Wn. App. at 380 ("bright line rule serves the public interest by giving decision makers, land owners and citizens a clear deadline").

Clyde Hill's citation to land use cases is therefore misplaced. New Cingular's declaratory judgment action does not invoke the superior court's

appellate jurisdiction, nor does it raise any policy concerns that warrant a shortened limitations period. The traditional rule of limitation-by-analogy applies. New Cingular's challenge to the validity of an unpaid municipal fine is identical to a challenge to the validity of a paid municipal fee, and the same three year statute of limitations should apply. In all events, New Cingular's complaint—filed less than three months after its administrative remedies were exhausted—was brought within a "reasonable time."

III. CONCLUSION

The trial court's dismissal of New Cingular's declaratory judgment action was erroneous. The court has original jurisdiction under Article IV, § 6 and RCW 2.08.010 over cases involving the "validity of any ... municipal fine." The judgment and award of attorneys' fees must be vacated, and the case remanded for further proceedings on the merits.

RESPECTFULLY SUBMITTED this 25th day of July, 2014.

LANE POWELL PC

By _____
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on July 25, 2014, I caused to be served a copy of the foregoing document to the following person(s) in the manner indicated below at the following address(es):

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Executed on the 25th day of July, 2014, at Seattle, Washington.

Patricia King

Patricia King