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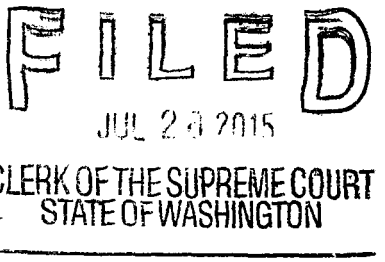

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

New Cingular Wireless PCS, LLC,

Appellant,
v.

City of Clyde Hill, Washington,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner is the City of Clyde Hill, defendant below.

B. COURT OF APPEALS DECISION

The City of Clyde Hill (the "City") seeks review of the published decision of the Court of Appeals, filed on April 20, 2015; and the order denying motion for reconsideration, filed on May 28, 2015. Copies of both decisions are in the Appendix at pages A-1 through A-15.

C. ISSUES PRESENTED FOR REVIEW

1. Where a municipal code requires exhaustion of administrative remedies prior to judicial review of the municipality's final quasi-judicial administrative decision, is a party wishing to appeal that decision required to seek judicial review under the procedures set forth by the Legislature at RCW 7.16.040 (the writ of review statue)?

2. If a party is allowed to bring an action under the Uniform Declaratory Judgments Act ("UDJA"), Ch. 7.24 RCW, to challenge a City's quasi-judicial administrative decision, then is a 30-day time period a reasonable time by analogy to file such action?

D. STATEMENT OF THE CASE

For a number of years the City has imposed a utility tax on telephone businesses such as New Cingular Wireless PCS, LLC ("New Cingular"). In November of 2010, New Cingular made written demand to the City for a refund of utility tax monies for sales of wireless internet services to Clyde Hill customers for a five-year period between November

1, 2005, and September 30, 2010 (the "refund demand"). *CP 560-79* In its refund demand, New Cingular admitted it had collected and paid monies for the City's utility tax in violation of the Internet Tax Freedom Act ("ITFA"), which prohibits the taxing of wireless internet services. *Id.*

New Cingular had originally submitted its tax returns along with declarations verifying the truth and accuracy of the statements made therein. *CP 383-515.* As it had collected and paid taxes in violation of the ITFA, the City determined these declarations contained false statements that violated the City's tax code, CHMC 3.28.130 B.[1]

The City issued New Cingular a notice of violation (NOV) for making false statements in connection with it utility tax returns. *CP 555-558* The City assessed fines under CHMCs 3.28.140 and 1.08.010. App., A- 52 and A- 54. The City's code requires a party challenging an NOV to file a written request for a hearing within 15 days. CHMC 1.08.030. The appeal is heard and decided by the Mayor. *Id.*

New Cingular timely responded to the City with a letter of protest and request for a hearing. *CP 580-585* New Cingular requested permission to appear at the hearing via telephone.[2] *CP 550* Although

[1] The complete text of CHMC 3.28.130 B is set out in the Appendix at A-53.

[2] The statement made by the Court of Appeals in its opinion at page 3, that "The city administrator offered New Cingular the choice of an 'informal hearing' or a decision

New Cingular could have provided evidence at this hearing, including witness testimony, billing records, and any documentation it felt necessary to mount a defense, it appeared only through its attorney (via phone) and relied solely upon its earlier letter of protest. *CP 230-233* New Cingular willfully chose not to submit any witnesses or documentary evidence at its hearing.[3] New Cingular appeared to treat the NOV – and the City's administrative process related to the NOV – as an unimportant nuisance.

The Mayor issued an administrative decision denying New Cingular's appeal and affirming the NOV. *CP 234-237* The City's code states that this decision is final and binding, subject only to an "appeal in superior court." CHMC 1.08.030.[4] App., A-54 to A-55. Had New Cingular wanted to seek judicial review of the Mayor's decision (a quasi-judicial administrative decision), it needed to file a timely statutory writ of

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based on its written protest alone. New Cingular requested an informal hearing," is not supported by the record. In truth, New Cingular is the party that requested a telephonic hearing, which the City granted.

[3] New Cingular's failure to offer any witnesses or documentary evidence resulted in the 5 minute hearing referenced by the Court of Appeals at page 3 of the Op.

[4] The code does not say a party must file a "Notice of Appeal." The City did not make such an argument. The Court of Appeals claim that the City made this argument, Op. at 5, is mistaken. (*See, e.g.,* the VRP at pgs. 11-12, where the City's legal counsel specifically advised the trial court that the City was *not* making this argument. App., A-66 through A- 67. This code provision is important, however, to the extent it indicates: (1) conclusion of the City's administrative process; and (2) that the City believes its decision is subject to the court's appellate jurisdiction.

review pursuant to RCW 7.16.040. It did not. Instead, almost four months later, it filed an action under the UDJA. *CP 1-5* The City answered and counter-claimed, requesting entry of judgment on the amount imposed by the NOV, plus interest and attorney's fees. *CP 10-36*

The City filed a motion to dismiss New Cingular's declaratory judgment action on the grounds that their sole avenue of judicial review had been to file a statutory writ of review pursuant to RCW 7.16 within 30 days of the City's decision; that it did not do so; and that the court could not entertain either (1) an untimely judicial appeal, or (2) an original trial action attempting to collaterally attack the City's decision. *CP 238-239* The trial court granted the City's motion, stating in its order that, "...the Court declines to entertain [New Cingular's] Complaint . . ." *CP 625*

In a published decision, the Court of Appeals reversed the trial court, holding that so long as any administrative remedy is first exhausted, a party may "contest the legality of a municipal fine" by *either* filing a complaint for declaratory judgment (which invokes the court's *trial* jurisdiction), *or* a petition for certiorari under RCW 7.16 (which invokes the court's *appellate* jurisdiction). Op. at 1. Although the court did not reach the question of the time limit applicable to a declaratory judgment action, it stated: "We leave that issue to the trial court on remand, holding

only that it is inappropriate to apply a 30-day time limit by analogy to an appellate proceeding." Op. at 11 (emphasis added). The court declined reconsideration to clarify its ruling regarding the time limit applicable to a declaratory judgment action. App., A-14 to A-15.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeal's decision involves a significant question of law under the Washington State Constitution, Article IV, sec 6

The Court of Appeals misinterpreted Art. IV, sec. 6 of our State Constitution. Art. IV, sec. 6 vests the superior courts with jurisdiction over a long list of cases, including cases that fall within the following catch-all provisions: "for such special cases and proceedings as are not otherwise provided for," and "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court[.]"[5] Obviating the need for the State to set up special courts to hear tax, impost, assessment, toll, or municipal fine issues, Art. IV, sec. 6 also vests authority in the superior courts to hear "cases at law which involve . . . the legality of any tax, impost, assessment, toll, or municipal fine, . . .".[6]

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[5] The full text of Art. IV, sec 6 can be viewed in the Appendix at A-49.

[6] In its opinion, at 4, the Court of Appeals cited to *only* the first clause of the second paragraph of Art. IV, sec. 6, quoting the Constitution as follows:

The Court of Appeals correctly noted that Art. IV, sec. 6 "pertains to both original trial jurisdiction and original appellate jurisdiction." Op. at 4. The court also observed that the Legislature has authority to set up procedural requirements for invoking the superior courts' jurisdiction. Op. at 4-6. Finally, the court correctly noted that the Legislature has set up particular statutes over the years to address the unique circumstances presented by certain administrative appeals, such as the Land Use Petition Act ("LUPA"), RCW 36.70C, for appeals of a local jurisdiction's final land use decisions; and the Administrative Procedures Act ("APA"), RCW 34.05, for appeals of state administrative agencies' decisions. Op. at 6.

Unfortunately, the court erred by failing to acknowledge that long ago (prior to 1895) the Legislature had enacted the writ statute, RCW 7.16.040, as the exclusive means for New Cingular to obtain judicial review of the City's administrative decision. RCW 7.16.040 provides:

> The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine. [stet]

The Court of Appeals ended its citation to Art. IV, sec. 6 with a period (".") after the words "municipal fine." In fact, this constitutional provision does *not* end with those words, but proceeds forward with nine more clauses and about 111 more words; granting original jurisdiction in numerous more instances. Appendix at A-49. The fact that the Constitution grants jurisdiction to the superior courts with regard to "municipal fines" is not unique. It merely means that our state's framers did not want to set up a separate court to hear cases involving the "legality of any tax, impost, assessment, toll, or municipal fine."

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

It is undisputed that the writ statute applies to non-land use[7] quasi-judicial administrative decisions. Both New Cingular and the Court of Appeals agree that the Mayor's decision affirming the NOV is an administrative decision subject to the writ statute.[8] Op. at 7. But without citation to relevant authority, the court held that the writ statute is not the exclusive means to seek judicial review of a "municipal fine." Instead, according to the court, New Cingular has a choice of whether to file a writ action under RCW 7.16 or a declaratory judgment action under the UDJA.

The Court of Appeals decision is wrong. The court tries to justify its decision by stating that because New Cingular was challenging a "municipal fine," and because the Legislature allegedly had not set up special procedures governing judicial review of "municipal fines" – as it

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[7] As noted previously, since 1995 land use decisions have been subject to LUPA.

[8] New Cingular has never disputed that the City's decision here meets the definition of a quasi-judicial administrative decision. *See, e.g., Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244-245, 821 P.2d 1204 (*1992*). *See also, CP 253-255.*

had with land use decisions in LUPA and state administrative agencies' decisions in the APA – then New Cingular "had a choice that is not available to a party who wishes to challenge a land use decision or an administrative agency decision and is subject to statutory procedural requirements in doing so." Op. at 7. The court concluded that "New Cingular could invoke the superior court's original jurisdiction over municipal fines *either* by filing for a writ of review under RCW 7.16.040 (appellate jurisdiction) or by filing a complaint (trial jurisdiction)." Op. at 7 (emphasis in original).[9] The Court of Appeals holding is unprecedented.

The Court of Appeals decision is bogged down in concepts of original versus appellate trial court jurisdiction. The Constitution requires that judicial review be available to litigants with regard to administrative decisions. This requirement applies to all administrative decisions; the type of administrative decision is of no import so long as an avenue of judicial review is available. Here, the Legislature has prescribed the

[9] In partial support of this novel theory, the Court of Appeals cited, without explanation, to its own decision in *Tacoma v. Mary Kay*, 117 Wn. App. 111, 70 P.3d 144 (2003). But *Mary Kay* does not support the court's decision. *Mary Kay* held that the superior court's jurisdiction cannot be compelled by a Tacoma city code provision that purportedly required the filing of a "Notice of Appeal" from the City's administrative decision. But *Mary Kay* did not address the issue of whether the superior court has concurrent trial *and* appellate jurisdiction over review of non-land use administrative decisions (as the Court of Appeals held in the case at bar), nor did *Mary Kay* address the issue of whether an appellant could chose which jurisdiction to invoke. *Mary Kay* is not relevant and does not support the court's published opinion.

process for securing judicial review of certain types of decisions, such as land use decisions (LUPA), state agency decisions (APA) and all other decisions (RCW 7.16).[10]

The Court of Appeals decision incorrectly assumes that if the Legislature has not enacted a prescribed process for seeking judicial review of a specifically identified type of administrative decision (such as, in this case, a "municipal fine"), then Art. IV, sec. 6 of the Constitution provides a litigant with the right to circumvent the administrative process and go to court via the UDJA. In fact, under the court's constitutional distinction between trial and appellate jurisdiction, nothing prevents LUPA or APA litigants from circumventing those statutes by invoking constitutionally-based jurisdiction in the superior courts via the UDJA.[11]

The Court of Appeals has misinterpreted the Constitution and the Legislature's intent. The fact that the Legislature has set up specific procedures for judicial review of certain types of decisions, such as land

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[10] Even the courts by court rule have lawfully prescribed how appellate jurisdiction may be exercised. *See, e.g., State v. Rolax*, 104 Wn.2d 129, 702 P.2d 1185 (1985)(a motion on the merits per RAP 18.14 is a proper and constitutional means of obtaining judicial review in criminal cases); *In re Detention of Petersen,* 145 Wn.2d 789, 42 P.3d 952 (2002)(discretionary review procedures satisfy constitutional right of alleged sexually violent predator to judicial review).

[11] Case law does hold to the contrary, and the Court of Appeals decision is in conflict with those cases. This is just another example of how the court's decision does not make sense.

use decisions under the LUPA, *does not mean that RCW 7.16 (the writ statute) has become obsolete with regard to securing judicial review of other types of administrative decisions.* On the contrary, RCW 7.16.040 clearly contains the Legislature's required procedures for securing judicial review of all types of quasi-judicial administrative decisions that have not otherwise been addressed by separate statutes. Those procedures have long been held by this Court to be the proper means of obtaining judicial review for administrative decisions. *See Reeder v. King County,* 57 Wn.2d 563, 358 P.2d 810 (1961). Prior to enactment of the LUPA and the APA, appeals of land use decisions and agencies' decisions were reviewed by the courts via the statutory writ of review, RCW Ch. 7.16, *even though the writ statute does not specifically single out those categories of administrative decisions.* The absence of specific language in the writ statute singling out "municipal fines" as within the scope of the statute is no basis for the Court of Appeals to reject the writ statute.

The Court of Appeals decision to completely ignore the requirements of the writ statute in this case, simply because RCW 7.16.040 does not state that it specifically applies to administrative decisions regarding "municipal fines," is unsupported. That is not how the writ statute and Art. 4, sec. 6 of the Constitution have historically been

interpreted. RCW 7.16 more than adequately assures litigants the right to obtain judicial review in accordance with Art. IV, sec. 6, while still preserving the administrative process. The Court of Appeals erroneous constitutional analysis merits review by this Court.

2. The Court of Appeals published decision conflicts with existing precedent from this Court and other appellate courts / RAP 13.4(b)(1)(2)

a. The court's decision conflicts with cases requiring parties to seek judicial review of administrative decisions via statutory writ proceedings / *Reeder v. King County*

The pivotal issue in this petition is whether the sole means of obtaining judicial review of a municipality's final administrative decision, such as the City's decision on the municipal fine issued to New Cingular, is by filing a timely writ of review pursuant to RCW 7.16.040. The Court of Appeals published opinion, which allowed New Cingular to challenge the City's decision via a complaint for a declaratory judgment, is in direct conflict with *Reeder v. King County,* 57 Wn.2d 563, 358 P.2d 810 (1961). In *Reeder,* this Court held that the proper procedure for seeking review of a local jurisdiction's quasi-judicial administrative decision is not a declaratory judgment action, but a statutory writ proceeding under RCW 7.16.040. 57 Wn.2d at 564. *Reeder* dismissed the plaintiff's declaratory judgment action after finding that a writ action was available and would

have afforded the plaintiff with all the relief to which he was entitled. In the present case, a writ action was likewise available under RCW 7.16.040, and it too would have afforded New Cingular with all the relief it was seeking.

But instead of following *Reeder,* the Court of Appeals held, for the first time, that a city's quasi-judicial administrative decision may be subject to judicial review only if the Legislature has first specifically enacted legislation setting forth a special procedure for seeking judicial review (such as the LUPA for land use cases); and, if not, then a party can choose to invoke the court's *trial* jurisdiction via a declaratory judgment action. The court incorrectly framed the "central issue" as follows: ". . . whether the *legislature* has established any specific procedures by which a party must challenge *the legality of a municipal fine.*" (Op. at 5; emphasis added.) Finally, the Court of Appeals held that because the writ statute itself, RCW 7.16.040, does not specifically state that it applies to municipal fines, it does "not circumscribe New Cingular's ability to invoke the superior court's original *trial* jurisdiction" via a declaratory judgment action to "challenge" the City's final decision with regard to its municipal fine. Op. at 7 (emphasis in original).

This last comment by the Court of Appeals is of most concern to the City, as the writ statute does not specifically state that it applies to *any* type of case at all (such as, for instance, cases regarding "municipal fines," or "tax assessments"). Under the court's analysis, parties are no longer required to file writ actions under RCW 7.16.040 for judicial review of a municipality's final administrative decision in *any* type of case; because the statute does not address any particular type of case. The result is that parties can now simply choose to ignore a municipality's final administrative decision, even though they used to be required to appeal those decisions under the writ statute. *See, Reeder, supra.* Such a result ignores this Court's holding in *Reeder;* renders RCW 7.16.040 voluntary -- at best -- and in reality, obsolete; and eviscerates this Court's long-standing requirement for exhaustion of administrative remedies.

New Cingular argued below that *Reeder*, which was decided in 1961, had already been rejected by the adoption of CR 57 in 1967 *and* this Court's decision in *Ronken v. Bd of County Comm'rs*, 89 Wn.2d 304, 572 P.2d 1 (1977). The Court of Appeals did not address this argument. To the extent this Court considers it, this argument is without merit.

First, CR 57 states, in part: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where

it is appropriate."[12] This rule does not change the law. Writs of review were always necessary to seek judicial review of an administrative decision, thus, declaratory relief was never an "appropriate" remedy and was not made appropriate by this rule.

Second, New Cingular's argument that *Reeder* was "rejected" by *Ronken* is also incorrect. The two cases are not comparable because they do not address the same type of governmental decisions. In *Reeder,* as in the case at bar, the County issued a quasi-judicial administrative decision (a land use decision which, at that time, was subject to review under writs of certiorari pursuant to RCW Ch. 7.16). This Court held that the plaintiff could not challenge the decision via a declaratory judgment action because a writ action was available and would have afforded him all the relief to which he was entitled. *Reeder,* 57 Wn. 2d at 564.

In contrast, in *Ronken* the County Board of Commissioners was sued by a local union and a local contractors' association for numerous policy decisions it had made to have public works projects completed by county employees instead of letting the work out to the private sector through the competitive bidding process.[13] 89 Wn.2d at 306. The

[12] The complete text of CR 57, is set forth in the Appendix at A-46.

[13] The trial court held that the Board's actions violated the competitive bidding procedures set by RCW 36.32.240, .250, and 36.77.060. *Ronken,* 89 Wn.2d at 306.

contested decisions in *Ronken*, unlike in *Reeder* and the case at bar, were *not* quasi-judicial administrative decisions. Instead, they were numerous "policy" decisions to which the plaintiffs were not even direct parties (unlike the single interpretation of a city code provision in *Reeder;* and/or the single imposition of a municipal fine directly against New Cingular in this case). Thus, *Ronken* is not comparable to *Reeder* and did not effect, much less overrule, this Court's decision in *Reeder*.

b. The court's decision conflicts with cases requiring the exhaustion of administrative remedies / *Cost Management v. City of Lakewood* and *IGI Resources v. City of Pasco*

The Court of Appeals decision is also contrary to the Washington courts' mandate of exhaustion of administrative remedies. *See, e.g., Cost Management Services, Inc. v. City of Lakewood*, 178 Wn.2d 635, 648, 310 P.3d 804 (2013)(holding that a taxpayer seeking a refund for alleged overpayment of taxes to a local jurisdiction is first required to exhaust the jurisdiction's available administrative remedies). *See, also, IGI Resources, Inc. v. City of Pasco*, 180 Wn. App. 638, 642, 325 P.3d 275 (1914), which contains a list outlining the main purposes supporting exhaustion:

> (1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting

> the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

By allowing New Cingular to proceed with a declaratory judgment action instead of requiring the company to file a timely application for a statutory writ of review, the court failed to serve the purposes of exhaustion. Specifically, the court's decision (1) encourages the deliberate flouting of administrative processes; (2) allows New Cingular to avoid aiding judicial review by permitting it to avoid the development of facts during the administrative proceeding; and (3) discourages judicial economy by allowing unnecessary judicial involvement.

In an attempt to align its decision with this state's strong exhaustion policy, the court claimed that allowing New Cingular to ignore the City's administrative decision and proceed by way of a complaint in superior court (forgoing any judicial review of the City's decision and allowing New Cingular to start over, *i.e.,* take the proverbial second bite at the apple) did not render the City's administrative procedures meaningless because it gave the City "an opportunity to correct any errors Clyde Hill may have made in imposing the fine," and correcting errors is "one of the purposes served by the doctrine of exhaustion of remedies." Op. at 8. This reasoning is flawed. A properly-operated administrative process will

afford all parties that opportunity, subject to judicial review. But more critically, in allowing parties to use the UDJA, why would participants ever seriously participate in the administrative process? New Cingular did not do so here (i.e., where it chose not to submit any witnesses or documentary evidence; chose only to appear through one representative; and chose to have its representative appear via telephone).

The City is not aware of any case(s) where exhaustion is required when only one of the purposes served by exhaustion is met; nor is the City aware of any case(s) that require exhaustion, but then allow an appellant to ignore the administrative decision and file a new complaint in court. This result is unheard of; it completely undermines the exhaustion requirement.

4. The time-limit to file for review of a local jurisdiction's administrative decision, by comparison with time-limits in similar cases, should be 30 days

a. Writs of review

New Cingular failed to timely seek a writ of review, which should have been filed within 30 days of when the City issued its decision. The general rule is that a statutory writ should be sought within the same period as that allowed for an appeal. *Cost Mgmt Srvs, supra.* In *Brutche v. Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995), the court held that where a statute does not provide a time limit for an appeal, a "reasonable time"

shall be "determined by analogy to the time allowed for appeal of a similar decision *as prescribed by statute, rule of court, or other provision.*" 78 Wn. App. at 376-77 (emphasis added).

Here, the time limit to file for an administrative appeal of the City's NOV under the City's Code is 15 days, CHMC 1.08.030; the time limit to file a judicial appeal of a local jurisdiction's land use decision under the LUPA is 21 days, RCW 36.70C.040(3); the time limit to file a judicial appeal of a state agency's decision is 30 days as provided for in the APA, RCW 34.05.542(2); and the time limit to file an appeal of a superior court decision to the Court of Appeals is 30 days as provided for by court rule, RAP 5.2. Assuming the most "reasonable" time by analogy to these time limits is the longest time, 30 days, New Cingular should have filed its writ within 30 days of the date the City's decision was issued.

b. Declaratory judgment action

Even if this Court ultimately determines that New Cingular could commence a declaratory judgment action given the facts of this case, it did not do so in a timely manner, as the same 30-day time limit applicable to a writ action applies to a case brought under the UDJA. *Summit-Waller Assn. v. Pierce County*, 77 Wn. App. 384, 392, 895 P.2d 405 (1995). The Court of Appeals statement that a 30-day time limit does not apply to the

declaratory judgment action in this case "by analogy to an appellate proceeding" (Op. at 11) is unsupported. New Cingular argued that the three-year statute of limitations applicable to the recovery of municipal taxes or fees found in RCW 4.16.080(3) should apply. This argument has no merit. This is not an action to "recover" taxes or fees. It is an appeal of an administrative decision, no matter how it is packaged. The three-year statute of limitations is simply inapplicable.

5. This petition addresses an issue of substantial public interest / RAP 13.4(b)(4)

Municipalities across the state routinely impose monetary fines and penalties for civil violations of their codes, and they provide administrative appeal hearings. A decision issued by the municipality is a final decision, unless appealed to the superior court for judicial review. The Court of Appeals decision, which allows a party who has gone through the administrative appeals process to then completely ignore the local jurisdiction's administrative decision by filing a complaint for declaratory judgment (which renders the administrative process, including the administrative record and final decision, meaningless), significantly diminishes the value and judicial economy in local administrative appeal procedures. It makes a mockery of the exhaustion of administrative remedies requirement. Thus, review is merited under RAP 13.4(b)(4).

F. CONCLUSION

The heart of this matter involves the proper procedure for obtaining judicial review of a municipality's non-land use quasi-judicial administrative decision. In 1895, over 100 years ago, the Legislature enacted the writ statute, RCW 7.16, setting forth the procedures applicable for obtaining judicial review of administrative decisions. Since then, the Legislature has enacted separate legislation to address the unique circumstances that face judicial appeals in certain types of administrative decisions. *But the Legislature has never repealed the writ statute, RCW 7.16.040, nor given the courts any indication that the statutory writ of review is no longer necessary for appeal of all other administrative decisions to which it previously and historically applied*, such as the City's decision on the municipal fine assessed against New Cingular in this case. The Court of Appeals opinion in this case makes assumptions regarding the Constitution and the intent of the Legislature that are simply unsupported. Furthermore, the court's decision completely undermines the requirement of exhaustion of administrative remedies; making a local jurisdiction's administrative processes and procedures meaningless, a waste of time, and futile. For these reasons, the City respectfully requests the Court to accept review.

DATED this 29th day of June, 2015.

Respectfully submitted,

STEPHANIE CROLL LAW

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Stephanie E. Croll, WSBA #18005
Attorney for City of Clyde Hill

OGDEN MURPHY WALLACE, P.L.L.C.

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By: Philip Talmadge (sec per approval)
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Attorney for City of Clyde Hill

CERTIFICATE OF SERVICE

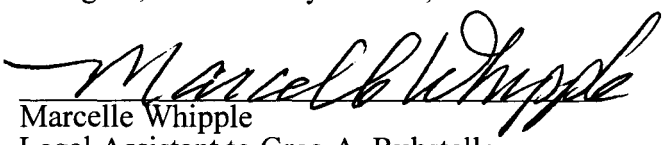
I hereby certify that I have this day served the PETITION FOR REVIEW, filed by the City of Clyde Hill upon all parties of record in this proceeding, via legal messenger:

Scott M. Edwards
Lane Powell, PC
1402 5th AVE, Suite 4100
Seattle, WA 98101-7107

and sent the original by legal messenger for filing with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

DATED at Seattle, Washington, this 29th day of June, 2015.



Marcelle Whipple
Legal Assistant to Greg A. Rubstello

APPENDIX

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RICHARD D. JOHNSON,
Court Administrator/Clerk

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April 20, 2015

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CASE #: 71626-3-I
New Cingular Wireless, Appellant v. City of Clyde Hill, Respondent

King County, Cause No. 13-2-16074-9 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "Judgment for Clyde Hill is reversed, and the case is remanded for further proceedings, including consideration of New Cingular's motion for summary judgment. The award of attorney fees to Clyde Hill is also reversed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Theresa B. Doyle

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS, LLC, a Delaware limited liability company,	)	No. 71626-3-I
Appellant,	)	DIVISION ONE
v.	)	PUBLISHED OPINION
THE CITY OF CLYDE HILL, WASHINGTON,	)	FILED: April 20, 2015
Respondent.	)	

BECKER, J. — A complaint for declaratory judgment invokes the superior court's trial jurisdiction, while a petition for certiorari invokes the superior court's appellate jurisdiction. Either avenue is available as a means of contesting the legality of a municipal fine in superior court, so long as any administrative remedy is first exhausted.

In this appeal, the party contesting the legality of a municipal fine is appellant New Cingular Wireless PCS LLC. For years, New Cingular paid a utility tax to the City of Clyde Hill on wireless data services provided to Clyde Hill residents. New Cingular was eventually named as a defendant in a nation-wide class action lawsuit alleging that such taxes are preempted by federal law and wireless companies were improperly billing their customers for them. As part of a

settlement agreement, New Cingular agreed to seek recovery of the disputed customer charges from the local taxing jurisdictions. Accordingly, New Cingular filed a claim with Clyde Hill in November 2010, asking the city to refund $22,053.38 in utility taxes.[1]

This appeal is not about whether Clyde Hill is obligated to refund the utility tax payments. This appeal concerns a municipal fine of $293,121 that Clyde Hill imposed on New Cingular on July 6, 2012. According to the notice of violation issued by Clyde Hill, New Cingular violated the municipal code by making "false" statements or misrepresentations in utility tax returns.[2] The notice of violation asserted that the company's tax returns were false because they did not inform the city that the tax payments were for services that should not have been taxed:

> By its own admission, New Cingular as far back as November, 2005, unilaterally decided to collect monies from its customers that it was not entitled to collect under federal law nor required to collect by any order or demand of the City. New Cingular included such monies in the amount of utility tax it reported was due the City without identifying to the City that the amount reported on its returns included monies billed its customers through September 7, 2010, for tax payments on services exempt from taxation under federal law. . . . New Cingular by its conduct seeks in bad faith to transfer the financial consequences of its illegal actions upon the City and other local jurisdictions unaware of New Cingular's illegal collections and reporting by seeking refunds of its tax payments, interest and attorney fees and costs from the City.

Notice of Violation (July 6, 2012). Clyde Hill notified New Cingular that it would also be liable for the city's attorney fees and costs.

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[1] The Clyde Hill Municipal Code allows a taxpayer to request a refund for overpayment. CHMC § 3.28.090A.

[2] See CHMC § 3.28.130B.

Clyde Hill's municipal code provides that a fine may be protested by an appeal to the mayor. CHMC 1.08.030. New Cingular filed a timely written protest, asserting that the fine could not be imposed absent evidence that the tax returns were intentionally misleading. The city administrator offered New Cingular the choice of an "informal hearing" or a decision based on its written protest alone. New Cingular requested an informal hearing.

In advance of the hearing, New Cingular received a letter from the city attorney for Clyde Hill offering to cancel the fine if New Cingular withdrew its refund claim. New Cingular did not accept this offer.

The hearing consisted of a five-minute telephone call between New Cingular's attorney and Clyde Hill Mayor George Martin. Mayor Martin issued a written "Final Decision" on January 22, 2013, denying and dismissing New Cingular's protest.

New Cingular filed this lawsuit in superior court on April 10, 2013, requesting a declaratory judgment that the fine was invalid. Clyde Hill answered and counterclaimed, seeking judgment on the fine plus interest and attorney fees. Clyde Hill then moved for summary judgment on the ground that New Cingular had 30 days to file a "judicial appeal" of the mayor's decision and had missed that deadline:

> New Cingular had 30 days in which to file a **judicial appeal of the Mayor's Final Decision** by application for a **statutory writ of review** pursuant to Ch. 7.17 RCW. New Cingular did not timely appeal. Thus, the Mayor's Final Decision is final and binding, and the superior court is without jurisdiction to entertain either (1) an untimely judicial appeal of the Mayor's Final Decision, or (2) an "original trial action" challenging the validity of the Notice of

> Violation and attempting to collaterally attack the Mayor's Final Decision affirming the Notice of Violation.

Clyde Hill thus took the position that New Cingular's only avenue of relief from the fine was a statutory writ of review of the mayor's decision.

The superior court agreed that New Cingular "should have sought review by petition for a writ of review." The court dismissed New Cingular's complaint without ruling on New Cingular's motion, granted summary judgment to Clyde Hill, and awarded Clyde Hill its attorney fees incurred in enforcing the fine. New Cingular appeals.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). When reviewing an order for summary judgment, an appellate court engages in the same inquiry as the trial court. Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 662, 63 P.3d 125 (2003).

The state constitution vests superior courts in Washington with original jurisdiction in cases involving the legality of a municipal fine.

> The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine.

WASH. CONST. art. IV, § 6; RCW 2.08.010. Article IV, section 6 "pertains to both original trial jurisdiction and original appellate jurisdiction." James v. County of Kitsap, 154 Wn.2d 574, 588, 115 P.3d 286 (2005).

New Cingular's objective in filing a complaint for declaratory judgment was to invoke the superior court's original *trial* jurisdiction. Clyde Hill contends that

once the mayor reviewed the fine and produced a decision affirming it, the superior court was limited to its *appellate* or review jurisdiction.

Clyde Hill's code provides that the determination by the mayor "shall be final, binding, and conclusive unless a judicial appeal is appropriately filed with the King County superior court." CHMC 1.08.030. Below, Clyde Hill asserted this code provision as a basis for arguing that the only way New Cingular could get into superior court was by invoking the court's appellate jurisdiction. On appeal, Clyde Hill has correctly abandoned that argument. A municipality cannot limit the jurisdiction of the superior courts or prescribe the manner in which they operate. City of Spokane v. J-R Distributors, Inc., 90 Wn.2d 722, 727-29, 585 P.2d 784 (1978). Accordingly, the reference in the Clyde Hill code to the mayor's decision being "final" unless a "judicial appeal" is filed is not relevant to our analysis. Clyde Hill cannot use its municipal code to limit the superior court to its appellate jurisdiction.

The central issue, then, is whether the legislature has established any specific procedures by which a party must challenge the legality of a municipal fine. The constitutional power to hear a particular type of controversy "does not obviate procedural requirements established by the legislature." James, 154 Wn.2d at 588. It is well established that "where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required

substantial compliance or satisfaction of the spirit of the procedural requirements before they will exercise jurisdiction over the matter." James, 154 Wn.2d at 588.[3]

Clyde Hill tries to shoehorn the mayor's affirmance of the fine into the same mold as land use decisions and administrative agency decisions. But the delegated power of municipalities to make land use decisions is constrained in Title 35 RCW and Title 36 RCW by a network of procedural statutes designed to assure basic fairness. And the Land Use Petition Act, chapter 36.70C RCW, comprehensively regulates the procedures that must be followed to challenge a land use decision in superior court. James, 154 Wn.2d at 582-83. Administrative agencies are likewise statutory creatures. Their decisions typically reach the superior court through the Administrative Procedure Act, chapter 34.05 RCW. No statute articulates specific procedures for getting into superior court with a challenge to the legality of a municipal fine.

Clyde Hill offers the writ of review statute, RCW 7.16, as the source of procedural requirements that New Cingular was required to follow:

> 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,

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[3] A superior court may have subject matter jurisdiction in a particular type of case, and yet still properly dismiss such a case on procedural grounds. See James, 154 Wn.2d at 588 (statutory procedural requirements do not abrogate judicial power vested in the courts by the constitution, but may control the circumstances under which a court will exercise its jurisdiction); Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 316, 76 P.3d 1183 (2003) (If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction). Any *procedural* defect in the means used to invoke the court's jurisdiction is not a jurisdictional error that can be raised for the first time on appeal under RAP 2.5(a)(1). There is no doubt that the superior court has subject matter jurisdiction in this case. The controversy is about procedure.

> board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

RCW 7.16.040.

The writ statute does provide a means of invoking the superior court's original *appellate* jurisdiction, and it explains the circumstances under which a writ of review should be granted. But it does not say that a writ of review is the exclusive means of resolving a dispute over the validity of a municipal fine; indeed, it makes no provision specific to fines. Thus, its procedural requirements do not circumscribe New Cingular's ability to invoke the superior court's original *trial* jurisdiction.

A superior court's original jurisdiction over a claim does not relieve it of its responsibility to consider whether the doctrine of exhaustion of administrative remedies should apply to the claim. Cost Mgmt. Srvs., Inc. v. City of Lakewood, 178 Wn.2d 635, 648, 310 P.3d 804 (2013). Here, as Clyde Hill concedes, New Cingular did exhaust its administrative remedies. New Cingular filed a written protest of the notice of violation and obtained a review by the mayor. Having exhausted its administrative remedies, New Cingular had a choice that is not available to a party who wishes to challenge a land use decision or an administrative agency decision and is subject to statutory procedural requirements in doing so. New Cingular could invoke the superior court's original jurisdiction over municipal fines *either* by filing for a writ of review under RCW 7.16.040 (appellate jurisdiction) *or* by filing a complaint (trial jurisdiction). See City of Tacoma v. Mary Kay, Inc., 117 Wn. App. 111, 115-16, 70 P.3d 144

(2003). New Cingular chose to invoke the superior court's original trial jurisdiction by filing a complaint.

Clyde Hill contends that allowing New Cingular to proceed by way of a complaint rather than by filing for a writ of review renders the hearing before the mayor a "superfluous" proceeding. We disagree. New Cingular's protest allowed the mayor an opportunity to correct any errors Clyde Hill may have made in imposing the fine. Providing an opportunity to correct error before resort to the courts is one of the purposes served by the doctrine of exhaustion of remedies. IGI Res., Inc. v. City of Pasco, 180 Wn. App. 638, 642, 325 P.3d 275 (2014).

Clyde Hill makes a fleeting suggestion that New Cingular was collaterally estopped from attacking the notice of violation once the mayor affirmed it and no appeal was taken, citing Shoemaker v. City of Bremerton, 109 Wn.2d 504, 745 P.2d 858 (1987). Shoemaker involved a police officer who, after dropping a civil service appeal filed under RCW 41.12.090, sued in federal court alleging his demotion was retaliatory. The court held that a finding made in the prior adjudication before the civil service commission, an administrative body, collaterally estopped the officer from relitigating the basis for his demotion in court. Clyde Hill does not brief how the elements of collateral estoppel are satisfied in this case. The appellant in Shoemaker was subject to a *statute* that prescribes an administrative procedure for challenging an adverse employment action. The statutory procedure permits a limited appeal to the superior court on the record developed before the civil service commission. RCW 41.12.090. As

discussed above, Clyde Hill does not identify an analogous statute setting up an administrative procedure for contesting a municipal fine.

Finally, Clyde Hill contends that New Cingular's right to obtain a writ of review under RCW 7.16.040 precludes the granting of a declaratory judgment. Clyde Hill relies on Reeder v. King County, 57 Wn.2d 563, 358 P.2d 810 (1961). Reeder held that a declaratory judgment action was not available to property owners involved in a rezone dispute with King County because "the writ of certiorari was available to them and would have afforded them all relief to which they may be entitled in this case." Reeder, 57 Wn.2d at 564. New Cingular's reply brief points out that the bar erected by Reeder is no longer absolute after the adoption in 1967 of CR 57,[4] as recognized by Ronken v. Board of Commissioners of Snohomish County, 89 Wn.2d 304, 310, 572 P.2d 1 (1977).[5]

Ronken does direct courts to be "circumspect" in granting declaratory relief if an alternative remedy is available. Ronken, 89 Wn.2d at 310. Declaratory relief is often held to be unavailable when it is sought as a means of avoiding the strict statutory procedural rules and short time limits that typically apply to land use decisions and administrative agency decisions. See, e.g., Evergreen Wash. Healthcare Frontier LLC v. Dep't of Soc. & Health Servs., 171 Wn. App. 431, 452, 287 P.3d 40 (2012) (a declaratory judgment is not available if

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[4] CR 57 states in part, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

[5] Clyde Hill has filed a motion to strike the portion of New Cingular's reply brief that argues Ronken in opposition to Reeder. Clyde Hill contends that if New Cingular wanted to rely on Ronken, the case should have been cited in the opening brief of appellant. We deny the motion. Explaining why a respondent's argument is incorrect is a proper subject for a reply brief.

courts can review the challenged agency action under the Administrative Procedure Act), review denied, 176 Wn.2d 1028 (2013); Grandmaster Sheng-Yen Lu v. King County, 110 Wn. App. 92, 106, 38 P.3d 1040 (2002) (because the Land Use Procedure Act provides an adequate alternative means of review, declaratory relief is not proper). But Clyde Hill has identified no statute establishing strict procedural rules and short time limits in connection with a mayor's decision that his city has issued a valid fine. Under these circumstances, we conclude the superior court is free to exercise its trial jurisdiction by hearing New Cingular's complaint for a declaratory judgment.

Clyde Hill contends the dismissal of New Cingular's declaratory judgment action can be affirmed on the alternative ground of untimeliness. A declaratory judgment action must be brought within a reasonable time, determined by analogy to the limitation period for a similar suit. Schreiner Farms, Inc. v. Am. Tower, Inc., 173 Wn. App. 154, 163, 293 P.3d 407 (2013). New Cingular filed its complaint more than two months after the mayor's decision. Clyde Hill argues that the proper analogy is to the 30-day deadline typical of appeals. New Cingular replies that the most analogous time limit is the three-year limitations period applicable to tax or municipal fee refunds. RCW 4.16.080(3); Carrillo v. City of Ocean Shores, 122 Wn. App. 592, 610, 94 P.3d 961 (2004).[6]

[6] Clyde Hill has moved to strike this portion of New Cingular's brief, along with the Reeder/Ronken discussion, on the basis that it is a new argument improperly raised in the reply brief. We deny the motion. The issue of untimeliness as an alternative ground for affirmance was raised in Clyde Hill's brief of respondent, and New Cingular is entitled to reply to it.

The trial court dismissed New Cingular's complaint solely on the ground that relief should have been sought by means of a petition for a writ of certiorari. The court did not reach the question of what time limit applies to a declaratory judgment action contesting the legality of a municipal fine. We leave that issue to the trial court on remand, holding only that it is inappropriate to apply a 30-day time limit by analogy to an appellate proceeding. The order of dismissal will not be affirmed on that alternative ground.

To summarize, New Cingular's complaint for declaratory judgment properly invoked the superior court's original trial jurisdiction to adjudicate this dispute involving the legality of a municipal fine. In hearing New Cingular's complaint for declaratory judgment, the superior court is to consider the legality of the fine de novo and will not be limited to the facts and arguments in the record developed in the hearing before the mayor.

Judgment for Clyde Hill is reversed, and the case is remanded for further proceedings, including consideration of New Cingular's motion for summary judgment. The award of attorney fees to Clyde Hill is also reversed.

Becker, J.

WE CONCUR:

Trickey, J

Dwyer, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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May 28, 2015

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CASE #: 71626-3-I
New Cingular Wireless, Appellant v. City of Clyde Hill, Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure
c: The Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NEW CINGULAR WIRELESS PCS, LLC, a Delaware limited liability company, Appellant, v. THE CITY OF CLYDE HILL, WASHINGTON, Respondent.	No. 71626-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, City of Clyde Hill, has filed a motion for reconsideration of the opinion filed on April 20, 2015, and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration of the opinion filed on April 20, 2015, is denied.

DATED this 28th day of May, 2015.

FOR THE COURT:

Becker, J.

Judge

2015 MAY 28 AM 10:41

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC, a Delaware limited liability company, Plaintiff, v. THE CITY OF CLYDE HILL, WASHINGTON, Defendant.	No. _____ COMPLAINT

Plaintiff, NEW CINGULAR WIRELESS PCS LLC ("New Cingular"), alleges as follows:

PARTIES

1. Plaintiff, New Cingular is a Delaware limited liability company doing business in King County, Washington.

2. Defendant, City of Clyde Hill ("Clyde Hill"), is a city of the State of Washington.

JURISDICTION AND VENUE

3. This lawsuit challenges the legality of a municipal fine asserted by the City of Clyde Hill. Jurisdiction is proper in this Court under Washington Constitution Art. 4 § 6 and RCW 2.08.010, which vest the Superior Court with original jurisdiction over all matters involving "legality of any tax, impost, assessment, toll or municipal fine."

4. Venue is proper in King County, Washington, under RCW 4.12.025.

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GENERAL ALLEGATIONS

5. New Cingular provides wireless telephone service to customers in Washington and throughout the United States, including customers in Clyde Hill.

6. Clyde Hill, like thousands of municipalities throughout the United States, imposes a local tax on wireless telephone service.

7. New Cingular charges residents of Clyde Hill for City of Clyde Hill taxes and remits the tax to the City of Clyde Hill.

8. New Cingular was named a defendant in numerous class action lawsuits filed around the country alleging that some charges on New Cingular's wireless telephone bills are preempted from local taxation by the Federal Internet Tax Freedom Act ("ITFA"), 47 U.S.C. § 151. Those suits sought refunds of state and local taxes allegedly overpaid on charges subject to ITFA.

9. New Cingular denied all allegations of wrongdoing asserted in the complaints and asserted numerous defenses.

10. The class action lawsuits were all transferred to the United State District Court for the Northern District of Illinois pursuant to transfer orders from the Judicial Panel on Multidistrict Litigation.

11. The U.S. District Court subsequently approved the terms of a settlement agreement between the parties (the "Settlement Agreement"). The Settlement Agreement expressly reflects that New Cingular denies any wrongdoing, disputes the factual and legal allegations of the Class Plaintiffs, and denies any liability to the Class Plaintiffs and the Settlement Class.

12. As part of the court-approved Settlement Agreement, New Cingular agreed to seek tax refunds for taxes paid on standalone data charges jointly identified by Class Counsel and New Cingular as charges for Internet Access services and to place the refunded amounts in escrow for the benefit of the customers from whom the tax had been collected.

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13. In accordance with its obligations under the Settlement Agreement, New Cingular filed a refund request with Clyde Hill for $22,053.38 in local utility tax attributed to receipts from wireless data services that had been determined to be federally-exempt Internet access services.

14. The refund claim was mailed to Clyde Hill on November 9, 2012 via certified mail and delivery was accepted by Clyde Hill on November 12, 2012.

15. The refund claim described the class action litigation and court-approved settlement and advised that the refunded tax would be placed into escrow for the benefit of the residents of Clyde Hill from whom the tax had been erroneously over-collected in accordance with the Settlement Agreement.

16. Clyde Hill Municipal Code §3.28.090 imposes a duty on Clyde Hill to investigate written requests for refund and to "return the overpaid amount" when it is determined that the amount of tax paid was "more than the amount required."

17. Clyde Hill did not respond to New Cingular's refund claim and on April 25, 2012, New Cingular, through class counsel, filed suit in King County Superior Court seeking to compel payment of the refund claim to which Clyde Hill had failed to respond.

18. On July 6, 2012, Clyde Hill issued a "Notice of Violation" asserting a fine of $293,131 (more than 13 times the amount of the tax refund claim) plus attorneys' fee and other costs.

19. The Notice of Violation asserted that New Cingular had violated the Clyde Hill Municipal Code by "making [a] false statement or representation in or in connection with utility tax returns submitted and received monthly by the City ... and for maintaining such false statement with the City each day thereafter until New Cingular filed its refund claim. The Notice of Violation further asserted that "[f]alse statement is a form of 'fraud.'"

20. The City cannot meet its burden to establish that the tax returns submitted by New Cingular were false or fraudulent. The City of Clyde Hill Tax returns in question were signed with the proviso that they were true and accurate to the best of the company's

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knowledge – not as an absolute guarantee that no overpayment might have been inadvertently included.

21. On July 20, 2012, New Cingular submitted a letter of protest denying the alleged violation, requesting Clyde Hill to withdraw the fine and to process its refund claim in accordance with its duties under CHMC §3.28.090.

22. By letter dated September 10, 2012 Clyde Hill, through its attorney, advised that Clyde Hill would cancel the penalty assessment if New Cingular would withdraw the refund claim New Cingular had filed as New Cingular is required to pursue under the Settlement Agreement.

23. By letter dated January 22, 2013, Clyde Hill affirmed its imposition of a fine for filing a refund request and asserting that the Notice of Violation is final.

24. Clyde Hill's retaliatory assertion of a fine to avoid paying a tax refund claim less than 1/13 the amount of the asserted fine is arbitrary, capricious, without basis in law, and violates Due Process.

25. Clyde Hill's Notice of Violation alleges a false statement as "a form of 'fraud'", yet the Notice fails to plead the elements of fraud with specificity as required.

26. Clyde Hill has not met its burden of establishing the elements of fraud by clear, cogent, and convincing evidence. To the contrary, Clyde Hill's letter of January 22, 2013 concedes that its fine merely presumes fraud based soley on the submission of a refund claim.

27. The imposition of a penalty for filing a tax refund claim is contrary to the plain language of Clyde Hill's tax code, Chapter 3.28 CHMC, which provides for penalties in the event of an underpayment of tax and provides for the submission of tax refund claims in the event of an overpayment of tax but does not impose a penalty or fine for filing a refund claim.

28. By asserting that the underlying tax returns constituted a "false or fraudulent" statement justifying in a penalty completely out of proportion to the overpaid tax, Clyde Hill effectively denied any meaningful opportunity to secure relief for overpaid taxes.

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX 206.223.7107

PRAYER FOR RELIEF

WHEREFORE, New Cingular prays for the following declaratory relief:

A. For a declaratory judgment in favor of New Cingular invalidating the Notice of Violation;

B. For an award of costs and attorneys' fees to New Cingular to the extent permitted by law; and

C. All other relief as may be just and proper.

DATED: April 10, 2013

LANE POWELL PC

By _____
Scott M. Edwards, WSBA No. 26455
Attorneys for Plaintiff New Cingular Wireless PCS LLC, a Delaware Limited Liability Company

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

The Honorable Mary I. Yu

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NEW CINGULAR WIRELESS PCS LLC,

Plaintiff,

v.

THE CITY OF CLYDE HILL, Washington,

Defendant.

No. 13-2-16074-9 SEA

ANSWER, AFFIRMATIVE DEFENSES AND COUNTER CLAIM OF THE CITY OF CLYDE HILL

Defendant, the City of Clyde Hill, presents the following Answer to Plaintiff's Complaint:

PARTIES

1. The City admits the allegations in this paragraph.

2. The City admits the allegations in this paragraph.

JURISDICTION AND VENUE

3. The allegations in this paragraph call for legal conclusions and are thus denied.

4. The allegations in this paragraph call for legal conclusions and are thus denied.

GENERAL ALLEGATIONS

5. The City admits the allegations in this paragraph.

6. The City admits that it imposes a utility tax on all persons engaged in business activities taxable under Chapter 3.28 of the Clyde Hill Municipal Code ("CHMC") including "Cellular telephone service". The remaining allegations in this paragraph call for legal conclusions, and the City has insufficient knowledge to know if such tax is "like thousands of municipalities throughout the United States," and for these reasons are thus denied.

7. The allegations in this paragraph call for legal conclusions and are thus denied. Clyde Hill does admit that New Cingular is required by Ch. 3.28 CHMC to remit to the City a tax payment based upon its gross income from "cellular telephone service" business operations within Clyde Hill, but denies the allegations of this paragraph as stated.

8. The City admits that AT&T Mobility, LLC, a Delaware corporation and affiliate of New Cingular was named as a defendant in several class action lawsuits in which it was alleged that AT&T violated the Internet Tax Freedom Act, 47 U.S.C. § 151 (1998) moratorium on state and local taxation on internet access, but denies the specific allegations of this paragraph as stated in the Complaint, including but not limited to the allegation that such suits sought refunds of state and local taxes allegedly "overpaid".

9. The City admits that AT&T Mobility denied all allegations of wrongdoing asserted in the class action complaints and asserted numerous defenses, but denies the allegations of this paragraph as stated in the Complaint.

10. The City admits that the class action lawsuits against AT&T Mobility were transferred to the United States District Court for the Northern District of Illinois pursuant to transfer orders from the Judicial Panel on Multidistrict Litigation.

11. The City admits the allegations of this paragraph with respect to AT&T Mobility, but otherwise denies the allegations with respect to New Cingular.

12. The City admits the allegations in this paragraph with respect to AT&T Mobility, but denies the allegations as stated.

13. The City admits that it received a request from New Cingular for a refund in the amount of $22,053.38. All other allegations in this paragraph are denied.

14. The City admits these allegations.

15. The so-called "refund claim" sent to Clyde Hill by New Cingular is a written document that speaks for itself. All other allegations in this paragraph are denied.

16. The provisions of CHMC 2.28.090 speak for themselves, but the City denies the allegations as stated.

17. The City admits that New Cingular filed a lawsuit against it in King County Superior Court on or about April 25, 2012. All other allegations in this paragraph are denied.

18. The City admits that on or about July 6, 2012, it lawfully issued a Notice of Violation against New Cingular assessing penalties totaling $293,131, plus attorney's fees and costs. The City further admits that this penalty amount is fully supported factually and legally. The City denies all other allegations in this paragraph.

19. The City's Notice of Violation to New Cingular is a written document that speaks for itself. The City denies all other allegations in this paragraph.

20. The City denies the allegations in this paragraph.

21. The City admits that on or about July 20 2012, New Cingular submitted a letter to the City of Clyde Hill protesting the Notice of Violation. This letter is a written document that speaks for itself. The City denies all other allegations in this paragraph.

22. The City admits its attorney sent a letter to New Cingular's attorney on or about September 10, 2013. This letter is a written document that speaks for itself. Additionally, this letter is inadmissible in any legal proceeding regarding the matters therein pursuant to Washington State Evidence Rule (ER) 408. The City denies all other allegations in this paragraph.

23. The City admits that its Mayor, serving as the hearing officer on New Cingular's appeal of the Notice of Violation, by letter dated January 22, 2013, after hearing on the appeal, affirmed the Notice of Violation. The Mayor's letter is a written document that speaks for itself. The City denies all other allegations in this paragraph.

24. The allegations in this paragraph constitute legal conclusions and are thus denied.

25. The allegations in this paragraph constitute legal conclusions and are thus denied. The allegations in this paragraph are also inaccurate as stated, and thus denied.

26. The allegations in this paragraph are denied.

27. The allegations in this paragraph constitute legal conclusions and are also inaccurate as stated, and thus denied.

28. The allegations in this paragraph constitute legal conclusions and are also inaccurate as stated, and thus denied.

PRAYER FOR RELIEF

To the extent any allegation in New Cingular's Prayer for Relief requires an answer, it is denied.

AFFIRMATIVE DEFENSES

1. Laches, Estoppel, or Unreasonable Delay. Some or all of Plaintiffs' claims against the City are barred by the doctrine of laches, estoppel and/or unreasonable delay, causing prejudice to the City.

2. Failure to state a Claim. Some or all of Plaintiff's claims against the City are barred based upon failure to state a claim upon which relief can be granted.

3. Lack of Causation. Plaintiff's damages, if any, are barred because the alleged acts and/or omissions or other conduct of the City was not a proximate cause of any damage, loss or injury to the Plaintiffs.

4. Public Duty Doctrine. Some or all of Plaintiff's claims against the City are barred by the public duty doctrine.

5. Statute of Limitations. Some or all of Plaintiff's claims against the City are barred based on the expiration of applicable statutes of limitation.

6. Lack of Jurisdiction. Some or all of Plaintiff's claims against the City are barred based upon lack of jurisdiction.

7. Waiver. Some or all of Plaintiff's claims against the City are barred by the doctrine of waiver.

8. Unclean Hands. Plaintiff's request for declaratory relief is barred by the doctrine of unclean hands.

9. Failure to Exhaust Judicial Remedies. Plaintiff's claims are barred based upon its failure to exhaust required statutory judicial remedies by a statutory Writ of Review, RCW Ch. 7.16.

10. Adequate Remedy at Law. Plaintiff's claim for equitable relief is barred by the fact that Plaintiff had an adequate remedy at law, specifically, a judicial appeal by a Statutory Writ of Review.

11. Fraud and/or Illegality. That the relief Plaintiff seeks is barred by Plaintiff's own conduct, which has been either fraudulent and/or illegal.

COUNTER-CLAIM BY CLYDE HILL AGAINST NEW CINGULAR

1. On July 6, 2012, Clyde Hill issued a "Notice of Violation" against New Cingular for violation of CHMC § 3.28.130B by the making of false statement or representation in or in connection with utility tax returns submitted and received monthly by the City of Clyde Hill from November, 2005 through December, 2010, and for maintaining such false statement with the City each day thereafter until Notice was given to the City by representatives of New Cingular, dated November 3, 2010, of the false

representation. A copy of the Notice of Violation is attached hereto as Exhibit A and incorporated by this reference herein.

2. On or about July 20, 2012, New Cingular Attorney Margaret C. Wilson sent a letter to Clyde Hill protesting the Notice of Violation.

3. Pursuant to CHMC § 1.08.030 a hearing on New Cingular's appeal/protest of the Notice of Violation was held by telephone (at the request of New Cingular) on September 12, 2012 before the Mayor of Clyde Hill. New Cingular was given opportunity to provide documentary evidence and witness testimony in support of its appeal. New Cingular offered no documentary evidence nor witness testimony at the hearing, only the arguments of its counsel Margaret C. Wilson.

4. After initially continuing his review of the appeal, the Mayor on January 22, 2013 issued a letter decision affirming the Notice of Violation and the penalty amounts set forth therein. A copy of the letter decision is attached as Exhibit B hereto and incorporated by reference. Pursuant to CHMC § 1.08.030: "The determination by the mayor shall be final, binding, and conclusive unless a judicial appeal is appropriately filed with the King County Superior Court."

5. No timely judicial appeal of the Mayor's determination was filed in the King County Superior Court by New Cingular.

6. The Notice of Violation is final and binding on New Cingular.

PRAYER FOR RELIEF OF DEFENDANT/COUNTER-CLAIMANT CLYDE HILL

WHEREFORE, Clyde Hill prays for the following relief:

1. That the Complaint for Declaratory Relief be dismissed with prejudice.

2. That Judgment be entered on Clyde Hill's counterclaim in favor of Clyde Hill and against New Cingular in the principal amount of $293,131.00, plus interest on this liquidated amount at 12% per annum from July 6, 2012 until paid; and for attorney fees and

costs incurred by Clyde Hill with respect to the Notice of Violation and in defending this lawsuit and pursuing the counterclaim as provided in CHMC § 1.08.010B.

3. For such other and further relief as is appropriate.

DATED: June 26, 2013

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: */s/ Stephanie E. Croll*
Stephanie E. Croll, WSBA #18005
Attorneys for Defendant

800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Phone: (206) 623-8861
Fax: (206) 223-9423
Email: scroll@kbmlawyers.com

OGDEN MURPHY WALLACE, P.L.L.C.

By: */s/ Greg A. Rubstello*
Greg A. Rubstello, WSBA #6271
Attorneys for Defendant

901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Phone: (206) 447-7000
Fax: (206) 447-0215
Email: grubstello@omwlaw.com

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on June 26, 2013, a true and correct copy of the foregoing document was served upon the parties listed below via the method indicated:

Attorneys for Plaintiff

Scott M. Edwards
Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338

☑ E-mail
☐ United States Mail
☐ Legal Messenger
☐ Other Agreed E-Service

DATED this 26th day of June, 2013, at Seattle, Washington.

Cathy Hendrickson, Legal Assistant

CITY OF
Clyde Hill

9605 NE 24th Street • Clyde Hill, Washington 98004
425-453-7800 • Fax: 425-462-1936 • www.clydehill.org

NOTICE OF VIOLATION
CHMC §3.28.130 (B)

TO: Attn: Linda A. Fisher
Assistant Secretary and Director of Tax
New Cingular Wireless PCS LLC
11760 U.S. Highway 1
West Tower, Suite 600
North Palm Beach, FL 33408

AND TO: Margaret C. Wilson
Wilson, McDermott, Will & Emery LLP
340 Madison Avenue
New Your, New York 10173-1922

Notice is hereby given that New Cingular Wireless PCS LLC ("New Cingular") is in violation of CHMC §3.28.130B (Copy Attached) by making false statement or representation in or in connection with utility tax returns submitted and received monthly by the City of Clyde Hill from November, 2005, through December, 2010, and for maintaining such false statement with the City each day thereafter until Notice was given to the City dated November 3, 2010, by its agent Margaret C. Wilson at McDermott Will & Emery, N.Y., N.Y. of the false representation within a Claim for Refund signed by Linda A. Fisher, Assistant Secretary and Director of Tax for New Cingular. Each violation is a separate violation subject to a cumulative civil penalty up to the amount of $250 for each day during any portion of which the violation of is committed, continued or permitted, plus payment of the City's reasonable attorneys' fees, witness fees, staff time, and other costs incurred in enforcing said civil penalty. CHMC §1.08.010B; and §3.28.140. False statement is a form of "fraud" in the context of RCW 4.16.080(4) which commences the three-year statute of limitations upon the discovery of fraud by an aggrieved party. *Western Lumber, Inc. v. City of Aberdeen*, 10 Wn. App. 325 (1973).

By its own admission, New Cingular as far back as November, 2005, unilaterally decided to collect monies from its customers that it was not entitled to collect under federal law nor required to collect by any order or demand of the City. New Cingular included such monies in the amount of utility tax it reported was due the City without identifying to the City that the amount reported on its returns included monies billed its customers through September 7, 2010, for tax payments on services exempt from taxation under federal law. In addition to the returns, payments were made to the City based upon such returns. New Cingular further acknowledges being included in class action litigation claiming that state and/or local taxes were incorrectly imposed by New Cingular on charges to its customers for Data Services because those taxes were barred by federal law (ITFA). New Cingular failed to notify the City of the false reporting until after it had entered into a settlement agreement with the class action plaintiffs obligating

New Cingular to seek refund of the illegal collections it paid to local jurisdictions and pay the refund amounts collected to the class action plaintiffs. New Cingular by its conduct seeks in bad faith to transfer the financial consequences of its illegal actions upon the City and other local jurisdictions unaware of New Cingular's illegal collections and reporting by seeking refunds of its tax payments, interest and attorney fees and costs from the City. Such conduct has been considered in assessing the penalties listed below.

Code Provision Violated: 3.28.130B

Corrective Action Required: Since New Cingular Wireless PCS LLC in accordance with its settlement agreement stopped the illegal collections from its customers and ceased the filing of false statement in its utility tax returns to the City sometime prior to the Notice dated Nov. 3, 2010, no additional corrective action is required excepting the timely payment of penalties, reasonable attorney fees, staff time and other city costs in enforcing the civil penalties.

Time Period for Compliance: The monetary penalties and other assessments are immediately due and owing.

FAILURE TO COMPLY WITH THIS NOTICE MAY SUBJECT THE TAXPAYER TO FURTHER CIVIL AND/OR CRIMINAL PENALTIES

Monetary Penalty and Other Assessments:

As shown on Exhibit A hereto titled "Summary of Cash Receipts from AT&T Mobility, M.E. / New Cingular Wireless PCS LLC," the City issued 60 receipts to New Cingular for utility tax payments covering the reporting periods from November 7, 2005, through September 7, 2010. A penalty amount of $250.00 for each return upon which the receipts are based is imposed totaling **$15,000.00**. In addition, a penalty amount of **$5.00 per day** is imposed for each day that each return with false statement was continued and maintained from the cash receipt date through the date of November 3, 2010, (the date of the Refund Claim notifying the City of the false statement on the returns). The table below shows the Cash Receipt Number, the Cash Receipt Date, the Beginning and Ending Dates of the reporting period, the Total Days the false statement was maintained after initial filing and the Total Penalty Due. The amount necessary to recover attorney fees and other city costs incurred to date is estimated at approximately $2500, and will increase as such fees and costs accrue. an itemized bill will be provided when all costs are known.

Cash Receipt Number	Cash Receipt Date	Beginning and Ending Dates of Reporting Period	Total Days False Statement was Maintained	Penalty Amount Due
9062	11/7/2005	9/5/05 - 9/30/05	1822	$9110
9160	12/5/2005	10/1/05 - 10/31/05	1794	$8970
9240	1/4/2006	11/1/05 - 11/30/05	1764	$8820
9345	2/6/2006	12/1/05 - 12/31/05	1731	$8656
9446	3/7/2006	1/1/06 - 1/31/06	1702	$8510
9527	4/3/2006	2/1/06 - 2/28/06	1675	$8375

Cash Receipt Number	Cash Receipt Date	Beginning and Ending Dates of Reporting Period	Total Days False Statement was Maintained	Penalty Amount Due
9650	5/2/2006	3/1/06 - 3/31/06	1646	$8230
9768	6/5/2006	4/1/06 - 4/30/06	1612	$8060
9868	7/3/2006	5/1/06 - 5/31/06	1584	$7920
10004	8/4/2006	6/1/06 - 6/30/06	1552	$7760
10124	9/5/2006	7/1/06 - 7/31/06	1520	$7600
10229	10/3/2006	8/1/06 - 8/31/06	1492	$7460
10379	11/3/2006	9/1/06 - 9/30/06	1461	$7305
10486	12/5/2006	10/1/06 - 10/31/06	1429	$7145
10598	1/4/2007	11/1/06 - 11/30/06	1399	$6995
10753	2/6/2007	12/1/06 - 12/31/06	1366	$6830
10855	3/6/2007	1/1/07 - 1/31/07	1338	$6690
11003	4/3/2007	2/1/07 - 2/28/07	1310	$6550
11176	5/4/2007	3/1/07 - 3/31/07	1279	$6395
11317	6/4/2007	4/1/07 - 4/30/07	1248	$6240
11470	7/5/2007	5/1/07 - 5/31/07	1217	$6085
11628	8/3/2007	6/1/07 - 6/30/07	1188	$5940
11797	9/4/2007	7/1/07 - 7/31/07	1156	$5780
11896	10/2/2007	8/1/07 - 8/31/07	1128	$5640
12049	11/5/2007	9/1/07 - 9/30/07	1094	$5470
12140	12/5/2007	10/1/07 - 10/31/07	1064	$5320
12238	1/2/2008	11/1/07 - 11/30/07	1036	$5180
12352	2/5/2008	12/1/07 - 12/31/07	1002	$5010
12458	3/4/2008	1/1/08 - 1/31/08	974	$4870
12597	4/4/2008	2/1/08 - 2/29/08	943	$4715
12711	5/6/2008	3/1/08 - 3/31/08	911	$4555
12798	6/4/2008	4/1/08 - 4/30/08	882	$4410
12911	7/7/2008	5/1/08 - 5/31/08	849	$4245
13027	8/4/2008	6/1/08 - 6/30/08	821	$4105
13124	9/3/2008	7/1/08 - 7/31/08	791	$3955
13203	10/6/2008	8/1/08 - 8/31/08	758	$3790
13289	11/3/2008	9/1/08 - 9/30/08	730	$3650
13356	12/5/2008	10/1/08 - 10/31/08	698	$3490
13397	1/5/2009	11/1/08 - 11/30/08	667	$3335
13469	2/3/2009	12/1/08 - 12/31/08	638	$3190
13541	3/9/2009	1/1/09 - 1/31/09	604	$3020
13621	4/7/2009	2/1/09 - 2/28/09	575	$2875
13700	5/5/2009	3/1/09 - 3/31/09	547	$2735
13764	6/3/2009	4/1/09 - 4/30/09	518	$2590
13847	7/7/2009	5/1/09 - 5/31/09	484	$2420
13932	8/5/2009	6/1/09 - 6/30/09	455	$2275
14008	9/2/2009	7/1/09 - 7/31/09	427	$2135
14079	10/5/2009	8/1/09 - 8/31/09	394	$1970

Cash Receipt Number	Cash Receipt Date	Beginning and Ending Dates of Reporting Period	Total Days False Statement was Maintained	Penalty Amount Due
14154	11/3/2009	9/1/09 - 9/30/09	365	$1825
14243	12/4/2009	10/1/09 - 10/31/09	334	$1670
14310	1/4/2010	11/1/09 - 11/30/09	303	$1515
14433	2/5/2010	12/1/09 - 12/31/09	271	$1355
14516	3/4/2010	1/1/10 - 1/31/10	244	$1220
14582	4/5/2010	2/1/10 - 2/28/10	212	$1060
14683	5/5/2010	3/1/10 - 3/31/10	182	$910
14767	6/8/2010	4/1/10 - 4/30/10	148	$740
14898	7/7/2010	5/1/10 - 5/31/10	119	$595
15002	8/9/2010	6/1/10 - 6/30/10	86	$430
15069	9/7/2010	7/1/10 - 7/31/10	57	$285
15151	10/4/2010	8/1/10 - 8/31/10	30	$150
TOTAL per day penalties				$278,131.00
Total $250 Penalties				15,000.00
TOTAL ALL PENALTIES				$293,131.00

THIS NOTICE REPRESENTS A DETERMINATION THAT A CIVIL VIOLATION HAS BEEN COMMITTED BY THE TAXPAYER. THE DETERMINATION IS FINAL UNLESS CONTESTED WITHIN 15 DAYS AS PROVIDED IN CHAPTER 1.08 CLYDE HILL MUNICIPAL CODE, A COPY OF WHICH IS ATTACHED HERETO.

DATED: July 6, 2012.

CITY OF CLYDE HILL

By: M. Wasserman

Mitchell Wasserman, City Administrator

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advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be fined no more than $500.00 or imprisoned for not more than six months or by both such fine and imprisonment. (Ord. 477 § 7, 1983)

3.26.080 Effective date.

This chapter shall take effect January 1, 1984. (Ord. 477 § 9, 1983)

Chapter 3.28

UTILITY TAXES

Sections:

3.28.010 Purpose.
3.28.020 Definitions.
3.28.030 Businesses subject to tax.
3.28.040 Exceptions and deductions from gross income.
3.28.050 Quarterly returns and payment.
3.28.060 Allocation of income for cellular telephone service.
3.28.070 Books and records – Inspection and confidentiality.
3.28.080 Investigation of returns.
3.28.090 Over or under payment.
3.28.100 Failure to make return or pay taxes.
3.28.110 Appeal to city council.
3.28.120 Rules and regulations.
3.28.130 Unlawful acts.
3.28.140 Penalty for violation.
3.28.150 Rate change.

3.28.010 Purpose.

The provisions of this chapter shall be deemed to be an exercise of the power of the city of Clyde Hill to impose excises for revenue, as authorized by RCW 35.21.865, 35A.82.020, and other applicable state law. (Ord. 829 § 1, 2001)

3.28.020 Definitions.

Where used in this chapter, the following words and terms shall have the meanings as defined in this section, unless, from the context, a more limited or different meaning is clearly defined or apparent:

A. "Cable service" shall have the meaning set forth in 47 U.S.C. Section 522(6), as said statute presently exists or is hereafter amended.

B. "Cellular telephone service" means a one- or two-way telecommunications system used to transmit voice and/or data-based signals or content in whole, or substantially in

part, on wireless radio communications, and which is not subject to regulation by the Washington Utilities and Transportation Commission (WUTC). This includes cellular mobile service, pager services, specialized mobile radio (SMR), personal communications services (PCS), and any other evolving wireless radio communications technology which accomplishes a purpose similar to cellular mobile service, including paging services. Cellular telephone service shall not include competitive telephone service.

C. "Clerk" shall mean the city clerk of the city of Clyde Hill, or his or her designee.

D. "Gross income" means the value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital of the business engaged in, including rentals, royalties, fees or other emoluments, receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness or stock and the like) and without any deduction on account of the cost of the property or service sold, the cost of materials used, labor costs, interest or discount paid, taxes, or any expense whatsoever, and without any deduction on account of losses.

E. "Person" or "persons" means natural persons of either gender, firms, co-partnerships, corporations, municipal corporations, and other associations of natural persons whether acting by themselves or by servants, agents or employees.

F. "Taxpayer" means any person liable for taxes imposed by this chapter.

G. "Tax year" or "taxable year" means the 12-month period commencing January 1st and ending December 31st of the same year. (Ord. 829 § 1, 2001)

3.28.030 Businesses subject to tax.

There is hereby levied upon all persons engaged in business activities taxable under this chapter a utility tax or business and occupation tax in the amounts to be determined by the application of the respective rates against gross income of such taxpayer. Taxpayers engaged in or carrying on the business shall be charged with collection of the tax as a condition of doing business, and the tax shall be levied thereafter upon their subscribers at the rate set forth below.

A. Upon every person engaged in or carrying on a telephone business, as defined in Chapter 82.04 RCW, as said statute presently exists or is hereafter amended, a tax equal to six percent of the total gross income, exclusive of the revenues from intrastate and interstate toll calls, derived from the operation of such business within the city. To the extent permitted by applicable federal and state law, any telecommunications services provided by a cable operator (as defined in 47 U.S.C. Section 522(5)) or other persons over cable television facilities owned or controlled by a cable operator shall be taxable hereunder.

B. Upon every person engaged in a gas distribution business, as defined in RCW 82.16.010(7), as said statute presently exists or is hereafter amended, a tax equal to six percent of the total gross income derived from the operation of such business within the city.

C. Upon every person engaged in a light or power business, as defined in RCW 82.16.010(5), as said statute presently exists or is hereafter amended, a tax equal to six percent of the total gross income derived from such business within the city.

D. Upon every person engaged in or carrying on the sale of cellular telephone service, a tax equal to six percent of the total gross income derived from the operation of such business within the city.

E. Upon every person engaged in the sale, delivery, distribution, or furnishing of water for domestic, farm, and other uses, a tax equal

to nine percent of the total gross income derived from the operation of such business within the city; provided, however, that the tax imposed by this subsection shall not apply to any entity which the city is prohibited from taxing under applicable federal or state law or to any entity which pays an equivalent franchise or other comparable fee to the city.

F. Upon every person engaged in the operation and sale of sewer utility services, a tax equal to nine percent of the total gross income derived from the operation of such business within the city; provided, however, that the tax imposed by this subsection shall not apply to any entity which the city is prohibited from taxing under applicable federal or state law or to any entity which pays an equivalent franchise or other comparable fee to the city.

G. There is levied a tax on the business of solid waste collection, transportation, or disposal and for the privilege of carrying on the business, such tax to be equal to four percent of the total gross revenue derived from solid waste collection, transportation, or disposal within the city.

H. There is levied a tax on the business of transmitting television by cable and for the privilege of carrying on the business, such tax to be equal to nine percent of the gross revenue derived from the sale of cable television services. (Ord. 896 §§ 1 – 4, 2008; Ord. 885 § 1, 2006; Ord. 883 §§ 1, 2, 2006; Ord. 876 §§ 1, 2, 3, 2005; Ord. 869 §§ 1, 2, 3, 2004; Ord. 829 § 1, 2001)

3.28.040 Exceptions and deductions from gross income.

There shall be excluded from the total gross income upon which the tax is computed the following:

A. Revenues derived from transactions in interstate or foreign commerce, or from business done for the United States and the state, or their officers or agents or any amounts paid by the taxpayer to the United States and the state, the city or to any political subdivision of the state, as excise taxes levied or imposed upon the sale or distribution of property or services, or as a utility tax.

B. That portion of gross income derived from charges to another telecommunications company, as defined in RCW 80.40.010, for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate service.

C. Charges incurred by a taxpayer engaging in a telephone business and paid to a telecommunications company, as defined in RCW 80.40.010, for telephone service that the taxpayer purchases for the purpose of resale.

D. Adjustments made to a billing or to a customer account or a telecommunications company accrual account in order to reverse a billing or a charge that has been made as a result of third party fraud or other crime and was not properly a debt of a customer.

E. A deduction from gross income, and for cellular telephone companies which keep their regular books of accounts on an accrual basis, for cash discounts and credit losses sustained by a taxpayer as a result of cellular telephone service business. (Ord. 829 § 1, 2001)

3.28.050 Quarterly returns and payment.

A. On or before the thirtieth day following the end of each calendar quarter (i.e., April 30th, July 30th, October 30th, and January 30th), each taxpayer shall remit payment for the preceding quarter's tax, accompanied by a quarterly statement showing the manner in which the quarterly payment is calculated. The quarterly statement shall be upon a form provided by the clerk and shall contain such information as may be necessary to enable the clerk to arrive at the lawful amount of the tax. The taxpayer shall, in a legible manner provide all information required by the clerk on such returns, shall sign the same, and by affidavit shall swear or affirm that the information therein given is full and true and that the taxpayer knows the same to be so.

B. Quarterly returns shall be accompanied by a remittance by bank draft, certified check, cashier's check or money order, payable to the city of Clyde Hill, or in cash, in the amount of the fee or tax owed, including delinquencies and installments.

C. Payment made by draft or check shall not be deemed a payment of the fee or tax unless and until the same has been honored in the usual course of business, nor shall acceptance of any such check or draft operate as an acquittance or discharge of the fee or tax unless and until the check or draft is honored.

D. If the taxpayer is a partnership, returns must be made by one of the partners; if a cor-

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poration, by one of the officers thereof; if a foreign corporation, co-partnership or nonresident individual, by the resident agent or local manager of said corporation, co-partnership or individual. (Ord. 829 § 1, 2001)

3.28.060 Allocation of income for cellular telephone service.

A. Service Address. Payments by a customer for the telephone service from telephones without a fixed location (i.e., cellular telephone service) shall be allocated among taxing jurisdictions to the location which the customer's principal service address during the period for which the tax applies.

B. Presumption. There is a presumption that the service address a customer supplies to the taxpayer is current and accurate, unless the taxpayer has actual knowledge to the contrary.

C. Roaming Phones. When service is provided while a customer is roaming outside the customer's normal cellular network area, the gross income shall be assigned consistent with the taxpayer's accounting system to the location of the originating cell site of the call, or to the location of the main cellular switching office that switched the call.

D. Authority of Clerk. The clerk is authorized to represent the city in negotiations with other cities for the proper allocation of cellular telephone service taxes imposed pursuant to this chapter. (Ord. 829 § 1, 2001)

3.28.070 Books and records – Inspection and confidentiality.

A. It is the duty of each taxpayer to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of its gross income, which account shall be open to inspection by the clerk, or his or her designee at a reasonable time, and from which the clerk or his or her designee may verify returns made by the taxpayer.

B. To the extent permitted by Chapter 42.17 RCW and other applicable statutes, returns made to the clerk pursuant to this chapter shall not be made public, nor shall they be subject to the inspection of any person except the mayor, the city administrator, the city attorney, the clerk, or his or her authorized agent and members of the city council. (Ord. 829 § 1, 2001)

3.28.080 Investigation of returns.

If any taxpayer fails to make his or her return, or if the clerk is dissatisfied as to the correctness of the statements made in the return of any taxpayer, the clerk, or his or her designee, may: (A) enter the premises of such taxpayer at any reasonable time for the purpose of inspecting and auditing the taxpayer's books or records to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be; (B) may examine any person under oath administered by the clerk, or his or her designee, touching the matters inquired into; or (C) fix a time and place for an investigation of the correctness of the return, and issue a subpoena to the taxpayer, or any other person, to attend such investigation and testify, under oath administered by the clerk, or his or her agent, in regard to the matters inquired into and may, by subpoena, require him or her, or any person, to bring with him or her such books, records and papers as may be necessary. In the event that any such audit reveals an underpayment of 10 percent or more, the taxpayer shall, in addition to any other penalties established by law, be responsible for all of the costs associated with the audit, including, but not limited to, staff time and overhead, accounting fees, professional service fees, and attorneys' fees. (Ord. 829 § 1, 2001)

3.28.090 Over or under payment.

A. Overpayment. If the clerk, upon investigation or upon checking returns, finds that the fee or tax paid by a taxpayer is more than the amount required of the taxpayer, he or she shall return the amount overpaid, upon the

written request of the taxpayer. Refund requests not made by the taxpayer within four years of any overpayment shall be forever barred.

B. Underpayment. If the clerk finds that the fee or tax paid by a taxpayer is less than required, he or she shall send a statement to the taxpayer showing the balance due, together with a penalty of 10 percent of the amount due, and the taxpayer shall, within 10 days, pay the amount shown thereon. If payment is not received by the clerk by the due date specified in the notice, the clerk shall add a penalty of an additional 25 percent of the amount of the additional tax found due. In the event that the balance due, including all penalties, is not paid in full within 30 days from the date specified, the penalty shall be increased by 15 percent of the amount due and the total amount due shall accrue interest at the rate of 12 percent per annum. If the clerk finds that all, or any part of, the deficiency resulted from an intent to evade the tax payable hereunder, a penalty of 50 percent of the additional tax found to be due shall be added and the amounts due, including penalties, shall accrue interest at the rate of 12 percent per annum from the date the tax became due and the date payment is actually made. (Ord. 829 § 1, 2001)

3.28.100 Failure to make return or pay taxes.

If any taxpayer fails to make a return or pay the fees or taxes therefor, or any part thereof, the clerk shall ascertain the amount of the fee or tax or installment thereof due and shall notify the taxpayer thereof, who shall be liable therefor in any suit or action by the city for the collection thereof. In the event that any taxes imposed by this chapter remain unpaid, the clerk may refer such claims to a collection agency or to the city attorney for collection. If referred to the city attorney for collection, the city attorney shall, with the assistance of the clerk, collect the same by any appropriate means or by suit or action in the name of the city. In the event that the city prevails on any claim that a taxpayer in noncompliance with the terms of this chapter, the city shall be entitled to an award of its reasonable attorneys' fees and other professional expenses associated with prosecuting the action. (Ord. 829 § 1, 2001)

3.28.110 Appeal to city council.

A. Any taxpayer aggrieved by the amount of the fee, tax, or penalty found by the clerk to be required under the provisions of this chapter, may appeal to the city council from such finding by filing a written notice of appeal with the clerk within five days from the time such taxpayer was given notice of such amount and paying an appeal fee as established by the city council by resolution from time to time. The clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than 30 days after the filing of the notice of appeal, and the clerk shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing the taxpayer shall be entitled to be heard and to introduce evidence on his or her own behalf. The city council shall thereupon ascertain the correct amount of the fee, tax, or penalty by resolution and the clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal including outside legal, accounting, and other expenses, if the appellant is unsuccessful therein, must be paid within 10 days after such notice is given.

B. Any judicial appeal of the city council's final determination of such an appeal shall be filed and served within 21 days of the date of the city council's final vote on the matter, and the taxpayer shall be responsible for payment of the costs associated with producing the city's administrative record therein. (Ord. 829 § 1, 2001)

3.28.120 Rules and regulations.

The clerk shall have the power to adopt, publish and enforce rules and regulations not inconsistent with this chapter or with applicable law for the purpose of carrying out the provisions of this chapter, and it is unlawful for any person or taxpayer to violate or fail to comply with any such rule or regulation. (Ord. 829 § 1, 2001)

3.28.130 Unlawful acts.

It is unlawful:

A. For any person liable for taxes or fees hereunder to fail or refuse to file returns or to pay any fee or tax or installment thereof when due;

B. For any person to make any false or fraudulent return or any false statement or representation in, or in connection with any such return;

C. To aid or abet another in any attempt to evade payment of the fee or tax, or any part thereof;

D. For any person to fail to appeal and/or testify in response to subpoena issued pursuant hereto;

E. To testify falsely upon any investigation of the correctness of a return, or upon the hearing of any appeal; or

F. In any manner to hinder or delay the city or any of its officers in carrying out the provisions of this chapter. (Ord. 829 § 1, 2001)

3.28.140 Penalty for violation.

Any person violating any of the provisions or failing to comply with any of the requirements of this chapter shall, in addition to being liable for the monetary penalties set forth herein, be subject to punishment in accordance with CHMC 1.08.010. (Ord. 829 § 1, 2001)

3.28.150 Rate change.

No change in the rate of tax upon persons engaging in providing services taxable under this chapter shall apply to business activities occurring before the effective date of the change, and, except for a change in the tax rate authorized by RCW 35.21.870, no change in the rate of the tax may take effect sooner than 60 days following the enactment of the ordinance establishing the change. The clerk, or his or her designee, shall send to each taxpayer known to the city a copy of any ordinance changing the rate or tax upon taxable services promptly upon its enactment. (Ord. 829 § 1, 2001)

Chapter 1.08

GENERAL PENALTY

Sections:

1.08.010 Designated.
1.08.020 Investigation and notice of violation.
1.08.030 Responding to a notice of violation.
1.08.040 Nuisance.
1.08.050 Applicability.

1.08.010 Designated.

A. Criminal Penalty. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of any ordinance of the city is guilty of a misdemeanor. Except in cases where a different punishment is prescribed by ordinance of the city or state law, any person convicted of a misdemeanor under the ordinances of the city shall be punished by a fine not to exceed $1,000 or by imprisonment not to exceed 90 days, or both. Except in cases where a different punishment is prescribed by ordinance of the city or state law, any person convicted of a gross misdemeanor shall be punished by a fine not to exceed $5,000 or by imprisonment not to exceed one year, or both. Each such person is guilty of a separate offense for each and every day during any portion of which any violation of any provision of the ordinances of the city is committed, continued or permitted by any such person, and he or she is punishable accordingly.

B. Civil Penalty. Any person, firm, or corporation violating any provisions or failing to comply with any of the mandatory requirements of any ordinance of the city may be subject, in addition to other penalties hereunder, to a civil penalty not more than $250.00 per day or portion of a day for each violation, plus payment of the city's reasonable attorneys' fees, witness fees, staff time and other costs incurred in enforcing said civil penalty. (Ord. 913 § 1, 2011; Ord. 832 § 1, 2001; Ord. 749 § 1, 1996; Ord. 439, 1981; Ord. 242, 1968)

1.08.020 Investigation and notice of violation.

The city administrator, or his or her designee, shall be authorized to investigate compliance with the city's regulations and to take reasonable action to bring about compliance with such regulations, including but not limited to the issuance of notices of violation. A notice of violation must contain (A) a separate statement of each standard, code provision or requirement violated; (B) what corrective action, if any, is necessary to comply with the standards, code provision or requirements; (C) a reasonable time for compliance, unless the violation threatens the health and safety of the person(s) named in the notice of violation or any member of the public; (D) a statement indicating that failure to comply with the notice may subject the owner or person causing the violation to further civil and criminal penalties; (E) a statement of the monetary penalty established for the violation; and (F) a statement that the notice represents a determination that a civil violation has been committed by the person named in the notice and that the determination is final unless contested within 15 days as provided in this chapter. (Ord. 913 § 2, 2011)

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)

1.08.040 Nuisance.

In addition to the penalties provided in CHMC 1.08.010, any condition caused or permitted to exist in violation of any of the provisions of this code is declared a public nuisance, and all remedies given by law for the prevention and abatement of nuisances shall apply regardless of any other remedy. (Ord. 913 § 4, 2011)

1.08.050 Applicability.

The procedures for notification and enforcement set forth in this chapter are intended to apply only where procedures for enforcement of civil violations have not been specifically provided elsewhere in the municipal code. The use of procedures set forth herein shall not require or preclude use of any other procedures allowed by the municipal code or state law. (Ord. 913 § 5, 2011)

City of Clyde Hill

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January 22, 2013

Margaret C. Wilson
Wilson, McDermott, Will & Emery LLP
340 Madison Avenue
New Your, New York 10173-1922

RE: Final Decision on Appeal of July 6, 2012 City of Clyde Hill Notice of Violation to New Cingular Wireless PCS LLC

This letter decision shall constitute the Mayor's Final Decision on the above administrative appeal.

Findings:

1. On July 6, 2012, the Clyde Hill City Administrator issued and caused notice to be served on New Cingular Wireless PCS LLC of a Notice of Violation of CHMC §3.28.130(B) ("NOV"). The NOV asserts that "New Cingular Wireless PCS LLC ("New Cingular") is in violation of CHMC §3.28.130(B) (Copy Attached) by making false statement or representation in or in connection with utility tax returns submitted and received monthly by the City of Clyde Hill from November, 2005, through December, 2010, and for maintaining such false statement with the City each day thereafter until Notice was given to the City dated November 3, 2010, by its agent Margaret C. Wilson ..."

2. The NOV states that, "By its own admission, New Cingular as far back as November, 2005, unilaterally decided to collect monies from its customers that it was not entitled to collect under federal law nor required to collect by any order or demand of the City. New Cingular included such monies in the amount of utility tax it reported was due the City without identifying to the City that the amount reported on its returns included monies billed its customers through September 7, 2010, for tax payments on services exempt from taxation under federal law."

3. The City received via Facsimile a timely letter of protest from New Cingular under signature of its attorney Margaret C. Wilson of Reeder Wilson LLP, Somerville, NJ 08876 dated July 20, 2012.

4. In her letter Ms. Wilson argues that because the utility tax returns at issue contain "an unintended mistake" the returns at issue cannot contain "false or

fraudulent" information, as both those terms Ms. Wilson argues, "require a showing of bad intent on the part of the party that made the statement." The only documentation attached to the letter was the NOV.

5. Ms. Wilson's argument, corroborated by the November 3, 2010 Notice of claim for refund states in effect that, until New Cingular billing practices came under scrutiny and became the subject of class action litigation, New Cingular made no effort to undertake "the time consuming process of identifying those of its thousands of billing codes corresponding to data services providing internet services to comply with provisions of the federal Internet Tax Freedom Act ("ITFA"), which Act NEW CINGULAR states in its Notice of Claim its billing practices violated.

6. On September 10, 2012 City Attorney Rubstello responded to Ms. Wilson's substantive arguments in a letter forwarded to her via email. Mr. Rubstello clarified that the term 'false" does not require an intentional untruth. Mr. Rubstello wrote, "CHMC 13.28.130(B) does not require a knowing or willful false statement, on a false statement which is simply a statement that is not genuine, inaccurate, or misleading."

7. The billing practices of NEW CINGULAR, its failure to take action to correct its billing codes for internet services until NEW CINGULAR was subject to class action litigation, together with its failure to identify on its returns that the tax reported and paid to the City included amounts for internet services NEW CINGULAR has acknowledged were collected in violation of federal law, is conduct that NEW CINGULAR knowingly and/or recklessly engaged in prior to its November 10, 2010 notice of claim to the City.

8. On July 6, 2012 an informal appeal hearing was held via telephone between Mayor Martin and Ms. Wilson. Ms. Wilson repeated the argument made in her July 20, 2012 letter. No witnesses were offered to present testimony nor were any exhibits offered in support of the appeal.

9. On September 20, 2012 Mayor Martin issued a written decision by letter to Ms. Wilson to continue the appeal for 120 days (January 21, 2013) for receipt of additional information concerning the progress of the claims in the civil action brought by New Cingular against Clyde Hill and other Washington cities in King County case #12-2-15031-1 SEA. No decisions on the validity of the claims have been made by the court to date, excepting the denial of 12(B)(6) motions brought by the defendant cities.

Upon consideration of the about facts, review of the above referenced documents and the City's files relating to the issuance of the Notice of Violation, I conclude that the appeal of NEW CINGULAR should be denied and dismissed. No

evidence in addition to the administrative record was submitted by New Cingular in support of the appeal by testimony or by documentary evidence.

Decision:

THE APPEAL OF NEW CINGULAR WIRELESS PCL LLC IS HEREBY DENIED.

DATED: January 22, 2013.

George S. Martin
Mayor

RULE 57
DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, RCW 7.24, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

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

[1987 c 202 § 130; 1895 c 65 § 4; RRS § 1002.]

Notes:

Intent -- 1987 c 202: See note following RCW 2.04.190.

Washington State Constitution
Article IV
The Judiciary

SECTION 6 JURISDICTION OF SUPERIOR COURTS. Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days. [AMENDMENT 87, 1993 House Joint Resolution No. 4201, p 3063. Approved November 2, 1993.]

Amendment 65, part (1977) - Art. 4 Section 6 Jurisdiction of Superior Courts - The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

[AMENDMENT 65, part, 1977 Senate Joint Resolution No. 113, p 1714. Approved November 8, 1977.]

Amendment 65 also amended Art. 4 Section 10.

Amendment 28, part (1952) - Art. 4 Section 6 JURISDICTION OF SUPERIOR COURTS - The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one thousand dollars, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

[AMENDMENT 28, part, 1951 Substitute House Joint Resolution No. 13, p 962. Approved November 4, 1952.]

Note: Amendment 28 also amended Art. 4 Section 10.

ORIGINAL TEXT - ART. 4 Section 6 JURISDICTION OF SUPERIOR COURTS - The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand, or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization, and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justice's and other inferior courts in their respective counties as may be prescribed by law. They shall be always open except on non-judicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of any person in actual

custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and non-judicial days.

The full text of the Washington State Constitution can be found at: http://www.leg.wa.gov/pub/other/washington_constitution.txt

Chapter 3.28
UTILITY TAXES

Sections:

3.28.010 Purpose.
3.28.020 Definitions.
3.28.030 Businesses subject to tax.
3.28.040 Exceptions and deductions from gross income.
3.28.050 Quarterly returns and payment.
3.28.060 Allocation of income for cellular telephone service.
3.28.070 Books and records – Inspection and confidentiality.
3.28.080 Investigation of returns.
3.28.090 Over or under payment.
3.28.100 Failure to make return or pay taxes.
3.28.110 Appeal to city council.
3.28.120 Rules and regulations.
3.28.130 Unlawful acts.
3.28.140 Penalty for violation.
3.28.150 Rate change.

3.28.010 Purpose.

The provisions of this chapter shall be deemed to be an exercise of the power of the city of Clyde Hill to impose excises for revenue, as authorized by RCW 35.21.865, 35A.82.020, and other applicable state law. (Ord. 829 § 1, 2001)

3.28.020 Definitions.

Where used in this chapter, the following words and terms shall have the meanings as defined in this section, unless, from the context, a more limited or different meaning is clearly defined or apparent:

A. "Cable service" shall have the meaning set forth in 47 U.S.C. Section 522(6), as said statute presently exists or is hereafter amended.

B. "Cellular telephone service" means a one- or two-way telecommunications system used to transmit voice and/or data-based signals or content in whole, or substantially in part, on wireless radio communications, and which is not subject to regulation by the Washington Utilities and Transportation Commission (WUTC). This includes cellular mobile service, pager services, specialized mobile radio (SMR), personal communications services (PCS), and any other evolving wireless radio communications technology which accomplishes a purpose similar to cellular mobile service, including paging services. Cellular telephone service shall not include competitive telephone service.

C. "Clerk" shall mean the city clerk of the city of Clyde Hill, or his or her designee.

D. "Gross income" means the value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital of the business engaged in, including rentals, royalties, fees or other

3.28.140 Penalty for violation.

Any person violating any of the provisions or failing to comply with any of the requirements of this chapter shall, in addition to being liable for the monetary penalties set forth herein, be subject to punishment in accordance with CHMC 1.08.010. (Ord. 829 § 1, 2001)

3.28.150 Rate change.

No change in the rate of tax upon persons engaging in providing services taxable under this chapter shall apply to business activities occurring before the effective date of the change, and, except for a change in the tax rate authorized by RCW 35.21.870, no change in the rate of the tax may take effect sooner than 60 days following the enactment of the ordinance establishing the change. The clerk, or his or her designee, shall send to each taxpayer known to the city a copy of any ordinance changing the rate or tax upon taxable services promptly upon its enactment. (Ord. 829 § 1, 2001)

attorneys' fees and other professional expenses associated with prosecuting the action. (Ord. 829 § 1, 2001)

3.28.110 Appeal to city council.

A. Any taxpayer aggrieved by the amount of the fee, tax, or penalty found by the clerk to be required under the provisions of this chapter, may appeal to the city council from such finding by filing a written notice of appeal with the clerk within five days from the time such taxpayer was given notice of such amount and paying an appeal fee as established by the city council by resolution from time to time. The clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than 30 days after the filing of the notice of appeal, and the clerk shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing the taxpayer shall be entitled to be heard and to introduce evidence on his or her own behalf. The city council shall thereupon ascertain the correct amount of the fee, tax, or penalty by resolution and the clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal including outside legal, accounting, and other expenses, if the appellant is unsuccessful therein, must be paid within 10 days after such notice is given.

B. Any judicial appeal of the city council's final determination of such an appeal shall be filed and served within 21 days of the date of the city council's final vote on the matter, and the taxpayer shall be responsible for payment of the costs associated with producing the city's administrative record therein. (Ord. 829 § 1, 2001)

3.28.120 Rules and regulations.

The clerk shall have the power to adopt, publish and enforce rules and regulations not inconsistent with this chapter or with applicable law for the purpose of carrying out the provisions of this chapter, and it is unlawful for any person or taxpayer to violate or fail to comply with any such rule or regulation. (Ord. 829 § 1, 2001)

3.28.130 Unlawful acts.

It is unlawful:

A. For any person liable for taxes or fees hereunder to fail or refuse to file returns or to pay any fee or tax or installment thereof when due;

B. For any person to make any false or fraudulent return or any false statement or representation in, or in connection with any such return;

C. To aid or abet another in any attempt to evade payment of the fee or tax, or any part thereof;

D. For any person to fail to appeal and/or testify in response to subpoena issued pursuant hereto;

E. To testify falsely upon any investigation of the correctness of a return, or upon the hearing of any appeal; or

F. In any manner to hinder or delay the city or any of its officers in carrying out the provisions of this chapter. (Ord. 829 § 1, 2001)

Chapter 1.08
GENERAL PENALTY

Sections:

1.08.010 Designated.
1.08.020 Investigation and notice of violation.
1.08.030 Responding to a notice of violation.
1.08.040 Nuisance.
1.08.050 Applicability.

1.08.010 Designated.

A. Criminal Penalty. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of any ordinance of the city is guilty of a misdemeanor. Except in cases where a different punishment is prescribed by ordinance of the city or state law, any person convicted of a misdemeanor under the ordinances of the city shall be punished by a fine not to exceed $1,000 or by imprisonment not to exceed 90 days, or both. Except in cases where a different punishment is prescribed by ordinance of the city or state law, any person convicted of a gross misdemeanor shall be punished by a fine not to exceed $5,000 or by imprisonment not to exceed one year, or both. Each such person is guilty of a separate offense for each and every day during any portion of which any violation of any provision of the ordinances of the city is committed, continued or permitted by any such person, and he or she is punishable accordingly.

B. Civil Penalty. Any person, firm, or corporation violating any provisions or failing to comply with any of the mandatory requirements of any ordinance of the city may be subject, in addition to other penalties hereunder, to a civil penalty not more than $250.00 per day or portion of a day for each violation, plus payment of the city's reasonable attorneys' fees, witness fees, staff time and other costs incurred in enforcing said civil penalty. (Ord. 913 § 1, 2011; Ord. 832 § 1, 2001; Ord. 749 § 1, 1996; Ord. 439, 1981; Ord. 242, 1968)

1.08.020 Investigation and notice of violation.

The city administrator, or his or her designee, shall be authorized to investigate compliance with the city's regulations and to take reasonable action to bring about compliance with such regulations, including but not limited to the issuance of notices of violation. A notice of violation must contain (A) a separate statement of each standard, code provision or requirement violated; (B) what corrective action, if any, is necessary to comply with the standards, code provision or requirements; (C) a reasonable time for compliance, unless the violation threatens the health and safety of the person(s) named in the notice of violation or any member of the public; (D) a statement indicating that failure to comply with the notice may subject the owner or person causing the violation to further civil and criminal penalties; (E) a statement of the monetary penalty established for the violation; and (F) a statement that the notice represents a determination that a civil violation has been committed by the person named in the notice and that the determination is final unless contested within 15 days as provided in this chapter. (Ord. 913 § 2, 2011)

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)

1.08.040 Nuisance.

In addition to the penalties provided in CHMC 1.08.010, any condition caused or permitted to exist in violation of any of the provisions of this code is declared a public nuisance, and all remedies given by law for the prevention and abatement of nuisances shall apply regardless of any other remedy. (Ord. 913 § 4, 2011)

1.08.050 Applicability.

The procedures for notification and enforcement set forth in this chapter are intended to apply only where procedures for enforcement of civil violations have not been specifically provided elsewhere in the municipal code. The use of procedures set forth herein shall not require or preclude use of any other procedures allowed by the municipal code or state law. (Ord. 913 § 5, 2011)

THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

NEW CINGULAR WIRELESS PCS, LLC, a Delaware limited liability company, Plaintiff/Appellant, vs. THE CITY OF CLYDE HILL, WASHINGTON, Defendant/Respondent.	)	No. 13-2-16074-9 SEA Appeal No. 71626-3-I

MOTION HEARING

February 28, 2014

The Honorable Theresa B. Doyle Presiding

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February 28, 2014

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THE COURT: Cingular Wireless vs. Clyde Hill. And it's 13-2-16074-9. And this is Clyde Hill's motion for summary judgment.

Counsel, your appearances for the record.

MR. RUBSTELLO: Yes. Greg Rubstello here on behalf of the City of Clyde Hill. I'm co-counsel with Stephanie Croll, who is with me also.

THE COURT: Okay, thank you. All right.

MR. EDWARDS: Scott Edwards representing New Cingular.

THE COURT: Okay. Good. Thank you. All right. I have read all your briefs. I will give each side ten minutes. And, let's see, Mr. Rubstello, did you want to begin? You can stay there or come up to the bar. Whatever you want.

MR. RUBSTELLO: All right. My notes -- I have my cheat notes here, so I'll just stand right here.

THE COURT: Okay.

MR. RUBSTELLO: And I think I'm loud enough that you can hear me.

THE COURT: I can. And let's see. Did you -- what do you want to do about your time? Do you want to reserve some time? You can do that if you want.

MR. RUBSTELLO: Yeah, I will reserve a couple minutes.

THE COURT: Okay. So Madam Bailiff will be timekeeper.

MR. RUBSTELLO: All right, okay.

THE COURT: Go ahead.

MR. RUBSTELLO: I guess to maybe brief it down into a nutshell since you read everything, the real issue I think that's before the Court is really what's the proper procedure to invoke this court's jurisdiction to review a quasi-judicial municipal decision.

Now, New Cingular has filed a lawsuit in which they really don't seek to have the quasi-judicial decision reviewed. They want to ignore it and they want to go back and attack the notice of violation, which was affirmed in the Mayor's decision.

Our position is: They can't do that. There was an administrative process that was exhausted. We have an agency final decision and that needs to be reviewed. Our supreme court in the Cost Management Case that was recently decided last year made very clear that exhaustion of administrative remedies is required, and any suggestion in the Qwest case that has been relied on by New Cingular that it doesn't is wrong. So we have this --

THE COURT: Now, that -- the Cost Management case, that was a tax refund case as well, right?

MR. RUBSTELLO: Yes, yes.

THE COURT: It was not under the APA.

MR. RUBSTELLO: It was not under the APA. It was a City of Tacoma decision by -- or, excuse me, City of Lakewood decision --

THE COURT: Right.

MR. RUBSTELLO: There was a process that -- a hearing examiner decision, as I recall, that the City didn't like. And then they tried to appeal that.

THE COURT: Okay.

MR. RUBSTELLO: Well, actually, no, I'm thinking of the Mary Kay case. In the Lakewood case, the -- Cost Management sought the jurisdiction of the superior court before there was ever any administrative process that got going.

THE COURT: Okay. The Court held that was fine in that case, right?

MR. RUBSTELLO: Yes.

THE COURT: Because there was no final determination.

MR. RUBSTELLO: Right, there was no --

THE COURT: They sent letters --

MR. RUBSTELLO: Right, the City.

THE COURT: -- saying you have to pay this tax, you have to pay this tax, and then Cost Management would respond, well, we don't want to, how do we appeal. And the City never really did anything.

MR. RUBSTELLO: Yeah, right.

THE COURT: Okay.

MR. RUBSTELLO: And that was the point of that case.

THE COURT: Right. So they haven't -- under those circumstances where there's inaction, then, really, in this case, the taxpayer doesn't have any other recourse but to file an action in superior court, so --

MR. RUBSTELLO: Exactly.

THE COURT: -- while they didn't exhaust remedies, they were unable to.

MR. RUBSTELLO: They were unable to. That was the point of that case.

THE COURT: Okay.

MR. RUBSTELLO: You know, we have got a body of law that says that quasi-judicial municipal decisions are reviewed by statutory writ. Before LUPA all the land use cases were reviewed --

THE COURT: Right.

MR. RUBSTELLO: -- under the statutory writ, but that took the land use cases out of that process, but nothing else. Everything else at the municipal level, unless there is some specific special statutory process for something, remains under the statutory writ decision. It would be a whole mockery of the administrative process, and to say you've got to go through this, exhaust remedies, to allow a party to, in essence, like New Cingular does want to here, basically ignore the final decision made at the municipal

level.

And the process -- we're not -- we at Clyde Hill are not telling the court how to go about what it's doing, we're not dictating a process, we're not dictating what papers you file to invoke the court's jurisdiction. That's done by statute and it's done by the processes described by the legislature in Chapter 7.16 -- 7.16 RCW.

We know from the case law that we have, The James vs. Kitsap County case, the Wells Fargo case that came down after Mary Kay, that the constitutional provision relied on by New Cingular is not self-implementing. There has to be procedures established by the legislature and by the superior court to initiate that process. And it's not Clyde Hill that established the writ procedure; the legislature did, and said that's how this court -- this court acquires appellate jurisdiction to review that agency decision or quasi-judicial final decision made at the municipal level.

So although we don't have -- neither one of us have that specific, you know, the white-cow, pink-tail case to present to you where another city issued a notice of violation, it went through the administrative process at the city, and then the person who didn't like that violation being affirmed tried to invoke the court's jurisdiction.

Neither one of us have that case to present to you, but we have all these other cases that for every other like

proceeding, it says you need to use a writ. And I see nothing in the case law that exempts this kind of quasi-judicial decision from the writ process. There is no time period specified for seeking a writ in the statute. The events --

THE COURT: In the writ statute.

MR. RUBSTELLO: In the writ statute.

THE COURT: Right.

MR. RUBSTELLO: So what do you do? We have all this case law that says you look to analogous, the most closely analogous procedures. And that's what we have here, is the 30-day time period to appeal to -- a judicial decision. We have the 30-day appeal period in the APA, and the cases that have said that's sort of the maximum time period. There can be shorter periods --

THE COURT: Okay.

MR. RUBSTELLO: -- if there's other -- but that's not the case here.

THE COURT: And then there's the RAPs, the rules on appeal.

MR. RUBSTELLO: And then there's the RAPs, rules on appeal --

THE COURT: And that's 30 days.

MR. RUBSTELLO: -- which, again, are the 30-day, and so the 30-day is giving the benefit, actually, the benefit to

New Cingular, the longer time period, but they did not take advantage of that and appeal.

If New Cingular -- if this court does not have jurisdiction to hear this complaint, then the final decision stands: They owe us the money and this court is entitled -- we're entitled to have that, reduce the judgment so that we can enforce it and collect the amount of moneys that are due us.

THE COURT: Okay. But don't you have to file like a collection action then? Because your argument is that I don't have jurisdiction, right?

MR. RUBSTELLO: Over -- my argument is --

THE COURT: Over their claim.

MR. RUBSTELLO: -- you do not have jurisdiction to hear their claim.

THE COURT: Right.

MR. RUBSTELLO: Their claim of -- that the notice of violation is invalid. But they brought this action and we filed a counterclaim simply seeking a judgment for moneys due and owing.

THE COURT: You don't happen to have a copy of your counterclaim, do you? I mean, I can download it easily if you don't have it.

MR. RUBSTELLO: Yes, let's see.

THE BAILIFF: Counsel, you're down to about two minutes.

MR. RUBSTELLO: Okay. Actually, I'm sorry.

THE COURT: I'm going to give you five more minutes each because I'm asking so many questions.

MR. RUBSTELLO: Okay. Actually, I did not bring my whole file. So I have my summary judgment file, I don't have my counterclaim, but --

THE COURT: Okay. Would you download that?

THE BAILIFF: Yeah.

MR. RUBSTELLO: It's -- obviously it's been filed. So we think the law supports our claim. It's like, you know, the Mary Kay case that's cited; although it's factually different, there, a city's effort to get this court's jurisdiction was booted out because they filed the wrong piece of paper. They filed the wrong piece of paper. Here, the wrong piece of paper was filed, as well as it was filed untimely. And we ask the Court to grant our motion and dismiss their claim but grant our counterclaim.

THE COURT: Okay. So what do you make -- how should the Court interpret, then, given your argument, RCW 2.08.010 about the superior court's original jurisdiction and the reference to taxes? The legality of any tax.

MR. RUBSTELLO: You know, in both the James and then particularly the Wells Fargo case, the court pointed out that that statute simply merged the constitutional provision and that -- and again, itself is not self-executing. There

needs to be process, procedure for obtaining the court's jurisdiction. And the term "jurisdiction" in that statute as well as in the constitution refers to both original and appellate jurisdiction. And you have to look at, in the particular case, what kind of jurisdiction is appropriate.

Here, because there was a quasi-judicial decision affirming the notice of violation, it's the court's original appellate jurisdiction that needs to be invoked. And then you look at the process or the procedure to do that.

THE COURT: Okay. And speaking about the procedure, what do you make of the fact that the ordinance refers to an appeal, something about an appeal?

And, of course, then the writ of review statute talks about writs of review, certiorari, mandamus.

MR. RUBSTELLO: Well, you know, the word "appeal" is just written in the general context. It's to seek the court's judicial review. They could have said "judicial review." If you look at the definition of "appeal" in Black's Law Dictionary, it's "judicial review." That's what it means. It simply says: For judicial review of this decision, this is what you've got -- it doesn't say what you have to do, it just says you have to go to superior court.

THE COURT: But it's not really -- the jurisdiction doesn't really have authority to determine what the procedure is for appeal, correct?

MR. RUBSTELLO: No, no.

THE COURT: I mean, it doesn't really matter what language they use, if indeed, under the recent cases, particularly Cost Management, it's the writ of review statute that controls.

MR. RUBSTELLO: Yes. And the -- I think it was the Bridle Trails vs. City of Bellevue case. In that case, the court pointed -- it pointed to Bellevue had an ordinance that I think said something similar in terms of judicial appeal. And all the Court said about that is that the case had to be brought to the superior court under its appellate jurisdiction. Bellevue wasn't attempting to say how you went about that or didn't prescribe their procedure. And this is not a case --

THE COURT: Okay.

MR. RUBSTELLO: -- like the Tacoma case where, in Mary Kay, where they used this, quote, "Notice of Appeal" language. We don't have that. We don't say: You file a notice of appeal. It just simply refers the general word, "appeal." If you want to further review this, then we need to appeal this to the superior court.

THE COURT: Okay. And the Bellevue case, is that the Qwest vs. Bellevue case you're talking about? That was a telephone service provider.

MR. RUBSTELLO: Yeah.

THE COURT: That was a tax again? Utility tax.

MR. RUBSTELLO: Yeah, there's another case cited in our brief, the Bridle Trails vs. Bellevue.

THE COURT: Okay.

MR. RUBSTELLO: I mean, what we're basically arguing here is that the superior court has appellate jurisdiction to review the Mayor's final decision, and really because it's appellate jurisdiction, the word "appeal" simply I think is self-describing.

THE COURT: And so it has to come up, though, by way of writ of review --

MR. RUBSTELLO: Yes.

THE COURT: -- rather than an action for declaratory judgment.

MR. RUBSTELLO: Because basically they're saying we can ignore -- we don't -- the Mayor's decision has nothing to do with this -- we can directly -- we can make a direct attack on the notice of violation.

THE COURT: Okay. So you're saying that's a collateral attack at this point.

MR. RUBSTELLO: Yeah, yeah.

THE COURT: Okay. And this court doesn't really have to decide -- if I agree with you, this court doesn't have to decide what the time limits are for filing a writ of review, right? Because it hasn't been filed.

MR. RUBSTELLO: It hasn't been filed, right.

THE COURT: Okay, all right. Got it. Thank you.

MR. RUBSTELLO: You bet.

THE COURT: Okay. And, Mr. Edwards, I'll give you 15 minutes. I think that's about how much time Mr. Rubstello got.

MR. EDWARDS: Your Honor, I'd like to start by briefly summarizing the facts and then addressing some of the legal issues that have come up here this morning. I think it's important to understand what the factual context is here.

THE COURT: I'm not interested in all the other litigation that's gone on --

MR. EDWARDS: I'm not talking about the other litigation. I want to talk about just --

THE COURT: I'm really focused on this --

MR. EDWARDS: Sure.

THE COURT: -- very narrow issue.

MR. EDWARDS: And what -- that is, the City has a tax that they impose on wireless service, both voice and data services. New Cingular collected the tax on both voice and data services from its customers in Clyde Hill and reported that tax to the city.

New Cingular was sued in a series of class action lawsuits alleging that the city's tax as it applies to certain data services is preempted by federal law. Those

lawsuits were settled, and under a court-approved settlement agreement, New Cingular is obligated to seek a refund of taxes that were paid to jurisdictions that are -- where these taxes were precluded by federal law. New Cingular filed a $22,000 refund claim in accordance with its obligation under that court-approved settlement agreement. And the City's response to that refund claim was to impose a $293,000 fine. And the City's position with respect to the legality of that fine is that, when you file a refund claim, it demonstrates that your original tax return was inaccurate and therefore a violation of the City's prohibition against filing false or fraudulent returns.

The City's specific claim -- it does not matter what your intent was. As long as the return was inaccurate, that's a violation of our ordinance.

And in connection with that, the City informed New Cingular that if they were to withdraw their refund claim, there would no longer be a legal basis for imposing the fine. New Cingular filed a complaint for declaratory judgment to invoke this court's original trial court jurisdiction to address the legality of that fine.

The issue before the Court is whether the City's ordinance imposes a fine for filing a false or fraudulent statement by virtue of filing a refund claim and inferring from that that the returns were inaccurate. That is the

legal basis for the fine and it is the subject matter of the complaint for declaratory judgment. We're seeking a ruling from the court that the City's ordinance does not authorize a $293,000 fine for filing a refund claim. That is a question of law. It's a matter of statutory interpretation of the City's ordinance.

THE COURT: Why couldn't you have filed a writ of review?

MR. EDWARDS: Whether we could have, we had the right to do either. And that's -- I think that's the key aspect of the Mary Kay case. The Mary Kay case says -- notes that the constitutional provision grants original jurisdiction to -- in the superior court to determine the legality of a tax or municipal fine.

It specifically says that by virtue of RCW 2.08.010, one of the mechanisms available to exercise the court's original jurisdiction is to exercise the original trial court jurisdiction by filing a complaint. That's what we have done.

Mary Kay does also indicate that a person choosing to challenge the legality of a tax or municipal fine could also choose, in the alternative, to file a statutory writ of review. The option to do that is on the part of the person challenging. You can seek review of the administrative decision or you can challenge the legality of the action directly. Under Mary Kay it says you can do either.

Contrary to what Mr. Rubstello has asserted today, there is not a single case cited in his motion saying that there is a general duty to appeal or to seek judicial review of an administrative agency decision utilizing a statutory writ of review proceeding. The only cases that Mr. Rubstello has cited involve either LUPA or the Administrative Procedures Act where the court says: These specific state statutes say that this is your exclusive method of challenging this particular type of agency action. It's undisputed that this is not a land use or Administrative Procedures Act case.

THE COURT: Right. But neither was Cost Management.

MR. EDWARDS: And Cost Management does not do what Mr. Rubstello claims that it does. The issue in Cost Management, the basic fact pattern there, is the taxpayer filed an administrative refund claim. The City ignored it. The taxpayer then filed a lawsuit directly in superior court seeking a refund of the same taxes that it had sought in the the administrative refund claim.

The taxpayer obtained a judgment on the refund for the taxes that they were seeking. The trial court imposed a three-year statute of limitations on that refund claim. The issue in CMS had to do with the City's subsequent petition for a writ of mandamus attempting to force the City to address the administrative refund claim for the purpose of getting a refund for periods that the trial court had

already held were barred by the statute of limitations. And the court held that's not permissible. It did not talk about the validity of filing a complaint to contest the legality of a municipal tax or fine.

There is some dicta in that case talking about exhaustion of administrative remedies. This is not an exhaustion of administrative remedies case. There is no authority that's been cited for the proposition that simply because you have exhausted administrative remedies, your sole avenue of further action is to seek judicial review of the administrative decision.

In fact, in Mary Kay there had been an administrative process, administrative remedies had been exhausted, and the court specifically says the person who's aggrieved can do either: File a complaint or file a writ of review.

The City's argument here is, effectively, that their ordinance, which says, "This is final unless a judicial appeal is appropriately filed" means that the only option that you have is to file a statutory writ of review.

And contrary to Mr. Rubstello's statements here today, there is a difference between a statutory writ of review and a judicial appeal. And, in fact, RCW 716 specifically says you're not entitled to a statutory writ of review unless, quote, "No appeal is available."

And in Bridle Trails, again, inconsistent with what

Mr. Rubstello said here today, the court specifically distinguished between an appeal and a writ proceeding and identified those as two separate things.

So the short answer to your question is: They could have pursued a statutory write of review seeking review of the Mayor's decision. They were not obligated to and they elected to pursue a remedy that they are entitled to, and that is a direct exercise -- invocation of the court's original jurisdiction to decide the legality of the fine.

I would also like to point out that in CMS, I think the court does a nice job of clarifying this jurisdictional issue and pointing out that the provision that we're talking about, with respect to original jurisdiction to decide the legality of a fine or tax, is a different portion of that article of the constitution than the portion that grants appellate jurisdiction.

At page -- I apologize -- paragraph 24 of that opinion, the court specifically distinguishes between the constitutional grant of original jurisdiction and the constitutional grant elsewhere in that same article of appellate jurisdiction.

In short, this case is not a judicial review of the Mayor's decision. This case is a direct challenge to the legality of the municipal fine. The City's ordinance requires for a false or fraudulent statement there to be an

intent to deceive.

And the City implicitly acknowledges that in their summary judgment motion today because they spend ten pages of their brief trying to infer a intent to deceive. If intent is required, as is our position, the City didn't even investigate that before making -- imposing the fine. Any issue with regard to intent in order to justify the fine is a factual issue that would have to be tried.

Having failed to do that, the fine is illegal on its face. The structure of the time ordinance also explicitly imposes a penalty for under-reporting your taxes, doesn't impose a penalty for over-reporting your taxes, and instead imposes a duty on the City to investigate any refund claim and to pay amounts overpaid without interest.

So if the ordinance had intended to impose a penalty simply for filing a refund claim, it would have been written differently than it is.

This court has jurisdiction to hear the direct challenge to the legality of the fine itself. That's the subject matter of a summary judgment motion that I had thought was going to be heard today, but the scheduling got mixed up so it's scheduled be heard on May 9th, but the Court has jurisdiction to hear this case.

If the Court didn't have jurisdiction to hear this case, the only thing that it can do is to dismiss. They're asking

the Court to issue a ruling on the merits with respect to the amount being fined. That is challenged -- whether -- while they did make a counterclaim, we answered that counterclaim. And, like I said, the issue about their entitlement to -- and the legality of that fine is the subject matter of a separately pending cross-motion for summary judgment.

Since this court has jurisdiction, the thing to do today is to dismiss -- or excuse me -- to deny the City's motion to dismiss and let the matter proceed forward for a resolution on the merits with respect to the legality of the fine.

THE COURT: All right. Very good. Thank you.

All right. And, Mr. Rubstello?

MR. RUBSTELLO: A few things.

THE COURT: How much time does he have left?

THE BAILIFF: Two minutes.

MR. RUBSTELLO: With regard to the amount of the fine, there is absolutely nothing in the responsive declarations or pleadings that were filed by New Cingular challenging the City's determination of how much money was owed, which is clearly set forth in our motion and the attached declarations. And their admissions of fact acknowledge that those are, in fact, the amounts, and there is no challenge to that at all.

The Mary Kay decision doesn't give them the right to do either. It wasn't even an issue in that case as to which, filing a complaint or filing a writ, would have been the proper thing to do. The fact is they didn't do either one of them, and that's all that the court did was point out: Here's how you invoke the court -- this court's jurisdiction gets invoked. It either gets invoked by filing an original complaint or filing a writ of review, but it didn't decide and didn't say that the party could have done either one of these things in that case. There was no such language in that case, and that was in fact not an issue.

We have cited in our brief cases where complaints seeking declaratory judgment just like New Cingular is seeking here were dismissed where the writ procedure was available and they could have gotten their relief under that act. We cited the Peoples Park vs. Anrooney and the Reeder vs. King County cases --

THE COURT: Where are you in your brief?

MR. RUBSTELLO: I am looking at page 4 of our reply brief.

THE COURT: Okay.

MR. RUBSTELLO: They're both cited there. They're also cited in our opening brief. This isn't novel. This isn't new law. This is old law. The writ statutes have been around for a long, long time, and we know how to use them.

And it should have been used in this case.

THE COURT: And so specifically their argument is: This is different. I don't remember what the facts were in these other cases. Frankly, I haven't read the Peoples Park vs. Anrooney or Reeder.

Their argument is that, well, we're not really appealing the Mayor's decision. We don't really care about that. We are making this broad challenge to the legality of the fine. Sort of like challenging the constitutionality of a statute on its face. That's my analogy.

MR. RUBSTELLO: They're trying to evade the writ requirements, so they're saying, oh, we're not challenging the Mayor's decision. That's the problem. They could have and they needed to. They could have and they needed to. That's basically what these cases say.

THE COURT: So you're saying they should have filed for the writ of review --

MR. RUBSTELLO: Yes.

THE COURT: -- challenging the Mayor's decision --

MR. RUBSTELLO: Yes.

THE COURT: -- and then making this broader argument?

MR. RUBSTELLO: And then made those arguments --

THE COURT: Within that, okay.

MR. RUBSTELLO: -- because these issues over whether or not what is meant in the Clyde Hill ordinance regarding

false information, what does that mean, what elements of proof does that require. Those were all issues that were before the Mayor and raised in that proceeding and in challenging through the writ procedure. If they're going to say his decision was illegal, that that notice of violation was wrong, it was illegal, they could have argued all those things in the writ procedure. They didn't need to file a new action.

The fact is, they simply did not timely initiate the writ action and now they've filed this later declaratory complaint which seeks to evade what they were required to do.

THE COURT: Okay, right.

And, Madam Bailiff, does Mr. Edwards have any time left?

THE BAILIFF: Yeah, he finished a little early. I think he had two minutes left.

THE COURT: Okay.

MR. EDWARDS: Your Honor, the key is this argument that there is a duty to pursue an exclusive remedy of filing a statutory writ of review proceeding. And the reality is there is not a single authority that has been cited in support of that proposition. The close -- the only case that is on point here is the Mary Kay case. There was exhaustion of administrative remedies there. The court said explicitly: There are two different options, you could have

done A or B. All of the cases that have required an exclusive remedy involve a statute that explicitly imposes an exclusive remedy. To the extent that cases talk about the fact that Article IV, Section 6 vests the court with two types of appellate -- two types of jurisdiction, none of those say that appellate jurisdiction is the only type of jurisdiction that can be used to challenge the legality of a municipal fine.

There is simply not a single case that has been cited in favor of the proposition that a statutory writ of review is the exclusive method of challenging the legality of a fine. Mary Kay says the opposite, that you can file a complaint. Mary Kay, CMS and Wells Fargo all recognize the difference between the original jurisdiction, to challenge the legality, and separate appellate jurisdiction under different procedures, such as LUPA or the APA, which are dealt with in a different portion of Article IV, Section 6.

The complaint was proper. There's -- let me, with respect to Anrooney and Peoples, the -- those cases predate CR 57 explicitly saying that it is permissible to file a declaratory judgment action. Their argument that the declaratory judgment action was impermissible is not based on authority that says the only thing you can do is file a writ of review. The statute is there to deal with these types of legal issues.

This type of legal issue is exactly the kind of thing that should be decided by a court, not by the Mayor. What does the statute require? Does it require evidence of a determination of fraudulent intent? The City made no effort to do any investigation whatsoever. It simply said: Because you filed a refund claim, we're going to fine you.

This isn't a question about, you know, what amount did they fine New Cingular; it is about the legality of that fine. The Court has jurisdiction to hear this and should decide the merits of that later in these proceedings.

THE COURT: Okay. Very good. Thank you. Very good oral argument and briefing. And I'm going to review the cases again in your briefs. You should have a decision by the end of next week.

MR. RUBSTELLO: All right. Thank you, Judge.

MS. CROLL: Thank you, Your Honor.

THE BAILIFF: Please rise.

(Proceeding is adjourned.)

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF SNOHOMISH)

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of 2014.

NOTARY PUBLIC in and for
the State of Washington,
residing at Lynnwood.
My commission expires 4-27-18.