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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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NORTHWEST TERRITORIAL MINT,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Administrative Procedure Act (APA) requires that a petition for judicial review of an agency order be served on the agency within 30 days after service of the final order. RCW 34.05.542(2). Appellant Northwest Territorial Mint (Northwest Territorial) sought judicial review of a final order of the Board of Tax Appeals (Board), but failed to serve the Board within 30 days as required by the APA. Accordingly, the superior court dismissed Northwest Territorial's petition for failing to timely invoke the appellate jurisdiction of the court under the APA.

Northwest Territorial appeals, asserting that the superior court erred in ruling that a petitioner must strictly comply with the time limits in RCW 34.05.542 and that it did not have jurisdiction to review the Board's order under the APA. These arguments lack merit. This case is not about whether Northwest Territorial's manner of serving the Board substantially complied with RCW 34.05.542(4). Rather, it concerns Northwest Territorial's noncompliance with the APA's requirement that the Board be served within 30 days after issuing its final decision. Because Washington courts have consistently held that noncompliance with the APA's time limit for service on the agency requires dismissal of a petition for judicial review, the superior court's order was correct as a matter of law and should be affirmed.

II. STATEMENT OF THE ISSUE

In light of the requirements in RCW 34.05.542 for obtaining judicial review of an agency order, did the superior court correctly dismiss Northwest Territorial's petition for judicial review when Northwest Territorial did not serve its petition on the Board until 17 days after the statutory deadline lapsed?

III. STATEMENT OF THE CASE

After an administrative hearing, the Board affirmed an assessment of manufacturing business and occupation tax by respondent State of Washington, Department of Revenue (Department) against Northwest Territorial. CP 61-79. The Board served its final order on the Department and Northwest Territorial on May 27, 2011. CP 79.

On June 24, 2011, Northwest Territorial filed in King County Superior Court a petition for judicial review of the Board's order. CP 1. Four days prior, Northwest Territorial had served the petition on the Department and the Washington State Attorney General's Office. CP 87. It did not, however, deliver a copy of the petition to the Board. *Id.* On July 13, 2011, the Department's counsel notified Northwest Territorial's counsel of its failure to serve the Board and requested that Northwest Territorial dismiss its petition based on its failure to comply with RCW 34.05.542(2). CP 89. That same day, 47 days after the Board served its

final order, Northwest Territorial's counsel served the petition on the Board. CP 101.

The Department moved to dismiss Northwest Territorial's petition for judicial review. CP 49-101. Specifically, the Department argued that Northwest Territorial's failure to comply with the time limit for service on the agency required dismissal. *Id.* The superior court agreed, concluding that the APA's "well-defined statutory scheme does not permit an appellant or a petitioner to file one document with the court and later, outside the statutory time frame, to serve it on the agency from whose decision the appeal is sought." VRP 29, ll. 21-25. The superior court, therefore, dismissed Northwest Territorial's petition for failure to comply with the APA. CP 148.

Northwest Territorial timely filed a notice of appeal after the superior court denied its motion for reconsideration. *See* CP 170, 171-73.

IV. ARGUMENT

A. **The Superior Court Properly Dismissed Northwest Territorial's Petition For Failing To Comply With The APA's Requirements For Obtaining Judicial Review.**

In Washington, the APA provides the exclusive method for obtaining judicial review of an agency's final order. RCW 34.05.510; *see also Sprint Spectrum, LP v. Dep't of Revenue*, 156 Wn. App. 949, 954, 235 P.3d 849 (2010), *review denied*, 170 Wn.2d 1023 (2011). Judicial

review proceedings are statutory in nature, not falling under the superior court's general or original jurisdiction. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cy.*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). As such, the superior court acts in a limited appellate capacity when reviewing an administrative decision. *City of Seattle v. Pub. Empl. Relations Comm'n (PERC)*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991). A party must comply with the APA's filing and service requirements to invoke the superior court's appellate jurisdiction. *Skagit Surveyors*, 135 Wn.2d at 555; *Skinner v. Civil Serv. Comm'n of Medina*, 168 Wn.2d 845, 850, 232 P.3d 558 (2010). Failure to comply requires dismissal. *Wells Fargo Bank, NA v. Dep't of Revenue*, 166 Wn. App. 342, 271 P.3d 268 (2012) (failure to file petition within 30 days of final agency action required dismissal); *Sprint Spectrum*, 156 Wn. App. at 953 (failure to comply with APA's terms for service of a copy of the petition on Board required dismissal).¹

¹ *Accord Skagit Surveyors*, 135 Wn.2d at 557 (dismissal when petitioner failed to appropriately serve some of the parties); *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 621, 902 P.2d 1247 (1996) (dismissal when petitioner served attorneys of record, not the actual parties as the APA required); *PERC*, 116 Wn.2d at 928 (dismissal when petitioner served parties three days after APA deadline); *Bock v. State Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 100, 586 P.2d 1173 (1978) (dismissal when petitioner failed to serve Board of Pilotage Commissioners until 53 days after service under former version of APA); *Cheek v. Employ. Sec. Dep't*, 107 Wn. App. 79, 85, 25 P.3d 481 (2001) (dismissal when petitioner failed to serve the agency until four days after APA deadline); *Banner Realty, Inc. v. Dep't of Revenue*, 48 Wn. App. 274, 278, 738 P.2d 279 (1987) (dismissal when taxpayer failed to serve the Board within 30 days under former version of APA).

RCW 34.05.542 sets the time limits and service requirements for a petition for judicial review under the APA. Specifically, the statute requires the petition to be filed with the superior court and served on the agency issuing the decision, the office of the attorney general, and all parties of record within thirty days after service of an agency's final order. RCW 34.05.542(2). While the office of the attorney general and the parties of record may be served by mail, service on the agency must be by delivery to the principal office of the agency. RCW 34.05.542(4).² The APA states that only failure to timely serve the office of the attorney general will not result in dismissal of the petition. RCW 34.05.542(5).³

In this case, the Board served its final order on the Department and Northwest Territorial on May 27, 2011. CP 79. To perfect the superior court's appellate jurisdiction to review the Board's order under the APA, Northwest Territorial had to deliver a copy of its petition for judicial review to the Board on or before Monday, June 27, 2011. RCW 34.05.542(2), (4). Northwest Territorial failed to do so. CP 43. Based on these undisputed facts, the superior court correctly concluded that

² RCW 34.05.542(4):

Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

³ RCW 34.05.542(5): "Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition."

Northwest Territorial did not comply with the APA's requirements for obtaining judicial review of an agency order and dismissed its petition. CP 148.

B. Northwest Territorial's Other Jurisdictional Arguments Lack Merit.

Despite admitting that this case involves the superior court's appellate jurisdiction, Northwest Territorial claims that the superior court erred in "ruling that, due to the Mint's delayed filing, it had no jurisdiction to review the Board's final order." Appellant's Br. at 2. It argues that its failure to comply with the time limit in RCW 34.05.542 does not deprive the court of subject matter jurisdiction to review the agency's order. *Id.* at 8-9. It also argues that its failure does not deprive the court of personal jurisdiction over the Department. *Id.* at 9-11. Northwest Territorial's arguments are misplaced as this case does not involve either type of original jurisdiction; rather it involves the superior court's appellate jurisdiction under the APA.

Northwest Territorial relies on two cases, *Dougherty v. Department of Labor & Industries*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003), and *Housing Authority of the City of Seattle v. Bin*, 163 Wn. App. 367, 260 P.3d 900 (2011), to argue that the superior court had subject matter jurisdiction to review the Board's final order. *See* App. Br. at 8-9.

Neither case, however, involved noncompliance with the APA's requirements for invoking appellate review of an agency order.

In *Dougherty*, the court analyzed whether failure to comply with a venue provision under the Industrial Insurance Act deprived the court of jurisdiction to hear the appeal. *Dougherty*, 150 Wn.2d at 313. Because all superior courts have the same subject matter jurisdiction, the court concluded it would “generally decline to interpret a statute’s procedural requirements regarding location of filing as jurisdictional” unless “mandated by the clear language of the statute.” *Dougherty*, 150 Wn.2d at 317.

This Court in *Bin* analyzed whether a housing authority’s failure to comply with its own procedures prevents the superior court from acquiring subject matter jurisdiction over an unlawful detainer action. *Bin*, 163 Wn. App. at 373-77. This Court held that, because a superior court’s subject matter jurisdiction in an unlawful detainer action is granted by the constitution, when a superior court dismisses an unlawful detainer action the reason must always be something other than lack of subject matter jurisdiction. *Id.* at 369, 376. This Court affirmed the superior court’s dismissal of the unlawful detainer action because of the housing agency’s failure to comply with its own grievance procedures. *Id.*

In this case, however, the APA establishes the superior court's authority to review the Board's final order. RCW 34.05.510; RCW 82.03.180. The APA also establishes the requirements for obtaining judicial review of the agency's order. RCW 34.05.542. Thus, an appeal from the Board's order invokes the superior court's appellate jurisdiction, not the court's original jurisdiction. *See Skagit Surveyors*, 135 Wn.2d at 555; *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990). The Department acknowledges that our appellate courts have recently expressed concerns regarding the use of the term "subject matter jurisdiction" to describe the superior's court's appellate jurisdiction under the APA. *See, e.g., ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 173 Wn.2d 608, 616-20, 268 P.3d 929 (2012); *Sprint Spectrum*, 156 Wn. App. at 964-67 (Becker, J., concurring).⁴ However, the Washington Supreme Court has not repudiated its holdings with respect to the Legislature's requirements for "invoking appellate jurisdiction" under the APA. *See Skinner*, 168 Wn.2d at 850 ("Because an appeal from an administrative body invokes the superior court's appellate jurisdiction, all

⁴ In *ZDI*, the Washington Supreme Court discussed limitations on the State's waiver of sovereign immunity and superior court jurisdiction. *ZDI*, 173 Wn.2d at 616-20. But that case addressed a venue requirement in a gambling statute and whether dismissal for lack of jurisdiction, rather than transfer of venue, was required where the plaintiff filed in the incorrect county. *Id.* The court held that dismissal for lack of jurisdiction was inappropriate. *Id.* at 619. In contrast, when analyzing the specific APA statute at issue in this case, Washington's appellate courts have twice upheld dismissals for failure to serve the Board within the statutorily mandated 30 days. *Sprint Spectrum*, 156 Wn. App. at 953; *Banner Realty*, 48 Wn. App. at 278.

statutory requirements must be met before jurisdiction is properly invoked.”).

Moreover, contrary to Northwest Territorial’s assertion, this case does not involve any issue of subject matter jurisdiction. The Department did not present any argument concerning subject matter jurisdiction, nor did the superior court hold that it lacked subject matter jurisdiction to review the matter. *See* CP 148; *see also* VRP 7, ll. 10-15 (colloquy between Department counsel and Judge Erlick). Instead, the superior court recognized that the APA solely governed its ability to review the Board’s final order. *Id.* The superior court recognized that Northwest Territorial’s failure to comply with the APA prevented it from properly invoking the superior court’s appellate jurisdiction under the APA. *See* VRP 29, ll. 13-25 & 30, ll. 10-13.

Northwest Territorial’s arguments regarding “personal jurisdiction” are likewise misplaced. Northwest Territorial likens service on the Board to service on a non-party and argues that its failure to timely serve the Board raises no jurisdictional or constitutional issues. *See* Appellant’s Br. at 9-11.⁵ Northwest Territorial’s argument, however,

⁵ Northwest Territorial’s insistence that the superior court erred in relying on *Union Bay Preservation Coalition v. Cosmos Development & Administration Corporation*, 127 Wn.2d 614, 902 P.2d 1247 (1996), to distinguish between a party and non-party is in error. The superior court made no such distinction. Rather, as discussed below in section C.2, the superior court relied on *Union Bay* for the holding that

ignores the APA's statutory requirements for service on the agency. *See* RCW 34.05.542. It also fails to recognize the importance of "timely service of a copy of the petition for review on the Board," the agency whose final order is the subject of the petition for judicial review. *See Sprint Spectrum*, 156 Wn. App. at 955.

The Legislature explicitly requires that a party seeking judicial review of an agency order serve the agency issuing the decision within 30 days after the final order. RCW 34.05.542(2). It also explicitly specifies when untimely service is not grounds for dismissal, i.e. when the Office of the Attorney General is not timely served. RCW 34.05.542(5). Here, the superior court correctly held that a party must comply with the APA's requirements for timely service on the agency in order to invoke the superior court's appellate jurisdiction under the APA. CP 148. Because Northwest Territorial failed to serve the Board within the statutory time limit, the superior court properly dismissed its petition and its order should be affirmed.

C. Northwest Territorial's Noncompliance With The APA's Time Requirements Was Not Substantial Compliance.

Northwest Territorial admits that this case concerns only the appellate jurisdiction of the superior court and that all statutory

"substantial compliance cannot trump the legislature's clear expression of intent as expressed through [the APA's] well defined statutory scheme." *See* VRP 29, ll. 7-12.

requirements must be met before appellate jurisdiction is invoked. Appellant's Br. at 12. Northwest Territorial nevertheless argues that only substantial compliance with the APA's requirements is necessary to invoke the court's appellate jurisdiction. *Id.* Northwest Territorial's substantial compliance argument is wrong because "noncompliance with a statutory mandate is not substantial compliance." *Crosby v. Spokane Cy.*, 137 Wn.2d 296, 302, 971 P.2d 32 (1999).

1. A party cannot substantially comply with the APA's time limit for service on the agency.

Substantial compliance is defined as "actual compliance in respect to the substance essential to every reasonable objective of a statute." *PERC*, 116 Wn.2d at 928. It has been applied when there has been actual compliance with the relevant statute, although in a procedurally faulty manner. *Id.* However, "where time requirements are concerned [the Washington Supreme Court] has held that failure to comply with a statutorily set time limitation cannot be considered substantial compliance." *Medina v. Pub. Util. Dist. No. 1*, 147 Wn.2d 303, 317, 53 P.3d 993 (2002) (citing *PERC*, 116 Wn.2d at 929, and *Forseth v. City of Tacoma*, 27 Wn.2d 284, 297, 178 P.2d 357 (1947)).

Northwest Territorial contends that substantial compliance is "generally sufficient" (see Appellant's Br. at 13-14), but none of the cases

upon which it relies involved noncompliance with an APA time limit for seeking judicial review. Rather, each involved situations where there was actual compliance with a service requirement but with minor procedural defects. For example, in *In re Saltis*, 94 Wn.2d 889, 621 P.2d 716 (1980), the court considered whether substantial compliance applied to service on the director of the Department of Labor and Industries. *Saltis*, 94 Wn.2d at 891. Specifically, the court considered whether the two appellants' particular methods of service provided sufficient notice of their appeals to the director even though they had not strictly complied with the applicable statute's requirements. *Id.* The court held that substantial compliance was sufficient if "(1) the director received actual notice of the appeal or (2) the notice of appeal was served in a manner reasonably calculated to give notice to the director." *Id.* at 896. The court in *Saltis*, therefore, did not consider whether substantial compliance applies to a time limit. *Id.*⁶ Instead, consistent with its holdings in later cases,⁷ the court concluded

⁶ See *San Juan Fidalgo Holding Co. v. Skagit Cy.*, 87 Wn. App. 703, 712, 943 P.2d 341 (1997), *review denied*, 135 Wn.2d 1008 (1998) ("In *Black [v. Dep't of Labor & Indus.]*, 131 Wn.2d 547, 551, 933 P.2d 1025 (1997)], *Hall v. Seattle Sch. Dist. 1*, 66 Wn. App. 308, 313, 831 P.2d 1128 (1992)] and *Saltis*, there was no question about untimely service; the issue in those cases was whether the appellants had served the correct parties.").

⁷ See *Skinner*, 168 Wn.2d at 854 (service on city clerk as opposed to actual commission was sufficient notice); *Medina*, 147 Wn.2d at 317 (listing six cases, including *In re Saltis*, where the court has applied substantial compliance to defects in service of process); *Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 910 P.2d 1284 (1996) (service by Federal Express was substantially equivalent to service by mail).

that substantial compliance applies to defects in the method or content of service. *Id.*

Similarly, in *Ruland v. Department of Social & Health Services*, 144 Wn. App. 263, 182 P.3d 470 (2008), Division Three of the Court of Appeals considered whether the petitioners' failure to file a formal notice of appeal to obtain an administrative hearing before DSHS required dismissal notwithstanding that they had provided notice to DSHS of their challenge to the agency's neglect findings in three separate ways. *Ruland*, 144 Wn. App. at 275. The court of appeals held that the petitioners' acts providing actual notice to DSHS prior to the filing deadline "were more than adequate substitutes" to constitute substantial compliance with the applicable notice requirements. *Id.* As such, the court of appeals held there was no policy reason to require the petitioners to file a second notice of appeal of DSHS's neglect findings. *Id.*

In this case, RCW 34.05.542 explicitly required that Northwest Territorial serve its petition for judicial review on the Board at its principal office within 30 days after service of the Board's final order. RCW 34.05.542(2), (4). Northwest Territorial's service of its petition on the Board was not merely procedurally faulty. It was 17 days late. As such, failing to serve a copy of the petition on the Board within the APA's time limit was a failure to comply with the express terms of the statute. *See*

Sprint Spectrum, 156 Wn. App. at 955. The superior court correctly rejected Northwest Territorial's erroneous reliance on the doctrine of substantial compliance. The superior court's order dismissing the petition should be affirmed.

2. Washington courts do not distinguish between untimely service on a party and untimely service on the agency whose decision is being reviewed.

Northwest Territorial also relies on *Union Bay Preservation Coalition v. Cosmos Development & Administration Corporation*, 127 Wn.2d 614, 902 P.2d 1247 (1996), for the proposition that substantial compliance applies with respect untimely service on a non-party, specifically in this case the agency whose decision is being reviewed. Appellant's Br. at 9-11, 15. *Union Bay*, however, does not support that proposition.

In *Union Bay*, the court considered whether the substantial compliance doctrine applied to service of a petition for judicial review on the parties' attorneys rather than on the parties themselves. *Union Bay*, 127 Wn.2d at 617. It held that the doctrine did not apply. *Id.* at 620. The court acknowledged that while it had "used the doctrine of substantial compliance in cases involving service of original process and appellate process," "the language and history of the APA" precluded service on attorneys. *Id.* Therefore, rather than relying on a party or entity

distinction, the court specifically relied on the words of the APA to determine that “decisions applying the doctrine of substantial compliance to other statutes are not persuasive.” *Union Bay*, 127 Wn.2d at 620.

Northwest Territorial incorrectly attempts to distinguish untimely service on a party from untimely service on the agency. No Washington court has held that the APA’s time limit for service on the agency whose action is being challenged is any less stringent than that for service on a party. No Washington court has held that untimely service on the agency is permissible under the doctrine of substantial compliance. And no Washington court has permitted a petitioner, such as Northwest Territorial, to serve its petition for judicial review on the agency whose order is being appealed 17 days late. Rather, as the superior court and other Washington courts have held, a party’s failure to comply with the time limit in RCW 34.05.542 for service on the agency requires dismissal. *See, e.g., Sprint Spectrum*, 156 Wn. App. at 953; *Banner Realty*, 48 Wn. App. at 278.

3. Even if the purpose of the time limit is ultimately satisfied, failure to comply with the time limit mandates dismissal.

Northwest Territorial also attempts to characterize its failure to serve the Board within the 30-day time limit as immaterial because the Board certified the administrative record in compliance with the superior

court's scheduling order. *See* Appellant's Br. at 18-19.⁸ Specifically, Northwest Territorial attempts to distinguish the facts in this case from those in *Sprint Spectrum* by stressing that, unlike in *Sprint Spectrum*, the Board here filed the administrative record. *Id.*⁹ However, while this Court in *Sprint Spectrum* acknowledged that one of the principal objectives of the APA's service requirement is to trigger transmittal of the administrative record, it also clearly stated that it would not abandon the premise that "dismissal is required if timely service of a copy of the petition for judicial review is not accomplished." *Sprint Spectrum*, 156 Wn. App. at 956-57, 960. Moreover, in *Medina v. Public Utility District No. 1*, the Washington Supreme Court specifically rejected the notion that substantial compliance applies if the purpose of the time limit has been met. *Medina*, 147 Wn.2d at 317-18.

In *Medina*, the appellant argued that, even though it had served its tort action early, substantial compliance applied because the purpose of the statutorily required 60-day waiting period between filing of a tort

⁸ Northwest Territorial's argument is disingenuous since Northwest Territorial likely never would have served the Board had the Department's counsel not notified its counsel of the issue. As the Board does not have the authority to modify the time limits set forth in the APA (see RCW 34.05.080(1)), the Board's subsequent compliance with its statutory mandate to file the administrative record does not excuse Northwest Territorial's noncompliance with RCW 34.05.542.

⁹ In *Sprint Spectrum*, the petitioner never served the Board. *Sprint Spectrum*, 156 Wn. App. at 952-53.

claim and commencement of the action had been met. *Id.* at 308. The court disagreed:

To hold as *Medina* suggests would call into question all statutory and court rule time requirements because often the underlying purpose of the statute or rule may be achieved without regard to time requirements. All time requirements necessarily involve a judgment by the legislature or a court as to the amount of time necessary to achieve the legislative or judicial purpose.

Medina, 147 Wn.2d at 317-18. The court then dismissed the appellant's tort action for failure to adhere to the requisite time period. *Id.*

Here, as with the statute at issue in *Medina*, nothing in the APA demonstrates that the Legislature intended to establish a flexible period for when the agency whose final order is being reviewed must be served. *See Medina*, 147 Wn.2d at 318. Instead, the Legislature specifically determined that service upon the agency must be accomplished within 30 days. RCW 34.05.542(2). Northwest Territorial failed to satisfy that requirement and thus simply failed to comply with the statute.

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V. CONCLUSION

For these reasons, the Department respectfully requests that this Court affirm the superior court's order dismissing Northwest Territorial's petition for judicial review.

RESPECTFULLY SUBMITTED this 15th day of June, 2012.

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