

71626-3

71626-3

No. 91978-0

No. 71626-3-1

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

NEW CINGULAR WIRELESS PCS, LLC,

Appellant,

v.

THE CITY OF CLYDE HILL, WASHINGTON,

Respondent.

RESPONSE BRIEF

Greg A. Rubstello, WSBA #6271
Attorney for Respondent
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

Stephanie E. Croll, WSBA #18005
Attorney for Respondent
KEATING, BUCKLIN & MCCORMICK
INC., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
Tel: 206.623-8861/Fax: 206.223-9423

FILED
COURT OF APPEALS, DIV. I
STATE OF WASHINGTON
2014 JUL -7 PM 4:13

TABLE OF CONTENTS

	<i>Page</i>
A. INTRODUCTION	1
B. STATEMENT OF ISSUES	6
C. STATEMENT OF THE CASE	8
D. SUMMARY OF ARGUMENT	22
E. ARGUMENT.....	24
1. New Cingular Cannot Invoke the Superior Court’s Jurisdiction Under Article IV, §6 of the Washington State Constitution or RCW 2.08.010.	24
a. The Superior Court’s Original Appellate Jurisdiction Was Not Timely Sought as Required by Article IV, §6, of the State Constitution and RCW 7.16.	24
b. The Appeal to Mayor Martin was Mandatory and his Quasi-Judicial Decision is Final, Subject Only to Appellate Review.....	31
2. Thirty days and the rule of reasonable time by analogy applies both to commencing actions for writ of review and for declaratory judgment actions.	34
3. Relief Under the Declaratory Judgments Act is Not Available.....	37
4. New Cingular raises straw man arguments.	41
5. The City’s cross claim for a judgment in favor of the City and against New Cingular for the amount of the Penalties assessed in the Notice of Violation, pre-judgment interest and attorney fees was properly granted.	42
6. Clyde Hill is entitled to Attorney fees on this appeal.	43
F. CONCLUSION.....	43

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>Banner Realty v. Dep't of Revenue</i> , 48 Wn. App. 274, 738.....	25
<i>Bridle Trails Community Club v. City of Bellevue</i> , 45 Wn. App. 248, 250	34
<i>Brutsche v. City of Kent</i> , 78 Wn. App. 370	34, 35
<i>Carillo v City of Ocean Shores</i> , 122 Wn. App. 592, 610	37
<i>Clark County PUD No. 1 v. Wilkinson</i> , 139 Wn.2d 840, 847	35
<i>Cost Management Services v. Lakewood</i> , 178 Wn.2d 635	29, 30, 31, 32, 33, 35
<i>Cost Management Services, Inc. v. City of Lakewood</i> , 310 P.3d 804	35
<i>Foothills Development Co. v. Clark County Bd. of Comm'rs</i> , 46 Wn. App. 369, 370, 730	39
<i>Holiday v. Moses Lake</i> , 157 Wn. App. 347, 353-54, 236.....	34, 35
<i>James v. Kitsap County</i> , 154 Wn.2d 574, 588.....	25, 26
<i>Oden Investment Co. v. Seattle</i> , 28 Wn. App. 161, 622	39
<i>Peoples Park & Amusement Ass'n v. Anrooney</i> , 200 Wash. 51, 57-58	30, 38
<i>Qwest v. Bellevue</i> , 161 Wash.2d 353.....	30
<i>Raynes v. City Leavenworth</i> , 118 Wn.2d 237, 244.....	33, 34
<i>Reeder v. King County</i> , 57 Wn.2d 563	30, 40
<i>Robinson v. City of Seattle</i> , 119 Wn. 2nd 34, 830	37
<i>Shoemaker v. City of Bremerton</i> , 109 Wash.2d 504.....	32
<i>Spokane v. J-R Distributors, Inc.</i> , 90 Wn.2d 722 (1978)	28
<i>Summit-Waller Assn. v. Pierce County</i> , 77 Wn.App. 384, 392, 895	37
<i>Tacoma v. Mary Kay</i> , 117 Wn. App. 111, 115.....	27, 28, 29
<i>Vance v. Seattle</i> , 18 Wn. App. 418, 424.....	35
<i>Washington Fed'n of State Employees v. Personnel Bd.</i> , 23 Wn. App. 142, 148, 594	39
<i>Washington Public Employees Ass'n v. Washington Personnel Resources Bd.</i> , 91 Wn. App. 640	33
<i>Wells Fargo Bank v. Depart. of Revenue</i> , 166 Wn. App. 342, 271	26, 27
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 181, 4...40	
Statutes	
RCW 2.08.010	26, 27, 29, 36
RCW 34.05.542(2).....	36
RCW 4.16.080(3).....	8, 37

{GARI182031.DOCX;1/00019.050025/ }

RCW 7.16	passim
RCW 7.16.040	31, 32
RCW 7.24	23

Other Authorities

Clyde Hill Municipal Code (“CHMC”).....	passim
-----------------------------------------	--------

Regulations

Administrative Procedures Act (APA)	26, 27, 36
Washington State Constitution, Article IV, §6	passim
Federal Internet Freedom Act (IFTA)	1, 2, 9, 10
Land Use Petition Act (LUPA).....	26, 27, 40
WASHINGTON ADMIN MANUAL Issue 10 (2000)	38

A. INTRODUCTION

AT&T Wireless and its subsidiary New Cingular¹ made a series of bad choices leading to this appeal. New Cingular first chose to ignore the Federal Internet Freedom Act (IFTA) and to bill its customers in Clyde Hill and other cities nationwide for money it would use to pay local utility taxes on the revenue it collected from customers for internet services. New Cingular certainly cannot claim it acted in ignorance of the IFTA since New Cingular through its parent company AT&T Mobility, lobbied Congress for the passage of the IFTA and its extensions and knew full well that no tax was to be collected on sales of internet access services. Then, in apparent complete violation of the IFTA, New Cingular filed local utility tax returns with Clyde Hill and other cities nationwide, including in its statement of taxable income, revenue received from providing internet services.²

Another bad choice occurred after New Cingular was sued in a nationwide class action lawsuit for violating the Internet Freedom Act. In order to avoid any risk of paying damages to Class Plaintiffs from its own financial resources, New Cingular agreed with the Plaintiffs in a court

¹ AT&T Wireless and New Cingular Wireless PCS, LLC will be referred herein collectively simply as “New Cingular”.

² The inclusion of revenue from internet services was not disclosed by New Cingular in its utility tax returns, at least in the returns it filed with Clyde Hill.
{GAR1182031.DOCX;1/00019.050025/ }

approved settlement agreement that it would seek recovery of the disputed customer charges from the local taxing jurisdictions to which it had supposedly paid utility tax.³ In the settlement agreement New Cingular adamantly maintained it did not violate federal law or otherwise illegally collect the monies for utility tax payments. New Cingular however, when demanding the refund of tax payments from the local taxing jurisdictions, including Clyde Hill, stated it did indeed violate the Federal Internet Freedom Act.⁴

Clyde Hill called New Cingular on the carpet for making false statement in their utility tax returns filed with the City, based upon New Cingular's admissions that it: (i) paid utility taxes with funds illegally collected from its customers; and (ii) included revenue from providing internet services in its statement of taxable income. Clyde Hill issued a Notice of Violation to New Cingular for making false statement in the tax returns. New Cingular protested and requested an appeal hearing as provided in the Clyde Hill Municipal Code ("CHMC"). To its own detriment, New Cingular requested to participate telephonically instead of in person and offered no witness testimony or any additional

³ The settlement agreement provided that New Cingular would be reimbursed for its attorney fees and costs from the monies received from the local taxing districts.

⁴ New Cingular needed to state a reason supporting the demand for tax refunds.
{GARI182031.DOCX;1/00019.050025/ }

documentation as exhibits. The Clyde Hill Mayor, serving as the hearing officer, affirmed the Notice of Violation by issuing a written decision. New Cingular however failed to timely seek judicial review of the decision as allowed by state statute.

New Cingular now appeals a summary judgment determination of the Superior Court made in accordance with adopted rules and principles of law. If “fairness” is defined as just and reasonable treatment in accordance with accepted rules or principles,⁵ New Cingular received a fair as well as a legally correct outcome from the court below. New Cingular failed to follow the rules applicable to everyone who seeks to judicially challenge a final quasi-judicial determination made by a local government. New Cingular had 30 days to commence a writ action in Superior Court to invoke the court’s appellate jurisdiction. Even if New Cingular had the option to commence a declaratory judgment action and invoke the court’s trial jurisdiction (which the City contests), the time for commencing the declaratory judgment action is the same 30 day time as existed for commencing the writ action. Summary judgment dismissal of New Cingular’s Complaint for Declaratory Relief was proper.

⁵ www.yourdictionary.com
{GAR1182031.DOCX;1/00019.050025/ }

New Cingular's Complaint for Declaratory Judgment sought to contest the validity of the City's Notice of Violation which imposed a monetary penalty for providing false information on tax returns during the years 1995-2010.⁶ New Cingular's complaint fails to state any claim to recover municipal taxes or fees paid to the City that would be subject to the three year statute of limitations.⁷ In this lawsuit, New Cingular attempted to collaterally attack a quasi-judicial decision⁸ upholding a civil penalty that New Cingular has yet to pay to the City. There is no claim for

⁶ Although not relevant to the legal issues before the court on this appeal, New Cingular spins a self-serving factual tale in the Introduction to its Opening Brief. New Cingular colors its effort to recover taxes paid to the City on income New Cingular reported as subject to Clyde Hill's utility tax as "overpaid taxes" instead of illegally collected monies for services not subject to Clyde Hill's utility tax. New Cingular provided false information in its utility tax returns. It did not simply overpay taxes. The amounts of taxes paid were the correct amounts based upon New Cingular's illegal collection of monies from its customers for the specific purpose of paying utility taxes. Although adamant in its Settlement Agreement with the class action plaintiffs that it did not illegally collect the money to pay utility taxes, it demands a refund of taxes paid to Clyde Hill and other cities, asserting it collected the monies in violation of federal law. **New Cingular cannot keep its story straight.** It is no wonder that Clyde Hill for purposes of its Notice of Violation could accept New Cingular's statement in its refund demand letter that it violated federal law in collecting the money it used to pay utility taxes and at the same time take the position in the refund lawsuit that it "has insufficient information on... whether the taxes paid were 'erroneous.'" See fn 2, p 6, of the Opening Brief.

⁷ New Cingular states in its Opening Brief that the Complaint for Declaratory Relief challenged the legality of Clyde Hill's municipal fine. Opening Brief at 3.

⁸ New Cingular does not argue or claim that Mayor Martin did not make a quasi-judicial decision subject to a writ of review under RCW 7.16. It admits that appellate review by writ was an option, but instead it chose the option of a de novo proceeding by invoking the court's original jurisdiction. Opening Brief at 12.

{GAR1182031.DOCX;1/00019.050025/ }

the recovery of money or other property from the City made in New Cingular's Complaint for Declaratory Relief⁹.

The Superior Court correctly declined jurisdiction of New Cingular's Complaint for Declaratory Relief. Following well-developed Washington case law, the Superior Court agreed with the City that New Cingular was required to invoke the court's appellate jurisdiction by writ of review. New Cingular's argument that it had the choice of either invoking the court's original trial jurisdiction by commencing a declaratory judgment action or seeking Superior Court appellate review by commencing a writ action, is an argument that cannot carry the day for New Cingular on this appeal. First, New Cingular was required to appeal the Mayor's quasi-judicial decision by writ of review. Exhaustion of the administrative remedy was required and a writ of review was required for judicial review of the Mayor's final decision. Second, even if New Cingular had the choice to commence a declaratory judgment action, the time for commencing the declaratory judgment action is the same 30 day time as existed for commencing the writ action, and summary judgment dismissal of their complaint was proper. Unable to make any challenge to

⁹ New Cingular seeks the recovery of taxes paid in separate litigation with the City of Clyde Hill in a pending lawsuit in the U.S. District Court for the Western District of Washington, case no. 2-13-md-02485-JCC.
{GAR1182031.DOCX;1/00019.050025/ }

the Notice of Violation with the dismissal of their complaint, New Cingular was left with no defense to the City's counterclaim.

The City's counterclaim to reduce to judgment the amount of monies owed the City from the Notice of Violation was also properly granted. The only argument made by New Cingular in its opening brief for reversal of the grant of summary judgment on the City's counterclaim is that the court wrongfully dismissed New Cingular's complaint for lack of jurisdiction, therefore New Cingular argues, "the resultant counterclaim must also be vacated."¹⁰

In sum, the Superior Court lacked jurisdiction to entertain New Cingular's claims for declaratory judgment and New Cingular's complaint was properly dismissed. The Superior Court did, however, have jurisdiction over the City's properly pled counter-claim, which was appropriately granted. The Superior Court's summary judgment order should be affirmed.

B. STATEMENT OF ISSUES

New Cingular alleges the Superior Court erred in holding that New Cingular should have sought review in the trial court by petition of a writ of review and dismissing its Complaint for Declaratory Relief. New

¹⁰ Opening Brief at 21.
{GAR1182031.DOCX;1/00019.050025/ }

Cingular argues it had the choice of challenging the Notice of Violation by invoking the Superior Court's original jurisdiction by commencing an action for declaratory relief. New Cingular also alleges the Superior Court erred in granting the City's counterclaim and entering judgment for the principle amount due on the Notice of Violation, plus interest and attorney fees, because the court erred when it dismissed the Complaint for Declaratory Relief. Therefore, the issues before the court are as follows:

1. **Did the Superior Court error in declining to entertain New Cingular's Complaint for Declaratory Relief and granting summary judgment to the City of Clyde Hill on its counterclaim?**¹¹

a. After entry of the Mayor's written decision affirming the Notice of Violation, did New Cingular have the choice between obtaining judicial review of the Mayor's decision by writ of review or by challenging the Notice of Violation *de novo* by filing a Complaint for Declaratory Relief.

b. If New Cingular did have the choice of filing a complaint for declaratory relief, was the filing time limited to 30 days

¹¹ New Cingular begins its argument at p. 10 of its opening brief by stating: "The only issue on appeal is whether the trial court had jurisdiction over New Cingular's complaint challenging the validity of Clyde Hill's municipal fine." It may be a fine distinction but the Superior Court noted in its written Order (CP 624-625) that it declined to entertain New Cingular's claims - not that it did not have jurisdiction over the Complaint.
{GAR1182031.DOCX;1/00019.050025/ }

under the reasonable time by analogy rule, or subject to the three year statute of limitations in RCW 4.16.080(3).

C. STATEMENT OF THE CASE

1. New Cingular, an affiliate of AT&T Wireless (“AT&T”), is a wireless service provider operating within the City of Clyde Hill. New Cingular pays a monthly local utility tax to the City pursuant to Clyde Hill Municipal Code (“CHMC”) Ch. 3.28. (CP 382-515). The City relies upon New Cingular (and other businesses subject to the utility tax) to determine the amount of tax due pursuant to the utility tax code by self-accounting for all sales it makes that are subject to the tax. New Cingular reports the total amount of sales subject to the tax and the amount of tax due in monthly returns submitted to the City (“utility tax returns”). (CP 277-279). New Cingular then pays the City the amount of tax New Cingular itself computes to be due according to CHMC 3.28.

2. In the allegations made by New Cingular in its Complaint and in the “AT&T Mobility Claim for Refund of Tax Attributable to Internet Access Services” New Cingular stated that over a five year period of time it had included within its reported sales subject to the City’s utility tax, those sales attributed to wireless internet services. (CP 560-579). When computing the amount of tax it owed the City, New Cingular

alleges that it included the sale of wireless internet services to its customers. New Cingular alleges it collected this amount of “tax” from its customers and paid it to the City. New Cingular only stopped including internet service charges in the amount of reported sales on its utility tax returns after it was named (along with AT&T and other AT&T affiliates) as a defendant in a nationwide class action lawsuit in federal district court (the “class action lawsuit”). (CP 277-279). In that federal case, the class action plaintiffs alleged that the collection of local utility tax based upon sales of “internet services” violated the Federal Internet Tax Freedom Act (“ITFA”).

3. **New Cingular, however, unequivocally denied in the class action lawsuit any violation of the Federal Internet Tax Freedom Act.** (CP 277-279), and Exhibit B to the attached Request for Admission (CP 281-381). In a settlement agreement entered into with the class plaintiffs and approved by the federal court, New Cingular continued to explicitly deny any violation of the ITFA. **The settlement agreement specifically provided that New Cingular made no admission of wrongdoing and denied any liability to the class plaintiffs.** However, New Cingular agreed - despite its denials - that it would attempt to recover (from Clyde Hill and other local governments) monies it collected from its

customers for local utility tax payments based on sales of internet services. New Cingular also agreed to pay any monies it recovered (less its costs and expenses) over to funds set up for the class plaintiffs. No guarantee of collection was made by New Cingular. (CP 277-279; 281-381).. The settlement was designed to shift financial responsibility for New Cingular's illegal conduct to the local governments who unknowingly received the alleged unlawful collections.

4. Despite its unequivocal denials of any illegal conduct in the class action litigation, and the lack of any judgment from any court holding that New Cingular had violated any federal law, New Cingular made written demand to the City for a refund of utility tax monies it had allegedly paid to the City for sales of internet services to customers within Clyde Hill during the five-year period between November 1, 2005, and September 30, 2010. (CP 550, 560-579). **In the refund demand New Cingular specifically alleged, as the basis for such refund, that it had, in fact, collected monies for local utility tax in violation of the Federal Internet Tax Freedom Act.** New Cingular's admission, in the refund claim, that it had collected and paid taxes to the City in violation of federal law is absolutely contrary to the declarations that it made to the City in the monthly utility tax returns. (CP 383-515). For instance, in each utility tax

return submitted to the City, New Cingular stated an amount for *Net Sales subject to Tax* and signed the following statement: *I hereby declare that all information provided herein is true, complete and accurate to the best of my knowledge* — when in fact, New Cingular through its parent company AT&T Mobility, lobbied Congress for the passage of the ITFA and its extensions and knew full well that no tax was to be collected on sales of internet access services. (CP 519-548). Based upon New Cingular’s admissions in its refund claim, it is obvious that those statements in monthly tax returns — as to the amount of net sales subject to the tax and as to the amount of tax due — were all false when made. These false statements constituted violations of the City’s utility tax code (CP 383-515).

5. On the basis of New Cingular’s disclosure and admission of facts demonstrating that the information it gave the City in its monthly utility tax returns to the City for the five-year period between November 1, 2005, and September 30, 2010, were false, Clyde Hill issued New Cingular a Notice of Violation dated July 6, 2012. (CP 549-568).

6. CHMC §3.28.130 makes it unlawful for a tax payer to make a false statement in the monthly utility tax returns submitted to the City as follows:

{GAR1182031.DOCX;1/00019.050025/ }

Unlawful acts.

It is unlawful:

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;

(CP 548).

7. The City assessed penalties against New Cingular for making false statements in its utility tax returns as provided for in CHMC §3.28.140 and CHMC §1.08.010. SEE Exhibits B and C to the DECLARATION OF RUBSTELLO (CP 281-381, and 383-515). **The Notice of Violation was issued independent of any determination on the merits of New Cingular's refund request.** (CP 549-550). New Cingular has pursued recovery of the monies sought in its refund request from the City in civil litigation independent of this cause of action.¹²

8. **Clyde Hill's municipal code requires an administrative appeal of a Notice of Violation to the City's Mayor.**¹³ New Cingular made timely written request for an appeal hearing before Mayor George Martin. (CP 550). A hearing was held on September 12, 2012. New

¹² KCSC No. 12-2-15031-1, and 13-2-27778-6. See Response to Request for Admission No. 18 and 19.

¹³ CHMC §1.08.030.
{GAR1182031.DOCX;1/00019.050025/ }

Cingular appeared through its attorney Margaret C. Wilson.¹⁴ Ms. Wilson offered no evidentiary witnesses or other testimony or evidence, but instead relied solely upon her letter of protest dated July 20, 2012. (CP 206-207). After opportunity for hearing and the presentation of whatever evidence New Cingular sought to provide the Mayor in support of its appeal (which was none), the hearing was closed. (CP 206-207) After consideration, Mayor Martin issued a “final, binding, and conclusive” decision denying New Cingular’s appeal and affirming the penalty amount imposed in the Notice of Violation. (CP 206-237). Mayor Martin’s final written decision was received by New Cingular on or about January 22, 2013. (CP 266), and Response to Request for Admission No. 5 below (266-267).

9. Clyde Hill’s municipal code states that the Mayor’s decision is final and binding, subject only to an **appeal** in Superior Court. CHMC §1.08.030. The City’s code does not, however, in any way, shape or form attempt to dictate how a claimant should pursue judicial review in Superior Court; instead, claimants should follow the review procedures set forth in State law. Following exhaustion of the administrative remedy provided by the City, New Cingular failed to timely seek judicial review

¹⁴ New Cingular requested permission to appear via telephone, and this request was granted by the City.
{GAR1182031.DOCX;1/00019.050025/ }

of the Mayor's final written decision. Specifically, New Cingular failed to timely invoke the Superior Court's appellate jurisdiction as provided for in the statutory writ of review procedures set forth in RCW 7.16, by making application for a writ of review within 30 days of the decision. Instead, almost four months after its receipt of the Mayor's Final administrative Decision, New Cingular commenced this Declaratory Judgment Action, attempting to collaterally attack the final administrative decision of Mayor Martin.

10. New Cingular Wireless by their responses to Defendant's Requests for Admission a copy of which is attached as Exhibit A to the DECLARATION OF RUBSTELLO (CP 264-279), **admits (except as denied in Responses 15, 16 and 20)** the following:

1) Response to RFA No. 1: New Cingular **admitted** that by letter dated July 20, 2012, counsel for New Cingular wrote to Clyde Hill protesting and demanding the withdrawal of Clyde Hill's July 6, 2012 "Notice of Violation," and that the contents of the July 20, 2012, document speaks for itself. The letter expressly states: "New Cingular demands a hearing and demands that adequate notice of the same be provided to the undersigned [Margaret C. Wilson]." New Cingular's refusal to admit that it administratively appealed the "Notice of Violation"

because “it is unclear what is meant by the phrase ‘administratively appealed’ is disingenuous, contrary to undisputable fact and its Responses to Request for Admission Nos. 3 and 4. (CP 264).

2) Response to RFA No. 2: New Cingular **admitted** that on or about September 12, 2012, New Cingular attorney Margaret C. Wilson had a telephone call with Clyde Hill Mayor George Martin that Mayor Martin characterized as an “appeal hearing”, and that to New Cingular’s knowledge there were no other persons on the telephone call. New Cingular’s refusal to admit that the telephone call was an “appeal hearing” because “the phrase ‘appeal hearing’ is vague and ambiguous” is disingenuous, contrary to undisputable fact and its Responses to Request for Admission Nos. 3 and 4. (CP 265).

3) Response to RFA No. 3: New Cingular **admitted** that the City issued its decision with regard to New Cingular’s administrative appeal by letter dated January 22, 2013, signed by Clyde Hill Mayor George Martin. (CP 265).

4) Response to RFA No. 4: New Cingular **admitted** that attached to the Responses as Exhibit A is a true and correct copy of the City’s letter decision with regard to New Cingular’s administrative appeal,

signed by Clyde Hill Mayor George Martin, dated January 22, 2013. (CP 265).

5) Response to RFA No. 5: New Cingular **admitted** that New Cingular's attorney Margaret C. Wilson received a copy of the Mayor's letter decision by email on or about January 22, 2013, and by U.S. Mail, on or about January 26, 2013. (CP 266-267).

6) Response to RFA No. 6: New Cingular **admitted** that it [New Cingular] has not filed any petition for writ of certiorari pursuant to RCW 7.16 to appeal the Mayor's final letter decision, but instead has attempted to challenge the final decision via this Complaint initiating this lawsuit. (CP 267).

7) Response to RFA No. 7: New Cingular **admitted** that Exhibit B to the Requests for Admission is a true and correct copy of the Settlement Agreement in the federal class action lawsuit initiated against it (and AT&T Mobility and other affiliates of AT&T) referenced in paragraph 11 of the Complaint, omitting Exhibits B, C, D, E, and G (omitting also the exhibits to Exhibit G) of the federal Settlement Agreement. (CP 268).

8) Response to RFA No. 8: New Cingular **admitted** that New Cingular is an affiliate of AT&T Mobility, and a named party in both

(a) the federal class action lawsuits, and (b) the Settlement Agreement referenced in paragraphs 8 through 13 of the Complaint and reproduced as Exhibit B to Clyde Hill's Requests for Admission. New Cingular's refusal to admit that New Cingular and AT&T Mobility legally disputed the factual and legal allegations of the Class Plaintiffs in the federal litigation referenced in paragraphs 8 through 13 of the Complaint and denied any liability to the Class Plaintiffs and the Settlement Class, as set forth in Exhibit B to the Request for Admission, because Request No. 8 is "vague and ambiguous" and "It is unclear what is meant by reference to 'New Cingular and AT&T Mobility' is disingenuous and contrary to undisputable facts. (CP 268-269).

9) Response to RFA No. 9; New Cingular **admitted** that the Settlement Agreement referenced in paragraph 11 of the Complaint and attached as Exhibit B to the Requests for Admissions was entered into prior to a judicial ruling on the merits of the allegations in the class action lawsuit and was approved by the court. New Cingular's refusal to admit there has been no judicial determination that any money collected by New Cingular or by AT&T Mobility from its customers related to internet access services and paid to the City of Clyde Hill, or to any other Washington City, was collected by New Cingular or AT&T in violation of

federal law because “Request for Admission No. 9 is vague and ambiguous” is disingenuous and contrary to undisputable fact. (CP 269).

10) Response to RFA NO. 10: New Cingular **admitted** that Exhibit C to the Requests for Admission contains true and correct copies of Utility Tax Reports submitted by New Cingular to the City of Clyde Hill for the period of November 2005 through December 2010. (CP 269-270).

11) Response to RFA No. 11: New Cingular **admitted** that the column of Exhibit D to the Requests for Admission, titled “Cash Receipt Amount” contains a true and correct summary of the amounts paid by New Cingular to Clyde Hill with respect to the tax reporting periods identified in the columns titled “Beginning of Reporting Period” and “End of Reporting Period.” (CP 270).

12) Response to RFA No. 12: New Cingular **admitted** that New Cingular reported to the City in each of the Utility Tax Reports it submitted to the City, see Exhibit C, the amount of utility tax based upon the amount of “sales subject to tax” reported by New Cingular in the return. (CP 270-271).

13) Response to RFA No. 13: New Cingular **admitted** that Exhibit E attached to the Requests for Admission is a true and correct

copy of the refund request submitted to the City of Clyde Hill by New Cingular. (CP 271).

14) Response to RFA No. 14: New Cingular **admitted** that the amount of “sales subject to tax” reported by New Cingular in the Utility Tax Returns to the City (see Exhibits C and D) during the period covered by the refund claim referenced in paragraph 13 of the Complaint (see Exhibit E) included amounts New Cingular is now alleging were not subject to the tax. (CP 271).

15) Response to RFA NO. 15: New Cingular **denied** (by stating: “Except as expressly admitted herein, the request is otherwise denied”) that it believes its Utility Tax Returns to the City for the period covered by the refund Request referenced in paragraph 13 of the Complaint (see exhibit E) accurately stated the amount of “sales subject to tax,” “Total Gross Tax Due,” and “Net Tax Amount to be Remitted.” New Cingular’s objection that “Request for Admission No. 15 is vague and ambiguous” is disingenuous. (CP 271-272).

16) Response to RFA No. 16: New Cingular **denied** (by refusal to admit) that the following statement made in their Refund Request to the City that, “This Refund Claim seeks the refund or credit of taxes remitted by AT&T Mobility with regard to charges it made for Data

Services because those Data Services constitute protected Internet access under the ITFA,” is contrary to New Cingular’s denials of wrongdoing, dispute of the factual and legal allegations of the Class Plaintiffs, and denial of any liability to the Class Plaintiffs and the Settlement Class that were asserted by New Cingular in the Settlement Agreement referenced in paragraph 11 of the Complaint (see Exhibit B). **New Cingular’s objection that Request No. 16 “is vague, ambiguous, argumentative, seeks information protected by the attorney-client privilege and/or work product doctrine, calls for a legal conclusion, and is otherwise the improper subject of a Request for Admission under CR 36” is disingenuous, contrary to the statements made by New Cingular in the documentary evidence, and without legal foundation.** (CP 272).

17) Response to RFA No. 17: New Cingular **admitted** that CHMC §1.08.030 contains the words that the determination by the Mayor is “final, binding, and conclusive unless a judicial appeal is appropriately filed with the King County Superior Court.” (CP 272-273).

18) Response to RFA No. 18: New Cingular **admitted** that as alleged in paragraph 17 of the Complaint, New Cingular filed suit against Clyde Hill in King County under case number 12-5-2-15031-1 SEA seeking to require Clyde Hill to refund “erroneously collected taxes

on Internet access”; and further admits that Clyde Hill was dropped from that suit without prejudice. (CP 273).

19) Response to RFA No. 19: New Cingular **admitted** that on or about July 31, 2013, New Cingular served a new and second Complaint on Clyde Hill in King County Case No. 13-2-27778-6 SEA, which Complaint asserts three causes of action against Clyde Hill and seeks the following relief: “(1) for a declaration that Defendant (the City of Clyde Hill) has an obligation to refund the erroneously collected tax on internet access; (2) For an award of taxes unjustly retained by Defendant (Clyde Hill), in an amount to be proven at trial; (3) for an award of the costs of this suit; and (4) Such other and further relief as may be just and proper.” (CP 273-274).

20) Response to RFA No. 20: New Cingular inexplicitly **denied** that that the City’s Notice of Violation, including any assertion that the underlying tax returns constituted a ‘false or fraudulent’ statement, did **not** deny, or affect in any way, New Cingular’s opportunity to secure relief for allegedly overpaid taxes in King County Case No. 12-2-15031-1 SEA or in King County Case No. 13-2-27778-6 SEA. **This denial is disingenuous, contrary to the records of this court in Cause Nos. 12-2-15031-1 SEA and 13-2-27778-6 SEA (of which this court can take**

{GAR1182031.DOCX;1/00019.050025/ }

judicial notice) and contrary to the admissions made by New Cingular in Request for Admission Nos. 18 and 19. (CP 274).

D. SUMMARY OF ARGUMENT

Given the undisputed material facts before the Superior Court, the procedural requirements for judicial review of the Mayor's quasi-judicial final administrative decision ("the Mayor's Final Decision") affirming the challenged Notice of Violation were clear. The City issued Plaintiff New Cingular a final and binding decision, subject to judicial appeal to Superior Court. See CHMC §1.08.030 (Attachment "A" hereto, incorporated herein by this reference). New Cingular had 30 days in which to obtain judicial review of the Mayor's quasi-judicial decision by application for a statutory writ of review pursuant to RCW 7.16. New Cingular did not seek judicial review by a writ proceeding, although it freely acknowledges in its Opening Brief that it could have chosen to seek a writ of review. Thus, the Mayor's Final Decision is final and binding, and the Superior Court could not 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.

Additionally, the Declaratory Judgments Act (RCW 7.24) is not available to a party where, as here, a timely-filed statutory writ of review proceeding (RCW 7.16) would have provided the party with all the relief it seeks to obtain in the Declaratory Judgment proceeding. Also, the time for commencing an action for relief under the Declaratory Judgment Act is the same as for filing an application for a writ of review. The three year statute of limitations does not apply to an action challenging the validity of an unpaid penalty imposed by a Notice of Violation.

Without opportunity for the Superior Court to entertain New Cingular's claims, the Superior Court correctly granted Clyde Hill's counterclaim for summary judgment reducing the amount of penalties and accrued interest to judgment and awarding attorney fees. Clyde Hill is entitled to additional attorney fees for defending this appeal.

In its opening brief to this Court, New Cingular continues to ignore the applicable State Supreme Court authority, raises straw man arguments, and cites to Court of Appeals cases which are irrelevant or distinguishable on their facts and, in at least one instance, have been overruled in pertinent

part.¹⁵ The Summary Judgment Order of the Superior Court should be affirmed.

E. ARGUMENT

1. New Cingular Cannot Invoke the Superior Court’s Jurisdiction Under Article IV, §6 of the Washington State Constitution or RCW 2.08.010.
 - a. The Superior Court’s Original Appellate Jurisdiction Was Not Timely Sought as Required by Article IV, §6, of the State Constitution and RCW 7.16.

Article IV, §6, of the Washington State Constitution provides that 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.**” (Emphasis added.) Article IV, §6, also provides that: “Said courts and their judges **shall have power to issue writs of** mandamus, quo warrant, **review,** certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties.” (Emphasis added.)

Here, New Cingular argues that the constitution endows the Superior Court with original trial jurisdiction with regard to the legality of any tax or municipal fine, despite the quasi-judicial decision made by Mayor Martin with regard to the City’s NOV and New Cingular’s

¹⁵ *Qwest v. Bellevue*, 161 Wash.2d 353, 166 P.3d 667 (2007) overruled in pertinent part by *Cost Management v. Lakewood*, 178 Wash.2d 635, 645-648, 310 P.3d 804 (2013).
{GAR1182031.DOCX;1/00019.050025/ }

requirement to exhaust administrative and judicial remedies with regard to that decision. New Cingular's argument is contrary to the plain language of the constitution and Washington Supreme Court decisions interpreting this language. As the Supreme Court clearly held in *James v. Kitsap County*, 154 Wn.2d 574, 588, 115 P.3d 286, 293 (2005), Article IV, §6, pertains to both **original trial jurisdiction** and **original appellate jurisdiction** of the Superior Courts. By enactment of RCW 7.16, the legislature set forth the types of decisions subject to Superior Court review by original appellate jurisdiction, and the procedures for seeking appellate review by statutory writ. While it is true that a judicial power vested in courts by the constitution may not be abrogated by statute, New Cingular ignores the well-established rule that where statutes prescribe procedures for the resolution of a particular type of dispute, state courts demand substantial compliance with the procedural requirements before they will exercise jurisdiction over the matter. *James*, 154 Wn.2d 588, citing *Banner Realty v. Dep't of Revenue*, 48 Wn. App. 274, 738 P.2d 279 (1987) (holding that a Superior Court could not exercise its original jurisdiction under Article IV, §6, over a challenge to a tax decision where the party failed to strictly or substantially comply with statutory procedural

requirements by filing a timely appeal of that decision within 30 days, as required by the Administrative Procedures Act (APA)).

Thus, while a Superior Court may be granted power to hear a case under Article IV, §6, that grant does not mean the court automatically has original trial jurisdiction over the case; instead, it means the court has either trial or appellate jurisdiction – it is not limited to trial jurisdiction only. Nor does this grant of power obviate procedural requirements for invoking jurisdiction, as established by the legislature. For instance, in *James v. Kitsap County*, the court held that although an appeal of a final land use decision under the Land Use Petition Act (LUPA) may invoke the original *appellate* jurisdiction of the Superior Court, the appealing party was required to substantially comply with the LUPA's procedural requirements before a Superior Court could exercise its jurisdiction. *James*, 154 Wn.2d at 588-89.

New Cingular also attempts to rely upon RCW 2.08.010, which mirrors and implements Article IV, §6 of the Washington Constitution, to support its argument that the Superior Court has jurisdiction to entertain its claims for Declaratory Judgment. Again, however, this statute *does not obviate procedural requirements* established by the legislature for appeal of a local quasi-judicial decision. *Wells Fargo Bank v. Depart. of*

Revenue, 166 Wn. App. 342, 271 P.3d 268 (2012), clarifying *Tacoma v. Mary Kay*, 117 Wn. App. 111, 115, 70 P.3d 144 (2003) (relied upon by New Cingular, see Response to Request for Admission No. 6). As the court stated in *Wells Fargo Bank*, although RCW 2.08.010 confers on the Superior Court's original subject matter jurisdiction over the stated types of claims, "those claims do not include the Superior Court's original appellate jurisdiction in cases originating in agency actions governed by the APA." *Wells Fargo Bank*, 166 Wn. App., at 278. Nor do they include, similarly, the Superior Court's original appellate jurisdiction in cases subject to statutory writs of review under RCW 7.16. Like the APA and LUPA, the statutory writ procedures provide a mandatory means for appellate review of a quasi-judicial municipal decision. The APA applies to agency decisions subject to the APA. LUPA applies to final local land use decisions. RCW 7.16 applies to quasi-judicial decisions not subject to the APA or LUPA; which includes the Mayor's decision at issue here. New Cingular's argument that once it exhausts administrative remedies and obtains a quasi-judicial decision from the local jurisdiction, it can then ignore those administrative procedures - and the quasi-judicial decision - entirely and file a new action in Superior Court at any time thereafter, with no applicable statute of limitations (or, alternatively, a three-year SOL) is

mistaken. Not only does it make the requirement to exhaust administrative procedures a meaningless waste of time, but it ignores the Washington Supreme Court's interpretation of the constitutional grant of jurisdiction to the Superior Courts of this State.

New Cingular's citation to *Tacoma v. Mary Kay*, 117 Wn. App. 111, 115, 70 P.3d 144 (2003), in support of its argument is inapposite. In *Mary Kay* the court addressed a Tacoma ordinance that purported to grant the Superior Court jurisdiction to conduct a trial *de novo* following a hearing examiner's decision in a tax assessment case; the ordinance also required an aggrieved party to file a *notice of appeal* - rather than a complaint - in Superior Court. The Court of Appeals rejected the City's argument, finding the Superior Court's original jurisdiction for a trial *de novo* cannot be invoked by the filing of a *Notice of Appeal* as mandated solely by a municipal code. Here, the City's code does not require the appellant to file a *Notice of Appeal*. The City's ordinance does not suffer from the same shortcoming as the Tacoma ordinance in *Mary Kay*. It is also unlike the Spokane ordinance at issue in *Spokane v. J-R Distributors, Inc.*, 90 Wn.2d 722 (1978). The Clyde Hill provision for judicial review of an NOV does not purport to prescribe rules regarding the admissibility

of evidence or otherwise invade the province of the courts with respect to practice and procedure.

Mary Kay also does not support New Cingular's argument that this court has original trial jurisdiction over the subject matter of its lawsuit after administrative remedies have been exhausted. In *Mary Kay*, the court simply did not address this matter; it did not address the distinction between the court's original trial jurisdiction and its original appellate jurisdiction because the distinction was not at issue. The court limited its analysis to whether Tacoma could obtain the trial court's original trial jurisdiction for the trial *de novo* Tacoma sought, by filing a *Notice of Appeal* (which is not relevant to this case).

Here, the distinction between the Superior Court's original trial jurisdiction and its original appellate jurisdiction under Constitution Article IV, §6, and RCW 2.08.010, is squarely at issue. New Cingular's exhaustion of administrative remedies was required. *Cost Mgmt. Servs.*, at 812. But unlike the facts in *Cost Mgmt. Servs.*, where the administrative process never got started and no final decision was made at the local level, here the administrative process was exhausted. Thus, judicial review of the Mayor's quasi-judicial final administrative decision required New

Cingular to invoke the Superior Court's original appellate jurisdiction by timely application for a statutory writ.

New Cingular's citation to *Qwest v. Bellevue*, 161 Wash.2d 353 (2007), in support of its argument to the Superior Court that CR 57 nullifies the earlier cases of *Peoples Park v. Anrooney*, 200 Wash. 51 (1939) and *Reeder v. King County*, 57 Wn.2d 563 (1961) holding that the existence of an adequate remedy by writ of review precluded relief by declaratory judgment is without merit. First, *Qwest* has been overruled in pertinent part by *Cost Mgmt. Servs. v. Lakewood*, supra, at 812. Any suggestion made in *Qwest* that no exhaustion is required if the court has original jurisdiction, and thus a taxpayer cannot be required to exhaust its remedies was expressly determined to be incorrect.

Additionally, the application of CR 57 to prior case law was not an issue before the court in *Qwest*. Nor was the court's appellate jurisdiction at issue in *Qwest*. "*In fact, invoking the Superior Court's appellate jurisdiction would have made no sense as the hearing examiner had not yet reached a decision when Qwest filed its lawsuit.*" *Qwest*, supra, at p. 371, n. 19.

In sum, in the present case, the Superior Court's jurisdiction to review the City's Notice of Violation is original appellate jurisdiction

pursuant to RCW 7.16. Review is implemented only if a party timely files for a writ of review pursuant to the procedures in RCW 7.16. New Cingular failed to timely file an appeal pursuant to RCW 7.16.040. Thus, the court has no jurisdiction to hear this case and the City respectfully requests that it be dismissed as a matter of law.

b. The Appeal to Mayor Martin was Mandatory and his Quasi-Judicial Decision is Final, Subject Only to Appellate Review.

The recent Washington Supreme Court decision in *Cost Management Services v. Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (October 10, 2013), makes clear that exhaustion of an available administrative remedy is mandatory before the Superior Court can invoke its jurisdiction to hear municipal tax issues. New Cingular states at footnote 5 of its opening brief that: "...Exhaustion is not an issue here; it is undisputed that New Cingular fully exhausted Clyde Hill's administrative process prior to filing suit." New Cingular goes on to assert that it had two options at this point: (1) It could have filed a writ of review pursuant to RCW 7.16; or (2) it could ignore the final administrative decision and file a de novo action under the declaratory judgments statute. But New Cingular's argument is flawed. It does not have two options. Here, where a final municipal administrative decision is

issued, the second option is not available. New Cingular cannot now make the required administrative appeal to the Mayor a superfluous proceeding by collaterally attacking the same Notice of Violation affirmed by the Mayor in this action. *See, Shoemaker v. City of Bremerton*, 109 Wash.2d 504, 745 P.2d 858 (1987). Instead, the Mayor's decision is final, subject only to appellate review via a statutory writ of review.

As a matter of law, the Mayor's Final Decision meets the requirements for a decision subject to judicial review under RCW 7.16.040, the statutory writ of review proceedings.

RCW 7.16.040 provides (emphasis added):

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 ... 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.**

Thus, in order to issue a writ of review, the court must find: 1) that an inferior tribunal; 2) exercising judicial functions; 3) exceeded its jurisdiction or acted illegally; and 4) there is no adequate remedy at law.

Raynes v. Leavenworth, 118 Wash. 2d 237, 244, 821 P.2d 1204, 1208
{GAR1182031.DOCX;1/00019.050025/ }

(1992). Here, the City's final decision on the NOV meets these four criteria. First, Mayor Martin is an officer of an inferior tribunal, *i.e.*, the City of Clyde Hill, a municipal corporation. Second, Mayor Martin was clearly exercising a judicial function when he acted as the hearing officer on New Cingular's appeal of the Notice of Violation.¹⁶ New Cingular in its Opening Brief made no argument to the contrary. Third, New Cingular alleges in its Complaint that the Notice of Violation was issued contrary to the requirements of law and the language of CHMC §3.28.130B, and the Mayor affirmed the Notice of Violation.¹⁷ Fourth, New Cingular has no other remedy at law to appeal the Mayor's Final Decision.

Because the four criteria for issuance of a writ were present in this case, a writ would have been issued if timely application had been made with the Superior Court. See *Washington Public Employees Ass'n v.*

¹⁶ There is no doubt that the Mayor's actions here were quasi-judicial in nature. New Cingular offers no argument to the contrary in its opening brief. When in doubt, however, a 4-part test has been developed to determine when a given action is quasi-judicial in relation to the writ. Examination of the following factors is useful in deciding if the actions taken are functionally similar enough to court proceedings to warrant judicial review: 1) whether the court could have been charged with the duty at issue in the first instance; 2) whether the courts have historically performed such duties; 3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and 4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators. *Raynes*, 118 Wn.2d at 244-45.

¹⁷ "For purposes of obtaining a statutory writ of certiorari for review of allegedly illegal administrative action, "acting illegally" includes errors of law and is not limited to procedural errors." *Washington Public Employees Ass'n v. Washington Personnel Resources Bd.*, 91 Wn. App. 640, 959 P.2d 143 (1998).
{GAR1182031.DOCX;1/00019.050025/ }

Washington Personnel Resources Bd., supra, at 646, citing to *Raynes v. City Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992) and *Bridle Trails Community Club v. City of Bellevue*, 45 Wn. App. 248, 250, 724 P.2d 1110 (1986).

2. Thirty days and the rule of reasonable time by analogy applies both to commencing actions for writ of review and for declaratory judgment actions.

The NOV was final on January 22, 2013. It was received by New Cingular on January 26, 2013. Pursuant to the well established case law cited below, *Brutsche v. Kent, infra*, the 30 day deadline to file an appeal began to run on January 22, 2013, the date of the decision. New Cingular did not file an appeal with the Superior Court within 30 days. The failure to initiate review of a final, appealable judgment will render an appellate challenge to the judgment untimely, even if there are further proceedings in the case. 15A Washington Practice Handbook, Civil Procedure, sec. 85.1 (2013-2014 ed.), citing to *Holiday v. Moses Lake*, 157 Wn. App. 347, 353-54, 236 P.3d 981, 984-85 (2010). In *Holiday*, the trial court issued a writ of prohibition that prohibited the City from taking code enforcement action against the Holidays. The City did not appeal the writ of prohibition. The Court dismissed the City's later attempt to attack the writ

of prohibition in a subsequent appeal of a code enforcement action. *Holiday*, 157 Wn. App. 354.

New Cingular failed to timely seek a writ of review and the Superior Court cannot now exercise original jurisdiction (either trial jurisdiction or appellate jurisdiction) over the subject matter of New Cingular's complaint. The general rule is that a statutory writ 'should be sought within the same period as that allowed for an appeal.' *Cost Management Services, Inc. v. City of Lakewood*, 310 P.3d 804, 812 (October 10, 2013). The writ action must be brought within 30 days of the municipality's final decision. *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995).

Brutsche holds that where a statute does not provide a time limit for an appeal (as with statutory writs per RCW 7.16) 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." *Brutsche*, at 376-77. This rule (known as the *Vance* rule), was announced in *Vance v. Seattle*, 18 Wn. App. 418, 424, 569 P.2d 1194 (1977), a non-land use case. Citing *Vance*, the State Supreme Court in *Clark County PUD No. 1 v. Wilkinson*, 139 Wn.2d 840, 847, 991 P.2d 1161 (2000), also a non-land use case, stated as follows:

{GAR1182031.DOCX;1/00019.050025/ }

A reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period because chapter 7.16 RCW does not prescribe a limitation period. As the Court of Appeals stated: ‘the time within which [statutory] certiorari must be applied for is determined by reference to the time prescribed by statute or court rule for bringing an appeal.’ *Vance v. City of Seattle*, 18 Wn. App. 418, 423, 569 P.2d 1194 (1977).

One such “analogous statutory or rule time period” can be found in the Administrative Procedures Act (APA). In the APA, final decisions must be appealed to the Superior Court within 30 days. RCW 34.05.542(2). In addition, per the Rules of Appellate Procedure, final decisions and orders of the Superior Court must also be appealed to the Court of Appeals within 30 days. RAP 5.2. These situations are similar to the appeal of a final decision on a Notice of Violation (“NOV”). New Cingular should have filed a petition for a writ of review within 30 days. It is uncontested they did not do so. Their action is untimely and should be dismissed.

The original jurisdiction provided to the Superior Court by Washington Constitution Article IV, §6, and RCW 2.08.010, does not excuse the requirement to exhaust administrative remedies and to seek review of an adverse quasi-judicial final decision by timely application for a writ of review.

But even if New Cingular could have commenced a Declaratory Judgment Action it did not timely do so. The same 30 day time limit would apply. As stated in *Summit-Waller Assn. v. Pierce County*, 77 Wn.App. 384, 392, 895 P.2d 405 (1995) (internal citation omitted, emphasis added):

The statutes governing declaratory judgment actions, like those governing writs of certiorari, contain no timeliness provisions. The rule of “reasonable time by analogy” determines the timeliness of a certiorari proceeding. The court selects a time limit for appeal of a similar decision as prescribed by statute, court rule or other provision. These time limits are short. Thirty days is typical.

New Cingular’s argument that the three year statute of limitations period applicable to the recovery of municipal taxes or fees found in RCW 4.16.080(3) is applicable to their claims for declaratory relief is flawed. Their lawsuit sought to invalidate the Notice of Violation issued by the city, not to recover any monies paid in utility taxes. New Cingular confuses this lawsuit with their totally separate lawsuit against the City for the recovery of taxes paid pending the U.S. District court for the Western District of Washington, case no. 2-3-md-02485-JCC. The cases cited by New Cingular, to wit: *Carillo v City of Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004); and *Robinson v. City of Seattle*, 119 Wn. 2nd 34, {GAR1182031.DOCX;1/00019.050025/ }

830 P.2d 318 (1992) are distinguishable on the facts and have no applicability to the issues before this court on this appeal. The 30 day period to seek review by writ or to bring a declaratory judgment action *if a declaratory judgment action was a choice as argued by New Cingular) -- commencing when the mayor issued his written decision is the applicable statute of limitations.

3. Relief Under the Declaratory Judgments Act is Not Available

A declaratory judgment action is not a substitute or alternative for the common law or statutory actions existing when the declaratory judgment act was adopted in this state. *Peoples Park & Amusement Ass'n v. Anrooney*, 200 Wash. 51, 57-58, 93 P.2d 362 (1939) (holding that a declaratory judgment action shall not take the place of an unlawful detainer action). The Act was not designed to supplant other remedies well established and working satisfactorily. *Id.* Here, common law writs were well established when the Declaratory Judgment Act was adopted, and it was not intended to replace writ actions.

Washington law prohibiting the use of a complaint for declaratory relief is summarily stated in Chapter 14 *Judicial Review of Administrative Proceedings Not Subject to APA* of the WASHINGTON ADMIN

MANUAL Issue 10 (2000), §14.04 G., P. Stephen DiJulio, as follows

(emphasis added):

In order to avoid the strict rules governing administrative appeals, an appellant has sometimes entitled a petition a request for a declaratory judgment. However, this is generally inappropriate, and the courts should review legislative or executive conduct only through the proper review proceedings. See *Washington Fed'n of State Employees v. Personnel Bd.*, 23 Wn. App. 142, 148, 594 P.2d 1375 (1979) (trial court properly dismissed declaratory judgment complaint given the policy of limiting judicial review to writ proceedings). Similarly in *Oden Investment Co. v. Seattle*, 28 Wn. App. 161, 622 P.2d 822 (1981) review denied, 95 Wn.2d 1015 (1981), the court of appeals held that **filing a declaratory judgment action would not extend the time within which a writ must be brought, nor could the declaratory judgment action substitute for the writ proceeding.** See also *Foothills Development Co. v. Clark County Bd. of Comm'rs*, 46 Wn. App. 369, 370, 730 P.2d 1369, rev. denied, 108 Wn.2d 1004 (1968)(request for declaratory judgment coupled with statutory writ of review petition dismissed on writ limitation grounds).

New Cingular's Complaint for a Declaratory Judgment was appropriately dismissed by the Superior Court. A writ of review proceeding would have provided New Cingular with all the relief it seeks

{GAR1182031.DOCX;1/00019.050025/ }

to obtain in this proceeding. Washington case law requires dismissal where, as here, the decision is subject to review by a writ of certiorari. *Reeder v King County*, 57 Wn.2d 563, 358 P.2d 810 (1961) (holding that declaratory judgment action should be dismissed where a writ of certiorari was available to appellants and would have afforded them all relief to which they might have been entitled). New Cingular cannot use the Declaratory Judgments Act to collaterally attack the Mayor's Final Decision, nor to extend the time for filing review.

The Mayor's Final Decision, issued after a quasi-judicial hearing on appeal by New Cingular of the Notice of Violation, became final for all purposes when it was not appealed via a writ of review within 30 days. New Cingular cannot collaterally attack the Mayor's decision affirming the Notice of Violation by filing a complaint for declaratory judgment. *See, e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123, 128 (2000) (holding that approval of a rezone became valid once the opportunity to file a judicial challenge of it passed; and the rezone decision could not be collaterally attacked in a later-filed LUPA petition of a different land use decision).

New Cingular failed to timely seek a writ of review and the Superior Court cannot now exercise original jurisdiction (either trial

jurisdiction or appellate jurisdiction) over the subject matter of New Cingular's complaint.

4. New Cingular raises straw man arguments.

New Cingular raises a straw man argument (*i.e.*, an argument not raised by the City, but which New Cingular claims the City raised), asserting the City has argued it has the right to "create" a judicial appeal through a provision of its municipal code by stating, at CHMC 1.08.030, that the Mayor's final quasi-judicial decision "is final and binding, subject only to an appeal in Superior Court." The City never argued its code creates a new right of appeal to Superior Court; nor does the City's code prescribe the procedure by which New Cingular can invoke the Superior Court's original jurisdiction. The procedures for invoking the Superior Court's jurisdiction are prescribed by statute in RCW 7.16. The City never argued, as claimed by New Cingular to the Superior Court, that New Cingular had to file a "Notice of Appeal" with the Superior Court. Instead, the right to invoke the Superior Court's original appellate jurisdiction to review the Mayor's quasi-judicial decision already exists, as a matter of law, by way of a writ of review. Procedures for filing a statutory writ of review are set forth at RCW 7.16. It is uncontested that a petition for a writ of review invokes the Superior Court's appellate

authority. By stating in its municipal code a party has the right to an “appeal” in Superior Court, the City is plainly indicating no further administrative remedies exist and further review must be sought in Superior Court.

5. The City’s cross claim for a judgment in favor of the City and against New Cingular for the amount of the Penalties assessed in the Notice of Violation, pre-judgment interest and attorney fees was properly granted.

New Cingular makes no argument in its opening brief against the grant of summary judgment on the City’s counter-claim and award of attorney fees other than New Cingular’s Complaint should not have been dismissed. Having failed to timely seek the Superior Court’s original appellate jurisdiction by timely application for a writ of review the administrative decision remains a final and binding decision. The penalties are due and owing to the City. The City is entitled to a judgment based upon the Notice of Violation as the penalty amount set forth in the Notice of Violation is due and owing. Interest has accrued on this liquidated amount at the statutory rate. In addition attorney’s fees are provided for in CHMC §1.08.010B. New Cingular was notified of the accrual of interest and of the attorney’s fee obligation in the Notice of Violation.

6. Clyde Hill is entitled to Attorney fees on this appeal.

The City is entitled to an award of attorney fees under CHMC §1.08.010B as it was in Superior Court if the summary judgment order of the trial court is affirmed.

F. CONCLUSION

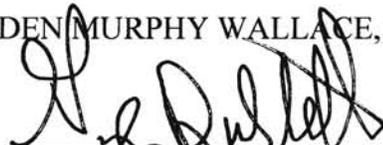
The Summary Judgment Order and the Order for Attorney Fees entered by the Superior Court should be affirmed. Additional attorney fees should be awarded to the City in defense of this appeal.

RESPECTFULLY SUBMITTED this 7th day of July, 2014.

Respectfully submitted,

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

By



Greg A. Rubstello, WSBA #6271
Stephanie E. Croll, WSBA #18005
Attorneys for Respondent

DECLARATION OF SERVICE

Charolette Mace hereby makes the following declaration: I am now and was at all times material hereto over the age of 18 years, I am not a party to the above-entitled action, and am competent to be a witness herein.

I certify that on the date below I sent copies of the foregoing document to the following counsel via email and U.S. mail:

Scott M. Edwards
Lane Powell, PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-7107
Email: edwardss@lanepowell.com
kittled@lanepowell.com
mitchelll@lanepowell.com

Stephanie Croll
Keating, Bucklin & McCormack, P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
Email: scroll@kbmlawyers.com
dnylund@kbmlawyers.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

July 7, 2014, at Seattle, WA
Date and Place



Charolette Mace
Legal Assistant

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JUL -7 PM 4:13