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No. 91978-0

No. 71626-3-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS, LLC,

Plaintiff-Appellant

v.

THE CITY OF CLYDE HILL, WASHINGTON,

Defendant-Respondent

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

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal presents a basic question of superior court jurisdiction, but at its core, it is all about fairness. New Cingular Wireless PCS, LLC ("New Cingular") collects local utility taxes from its customers, and then pays those taxes to the various municipalities where its customers reside. Several years ago, New Cingular was sued on the theory that a portion of those local taxes were preempted by a federal law and should not have been collected and paid. To settle that class action suit, New Cingular entered into to a court-approved settlement in which it agreed to seek refunds of the challenged taxes from over a thousand states and local municipalities around the country for the benefit of the class. One of those municipalities was the City of Clyde Hill ("Clyde Hill") and, in 2010, New Cingular filed a refund claim with the city for approximately $22,000.

Clyde Hill apparently did not much like the prospect of refunding the overpaid taxes, even though the proceeds would benefit the city's own residents. So it simply sat on the refund claim. After nearly a year and a half of inaction, New Cingular brought a lawsuit to compel Clyde Hill to process its refund claim. Clyde Hill still didn't take any action on New Cingular's refund claim (and continues to fight the refund action in federal court), but instead sent New Cingular a "Notice of Violation," in which the city found New Cingular guilty of filing allegedly "false or fraudulent" tax

returns. The only basis for the penalty was that New Cingular's original returns had overstated the amount of taxes due. The Notice of Violation assessed New Cingular a civil penalty of more than $293,000.

New Cingular saw the penalty as essentially blackmail and, indeed, Clyde Hill offered to rescind the fine if New Cingular agreed to withdraw its refund claim. New Cingular refused. An overstated tax return is not evidence of fraud. After New Cingular's protest to the city's mayor was rejected, it invoked the superior court's original jurisdiction to decide cases involving the "legality of any … municipal fine" by filing this declaratory judgment action. Clyde Hill moved to dismiss, arguing that New Cingular could only invoke the superior court's appellate jurisdiction by filing a petition for writ of review, which New Cingular did not do. The trial court agreed, and dismissed New Cingular's claims. To add insult to injury, the court entered judgment for the city in the amount of the fine, plus interest and attorneys' fees. In short, as a result of its court-approved request for a $22,000 refund, a request expressly permitted by the Clyde Hill Municipal Code, New Cingular is now liable for over $400,000 in fines and fees.

The judgment below must be reversed and the case remanded. The trial court's ruling rests on the faulty premise that New Cingular's sole avenue to challenge Clyde Hill's illegal fine was to invoke the superior court's appellate jurisdiction. Not so. Neither Washington law nor Clyde

Hill's municipal code limited the superior court's jurisdiction in this matter. After it exhausted its remedies with the city, New Cingular had a choice. It could either challenge the legality of the Notice of Violation by invoking the superior court's original *trial* jurisdiction, or it could seek review of the mayor's administrative decision by invoking the superior court's *appellate* jurisdiction. New Cingular chose the former, and it did so properly by filing a complaint within the applicable limitations period.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

The trial court erred when it granted Clyde Hill's motion for summary judgment, dismissed New Cingular's complaint, and entered judgment for Clyde Hill on its counter-claim and motion for attorneys' fees. CP 624-25; CP 692-96. These errors all arise from the trial court's conclusion that it lacked jurisdiction to consider New Cingular's challenge to the legality of Clyde Hill's fine. The issues for review are as follows:

1. Did New Cingular properly invoke the superior court's original jurisdiction under Article IV, Section 6 of the Washington Constitution and RCW 2.08.010 by filing a complaint for declaratory judgment challenging the legality of Clyde Hill's municipal fine? **Yes.**

2. Can Clyde Hill's Municipal Code, in the absence of any constitutional or legislative authority, lawfully limit the superior court's

original jurisdiction such that New Cingular could only invoke the court's appellate jurisdiction by filing a petition for writ of review? **No.**

3. In any event, does the Municipal Code's provision allowing a "judicial appeal" exclusively require the filing of a "writ of review," as opposed to a complaint, where the code provides that its procedures "shall not … preclude use of any other procedures allowed by … state law." **No.**

III. STATEMENT OF THE CASE

A. Factual Background

1. New Cingular Collects Local Utility Taxes On Wireless Data Services From Clyde Hill Residents.

New Cingular is an affiliate of AT&T Mobility, LLC. It provides wireless telephone services under the AT&T brand name to customers in various parts of the United States including Clyde Hill, Washington. CP 56 (¶ 3). Clyde Hill imposes a local utility tax on wireless telephone services, which applies to both voice and data services. Clyde Hill Municipal Code ("CHMC") §§ 3.28.020B & 3.28.030D.[1] During the period at issue, New Cingular collected the utility tax from Clyde Hill residents on all charges for wireless telephone voice and data services, and paid the tax to Clyde Hill. CP 56 (¶ 6). New Cingular signed each tax return with the proviso

[1] A copy of the Clyde Hill Municipal Code can be accessed at the city's website at http://www.codepublishing.com/wa/clydehill/. Relevant excerpts are also located at CP 539-48.

that the return was true and accurate to the best of New Cingular's knowledge. *Id.*; *see* CP 383-515 (9/1/05 – 11/30/10 tax returns).

2. New Cingular Requests A Tax Refund From Clyde Hill For $22,053 Pursuant To A Class Action Settlement.

New Cingular was named as a defendant in class action lawsuits alleging that local taxes on certain data services collected from customers throughout the United States were preempted by federal law—specifically, the Federal Internet Tax Freedom Act, 47 U.S.C. § 151. CP 281-381. As part of a court-approved settlement, New Cingular agreed to seek refunds of the state and local taxes it had collected and paid on such data services, and to place the refunded amounts in escrow for the benefit of its customers. CP 295-303 (¶¶ 8.3-8.14). The settlement agreement identified Clyde Hill's utility tax as one of the more that 1,300 state and local taxes for which New Cingular was required to seek a refund. CP 163-82.

On November 3, 2010, as required by the settlement agreement and as permitted by the Clyde Hill Municipal Code, New Cingular and the class action plaintiffs jointly filed a refund claim for a refund of $22,053.38. CHMC § 3.28.090A ("Overpayment. If the clerk … 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."). The detailed statement of claim explained the basis for the

refund (federal preemption and the terms of the class action settlement) and that all refund proceeds would exclusively benefit a specific settlement subclass comprised of individuals who paid the Clyde Hill tax. CP 560-79.

3. Clyde Hill Fines New Cingular $291,131 For Filing Allegedly False And Fraudulent Tax Returns.

Clyde Hill took no action on New Cingular's refund claim.[2] More than a year and half later, on July 6, 2012, it sent New Cingular a Notice of Violation under CHMC § 3.28.130B, which makes it unlawful "to make any false or fraudulent return or any false statement or representation ... in connection with any such return." CP 555-58. According to Clyde Hill, New Cingular filed "false or fraudulent" returns when it originally paid Clyde Hill's utility tax "without identifying to the City that the amount reported on its returns included monies ... for tax payments on services exempt from taxation under federal law." *Id.* The city's finding relied solely on the statements contained in New Cingular's refund claim. CP 89. The Notice of Violation fined New Cingular $293,131 (more than 13 times

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[2] And it still hasn't. Indeed, New Cingular was forced to file lawsuits against Clyde Hill and other municipalities to compel action on the refund claims. CP 273-274. Incredibly, in its August 2013 answer in that case, Clyde Hill took the position that it "has insufficient information on ... whether the taxes paid were 'erroneous.'" *New Cingular Wireless PCS LLC v. The City of Clyde Hill*, King Cnty. Sup. Ct., No. 13-2-27778-6 SEA; Answer to Complaint of Defendant City of Clyde Hill, ¶¶ 1, 32 (Aug. 21, 2013). On remand, Clyde Hill will have to explain how it determined New Cingular's tax returns were "false or fraudulent" in July 2012 when, a year later, it claimed not to know whether the taxes were "erroneous" at all.

the amount of the tax overpayment) pursuant to the civil penalty provisions of the Clyde Hill Municipal Code. CP 555-58; CHMC § 1.08.010B.

4. The Mayor Of Clyde Hill Rejects New Cingular's Administrative Appeal And Upholds The Fine.

On July 20, 2012, New Cingular filed a timely written protest of the Notice of Violation. CHMC § 1.08.030. New Cingular argued, among other things, that the prohibition against "false or fraudulent" statements required an intent to deceive, and that no such showing had been or could be made; after all, what motive would New Cingular have to overstate its local utility tax liability. CP 581-85. It also pointed out that Clyde Hill's Municipal Code imposed mandatory penalties for an underpayment of taxes, including a penalty of 50% of the tax due if "the deficiency resulted from an intent to evade the tax," but contained no mandatory penalties for an incorrect overpayment. CP 584 (*citing* CHMC § 3.28.090A & B).[3]

Clyde Hill responded by letter, asking New Cingular whether it wanted an "informal hearing" or a decision based on New Cingular's written protest alone. CP 594. Neither the Clyde Hill Municipal Code nor

[3] In other words, if New Cingular had understated its utility taxes by $22,000, and Clyde Hill found that it did so intentionally, the city could have fined New Cingular no more than $11,000 (50% of the additional tax due). CHMC § 3.28.090B. Because Clyde Hills' tax code provides no penalties for overstated utility taxes, Clyde Hill relied on the code's generic civil penalty provision to fine New Cingular $293,000 for overpaying its taxes without any finding of an intent to defraud.

the city's letter provided New Cingular with an opportunity to request discovery or an evidentiary hearing. New Cingular chose the informal hearing, which consisted of a five minute recorded telephone call between New Cingular's attorney and the mayor of Clyde Hill. CP 230-33. The mayor asked no questions. *Id.* Although the city's attorney provided a letter to counsel in advance of the call (CP 227-28), he did not attend.[4]

More than four months later, on January 22, 2013, the mayor issued a Final Decision upholding the Notice of Violation and amount of the fine (the "Mayor's Decision"). CP 596-98. Even though there had been no additional evidence submitted by New Cingular or the city, the Mayor's Decision went even further than the Notice of Violation—this time finding that New Cingular acted "knowingly and/or recklessly" when it collected local taxes preempted by federal law and failed to disclose that fact in the tax returns for which it sought a refund. CP 597 (Finding #7). With that, the mayor denied and dismissed New Cingular's administrative appeal.

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[4] The letter reiterated Clyde Hill's contention that it could impose a punitive fine on New Cingular absent evidence of an intent to deceive simply because the tax returns were "inaccurate." Revealing the true basis for the fine, the city added: "[s]hould your client withdraw its refund claim and lawsuit against the City, there would be no basis for the City to pursue the code violation and penalties." CP 227.

B. Procedural Background

On April 10, 2013, less than three months after receiving the Mayor's Decision, New Cingular filed this lawsuit seeking a declaratory judgment to invalidate the Notice of Violation. CP 1-5. New Cingular alleged that Clyde Hill's fine was contrary to law, lacked a basis in fact and violated due process. *Id.* Clyde Hill answered and counter-claimed, seeking a judgment in the amount of the fine, plus interest and attorneys' fees. CP 14-16. The city alleged that because New Cingular did not file a petition for a writ of review challenging the Mayor's Decision, the fine was "final, binding, and conclusive" according to the provisions of the Clyde Hill Municipal Code. *Id.* (citing CHMC § 1.08.030).

Clyde Hill moved for summary judgment. It asked the trial court to dismiss New Cingular's complaint, and enter judgment in its favor on the counter-claim, on the grounds that the court lacked jurisdiction to consider the validity of the Notice of Violation. CP 238-58. Clyde Hill argued that New Cingular could only challenge the fine in court by filing a "judicial appeal," which the city claimed New Cingular did not do. CP 238 (citing CHMC § 1.08.030). New Cingular opposed the motion. CP 599-610.

The parties argued the motion on February 28, 2014, after which the trial court granted Clyde Hill summary judgment. CP 624-25. The court's order stated that it "decline[d] to entertain Plaintiff New Cingular Wireless

PCS LLC's Complaint because Plaintiff should have sought review by petition for writ of review[.]" CP 624-25. The court dismissed New Cingular's complaint, and entered judgment for Clyde Hill on the Notice of Violation in the principal amount of $293,131, plus 12% interest since the date of Notice of Violation (for a total of more than $350,000). *Id.*

Clyde Hill then moved for an award of attorneys' fees pursuant to the Clyde Hill Municipal Code, which allows the city to recover reasonable attorneys' fees ... incurred in enforcing [a] civil penalty." CP 626-28; CHMC § 1.08.010B. The city requested an award of all fees incurred by both its separately retained attorneys in the case, not just those incurred litigating its counter-claim to enforce the Notice of Violation. *Id.* On April 12, 2014, the trial court granted the motion in its entirety, and entered findings of fact and conclusions of law awarding Clyde Hill attorneys' fees in the amount of $47,500.90. CP 692-96. New Cingular timely appealed.

IV. ARGUMENT

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. Whether a trial court has subject matter jurisdiction is a question of law that this Court reviews *de novo*. *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003). Interpretation of statutes and

ordinances is also a question of law reviewed *de novo*. *Nollette v. Christianson*, 115 Wn.2d 594, 600, 800 P.2d 359 (1990).

A. New Cingular's Complaint Properly Invoked The Superior Court's Original Trial Jurisdiction; New Cingular's Original Action Was Filed Within The Applicable Limitations Period.

The Washington Constitution provides that "[t]he superior court shall have original jurisdiction … in all cases at law which involve the … the legality of any … municipal fine …." WASH. CONST. Art. IV, § 6 (emphasis added). The legislature implemented this grant of jurisdiction by statute. RCW 2.08.010 ("The superior court shall have original jurisdiction … in all cases at law which involve the … the legality of any … municipal fine …"). It is now well-established that 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). As explained further below, however, original trial jurisdiction can be eliminated or circumscribed only by state statute, not by municipal code. *Id.*; *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 70 P.3d 144 (2003).

In the absence of any such state statute, Washington cases recognize that a party may challenge the legality of a municipal fine, fee or tax by invoking the superior court's original trial or appellate jurisdiction. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) ("CMS chose to [file] suit in superior court. CMS could also have

chosen (although it was not required to do so) to seek [a writ of] mandamus from the superior court"); *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007) (Qwest "did not invoke the Superior Court's appellate jurisdiction .... Instead, ... it invoked the Superior Court's *original* jurisdiction" under Art. IV, § 6 and RCW 2.08.010) (internal marks and citations omitted); *Mary Kay*, 117 Wn. App. at 115-16 ("there are only two ways that Tacoma could invoke the superior court's original jurisdiction: first, by filing a complaint ... or second, by filing a writ.").[5]

The choice is not simply one of procedure. Where a party invokes the superior court's original trial jurisdiction, proceedings are conducted *de novo* and, thus, are subject to all the ordinary civil rules governing discovery, motions and trial. Where, on the other hand, a party invokes the superior court's appellate jurisdiction by writ of review, the superior court sits in a limited appellate capacity, with its review confined to the administrative record. *Mary Kay*, 117 Wn. App. at 116 n. 6 (citing cases);

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[5] *Cost Management* clarified dicta in *Qwest* that could be construed to improperly conflate the concepts of jurisdiction and exhaustion, and held that the "superior court's original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply to the particular claim before the court." 178 Wn.2d at 648; *also IGI Res., Inc. v. City of Pasco*, __ Wn. App. __, __ P.3d __, __ (2014) (superior court had original trial jurisdiction over refund claim under Art. IV, Sec. 6 and RCW 2.08.010, but taxpayer did not exhaust city's administrative remedies). Exhaustion is not an issue here; it is undisputed that New Cingular fully exhausted Clyde Hill's administrative process prior to filing suit.

RCW 7.16.070. Indeed, in a writ of review proceeding, the scope and standard of the superior court's review is arguably more narrow than it is in an ordinary appeal. *Coballes v. Spokane County*, 167 Wn. App. 857, 865-67, 274 P.3d 1102 (2012); RCW 7.16.040 (grounds for writ).

New Cingular chose to invoke the superior court's original trial jurisdiction so that it could challenge the legality of Clyde Hill's fine *de novo*. While that option is often more expensive and lengthy, seeking a writ of review made little sense here. Clyde Hill's administrative appeal was perfunctory. New Cingular contested the Notice of Violation by letter; there was no opportunity for discovery or an evidentiary hearing. It was (and still is) New Cingular's position that both the Clyde Hill Municipal Code and due process require Clyde Hill to substantiate the Notice of Violation and fine with proof of fraudulent conduct, not simply proof that New Cingular's tax returns were overstated. Because the administrative record was devoid of evidence on that core issue, appellate review of the Mayor's Decision would amount to no "full and fair hearing" at all.

Where, as here, a party chooses to challenge a municipal fine through an original action, as opposed to appellate review, the procedure and timing of a writ is irrelevant. The party must invoke the superior court's jurisdiction by filing a complaint. *Mary Kay*, 117 Wn. App. at 115. New Cingular did that. CP 1-5. And it must do so within 3-year

limitations period applicable to municipal taxes or fees. RCW 4.16.080(3); *Carillo v. City of Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992). New Cingular did that too. It filed its action on April 12, 2013, less than one year after Clyde Hill issued the Notice of Violation. CP 1-5. The trial court's conclusion that it lacked jurisdiction over New Cingular's original action was therefore erroneous and must be reversed.

B. Clyde Hill's Municipal Code Could Not And Did Not Eliminate Or Restrict The Superior Court's Original Trial Jurisdiction Over New Cingular's Declaratory Judgment Action.

Clyde Hill suggested below that its Municipal Code effectively prescribed the procedure by which New Cingular could invoke the superior court's original jurisdiction. CP 1, 7.[6] The code provides in part:

> 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. Although the ordinance does not refer to writs of review, the trial court concluded that its reference to "judicial appeal" meant that New Cingular's only means to challenge Clyde Hill's fine was to invoke the superior court's *appellate* jurisdiction by filing a "petition for

[6] Clyde Hill also argued that, although the ordinance does not state a deadline for seeking a writ of review, a 30-day deadline applied by analogy. CP 257 (citing *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.3d 319 (1995)). The trial court did not address this issue (VRP at 13:22-14:2), dismissing New Cingular's complaint solely on the grounds that it "should have sought review by petition for a writ of review." CP 625.

writ of review" of the Mayor's Decision. CP 625. That conclusion was erroneous as a matter of law because it violates (1) basic tenets of the separation of powers and (2) accepted rules of statutory construction.

1. Only State Law Can Impose Procedural Limits On The Original Trial Jurisdiction Of The Superior Court Under Article IV, Section 6 And RCW 2.08.010.

Clyde Hill's Municipal Code cannot limit New Cingular's right to invoke the original trial jurisdiction of the superior court. "Municipal corporations are creatures of the state and derive all of their authority and powers from the state constitution and the legislature." *City of Spokane v. J-R Distrib., Inc.*, 90 Wn.2d 722, 726, 585 P.2d 784 (1978); *also Employco Personnel Servs. v. City of Seattle*, 117 Wn.2d 606, 617, 817 P.2d 1373 (1991) ("The City may exercise only such power as is delegated to it by the Legislature."). As a fundamental aspect of the separation of powers and the need for uniformity, "[t]he jurisdiction and duties of the superior court, and the methods prescribed by which the court shall exercise its jurisdiction, must be conferred by the constitution and by legislative authority." *J-R Distrib.*, 90 Wn.2d at 729 (quoting *Fawcett v. Superior Court of Pierce Cnty.*, 14 Wash. 604, 45 P. 23 (1896)).

Thus, in the absence of authority "from a legislative source higher than a municipality," a municipal code cannot eliminate or circumscribe the original jurisdiction that the superior court otherwise has under Article IV,

Section 6 and RCW 2.08.010. *Id.*; *Mary Kay*, 117 Wn. App. at 115. The legislature has exercised this authority in the past. For example, for municipal land use decisions, the legislature enacted the Land Use Petition Act ("LUPA") to establish "uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. In *James*, the Supreme Court relied on the "explicit objectives of the legislature," to hold that LUPA validly eliminated the superior court's original trial jurisdiction over land use decisions. 154 Wn.2d at 587-89.[7]

There is no state statute that similarly limits superior court original trial jurisdiction to decide the legality of a municipal fine, nor is there any statute allowing municipalities to do so. In an analogous setting, the court in *Mary Kay* held that a city ordinance could not define the superior court's original jurisdiction to decide the legality of a municipal tax. There, a city ordinance provided that decisions of a hearing examiner were "appealable to the Superior Court for the State of Washington," and that no other pleadings were necessary to invoke that jurisdiction other than a "notice of appeal," which the city filed. 117 Wn. App. at 113-14 & n. 2. The trial

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[7] The courts have similarly held that the Administrative Procedures Act and other state-level legislation can validly limit the superior court's original jurisdiction to purely appellate review. *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 359-60, 271 P.3d 268 (2012).

court denied the taxpayer's motion to dismiss for lack of jurisdiction, concluding it had original jurisdiction under Article IV, Section 6. *Id.*

The court of appeals agreed that the superior court would have original jurisdiction to decide the validity of the tax, but dismissed the action because the city failed to properly invoke that jurisdiction. The court noted that, like here, the city could have invoked the superior court's original *trial* jurisdiction by filing a complaint, or its *appellate* jurisdiction by filing a writ of review. *Id.* at 115-16. But the city did neither thing, and its filing of a "notice of appeal" pursuant to the city's ordinance was insufficient because a municipal code could not prescribe the superior court's original jurisdiction. *Id.* at 115. All the same is true here. Just as in *Mary Kay*, the Clyde Hill Municipal Code provision allowing a "judicial appeal" cannot lawfully prescribe New Cingular's right to invoke the superior court's original trial jurisdiction through the filing of a complaint.

2. Even If A Municipality Had Authority To Limit The Superior Court's Original Trial Jurisdiction, Clyde Hill's Municipal Code Did Not Do So.

The trial court fundamentally misapprehended the limited power of municipalities to interfere with the constitutional and legislative grants of jurisdiction expressly conferred upon the superior court. But even if a city ordinance could eliminate the superior court's original trial jurisdiction, Clyde Hill's Municipal Code reveals no such intention. Municipal codes

are construed according to the ordinary rules of statutory interpretation. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007). Washington courts have consistently upheld the long-standing "principle that procedural rules should be interpreted to eliminate procedural traps and to allow cases to be decided on their merits." *Haywood v. Aranda*, 143 Wn.2d 231, 238, 19 P.3d 406 (2001). In dismissing New Cingular's claims, the trial court erroneously did just the opposite here.

Clyde Hill's Municipal Code states that a decision of the mayor is final "unless a judicial appeal is appropriately filed with the King County superior court." CHMC § 1.08.030. The term "judicial appeal" is not defined in the code. Clyde Hill suggested, and the trial court apparently agreed, that "judicial appeal" must be construed to mean "writ of review." But the two terms are incompatible. A writ of review cannot be issued unless "there is no appeal." RCW 7.16.040; *Coballes*, 167 Wn. App. at 867 ("since Ms. Coballes had a statutory right to appeal, a request for a writ of review … was not a permitted procedure"). By the same token, as explained above, a party cannot invoke the superior court's original writ jurisdiction by filing a "notice of appeal." *Mary Kay*, 117 Wn. App. at 116. In short, while a writ of review, where proper, functions somewhat like appellate review, it is anything but a "judicial appeal."

Moreover, a "fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms." *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). A parallel provision of the Clyde Hill Municipal Code addressing decisions of the city council (as opposed to the mayor) states in pertinent part:

> Except in cases where a different appeal period is provided by this code, all actions of the city council shall be final and conclusive, unless within 21 days of the council's action a party makes application to the superior court for King County for a <u>writ of certiorari</u>, writ of prohibition, or writ of mandamus, or files a petition under [LUPA].

CHMC § 1.04.100 (emphasis added).[8] In other words, Clyde Hill understood there was a distinction between "writs" and "judicial appeals," and chose the latter, more generic, term when describing the legal challenge of a mayor's decision. For this reason too, the term "judicial appeal" cannot mean "writ of review"—at least not exclusively.

The more reasonable construction of that term is that the city's imposition of a fine is final and enforceable unless it is properly challenged in superior court—either through an original action <u>or</u> a writ. Not only is such a construction consistent with the language of the code and the limited

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[8] A "writ of certiorari" is the same thing as a "writ of review." *See City of Seattle v. Holifield*, 170 Wn.2d 230, 236 n. 4, 240 P.3d 1162 (2010) ("[T]he terms [writ of] certiorari and writ of review are regarded as interchangeable." (citation omitted)); *see also* RCW 7.16.030 ("The writ of certiorari may be denominated the writ of review.").

authority of municipalities over the superior court, it is required by a separate, but related, ordinance that provides, "[t]he use of procedures [for enforcement of civil violations] set forth herein shall not require or preclude use of any other procedures allowed by the municipal code or state law." CHMC § 1.08.050. As explained, an original declaratory judgment action is among the "procedures … allowed by … state law." Accordingly, even if Clyde Hill could eliminate the superior court's trial jurisdiction, its own code shows that it had no intent to do so here.

Finally, and coming full circle, the Clyde Hill Municipal Code provides that "the ordinances of the city and all proceedings under them are to be construed to effect their objects and to promote justice." CHMC § 1.04.080. In accepting Clyde Hill's argument that a "judicial appeal" must mean a "writ of review"—an interpretation not compelled by the law or the language of the code—the trial court failed to construe the city's ordinances to promote justice. New Cingular did not sleep on its rights; it exhausted its administrative remedies and, after that, promptly moved to challenge the city's fine in court. It did not file a defective and untimely writ of review; it filed a proper and timely complaint. Clyde Hill was not, and never claimed to be, prejudiced by New Cingular's chosen procedure. Justice requires that New Cingular be given its day in court.

C. The Judgment Against New Cingular On Clyde Hill's Counter-Claim And Its Award Of Attorneys' Fees Must Be Vacated.

Clyde Hill's counter-claim for a judgment in the amount of the fine and its motion for summary judgment on that issue were wholly contingent on its claim that the trial court lacked jurisdiction to consider New Cingular's challenge to the legality of the fine. CP 15 (¶¶ 5, 6); CP 258. The trial court agreed and, when it dismissed New Cingular's complaint, it simultaneously entered judgment for Clyde Hill. CP 625. The trial court later awarded Clyde Hill's two attorneys their fees pursuant to a provision in the Clyde Hill Municipal Code. CP 692-95; CHMC § 1.08.010B.

Because the order dismissing New Cingular's complaint for lack of jurisdiction must be reversed, the resultant counter-claim judgment and fee award must also be vacated. The trial court did not consider or decide the legality of Clyde Hill's fine against New Cingular and, thus, a remand for further proceedings on the merits is necessary.[9]

V. CONCLUSION

New Cingular properly invoked the superior court's original trial jurisdiction by filing a complaint. Neither Washington law nor Clyde

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[9] New Cingular filed a motion for summary judgment showing that Clyde Hill's fine was invalid. CP 44-54. Clyde Hill did not file an opposition to New Cingular's motion, choosing instead to file its own motion for summary judgment on the jurisdictional issue, which is the only motion addressed in the trial court's summary judgment ruling. CP 624-25.

Hill's Municipal Code required New Cingular to file a petition for a writ of review. The judgment below must be reversed, and the case remanded.

RESPECTFULLY SUBMITTED this 30st day of May, 2014.

LANE POWELL PC

By _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on May 30, 2014, I caused to be served a copy of the foregoing document to the following person(s) in the manner indicated below at the following address(es):

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Executed on the 30th day of May, 2014, at Seattle, Washington.

Kathryn Savaria

Kathryn Savaria