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Ronald R. Carpenter  
Clerk

No. 91978-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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NEW CINGULAR WIRELESS PCS, LLC,

Respondent

v.

CITY OF CLYDE HILL

Petitioner

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ON PETITION FOR REVIEW FROM  
COURT OF APPEALS, DIVISION I  
(Court of Appeals No. 71626-3-I)

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. STATEMENT OF THE ISSUES.....	1
III. STATEMENT OF THE CASE.....	2
A. New Cingular Collects Local Utility Taxes On Wireless Data Services From Clyde Hill Residents .....	2
B. New Cingular Requests A Tax Refund From Clyde Hill for \$22,053 Pursuant To A Class Action Settlement .....	3
C. Clyde Hill Fines New Cingular \$293,131 For Filing Allegedly False And Fraudulent Tax Returns .....	4
D. Clyde Hill's Mayor Rejects New Cingular's Administrative Appeal And Upholds The Fine .....	5
E. The Trial Court Dismisses New Cingular's Lawsuit.....	6
F. The Court Of Appeals Reverses .....	7
IV. ARGUMENT .....	7
A. New Cingular Invoked The Superior Court's Original <i>Trial</i> Jurisdiction By Filing A Complaint For Declaratory Relief .....	7
1. The Washington Constitution Gives Superior Courts Original Jurisdiction Over Cases Involving Municipal Fines, Which The Legislature Has Never Limited .....	8
2. The Superior Court's Exercise Of Original Jurisdiction Over Cases Involving The Legality Of A Municipal Fine Does Not Undermine The Doctrine Of Exhaustion Or The Integrity Of the Administrative Process.....	13

3.	The Availability Of A Writ Of Review Did Not Preclude New Cingular From Filing A Declaratory Judgment Action As A More Adequate Means Of Judicial Review .....	16
B.	New Cingular's Complaint For A Declaratory Judgment Was Not Subject To A 30-Day Statute Of Limitations Period.....	19
V.	CONCLUSION .....	20

## TABLE OF AUTHORITIES

### CASES

<i>Arborwood Idaho, LLC v. City of Kennewick,</i> 151 Wn.2d 359, 89 P.3d 217 (2007) .....	17
<i>Blanchard v. Golden Age Brewing Co.,</i> 188 Wash. 396, 63 P.2d 397 (1936).....	8
<i>Burman v. State,</i> 50 Wn. App. 433, 749 P.2d 708 (1988).....	17
<i>Burnside v. Simpson Paper Co.,</i> 123 Wn.2d 93, 864 P.2d 937 (1994).....	9
<i>Carrillo v. City of Ocean Shores,</i> 122 Wn. App. 592, 94 P.3d 961 (2004).....	20
<i>City of Spokane v. J-R Distribs., Inc.,</i> 90 Wn.2d 722, 585 P.2d 784 (1978).....	8
<i>City of Tacoma v. Mary Kay, Inc.,</i> 117 Wn. App. 111, 70 P.3d 144 (2003).....	12
<i>Cost Mgmt. Servs., Inc. v. City of Lakewood,</i> 178 Wn.2d 635, 310 P.3d 804 (2013).....	12, 14
<i>Davidson Serles and Assocs. v. City of Kirkland,</i> 159 Wn. App. 616, 246 P.3d 822 (2011).....	18
<i>Donald v. City of Vancouver,</i> 43 Wn. App. 880, 719 P.2d 966 (1986).....	17
<i>Dougherty v. Dep't of Labor &amp; Indus.,</i> 150 Wn.2d 310, 76 P.3d 1183 (2003).....	9
<i>Evergreen Wash. Healthcare Frontier LLC v. Dep't of Soc. &amp; Health Servs.,</i> 171 Wn. App. 431, 287 P.3d 40 (2012).....	18

<i>Federal Way v. King Co.</i> , 62 Wn. App. 530, 815 P.2d 790 (1991).....	16
<i>Glenrose Comm. Assoc. v. City of Spokane</i> , 93 Wn. App. 839, 971 P.2d 82 (1999).....	17
<i>Grandmaster Sheng–Yen Lu v. King Co.</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002).....	18
<i>Harting v. Barton</i> , 101 Wn. App. 954, 6 P.3d 91 (2000) .....	9
<i>Hillis Homes, Inc. v. Snohomish Co.</i> , 97 Wn.2d 804, 650 P.2d 193 (1982).....	20
<i>In re Marriage of Major</i> , 71 Wn. App. 531, 859 P.2d 1262 (1993).....	9
<i>IGI Res., Inc. v. City of Pasco</i> , 180 Wn. App. 638, 325 P.3d 275 (2014).....	14
<i>James v. County of Kitsap</i> , 154 Wn.2d 574, 115 P.3d 286 (2005).....	2, 8, 9, 10
<i>MT Dev., LLC v. City of Renton</i> , 140 Wn. App. 422, 165 P.3d 427 (2007).....	17
<i>New Cingular Wireless PCS LLC v. City of Clyde Hill</i> , 187 Wn. App. 210, 349 P.3d 53 (2015).....	<i>passim</i>
<i>Phillips v. City of Seattle</i> , 51 Wn. App. 415, 754 P.2d 116 (1988).....	17
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007).....	12
<i>Reeder v. King Co.</i> , 57 Wn.2d 563, 358 P.2d 810 (1961).....	16, 17
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992).....	20

<i>Ronken v. Bd. of Co. Comm'rs of Snohomish Co.,</i> 89 Wn.2d 304, 572 P.2d 1 (1977).....	17, 18
<i>Schreiner Farms, Inc. v. Am. Tower, Inc.,</i> 173 Wn. App. 154, 293 P.3d 407 (2013).....	19, 20
<i>State ex rel. Oregon-Washington R. &amp; Nav. Co. v.</i> <i>Clausen,</i> 82 Wash. 1, 143 P. 312 (1914) .....	11
<i>State v. Superior Court for King County,</i> 164 Wash. 515, 2 P.2d 1095 (1931).....	11
<i>State v. Superior Court of Pierce Co.,</i> 49 Wash. 203, 94 P. 920 (1908).....	11
<i>Sunderland Family Treatment Servs. v. City of Pasco,</i> 127 Wn.2d 782, 903 P.2d 986 (1995).....	15
<i>Wells Fargo Bank, N.A. v. Dep't of Revenue,</i> 166 Wn. App. 342, 271 P.3d 268 (2012) .....	9, 10
<i>Weyerhaeuser Timber Co. v. Pierce Co.,</i> 133 Wash. 355, 233 P. 922 (1925).....	11

**CONSTITUTIONAL PROVISIONS**

WASH. CONST. Art. IV, § 6 .....	1, 8
---------------------------------	------

**STATUTES, RULES AND CODES**

RCW 2.08.010 .....	8
RCW 7.16.040 .....	7, 10
RCW 34.05.435 .....	15
RCW 34.05.446 .....	15

RCW 34.05.449 .....	15
RCW 34.05.452 .....	15
RCW 34.05.510 .....	9
RCW 36.32.330 .....	9
RCW 36.70A.290.....	9
RCW 36.70A.300.....	9
RCW 36.70C.030.....	9
RCW 36.70C.120.....	15
RCW 43.21C.075.....	9
RCW 51.04.010 .....	9
RCW 58.17.180 .....	9
RCW 85.18.100 .....	9
RCW 85.32.170 .....	9
RCW 90.58.180 .....	9
CR 57 .....	17, 18
CHMC § 1.08.010B .....	4
CHMC § 1.08.030.....	5
CHMC § 3.28.020B .....	2
CHMC § 3.28.030D.....	2
CHMC § 3.28.090A.....	3, 5
CHMC § 3.28.090B .....	5
CHMC § 3.28.130B.....	4

**OTHER AUTHORITIES**

B. McAllister, *Taxpayers' Remedies – Washington  
Property Taxes*, 13 Wash. L. Rev. 91 (1938) .....11

## I. INTRODUCTION

New Cingular filed this original action for declaratory relief to challenge the legality of a punitive fine imposed by the City of Clyde Hill in retaliation for New Cingular's filing a tax refund claim. The Washington Constitution expressly confers the superior court with original jurisdiction over cases involving the legality of a "municipal fine" and case law recognizes that New Cingular could invoke the superior court's original *trial* jurisdiction by filing a complaint or its *appellate* jurisdiction by seeking a writ of review. New Cingular chose the former so that it could obtain discovery and challenge the fine in a *de novo* proceeding.

Neither the legislature nor the courts can divest the superior court of its constitutionally-granted jurisdiction over this case. As the Court of Appeals properly held—unlike the APA, LUPA or other explicit statutes—the legislature has not imposed any "procedural requirements" limiting the superior court's original jurisdiction over cases involving municipal fines. Nor can such a limitation be implied from the writ of review statute. That statute was intended to grant the superior court appellate jurisdiction where it didn't exist—not to limit its original trial jurisdiction where it already exists. The Court of Appeals' decision should be affirmed.

## II. STATEMENT OF THE ISSUES

1. The Washington Constitution confers the superior court with "original jurisdiction in all cases which involve ... the legality of any tax ... or municipal fine." WASH. CONST. Art. IV, § 6. The legislature cannot deprive the superior court of this constitutionally enumerated grant

of jurisdiction, but it can impose “procedural requirements” to effectively confine the superior court’s jurisdiction to appellate review for certain types of cases, as it did with the APA and LUPA. *James v. Kitsap Co.*, 154 Wn.2d 574, 115 P.3d 286 (2005). Did the legislature intend the writ of review statute, enacted in 1895, to provide an exclusive means of challenging the legality of a municipal fine? **No.**

2. A declaratory judgment action must be brought within a reasonable time, determined by analogy to the relevant limitations period applicable to similar actions. Where, as here, a party invokes the superior court’s original jurisdiction by filing a complaint for declaratory relief, rather than invoking its appellate jurisdiction by seeking a writ of review, is it improper to impose a 30-day time limit, analogous to the deadline for filing a notice of appeal, on the filing of the complaint? **Yes.**

### **III. STATEMENT OF THE CASE**

#### **A. 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 and 3.28.030D (CP 539-48). 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 that the return was true and accurate to the best of New Cingular's knowledge. *Id.*; see CP 383-515.

**B. 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 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 than 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 permitted by the Clyde Hill Municipal Code, New Cingular and the class action plaintiffs 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 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.

**C. Clyde Hill Fines New Cingular \$293,131 For Filing Allegedly False And Fraudulent Tax Returns.**

Clyde Hill took no action on New Cingular's refund claim. So, on April 25, 2012, New Cingular filed an action against Clyde Hill (and other municipalities) seeking a tax refund. CP 3 (¶ 17).<sup>1</sup> In obvious response to New Cingular's refund suit, 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 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 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.

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<sup>1</sup> That action was voluntarily dismissed, re-filed in superior court and then removed by Clyde Hill to federal court, where it is still pending. Incredibly, and contrary to the basis for its fine, in its August 2013 answer in the tax refund case, Clyde Hill took the position that it "has insufficient information on ... whether the taxes paid were 'erroneous.'" *New Cingular Wireless PCS LLC v. Clyde Hill*, King Co. Sup. Ct., No. 13-2-27778-6 SEA; Answer of Defendant Clyde Hill, ¶¶ 1, 32 (Aug. 21, 2013).

**D. Clyde Hill's Mayor 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 and B).<sup>2</sup> There is no penalty provision for overpayments.

Clyde Hill responded by letter, asking New Cingular whether it wanted an in-person or telephonic "informal hearing" or a decision based on its written protest alone. CP 594. Neither the Clyde Hill Municipal Code nor the city's letter provided New Cingular with an opportunity for discovery, an impartial decision-maker or a formal evidentiary hearing. CHMC § 1.08.030. New Cingular chose the informal hearing, which consisted of a five minute tape-recorded telephone call between New

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<sup>2</sup> 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.

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.

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 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.

**E. The Trial Court Dismisses New Cingular's Lawsuit.**

On April 10, 2013, less than three months after receiving the Mayor's Decision, New Cingular filed this declaratory judgment action to invalidate the Notice of Violation. CP 1-5. Clyde Hill answered and counter-claimed, seeking a judgment in the amount of the fine, plus interest and attorneys' fees. CP 14-16. 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 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 seeking a statutory writ of review, which New Cingular did not do. *Id.*

The trial court granted Clyde Hill's motion for 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[.]" *Id.* It dismissed New Cingular's complaint, and entered judgment for Clyde Hill on the Notice of Violation in the amount of \$293,131, plus 12% interest since the date of notice for a total of more than \$350,000. *Id.* The trial court thereafter granted Clyde Hill's motion for an award of attorney fees for an additional \$47,500. CP 692-96. In short, as a result of its request for a \$22,000 tax refund, New Cingular was penalized over \$400,000.

**F. The Court Of Appeals Reverses.**

The Court of Appeals reversed and remanded. The Court correctly recognized that the Washington Constitution vested the superior court with original jurisdiction over challenges to the legality of a municipal fine, and that the writ of review statute "does not say that a writ of review is the exclusive means of resolving" that dispute. *New Cingular*, 187 Wn. App. at 217-18. Because it properly exhausted its limited administrative remedies with the City to no avail, "New Cingular could invoke the superior court's jurisdiction over municipal fines *either* by filing for a writ of review under RCW 7.16.040 (appellate jurisdiction) *or* by filing a complaint (trial jurisdiction)." *Id.* at 218 (emphasis in original).

**IV. ARGUMENT**

**A. New Cingular Invoked The Superior Court's Original Trial Jurisdiction By Filing A Complaint For Declaratory Relief.**

**1. The Washington Constitution Gives Superior Courts Original Jurisdiction Over Cases Involving Municipal Fines, Which The Legislature Has Never Limited.**

The Washington Constitution provides that the superior court has “original jurisdiction ... in all cases at law which involve ... the legality of any ... municipal fine ....” WASH. CONST. Art. IV, § 6; *see also* RCW 2.08.010. It is well-settled 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). While the legislature cannot strip the superior court of this enumerated grant of jurisdiction, *see Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 418, 63 P.2d 397 (1936), it may impose “procedural requirements” that govern the manner in which an aggrieved party can invoke the superior court’s original jurisdiction. *James*, 154 Wn.2d at 588-89 (“state courts have required substantial compliance [with] ... the procedural requirements before they will exercise jurisdiction over the matter”).<sup>3</sup>

For certain kinds of cases arising in the administrative context, the legislature has imposed such “procedural requirements” so as to effectively limit the superior court’s original jurisdiction to appellate review. It did so, for example, with respect to most state agency actions

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<sup>3</sup> Municipalities cannot go even that far. *City of Spokane v. J-R Distributions, Inc.*, 90 Wn.2d 722, 729, 585 P.2d 784 (1978) (local ordinances cannot divest superior court of jurisdiction nor prescribe the manner in which the courts operate). As the Court of Appeals noted, Clyde Hill abandoned its claim that the Clyde Hill Municipal Code—which says that a mayor’s decision is final absent “judicial appeal”—could limit the superior court’s original jurisdiction. *New Cingular*, 187 Wn. App. at 216.

via the Administrative Procedures Act (“APA”), *see* RCW 34.05.510 and *Wells Fargo Bank, N.A. v. Dep’t of Rev.*, 166 Wn. App. 342, 271 P.3d 268 (2012); workers’ compensation cases via the Industrial Insurance Act, *see* RCW 51.04.010 and *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003); and most land-use decisions via the Land Use Procedures Act (“LUPA”), *see* RCW 36.70C.030(1) and *James*, 154 Wn.2d at 587-89. There are many other statutes expressly governing judicial review of a variety of local quasi-judicial decisions.<sup>4</sup>

Thus, as the Court of Appeals recognized, the issue is whether the legislature has imposed similar “procedural requirements” on a challenge to the legality of a “municipal fine” so that the superior court can exercise only its appellate jurisdiction over the dispute. *New Cingular*, 187 Wn. App. at 217-18. It hasn’t. In light of the Constitution’s broad grant of jurisdiction to the superior court, “courts may only find a lack of jurisdiction under compelling circumstances, such as when it is explicitly limited by the Legislature[.]” *In re Marriage of Major*, 71 Wn. App. 531, 534, 859 P.2d 1262 (1993); *Harting v. Barton*, 101 Wn. App. 954, 960, 6 P.3d 91 (2000) (same); *also Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 99, 864 P.2d 937 (1994) (“Exceptions to that jurisdictional grant are

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<sup>4</sup> *See, e.g.*, RCW 85.18.100 and 85.32.170 (diking and drainage district levies); RCW 58.17.180 (plats); RCW 90.58.180 (shoreline management); RCW 36.32.330 (orders of county commissioners); RCW 43.21C.075 (environmental impact); RCW 36.70A.290 - .300 (comprehensive plans). As discussed herein, no similar legislation curbs original trial jurisdiction over cases involving “municipal fines.”

narrowly construed.”). Unlike the express provisions of the APA, LUPA and the like, there is no statute that explicitly limits the superior court’s original trial jurisdiction to decide the legality of a municipal fine.

Clyde Hill’s suggestion that the Court of Appeals’ opinion allows litigants to bypass the APA or LUPA by filing a complaint is a red-herring. *See* Petition for Review at 9; WSAMA Mem. at 10. As the Court of Appeals correctly noted, the APA and LUPA are prime examples where the legislature imposed “procedural requirements” that expressly limit a party’s means of invoking the superior court’s jurisdiction—making appellate jurisdiction the exclusive means of review. *New Cingular*, 187 Wn. App. at 217 (*citing James*, 154 Wn.2d at 588); *also Wells Fargo*, 166 Wn. App. at 360 (“before a challenge to agency action may invoke the superior court’s original appellate jurisdiction, parties must substantially comply with the APA’s procedural requirements.”). Although the legislature could impose similar prerequisites to superior court jurisdiction over disputes involving municipal taxes or fines, it never has.

The writ of review statute, which has changed little since its enactment in 1895, does not manifest a legislative intent to curtail the superior court’s original trial jurisdiction. RCW 7.16.040. The statute does not purport to provide an exclusive means of judicial review for particular types of dispute, much less challenges to “municipal fines” or any other local administrative decisions. On the contrary, the statute was enacted long before comprehensive legislation provided a uniform means of challenging administrative decisions; it was intended to *grant* the

superior court jurisdiction where there was no right to appeal and/or where an original action was inadequate. *State v. Superior Court of Pierce Co.*, 49 Wash. 203, 204, 94 Pac. 920 (1908) (writ “will be issued only in cases where there is no appeal, or where, in the judgment of the court, there is not any plain, speedy, and adequate remedy at law.”).<sup>5</sup> In short, the writ statute provided an additional or at least faster means of getting into court.

There is no authority suggesting the legislature intended the writ of review statute to provide the exclusive means of challenging municipal fines, taxes or similar administrative decisions. Indeed, many of this Court’s early decisions recognize just the opposite; that the statutory writ of review was not an adequate means of challenging some state-level and local administrative decisions—including challenges to property tax assessments. *See Weyerhaeuser Timber Co. v. Pierce Co.*, 133 Wash. 355, 233 P. 922 (1925); *State ex rel. Oregon-Washington R. & Nav. Co. v. Clausen*, 82 Wash. 1, 143 P. 312 (1914); B. McAllister, *Taxpayers’ Remedies—Washington Property Taxes*, 13 Wash. L. Rev. 91, 107-09 (1938). These cases recognized that the administrative record—which is

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<sup>5</sup> Indeed, the writ statute is not confined to administrative matters, but also applies to any “inferior tribunal” exercising judicial functions. Prior to codification of discretionary review in the Rules of Appellate Procedure, the statutory writ was the primary means of obtaining appellate review of non-appealable and interlocutory orders entered by the superior court. *See, e.g., State v. Superior Court for King County*, 164 Wash. 515, 520, 2 P.2d 1095 (1931) (“We are of the opinion that, under the facts disclosed by the record before us, plaintiff’s remedy by way of appeal is inadequate, and that he may proceed by way of a writ of review.”).

all a court can review in a writ proceeding—was not always sufficient, and that an original action is necessary to afford complete relief. *Id.*

More to the point, in the analogous context of local tax refund cases, this Court and the Court of Appeals have recognized that a taxpayer has a choice of invoking the superior court’s original trial jurisdiction or its appellate jurisdiction. *See 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 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”); *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 115-16, 70 P.3d 144 (2003) (“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.”).<sup>6</sup>

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 (and exposes New Cingular to the risks and burden of discovery), seeking a writ of

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<sup>6</sup> *Cost Management* clarified dicta in *Qwest* improperly conflating jurisdiction and exhaustion, holding that the “superior court’s original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply ....” 178 Wn.2d at 648. Importantly, *Cost Management* did not reject, much less overrule, *Qwest*’s recognition that the superior court had original trial jurisdiction in a municipal tax case; on the contrary, it reaffirmed and followed that principle itself.

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.<sup>7</sup>

**2. The Superior Court's Exercise Of Original Jurisdiction Over Cases Involving The Legality Of A Municipal Fine Does Not Undermine The Doctrine Of Exhaustion Or The Integrity Of The Administrative Process.**

The fact the legislature has not limited the superior court's original jurisdiction over New Cingular's *de novo* action is the end of the analysis. The concept of exhaustion cannot divest the court of a constitutional grant of jurisdiction, nor can it limit that jurisdiction in the absence of legislative action. "The exhaustion doctrine has no bearing on the jurisdiction of the court in terms of the constitutional power of the court to hear a case."

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<sup>7</sup> Clyde Hill suggests that New Cingular had the opportunity for discovery and a formal hearing, but purposely flouted the process. Petition for Review at 2-3 and n. 2; WSAMA Mem. at 7; Clyde Hill's Resp. to WSAMA Mem. at 1, 9 and n. 1. The record says otherwise. The Code allowed New Cingular to file a written protest and request a hearing (which it did), and the City responded with an offer for an "informal hearing" only. CP 594. It wasn't until New Cingular filed this *de novo* action that it could inquire into the basis of the fine. See CP 85-92 (New Cingular's first set of interrogatories and requests for production).

*Cost Mgmt.*, 178 Wn.2d at 648. Rather, when jurisdiction exists, a trial court should consider, as a matter of “judicial administration” and “deference,” whether “an adequate administrative remedy exists that the claimant should try first[.]” *Id.* Thus, in *Cost Management*, this Court found exhaustion excused. In *IGI Res., Inc. v. City of Pasco*, 180 Wn. App. 638, 325 P.3d 275 (2014), the court found that it was not. *Id.* at 642. Critically, in both cases, there was no dispute that the superior court had original *trial* jurisdiction over the plaintiff’s local tax refund claim.

New Cingular exhausted Clyde Hill’s administrative process *before* filing suit. And its election to file an original action rather than writ of review did not, as Clyde Hill and amici claim, render the process meaningless. Petition for Review at 16-17; WSAMA Mem. at 7. As the Court of Appeals held, New Cingular’s protest fulfilled the purpose of exhaustion by giving the “mayor an opportunity to correct errors Clyde Hill may have made in imposing the fine.” *New Cingular*, 187 Wn. App. at 218. A party has every incentive to press its case (and, if allowed, muster witnesses and evidence) during the administrative process to avoid the need for judicial review—which is even more costly if the party chooses (or, as here, has no choice but) to file a *de novo* action rather than a writ. If anything, the prospect of a *de novo* challenge in court should incentive municipalities to provide a more robust administrative process.

Conversely, if the writ statute were construed as a restraint on the superior court’s original jurisdiction over local administrative decisions, municipalities may be incentivized to afford parties fewer procedural

rights so as to effectively immunize their actions from judicial review. In a writ proceeding the superior court sits strictly in an appellate capacity, and ordinarily must base its review on the static administrative record, such as it is, with no additional evidence. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 789-90, 903 P.2d 986 (1995). Where, as here, the administrative process does not allow discovery or a hearing with a right to cross-examine, challenging the basis for the municipality's fine by statutory writ of review may be futile.

A rule that limits judicial challenge of local administrative decisions to appellate review makes sense only if, as a corresponding measure, the municipality affords parties adequate procedural rights and an opportunity to make a record at the administrative level. There cannot be one without the other. For example, the APA allows the hearing officer to be disqualified for bias, prejudice or interest, RCW 34.05.435, gives the agency discretion to allow subpoenas, discovery and depositions, RCW 34.05.446, and requires the agency to afford parties "the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence" with all testimony "made under oath or affirmation," RCW 34.05.449 and .452. Similarly, under LUPA, while there are no procedural restraints imposed on the local administrative process, on review, the superior court may allow discovery and additional evidence if the parties did not have "an opportunity consistent with due process to make a record on the factual issues." RCW 36.70C.120.

The writ of review statute does not reflect any such tradeoff or concern for due process because—unlike the APA, LUPA or the rest—it was never intended to provide an exclusive means of judicial review for all local administrative decisions. It is but one option for invoking the superior court’s original jurisdiction in appropriate cases (*e.g.*, where the record is fully developed and/or the issues are purely legal). Of course, the legislature can enact legislation to impose procedural requirements so as to limit that jurisdiction to appellate review, but it is unlikely to do so without insisting on the kinds of procedural rights and safeguards found in other comprehensive statutory schemes. Either way, it is the kind of policy choice that only the legislature can make, and one that it did not contemplate when it enacted the statutory writ of review statute in 1895.

**3. The Availability Of A Writ Of Review Did Not Preclude New Cingular From Filing A Declaratory Judgment Action As A More Adequate Means Of Judicial Review.**

The Court of Appeals also properly rejected Clyde Hill’s argument that the availability of a writ of review barred New Cingular from seeking alternative (and superior) relief through a declaratory judgment. *New Cingular*, 187 Wn. App. at 219-20. In *Reeder v. King Co.*, 57 Wn.2d 563, 358 P.2d 810 (1961), this Court held that a party challenging a land-use decision could not seek declaratory relief if a writ of review was an “adequate remedy.” *Reeder* reflects a pre-LUPA policy requiring prompt review in land-use cases. *Federal Way v. King Co.*, 62 Wn. App. 530, 538, 815 P.2d 790 (1991) (“The consistent policy in this state is to review

decisions affecting use of land expeditiously so that legal uncertainties can be promptly resolved and land development not unnecessarily slowed or defeated by litigation-based delays.”). The precise holding in *Reeder* is now reflected in and superseded by LUPA itself.

*Reeder* did not hold that the availability of a writ bars declaratory relief in all cases. But even if it did, that reasoning was abrogated by rule. “The rule previously followed by Washington ... that declaratory relief will not lie where any alternative remedy is available, was changed by court rule in 1967.” *Ronken v. Bd. of Co. Comm’rs of Snohomish Co.*, 89 Wn.2d 304, 310, 572 P.2d 1 (1977) (“*Reeder* ... and those cases following [it], no longer control on this issue.”). Since 1967, CR 57 has provided: “The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Thus, the fact that New Cingular *could* have sought a writ did not preclude it from seeking, as a more adequate remedy, a declaratory judgment.<sup>8</sup> See, e.g., *Donald v. City of Vancouver*, 43 Wn. App. 880, 883 n. 2, 719 P.2d 966 (1986) (“defendants’ attempt to defend the conclusion that [plaintiff] was not

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<sup>8</sup> There are innumerable cases where the plaintiff sought judicial review of a local administrative decision by filing a petition for writ of review *and* a complaint for declaratory relief. In many of these cases, the court decided the declaratory judgment action *de novo*. See *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 364-65, 89 P.3d 217 (2007); *Glenrose Comm. Assoc. v. City of Spokane*, 93 Wn. App. 839, 844, 971 P.2d 82 (1999); *MT Dev., LLC v. City of Renton*, 140 Wn. App. 422, 165 P.3d 427 (2007); *Phillips v. City of Seattle*, 51 Wn. App. 415, 754 P.2d 116 (1988); *Burman v. State*, 50 Wn. App. 433, 749 P.2d 708 (1988).

entitled to seek declaratory relief because he could have sought ... a writ of review is not well taken. Such doctrine was overruled long ago”).

Granted, courts should still be “circumspect,” *Ronken*, 89 Wn.2d at 310, and may deny declaratory relief where it is not “appropriate.” CR 57. Thus, as the Court of Appeals properly recognized, and subsequent case law confirms, declaratory relief is not appropriate if “sought as a means of avoiding the strict statutory procedural rules and short time limits” found in comprehensive and exclusive statutory schemes. *New Cingular*, 187 Wn. App. at 220 (citing *Evergreen Wash. Healthcare Frontier LLC v. Dep’t of Soc. & Health Servs.*, 171 Wn. App. 431, 287 P.3d 40 (2012) (APA) and *Grandmaster Sheng–Yen Lu v. King Co.*, 110 Wn. App. 92, 38 P.3d 1040 (2002) (LUPA)); see also *Davidson Serles and Assocs. v. City of Kirkland*, 159 Wn. App. 616, 246 P.3d 822 (2011) (GMA).

New Cingular did nothing of the sort here. As discussed above, and coming full circle, there is no statutory regime imposing procedural rules or time limits on judicial review of municipal fines, fees or taxes. Although New Cingular could have sought a writ of review, declaratory relief is clearly an “appropriate” alternative because it will give New Cingular an opportunity to make its best case. On remand, through discovery that was unavailable in Clyde Hill’s administrative process and equally unavailable in a writ proceeding, New Cingular can show that Clyde Hill’s application of its Municipal Code’s generic penalty provision was contrary to its own interpretation and historic use of that provision,

and was applied to New Cingular in a discriminatory and punitive fashion. A writ of review would not afford New Cingular similar relief.

**B. New Cingular's Complaint For A Declaratory Judgment Was Not Subject To A 30-Day Statute Of Limitations Period.**

Finally, Clyde Hill argued, in the alternative, that New Cingular's declaratory judgment action was untimely. The Uniform Declaratory Judgment Act does not have a limitations period. *See* RCW 7.24 *et seq.* Thus, a declaratory judgment action must be brought within a reasonable time, "determined by analogy to the time allowed for ... a similar [action] as prescribed by statute, rule of court, or other provision." *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 163, 293 P.3d 407 (2013). The trial court never reached the issue, *see* VRP at 13-14, and the Court of Appeals refused to affirm on this alternative ground—leaving the issue to the trial court on remand. *New Cingular*, 187 Wn. App. at 220-21. The Court of Appeals held, however, that—because New Cingular invoked the superior court's *trial* jurisdiction—it would be "inappropriate to apply a 30-day time limit by analogy to an appellate proceeding." *Id.*

That holding was correct. The Court of Appeals rightly rejected Clyde Hill's claim that a declaratory judgment action should be governed by the "same 30-day time limit applicable to a writ." Petition for Review at 18. Clyde Hill ignores the difference between the superior court's original trial jurisdiction and its appellate jurisdiction. A writ of review requires the court to act only in an appellate capacity and, thus, it is analogous to an appeal; time limits are usually measured in days. A

declaratory judgment action, on the other hand, is a *de novo* proceeding and, thus, it is like any other original action; time limits are usually measured in years. *See Schreiner*, 173 Wn. App. at 160-64 (6-year breach of contract limitations period applied by analogy in declaratory action).

Here, the most analogous limitations period is three years—which is “the time limit for seeking a refund of an illegal tax or fee” assessed by a municipality. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992); *Hillis Homes, Inc. v. Snohomish Co.*, 97 Wn.2d 804, 650 P.2d 193 (1982). Clyde Hill seeks to distinguish these cases on the grounds that “[t]his is not an action to ‘recover’ taxes or fees.” Petition for Review at 19. But the fact that New Cingular sought declaratory relief to *invalidate* an illegal municipal fine *before* it was paid, instead of bringing a refund action to *recover* an illegal fine *after* it was paid, is a distinction without a difference; the nature of the action is the same. For purposes of analogy, the applicable limitations period is the same too.

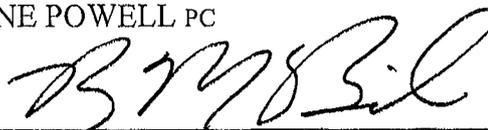
## V. CONCLUSION

The decision of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of January, 2016.

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 January 4, 2016, 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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 Kathryn Savaria

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A hard copy will follow via U.S. Mail to all counsel of record. Thank you.

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