

No. 68065-0-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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Northwest Territorial Mint, *Appellant*

v.

State of Washington, Department of Revenue, *Appellee*

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REPLY BRIEF OF APPELLANT

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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## I. Introduction

Northwest Territorial Mint (Mint) did not strictly comply with the deadline for serving the Board of Tax Appeals (Board). The Department of Revenue (DOR) insists that is the end of the analysis, claiming there are only two possibilities for perfecting a petition for judicial review under the Administrative Procedure Act (APA): strict compliance or noncompliance. Washington's courts recognize a third: substantial compliance.

Where a petition for judicial review is timely filed and the parties are timely served, additional procedural requirements can be satisfied with substantial compliance, *Skinner v. Civil Service Com'n of City of Medina*, 168 Wn.2d 845, 854, 232 P.3d 558 (2010). The Mint has met that standard. DOR sidesteps the Mint's substantial compliance, repeatedly asserting this case presents simple noncompliance. See Respondent's brief p. 1, 5, 11.

The Mint is not asking the Court to relitigate *Sprint Spectrum v. Dep't of Revenue*, 156 Wash.App. 949, 235 P.3d 849 (2010), review denied, 170 Wash.2d 1023, 245 P.3d 774 (2011) or *Banner Realty Inc. v. Dep't of Revenue*, 48 Wash.App. 274, 738 P.2d 279 (1987). Clearly, noncompliance is not substantial compliance. The Mint's point is very different. It asks

this Court to review the facts of its delayed service and recognize that, unlike the noncompliance in *Sprint Spectrum* and *Banner*, that service allowed the Board to accomplish the purpose of the statute. That is, unlike the appellants in *Sprint Spectrum* and *Banner*, the Mint substantially complied with the requirement to serve the Board.

Because the Mint substantially complied it asks the Court to reverse the Superior Court's order of dismissal and remand for judicial review on the merits.

## **II. Analysis**

The threshold question of law is whether a Petitioner can substantially comply with APA service requirements. Washington's Courts have already ruled that it can. The question of first impression here is whether the facts of this case meet that standard. The fact that the service requirement is not jurisdictional informs that question.

### **A. Substantial Compliance Satisfies Procedural Requirements.**

Though DOR's analysis does not use the phrase "strict compliance" that is clearly what it is urging, *see* Respondents Brief, p. 15, 17. DOR's

argument that only strict compliance will do is mistaken. “Nonetheless, substantial compliance with service requirements is generally sufficient to invoke a superior court's appellate jurisdiction.” *Skinner*, 854. DOR seeks a different result by analyzing each case in isolation.

**1. Washington’s Substantial Compliance Doctrine is Comprehensive, not Compartmentalized.**

DOR first attempts to distinguish Washington’s substantial compliance cases because they did not involve “noncompliance with the APA’s requirements for invoking appellate review of an agency order.” *See* Respondent’s brief p. 7. The opinions themselves eschew such compartmentalization, cross-referencing cases adjudicating Superior Court appellate jurisdiction in a number of different contexts.

*Skinner*’s acceptance of substantial compliance with requirements to perfect judicial review under RCW 41.12.090<sup>1</sup> relied on cases arising in a variety of contexts. This included judicial review of Board of Industrial Insurance Appeals orders, *Black v. Dep’t of Labor & Indus.*, 131 Wash.2d 547, 552-53, 933 P.2d 1025 (1997); and *In re Saltis*, 94 Wash.2d 889, 896, 621 P.2d 716 (1980); and school board decisions under RCW 28A.58.460,

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<sup>1</sup> Governing judicial review of a city civil service commission’s decision.

*Hall v. Seattle Sch. Dist. No. 1*, 66 Wash.App. 308, 316, 831 P.2d 1128 (1992).

In *Saltis* the Court recognized the scope of substantial compliance cases adjudicating other statutes: “Our acceptance of the sufficiency of “substantial compliance” with procedural rules has as much application to this special jurisdictional notice requirement as it has to the more general provisions of the rules of civil procedure” *Saltis*, p. 896<sup>2</sup>. Similarly, in *Crosby v. County of Spokane*, 137 Wn.2d 296, 971 P.2d 32 (1999), involving judicial review of a City Hearings Examiner decision under RCW 7.16.050, the Court relied on a Board of Industrial Insurance Appeals case, *Continental Sports Corp. v. Department of Labor & Indus.*, 128 Wash.2d 594, 602, 910 P.2d 1284 (1996), which relied on an APA case, *Seattle v. PERC*, 116 Wash.2d 923, 928, 809 P.2d 1377 (1991), which relied on a habeas corpus case, *In re Writ of Habeas Corpus of Santore*, 28 Wash.App. 319, 327, 623 P.2d 702 (1981) before concluding: “The doctrine of substantial compliance has been utilized where invocation of a superior court's appellate jurisdiction is concerned” and then citing *Saltis* as further support. *Crosby*, 301, 302.

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<sup>2</sup> *Saltis* adjudicated the requirement to serve the agency director who was a party to the appeal. It thus, unlike the present case, involved personal jurisdiction.

*Skinner* declined to apply *Union Bay Preservation Coalition v. Cosmos Development & Administration Corp.*, 127 Wash.2d 614, 617, 902 P.2d 1247 (1995) and *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 958 P.2d 962 (1998), not because they arose under different statutes, but because they were limited to their facts - personal service on the party's attorney rather than the party, *Skinner* at 855. *Union Bay's* own analysis of substantial compliance cited APA cases, *PERC supra*, Board of Industrial Insurance Appeals case, *Saltis*, as well as cases involving service of original process. *Union Bay* at 620; "The process for handling court appeals of the decisions of the Board of Industrial Insurance Appeals is exactly analogous to court review of decisions of administrative agencies under the APA." *Union Bay* at 625 (Talmadge, J, dissenting).

The Legislature endorse substantial compliance with APA service requirements on a non-party by specifically providing that late service on the attorney general is not grounds for dismissal, RCW 34.05.542(5). To the extent the Legislature has spoken on late service on non-parties, it has approved it. Reversing that approval would frustrate Legislative Intent and Court policy. Washington's substantial compliance

decisions form a coherent body of law, not fragmented compartments. That coherent body of law authorizes substantial compliance with APA procedural requirements.

## **2. Washington's Substantial Compliance Cases Adjudicating Missed Deadlines Apply Here.**

DOR next tries to distinguish Washington's substantial compliance cases by claiming they don't adjudicate compliance with a time limit, *see* Respondents brief p. 12, 13. This argument simply fails to recognize what the cases are about. Every case adjudicated the effect of failing to strictly comply with a procedural requirement before expiration of a time limit<sup>3</sup>. If a statutory time limit had not expired, the opinion would not exist, as the appellant could simply cure the procedural defect by taking the action later.

*Skinner* and the cases cited therein unambiguously hold procedural time limits can be satisfied with substantial compliance. That question is

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<sup>3</sup> *Banner*, supra, at 276, requirement to serve the Board of Tax Appeals within 30 days of decision; *Black*, supra at 550, alleged failure to serve agency within 30 day period; *Clymer v. Employment Security Dep't*, 82 Wn.App. 25, 27, 917 P.2d 1091 (1996), failure to file appeal by 30 day deadline; *Crosby*, supra at 300, failure to file affidavit by 90 day deadline; *Dougherty*, supra at 313, failure to file in proper county by 30 day deadline; *Saltis*, supra at 892, alleged failure to serve agency director prior by 30 day deadline; *Ruland*, supra, at 267, failure to file notice of appeal by 30 day deadline; *Skinner*, supra, at 847, alleged failure to serve Board by 30 day deadline; *PERC*, supra, at 926, failure to serve parties within 30 day limit; *Sprint*, supra, failure to serve Board by 30 day deadline; *Union Bay*, supra at 617, failure to serve parties of record by 30 day deadline.

settled. The as yet unanswered question before this Court is whether the Mint's actions constitute substantial compliance. The answer is yes.

**B. The Mint Substantially Complied With the Service Requirement**

Application of substantial compliance turns on the facts of each case, *Sprint Spectrum* at 958. That said, Washington's courts have been less likely to find substantial compliance where the procedural requirement is jurisdictional, such as a filing deadline, *Medina v. Pub. Util. Dist. No. 1*, 147 Wn. 2d 303, 317, 318, 53 P.3d 992 (2002); *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn.App. 703, 711, 712, 943 P.2d 341 (1997); *PERC*, supra. The court has authorized substantial compliance with jurisdictional requirements but it sets the bar higher, *Ruland v. State, Dept. of Social and Health Services*, 144 Wn.App. 263, 274, 275, 182 P.3d 470 (2008); *Crosby*, 301, 302, *Saltis* supra. The Mint's satisfaction of the substantial compliance standard here is underlined by the fact that the procedural requirement at issue is not jurisdictional.

**1. The Court Has Jurisdiction.**

DOR claims the Superior Court does not have appellate

jurisdiction<sup>4</sup>, arguing the APA's procedural requirements for perfecting a petition for judicial review are jurisdictional. That is not the law in this state. "Generally, a valid judgment consists of three jurisdictional elements: jurisdiction of subject matter, jurisdiction of person, and power or authority to render a particular judgment." *State v. Barnes*, 146 Wn. 2d 74, 85, 43 P.3d 490 (2002). See also *Marley v. Department of Labor and Industries of State*, 125 Wn.2d 533, 539, 540, 886 P.2d 189 (1994) applying those same three elements to an APA appeal.

DOR does not dispute the Court's subject matter jurisdiction and personal jurisdiction over the parties, *see* Respondents brief p. 9, 10; VRP p. 7, l. 3-7. It also admits the case was timely filed, thus satisfying the requirement that the Court has power to render the particular judgment, *see* Respondents brief, p. 2. While acknowledging the 3 required jurisdictional elements are present here, DOR asks the Court to treat other procedural requirements as jurisdictional.

The Court rejects that policy "Elevating procedural requirements to the level of jurisdictional imperative has little practical value and

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<sup>4</sup>

DOR raises arguments contrasting appellate jurisdiction with original jurisdiction, *see* DOR brief p. 6, 8, the Mint is unclear on DOR's point, but notes that the cases cited in the Mint's pleadings adjudicate superior court appellate jurisdiction.

encourages trivial procedural errors to interfere with the court's ability to do substantive justice." *Dougherty v. Dep't of Labor & Industries*, 150 Wn.2d 310, 319, 76 P.3d 1183 (2003), quoting *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash.2d 769, 791, 947 P.2d 732 (1997) (Durham, C.J. concurring).

DOR's bid to "jurisdictionalize" procedural requirements seeks an extension of *Union Bay* to require strict compliance with other APA provisions. See Respondent's Brief, p. 14, 15. The Court has already said no:

In *Union Bay*, we held that a superior court did not obtain jurisdiction over an appeal from an agency decision unless the appealing party timely filed a petition for review in the superior court and timely served the petition on all of the parties.

...

Friends next asks us to expand the scope of our *Union Bay* holding by interpreting other procedural provisions of the APA as jurisdictional requirements. ...We decline to hold that strict compliance with RCW 34.05.546 is a jurisdictional requirement...

*Skagit Surveyors* at 555. The Court's adoption of different standards for jurisdictional requirements and nonjurisdictional requirements could not be more plainly stated.

DOR's request to extend *Union Bay* is inconsistent with both *Skagit*

*Surveyors* and *Union Bay* itself. The disallowance of service on a party's attorney rather than the party to perfect an APA appeal "had no bearing on other statutes and other requirements of service." *Union Bay* at 620. *Skinner* confirmed this limitation, declining to extend *Union Bay's* strict compliance regime to other service requirements, *Skinner*, 854, 855.

By timely filing its appeal and serving the parties, the Mint met both of the jurisdictional elements required under *Union Bay*, thus properly invoking Superior Court jurisdiction. Like the procedural requirements of RCW 34.05.546 in *Skagit Surveyors*, RCW 34.05.542's requirement to serve a nonparty is not jurisdictional.

But the Court need not rely on analogy to reach that conclusion. It already considered that exact question in *Sprint Spectrum*, where the majority opinion upholding dismissal: "...carefully stated a rationale for affirming without mentioning the term: 'jurisdiction.'" *Sprint Spectrum*, 965, 967 (Becker J. concurring). Judge Becker's concurrence in *Sprint Spectrum* referenced sound judicial policy for not buying into DOR's jurisdictional argument, citing *Dougherty's* disapproval of elevating procedural requirements and noting to do so would create a "trap for the unwary," allowing the issue to be raised at any time in the litigation and

causing “...a huge waste of judicial resources.” *Sprint Spectrum* at 965, 966 (Becker J. concurring) citing *Dougherty* at 319. The facts of this case show that danger is very real.

DOR correctly notes it was the first to notify the Mint’s counsel of his oversight. *See* Respondent’s brief, p. 2. However, as DOR’s counsel noted in hearing, it could have refrained and said nothing until it filed its motion to dismiss, VRP p. 24, l. 7-13. The professionalism of DOR’s counsel in promptly notifying the Mint’s counsel is to be commended. But finding the service requirement jurisdictional, as urged by DOR, would allow less scrupulous counsel to lie in wait and spring a trap, wasting judicial resources, and accomplishing a different legal result by choosing to remain silent. That policy has been properly rejected by the Court.

Although failure to serve the Board is not jurisdictional, it is not irrelevant. Both litigants note: “all statutory procedural requirements must be met before the court’s appellate jurisdiction is properly invoked.” *Union Bay* at 617, citing *PERC* at, 926. That is a key point in the analysis, but it is not the end point. The next point is: What actions satisfy the APA’s nonjurisdictional requirements?

## **2. The Mint Substantially Complied.**

DOR does not dispute that the Mint's delayed service constitutes substantial compliance. Instead, it puts all its eggs in the basket of strict compliance: "a party cannot substantially comply with the APA's time limit for service on an agency". See Respondent's Brief, p. 11. After claiming substantial compliance is not allowed, DOR spends the next 6 pages attempting to distinguish Washington's caselaw allowing it. It fails.

Substantial compliance meet's the APA's requirement to serve a nonparty. That standard is met on a showing the: "'statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.'" That determination depends on the facts of each particular case." *Sprint Spectrum* at 958, quoting *Banner* at 278. Because the Court below insisted on strict compliance, it never reached this question.

The purpose of the requirement to serve the Board is ensuring the timely provision of the administrative record to the Superior Court. *Sprint Spectrum* at 956, 957, quoting *Banner* at 278. The record clearly shows that, despite delayed service by the Mint, that purpose was met. DOR does not dispute that record, instead arguing that satisfying the statute's purpose is irrelevant: "Even if the purpose of the time limit is ultimately satisfied,

failure to comply with the time limit mandates dismissal.” See Respondent’s Brief, p. 15. But satisfying the statute’s purpose is relevant. Otherwise the discussion of substantial compliance in *Sprint Spectrum* and *Banner* would be worse than superfluous, it would be misleading.

The lack of prejudice from the Mint’s delayed service is another important factor in the substantial compliance analysis, *Skinner* 856. DOR claims no prejudice, either on its own behalf or on the Board’s. This is because the record contains none.

After receiving the Court’s scheduling order, the Board requested payment from the Mint as a condition precedent for submitting the record. It set a payment deadline, presumably based upon the Courts deadline for submission of the record. CP 116, 117. The Mint promptly paid the fee, CP 119, and the Board proceeded to produce the record prior to the Court’s deadline, exactly as if had it been served 17 days earlier. CP 121, 122. The absence of prejudice reinforces a finding of substantial compliance.

**C. The Mint is Entitled to Attorney’s Fees**

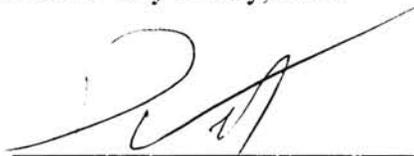
As pled before the Superior Court and in its notice of appeal, the Mint is entitled to an award of attorneys fees and costs incurred in opposing

DOR's motion to dismiss, RCW 4.84.350. If the Mint obtains reversal of the Superior Court's order of dismissal it will be a prevailing party under RCW 4.84.350(1). The Mint is also a qualified party as defined in RCW 4.84.340(5), *see* Declaration of Ross Hansen, attached as exhibit 1. As a qualified party who prevailed in a judicial review action, the Mint is entitled to an award of reasonable attorney's fees and costs, RCW 4.84.350.

### **III. Conclusion**

The Mint seeks adjudication of the merits of its case. It satisfied the APA's requirements for perfecting a petition for judicial review by: 1) strictly complying with the requirements for filing with the Court and service on a party; and 2) substantially complying with the nonjurisdictional requirement to serve the Board. It asks the Court to reverse the Superior Court order of dismissal, remand the case for adjudication on the merits, and award the Mint attorney fees under RCW 4.84.350.

Respectfully submitted this 5<sup>th</sup> day of July, 2012.



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Paul Neal, WSBA # 16822  
Attorney for Northwest Territorial Mint

CERTIFICATE OF SERVICE

I certify that on the 5<sup>th</sup> day of July, 2012, I personally served a true and correct copy of the Appellant's Reply Brief on counsel for the Department of Revenue by delivering the same to her place of business at:

Callie Castillo, Counsel for Dept. of Revenue  
Office of the Attorney General  
7141 Cleanwater Drive SW  
PO Box 40124  
Olympia, WA 98504-0124

Signed this 5<sup>th</sup> day of July, 2012, in Olympia Washington

*Camille Fastle*

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MINT**

**Appellant**

v.

**STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE**  
**Appellee**

**DECLARATION OF ROSS  
HANSEN.**

I, Ross Hansen, declare:

1. I am the owner and manager of Northwest Territorial Mint, a single-member Washington Limited Liability Company headquartered in Federal Way, Washington.
2. On May 24, 2011, my counsel caused the Mint's petition for judicial review to be filed with the King County Superior Court. On that date the net worth of my company, Northwest Territorial Mint, did not exceed 5 million dollars. Accordingly, the Mint meets the definition as a qualified party entitled to an award of attorney's fees under RCW 4.84.350 should we prevail in this

appeal.

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

Signed in Federal Way, Washington, on this 2 day of July, 2012.

A handwritten signature in black ink, appearing to be 'RH', written over a horizontal line.

Ross Hansen, Owner  
Northwest Territorial Mint