NO. 100645-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

AHMET CHABUK,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals affirmed the City of Tacoma's authority to impose: (1) board-up charges against the owner of a derelict building, and (2) a fee for an illicit utility reconnection. Petitioner Ahmet Chabuk, the owner of the property in question, originally challenged the imposition of those charges to the Hearing Examiner for the City of Tacoma. The Superior Court subsequently affirmed the decision of the Hearing Examiner, and Division II of the Court of Appeals, in turn, affirmed.

Chabuk now seeks review by this Court. He argues that Tacoma Municipal Code (TMC hereinafter) 2.01.070.B.2, the ordinance authorizing the board-up of the property as well as the assessment of the costs, is unconstitutional. He also alleges that Division II erred when it ruled that he failed to exhaust his administrative remedies related to the unauthorized reconnection fee (and other utility fees).

Chabuk's allegations of constitutional deprivations are neither borne out by the record nor reflective of the decision made by the Court of Appeals in its unpublished opinion. Petitioner presents the same arguments that were previously rejected by the Hearing Examiner, the Superior Court, and the Court of Appeals. For the reasons outlined herein, Chabuk has not demonstrated grounds for review under RAP 13.4 and the instant petition should be denied.

II. ISSUES RESTATED

A. Whether review should be denied as Chabuk fails to establish that the City's ordinance is unconstitutional?

B. Whether review should be denied when Division II correctly ruled that Chabuk failed to exhaust his administrative remedies, and he has failed to show that this decision should be reviewed under RAP 13.4(b)?

III. STATEMENT OF THE CASE

Division II's analysis of the instant case includes a detailed and accurate description of the underlying facts and procedural history of this case. Therefore, the City will not repeat in full

that factual and procedural background herein. Certain points, however, warrant emphasis.

In June 2018, a City of Tacoma Neighborhood and Community Services (NCS) inspector determined that a house at 6432 South Ferdinand owned by Chabuk was occupied by seventeen individuals, yet had no running water or electricity (utility services had been terminated due to non-payment). The water meter had also been tampered with and Chabuk's tenants had hooked up a generator inside the garage. There were other life safety hazards observed (for example, inoperable smoke detectors). Pursuant to the emergency powers in TMC 2.01.070.B.2, the City's inspector determined that the conditions were hazardous to the occupants and subsequently boarded up the premises (the City had to re-secure the premises on more than one occasion due to repeated unlawful entries). In accordance with that provision of the Municipal Code, the City assessed the board-up costs against the owner, Chabuk.

In September 2018, Chabuk received two Notices of Violation from the City. One was issued under the City's Minimum Buildings and Structures Code, and stated that the house itself had been classified as a derelict building in accordance with TMC 2.01.050.C.3 (that provision of the TMC defines what constitutes a derelict building or structure). Chabuk was provided with the notice of appeal procedures and a list of the deficient conditions.[1] The City also issued a Notice of Violation under TMC 8.30, for public nuisance conditions observed on the premises (debris and litter in the yard); Chabuk also received notice of those conditions and the appeal process for the nuisance violation.

[1] With regards to the derelict building, Chabuk never appealed the classification of the house as derelict; he only argued he was not responsible for the board-up fees, because he had not received prior notice the City would be securing the house. Therefore, his arguments in his petition that the building did not present a danger, and should not have been classified as derelict, are not properly before this Court.

Chabuk continues to assert—inaccurately, as Division II took pains to point out—that the TMC provisions were somehow "switched" or "substituted" in his Notice of Violation for the derelict building. Chabuk continues to not only misread the record, but he continues to misapprehend the Municipal Code provisions that governed the enforcement actions of the City in this case.

IV. REASONS WHY REVIEW SHOULD BE DENIED.

The City of Tacoma opposes Chabuk's petition, as further review in this case is not warranted under RAP 13.4(b). A petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial

public interest that should be determined by the Supreme Court. RAP 13.4(b).

The crux of Chabuk's argument is: (1) the City violated his due process rights in June 2018 by boarding up the house at 6432 South Ferdinand Street, without prior notice, pursuant to TMC 2.01.070, and (2) that the Court of Appeals erred when it ruled he had failed to exhaust his administrative remedies regarding the unauthorized reconnection fee and other utility charges that were incurred by his tenants.[2]

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[2] As noted herein, Chabuk's repeated and unsuccessful attempts to claim that the TMC citations were somehow nefariously switched in order to violate his due process rights is utterly without merit. As Division II pointed out, Chabuk misreads the record and the Code. TMC 2.01.050 was appropriately cited in the Notice of Violation informing Chabuk the building had been formally classified as derelict. TMC 2.01.050 outlines the classification process of buildings and structures, and simply defines "derelict" buildings or structures as "any building or structure, whether residential or commercial, which is not approved for human occupancy." Derelict buildings cannot be lawfully occupied. See TMC 2.01.050.C.3.b. This is exactly what the Notice of Violation regarding the derelict building that was issued in September 2018 stated. TMC 2.01.070 is the provision that gives the City emergency and summary authority to secure properties that are a threat to human safety and

A. Chabuk fails to show that TMC 2.01.070.B is unconstitutional.

Chabuk's primary complaint is that the City did not provide him with notice ahead of time that it was securing the house at 6432 South Ferdinand, which had no legal utility services and which was occupied by nearly twenty people. Chabuk contends that this constituted a due process violation. He is mistaken. The ordinance is not unconstitutional.

The City has authority to secure certain buildings, as outlined in TMC 2.01.070, which states in relevant part:

> If a building is occupied and determined by the City to be in violation of this chapter and presents an immediate danger to the health, safety, and welfare of the occupants or the public, the building shall be ordered vacated by the Building Official, and the Building Official shall cause the building to be immediately secured from unauthorized third-party entry. In the event that the City secures the building, all costs incurred shall be assessed to the owner of the property and the City may classify the building as derelict or unfit….

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welfare—like the case herein. This "issue" does not bear any further response.

TMC 2.01.070.B.2. The Municipal Code also mandates that all doors, windows, and other accessible openings shall be closed and locked or shuttered so as to prevent third party entry. TMC 2.01.070.C. The ordinance does not require that a building be classified as derelict or unfit *before* the City can take action to secure a building when it determines there is a life or safety hazard to its occupants.

Chabuk broadly argues that TMC 2.01.070.B.2 violates his due process rights as guaranteed by 14th Amendment of the U.S. Constitution and article I, § 3 of the Washington State Constitution, but fails to present any meaningful argument or authority in support of his contention, or that he should have been provided notice before the property was secured.[3]

[3] It is undisputed the building was subsequently declared derelict and Chabuk received notice of that, as well as the notice of the nuisance conditions. TMC 2.01.050 was appropriately cited in the Notice of Violation informing Chabuk the building had been formally classified as derelict.

This Court reviews constitutional issues de novo. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Statutes are presumed constitutional and the burden is on the challenger to show unconstitutionality. In re Estate of Hambleton, 181 Wn.2d 802, 817, 335 P.3d 398 (2014) (quoting Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006)).

As a validly enacted municipal ordinance, TMC 2.01.070.B.2 is presumptively constitutional, and Chabuk has failed to demonstrate otherwise. To the extent he alleges a violation of his procedural due process rights for his failure to receive notice prior to the building being secured, his argument fails.

At a minimum, due process requires notice and an opportunity to be heard appropriate to the case at a meaningful time and in a meaningful manner. Hasit LLC v. City of Edgewood (Local Improvement Dist. #1), 179 Wn. App. 917, 953, 320 P.3d 163 (2014). "However, while the minimal requisites of due process are definite, their form may vary

according to the exigencies of the particular situation." Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wn.2d 418, 423, 511 P.2d 1002 (1973).

Due process is flexible. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Olympic Forest Prods., 82 Wn.2d at 423. When the circumstances require immediate action, post-deprivation process satisfies the requirements of the Due Process Clause. Gilbert v. Homar, 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997). Matters of public health and safety require the government to act quickly. N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315-16, 29 S. Ct. 101, 53 L. Ed. 195 (1908); see also Reilly v. State, 18 Wn. App. 245, 251, 566 P.2d 1283 (1977) (a hearing leading to the deprivation of a significant property interest may be postponed under extraordinary circumstances, *i.e.* when such procedure is directly necessary to secure an important governmental or general public interest and there is a special need for prompt action).

Securing the safety and welfare of its citizens is perhaps the most paramount government interest. TMC 2.01.070.B.2 authorizes the City to immediately secure buildings that it determines present an immediate danger to the health, safety, and welfare of the occupants or the public. By its plain language, the ordinance is intended to preserve the safety and well-being of anyone entering a building, because of the risk of death or injury.

Moreover, the Tacoma Municipal Code provides for an appeal process once the owner is notified of the derelict status of a building. TMC 2.01.050. The Hearing Examiner for the City has jurisdiction over these appeals, as outlined in TMC 2.01.050.6 and TMC 1.23.050.B.22. Chabuk had the opportunity to be heard by the Hearing Examiner on the issue of the board-up fees. Indeed, he *was* heard, and simply lost the argument before the Hearing Examiner.

Chabuk has never disputed that his seventeen tenants were residing without utility services, nor that they attempted to

illegally connect to the City's water and power systems. He simply disagrees, apparently, that the City has explicit authority to *secure* those premises that present life, safety, and health hazards, as outlined in TMC 2.01.070, regardless of whether or not those premises have been classified as substandard, derelict or unfit. Indeed, the language of TMC 2.01.070 expressly contemplates that the City may *subsequently* classify a building. That is precisely what happened in this case. Chabuk was not deprived of his due process rights; he had the opportunity to appeal the costs afterwards, and he did so. TMC 2.01.070.B.2 does not violate due process and Chabuk has presented no authority as to why the costs should not be borne by the owner as the ordinance mandates.[4]

[4] Chabuk does not appear to allege a *substantive* due process violation; even if he did, it would be futile. Statutes enacted pursuant to the police power of the state are not unconstitutional if they reasonably tend to protect public welfare or health. Campbell v. State, 12 Wn.2d 459, 122 P.2d 458 (1942); see also Seattle v. Gervasi, 144 Wash. 429, 258 P. 328 (1927) (regulatory or prohibitory law which operates equally upon all persons similarly situated not denial of due process). Chabuk has failed

For the reasons outlined herein, Chabuk's challenge to the constitutionality of the ordinance fails and review must be denied.

B. Division II did not err in ruling that Chabuk had failed to exhaust his administrative remedies regarding utility fees; this Court should deny review as none of the criteria in RAP 13.4(b) have been met.

Chabuk contends that he should not have been charged for certain utility fees, such as the unauthorized connection fee and other utility charges (for waste and surface water). Chabuk further asserts he is not a Tacoma Public Utilities customer (despite being an owner of property in Tacoma), and he was not required to exhaust his administrative remedies as required by the Municipal Code (former TMC 12.08.520, -.678; TMC 1.23.050.B) and case law. Cost Mgmt. Servs., Inc. v. City of Lakewood, 178 Wn.2d 635, 641, 310 P.3d 804 (2013) (when

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to adduce any case law that hold building and other life safety standards are not legitimate and reasonable exercises of the City's police power. Any substantive due process challenge would be futile.

an adequate administrative remedy is provided, it must be exhausted before the courts will intervene). Nor has he shown exhaustion would have been futile. S. Hollywood Hills Citizens Ass'n v. King County, 101 Wn.2d 68, 677 P.2d 114 (1984).

At the outset, the City respectfully submits that Chabuk has failed to articulate how the Court of Appeals decision on this issue meets the criteria for review under RAP 13.4(b). He does not argue that the opinion in this case on the exhaustion of administrative remedies conflicts with a decision by the Washington Supreme Court, or is in conflict with a published decision of the Court of Appeals. It is not a constitutional question, nor does Chabuk assert his petition involves an issue of substantial public interest that should be determined by the Supreme Court. Chabuk has failed to identify how Division II's opinion in this case has the potential to impact a significant number of other litigants, and such an impact is not readily apparent from the face of the matter. Therefore, review should not be granted on this basis alone.

Nevertheless, the substance of Chabuk's arguments are without merit. The unauthorized reconnection fee is mandated under TMC 12.10.110. Tacoma Public Utilities has enacted, via resolution of the Utility Board, a comprehensive administrative framework for billing disputes, which Chabuk failed to follow.[5]

To the extent he protests being charged for wastewater and surface water fees, his argument is similarly anemic. Former Chapter TMC 12.08 governed the regulation of wastewater and surface water. Every parcel in the City is subject to storm and surface water rates by mandate of the Tacoma Municipal Code, regardless of whether there are utility services at the property. Former TMC 12.08.510. The first avenue of appeal for these is delineated in the Municipal Code to be the Department Director. It is undisputed by the record that Chabuk—as the owner of the

[5] It bears noting that Chabuk is a member of the Washington State Bar, and should be better positioned than the average individual to be able to navigate appeal procedures such as those he claimed he could not exhaust.

property against which these charges were levied—did not follow the appeal processes outlined in the Code. Neither the Hearing Examiner nor Division II erred in finding that Chabuk failed to exhaust his administrative remedies.

V. CONCLUSION

Division II issued a thorough, well-reasoned opinion, and correctly concluded that neither the City's actions of which Chabuk complains, nor any of the City's code provisions violated Chabuk's due process rights. Division II did not err in reaching this conclusion and review of the opinion is not warranted, on any grounds. For the foregoing reasons, therefore, the City of Tacoma respectfully requests that Ahmet Chabuk's petition for review be denied.

This document contains 2,733 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 8th day of March, 2022.

WILLIAM FOSBRE, City Attorney

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CERTIFICATE OF SERVICE

On March 8, 2022, I hereby certify that I electronically filed the foregoing ANSWER TO PETITION FOR REVIEW with the Clerk of the Court, which will send notification of such filing to the following:

Ahmet Chabuk, Petitioner
achabuk@gmail.com

EXECUTED this 8th day of March, 2022, at Tacoma, WA.

/s/*Angela Krupa*
Angela Krupa, Legal Assistant
Tacoma City Attorney's Office

TACOMA CITY ATTORNEY'S OFFICE

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