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Supreme Court Case No. 102036-8

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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THE CHURCH OF THE DIVINE EARTH  
Petitioner,

v.

CITY OF TACOMA  
Respondent.

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**MEMORANDUM OF AMICUS CURIAE THE  
BUILDING INDUSTRY ASSOCIATION OF  
WASHINGTON**

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JACKSON WILDER  
MAYNARD, JR.  
GENERAL COUNSEL  
WSBA #43481  
JACKSONM@BIAW.COM

BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON  
300 DESCHUTES WAY SW, SUITE 300  
TUMWATER, WA 98501  
(360) 352-7800

ASHLI RAYE TAGOAI  
ASSOCIATE GENERAL  
COUNSEL  
WSBA #58883  
ASHLIT@BIAW.COM

*Counsel for Amicus Curiae the Building Industry Association of  
Washington*

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## I. INTRODUCTION

Although on the surface, the case at bar appears to present a relatively straightforward legal issue on the discretion of a trial court to award attorney's fees pursuant to statutory authority, the truth is much more complicated. In this matter, Petitioner, the Church of the Divine Earth, sought to construct a parsonage by obtaining a permit from the City of Tacoma. Despite its modest request, the Church was forced to endure a multi-year odyssey litigating against the full resources of the City to protect its property rights. The Church prevailed in the first round of its challenge to unconstitutional conditions placed on its permit. However, the victory was pyrrhic, as the City prevailed upon the trial court on remand to slash the Church's fees incurred in the course of the extensive litigation of this matter by up to 40% without explanation. By forcing the Church to pay hundreds of thousands of dollars expended in vindicating its civil right to the use and ownership of property, the City effectively gutted the remedy available to wronged parties under RCW 64.40.020.

This issue appears against a policy backdrop in which Washington State struggles with what is universally recognized as the worst housing crisis in state history. A primary focus of the most recent legislative session in addressing this crisis was in eliminating delays in local government permitting. In the absence of an effective remedy in RCW 64.40.020, local governments will be at liberty to ignore legal and constitutional boundaries on their permitting decisions, which will drastically worsen the existing housing affordability and supply crisis. In addition to posing obvious questions of law under the Constitution of the state or of the United States, this case goes to the heart of Washington's most important issue of public interest. It affects millions of our residents (all of whom require shelter), thousands of businesses – especially those represented by amicus in the homebuilding industry who rely on the protection of RCW 64.40.020 – and thousands of local governments who require clarity in the law.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

In the interest of judicial economy, this memorandum defers to the thorough recitation of the facts and procedural background of this case given by Petitioners.

## **III. IDENTITY AND INTEREST OF AMICUS**

BIAW's members are engaged in every aspect of the residential construction industry and the vast majority of BIAW builders construct between 1 and 5 single-family houses per year. RCW 64.40 provides a check on permitting bodies, an area of constant concern to builders. Without reliable redress, all perception of fairness vacates the permitting process. BIAW, on behalf of its members, speaks with authority on the impact of this case in expectation that permitting bodies be aware of the law governing permit issuance.

## **IV. ISSUES OF INTEREST TO AMICUS CURIAE**

1. Whether the inability of a party wronged by a local permitting decision to obtain adequate redress under fee provisions in RCW 64.40.020



presents an issue of substantial public interest that should be determined by the Supreme Court.

2. Whether the inability of a party wronged by a local permitting decision to obtain adequate redress under fee provisions in RCW 64.40.020 presents a significant question of law under the Constitution of the state of Washington or of the United States.

## V. ARGUMENT

- A. **The inability of a party wronged under a local permit to obtain adequate redress under fee provisions in RCW 64.40.020 presents an issue of substantial public interest that should be determined by the Supreme Court.**

RAP 13.4 governs this Court's review of the Petition in this matter. It provides in pertinent part: "[a] petition for review will be accepted by the Supreme Court only . . . (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Here, because the issue presented involves a provision of law relied upon by the housing industry and permitting delay is a key aspect in addressing the housing crisis in the state, it easily meets the standard for a matter of substantial public interest.

**1. Timely permit processing is a key approach to expanding access to homeownership.**

Our state and country are in the midst of a housing crisis. About 40% of the 125.4 million households in the United States could afford to buy a new median-priced home at \$346,757 in 2021. By way of example, a \$1,000 home price increase thus will price 153,967 households out of the market for this home. The situation is especially dire in the state of Washington where the median home price is \$522,023, requiring an income of \$112,295, such that 2,524 households are priced out of the market by a \$1,000 price increase.<sup>1</sup>

From 2000 to 2015, Washington State underproduced housing by approximately 225,600 units, or roughly 7.5% of the total 2015 housing stock.<sup>2</sup> This underproduction has created a supply and demand imbalance that is reflected in the housing and homelessness crisis playing out in communities across the state.

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<sup>1</sup><https://www.nahb.org/-/media/BEB45F8305C44CF8B2D0F3DC7B451658.ashx>

<sup>2</sup><https://www.upforgrowth.org/sites/default/files/2020-01/HousingUnderproductionInWashingtonState2020-01-10.pdf>

High spending on housing reduces funds available for other family necessities, such as food, medical services, transportation, childcare, and emergencies. This uncertainty is detrimental to job stability and to children's educational outcomes. Access to safe, affordable housing sets the foundation for economic mobility and equity.

One of the foundational steps in building wealth is homeownership. Decades of racial injustice and economic inequality have led to persistent disparities in wealth, specifically for people of color. The rate of homeownership among historically marginalized groups is especially troubling. For Asian, Native Hawaiian, and Pacific Islander populations alone, householders were second at 59.6%, and the rate for Black householders was lowest at 45.1%.<sup>3</sup> Increasing artificial costs, such as a significant shift in the likelihood of permitting delays

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<sup>3</sup> Quarterly Residential Vacancies and Homeownership, United States Census Bureau, <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> (last visited May 7, 2021).

presented in the instant case, will increase the economic pain felt by thousands of households across the state.

**2. Timely permit processing is a key factor in housing affordability.**

According to a recent report by BIAW's Housing Research Center, eliminating delays in permitting is a key factor in reducing housing costs. Washington State has an average median new home price of \$565,613. Additionally, the state has an average permit approval delay of 6.5 months, resulting in a holding cost of \$31,375. This illustrates an increase of \$5,077 in total holding costs, up from our previously reported total of \$26,298. Overall, BIAW has seen an increase in holding costs by \$9,028 since its first published report in 2021.

Both median new home prices and interest rates have risen significantly in the last two years due to variables largely out of our realm of control at the state and local levels. What we can control, however, are the costs imposed by the government. Processing permits in a timely manner is essential to lowering housing costs in Washington. To illustrate, if the average permit

only took 5.5 months (instead of 6.5 months), holding costs would be reduced by \$4,419.

In short, the report demonstrates a strong relationship between permit delays and housing costs. The data shows a correlation between the length of delay and the median new home price in each county. Therefore, one could assume that the longer permits are delayed, the more holding costs a homeowner or builder can expect, and the higher the final sales price of the home will be.<sup>4</sup>

The importance of permitting reform is also reflected in the recent passage by the legislature as a part of the package of bills related to the housing shortage, two of which relate to permit reform: Senate Bill 5290 and Senate Bill 5412. SB 5290 set new timelines for local governments to respond to permit applications and provided reporting requirements for permit processing. SB 5412 reformed requirements for local government permitting by

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<sup>4</sup> <https://www.biaaw.com/wp-content/uploads/2022/11/Cost-of-Permitting-Delays-November-2022.pdf>

expanding exemption for review under the State Environmental Protection Act for certain types of housing. Given the obvious importance of permitting reform to the state's efforts to combat the housing crisis, anything which contributes to delay in review and processing of these building permits would undermine these efforts.

**3. If the trial court's discounted fee award stands, it will undermine an important tool to avoid costly delays and enforce recent permitting reforms.**

The key provision of law at issue in this case is also one that serves as the most effective deterrent for local government abuse of the permitting process. It is also the most likely statutory cause of action to be used to enforce recent reforms to permitting passed by the legislature. RCW 64.40.020 provides:

*(1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it*

*should reasonably have been known to have been unlawful or in excess of lawful authority.*

*(2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.*

*(3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.*

*(4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter.*

Here, if the prevailing party against a local government is no longer able to realize his or her reasonable fees and costs, the remedy provided in the statute is meaningless and local government will be able to put up barriers that delay and increase the cost of housing with impunity.

Courts in Washington State have routinely recognized the importance of attorney fees provisions in ensuring that the law affords an adequate remedy for the harm addressed. *See e.g. Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 4 P.3d 808 (2000). (Recognizing that all of these civil rights laws depend heavily

upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. “In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.”). *See also, Martinez v. City of Tacoma*, 81 Wash. App. 228, 245, 914 P.2d 86, 95 (1996); *Ermine v. City of Spokane*, 100 Wn. App. 115, 120, 996 P.2d 624, 626 (2000), *aff'd*, 143 Wash. 2d 636, 23 P.3d 492 (2001); *Blair v. Washington State Univ.*, 108 Wash. 2d 558, 740 P.2d 1379 (1987). This Court should grant review on this matter that involves substantial public interest and has such a substantial bearing on the welfare of the state.



**B. The inability of a party wronged by a local permit decision to obtain adequate redress under fee provisions in RCW 64.40.020 presents a significant question of law under the Constitution of the state of Washington and of the United States.**

In addition, the case at bar poses significant questions of law under the constitution of the state of Washington and of the United States. *See* RAP 13.4 (3). In fact, the right to property is one of the most important civil rights afforded under the state and federal constitutions. Individual rights in the ownership of property, such as liberty and property rights, were not created by the Constitution, but existed before its adoption. They have been defined by independent sources such as state laws and common law. § 1:4. Liberty and property rights defined, 36 Wash. Prac., Washington Land Use § 1:4.

The Fourteenth Amendment's procedural protection of property rights are discussed in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548, 1 IER Cases 23 (1972), where the court said that “[p]roperty interests, of course, are not created by the Constitution. Rather

they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”

This Court has consistently recognized the importance of the right to use and possess property as an important freedom that should be protected in our state. In *Holmquist v. King Cnty.*, 192 Wn. App. 551, 368 P.3d 234, (2016), this Court considered an analogous challenge to an action by a local government impacting property rights. The Court noted that “[t]he City’s argument ignores that ‘[t]he very essence of the nature of property is the right to its exclusive use’.” *Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 286, 173 P.2d 652 (1946); *accord Guimont v. Clarke*, 121 Wn.2d 586, 608, 854 P.2d 1 (1993) (fundamental attributes of ownership include ‘the right to possess, exclude others from, or dispose of property’).”

The Court further explained that, stated differently, “the right to exclude others” is “one of the most essential sticks in the

bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979). The Court concluded that in respecting the paramount right to exclude others, Washington courts compensate the loss of exclusive possession under a variety of legal theories. Similarly, in *City of Seattle v. McCoy*, 101 Wn. App. 815, 4 P.3d 159 (2000), the Court noted that a fundamental attribute of property includes the right to possess, to exclude others, and to dispose of the property.

This well-recognized property right to possess, exclude, and dispose of property is clearly implicated by the requirement to obtain a permit from a local government to be able to exercise the right to use property. However, an important safeguard is the protection provided against “the acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law” by RCW 64.40.020, and especially the ability of a wronged party to obtain his or her reasonable fees and costs. Because this case

involves issues of significant questions of law under the state and federal Constitutions, review should be granted.

## **VI. CONCLUSION**

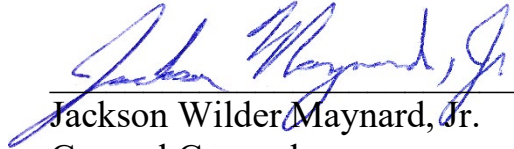
For the reasons stated in this memorandum, this Court should grant review of this matter.

### **RAP 18.17(b) CERTIFICATE OF COMPLIANCE**

This document contains 2,497 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 4<sup>th</sup> day of August, 2023.

By:



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Jackson Wilder Maynard, Jr.

General Counsel

WSBA No. 43481

Building Industry Association of  
Washington

300 Deschutes Way SW, Suite 300

Tumwater, WA 98501

(360) 352-7800



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Ashli Tagoai

Associate General Counsel

WSBA No. 58883

Building Industry Association of  
Washington

300 Deschutes Way SW, Suite 300

Tumwater, WA 98501

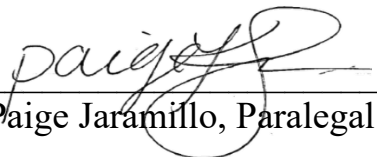
(360) 352-7800

*Attorneys for Amicus Curiae the Building  
Industry Association of Washington*

**DECLARATION OF SERVICE**

I, Paige Jaramillo, hereby declare under penalty of perjury under the laws of the State of Washington, that on August 4, 2023, I electronically filed the foregoing document via the Washington State Appellate Court's Secure Portal, which will send e-mail notifications of such filing to all parties of record.

Signed in Tumwater, Washington, this 4<sup>th</sup> day of August, 2023.

  
\_\_\_\_\_  
Paige Jaramillo, Paralegal

# BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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Sender Name: Jackson Maynard - Email: jacksonm@biaw.com  
Address:  
300 DESCHUTES WAY SW STE 300  
TUMWATER, WA, 98501-7719  
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