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IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

SUPREME COURT NO. 95171-3

COURT OF APPEALS NO. 75737-7-I

SCOTT BLOMENKAMP, Petitioner,

v.

CITY OF EDMONDS, a municipal corporation,

and

KAUTZ ROUTE LLC, Respondents.

AMENDED PETITION FOR REVIEW

Scott Blomenkamp, PRO SE

23227 92nd Ave W

Edmonds WA 98020

(206) 569-4149

Table of Contents

I. IDENTITY OF THE PETITIONER 1

II. CITATION TO COURT OF APPEALS DECISION.......1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE.......................................3

A. The Facts Giving Rise to the Dispute 3

B. The Review of Approved Permit 5

C. LUPA Petition to Superior Court....................................6

D. Appellant Court..7

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 9

A. The Decision that the Appellant did not Exhaust His Administrative Remedies Raises Serious Constitutional Questions, Implicates Issues of Substantial Public Importance, and Conflicts with Decisions of this Court...9

B. The Court of Appeals Interpreted the Appellant's Miscellaneous Hearing and Subsequent LUPA Action as an Impermissible Collateral Attack on an Approved Permit Inconsistent with Prior Decisions by Itself and this Court...13

C. The Court of Appeals by Declining to Review the Process by Which a City Administrator Had Sole Authority without Judicial Review to Summarily Dismiss Code Violation Accusations Raises Significant Constitutional Questions and is in Conflict with Opinions of this Court. 16

D. The Hearing Examiner Holding a Hearing that by Code is Required to be Held in Accordance to Procedures that are Repealed, Raises Serious Questions of Constitutional Due Process and is in Conflict with Opinions of this Court...18

E. The City of Edmonds by Consciously Refusing to Enforce its Development Code Raises Constitutional Questions as to if they Participated in a Private Taking. 19

VI...20

VII. CONCLUSION 20

APPENDIX...22

Division I Court of Appeals Decision

Division I Court of Appeals Decision Declining Reconsideration

Cases

Chumbley v. Snohomish County, 386 P.3d 306 (2016) 14

Citizens for Mount Vernon v. City of Mount Vernon, 133 Wash.2d 861, 868-71, 947 P.2d 1208 (1997) 11

Habitat Watch v. Skagit County, 155 Wn.2d 397 (Wash. 2005)...............15

Habitat Watch v. Skagit County, 155 Wn.2d 397, 406-07, 120 P.3d 56 (2005)...10

Lauer v. Pierce County, 173 Wash.2d 242, 267 P.3d 988 (2011) 11

Pepper v. JJ Welcome Construction, 871 P. 2d 601 - Wash: Court of Appeals, 1st Div. (1994)..20

Post v. City Of Tacoma, 167 Wn.2d 300 (Wash. 2009)......................17, 19

Post v. City of Tacoma, 217 P. 3d 1179 - Wash: Supreme Court (2009)..16

Post v. City of Tacoma, 167 Wn.2d 300 (Wash. 2009)............................17

Valley View Indus. Park v. City of Redmond, 107 Wash.2d 621, 633, 733 P.2d 182 (1987) 12

Federal Cases

Gomez v. Taylor, 446 U.S. 635, 100*74 S.Ct. 1920, 64 L.Ed.2d 572 (1980)....20

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)....17, 18

Statutes

36.70B.160(3)....7

36.70C.060(2)....10, 12

RCW 36.70B.040....3

RCW 36.70B.060(3)....9

RCW 36.70C.060....7

RCW 36.70C.080(3)....12

Regulations

18.45.050(H)....5

20.100.040....18

20.91 ECDC....18

ECDC 18.45 .... 3, 5

ECDC 18.45.75(A)(2) 2

ECDC 20.04 3

ECDC 20.100.040 .... 5, 13

ECDC 20.100.040(C)(4) 2, 18

ECDC 20.91 18

Constitutional Provisions

Article 1 Section 16 of the Washington State Constitution 19

Due Process Clause of the United States Constitution 19

I. IDENTITY OF THE PETITIONER

Scott Blomenkamp, appellant below, hereby petition for review of the Court of Appeals decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Appellant seeks review of an unpublished Court of Appeals decision captioned *Scott Blomenkamp, Appellant v. City of Edmonds and Kautz Route LLC, Respondents* (July 24, 2017) (App. A hereto). The Court of Appeals denied appellants' motion for reconsideration on October 3, 2017 (App. B hereto).

III. ISSUES PRESENTED FOR REVIEW

1. The Land Use Petition Act ("LUPA"), ch. 36.70C RCW, provides that an aggrieved person may appeal local land use decisions to the superior court, provided, inter alia, that they "exhausted his or her administrative remedies to the extent required by law." Is a petitioner required to have exhausted remedies, not available to him, pertaining to a project permit and a grading permit issued 14 months and 6 months respectively prior to his purchase of adjacent property?

2. Under Local Project Review, RCW 36.70B.160(3), each local government is required to "adopt procedures to monitor and enforce permit decisions and conditions." Is a petition for project review and

enforcement alleging development code violations, hazardous conditions, or causing a nuisance an impermissible collateral attack on the permits?

3. Under the Due Process Clause of the United States Constitution, government may not deprive a person of a "property interest" without prior notice and an opportunity to be heard. Did the Hearing Examiner erred in procedure by holding an ad hoc hearing where according to ECDC 20.100.040(C)(4) it shall be in accordance with Chapter 20.91 ECDC, a chapter that was repealed several years earlier thereby denying the petitioner all the Constitutional protections of due process?

4. The objective of the courts is to ascertain what the legislative intent of a statute is and apply it. To this end every word of a statute must be given meaning. Whether the Hearing Examiner interpreted the law correctly and applied the law correctly when he ordered replacement trees of 10' height instead of a value of caliper? Whether the Hearing Examiner was required to determine what the City Council meant in enacting the provision in ECDC 18.45.75(A)(2) "sufficient caliper to adequately replace the lost tree(s)"? Did the Hearing Examiner's decision of replacement trees being the minimum 3" caliper and the subsequent affirmation of the Superior Court and Appellant Court satisfy the requirement that replacement trees be of "sufficient caliper to adequately

replace the lost tree(s)"?

5. Article I, Section 16 of the state constitution provides that "...No private property shall be taken or damaged for public or private use...". Was the destruction of the appellants' property a private taking under the state constitution?

IV. STATEMENT OF THE CASE

This case arises from the City of Edmonds failing to follow its development permit process and intentionally refusing its responsibility to enforce its development codes and subsequently the Superior Court and Court of Appeals not interpreting and applying the law.

A. The Facts Giving Rise to the Dispute

The project property is located at 23220 Edmonds Way. Mr. Blomenkamp owns property adjoining the approved project. The project began in 2013 with two pre-application meetings in early 2013 and formally with an application for design review under permit number PLN20130066. The development staff was required to determine consistency in accordance with RCW 36.70B.040 and ECDC 20.04. There is no evidence in the record that the requirements of ECDC 18.45 (Land Clearing and Tree cutting Code) were discussed nor was the required decision pertaining to ADB approved projects issued. The Architectural Design Board (ADB) reviewed the proposed development

at a public hearing on February 5, 2014, and approved the development with conditions following the public hearing.

Following ADB approval, the applicant submitted five separate building permits for development of the site which were approved December 29, 2014. However, the required Land Clearing and Tree Cutting permit was not issued.

Mr. Blomenkamp bought his property May 12, 2015, nearly six months after permit approval and before any initiation of clearing and grading. There was not any notice of pending action on the Kautz Route property. Development of the site began in May 2015. While grading the site, the grading machinery cut roots that extended into the development site from some trees located on Mr. Blomenkamp's property.

Mr. Blomenkamp contacted City staff about the damage and requested code enforcement on June 4th, 2015. City staff inspected the property and spoke with the developer, Respondent Kautz Route LLC, about the problem. Appellant Blomenkamp met with the Edmonds Mayor and the Director of Development Services on June 12th, 2017 to express his concern the development code was not being followed and enforced. Kautz Route LLC (hereinafter "Kautz" or "Kautz Route") voluntarily agreed to not continue work temporarily in the immediate vicinity of the property line while the issue was being investigated. Subsequently, Kautz

Route and the City of Edmonds commissioned arborist reports to assess the damage to the trees. Both arborist reports noted some of the trees have been impacted to a degree that the arborists determined them to be hazardous trees.

On June 24th, 2015 the Director of Development Services sent a letter of determination that the development was found to be operating within the conditions of the permit. CP at 437. This determination however did not memorialize that the development was compliant with ECDC 18.45. It also did not indicate any appeal process.

B. The Review of Approved Permit

On June 29, 2015, Scott Blomenkamp, Marj Penderaft and Andrew Baxter jointly filed a request for review of the ADB approval of the duplex project under ECDC 20.100.040. The request asserted that the duplex project was not compliant with ECDC 18.45, specifically section 18.45.050(H), also that the property had created a hazardous situation and nuisance by causing four of Mr. Blomenkamp's trees to become severe hazards. The hazard and nuisance portions of the Petitioner's ECDC 20.100.040 review were bifurcated from the code violation allegations and forwarded to the Hearing Examiner for review. The Development Services Director summarily dismissed the remaining deficiencies of Petitioner's application for review of an approved permit.

Also on August 27, 2015, the Hearing Examiner held a hearing and took oral testimony on the application. At the hearing, The City objected to the entering of Mr. Blomenkamp's Opening Brief into the record because the brief contained arguments on issues of code enforcement that were outside the scope of the hearing as defined by the Director. Mr. Blomenkamp argued that the development services director did not have the authority to prevent his entire request for review from being considered by the Hearing Examiner. At the hearing the Hearing Examiner ruled in favor of the Development Director's administrative decision not to hear code violations and proceeded contrary to testimony that he was required to hear the whole application and not a referral by the Director.

On November 18, 2015, the Hearing Examiner submitted his Decision Upon Reconsideration.

C. <u>LUPA Petition to Superior Court</u>

On December 9, 2015, Mr. Blomenkamp filed this LUPA petition seeking judicial review of the Hearing Examiners decision limiting the scope of the hearing and his decision that the statutory required redress was ambiguous and as such he determined the replacement standard for the trees would be a height of 10' in Snohomish County Superior Court, Cause No. 15-2-07634-3, pursuant to LUPA Chapter 36.70C RCW. CP at 624-642. Further Mr. Blomenkamp claimed that the damage to his trees

violated his rights under Article 1 Section 16 of the Washington State Constitution prohibiting the damage or taking of property for private or public use and that the decision limiting the scope of the hearing violated his right to due process.

On July 9, 2016, the Superior Court issued its Decision on LUPA and Order. CP at 20-30.

On August 9th, 2016 the Superior Court issued its Order Granting/Denying Motion for Reconsideration. CP at 17-19.

D. Appellant Court

On July 24th, 2017, the Court of Appeals ruled that the appellant had not exhausted his administrative remedies and therefor was barred from pursuing enforcement. The court did not base its decision on the one provision in LUPA that expressly discusses the exhaustion requirement (RCW 36.70C.060). That provision, titled "Standing", requires exhaustion only of "his or her administrative remedies to the extent required by law." The court ignored the clear unrebutted evidence that the appellant did not own the damaged property until May of 2015 and therefore the administrative remedies of appealing the ADB decision or appealing the grading permit were not available to him. They further ignored the requirement of RCW 36.70B.160(3) that "Each local shall adopt procedures to monitor and enforce permit decisions and conditions."

Based on their interpretation of exhaustion and finality, they declined to resolve the question of whether the Director had the authority to bifurcate the hearing and whether the Hearing Examiner failed to follow the prescribed process to hear the whole matter including code violation allegations and not a referral from the Director. The Court further ignored the appellants argument that the Hearing Examiner was required to find the remedy provided trees of "sufficient caliper to adequately replace the lost tree(s)" and affirmed that the Hearing Examiner had discretion to arbitrarily order only the minimum caliper replacement.

The appeals court also denied the appellants claim that the beyond the mere approval of development, the intentional failure to enforce the municipal development regulations were actions by the government destroying a fundamental attribute of ownership constituting a taking for private use under article I, section 16 of the state constitution. The court further denied the appellant's due process rights were violated by the hearing examiner not following the prescribed process by the Edmonds City Development Code requiring him to hear all allegations and instead denying he had the jurisdiction to hear the all allegations thereby denying the appellant his right to be heard at a meaningful time and in a meaningful manner.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may grant review and consider a Court of Appeals opinion if the it involves a significant question of law under the Constitutions of the State of Washington or the United States, if it involves an issue of substantial public interest, or if the decision conflicts with other decisions of this Court or the Court of Appeals. RAP 13.4(b)(1)-(4). This petition has multiple issues of first impression.

Is an appellant under LUPA required to exhaust administrative remedies not available to him because he does not have standing to exercise, and must rely on either others and/or previous owners to exhaust administrative remedies?

Is a LUPA petition of an enforcement decision an attack on an approved permit when RCW 36.70B.060(3) requires local municipalities to have processes to monitor and enforce permit decisions and conditions?

Does the refusal of the local municipality to enforce development regulations constitute an affirmative action supporting that the local municipality affirmatively supported, encouraged or compelled the actionable conduct of the private party thereby being a violation of article I, section 16 of the state constitution prohibiting a private taking?

A. The Decision that the Appellant did not Exhaust His Administrative Remedies Raises Serious Constitutional

Questions, Implicates Issues of Substantial Public Importance, and Conflicts with Decisions of this Court.

LUPA codifies its version of the exhaustion requirement at RCW 36.70C.060(2), as an element of standing. But, reflecting the established case law in Washington prior to LUPA's passage, the Legislature was careful to not make the requirement absolute. Instead, RCW 36.70C.060(2) provides, in relevant part:

> Standing to bring a land use petition under this chapter is limited to the following persons:
> ...
> (2) [A] person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
> ...
>
> (d) The petitioner has exhausted *his or her* administrative remedies to the extent required by law.

RCW 36.70C.060(2) (emphasis added).

Here, the phrase "his or her" clearly refer to the petitioner and remedies available to him/her and not every possible administrative remedy. This Court has recognized this basic fact, as applied to LUPA. *See Habitat Watch v. Skagit County,* 155 Wn.2d 397, 406-07, 120 P.3d 56 (2005) ("[O]nce a party *has had a chance* to challenge a land use decision *and exhaust all appropriate remedies,"* the petitioner must challenge it

within LUPA's statutory limitations period.) (emphasis added).[1] Similarly, the decision is inapposite to *Lauer v. Pierce County*, 173 Wash.2d 242, 267 P.3d 988 (2011), the appellants did not challenge an application and approval of a building permit that there was no indication they were given notice of. They did end up participating in a hearing in which the respondents were appealing a cease and desist order on the permit. As this court stated "However, Lauer and de Tienne only had to exhaust the administrative remedies that were available to them. See *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 868-71, 947 P.2d 1208 (1997) (holding that where the only administrative remedy available was participation in a public hearing, and where the petitioners participated, they satisfied the exhaustion requirement). "The rationale for the exhaustion requirement is that the administrative officer or agency may possess special expertise necessary to decide the issue, and that an administrative remedy may obviate the need for judicial review." *Valley View Indus. Park v. City of Redmond*, 107 Wash.2d 621, 633, 733 P.2d

[1] Similarly, Division I has construed LUPA's exhaustion requirement to contain an exception where the plaintiff was not notified of the land use decision, although in that case the exception did not apply. *See Nickum v. City of Bainbridge Island,* 153 Wn. App. 366, 378, 223 P.3d 1172 (2009) (under LUPA, courts "have the ability to independently determine whether to excuse a land use petitioner's failure to exhaust administrative remedies due to insufficient notice or another recognized exception."). *Cf Mellish v. Frog Mountain Pet Care,* 172 Wn.2d 208, 219, 257 P.3d 641 (2011) (reversing Court of Appeals' decision under LUP A where it would deprive the petitioner of a "realistic chance to exhaust administrative remedies")

182 (1987). …Once they learned of the Garrisons' construction plan, Lauer and de Tienne fully participated in every step of *administrative* review related to this case, exhausting all remedies." Appellant Blomenkamp, having bought the property over a year after the ADB hearing and 6 months after the building and grading permits were issued, had no knowledge of the pending construction and pursued all administrative remedies including meeting with the Edmonds Mayor, speaking at every weekly city council meeting, ultimately filing the miscellaneous review application and fully participating in the subsequent hearing. The Edmonds administration had every opportunity to resolve the issue correctly.

LUPA codifies its version of the exhaustion requirement at RCW 36.70C.060(2), as an element of standing. LUPA further codifies at RCW 36.70C.080(3) "The defense of lack of standing, … are waived if not raised by timely motion noted to be heard at the initial hearing, …" No such motion is in the record. While this court and the appellant court certainly may raise issues on its own accord for the just adjudication of an issue, they may not directly do so where a statute expressly waves a defense.

This Court should grant review to ensure the decision is consistent with this courts prior decisions, and is consistent with constitutional due process protections and because of its importance to the public.

B. The Court of Appeals Interpreted the Appellant's Miscellaneous Hearing and Subsequent LUPA Action as an Impermissible Collateral Attack on an Approved Permit Inconsistent with Prior Decisions by Itself and this Court.

There are several types of decisions defined as a "Land use decision" under LUPA. The common denominator between all of them is that they all must be "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, …
>
> …
>
> (c)The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020

The appellants LUPA appeal was of a decision by the hearing examiner presiding over a "Review of Approved Permits" ECDC 20.100.040. This

review is clearly a local jurisdiction enforcement procedure of which the scope is stated as such:

> "Any permit approved by the city under the community development code may be reviewed under this section if the conditions of the permit are not being met, the requirements of the city code of Edmonds are not being met, or the permitted activity is causing a nuisance or hazardous condition. A permit includes any city approval under the community development code."

The appeals court ruled that such an enforcement action was an impermissible collateral attack on an approved permit because the appellant had not challenged the original ADB approved development permit nor the subsequent building and grading permits. In December, 2016, the same appeals court itself addressed a similar issue in *Chumbley v. Snohomish County*, 386 P.3d 306 (2016). In *Chumbley,* permits for a development were not challenged. However, neighboring lots where the developments sewage disposal system was to be developed were not issued a permit for land disturbing and during work hillside and critical areas were adversely affected. After several enforcement actions the issue was resolved to the counties satisfaction and the enforcement file was closed and an occupancy certificate was issued. The neighboring homeowners and BNSF railroad filed a LUPA action which was subsequently dismissed for being untimely based on the building permit for the development not the final decision in the enforcement action being

the closing of the enforcement file and issuance of the certificate of occupancy. Upon appeal, the dismissal was overturned. "We reject the respondents' argument that the complaint is an implied challenge to or a belated collateral attack on the permit." As in *Chumbley*, the ADB permit decision included language that speaks to future activity (Condition (12) stated "The plans must comply with the current conditions and regulations." CP at 546. Subsequently, the approved building and grading permits include on their face "Issuance of this permit shall not be deemed to modify, waive or reduce any requirements of any City ordinance nor limit in any way the City's ability to enforce any ordinance provision."

The appeals court decision is also in conflict with this court's decision in *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (Wash. 2005). This court held a collateral attack was not permissible, this was stated as "In challenging the grading permit, Habitat Watch actually (and exclusively) challenges the validity of the special use permit and its extensions. Because appeal of the special use permit and its extensions are time barred under LUPA, Habitat Watch cannot collaterally attack them through its challenge to the grading permit." *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (Wash. 2005). The controlling issue was the enforcement issues cannot be exclusively that they are challenging the validity of the permit. The only basis for challenging the grading permit in

Habitat Watch was the validity of the underlying special use permit which the petitioners argued had been issued for an impermissible use. There were no allegations that the grading was being done in a way that violated any other regulations. That is wholly different from the current case. Beyond any questions of validity of the ADB approved development permit, there are clear questions of the actual clearing violating the land clearing and tree cutting code. No permit decision could allow for the "clearing" of trees on the neighboring property. The present case is not a case of attacking the permit through such a collateral way, it is a case of the actual act of land clearing and tree cutting not being compliant with the city development code.

This Court must grant review to bring the decision consistent with the court of appeals decisions as well as its own.

C. The Court of Appeals by Declining to Review the Process by Which a City Administrator Had Sole Authority without Judicial Review to Summarily Dismiss Code Violation Accusations Raises Significant Constitutional Questions and is in Conflict with Opinions of this Court.

This Court held in *Post v. City of Tacoma*, 217 P. 3d 1179 - Wash: Supreme Court (2009) that cities have 2 paths for civil code enforcement, district court or its own system, both must be constitutionally compliant. If the city choses its own system then it must be a full system, providing all the procedural and substantive protections. If it chooses its own system,

the City of Edmonds is required to implement a system that provided full due process protections, one not provided for by interpreting ECDC 20.100.040 to allow the Director to be the sole decider of the validity of deficiencies. Local jurisdictions are given authority to issue and impose penalties as governed by chapter 7.80 RCW. As the Supreme Court held in *Post v. City of Tacoma*, 167 Wn.2d 300 (Wash. 2009). By the City's interpretation of the process the City process does not allow for an appeal of the supposed Directors determination of the deficiencies. The City must provide a complete system. Without a complete system they violate the principals of due process as the *Post* court determined.

Though the procedures may vary according to the interests at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Where local jurisdictions issue infractions (finding violations and assessing penalties), there must be some express procedure available by which citizens may bring errors to the attention of their government and thereby guard against the erroneous deprivation of their interests. *Post v. City Of Tacoma*, 167 Wn.2d 300 (Wash. 2009).

This Court must grant review to determine if the City of Edmonds Miscellaneous Review process complies with constitutionally guaranteed

protections.

D. <u>The Hearing Examiner Holding a Hearing that by Code is Required to be Held in Accordance to Procedures that are Repealed, Raises Serious Questions of Constitutional Due Process and is in Conflict with Opinions of this Court.</u>

Under the Due Process Clause of the United States Constitution, government may not deprive a person of a "property interest" without prior notice and an opportunity to be heard. The ECDC requires that a hearing under 20.100.040 was to be held in accordance with ECDC 20.91. See ECDC 20.100.040(C)(4).

The Hearing Examiner erred in procedure by holding an ad hoc hearing where according to ECDC 20.100.040(C)(4) it shall be in accordance with Chapter 20.91 ECDC, a chapter that was repealed several years earlier thereby denying the petitioner all the Constitutional protections of due process. How could an applicant receive a chance to be heard in a meaningful way if the rules for the hearing are repealed and no substitute available. This enables the municipality to "make the rules" as they go, a fundamental violation of due process.

Though the procedures may vary according to the interests at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Where local jurisdictions issue infractions (finding violations and assessing penalties), there must be some *express procedure* available by which citizens may bring errors to the attention of their government and thereby guard against the erroneous deprivation of their interests. *Post v. City Of Tacoma*, 167 Wn.2d 300 (Wash. 2009). *Emphisis added.*

This Court must grant review to determine if the City of Edmonds Miscellaneous Review process complies with constitutionally guaranteed protections.

E. The City of Edmonds by Consciously Refusing to Enforce its Development Code Raises Constitutional Questions as to if they Participated in a Private Taking.

Article 1 Section 16 of the Washington State Constitution[2] has an absolute prohibition to the taking or damage of private property for a private use other than a very limited provision for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. A claim of a taking under Article 1 Section 16, as under 42 U.S.C. § 1983, must allege both

[2] SECTION 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. (Pertinent part only)

that the respondents acted under color of state law and that they deprived the Petitioner of a right secured by the Constitution of Washington State or the United States of America. *Gomez v. Taylor*, 446 U.S. 635, 100*74 S.Ct. 1920, 64 L.Ed.2d 572 (1980). In a case of a private takings case the courts have held that "In determining what conduct by a private individual constitutes a taking by state action, there must be a close nexus between the conduct complained of and the State, some state official or some state entity." *Pepper v. JJ Welcome Construction*, 871 P. 2d 601 - Wash: Court of Appeals, 1st Div. (1994). While the courts have held that there must be affirmative action by the state beyond just the approval of development permits there has not been a determination if the refusal to enforce development regulations constitutes an affirmative action.

This Court must grant review to clarify how the action of refusal to enforce does not abrogate due process rights and the strict prohibition of taking of property in the state constitution.

VI.

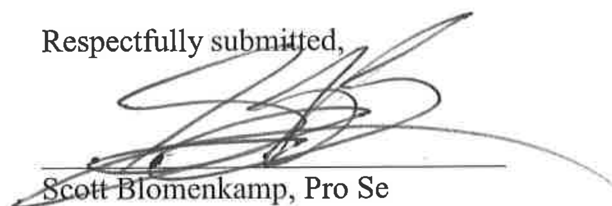
VII. CONCLUSION

For the reasons above, Appellant Scott Blomenkamp respectfully requests that this Court grant review under RAP 13.4(b)(1)-(4) of the court of appeals affirmation of the superior court decision.

I, Scott Blomenkamp hereby declare under penalty of Washington perjury laws that the foregoing is true and correct.

Dated this 6th day of December, 2017.

Respectfully submitted,



Scott Blomenkamp, Pro Se

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SCOTT BLOMENKAMP, Appellant, v. CITY OF EDMONDS, a municipal corporation; KAUTZ ROUTE, LLC, Respondents.	)	No. 75737-7-1-I UNPUBLISHED OPINION FILED: July 24, 2017

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 JUL 24 AM 10: 3

VERELLEN, C.J. — Exhausting administrative remedies is a fundamental tenet of the Land Use Petition Act, chapter 36.70C RCW (LUPA). A person who fails to exhaust the administrative remedy of an appeal allowed by city code to challenge the failure of the city to impose substantive land clearing tree protection standards in a permit may not use a LUPA appeal to collaterally attack the city's failure to impose such standards. Additionally, an untimely challenge of a land use decision in the guise of a failure to enforce claim is a prohibited collateral attack.

While clearing its property pursuant to a site and utility improvements permit, Kautz Route, LLC (Kautz) damaged roots extending onto its property from trees on Scott Blomenkamp's adjoining property. But no one exhausted the administrative remedy of appealing that permit. Alternatively, the Architectural Design Board (ADB) reviewed clearing proposals for the project. But no one appealed the ADB approval of the project.

Blomenkamp argues the City of Edmonds (City) failed to enforce tree protection provisions, but the critical question whether his off-site trees were in "areas immediately subject to construction" is a determination to be made as part of the permitting process. Waiting more than 14 months after ADB approval to allege the City failed to include tree protection standards for his off-site trees is a prohibited collateral attack. Blomenkamp may not raise the land clearing standards in his LUPA appeal.

Blomenkamp's other issues on appeal are not persuasive.

Therefore, we affirm.

FACTS

Kautz has a five-duplex development project in Edmonds, Washington. On February 5, 2014, the ADB for the City reviewed and approved the project with conditions. No one appealed the ADB decision. On December 29, 2014, Kautz obtained a site and utility improvements permit that contemplated clearing. No one appealed that permit.

Kautz began developing the site in May 2015. Blomenkamp purchased property adjoining the approved project on May 12, 2015. "While grading the site in accordance with plans approved under [the site and utility improvement permit], roots extending into the development site from some trees located at [Blomenkamp's property] were damaged."[1] Blomenkamp contacted City staff about the damage. Arborists concluded several of Blomenkamp's trees were hazardous.

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[1] Clerk's Papers (CP) at 297 (Finding of Fact 3).

The City notified Blomenkamp that the Development Services Director (Director) determined the project was "operating within the conditions of the approved permits" and allowed Kautz to continue work under the approved permits.[2]

On June 29, 2015, Blomenkamp and two other residents jointly filed a request for review of the ADB approval under Edmonds Community Development Code (ECDC) 20.100.040. Among other challenges, the request asserted that the project violated the ECDC 18.45.050(H) tree clearing provisions, resulting in four hazardous trees and a nuisance.[3] They asked that the Hearing Examiner (Examiner) revoke the permit approving the project.

The Director determined Blomenkamp failed to allege the *conditions of the permit* were not being met.[4] The Director concluded the scope of the Examiner's open hearing would focus on "whether the *requirements of the city code are being met* and whether the permitted activity is causing a nuisance or hazardous condition."[5]

The Examiner conducted an open record hearing. Blomenkamp filed a brief alleging private nuisance and seeking payment of $50,000.

The Examiner concluded he had no authority to consider claims not forwarded by the Director or to award damages for nuisance claims. As relief for the nuisance, the Examiner determined Kautz must pay for (i) removal of three trees and *replacement of them by ten foot tall trees of the same species*, (ii) monitoring of a fourth tree, and

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[2] CP at 437.

[3] The request also asserted various violations of ADB design regulations and that City staff did not disclose material information to the ADB. CP at 391-94.

[4] See ECDC 20.100.040(A); CP at 398.

[5] See CP at 398 (emphasis added) (citing ECDC 20.100.040(A)).

replacement if necessary, and (iii) repair of a fifth tree. On reconsideration, the Examiner ordered Kautz to "pay for the replacement of [each removed tree] by *up to three trees* of the same species ten feet in height."[6] The Examiner concluded that under ECDC 20.100.040, he could not reconsider issues that were addressed in the ADB approval.

Blomenkamp appealed the Examiner's decision to Snohomish County Superior Court under LUPA. The superior court entered an order remanding to the Examiner

> with instructions to *address the caliper of the replacement trees*, pursuant to ECDC 18.45.075(A)(2), consistent with this decision. [Blomenkamp] did not establish any other errors by the Hearing Examiner related to issues raised in [his] Land Use Appeal. [He] is entitled to no further relief.[7]

The superior court granted the City's motion for reconsideration and revised the prior order

> [w]ith instructions to modify his decision to state that the three replacement trees shall be at least three inches in caliper and at least ten feet in height. *There shall be no briefing, hearing or other fact-finding proceedings on remand. If the Hearing Examiner corrects his decision in a manner that is consistent with this order, Petitioner shall not be entitled to file a new land use petition upon issuance of the Hearing Examiner's corrected decision.* Petitioner did not establish any other errors by the Hearing Examiner related to issues raised on Petitioner's Land Use Appeal. Petitioner is entitled to no further relief.[8]

The Examiner issued a "Decision Upon Judicial Remand" consistent with the superior court's order. Blomenkamp appeals.

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[6] CP at 149 (emphasis added).

[7] CP at 13 (emphasis added).

[8] CP at 15 (emphasis added).

ANALYSIS

LUPA governs judicial review of Washington land use decisions.[9] On review of a LUPA proceeding, we stand in the same position as the superior court.[10] We review "'administrative decisions on the record of the administrative tribunal, not of the superior court.'"[11] We review the record and questions of law de novo to determine whether the land use decision was supported by law and fact.[12]

Blomenkamp must establish that one of the following standards has been met:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.[13]

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[9] HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 467, 61 P.3d 1141 (2003).

[10] Habitat Watch v. Skagit County, 155 Wn.2d 397, 405-06, 120 P.3d 56 (2005).

[11] HJS, 148 Wn.2d at 468 (quoting King County v. Washington State Boundary Review Bd. for King County, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993)).

[12] Id.

[13] RCW 36.70C.130(1)(a)-(f).

I. Scope of Examiner Review

Blomenkamp contends the Examiner erroneously concluded ECDC 20.100.040 precluded him from considering issues not forwarded by the Director. Relying on the distinction in ECDC 20.100.040 between giving notice of "the alleged deficiencies" and referring only "the deficiencies" to the hearing examiner, the City and Kautz counter that the Director is authorized to decide which issues are to be forwarded to the Examiner. They contend the Director acted within his discretion by limiting the issues to the nuisance and hazardous condition claims, and because Blomenkamp failed to appeal the ADB approval, he could not make a collateral attack disguised as a code enforcement claim.

Unfortunately, ECDC 20.100.040 is not a model of clarity. It does not define the authority of the Director and Examiner. But we need not resolve that question.

It is a general principle of land use law that the failure to exhaust administrative remedies or appeals precludes an appeal under LUPA.[14] Additionally, the failure to timely pursue a right to appeal a land use decision, such as a permit, precludes a subsequent collateral attack of that decision.[15]

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[14] RCW 36.70C.060(2)(d) ("The petitioner has exhausted his or her administrative remedies to the extent required by law."); Durland v. San Juan County, 182 Wn.2d 55, 64-65, 340 P.3d 191 (2014) ("[W]here the permitting authority creates an administrative review process, a building permit does not become 'final' for purposes of LUPA until administrative review concludes."); Klineburger v. King County Dep't of Dev. and Envtl. Servs., 189 Wn. App. 153, 169, 356 P.3d 223 (2015) ("Because a 'land use decision' under LUPA must be a final determination by a local government, 'a LUPA petitioner must necessarily exhaust all available administrative remedies' before the superior court may exercise its appellate jurisdiction.") (quoting West v. Stahley, 155 Wn. App. 691, 699, 229 P.3d 943 (2010)).

[15] See Durland v. San Juan County, 174 Wn. App. 1, 13, 298 P.3d 757 (2012) ("[A] party may not collaterally challenge a land use decision for which the appeal period has passed via a challenge to a subsequent land use decision."); Habitat Watch v.

It is undisputed that the damage to the tree roots occurred when Kautz was grading in accordance with the permit issued December 29, 2014. A dispute arising out of a grading or clearing permit[16] is subject to an appeal to the hearing examiner. ECDC 18.45.060 recognizes that "[a]ny person aggrieved by the decision of the staff regarding a clearing permit may appeal such decision to the hearing examiner within 10 working days of the date of the decision." No one appealed the December 29, 2014 permit.[17]

If the December 29, 2014 permit contemplated clearing but failed to comply with the substantive clearing and tree removal standards of chapter 18.45 ECDC, including a resolution of whether off-site trees are in "areas immediately subject to construction" for purposes of ECDC 18.45.050(H), then such a decision by City staff was subject to an appeal to the Examiner under ECDC 18.45.060.

The Examiner concluded ECDC 18.45.035 required the ADB to consider any substantive clearing and tree removal standards. The ADB review addressed clearing.[18] But even ignoring the significance of the failure to appeal the December 29,

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Skagit County, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005) (challenge to grading permit amounted to untimely collateral attack of earlier special use permit, where authorization for grading permit came from special use permit, whose appeal period had passed, and where sole basis for challenging grading permit was that extensions of special use permit were improper); Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 180-82, 4 P.3d 123 (2000) (challenge to county's approval of plat application based on challenge to density of plat was untimely collateral attack where petitioner had not challenged rezone decision establishing allowed density for project two years earlier).

[16] As clarified at oral argument, the terms are used interchangeably.

[17] The record before this court does not include the application for the permit, any survey made in support of the permit, or the actual permit. But none of the parties dispute that the site and utility improvement permit was issued and that the grading which damaged the tree roots was undertaken in accordance with that permit.

[18] ECDC 18.45.030 exempts projects approved through ADB review from the procedures but not from the substantive provisions of chapter 18.45 ECDC.

2014 permit, no one exhausted the remedy of appealing the ADB approval. Blomenkamp acknowledges that "[t]he ADB's decision was appealable to the city council . . . but no such appeal was ever taken."[19]

Blomenkamp suggests his challenge is not to the failure of the ADB to include the appropriate tree clearing provisions. Instead, he frames his challenge as the City's failure to enforce those tree protection provisions in the field when the grading damaged his trees: "The present case is not a case of attacking the permit through such a collateral way, it is a case of the actual act of grading and clearing not being compliant with the conditions of the permit."[20] In support of his argument, he cites the provision of the ADB approval that "[t]he plans must comply with the current conditions and regulations."[21]

But Blomenkamp's June 29, 2015 request for review of the ADB approval under ECDC 20.100.040(B)(3) asserts the project does not comply with the tree clearing standards of ECDC 18.45.050(H) for protection of trees in "areas immediately subject to construction." Those standards contemplate a permit based on a survey that sets out the drip line of trees to be retained: "Where the drip line of a tree overlaps a construction line, this shall be indicated on the survey and . . . tree protection measures shall be employed."[22]

The key premise of Blomenkamp's failure-to-enforce argument is that the City failed to impose the substantive standards of chapter 18.45 ECDC to protect trees with

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[19] Appellant's Br. at 12-13.

[20] Id. at 28-29.

[21] Id. at 29 (quoting CP at 546).

[22] ECDC 18.45.050(H).

a drip circle in the "area immediate to construction." Because the code contemplates the City will make such a determination as part of the permitting process based on a survey provided in support of a clearing permit, his attack necessarily challenges the ADB approval itself. The ADB general provision that a property owner must comply with all regulations does not entitle Blomenkamp to a belated collateral attack on the City's alleged failure to impose and thus enforce the standards required to be considered in the permitting process.

Blomenkamp is correct that a LUPA appeal may extend to a final decision on the enforcement of ordinances.[23] But that does not allow a belated collateral attack on a permit in the guise of a failure-to-enforce claim.

Therefore, whether the clearing was permitted under the December 29, 2014 permit or the February 5, 2014 ADB approval, the failure to exhaust administrative remedies and the doctrine of finality preclude Blomenkamp from raising the substantive tree protection standards in his LUPA appeal.[24]

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[23] Chumbley v. Snohomish County, 197 Wn. App. 346, 361-64, 386 P.3d 306 (2016) (county issued a building permit on one lot and months later decided a grading permit was not required for two other lots in landslide area where sewage system was installed; because the potential for enforcement of county ordinance did not become final until the county decided that a grading permit was not required, the 21-day time limit for a LUPA appeal for failure to enforce ordinances did not begin until the county made final decision that no grading permit was required for the two lots).

[24] To the extent Blomenkamp suggested at oral argument an equitable exception because he had not yet purchased his property when the permits were issued, he offers no authority, and we find none.

II. Blomenkamp's Remedy

Blomenkamp contends the Examiner erred by failing to require that the combined width (caliper) of the replacement trees equal the width of the removed trees, but he cites no compelling authority for his proposition.

The Examiner referred to the ECDC 18.45.075(2) restoration standards:[25]

> For each tree removed, replacement planting of up to three trees of the same species in the immediate vicinity of the tree(s) which was removed so long as adequate growing space is provided for such species. The replacement trees shall be of sufficient caliper to adequately replace the lost tree(s). Replacement trees shall be a minimum of three inches in caliper and shall be replaced at the direction of the planning division director.

The context of chapter 18.45 ECDC does not support Blomenkamp's "combined equal caliper" theory. The code clearly grants broad discretion, including whether to require one, two, or three replacement trees for each removed tree, with the only specific reference to a minimum caliper of three inches for replacement trees.

Contrary to Blomenkamp's assertion, the Examiner did not conclude the term "adequately replace" was ambiguous and did not fail to follow the "ordinary principles of statutory construction."[26] The Examiner accurately observed that the city code does not include any identified formula for "adequate."[27] The Examiner noted that replacing removed trees with similar sized trees was not feasible:

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[25] Kautz contends it is exempt from the ECDC restoration standards, but the ECDC exemption for ADB-approved projects applies only to the procedural and application requirements of the section, not the substantive requirements. <u>See</u> ECDC 18.45.035; <u>see</u> Respondent Kautz's Br. at 18.

[26] The Examiner did acknowledge that ECDC 20.100.040 was ambiguous. <u>See</u> CP at 145, 148.

[27] CP at 149.

> [U]p to three replacement trees per lost trees is a recognition of the fact that it's not feasible or even probably possible to replace 100 foot trees with trees of a similar height. In past enforcement actions of Chapter 18.45 ECDC the City has never required replacement of this nature.[28]

The code does not support Blomenkamp's theory that the combined caliper of the replacement trees must equal the caliper of the removed tree. We conclude the Examiner's interpretation of law was not erroneous, his application of the code to the facts was not clearly erroneous, and the ultimate decision to impose a remedy consistent with the code was not an abuse of discretion.

III. Superior Court Remand With Instructions

Blomenkamp challenges the authority of the superior court to impose conditions on remand to the Examiner. The superior court remanded with instructions to impose a caliper size of at least three inches without engaging in additional fact finding. A remand for such a modification without further proceedings is consistent with the court's statutory authority. RCW 36.70C.140 provides:

> The court may affirm or reverse the land use decision under review or *remand it for modification* or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.[29]

Blomenkamp argues that the superior court improperly retained jurisdiction, notably by directing that such a modified order would not be subject to another LUPA appeal. But when the superior court instructed the Examiner to make a specific modification, the court did not retain jurisdiction. There was no need for "briefing,

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[28] Id.

[29] (Emphasis added.)

hearing or other fact-finding proceedings on remand."[30] And as long as the Examiner followed the court's instructions, an additional LUPA appeal would serve no purpose and would be contrary to the policy limiting such appeals.[31]

We conclude the superior court did not retain jurisdiction and did not err in remanding the matter to the Examiner with specific instructions.

IV. Constitutional Claims

Blomenkamp contends there was a constitutional taking of his property. A taking requires some form of government action, typically a physical invasion onto private property,[32] or a regulation of private property under the government's police power authority in such a way as to destroy a fundamental attribute of ownership.[33] To pursue a taking for private use under article I, section 16 of the state constitution, there must be government action.[34] Our Supreme Court has recognized that "a government entity's mere approval of development is insufficient to create takings liability."[35]

Blomenkamp argues the City exercised its police powers to regulate his private property in such a way that destroyed a fundamental attribute of ownership.

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[30] CP at 15.

[31] See Durland, 182 Wn.2d at 67 (recognizing "LUPA's stated purposes of promoting finality, predictability, and efficiency.").

[32] TT Props. v. City of Tacoma, 192 Wn. App. 238, 246, 366 P.3d 465, review denied, 185 Wn.2d 1036 (2016).

[33] Presbytery of Seattle v. King Cty., 114 Wn.2d 320, 330, 787 P.2d 907 (1990).

[34] State ex rel. Washington State Convention & Trade Ctr. v. Evans, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998).

[35] TT Props., 192 Wn. App. at 253 (citing Phillips v. King County, 136 Wn.2d 946, 962, 968 P.2d 871 (1998) (municipality not liable for a developer's design which caused damage to neighbors' property when the county's only actions are in approval and permitting)).

Here, a private actor cut tree roots located on its own property. Blomenkamp claims the "degree of joint activity between the [City] and [Kautz] sufficiently establishes a nexus between" a private and government actor, but he fails to point to any compelling facts in the record to establish this alleged nexus.[36] Blomenkamp cites no authority extending takings liability to this setting.

Blomenkamp also argues his due process rights were violated. "[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner" appropriate to the case.[37] Blomenkamp was afforded ample notice and opportunity to be heard at meaningful times and in a meaningful manner before the Examiner and the superior court.

Blomenkamp's constitutional claims fail.

V. Abandoned Argument On Appeal

Blomenkamp contends the superior court erred in declining to consider his argument that the Examiner failed to discuss the relationship between his decision and the City's comprehensive plan as required by RCW 35A.63.170(3).

But he failed to adequately raise this argument in his LUPA appeal. RCW 36.70C.070(7) requires a land use petition to include "[a] separate and concise statement of each error alleged to have been committed." Blomenkamp listed his procedural defect issue in his "Issues Presented" section of his opening brief to the superior court, but did not include any argument in the brief on the issue. Nor did he include the claim in his land use petition.

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[36] Appellant's Br. at 51; Reply Br. at 20.

[37] Post v. City of Tacoma, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009); Bellevue School Dist. v. E.S., 171 Wn.2d 695, 704-05, 257 P.3d 570 (2011).

We conclude Blomenkamp abandoned his RCW 35A.63.170 argument. He has not cited compelling authority that he can now raise this issue in this court.

Therefore, we affirm.

Verellen, C.J.

WE CONCUR:

Mann, J.

Becker, J.

FILED
10/3/2017
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

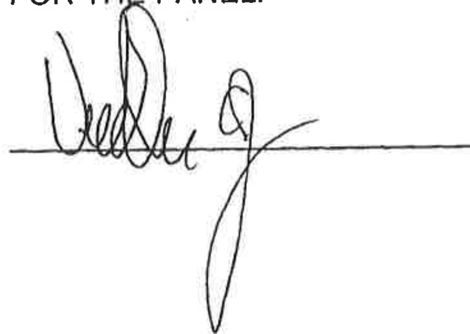
SCOTT BLOMENKAMP, Appellant, v. CITY OF EDMONDS, a municipal corporation; KAUTZ ROUTE, LLC, Respondents.	)	No. 75737-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of the court's July 24, 2017 opinion. Following consideration of the motion and respondents' answers, the panel has determined it should be denied.

Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



SCOTT BLOMENKAMP - FILING PRO SE

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