

69259-3

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Case No. 69259-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

THE CITY OF FERNDALE,

Defendant / Appellant

v.

ARTUR ROJSZA,

Plaintiff / Respondent

APPELLANT'S REPLY BRIEF

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I. ARGUMENT.

- A. **The Rojszas do not dispute that they repeatedly violated the City's Building Code with their unauthorized construction, which is sufficient grounds for revocation of their building permit, and support for the City's requirement for a new building permit.**

The Rojszas admit that between 2005 and 2010¹, they remodeled their home located in downtown Ferndale, Washington, without the necessary building permit(s). Mr. Rojsza worked as a contractor in four different countries and knew that building permits were required *prior* to initiating the substantial remodel of his home. He was completely aware that once he finally obtained a building permit, the work had to be consistent with the issued permit and approved plans, yet he repeatedly performed unauthorized construction. Contrary to the facts, he now suggests that the City's related enforcement actions were "politically motivated."²

The Rojszas do not dispute the City's version of the parties' negotiations relating to settlement of the City's first criminal prosecution (prior to the City's issuance of the building permit in 2010), or the City's description of the pertinent terms of the subsequent Settlement

¹ Rojszas' Respondents' Brief, paragraph 1, page 1.

² *Id.*

Agreement.³ Instead, the Rojszas ask the Court to consider that the Rojszas' failure to comply with the Settlement Agreement was the result of "legitimate confusion" over its scope.

Once the building permit was issued, the Rojszas again became "confused," this time as to the *scope of the permit*, and performed unauthorized construction.⁴ This violation was *actual*, not alleged as the Rojszas suggest, because they did not appeal the Stop Work Order issued by the City when the unauthorized work was discovered. The Rojszas also agreed to the City's imposition of a number of new conditions on further construction so that the City would lift the Stop Work Order.⁵ These conditions included the Rojszas' submission of revised structural/architectural drawings and plans for the unauthorized work,⁶ and the submission of plans to the City at least two weeks prior to their request for any inspection.⁷

The Rojszas do not dispute this condition requiring the pre-submission of plans prior to an inspection, but they don't explain why they

³ This appears on pages 12-13 of the City's Opening Brief.

⁴ Rojszas' Respondents' Brief, p. 7; CP 152-907; Ex. 2-2, p. 349, Attachment F to the City's Opening Brief.

⁵ Rojszas' Respondents' Brief, p. 7. The City refers to the Rojszas to their own argument in their Response Brief about how facts become "verities" if not appealed.

⁶ CP 152-907; Ex. 2-2, p. 340, Attachment G to the City's Opening Brief.

⁷ *Id.*, Attachment G to the City's Opening Brief.

refused to comply. Instead, they again claim “confusion,” and blame the City for failing to perform the inspections without the required plans.⁸

Significantly, the Rojszas make no mention at all of their failure to comply with the Settlement Agreement condition which required that all work included in the building permit be complete within 180 days of the date of permit issuance (April 9, 2010).⁹ On November 2, 2010, they acknowledged this condition of the Settlement Agreement by asking the City *in writing* for an extension of up to 180 days to complete the work, specifically “to satisfy conditions of the agreement.”¹⁰

This request was granted by the City,¹¹ but to ensure that the Rojszas understood the importance of compliance with this condition, the City wrote to the Rojszas on March 11, 2011, informing them that “if [the project at 2147 Main Street] is not finished by [May 1, 2011] the structure will be in violation of both the Building Code and the City’s Nuisance Ordinance . . .”¹² Apparently forgetting that he had previously written an e-mail to the City asking for the May 1, 2011 extension, Mr. Rojsza now responded by arguing that no extension was needed because the

⁸ Rojszas’ Respondents’ Brief, p. 8.

⁹ CP 152-907; Ex. 2-2, p. 181-182, Attachment E to the City’s Opening Brief.

¹⁰ CP 152-907; Ex. 2-2, p. 302, Attachment J to the City’s Opening Brief.

¹¹ CP 152-907; Ex. 2-2, p. 274, Attachment L to the City’s Opening Brief, CP 152-907; Ex. 2-2, p. 236, Attachment P to the City’s Opening Brief.

¹² CP 152-907; Ex. 2-2, p. 274, Attachment L to the City’s Opening Brief.

Agreement was “fulfilled” when they called for an inspection on November 3, 2010.¹³

According to Mr. Rojsza, the structure remained (and still remains) incomplete because “the final concept” is “a creative process of tests, errors, corrections and visualization, in order to achieve a desired result.”¹⁴ In other words, eight years after the remodel began; he has no plans for completion.

All of the above demonstrates that the Examiner correctly determined that the building permit expired, based on the Rojszas’ repeated violation of the Building Code and the Settlement Agreement. There is no legal support whatsoever for the Rojszas’ belief that the City is required to allow unlimited and unauthorized construction as “amendments” to an existing building permit, in order to accommodate the property owner’s desire to continue construction in perpetuity and avoid the payment of building permit fees. Additionally, there is no authority for the Rojszas’ belief that these amendments must be reviewed by the City under the Building Code in effect in 2010,¹⁵ even if it occurs 20 years in the future. Although there is no legal support for their erroneous

¹³ CP 152-907; Ex. 2-2, p. 245, Attachment N and O to the City’s Opening Brief, Rojszas’ Respondents’ Brief, p. 7.

¹⁴ *Id.*, Attachment O to the City’s Opening Brief.

¹⁵ The date the Rojszas only building permit application was for this structure was determined complete/issued.

interpretation of the vested rights doctrine, the Rojszas use it as the basis for their constitutional claim.¹⁶

B. The Rojszas did not file a timely administrative appeal, and because they failed to exhaust administrative remedies, this appeal must be dismissed.

The Rojszas argue that they did not need to appeal the City's May 11, 2011 letter and the June 16, 2011 Order because neither state that their building permit expired or was revoked.¹⁷ This is false. Here is the pertinent language from the City's May 11, 2011 letter: "The City has determined that, due to lack of inspections, your building permit has expired. The last inspection occurred on October 18, 2010, and more than 180 days has passed since that date."¹⁸

The May 11, 2011 letter was not appealed, so it was followed with the June 16, 2011 Order to Comply, which ordered the Rojszas to submit a new building permit. Here is the pertinent language from that Order:

"The City has determined that you have illegally added to and altered the structure of your building without a permit therefor. You have also built the structure in a manner not reflected by the approved permit. As a result, as the Building Official of the City of Ferndale, I have determined that it now appears that the permit was issued on the basis of incorrect, inaccurate and incomplete information. . . . **[T]he City will require that you submit the following by**

¹⁶ See, Respondents' Brief, p. 32.

¹⁷ Rojszas' Respondents' Brief, p. 9.

¹⁸ CP 152-907; Ex. 2-2, p. 190; Attachment Q to the City's Opening Brief.

July 18, 2011: -- Completed building permit application

...¹⁹

According to the Rojszas, the clear language in the above letters only meant that they should “call City staff and schedule an appointment to submit their ‘revised plans.’”²⁰ This is contradicted by their actions – as noted by the Hearing Examiner, “[o]n August 30, 2011, the Appellants submitted new engineering drawings, as part of an application for a new building permit to cover the work already done without a building permit, as well as future planned work.”²¹ After that point, “[t]he City reviewed drawings and Permit Application and notified the Appellants on September 7, 2011, that the City was ready to issue the new building permit.”²² Another letter was written by the City on September 13, 2011 to the Rojszas, informing them that the building permit was ready to issue.²³ Instead of picking it up, on September 16, 2011, they filed an untimely administrative appeal,²⁴ challenging the determinations made by the City in the May 11, 2011 letter and June 16, 2011 Order.

The September 7, 2011 e-mail that the Rojszas contend was the “final decision” triggering their appeal was only the first mention of the

¹⁹ CP 152-907; Ex 1, 1-20; Attachment R to the City’s Opening Brief, emphasis added.

²⁰ Rojszas’ Respondents’ Brief, p. 10.

²¹ CP 36, Hearing Examiner’s Decision, Section XVI, p. 16.

²² *Id.*, Section XVI, p. 16.

²³ *Id.*

²⁴ The deadline for filing an administrative appeal is within 10 calendar days of the date of the decision being appealed. FMC Section 14.11.070(B).

amount of the bond that would be a condition of the new building permit.

As noted by the Hearing Examiner, the Rojszas “had been aware the City was going to require a bond, at least, since August 19, 2011, [or] 29 days before the Appeal was filed.”²⁵ In a clear demonstration that the bond amount was completely irrelevant to their appeal, the Rojszas have never submitted any argument whatsoever on this issue.²⁶

C. The Rojszas admit that all of the City’s decisions at issue here, not just “final” decisions, were administratively appealable, and therefore have no excuse for failing to exhaust their administrative remedies by filing timely appeals.

To support the argument that their administrative appeal was timely, the Rojszas ask this Court to consider the tests for a “final, appealable decision under LUPA,” and to then declare that the City’s letters and e-mails do not meet this standard. There are at least two problems with this approach.

First, as noted by the Rojszas in their Brief, the City’s code relating to the deadline for filing an administrative appeal to the Hearing Examiner does not require that the decision being appealed must be “final.”²⁷ Here is the code provision at issue:

Every appeal to the Hearings Examiner of an administrative interpretation or administrative permit decision shall be filed in writing with the Planning and Building Director

²⁵ Hearing Examiner’s Decision, Section XVII, p. 17.

²⁶ Hearing Examiner’s Decision, Section V, p. 28.

²⁷ Rojszas’ Response Brief, p. 17.

within 10 calendar days from the date of the interpretation or decision regarding the matter being appealed.²⁸

The Rojszas argue that because the FMC doesn't define what constitutes a final decision under FMC 14.11.070(B), this Court should consider the definition of a "final decision" necessitating a LUPA appeal in *Durland v. San Juan County*.²⁹ However, there is no need to even consider this argument because the clear language of FMC 14.11.070(B) allows any decision to be appealed. With the exception of the amount of the bond (for which the Rojszas submitted no argument), the Rojszas failed to file a timely administratively appeal of any of the City's decisions, final or not.

A similar factual scenario was presented in *West v. Stahley*,³⁰ where West filed an administrative appeal to the hearing examiner within 20 days after receiving notice of the city's issuance of a permit to Weyerhaeuser.³¹ The hearing examiner dismissed it as untimely, because it was not filed within the 14 day appeal period in the city's code.³² A LUPA appeal was filed, and Weyerhaeuser filed a motion to dismiss based

²⁸ FMC Section 14.11.070.B, emphasis added.

²⁹ Cited on page 20 of Respondents' Brief.

³⁰ 155 Wash. App. 691, 229 P.3d 943 (2010).

³¹ 155 Wash. App. at 694.

³² *Id.*

on the appellant's failure to exhaust administrative remedies by filing a timely appeal. The superior court agreed and dismissed the case.³³

On appeal, West admitted that he had actual notice of the city's issuance of the permit to Weyerhaeuser on October 10, 2007, and didn't file an appeal until October 30, 2007, which was after the 14-day appeal period expired.³⁴ He argued that the court should excuse his failure to exhaust administrative remedies because the city didn't give him "proper notice" of the issuance of the permit.³⁵ The Court of Appeals applied the reasoning from *Habitat Watch v. Skagit County*,³⁶ to dismiss the appeal.³⁷

As stated by the Court of Appeals: "[j]ust as a LUPA petitioner *must* bring a petition within 21 days of the final land use decision, a LUPA petitioner *must* exhaust all administrative remedies before obtaining a final land use decision. . . . [E]xhausting administrative remedies is a fundamental tenant under LUPA, failure to do either is an absolute bar to bringing a LUPA petition to superior court."³⁸ The same logic applies here.

In another case directly on point, the Court of Appeals determined that "[i]f a decision is not timely appealed, then the agency's initial decision is final. . . . Therefore, a hearing examiner's denial of an

³³ 155 Wash. App. at 695.

³⁴ 155 Wash. App. at 697.

³⁵ 155 Wash. App. at 698.

³⁶ 155 Wash. App. 397, 120 P.3d 56 (2005).

³⁷ 155 Wash. App. at 699.

³⁸ *Id.*

untimely administrative appeal is not a land use decision for purposes of the LUPA 21 day time limit ...”³⁹ Other Washington courts have agreed that exhaustion of administrative remedies is a necessary prerequisite to a LUPA appeal for all appellants, including (as in the instant case,) the applicants for a permit.⁴⁰

To summarize the Rojszas’ argument, they didn’t timely appeal the City’s written notice that (1) their building permit expired; (2) that they had to apply for a new building permit; or (3) that the City would require the Rojszas to post a bond for the completion of the exterior of the structure by a date certain, *because they didn’t believe that any of these decisions were final and appealable*, even though the City’s code allows **any** decision (final or not) to be appealed. According to the Rojszas, they were waiting for the City to issue a decision on the amount of the bond before they would file an appeal, because:

The dollar amount of a bond is a critical component of the City issuing a final decision on imposing a bond, and critical in an applicant determining whether to assert their appeal rights. At no point prior to the September 7, 2011 e-mail did the City notify the Rojszas of the amount of the possible bond.

³⁹ *Nickum v. City of Bainbridge Island*, 153 Wash. App. 366, 380, 223 P.3d 1172 (2009).

⁴⁰ *Ward v. Board of County Com’rs Skagit County*, 86 Wash. App. 266, 270, 936 P.2d 42 (1997).

This argument contradicts the facts because the Rojszas have argued that the City had no authority to impose a bond *in any amount* as a condition on some future building permit. So, there was no reason for them to wait until the City actually calculated the bond amount to file an appeal. And, if the bond amount was so “crucial” to an appeal, there is no explanation for their failure to submit any argument to the Examiner challenging this amount.⁴¹

Next, the Rojszas argue that the City cannot now raise the argument that the Rojszas failed to exhaust their administrative remedies because the City stipulated to waive the initial hearing. (RCW 36.70C.080(3) waives “the defenses of lack of standing, untimely filing or service of the Petition” if not raised by timely motion at the initial hearing.) This argument is contrary to the holding in *West* (“[e]xhausting administrative remedies is *always* a condition precedent to challenging a

⁴¹ Here is the Hearing Examiner’s observation at Section V, page 28 of the Decision:

While the Building Official is well within his authority and used appropriate discretion to require a bond and time limit, it is not clear from the record as to whether or not the amount of the bond is reasonable. However, since the Appellants have not raised the issue of the reasonableness of the amount of the bond and since the condition setting the amount is no longer appealable, the Hearing Examiner upholds the requirement of a \$30,000 Performance Bond or Assignment of Savings and the time limitations set forth in the building permit, approved, but not yet picked-up by the Appellant.

‘land use decision’ that is subject to review under LUPA”⁴²), *Habitat Watch* (“a LUPA petitioner *must* exhaust all administrative remedies before obtaining a final land use decision”⁴³), and *Nickum*, (“a hearing examiner’s denial of an untimely administrative appeal is not a land use decision for purposes of the LUPA 21 day time limit”⁴⁴). The cited legal authority supports the conclusion that because the May 11, 2011 letter and the June 16, 2011 Order to Comply were not timely appealed within 10 calendar days, they were final. And, the Hearing Examiner’s decision finding the September 16, 2011 appeal untimely does not meet the definition of a “land use decision” under LUPA. Therefore, if the Court finds that the City waived the standing/exhaustion argument, the Court may still find that there was no “land use decision” subject to appeal under LUPA, which warrants dismissal of this case.

D. There is no reason for this appeal, other than the Rojszas’ misunderstanding of the law.

This Court has to be asking itself the same question posed by the Hearing Examiner – why was this appeal filed? Given that the Rojszas submitted their new building permit application materials and the City notified them that their new building permit was ready to be picked up,

⁴² *West v. Stahley*, 155 Wash. App. 681, 697, 229 P.3d 943 (2010), emphasis in original.

⁴³ *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005), emphasis in original.

⁴⁴ *Nickum v. City of Bainbridge Island*, 153 Wash. App. 366, 381, 223 P.3d 1172 (2009).

what could possibly be gained by the Rojszas through their choice to instead file an administrative appeal, or this LUPA appeal? The Hearing Examiner also found the Rojszas' decision to file an administrative appeal "mysterious."⁴⁵ He concluded that the rationale for the appeal could not have been the bond amount, because the Rojszas did not even mention it in their appeal or complain that it was unreasonable.⁴⁶ And, so far, the Rojszas' costs associated with this LUPA appeal have likely far exceeded the fee that the City would have imposed for a new building permit. So, why was this appeal filed?

The City believes that the Rojszas' rationale for filing the appeal is based on a misunderstanding of the Building Code and the vested rights doctrine. Apparently, the Rojszas believe that if they continue to perform construction that is not authorized under an existing building permit, then the City will be required to extend the permit indefinitely, as long as they continue to call for inspections. They appear to have the impression that any construction not shown in the original permit must be reviewed by the City without any additional permit applications or fees, through revised plans. The Rojszas further assume that these revised plans will be reviewed under the Building Code in effect at the time the original permit

⁴⁵ The Hearing Examiner's musing on this point appears at the top of page 24 of the Decision.

⁴⁶ See, Section V on page 28 of the Hearing Examiner's Decision.

was determined complete, *regardless of when the revised plans are submitted*. Here is the pertinent portion of their argument supporting this:

[T]he Rojszas will have lost the right to their existing building permit and the vested rights attendant thereto. (*See*, RCW 19.27.095.) The Rojszas will have to pay thousands in ‘new’ permit fees.

The Rojszas apparently arrived at this interpretation because of the City’s lenient code enforcement efforts (which were borne of utter frustration with a repeat violator). Based on their past experience with the City, the Rojszas now believe they are entitled to some benefit that no other property owner in the State of Washington has – a building permit that will allow unlimited construction at any time in the future, which must be revised by the City under the Building Code in existence in 2010, free of charge. There is absolutely no support for this argument.⁴⁷

The City’s Building Code requires that every property owner obtain a building permit *prior to initiation of construction*.⁴⁸ The owner can’t deviate from the approved plans,⁴⁹ and the owner can’t perform work beyond the point indicated in each successive inspection without first

⁴⁷ The Rojszas can’t argue that they have some vested right to permit amendments, merely because it has allowed them to use this procedure in the past. *See, Dykstra v. County of Skagit*, 97 Wash. App. 670, 677, 985 P.2d 424 (1999) (no vested right to erroneous interpretation of code or enforcement practices).

⁴⁸ R105.1, cited in the City’s Opening Brief at page 8.

⁴⁹ R106.4.

obtaining approval of the building official.⁵⁰ The Building Code further prohibits any construction performed in violation of the Code,⁵¹ and allows the Building Official to suspend or revoke permits issued on the basis of incomplete or inaccurate information.⁵²

E. The Hearing Examiner’s Decision finding that the Rojszas’ appeal was untimely did not violate their constitutional right to Due Process.

In the LUPA appeal before the superior court, the Rojszas argued for the first time, that “City of Ferndale violated the Rojszas’ Procedural Due Process rights when the Hearing Examiner refused to hear the merits of the appeal on grounds of untimeliness.”⁵³ Anyone reading the Hearing Examiner’s decision would conclude that this statement is blatantly false, because the Examiner methodically addressed each one of the Rojszas’ appeal issues in his 30 page decision. The Rojsza contradict their own argument by admitting that: “[w]hile the Hearing Examiner decided all the issues, he still dismissed the appeal for being untimely; a meaningless hearing does not satisfy Due Process.”⁵⁴

⁵⁰ R109.4

⁵¹ R113.1.

⁵² R105.6.

⁵³ CP 1347, line 2-3. Because the constitutional issue was raised for the first time at the trial court level, it had to be reviewed *de novo*. *Harrington v. Spokane County*, 128 Wash. App. 202, 209, 114 P.3d 1233 (2005). This Court can’t review the trial court’s findings, conclusions or decision on this issue, because none exist.

⁵⁴ Respondents’ Brief, p. 35.

They further claim that “this is a ‘deprivation’ case with a right to a pre-deprivation hearing.”⁵⁵ However, the Rojszas fail to acknowledge that the Hearing Examiner held a full hearing on their appeal before he issued his Decision.

To bolster the position that the City violated their Due Process rights, the Rojszas falsely argue that the City planned to hire “a new contractor to take over the remodel of their residence against the Rojszas’ will.”⁵⁶ There is no support whatsoever for this claim, which is apparently based on the Rojszas belief as to the language of a condition that the City might attach to a building permit that never issued. (Significantly, the Rojszas failed to address the City’s argument that any appeal based on an

⁵⁵ Respondents’ Brief, p. 32.

⁵⁶ As explained in the City’s Opening Brief, the City repeatedly informed the Rojszas that it would be requiring a performance bond as a condition of the new building permit to ensure completion of the *exterior siding* within the previously established deadline. This first appeared in a letter to the Rojszas on August 19, 2011, CP 152-907; Ex. 1, p. 103, Attachment U to the Opening Brief. On August 30, 2011, the City sent an e-mail to the Rojszas’ attorney, asking for “an estimate to complete the exterior siding for the purpose of determining the appropriate bond/Assignment of Savings amount.” CP 152-907; Ex 1, p. 59, Attachment V. On September 7, 2011, the City notified the Rojszas’ attorney that the new building permit was ready to issue, and stated that the new building permit will include a requirement “that an assignment of funds or bond for no less than \$30,000 be submitted . . . [for the purpose of allowing] the City to utilize those funds to hire a contractor and for that contractor to finish the exterior siding of the building.” CP 152-907; Ex 1, p. 47, Attachment W to the City’s Opening Brief. On September 28, 2011, the City Building Official told the Rojszas’ attorney that: “If the Rojszas complete their siding, they would not need to do the bond/Assignment of Security.” CP 152-907, Ex. 2-2, p. 24, Attachment X to the City’s Opening Brief.

expectation of the language of a building permit that never issued is not a “final land use decision” appealable under LUPA.⁵⁷⁾

None of the tests for a Due Process violation are satisfied here. Aside from their false statements, the Rojszas submit nothing more than confusing and erroneous interpretations of the law. For example: “[h]ad the Hearing Examiner determined the Rojszas’ appeal was timely but upheld the City’s determinations on substantive grounds, this [constitutional] issue would not even exist in this appeal.”⁵⁸ In other words, the Rojszas believe, with any legal support, that a Hearing Examiner subjects a city to constitutional Due Process claim in a LUPA appeal simply by making a decision that an appeal is untimely. Not surprisingly, they cite no authority for this argument.

Next, they assert that the City did not provide sufficient notice of the City’s decisions, even though they had **actual** notice of every letter, order and e-mail that could have been appealed. It is the Rojszas’ belief that all of the City’s appealable decisions must include the words “Final

⁵⁷ See, page 48 of the City’s Opening Brief.

⁵⁸ Respondents’ Brief, p. 46. This argument also ignores the facts, because the Hearing Examiner did not find that the Rojszas had a valid building permit. The Examiner determined that the City incorrectly determined that the building permit expired, but that this issue was moot because the City correctly determined in the June 16, 2011 Order that the building permit was revoked. The Rojszas failed to appeal this June 16, 2011 Order.

Decision”⁵⁹ at the top of the first page, even though the City’s code allows *all*, not just final decisions to be appealed.

Finally, the Rojszas assert that contrary to the authority cited by the City (*Harrington v. Spokane County*⁶⁰) there was no requirement that they raise constitutional arguments before the Hearing Examiner. They do acknowledge two of the purposes behind the administrative exhaustion doctrine -- to develop a factual record and to correct any errors.⁶¹ However, the Rojszas contend that the doctrine can’t apply here because they are asserting that it was the Hearing Examiner’s decision that was unconstitutional. Here is their circular argument – if the LUPA petitioner fails to file a timely administrative appeal, all it needs to do in order to avoid the anticipated city defense based on exhaustion of administrative remedies is to add a claim to the LUPA petition that the Hearing Examiner’s decision dismissing the untimely appeal is unconstitutional.

The Rojszas next argument is just as flimsy. They contend that the City can’t assert a failure to exhaust administrative remedies if the administrative record was large. According to the Rojszas, as long as they submit hundreds of pages of unnecessary documents and affidavits into the administrative record (which occurred here), the City won’t be able to

⁵⁹ Again, this argument is contradicted by the Rojszas own admission that the City’s code allows all interpretations and decisions to be appealed, not just final decisions.

⁶⁰ 128 Wash. App. 202, 210, 114 P.3d 1233 (2005).

⁶¹ *Harrington v. Spokane County*, 128 Wash. App. 202, 210, 114 P.3d 1233 (2005).

argue the exhaustion of administrative remedies doctrine because the record has been “fully developed.”

In *Harrington*, the court determined that exhaustion of administrative remedies was a prerequisite even to constitutional claim, *if the claim was based on the agency’s compliance with the law and its constitutionality as applied to him.*⁶² This is because “administrative review is . . . required to develop the facts necessary to adjudicate [an] ‘as applied’ constitutional challenge.”⁶³

There is nothing in the administrative record to support the facts relied upon the Rojszas to support their constitutional claim.⁶⁴ They refused to pick up the building permit that would have been conditioned upon the \$30,000 bond with a deadline for completion. There are no “orders to demolish or remove portions of their residence.” Because the building permit never issued, there is simply no basis for this appeal or constitutional claim.

F. The Rojszas’ Due Process rights were not violated simply because they are required to follow the Building Code, like everyone else.

According to the Rojszas, their Due Process rights will be violated if they are not able to proceed with their appeal to preserve their existing

⁶² *Id.*

⁶³ *Id.*

⁶⁴ These “facts” are set forth beginning on page 32 of the Respondents’ Brief.

building permit in perpetuity. This argument is based on errors of law and fact.

First, the City is not requiring that the Rojszas complete their entire project or face the City's hiring of "contractors to 'finish' the Rojszas' residence."⁶⁵ The administrative record demonstrates that the City *planned to require that* the Rojszas install siding on the unattractive, weathered plywood exterior of the structure within 180 days of issuance of the permit or post a bond for this purpose. The record also shows that the City agreed this could be eliminated if the Rojszas installed this siding.

Next, the requirement that the Rojszas pay additional fees for a new building permit is included in the City's Building Code, which applies to all permit applicants. There is no authority for the Rojszas' argument that they should be treated differently than other property owners in the City, as a reward for violating the Building Code on a regular basis.

The other consequences that the Rojszas believe that they will suffer have been manufactured for purposes of this appeal only. Nothing in the administrative record demonstrates that the City has any plans to demolish the structure or take over the remodel of the structure "against the Rojszas' will." There is absolutely no authority for the Rojszas' claim

⁶⁵ Respondents' Brief, p. 32.

that to deny their appeal will result in some deprivation of a building permit that has “indefinite” or perpetual life. This is a complete misunderstanding of the Building Code and an e-mail from the Building Official.⁶⁶

Furthermore, the Rojszas admit that “the procedure of the hearing that was held before the Hearing Examiner was more than adequate.”⁶⁷ They are only complaining because the Examiner ruled against them on the merits.⁶⁸ The City cannot be said to have violated an appellants’ Due Process rights simply because the Examiner denied an appeal.

Next, the Rojszas argue that there was no authority to support the City’s imposition of the bond on the permit that never issued – when a

⁶⁶ The Rojszas assert, in footnote 71 on page 34 of the Respondents’ Brief, that the City Building Official acknowledged that “a building permit can remain active for nearly unlimited period of time provided that periodic inspections taken place.” What the Rojszas do not understand is that in order to obtain a building permit, the property owner must identify the work that will be done in the permit and associated plans. If the same are consistent with the Code, the building permit issues. After issuance of the permit, the property owner/builder performs the work identified in the permit/plans. The City inspects to ensure compliance with the permit/plans. When the work is complete, the City signs off on the final inspection, usually in a certificate of occupancy. If the property owner wants to perform any additional construction on the same structure, he/she has to obtain a new building permit. This is different from the Rojszas’ understanding of the process, because they believe that once a building permit issues, they can perform *any construction at all, regardless of whether it is included in the approved plans/permit, as long as they choose to continue the work.* Contrary to the Rojszas’ argument, the City has never acknowledged that an issued building permit “allowed for virtually continuous construction” inconsistent with the permit.

⁶⁷ Respondents’ Brief, p. 36.

⁶⁸ As stated by the Rojszas, “the fact that the Hearing Examiner found that the Rojszas permit did not actually expire shows the prejudice that occurred here.” This appears on page 36 of their Brief. The Rojszas fail to acknowledge that the Examiner determined that expiration of the permit was a moot issue because their appeal was untimely. Meaning, that the June 16, 2011 Order to Comply requiring them to get a new building permit was final because it was not appealed within 10 calendar days.

lawfully adopted ordinance specifically allows such bond in FMC 18.12.090(C). This argument is premature because no permit includes this condition. Even so, *Pacific County v. Sherwood Pacific, Inc.*⁶⁹ supports the City's imposition of a bond. In *Pacific County*, the developer asserted that at the time the county approved a development and imposed a bond requirement in 1968, there was no statutory authority allowing the county to require the bond (the authority was adopted by statute in 1969). The *Pacific County* court disagreed, and held that it was not only reasonable for the county to impose this bond requirement, but that such authority "was necessarily implied from the powers expressly granted to the county" under general subdivision law.⁷⁰

According to the Rojszas, *Pacific County* is inapplicable because it did not "hold that a city has bonding authority without first adopting a local ordinance granting its administration such powers."⁷¹ This argument makes no sense, as FMC 18.12.090(C) *is* the City's ordinance adopted to grant the City administration the power to require bonds. If the Rojszas refuse to recognize the clear authority in FMC 18.12.090(C), then *Pacific County* is clear that the City's may impose the bond requirement on a

⁶⁹ 17 Wash. App. 790, 567 P.2d 642 (1977).

⁷⁰ 17 Wash. App. at 795.

⁷¹ Respondents' Brief, p. 39.

future permit because such power is “necessarily implied from the powers expressly granted” to the City under the Building Code.

G. The Hearing Examiner correctly determined that FMC Section 18.12.090(C) authorized the Building Official to require a bond for the installation of the siding.

Under FMC Section 18.12.090(C), after the Building Official determines that a building permit has expired:

The Building Official may send written notice of expiration to the persons affected together with notice that work as described in the expired permit shall not proceed unless and until a new building permit has been obtained. . . . The new permit may include limitations on time allowed for substantial completion of the work, and provisions for a reasonable performance bond to ensure completion within the time limit set.

The Rojszas argue that because the Hearing Examiner concluded that the original building permit did not expire, the City could not impose a bond as a condition on the Rojszas’ new building permit. Again, this is too narrow a reading of the Examiner’s Decision, which included at least two bases for his conclusion. First, while the Examiner determined that the Rojszas’ original building permit did not “automatically expire” under FMC Section 18.12.090(B) for lack of the necessary inspections, he said that this was “moot” because the June 16, 2011 Order was not timely appealed.. Second, the Examiner found that the City correctly required a new building permit because the Rojszas deviated from the plans in the

original building permit. He further agreed that the City had the authority to impose the bond requirement on the new permit.⁷²

Again, it should be noted that this issue has been prematurely appealed. The Rojszas filed an appeal rather than picking up the building permit with this bond condition. Because the building permit with the bond condition never issued, there can be no final land use decision appealing a future building permit, and the trial court erred by not dismissing it. The Rojszas submit no response to this argument in the City's Opening Brief.

H. The trial didn't enter an order finding that the City violated the Rojszas' Due Process rights, and this Court can't presume that the trial court made such a finding.

The Rojszas believe that they don't need to raise constitutional issues before the Hearing Examiner, because he has no jurisdiction. They also assert that it is "unnecessary" for the trial court to rule on issues never considered by the Examiner. According to the Rojszas, the parties must simply assume that the trial court determined that the City violated their constitutional rights because the trial court didn't rule on the issue one way or another.

⁷² CP 50-51.

The trial court's order must be disregarded in all respects by this Court, and considered "mere surplusage" in total.⁷³ No finding or conclusion has been made by the trial court that the City violated the Rojszas' Due Process rights. This Court must affirmatively conclude that the Rojszas have not met their burden on any constitutional issue.

ATTORNEYS' FEES

This Court should award the City its statutory attorneys' fees as the prevailing party.

CONCLUSION

For all of the above reasons, the Court of Appeals should reverse the trial court and affirm the Hearing Examiner's decision. In addition, the Court should affirmatively find that the City did not violate the Rojszas' constitutional Due Process rights and dismiss the related claim with prejudice.

Dated this ²⁶th day of May, 2013.

Respectfully submitted,



Carol A. Morris, WSBA #19241

Attorney for Appellant/ Respondent
City of Ferndale

⁷³ *Grader v. Lynnwood*, 45 Wash. App. 876, 879, 728 P.2d 1057 (1986); *Wellington River Hollow LLC v. King County*, 121 Wash. App. 224, 230, 54 P.3d 213 (2002).

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3 IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR WHATCOM COUNTY

4 ARTUR and MARGARET ROJSZA,
husband and wife,

5 Respondents,

6 vs.

7 CITY OF FERNDALE, a Washington
8 municipal corporation,

9 Appellant.
10

COURT OF APPEALS
No. 69259-3-I

SUPERIOR COURT
No. 12-2-00582-2

DECLARATION OF SERVICE

11 CAROL A. MORRIS, declares as follows:

12 1. I am the attorney for the appellant City of Ferndale in the above-captioned
13 action. I am over the age of eighteen and competent to make this declaration.
14

15 2. On May 20, 2013, I placed the City's Reply Brief in the U.S. Mail, first class,
16 postage pre-paid, to the Court of Appeals, and also sent the same document to opposing
17 counsel, addressed as follows:

18 Peter R. Dworkin
19 Belcher/Swanson
20 900 DuPont Street
21 Bellingham, WA 98225

22 I declare that the above is true and correct under penalty of perjury under the laws of the
23 State of Washington.
24
25

DECLARATION OF SERVICE - 1

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Date and Place of Signing: Seabeck WA 5-20-13



CAROL A. MORRIS