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STATE OF WASHINGTON

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NO. 34808-0-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST

Appellant,

v.

CITY OF TACOMA; CITY OF TACOMA DEPARTMENT OF PUBLIC
WORKS BUILDING AND LAND USE SERVICES DIVISION; RISK
MANAGEMENT ALTERNATIVES INC.; and CHARLES SOLVERSON

Respondents.

APPELLANT'S REPLY BRIEF

ORIGINAL

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A. REPLY TO RESPONDENT/DEFENDANT CITY'S COUNTER-STATEMENT OF THE CASE.

Appellant/Plaintiff filed the complaint for declaratory judgment and injunction to declare certain portions of TMC 2.01.060 unconstitutional and enjoin future enforcement, and the collection of unpaid fines already paid. Since Plaintiff did not file a claim before filing the lawsuit, the parties stipulated the action for damages to return already paid fines would be dismissed without prejudice.

Respondent/Defendant City states on Page 12 of its brief that the facts are not in dispute. While the ultimate facts regarding the procedure the City uses are not in dispute, counsel for the City makes many misstatements as to what the record shows and what the court has held. In counsel's defense, she was not involved at any time at the trial court level and it would have been almost impossible to read and/or digest the nearly 600 pages in the court records. The City is not correct when it said that there are currently 22 properties in an extreme state of disrepair and neglect. There were never 22 properties that were in extreme disrepair and neglect. Respondent/Defendant City cites CP 233 to support its miscalculations. Shortly after this case was filed, the record shows 14 properties had been totally repaired and 14 properties were being worked on, but were in various states of repair. (CP 233, 213-231, and 434-435) Appellant/Plaintiff Post did have properties that

were derelict, he purchased said properties in that condition with the purpose of putting them in a repaired condition. (CP 213-233) In TMC 2.01 there is a provision for determining the houses are dangerous, which the City can order to be torn down. TMC 2.01.050 and 060 (f). Appellant/Plaintiff Post had one property that was determined to be a dangerous building in the 1960's. (CP 214) Respondent/Defendant City cites CP 233 to support her miscalculations. There are a total of 14 properties presently substandard or derelict and fourteen properties had previously been so designated, but due to the fact that Appellant/Plaintiff Post has constantly worked away at correcting the problem, were removed from the list. (CP 233) In addition, counsel has to be excused for her understanding that the buildings are in extreme disrepair or neglect. She probably takes that opinion from the pictures the City provided on the worst properties and was not aware that most properties are maintained in a very presentable condition. The pictures supplied by Appellant/Plaintiff at CP 235-250 show all of Appellant/Plaintiff's properties. If she were to tour Appellant/Plaintiff Post's 44 properties, she would likely see that presently they are in a condition that would receive no complaints from neighbors.¹ This is in spite of the fact that no fines have been imposed since receiving Appellant/Plaintiff's brief in support of motion

¹ Appellant/Plaintiff realizes the record cannot reflect present day facts. However, Respondent/Defendant reflects that 22 properties are presently in extreme disrepair or

for summary judgment filed in September 2005 raised the issue of procedural due process. In addition, counsel probably did not read the declarations of Mr. Post found in CP 213-231 and the pictures attached in CP 235-250. She was also likely unaware that Mr. Post had offered the City early in the process to get all of the exteriors fixed to avoid neighborhood complaints. That offer was refused. (CP 214) At the very least, the differences in presented facts should result in denial of summary judgment.

In addition, the City complains factually that it estimates that inspection of Mr. Post's properties takes approximately 50% of one inspector's time. The City passed Ordinance No. 27154 in 2003 to license rental properties for the specific purpose of paying for code enforcement services estimated to be in the amount of \$250,000.00 per year. A copy of said ordinance is attached as Appendix 2 for the Court's reference. The passage of the registration and license fee requirements show that the penalties are truly fines and not for the purpose of paying for inspections or totally as remedial purposes as claimed by the City.

The City is correct in its claim that the procedural facts or some of the procedural facts are not in dispute. Appellant/Plaintiff Post agrees the City gave him notice that his properties were either substandard or derelict and that he was imposed a fine of \$125. Said notice also allows him to appeal

neglect and substandard and/or derelict.

both the findings and the fine within 30 days. TMC 2.01.060. Strangely, LUPA allows appeals within 14 days following notice of a determination having been made. RCW 36.70B.110 (6) (d)². Appellant/Plaintiff did not contest either the determinations or the \$125.00 fine. Thirty days following the original notice, TMC 2.01.060 provides for \$250.00 per day fines. The City admits those fines are imposed without any right of the recipient of the notice to a hearing to determine whether or not the properties are in a substandard or derelict condition or whether the condition of the premises warrants a fine in the amount of \$250. (CP 435, 314, 392-393 Post & Solverson) The City also admits there is no deviation from the amount of the daily fine. The fine is \$250.00 if no work has been done on the property after receiving the original notice. The fine is \$250.00 if the work is nearly complete. (CP 241-245, CP 215) As an example, the apartment building at 1301-1311 South 8th was fined \$250.00 per day even though nearly all the work except painting the gables was complete. (CP 222-223) The City also states that Appellant/Plaintiff Post appealed only one case and the superior court affirmed that decision. This conclusion by counsel is incorrect. During

² Although the City raised a defense of exhaustion of remedies in its original answer and first amended answer, the application of LUPA as a defense was not considered until its second amended answer filed January 10, 2006. Also the City's original motion for summary judgment filed January 16, 2005, did not raise the time limits imposed by LUPA. The City abandoned the standard exhaustion of remedies defense in favor of the LUPA timelines in its second motion for summary judgment.

the appeal process, the house was severely damaged by fire and Appellant/Plaintiff and Respondent/Defendant stipulated on dismissal of the appeal since the issues were no longer relevant. The City also in footnote one states a number of Appellant/Plaintiff Post's claims are argumentative and not supported by the record in claiming the arbitrariness of the decisions of the city inspectors. The statements are supported by the declarations of Appellant at CP 435, 213-230. There is no place in the record that denies those statements and the court made no factual determination as to why the fines were not excessive or unreasonable.

B. ARGUMENT.

1. RESPONSE TO RESPONDENT/DEFENDANT CITY'S CLAIM THAT APPELLANT/PLAINTIFF POST'S CLAIMS ARE BARRED UNDER THE LAND USE PETITION ACT.

Respondent/Defendant City states that appellant did not challenge that the imposition of the penalties is a land use decision. This is absolutely not true. Appellant/Plaintiff stated that the notice of penalties served on him after determination of a fine by the inspector was not appealable to the hearings examiner. (CP 443, CP 508, CP 465, CP 468) The Respondent/Defendant City admits the same. Only land use decisions are subject to the procedures under LUPA. A land use decision is 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. RCW 36.70C.020. The record is constantly referring to the fines by the inspectors as decisions by the inspectors without giving any rights to appeal to the appellant to the hearings examiner. Since the hearings examiner is the person to make a final determination and the inspector's determination that a penalty of \$250.00 shall be imposed by the inspector without the right to appeal to the hearing's examiner, the inspector's notice is not a final determination by the hearing's examiner and therefore is not a land use decision. As cited by Respondent/Defendant City in its own brief, the Appellate Court can make a decision based upon other grounds supported by the record. (See City's Response Brief, Footnote, Page 26) There is no question the Respondent/Defendant City claims there is no appeal to the hearings examiner and therefore no decision may be made by the hearings examiner on the \$250.00 per day fine daily fines. The fact Appellant/Plaintiff Post may have erroneously referred to the inspector's decision as interim and/or interlocutory rather than not being a final determination is irrelevant when the City admits and in fact defends its position by claiming appellant has no rights following the imposition of the \$125.00 fine other than to appeal said \$125.00 fine.

In addition, Appellant/Plaintiff's differentiation of *James v. Kitsap*

County, 154 Wn.2d 572 (2005) was argued on the direct reference to LUPA found in RCW 36.70A placing impact fees into LUPA. There is a direct reference placing the civil penalties under LUPA. This argument inherently means the fining is not a land use decision.

In spite of Respondent/Defendant City's claim, Appellant/Plaintiff did raise the issue before the trial court by citing *Harrington v. Spokane County*, 128 Wn.App. 202 (2005) in stating that the \$250.00 daily fines imposed upon Appellant/Plaintiff did not come from a notice that was "clearly cognizable as a final determination of rates." See CP 507 and 508.³

Respondent/Defendant City cites *James v. Kitsap County*, 154 Wn.2d 572 (2005) and disputes Appellant/Plaintiff Post's position that RCW 82.02.050 and RCW 82.02.070 specifically allow enforcement of the impact fees under LUPA. RCW 82.02.050 (4) and 070 states as follows:

(4) Impact fees may be collected and spent only for the public facilities defined in RCW 82.02.090 which are addressed by a capital facilities plan element of a comprehensive land use plan adopted pursuant to the provisions of RCW 36.70A.070 or the provisions for comprehensive plan adoption contained in chapter 36.70, 35.63, or 35A.63 RCW.

³ The City was confused by the stipulation to dismiss the claim for monetary damages. Said claims were dismissed as a result of Post's failure to file a claim. Therefore all prayers for damages were premature and the dismissal was without prejudice. Post immediately filed a claim and after the expiration of the claim period filed another cause of action for damages. Therefore the only matters before the court are the validity of the daily fines under TMC 2.01.060 and the applicability of LUPA.

RCW 36.70A states as follows:

... continued authorization to collect and expend impact ...
are authorized to impose impact fees on development
activity as part of the financing for public facilities.

The impact fee authorized under the Land Use Petition Act (RCW 36.70A) is defined in RCW 82.02.090 (3). How much more explicit can a statute be in making the imposition of an impact fee a land use decision? There is no similar statute authorizing civil penalties to be enforced through LUPA. The only known statute authorizing civil penalties by local courts is RCW 7.80. (Mis-cited in Respondent/Appellant's brief as RCW 7.08.) It is interesting Respondent/Appellant City denies the application of *WCHS, Inc. v. Lynnwood*, 120 Wn.App. 668 (2004) as having application to the case at hand. *WCHS, Inc. v. Lynnwood* took the case out of LUPA because the decision that was made was not appealable. Likewise in the case at hand, Respondent/Defendant City states not only in its brief but in the declarations of the head of the building department that the daily fines are not appealable. It seems contradictory that the City claims the penalties are not reviewable under LUPA and on other hand exclusive means of review is under LUPA.

2. STANDARD OF REVIEW.

Respondent/Defendant City cites the case of *Teter v. Clark County*, 104 Wn.2d 227 (1985) to support its position that Appellant/Plaintiff must

prove beyond a reasonable doubt that the ordinance is arbitrary and capricious and unreasonable before it may be determined to be unconstitutional. It also claims that *Teter* supports the position that any legislative determination is appropriate if any facts justify the statute or ordinance. Respondent/Defendant City also cites *Olympia v. Thurston County*, 131 Wash.App. 85, 125 P.3d 997 (2005) to support that position. *Olympia v. Thurston County*, states as follows:

Considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement.

However, earlier in the case it states:

If statutory language is clear, the court may not look beyond the language or consider legislative history.

The language of this ordinance is clear and admitted by Respondent/Defendant City that it does not allow appeal of the daily fines. You do not get to the issue of the reasonableness of the ordinance if the ordinance is facially defective. *Harrington v. Spokane County*, supra. Respondent/Defendant also cites the case of *Weden v. San Juan County*, 135 Wn.2d 678 (1998) to support its position that the City's police power is very broad. However, Respondent/Defendant ignores a very important caveat cited in *Weden*:

... Ordinances will be presumed to be constitutional, unless a fundamental right or a suspect class is involved, in which case the presumption is reversed. *Weden* at 690.

Query: Is the police power broad enough to put a person in jail without a hearing?

The City claims its broad police power allows it to impose penalties to help pay for enforcement. Respondent/Defendant cites the case of *Margola Assocs. v. Seattle*, 121 Wn.2d 625 (1993) to support its position that the City may use its police power to regulate safe housing. The fact that Seattle imposed registration of rental housing as well as a registration fee upon rental housing owners in order to pay for the inspection for defects in the property is a regulatory position that the City of Tacoma has also taken. See Appendix 1.⁴ In *State Line Sparkler v. WV Ltd.*, 187 W.Va. 271, 418 S.E.2d 585, (1992) the state gave the city the power to impliedly enforce its violations. It should be noted that the city in *Sparkler v. WV Ltd.* limited its enforcement to a penalty of \$500. That fine was within the limits established as maximum fines for municipalities. Likewise in the state of Washington, the limitation on punishment is provided for in RCW 35.22.080 (35) where the punishment shall not exceed a fine of \$5,000.00 or imprisonment in the city jail for one year or both said fine and imprisonment. The same statute allows cities to

⁴ Under the authority given to regulate rental housing, Appellant/Plaintiff agrees with the City that the City has the police power to regulate rental housing. It has imposed annual fees to pay for the cost of enforcement. See Appendix 1 with the ordinance requiring registration and a licensing fee together with the documents supporting the basis for the ordinance.

provide violation of ordinance that constitute a civil violation subject to monetary penalties. The only civil penalties provided for by state law are for minor offenses pursuant to RCW 7.80. Cities have no power to prosecute felonies in city court and there is no claim that violation of RCW 2.10.060 is not a minor offense. TMC 2.17 limits fines for violation of ordinances to \$300.

3. RESPONSE TO CONSTITUTIONAL ARGUMENTS.

a. State v. Federal Constitutional Protections.

Respondent/Defendant City cites the case of *Gunwall State v. Gunwall*, 106 Wn.2d 54 (1986) as limiting the argument of Appellant/Plaintiff regarding prohibitions emanating from the Washington State Constitution. Appellant/Plaintiff found no differences with regard to the specific provisions of the Washington State Constitution as opposed to the U.S. Constitution. Therefore, any analysis regarding violation of Appellant's constitutional rights under both constitutions is the same and analysis by state courts would be totally appropriate.

b. Reply to Respondent/Defendant City's Position that Appellant/Plaintiff has the Burden of Proof to Show the City Acted in an Arbitrary and Capricious Manner.

Respondent/Defendant City cites the case of *Usury v. Turner Elkhorn*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed.2d. 752 (1976) to support its position that

the standard of review in the conduct of city officials is whether they acted in an arbitrary, capricious or unreasonable manner in enforcing the ordinance. That standard has been used in a number of cases where fees established by ordinances are reasonably related to the regulatory purpose of the ordinance. Only when the fees are determined to be authorized does the court reach the point of determining if the amount of the fees is arbitrary, capricious, or unreasonable. *Teter v. Clark County*, supra. While Appellant/Plaintiff Post certainly believes the penalties (not fees) are arbitrary and capricious as a result of the actions of the city inspectors in imposing those fines, Appellant/Plaintiff is also claiming that the ordinance is invalid on its face for the reasons previously stated in Appellant's Brief. *State v. WWJ Corp.*, 138 Wn.2d 595 (1999). The fact that Appellant/Plaintiff has no opportunity to appeal either the amount or the basis of the fine plus the fact the City has exceeded its authority in imposing the fines are issues that must be reached before the court determines whether the inspector's application of the ordinance to Appellant/Plaintiff's properties was unreasonable. Appellant/Plaintiff presented many facts in his declarations showing that at the very least a trial was necessary to determine whether the imposition of fines on him were arbitrary, capricious and unreasonable or excessive.

c. Procedural Due Process.

It is interesting that the City refers to the case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed.2d 484 (1972) to support its position that due process is flexible as the situation demands. *Morrissey* involved the amount of due process required to prove a parole violation. The original crime was not at issue. The court stated that minimal due process is required in the determination whether the parole had been violated. The minimal due process required that the violator be given notice of a preliminary hearing to determine probable cause that the violation had been committed. In addition, the notice should state what parole violations have been alleged. One would think that a person being found to be in possession of substandard or derelict property, and fined for said condition, would have the opportunity to determine whether the property was still substandard or derelict and whether the fine was reasonably imposed. This is analogous to the police in *Morrissey* observing what they felt to be a violation and sending him back to prison without a hearing.

Respondent/Defendant City seems to be saying in *Anderson National Bank v. Lueckett*, 321 U.S. 233, S. Ct. 599, 88 L. Ed. 692 (1944) that the city met appellant's due process rights by giving him a hearing when it gave its official notice of determination that the property was substandard and/or derelict and imposed a \$125.00 fine. There is no doubt that the condition on

Appellant/Plaintiff's property changed dramatically following the original imposition of fines. (CP 213-230) As in *Anderson National Bank v. Lueckett*, even persons who have apparently abandoned bank deposits have the right to a notice and a hearing before their deposits escheat to the state. Unlike the bank depositors, Mr. Post does not even have that right. While the City may be right in stating that procedural due process is flexible, there is no situation where any court says that money be taken from a property owner without any due process.

d. Substantive Due Process.

Respondent/Defendant City cites *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed.2d 114 (1994) to support its position that substantive due process may not be claimed where there is another specific constitutional right that covers the issue of whether the claimant's constitutional rights have been violated. In *Albright*, the person claiming the violation of constitutional rights had available to him the Fourth Amendment. The Fourth Amendment protections had not been raised in the case and the court said that that amendment must be raised first. In this case, Appellant/Plaintiff Post did raise the issues of the fines being excessive under the Eighth Amendment both on its face and factually. The court determined that there was no Eighth Amendment violation on its face and that without making any findings

whatsoever determined that Appellant/Plaintiff was not entitled to a trial to determine factually whether the fines under the particular circumstances were in violation of the Eighth Amendment. Since the Eighth Amendment was determined to not be violated by the City, Appellant/Plaintiff may then proceed under the substantive due process claim under the Fourteenth Amendment of the U.S. Constitution.

e. Eighth Amendment.

Respondent/Defendant City cites a number of cases showing large fines being imposed by the U.S. Government. Interestingly, the Respondent/Defendant City cited the case of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed.2d 674 (2001) where punitive damages were imposed in the amount of four and one-half million dollars. In a civil suit involving anti-trust violations by one company against the other, governmental penalties were not involved. The court in that case determined the Eighth Amendment did apply to punitive damages in civil cases and that the standard of review at the appellate level was a de novo review instead of abuse of discretion. The court in *Cooper* set out the three criteria that the court must go through in determining whether or not the penalties were grossly disproportionate to the offense. The trial court merely found that the Eighth Amendment had not been violated and did not

say why. Respondent/Defendant City also cited the case of *Austin v. U.S.*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed.2d 488 (1993) in support of its position that that the Eighth Amendment only applies if the intent of the legislature is to punish. Similar to the findings in *U.S. v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed.2d 314 (1998) the *Austin* court found that civil forfeitures can be punishment even if a purpose is remedial. Respondent/Defendant City agrees when it cites that monetary fines are subject to the Eighth Amendment standards when it cites *Austin*, *Bajakajian*, and *Cooper Industries*. Even the case of *U.S. v. Mackby* 339 F.3d 1013 (9th Cir. 2003) requires the court to discuss the criteria necessary in determining if fines are excessive. Respondent/Defendant City cited the case for the position that remedial sanctions involve removing dangerous items from society or making government whole.⁵

Another error Respondent/Defendant City makes in its discussion regarding the Eighth Amendment is made when it cites the case of *State v. Canfield*, 154 Wn.2d 698 (2005) in saying that Appellant/Plaintiff Post never discussed whether the penalties were punishment. Again,

⁵ Respondent/Defendant in citing *U.S. v. Mackby* seems to be agreeing that a threshold decision must be made as to whether or not the various properties of Post are in fact dangerous. It is obvious from the facts that none of Post's properties are in actuality dangerous. The criteria required by *Cooper Industries* and *Bajakajian* require the harm to the victim to be determined. That must be determined by the Court: 1. Degree of defendant's reprehensibility or culpability; 2. Relationship between penalty and harm to victim caused by defendant's actions; 3. Sanctions imposed in other cases for comparable

Respondent/Defendant City must be excused for such a mistake due to the extensiveness of the record. Appellant/Plaintiff's position regarding the penalty as punishment when he cited *U.S. v. Bajakajian*. (CP 458) *Bajakajian* held that a forfeiture is a fine for Eighth Amendment purposes if it constitutes punishment even in part. Appellant/Plaintiff and Respondent/Defendant continuously refer to penalties, fines which by definition are punishment. (See Black's Law Dictionary)

Another error of Respondent/Defendant is when it claims Appellant/Plaintiff cites *State v. WWJ Corp.*, supra, for holding that a \$500,000.00 fine was excessive. The case of *State v. WWJ Corp.*, was originally cited by the City in its briefing for the trial court to claim that a \$500,000.00 fine under the circumstances of that case was not excessive. Appellant/Plaintiff Post's response to that brief was to differentiate *State v. WWJ Corp.* on several basis. One, the main point was that the appellate court never got to the point of determining whether the fine was excessive because the issue had not been raised at the trial court level. Unlike *State v. WWJ Corp.*, the issue of the Eighth Amendment violation was thoroughly raised before the trial court. Interestingly, the Supreme Court overruled the Court of Appeals on one issue and that issue was that constitutional issues could be raised for the first time in the Court of Appeals whether the case is civil or

conduct.

criminal in nature.

Respondent/Defendant City cites a number of cases including *U.S. v. Gurley* , 384 F.3d 316 (6th Cir. 2004) and *Qwest Corp. v. Minnesota PUC* , 427 F3d 1061 (8th Cir. 2005) to support its position that substantial civil penalties will be upheld as not being excessive. All of those cases must be examined as to why those penalties were upheld. All the cases cited by Respondent/Defendant City are federal cases involving violations of federal law. Unlike the City of Tacoma, the federal government can impose civil penalties based upon violations that protect the citizens of the entire country. Unlike the City of Tacoma, the federal government can make criminal laws and impose fines for the violation thereof for violations of serious penalties.⁶ Unlike the City of Tacoma, the federal trial courts and all trial courts whether state or federal made factual determinations to determine whether the criteria imposed by *Austin*, *Cooper*, and *Bajakajian* were considered. There is nothing in the record to indicate that the court considered the required criteria. Even if the trial court had considered the criteria, the record is replete with disputed facts that would have required a trial.

⁶ TMC 2.17 restricts the City to a maximum of \$300.00 fine and 90 days in jail or both for violations of criminal laws.

f. Double Jeopardy.

Respondent/Defendant City claims that double jeopardy applies only to criminal punishments for the same offense. While *Hudson* did find that double jeopardy was not established, *Hudson* involved a case where there was a civil penalty in addition to a criminal finding and *Hudson* was punished for the criminal offense as well as being imposed with a civil penalty. The decision that must be made by this Court as to whether the imposition of \$250.00 per day fines following one hearing and one finding followed by subsequent multiple imposition of fines for the same conduct fined pursuant to the original notice.

C. CONCLUSION.

Appellant/Plaintiff ask this Court to reverse the trial court and hold Respondents'/Defendants' actions in fining Appellant/Plaintiff in violation of his constitutional rights in violation of the Washington State and U.S. Constitutions and are enjoined from the date of filing. In addition, Appellant/Plaintiff asks the Court to determine Defendants'/Respondents' fining in excess of authority given it by the State of Washington. In addition, Appellant/Plaintiff asks this Court to determine the actions by Defendants/Respondents violate Appellant's/Plaintiff's civil rights in violation of 42 U.S.C. § 1983. Alternatively, Appellant/Plaintiff asks this

Court to reverse the trial court and remand for trial on the issue of whether
Respondent's/Defendant's fining is excessive as practiced.

Respectfully submitted,

DATED:
January 16, 2007

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APPENDIX

1.	Ordinance No. 27154	3
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Appendix 1



ORDINANCE NO. 27154

AN ORDINANCE relating to licenses and rental properties; amending Chapter 2.01 of the Tacoma Municipal Code by repealing Section 2.01.100 thereof; amending Chapter 6.24 by amending Section 6.24.020 thereof; and amending Chapter 6.69 by amending Section 6.69.020.

WHEREAS the activity of rental of real estate is recognized by the City as a business activity, and

WHEREAS it is not the intent of this ordinance to assess a Business and Occupation Tax against such activity, and

WHEREAS it has been statistically demonstrated that some rental facilities are responsible for a disproportionate share of police and emergency medical calls for service and blighted property conditions, and

WHEREAS licensing is a tool to hold landlords accountable for conditions and activities on their properties, and

WHEREAS the rental license fees may help to sustain crime prevention and code enforcement services, including training, education, and inspection, and

WHEREAS it is the intention of the City to implement a business license fee for the activity of rental of real estate; Now, Therefore,

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. That Section 2.01.100 of the Tacoma Municipal Code is hereby repealed in its entirety as follows:

~~**2.01.100 Residential Building Rental Registration Program.**~~

~~A. General. All buildings containing dwelling units for rent shall be registered with the Public Works Department, Building and Land Use Services~~

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1 ~~Division. All existing buildings containing dwelling units for rent shall be~~
 2 ~~registered upon notification of the building owner or property manager. All~~
 3 ~~buildings containing dwelling units for rent, which are under permit either as a~~
 4 ~~new building or addition and/or remodel to an existing building, shall be~~
 5 ~~registered during the final inspection or certificate of occupancy process, if not~~
 6 ~~previously registered.~~

7 ~~B. Purpose. The sole purpose of the Residential Building Rental~~
 8 ~~Registration Program is to prevent neighborhood blight and deterioration by~~
 9 ~~providing accurate information for the notification of owners, or the owners'~~
 10 ~~agents, by officers of the City of Tacoma, so as to be able to respond quickly~~
 11 ~~and accurately if a complaint is filed against the property. It is also the intent of~~
 12 ~~this program to offer incentives for the voluntary compliance of all residential~~
 13 ~~rental buildings with the Crime Prevention Through Environmental Design~~
 14 ~~(CPTED) and the participation of all multiple family rental buildings in the~~
 15 ~~Crime Free Multi-Family Housing Program.~~

16 ~~C. Scope. The Residential Building Rental Registration Program shall~~
 17 ~~apply to all buildings that contain one or more dwelling units which, for payment~~
 18 ~~of money, goods, and/or services, are rented or leased to any individual or~~
 19 ~~group of individuals.~~

20 ~~D. Registration Information.~~

21 ~~1. In order to register residential rental buildings, the following~~
 22 ~~information shall be provided to the Public Works Department, Building and~~
 23 ~~Land Use Services Division:~~



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- a. ~~The owner's and local agent's name.~~
- b. ~~The address where the owner or local agent will receive mail.~~
- c. ~~The owner's or local agent's 24-hour telephone number.~~
- d. ~~The address of each residential rental property owned within the City of Tacoma.~~
- e. ~~A list of the number of dwelling units at each rental address.~~
- f. ~~The name and telephone number of the on-site manager, if applicable.~~

~~2. In addition to the information required by Subsection 1.a above, each owner whose principal place of residence is outside a 50-mile radius measured from the City of Tacoma Municipal Building at 747 Market Street, shall provide the following information:~~

- a. ~~The name of one local agent for each property.~~
- b. ~~The address where the local agent will receive mail.~~
- c. ~~The local agent's telephone number and/or a 24-hour emergency telephone number.~~

~~All of the above information shall be submitted to the Public Works Department, Building and Land Use Services Division, on forms provided for that purpose.~~

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E. Registration Fees.

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1. A registration fee of \$25.00 shall be paid by each owner of residential rental properties. The single registration fee shall cover all residential rental properties within the City of Tacoma under a single ownership or licensed property management company. An owner may authorize a licensed property management company to register said residential rental properties.

2. Changes in information from the initial registration, including additions or deletions from the ownership list, shall be assessed a fee of \$10.00.

F. Incentives. The registration fee shall be waived for all owners of residential rental properties who voluntarily participate in the Tacoma Crime Free Housing Program and meet the certification requirements.

EXCEPTION: Owners are not personally required to participate in the training program if they employ a property manager who has completed the Tacoma Crime Free Housing Program training component.

G. Penalties.

1. When an owner of rental property has been notified to register his/her properties in accordance with the requirements of Subsection A, he/she shall have 30 calendar days in which to comply from the date of receipt of the letter of notification, sent by both first class mail and by certified mail, return receipt requested.



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~~2. In the event the owner of such property fails to register said property within the allotted time, a civil penalty or penalties, in accordance with the first penalty assessment in Table F, shall be assessed. These penalties are intended to be only for remedial purposes. A new letter requesting registration of the property shall be sent to the owner along with the assessment of the first penalty. The owner shall be given 30 calendar days from the receipt of the second letter to register the property.~~

~~3. In the event the owner of such property still fails to register said property within the allotted time, a civil penalty or penalties, in accordance with the second penalty assessment in Table F, shall be assessed. A new letter requesting registration of the property shall be sent to the owner along with the assessment of the first penalty. The owner shall be given 14 calendar days from the receipt of the third letter to register the property.~~

~~4. In the event the owner of such property still fails to register said property within the allotted time, a civil penalty or penalties, in accordance with the third penalty assessment in Table F, shall be assessed. A new letter requesting registration of the property shall be sent to the owner along with the assessment of the first penalty. The owner shall be given seven calendar days from the receipt of the fourth letter to register the property.~~

~~5. In the event the owner of such property still fails to register said property within the allotted time, a civil penalty or penalties, in accordance with the Fourth Penalty and Subsequent Assessments in Table F, shall be assessed. A new letter requesting registration of the property shall be sent to~~

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1 the owner along with the assessment of the fourth penalty. The owner shall be
2 given seven calendar days from the receipt of the fifth and subsequent letter(s)
3 to register the property.

4 ~~6. The process described in Subsection (e) above shall be~~
5 ~~repeated every seven days until such time as the owner registers his/her~~
6 ~~residential rental property(ies), each time assessing penalties in accordance~~
7 ~~with the Fourth Penalty and Subsequent Assessments in Table F.~~

8 Section 2. That Section 6.24.020 of the Tacoma Municipal Code is
9 hereby amended to read as follows:

10 **6.24.020 Exemptions.** The fee assessed by the provisions of this
11 chapter shall not apply to:

12 A. Any charitable organization that has been exempted from payment of
13 taxes to the Federal government under Section 501(c)(3) of the United States
14 Internal Revenue Code;

15 B. Day Cares, Bed and Breakfasts, and Boarding Homes.

16 C. Business of renting or leasing real property.

17 GD. Effective January 1, 1997, provisions of this chapter shall not apply
18 to those persons whose gross business income is derived from service activity
19 in or with the City of Tacoma ("City") generating annual gross income of less
20 than \$1,000.00.
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Section 3. That Section 6.69.020 of the Tacoma Municipal Code is hereby amended to read as follows:

6.69.020 Date of payment. The annual license fee prescribed herein shall be due on the first day of January of each year, ~~provided, however, that the taxpayer shall have until March 31, 1992, to pay without incurring a penalty, and until January 31st of subsequent years.~~ Effective January 1, 2004, taxpayers who engage in the business of renting or leasing real property in the City shall pay the annual license fee. Said taxpayers shall have until March 31, 2004, to pay without penalty, and until January 1 of subsequent years. The amount of penalties to be assessed shall be calculated pursuant to the provisions of Section TMC 6.02.050 of the Official Code of the City of Tacoma.

Passed _____

Mayor

Attest:

City Clerk

Approved as to form and legality:



Assistant City Attorney

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REQUEST FOR ORDINANCE OR RESOLUTION

CITY CLERK USE

Request #:	9732
Ordinance #:	27154
Resolution #:	

1. DATE: September 23, 2003

2. REQUESTING DEPARTMENT/DIVISION Finance, Tax and License Division PWD/Building and Land Use Services	3. CONTACT PERSON (for questions): Jodie Trueblood, T & L Manager Lisa Wojtanowicz, BLUS, Program Coordinator	PHONE 591-5251 591-5267
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4. PREPARATION OF AN ORDINANCE IS REQUESTED FOR THE CITY COUNCIL MEETING OF TUESDAY, OCTOBER 14, 2003.

5. SUMMARY TITLE/RECOMMENDATION: (A concise sentence, as it will appear on the Council Agenda)

Authorize proposed amendments to Chapter 2.01 of the Tacoma Municipal Code (TMC) by repealing Section 2.01.100 thereof; and, amend Chapter 6.24 Section 6.24.020 thereof; and, Chapter 6.69 Section 6.69.020 relating to business licenses and the activity of rental of real estate.

6. BACKGROUND INFORMATION/GENERAL DISCUSSION:

On December 3, 2002, the City Council passed Resolution 35712 directing staff to form an advisory committee consisting of representatives of the City, community stakeholders from the commercial rental industry, neighborhood business districts, apartment owners, single-family dwelling rental owners and neighborhood councils to establish a proposal to reduce criminal activity and improve building conditions at rental properties.

By amending Section 6.69.020 of the TMC, a requirement for an annual business license for the activity of renting or leasing real property will be implemented. This activity is recognized by the City as a business activity. It has been statistically demonstrated that some rental facilities are responsible for a disproportionate share of police and emergency medical calls for service and blighted property conditions. Licensing is a tool to hold landlords accountable for conditions and activities on their properties. This license will apply to residential and commercial properties. By amending Section 6.24.020 of the TMC, the business of renting or leasing real property will be exempt from the requirement to obtain a home occupation license.

By repealing Section 2.01.100 of the TMC, the rental registration requirement in the Minimum Building and Structures Code will be eliminated.

In addition to focus groups comprised of property owners, input has been received from the Cross District Association of Tacoma and the Olympic Rental Association.

7. FINANCIAL IMPACT: (Future impact on the budget.)

It is anticipated that the fees from this ordinance will be utilized to cover additional resources necessary to implement the program, provide education, and to cover some enforcement costs. It is estimated that approximately \$250,000 will be generated annually.

8. LIST ALL MATERIAL AVAILABLE AS BACKUP INFORMATION FOR THE REQUEST AND INDICATE WHERE FILED:

Source Documents/Backup Material	Location of Document
Draft Ordinance and Proposed Amendments	City Clerk

9. FUNDING SOURCE:

Fund # & Name:	State \$	City \$	Other \$	Total Amount
If an expenditure, is it budgeted?	<input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Where? Org #	Acct #

10. ATTORNEY CONTACT: Kari Sand, Assistant City Attorney, 591-5074.

 William L. Pugh, P.E., Public Works Director	Approved as to Availability of Funds Steve Marcotte, Finance Director	 James L. Walton, City Manager
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Appendix 2

Chapter 6.69

LICENSES

Sections:

6.69.010 Annual license fee.

6.69.015 Exemptions.

6.69.020 Date of payment.

6.69.025 Failure to file.

6.69.030 License required to be posted at each business location.

6.69.040 Suspension or revocation.

6.69.045 Statute of limitations - Unlicensed taxpayers.

6.69.050 Mailing of notices.

6.69.060 Severability.

6.69.070 Violation - Penalties.

6.69.010 Annual license fee.

There is hereby imposed an annual license fee of \$72.00 on all persons for the act or privilege of engaging in business activities with the City of Tacoma or within the City, whether his/her office or place of business be located within and/or outside the City limits of Tacoma. The fee shall be prorated in the amount of one-twelfth of the annual fee for each month or part thereof as to all first-time registrants commencing business after January 1st. (Ord. 25072 § 1; passed Mar. 3, 1992; Ord. 25019 § 8; passed Dec. 3, 1991)

6.69.015 Exemptions.

Except as hereinafter provided, the fee assessed by the provisions of this chapter shall not apply to:

A. Any person in respect to a business that has an annual gross income of \$10,000.00 or less.

B. Any charitable organization that has been exempted from payment of taxes to the federal government under Section 501(c)(3) of the Internal Revenue Code.

C. Effective January 1, 1997, provisions of this chapter shall not apply to those persons whose gross business income is derived from service activity in or with the City of Tacoma generating annual gross income of less than \$1,000.00.

D. Effective January 1, 2003, provisions of this chapter shall not apply to those persons whose gross business income is derived from activity occurring both within and without the City of Tacoma generating annual gross income of less than \$10,000.00. (Ord. 27010 § 78; passed Nov. 19, 2002; Ord. 26027 § 19; passed Feb. 11, 1997; Ord. 25648 Ord. § 2; passed Dec. 20, 1994; 25072 § 2; passed Mar. 3, 1992)

6.69.020 Date of payment. The annual license fee prescribed herein shall be due on the first day of January of each year, ~~provided, however, that the taxpayer shall have until March 31, 1992, to pay without incurring a penalty, and until January 31st of subsequent years.~~ Effective January 1, 2004, taxpayers who engage in the business of renting or leasing real property in the City shall pay the annual license fee. Said taxpayers shall have until March 31, 2004, to pay without penalty, and until January 1 of subsequent years. The amount of the penalties to be assessed shall be calculated pursuant to the provisions of ~~Section TMC 6.02.050 of the Official Code of the City of Tacoma.~~

6.69.025 Failure to file.

If any taxpayer fails, neglects, or refuses to file license application as and when required under this chapter, the Director is authorized to determine the amount of fee payable, together with any penalty assessed under the provisions of this chapter, and by mail notify such taxpayer of the amount so determined, which amount shall thereupon become the fee and penalty and shall become immediately due and payable. (Ord. 26027 § 20; passed Feb. 11, 1997)

6.69.030 License required to be posted at each business location.

The business licensee shall be personal and nontransferable. In case business is transacted at two or more separate places by one taxpayer, a separate license for each place at which business is transacted with the public shall be required, but no fee shall be required for such additional licenses. Each license shall be numbered, shall show the name, place, and character of business of the taxpayer, such other information as the Director shall deem necessary, and

shall at all times be conspicuously posted in the place of business for which it is issued. Where a place of business of the taxpayer is changed, the taxpayer shall return the license to the Director, and a new license shall be issued for the new place of business, free of charge.

No person to whom a license has been issued pursuant this chapter shall suffer or allow any person for whom a separate license is required to operate under or display his/her license; nor shall such other person operate under or display such license. (Ord. 25019 § 8; passed Dec. 3, 1991.)

6.69.040 Suspension or revocation.

The Director shall have the power and authority to suspend or revoke a license issued under the provisions of this title. The Director shall notify such licensee in writing by certified mail of the suspension or revocation of his/her license and the grounds therefor. Any license issued under this title may be suspended or revoked based on one or more of the grounds set out in Section 6.02.070 of the Official Code of the City of Tacoma. The procedures to be followed relative to such revocation or suspension are those set out in Section 6.02.070. (Ord. 26027 § 21; passed Feb. 11, 1997; Ord. 25019 § 8; passed Dec. 3, 1991)

6.69.045 Statute of limitations – Unlicensed taxpayers.

With regard to unlicensed taxpayers, no assessment or correction of an assessment for additional fees and penalties may be made due by the Director more than five years after the close of the calendar year, except upon showing of the taxpayer's failure to file license application as and when required under this chapter, which failure to file license application resulted from the taxpayer's willful and fraudulent intent to avoid payment of required fees. (Ord. 26027 § 22; passed Feb. 11, 1997)

6.69.050 Mailing of notices.

Any notice required by this chapter to be mailed to any taxpayer shall be sent by ordinary mail, addressed to the address of the taxpayer as shown by the records of the Director, or if no such address is shown, to such address as the Director is able to ascertain by reasonable effort. Failure of the taxpayer to receive such mailed notice shall not release the taxpayer from any fee or any penalties thereon, nor shall such failure operate to extend any time limit set by the provisions of this chapter. (Ord. 25019 § 8; passed Dec. 3, 1991)

6.69.060 Severability.

If any provision or section of this chapter shall be held void or unconstitutional, all other parts, provisions, and sections of this chapter not expressly so held to be void or unconstitutional shall continue in full force and effect. (Ord. 25019 § 8; passed Dec. 3, 1991)

6.69.070 Violation - Penalties.

Any person violating or failing to comply with any of the provisions of this chapter or any lawful rule or regulation adopted by the Director pursuant thereto, upon conviction thereof, shall be punished by a fine in any sum not to exceed \$1,000.00, or by imprisonment in the county jail for a term not exceeding 90 days, or by both such fine and imprisonment. (Ord. 26027 § 23; passed Feb. 11, 1997; Ord. 25019 § 8; passed Dec. 3, 1991)

6.24.050 Violation - Penalties.

A. Any person violating or failing to comply with any of the provisions of this chapter or any lawful rule or regulation adopted by the Director pursuant thereto, upon conviction thereof, shall be punished by a fine in any sum not to exceed \$1,000.00, or by imprisonment in the county jail for a term not exceeding 90 days, or by both such fine and imprisonment.

B. That person shall also be subject to a civil penalty of \$250.00 a day for each day during which the business is carried on in violation of this Chapter or the Conditional Home Occupation Agreement.

C. A license may be suspended or revoked in accord with TMC 6.02.070. (Ord. 26340 § 4; passed Dec. 8, 1998; Ord. 22251 § 12; passed Nov. 25, 1980)

6.02.070 Suspension or revocation.

The City Manager, or any officer of the City designated by him, shall have the power and authority to suspend or revoke any license issued under the provisions of this title. The City Manager, or such officer of the City designated by him, shall notify such licensee in writing by certified mail of the suspension or revocation of his/her license and the grounds therefor. Any

license issued under this title may be suspended or revoked based on one or more of the following grounds:

- A. The license was procured by fraud or false representation of fact.
- B. The licensee has failed to comply with any of the provisions of this title.
- C. Licensee's continued conduct of the business for which the license was issued will result in a danger to the public health, safety, or welfare by reason of any of the following:
 - 1. The licensee, his/her employees or agents have been convicted of a crime, which bears a direct relationship to the conduct of the business under the license issued pursuant to this title.
 - 2. The licensee, or his/her agents or employees, have in the conduct of the business, violated any law or ordinance relating to public health or safety.
 - 3. The conduct of the business for which the license was issued has resulted in the creation of a public nuisance as defined in the Tacoma Municipal Code, or in state law.

Any licensee may, within 10 days after receipt of such notice of suspension or revocation, appeal from such suspension or revocation by filing a written notice of appeal setting forth the grounds therefore with the City Clerk, and the City Clerk shall set a date for the hearing of such appeal before the Hearing Examiner, and the City Clerk shall notify the licensee by mail of the time and place of the hearing. After the hearing thereon the Hearing Examiner shall, after appropriate findings of fact, and conclusions of law, affirm, modify, or overrule the suspension or revocation and reinstate the license, and may impose any terms upon the continuance of the license which to the Hearing Examiner may seem advisable. No suspension or revocation of a license issued pursuant to the provisions of such chapters shall take effect until 10 days after receipt of the notice thereof by the licensee, and if appeal is taken as herein prescribed the suspension or revocation shall be stayed pending final action by the Hearing Examiner. All licenses which are suspended or revoked shall be surrendered to the City on the effective date of such suspension or revocation.

(Ord. 24747 § 4; passed Oct. 23, 1990: Ord. 23837 § 1; passed May 5, 1987: Ord. 21974 § 3; passed Jan. 29, 1980: Ord. 19225 § 2; passed Nov. 4, 1970: Ord. 17926 § 1, 2; passed Sept. 14, 1965)

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STATE OF WASHINGTON
BY C. M. M.
DEPUTY

NO. 34808-0-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST,

Appellant,

vs.

CITY OF TACOMA; CITY OF
TACOMA DEPARTMENT OF
PUBLIC WORKS BUILDING AND
LAND USE SERVICES DIVISION;
RISK MANAGEMENT
ALTERNATIVES INC.; and
CHARLES SOLVERSON,

Respondents.

NO. 34808-0-II

DECLARATION OF
SERVICE

Everett Holum states:

I, Everett Holum, attorney for Appellant in the above-entitled cause of

DECLARATION OF SERVICE - 1

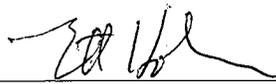
ORIGINAL

action, over 18, competent to testify on the matters stated herein and do so based on personal knowledge.

On January 16, 2007, I filed an original and one true and correct copy of Appellant's Reply Brief and Declaration of Service at *The Court of Appeals of the State of Washington, 949 Market Street, Suite 500, Tacoma, Washington 98402*. In addition, I served one true and correct copy of Appellant's Reply Brief and Declaration of Service to *Ms. Debra E. Casparian at 747 Market Street, Rm 1120 Tacoma WA 98402-3767*.

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

DATED at Tacoma, Washington, on January 16, 2007.



Everett Holum