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Court of Appeals
Division II
State of Washington

NO. 49854-5-II

DIVISION II OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

CHURCH OF THE DIVINE EARTH

APPELLANT

V.

CITY OF TACOMA,

RESPONDENT.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION TO CHAOS

This action arises under RCW 64.40 to recover damages for imposition of an unconstitutional 30 foot right-of-way exaction as a condition to a single family residential building permit; and to recover reasonable attorney fees and penalties for silently withholding documents contrary to the Public Records Act, RCW 42.56.

Fundamental to any 64.40 action is proper identification of the "final decision" of the agency. The Church argued the final decision was the Letter Decision of Director Huffman dated April 28, 2014. P84[1] The City argued the final decision was that of the City's Hearing Examiner dated August 19, 2014. P105 Both called for a 30 foot right-of-way exaction as a permit condition.[2] The Court entered Conclusion of Law 1 holding the "final decision" was the Hearing Examiner's decision. CP 2407

However at the oral hearing of the Church's LUPA appeal on February 19, 2015, Deputy City Attorney Jeff Capell, for the first time, stated the exaction required of the Church was 8 feet, not 30. RP 14 ("It's only 8 feet *now*"), 26, 32 Judge Elizabeth Martin trusted him,

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[1] Exhibits identified by plaintiff Church begin with "P", those from the City begin with "A." P135-143 are deposition excerpts received into evidence.

[2] See note 10 infra for Huffman testimony that his Letter Decision called for 30 feet.

interlineating same on the face of the order,[3] notwithstanding the clear text of the Hearing Examiner order and prior LUPA briefs by all the parties, *including the City,* referencing a 30 foot exaction. CP 230[4], 233, 272[5] Nonetheless Judge Martin concluded even an 8 foot exaction was an unconstitutional condition lacking nexus to the project, but based on that 8 interlineation trial Judge Vicky Hogan considered herself bound to conclude 8 feet was the exaction and entered an order in limine excluding all evidence to the contrary CP1927; and announced at the beginning of trial she had prejudged the issue. RP 297, 345 Quixotically the court also granted the Church's motion in limine excluding evidence that the dedication condition was imposed for any reason other than right of way uniformity although only 30 feet, not 8, would make it uniform. CP 1929, RP 300

The primary legal issue at the trial was whether the City knew or should have known the condition was unlawful as per RCW 64.40.020. Since the 30 foot condition was justified on its face to require the Church to make B Street right of way uniform with adjacent property to the South

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[3] "The City of Tacoma violated the Petitioner's due process rights as secured by the Fourteenth amendment and the Takings clause of the United States Constitution by requiring a 8 foot dedication of land to the City as a condition to issuance of a single family residential building permit...and by failing to carry its burden to prove the condition complied with the requirements of *Nollan*..."

[4] 2,472 square feet divided by length of 82.4 feet (RP 192) equals an exaction 30 feet wide

[5] The City brief filed one day before the LUPA hearing relies on the Amended Declaration of Huffman which calls for 30 feet.

by dedicating 30 feet to the City, not because of any impact of the project, the Letter Decision and the Hearing Examiner decision were facially indefensible, as was the mythical 8 foot decision which obviously didn't even achieve uniformity of right of way. Moreover, the City had no plans to build out any increased right of way in any event. RP782, P142 p.25

At trial the City didn't even try to justify the actual 30 foot exaction, rather attempted to justify *8 feet* as meeting nexus requirements, despite the court's order in limine which said the only justification for the exaction could be to achieve a uniform right of way. Ultimately the court legally concluded that City *reasonably believed* the right of way dedication condition was lawful dismissing the Church's 64.40 cause of action. This was an error of law

Approximately one year before the trial the Church moved to amend its complaint to add a cause of action for the federal constitutional violation under 42 USC 1983. Despite language in CR 15 that leave should be "freely given" to amend in such situations, and the City claimed no prejudice, the court denied the amendment claiming the amendment was "futile.". CP 573, 639 This was also an error of law.

The court also dismissed the Church's claim under the Public Records Act (PRA) notwithstanding requested notes and a video were silently withheld for a full year after the original request, long after the

City had closed its response. Apparently the court legally concluded mistakes or human error is a defense under the PRA for withholding documents. This was also an error of law.

II. STATEMENT OF THE CASE: EXTORTION, LIES AND VIDEO TAPE

1. EXTORTION

In September 2013 Pastor Terry Kuehn, a gentleman in his mid-seventies, attempted to realize his life's dream by submitting an application to the City of Tacoma's Department of Planning and Development Services to build a parsonage where he and his wife of many years could live out the remainder of their lives.[6] However within a handful of days the Department had stopped all processing of the building permit until and unless Mr. Kuehn deeded to the City, without compensation, a 30 foot wide strip of land facing B Street, i.e. 2,472 square feet. P50 The stated reason for the dedication was to make the Church property lines, established by platting more than 100 years prior, "uniform" with the lot line of neighboring property immediately to its south, thereby increasing City right-of-way by that measure. P46 Pastor Kuehn's dream had become a nightmare.

Of course the dimensions of the lot previously platted a century before had nothing whatsoever to do with the planned construction of a

[6] Sadly Mrs. Kuehn did not survive the process. She died of cancer in the winter of 2014.

parsonage, which was simply to replace a prior single family residence built in 1909, demolished within six months of the church's purchase of the property. RP 20, 234, 468, 469

However Pastor Kuehn was a man not only of spiritual persuasion but also worldly experience, a man of business and a licensed real estate agent, who recognized the condition for what is was, extortion.

And Pastor Kuehn had firm legal ground upon which to take his stand. A long line of cases starting with *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) holds to require a real property exaction as a development condition the government has the burden to justify the condition as a proportional remedy to some problem caused by the newly permitted development. Without this essential nexus "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" [Citing cases] *Nollan,* 483 U.S. at 837

In an effort to fight this condition as well as others Pastor Kuehn followed the advice of City staff to file a request on a City form directed to the Director of Planning and Development Services, Peter Huffman, to "waive" the objectionable conditions. Pastor Kuehn filled out the form and

filed it with the City on November 12. 2013. P57[7] At that time, and over the ensuing months, Pastor Kuehn further supported his waiver request with eleven "supplements" where he quoted relevant case law and city ordinances regarding the unconstitutional exaction. See e.g. P58 p.6 ("unconstitutional exaction"), P66 p. 3 ("unlawful and unconstitutional exaction"), P77 p.5 (quotes *Koontz*) There is no evidence City staff much less Director Huffman bothered to read the waiver request (Huffman testified he didn't, P141, p.19) much less read or seriously consider the grounds spelled out to support it in the Church's 11 supplements. The City *never* provided Pastor Kuehn a substantive response why the exaction was *not* extortion. RP 279

In March 2014 a Public Works staffer, Jennifer Kammerzell, recommended the exaction be reduced to 8 feet, P75, but argued no supporting nexus to the proposed construction of a single family residence to even support that. She testified she had no authority to change the condition herself, P140 p.14, and didn't know if her recommendation was accepted by Director Huffman. P140 p. 28 In fact her recommendation was not even seen by Director Huffman when he issued his final *appealable* Letter Decision on April 28, 2014. P141 p.72 There he summarily denied the waiver request, and every part thereof, including the

[7] "proposed demands by city of Tacoma are unlawful exactions..."

request to waive the 30 foot dedication. P141 p.49 The Letter Decision advised the Church it had 14 days to file an administrative appeal to the city's hearing examiner or be barred from further challenge. P84 Huffman testified his was the final denial on the waiver. P141, p.31 Thereupon, the Church paid the filing fee and sought administrative review.

On August 19, 2014 the Hearing Examiner rendered summary judgment in favor of the City. P105 He relied on Mr. Huffman's Amended Declaration of July 9, 2014, P98, wherein Mr. Huffman repeated the City's demand for a 30 foot dedication totaling 2,472 square feet for the sake of right-of-way uniformity—not any problem caused by building a small replacement house on a residential lot. The Hearing Examiner directed that the permit only issue upon fulfillment of that condition referenced in that Amended Huffman Declaration.

The Church obtained counsel and timely appealed to Superior Court under the Land Use Protection Act (LUPA) joining this claim with one for damages under RCW 64.40.020. CP 1 On February 19, 2015, Judge Elizabeth Martin of the Pierce County Superior Court struck the condition for the real property exaction as unconstitutional under *Nollan*, opining, however, that based on the oral argument of the City attorney she believed the exaction was for 8 feet rather than 30. RP 32 However since

neither bore any nexus to the proposed development she concluded the result was the same: the unconstitutional condition must be stricken.

The significance of the alteration from 30 feet to 8 feet will be discussed in the next section. The damage portion of the case proceeded under 64.40 before Judge Martin until shortly before the trial which was conducted by Judge Vicky Hogan (now retired).

In the Spring and Summer of 2015 the church sought timely amendments to its complaint to add causes of action for the federal constitutional violation under 42 USC 1983 and add specific reference to a sidewalk condition actionable under the 64.40 claim. The city bitterly opposed these amendments even though the trial was a year away. The trial court denied leave to amend claiming "futility", CP 573, 639, which is also assigned as an error of law.

In May 2016 the 64.40 claim and a separate claim under the Public Records Act (PRA) went to trial before Judge Hogan. Judge Hogan granted motions in limine filed by the City forbidding the Church from even offering any evidence the exaction sought and defended by the City was 30 feet rather than 8 CP 1927 and forbid the church from offering any evidence that the sidewalk condition was arbitrarily imposed without code authority. Moreover the Judge granted the Church's motion in limine to exclude any evidence that the "8 foot" exaction was imposed for any

purpose other than right of way uniformity RP 1929; although 8 feet couldn't make it "uniform" in any event. She ultimately denied the Church any relief under 64.40 legally concluding the City did not know nor should it have known the exaction was unlawful. She also denied any relief under the PRA legally concluding the City conducted a "reasonable" search even though it mistakenly silently withheld a video and staff notes for a year after the original request, long after it closed its response to the request. The church's motion for reconsideration was denied CP 2478 and this appeal follows.

2. LIES

Lawyers must zealously advance the cause of their clients, and should be commended for doing so; however there are limits, such as honesty. In this case Tacoma City Attorney Elizabeth A. Pauli, through her deputies, crossed the line by lying to the court and cheating the Church of a fair trial.

The facts are quite straight forward. Throughout the course of the administrative appeal, and before, the City Attorney defended the 30 foot development condition (2,472 square feet). This was perfectly consistent with Director Huffman's Letter Decision of April 28, 2014 which denied the Church's request to waive this and other conditions. Whenever

meeting with Pastor Kuehn, Deputy Capell was always adamant that the City demanded 30 feet. RP 301, 349, P100

After the Hearing Examiner made the parties aware that he would entertain motion(s) for summary judgment, the parties filed cross motions. The City's motion was supported by a declaration from Peter Huffman dated July 3, 2014. P96 That declaration stated the City would waive all contested conditions except for an exaction of 659 square feet (equivalent to 8 feet) to achieve a "uniform" right-of-way. At the same time Deputy Capell emailed Pastor Kuehn a proposed legal description for the dedication deed which described a 30 foot exaction. P93 Pastor Kuehn immediately emailed Deputy Capell asking the legal description be corrected to conform to the Huffman declaration of July 3 as that was a welcome change from the Church's perspective. P97 Capell discovered the discrepancy, emailing back to Pastor Kuehn that he, Capell, had made a mistake because he and the City all along was demanding 30 feet, as he had personally told Pastor Kuehn for weeks. P100 He refused to correct the "*accurate*" legal description and then amended his summary judgment motion P101 and the Huffman declaration P98 to reflect the proper square footage for a 30 foot exaction. Attached to the Amended Declaration was a map showing the right-of-way increased by 30 feet to make the right of

way uniform. The City Attorney stood on that Amended Declaration[8] for the remainder of the administrative appeal, never informing the Hearing Examiner RP 645, 671 or Pastor Kuehn anything to the contrary. RP 367-8

That 30 foot decision was then taken up in a LUPA appeal. Briefs filed by the Church argued the 30 foot dedication condition violated the *Nollan* nexus rule. The Respondent City's brief of January 29, 2015 stated: "In the HEX decision, the Hearing Examiner upheld the City's ability to require dedication of an aria of real property approximately 2,472 square feet in area..." CP 230 He further stated: "...the Subject property protrudes out a distance of approximately thirty (30) feet farther to the West than all other lots..." CP 233 He argued CP 238 lack of uniformity was the problem which in turn caused other problems. Only an exaction of 30 feet would solve the uniformity "problem," however.

Deputy Capell attached various documents to his brief not before or germane to the hearing examiner decision even though documents outside the administrative record are not admissible in a LUPA appeal. RCW 36.70C.120. One of those attached documents was the Kammerzell

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[8] Throughout the trial the City attempted to impeach the Amended Declaration as "mistakenly signed." Director Huffman verified an interrogatory response under oath that "A staff person, who did not know that the right of way dedication had been reduced to eight feet, made what she thought was a correction to the declaration but what, in fact, was an error." RP 569 At trial Huffman testified the declaration was presented to him for signature by Jeff Capell, who is neither his staffer nor a "she." RP 569-70 Of course the Amended Declaration of Huffman was presented to the Church and the Hearing Examiner, never modified or withdrawn, and was the basis of the examiner's decision.

memo of March 5, 2014 P75 which referenced her suggestion the exaction could be reduced to 8 feet—a suggestion the hearing examiner found had been subsequently changed by the City to 30 feet. P105, CP 13, para. 9 – 10 Moreover the City's Response to the Church's Motion to Strike signed on behalf of City Attorney Elizabeth Pauli on February 18th (one day before the oral hearing) specifically notes the Hearing Examiner decision incorporated the condition set forth in the Huffman Amended Declaration of July 9, i.e. 30 feet.

But the next day February 19 at the oral hearing, when the court expressed doubt the City's condition could pass constitutional muster, the City Attorney through her deputy misrepresented to the Court on three separate occasions that the exaction decision was "now" only 8 feet rather than 30. RP 14, 26, 32 This false statement was apparently an effort to make the exaction more palatable to the court. Notwithstanding, the court recognized there was no nexus to the condition in any event. Unfortunately she trusted the City Attorney to tell her the truth about the demanded exaction rather than relying upon the Hearing Examiner decision, review of which was the only issue before her.

Mr. Capell was later to testify at trial as a City witness. He admitted that the only purpose of a LUPA appeal and hearing was to review the decision of the Hearing Examiner. RP 672 He was asked

Did you appraise the [LUPA] court either in writing or orally that the decision from the hearing examiner was for a 30 foot dedication? A. We discussed with the LUPA judge repeatedly it was not 30 feet; it was 8 feet. So to that extent, the answer to your question is, yes, she was apprised of that. RP 672

Unfortunately the LUPA court trusted him and modified language in the LUPA order from 30 feet as submitted by the Church and specified by the Hearing Examiner to 8 feet as orally argued by the City Attorney. RP 32, CP 275 The City did not appeal and the Church couldn't because it wasn't an aggrieved party. RAP 3.1 After all, it had "won" because the condition was stricken as unconstitutional in any event.

As the record shows, after the hearing the lawyer for the Church called Deputy Capell to request he voluntarily correct the record that the final decision of the City was 30 feet rather than 8. He returned the call on a speaker phone with Deputy Elofson by his side. He responded that the discrepancy in size did not affect the result of the LUPA hearing. At that point Deputy Elofson told him to stop talking and asked the Church's lawyer to put his concerns in writing, which he did. Eventually City Attorney Pauli wrote back doubling down on the claim the exaction was for 8 feet, not 30, and refused to correct the mistaken judgment. She did not, however, state *when* the City changed its demand to 8 feet from 30. The Church lawyer followed up by asking that exact question. She did not respond. CP 2469-75

At trial Peter Huffman testified if the Church had not appealed the Hearing Examiner decision the City would have enforced his 30 foot exaction against the Church. RP 582 Deputy Capell testified to the same effect in his deposition which the court refused to consider.

Although this lie did not affect the result of the LUPA appeal since *any exaction* lacked nexus to the project, it did have profound consequences in the 64.40 proceeding. It was used to defeat proposed amendments to the church's complaint and it induced Judge Hogan to enter an order in limine to bar evidence challenging the imaginary " 8 foot" exaction.

More fundamentally the lie undercut a clear understanding by the court that the reason for the exaction was uniformity of right-of-way which could only be achieved by taking 30 feet, not 8. This played into the City's argument at trial (and before) that other factors justified an 8 foot exaction rather than uniformity, notwithstanding the record shows a 30 foot exaction was imposed for uniformity, and for that reason alone. This is the underlying error of the whole proceeding which poisoned the well. The City Attorney LIED.

3. VIDEO TAPE

In October 2014, the Church submitted a PRA request to obtain the City's records regarding the subject permit application. P106 When it

appeared the City was not going to promptly respond, the Church filed an amended complaint adding a PRA cause of action. Although there were further PRA proceedings not relevant to this appeal, the City took the position that it had fulfilled its obligation for production of all requested documents by January 8, 2015. CP 316

The City redacted and withheld a number of documents on claim of privilege. The Court found its privilege log, which failed to provide a brief explanation of why the document fit the claimed privilege, violated the statute and awarded some reasonable attorney fees to the Church CP 489; although trial testimony from the City demonstrated it had not changed its procedure regarding the brief explanation requirement even though almost a year had passed since the Church's summary judgment on this issue. RP 996 It continued to flout the law.

Not produced, and silently withheld from disclosure and production until October 15, 2015 (a full year after the original request), was a video of a site visit in January, 2014 P70 and notes from staffer Shanta Frantz regarding an October 10, 2013 meeting with the applicant. P54 The City admitted "mistakes were made" RP 1180 by not locating these documents however claimed it did not violate the PDA because its search was "reasonable." The Court agreed and denied any further recovery under the PRA to the Church. Further circumstances regarding

this "mistake" will be discussed in the relevant argument section as well as legal authority that staff "mistakes" are no defense.

III. ASSIGNMENTS OF ERROR

1. The court erred by adopting Finding 5, CP 2401:

> **At the Review Panel meetings, City staff conducted a *Nollan/Dolan* analysis, considering the impact that the construction of the parsonage would have on the existing infrastructure and determined that the dedication requirement was made necessary, in part, to address the impacts created by the new structure. For example, the Church was building a parsonage on a vacant lot, which would create an increase in both vehicular and pedestrian traffic.**

Issues:
A. Is there substantial evidence that the Review Panel conducted a *Nollan* analysis?
B. Should this be reviewed as a legal conclusion?
C. Was this a "vacant lot" for the purpose of a *Nollan* analysis when the record shows a prior single family residence existing for more than 100 years was demolished within six months of the Church's purchase of the property?
D. If a *Nollan* analysis is conducted which is improper, or reaches the wrong conclusion, does that satisfy the requirements of *Nollan*?
E. Does it matter what a review panel thinks or does under RCW 64.40 if it doesn't make the "final decision" of the agency?

2. The court erred by adopting Finding 16, CP 2403:

> **On March 7, 2014 Craig Kuntz, on behalf of the City provided its response to the Church's waiver request. The City denied the Church's request that all development conditions be dropped but did modify the right of way dedication.**

Issues:
A. Was this a "final decision" for the purposes of RCW 64.40?
B. Did Jennifer Kammerzell/Craig Kuntz have authority to "modify the right of way dedication?

3. **The court erred by adopting Finding 17, CP 2403:**

> **The Kuntz letter City response to the Waiver request, included a memorandum from Jennifer Kammerzell, which indicated that after consideration of the applicant's proposed and existing improvements, the City was reducing its required conditions and that the right of way dedication requirement along East B Street would be reduced from 30' to eight feet. P75**

Same issues as above

4. **The court erred by adopting Finding 29, CP 2406:**

> **In locating and providing records responsive to the Church's request, the City searched in all places reasonably likely to contain responsive materials. There was detailed testimony at trial about how each department and sub-department at the City processed the Church's request for records as well as about the various methods for gathering and storing information.**

Issues:
A. Is there substantial evidence the City searched the entire computer drive which held the site visit videos?
B. Is there substantial evidence the City *produced* notes from Shanta Frantz on the SAP drive/operating system?
C. Did City employees charged with responsibility to locate the January 2014 video and the October 10, 2013 Frantz notes mistakenly fail to locate and/or produce to the Church the video and notes?

5. **The court erred by adopting the following language in Finding 30, CP 2406:**

> **Both hard copies and electronic documents were searched. The electronic documents are maintained on various hard drives, servers, and data bases, all of which were searched for responsive documents.**

Issues:
A. Is there substantial evidence that the drive holding the video of January, 2014 was *thoroughly* searched?
B. If there substantial evidence that the SAP operating system was thoroughly searched, why weren't the notes timely disclosed or produced?

C. Was the January 2013 video and Frantz notes of October 2013 located *and* timely produced to the Church?

6. The court erred by adopting Finding 31, CP 2406:

> **The City searched using the appropriate search terms such as address, applicant name, permit application number, and parcel number.**

Issues:
A. Is there substantial evidence that any of these terms would locate the January 2014 video which was stored by date?
B. Why weren't either the video or notes were timely disclosed much less produced to the Church? Is human error or lack of training a defense?

7. The court erred by adopting Finding 33, CP2407:

> **The City conducted a complete and detailed search that was broad enough in scope to identify all responsive documents and material even though two items were missed and were not included in the City's production: 1) a video approximately two minutes in length showing the Church's lot that was filmed on January 13, 2014 by an intern, Ben Wells; and 2) portions of computer notes created by Senior Planner Shanta Frantz in the fall of 2013.**

Issues:
A. If there was a "complete and detailed" search search why weren't the video and notes disclosed and produced?
B. Is there substantial evidence that there was "a complete and detailed search" when two items were missed for whatever reason, including human error?
C.. If "a complete and detailed search" locates items that are not produced to the Church because of mistake or operator error or lack of training is the City liable to the Church under the PRA?

8. The court erred by adopting Finding 34, CP 2407:

> **The Public Records Coordinator from Planning and Development Services that was handling this request believed that Ms. Frantz's computer notes had printed out along with other computer records, but the notes had not printed.**

Issues:

A. Is this Finding relevant to the City's duty to promptly fulfill public record requests under the PRA?
B. If relevant was her belief reasonable if she did not read line for line what actually printed?
C. Did this person fail to push the proper keys on her computer to print these notes?
D. Is human error a defense to a PRA claim against the City for silent withholding?

9. The Court erred by entering Conclusion of Law 1, CP 2407:

> **The Hearing Examiner's decision was the "final decision" of the City for purposes of RCW 64.40.**

Issues:
A. Was the appealable Letter Decision of Director Huffman of April 28, 2014, although identical in substance to the Hearing Examiner decision on the 30 foot right-of-way exaction, the actual "final decision" pursuant to RCW 64.40 criteria?

10. The Court erred when it entered Conclusion of Law 2, CP 2408:

> **The City acted within its lawful authority in applying development conditions to the Church of the Divine Earth's permit to build a parsonage at 6605 East B Street in Tacoma.**

Issues:
A. Does the City have "lawful authority" to impose development conditions which violate its own code, state statute and the United States constitution?

11. The court erred when it adopted Conclusion of Law 3, CP2408:

> **The City of Tacoma did not act arbitrarily or capriciously in attaching development conditions, including a dedication of right of way on East B Street, whether 8' or thirty feet in width, to Permit Number 40000209742.**

Issues:
A. Is it arbitrary or capricious to adopt conditions in disregard of the facts and the law, including the City code, state statute and the US Constitution?

12. The court erred by adopting Conclusion of Law 4, CP 2408:

> **The City reasonably believed that the development conditions it attached to the permit had a nexus to the project and were proportional to the Church's project.**

Issues:

A. Does this Conclusion pertain to the mythical 8 foot exaction rather than the 30 foot actual exaction?

B. Is "reasonably believed" the objective 64.40statutory standard measured by applying legal criteria to known facts?

13. The court erred by adopting Conclusion of Law 5, CP2408:

> **The City of Tacoma did not know and should not have reasonably known that its requirement for a dedication of right of way would be considered violative (sic) of *Nollan/Dolan* by the superior court.**

Issues:

A. Is this a legal conclusion regarding the mythical 8 foot exaction rather than the actual 30 foot exaction?

B. Is this conclusion relevant to the RCW 64.40 standard that the agency knew or should have known it was acting unlawfully?

C. Is an agency excused from liability under RCW 64.40 for its unlawful acts because it *didn't accurately predict what a judge might rule?*

D. Did the City believe it was above the law or that the judiciary was so biased in its favor that the court would rule in its favor no matter the facts or Law?

14. The court erred by adopting Conclusion of Law 6, CP 2408:

> **The City conducted an adequate search in responding to the Church's request for records submitted on October 15, 2014.**

Issues:

A. Is a search adequate which fails to follow leads from employees who have actual knowledge of the existence of the video not produced, fails to follow documentary evidence of the existence of the non- produced video, fails to search for the video by date in a drive that is only indexed by date, and fails to search for the video by dates immediately prior to review panel meetings where it is the common practice of the City to video prior to review panel meetings?

B. Is a search adequate which fails to print and produce minutes stored under the Church's permit number due to miscommunication between

staff who are responsible to produce the minutes, the individual conducting the search does not know the proper computer keys to print out the minutes, and that individual doesn't read what she prints?

15. The court erred by entering Conclusion of Law 8, CP 2408:

> **The city searched in all places reasonable likely to contain responsive materials.**

Issues:
A. Was the drive which held all site videos searched for all dates prior to review Panel meetings?
B. If the September video was located why not the January video?
C. If the SAP operating system was searched, why were not the Frantz notes produced for the Church? See issues under error 14.

16. The court erred by entering Conclusion of Law 9, CP 2408:

> **There was no silent withholding by the City.**

Issues:
A. Is not "silent withholding" by definition an agency's failure to identify to the requestor the existence of a document falling within the scope of the request at or prior to its final response?
B. If so, did the City silently withhold the video and notes for a year after the request and long after it made its final response?

17. The court erred by entering Conclusion of Law 10, CP 2408:

> **The City of Tacoma did not violate the Public Records Act by not providing the Frantz notes and the Wells' video until October 2015.**

Issues:
Of course it did.

18. The trial court erred when it denied the Church's timely motion to amend its complaint and its motion to reconsider to assert a cause of action under 42 USC 1983 for violating the Church's federal constitution rights and add language regarding sidewalks to its RCW 64.40 claim. CP 573, 639

Issues:
A. Was an amendment to add a 1983 claim barred as a matter of law because it was futile?

B. Was an amendment to the Church's 64.40 claim to reference the sidewalk condition actionable under RCW 64.40 barred as a matter of law because the City dropped the sidewalk condition after the final Letter Decision of April 28, 2014 but before Hearing Examiner Decision of August 19, 2014?
C. What was the "final decision" of the City for purposes of 64.40: the Letter Decision of the director of April 28 or the Hearing Examiner decision of August 19?
D. Did the trial court abuse its discretion under CR 15(a) which provides leave to amend "shall be freely given when justice so requires," the proposed amendment relates to the same core facts already at issue, there is plenty of time for additional discovery and the trial is nearly one year away?

19. The trial court erred when, after in camera review; it refused to strike one or more claims of exemption, wholly or partially, based on the attorney client privilege and/or work product. CP 640, 843

Issues:
A. Did the City carry its burden to prove an exemption to public disclosure applies? RCW 42.56.550(1)
B. Does the attorney-client exemption apply to all communications between attorney and client or just to those seeking and giving legal advice?
C. Are emails neither directed to nor authorized by anyone in the legal department, or simply cc'd there, exempt work product under the PRA?

20. The court erred when it granted the City's pretrial motion in limine to exclude evidence offered for the purpose of disputing that the right of way condition at issue was 8 feet. CP 1927, RP 318, 345

Issues:
A. Is the February 19, 2015 LUPA judgment the "law of the case" when there has been no prior appeal?
B. Does collateral estoppel or issue preclusion apply to a reference in the prior judgment to the width of a proposed dedication when that reference was mere surplusage unnecessary to the holding of the judgment, nor binding on the prevailing party which had no right to appeal as an "aggrieved party" under RAP 3.1?
C. Should the City be estopped to claim the dedication "really" 8 feet when it represented to the Hearing Examiner and the Church it was 30 feet

and the Hearing Examiner based his ruling on the City's representation of 30 feet?
D. Would preclusion of the Church's right to present facts of a 30 foot exaction contrary to the City's claim of an 8 foot dedication be unjust because the 8 foot claim was first advanced by the City Attorney at oral argument in a LUPA hearing without prior notice and contrary to the administrative record?

21. The court abused its discretion when it erroneously sustained multiple objections to cross examination questions to Deputy Capell and Director Huffman regarding representations to the Hearing examiner and LUPA judge at oral hearing regarding 30 feet v. 8 feet right-of-way exaction conditions. Capell: RP 672—676; Huffman: CP 1045--1047

Issues:
A. Was it proper to sustain these objections in cross examination of the Deputy City Attorney based on the Court's prior Order in Limine (assigned err #20) and or the LUPA judgment of February 19, 2015 which referenced an 8 foot dedication? CP 674
B. Considering the offer of proof by the church's attorney should the objections have been sustained? CP 675—676
C. How can the Church present its 64.40 case regarding the nature of the "final decision" at issue if it isn't allowed to prove the extent of the exaction called for in the Letter Decision of April 28, 2014 or the decision of the Hearing Examiner?

IV. STANDARD OF REVIEW

This was a bench trial which ultimately resulted in entry of Findings of Fact and Conclusions of Law. True Factual Findings are reviewed to determine if they are supported by substantial evidence. *Govett v. First Pac. Inv. Co.*, 68 Wn.2d 973, 973, 413 P.2d 972 (1966). Substantial evidence is such evidence that would persuade a fair minded person the facts were actually proven. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). Conclusions of Law are

reviewed de novo. *Morello v. Vonda*, 167 Wn.App. 843, 848, 277 P.3d 693 (Div. 2, 2012). Legal conclusions couched as factual findings are reviewed de novo. *In re Welfare of L.N.B.-L.*, 157 Wash. App. 215, 243, 237 P.3d 944 (Div. 2, 2010); *citing In re Disciplinary Proceeding Against VanDerbeek*, 153 Wash.2d 64, 73 n. 5, 101 P.3d 88 (2004). Conclusions not supported by findings are erroneous. *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008)

Evidentiary rulings, motions in limine, motions to amend, and application of judicial estoppel are reviewed for abuse of discretion. When a trial court's exercise of discretion is manifestly unreasonable or exercised for untenable grounds or reasons, an abuse of discretion exists. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *Tex Enters. v. Brockway Standard,* 110 Wn. App. 197, 204, 39 P.3d 362 (2002), *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352 (2008)

"Generally, the failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof." *Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987) Here the City has the burden to prove a permit condition complies with *Nollan* and also has the burden to prove compliance with the PRA.

V. ARGUMENT

A. The City is liable to the Church under RCW 64.40 because requiring a right of way dedication as a permit condition was arbitrary, or capricious, or unlawful and/or exceeded lawful authority and the City knew or should have known it was unlawful or exceeded lawful authority.

In pertinent part RCW 64.40.020 provides:

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

RCW 64.40.010(6) provides "'Act' means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed..."

The trial Court *concluded* "The Hearing Examiner's decision, P105, was the 'final decision' of the City for the purposes of RCW 64.40." Conclusion of Law 1.

The Church believes this was an error of law because the true "final decision" was the April 28,2014 Letter Decision[9] P84; however for the

[9] This assignment of error is discussed infra in the context of error assigned to the trial court refusal to allow an amendment regarding sidewalks

purpose of establishing liability both decisions imposed a 30 foot dedication to achieve right-of-way uniformity.[10]

The Hearing Examiner decision, P 105, by City of Tacoma Hearing Examiner Wick Dufford on August 19, 2014 held:

> Summary Judgment is granted to the City. A building permit, subject to the conditions set forth in the Amended Declaration of Peter Huffman, dated July 9, 2014, may be issued.

Order on Motion for Summary Judgment p. 9, P 105.

The July 9, 2014 Amended Declaration of Huffman incorporated into the Hearing Examiner decision by reference states: "...the City is now merely requiring Appellant to dedicate an area of approximately 2,472 sq. ft. at the front of the Subject Property *in order for the Subject property and surrounding area to have uniform right-of-way ("ROW")* width for street frontage (see map attached as Exhibit A showing current configuration of the Subject Property)." (Italics added) P 98

RCW 64.40.020 is in the disjunctive therefore the act is actionable if the action is *either* arbitrary *or* capricious *or* unlawful *or* exceeds lawful

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[10] Excerpts from Director Huffman's CR 30(b)(6) April 22, 2015 deposition were accepted into the record as exhibit P141. Therein the Director testified his Letter decision of April 28, 2014 was the "final denial" of the Church's waiver request of the conditions imposed by the Review Panel minutes of September 25, 2013 (p.33); he specifically denied the request to waive the 30 foot dedication requirement (p. 49); the City did no traffic studies of the property (p. 57); and there was no discussion of 8 feet until after the Letter Decision (p. 73)

authority and the City knew or should have known it was unlawful. *Lutheran Day Care v. Snohomish County*, 119 wn.2d 91, 112, 829 P.2d 746 (1992)

The liability question should have been answered when Judge Elizabeth Martin entered final judgment on February 19, 2015 holding the City's dedication condition was an unconstitutional condition under *Nollan* and related cases.[11] The City failed to carry *its burden* to prove *Nollan* had been satisfied. *Dolan*, 114 S. Ct.at 2320 n. 8 ("in this situation the burden properly rests with the city. See *Nollan,* 483 U.S. at 836") That judgment was not revisited by the trial court and collaterally estops the City from denying its action was unconstitutional. *Lutheran*, 119 Wn.2d at 115-116 Judge Martin's conclusion the City violated Nollan was based on two independent considerations: (1) there was no nexus to any problem caused by construction of the single family residence which replaced a previous single family residence recently demolished; and (2) if there was a problem created by the development, the exaction of additional right-of-way was no solution because there was no current plan to build out the right-of-way in any event. *Burton*, 91 Wn. App. at 525-529, *Unlimited*, supra. As illustrated by the LUPA decision, whether the exaction was 8 feet *or* 30 the legal result is a constitutional violation.

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[11] See e.g. *Dolan v. Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Koontz v. River Water Management* District, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988), rev. denied, 111 Wn.2d 1008 (1998); and *Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998), rev. denied, 137 Wn. 2d 1015 (1999)

As set forth in the LUPA judgment P116 the City violated the doctrine of unconstitutional conditions. This doctrine is an aspect of due process. It is ripe immediately. *Mission Springs*, 134 Wn.2d 947, 964-5, 954 P.2d 250 (1998) Mark Fenster, *Substantive Due Process by another Name; Koontz, Exactions, and the Regulatory Takings Doctrine,* 30 Touro L. Rev. 403, 415: "The entire field of exactions now, apparently, falls under the unconstitutional conditions doctrine rather than the Takings Clause." Richard A. Epstein, *Unconstitutional Conditions, State power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 11 (1998): "[The doctrine of unconstitutional conditions] has found expression in decisions under the equal protection and the due process clauses. [citing cases]"

The doctrine is designed to avoid government extortion:

> By conditioning a building permit on the owner's deeding over a public-right-of-way, for example, the government can pressure an owner into voluntary giving up property for which the *Fifth Amendment* would otherwise require just compensation [citing cases]...Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

Koontz, 133 S. Ct. at 2594-95 Although not a taking as such because nothing was taken, "the impermissible denial of a governmental benefit is a constitutionally cognizable injury." Id. 2596

RCW 64.40 recognizes causes of action for arbitrary *or* capricious government actions *or* actions that are unlawful *or* deprive a property owner of

his or her constitutional rights. RCW 64.40.020; *see also*; *Mission Springs,* 134 Wn.2d at 961-62 (arbitrary and capricious acts actionable under RCW 64.40); *Sintra v. Seattle,* 119 Wn.2d 1, 22, 829 P.2d 765 (1992) (deprivation of due process actionable under RCW 64.40).

Local government's imposition of a permit condition which violates RCW 82.02.020[12] will also support a claim for damages and attorneys' fees under RCW 64.40. *See, e.g.*, *Sintra*; *Isla Verde Int'l Holdings, Ltd. v. City of Camas*, 147 Wn. App. 454, 460-61, 464-65 (2008) (*Isla Verde II)*; *Cobb v. Snohomish County*, 64 Wn. App. 451, 459-60, 829 P.2d 169 (1992) rev' denied 119 Wn.2d 1212; *Ivy Club Investors Ltd. P'ship v. City of Kennewick*, 40 Wn. App. 524, 531, 699 P.2d 782 (1985). In all these cases local government acted under authority of a regulation, the application of which was later determined to be invalid (either facially or as-applied).

A local government's imposition of unlawful fees or conditions on a permit application constitutes an unlawful act under RCW 64.40, regardless of whether the act was authorized by a local regulation in force when the act occurred. *See Isla Verde II*, 147 Wn. App. at 464-65; *View Ridge Park Assocs. v. Mountlake Terrace*, 67 Wn. App. 588, 603, 839 P.2d 343 (1992), rev' denied

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[12] "...no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings...However, this section does not preclude dedications of land...which...the city...can demonstrate are reasonably necessary as a direct result of the proposed development...to which the dedication of land...is to apply."

121 Wn.2d 1016; *Ivy Club*, 40 Wn. App. at 531 Enforcement of a regulation that is oppressive or unlawful constitutes an unlawful act under RCW 64.40, regardless of whether the regulation is determined unlawful after the act is complete. *See, e.g.*, *Mission Springs*, 134 Wn.2d at 961-62; *Sintra*, 119 Wn.2d at 22; *West Main*, 106 Wn.2d at 50-53. Same also violates RCW 82.02.020 and TMC 13.05.040, both of which incorporate the *Nollan* nexus standard into statute and code.

1. An Unconstitutional Exaction is Arbitrary or Capricious as a matter of Law

Administrative or quasi-judicial decisions in violation of the United States Constitution's due process clause are variously arbitrary and capricious, inherently arbitrary and capricious, and manifestly arbitrary and capricious. A decision resulting from administrative and or quasi-judicial procedures may also be "so arbitrary and capricious that it amounts to a violation of substantive due process". *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641, 127 P.3d 713, 718 (2005). Here, the Court already found by final Judgment the City violated the Church's due process rights by imposing an unconstitutional dedication condition on the building permit. P116 Therefore, the City necessarily as a matter of law committed arbitrary and capricious action, or manifestly arbitrary and capricious action.

In *Dore v. Kinnear* the Supreme Court of Washington found that arbitrary and capricious acts violated the federal and state constitution. 79 Wn.2d 755, 757, 489 P.2d 898, 899-900 (1971). *Dore* further holds constitutionally untenable action by municipal government is "*inherently* arbitrary and capricious". *Id.* at 765. Emphasis in original.

A due process violation is "manifestly arbitrary and capricious." *Zehring v. Bellevue*, 99 Wn.2d 488, 493, 663 P.2d 823 (1983) Parties aggrieved by an invalid land use decision have grounds to pursue a writ of certiorari to remedy municipal acts that are "manifestly arbitrary and capricious acts". *Bridle Trails Cmty. Club v. Bellevue*, 45 Wn. App. 248, 251, 724 P.2d 1110, 1112 (1986). A due process violation is "manifestly arbitrary and capricious".

As a matter of law imposition of an unconstitutional condition on a building permit is arbitrary and capricious. The rule was applied in *Mission Springs* when the City of Spokane refused to issue a grading permit:

> The City of Spokane, acting through its City Council and/or its City Manager, arbitrarily refused to process Mission Springs' grading permit application and unlawfully withheld the permit as well. Its action was "'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action,' "id. at 718 (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991) (citations omitted), because it acted without lawful authority in unreasoning and willful disregard of the permit applicant's lawful entitlements.

Mission Springs, 134 Wn.2d at 962. Likewise The City of Tacoma as a matter of law arbitrarily conditioned the Church's building permit on a 30 foot exaction (or even an 8 foot exaction) "because it acted without lawful authority in unreasoning and willful disregard of the permit applicant's lawful entitlements."

Whether or not the City knew or should have known its arbitrary action violated the rights of the Church is irrelevant to establish the City's liability under RCW 64.40.020, as the statute only requires the City knew or should have known illegality of acts which are "unlawful or in excess of lawful authority", in contrast to arbitrary acts. *Lutheran*, 119 Wn.2d at 112. A party basing its RCW 64.40 action on arbitrary acts need show nothing more to establish liability. Id.

2. The City knew or reasonably should have known it acts were unlawful and/or beyond lawful authority

Whether the final decision of the agency was made with knowledge of its unlawfulness or in excess of lawful authority, or should reasonably have been known to be such, should be determined in the affirmative as a matter of law because the City is *presumed* to know the law. See, e.g., *State ex rel Dungan v. Sup'r Ct.*, 46 Wn.2d 219, 279 P.2d 918 (1955) (City officials are presumed to know the law); *Hutson v. Savings and Loan,* 22 Wn. App. 91, 98, 588 P.2d 1192 (1978) ("The presumption that people know the

law...In the civil area, most cases wherein the presumption is applied concern dealings with a governmental entity such as a municipal corporation [citing cases]")

Obviously the exaction reversed by the LUPA judge for unconstitutionality was, by definition, "unlawful" (assuming the US Constitution applies to the City, which may be disputed here.) The test in the statute is objective not subjective. Where the law is clearly established as are the facts the City *should* have known.

Simply put, *Nollan* requires that any permitting condition be justified by some problem caused by the proposed improvement and *Dolan* adds if there is any nexus, the condition must also be proportional. But here the "final decision" is that of the hearing examiner, so concluded the Court, and there was *nothing* in the record before the examiner which justified the dedication condition for any reason other than the City's stated reason--uniformity of right-of-way—a preexisting condition which obviously had nothing to do with any proposed construction of a parsonage. And the court entered an order in limine foreclosing any justification other than uniformity of right of way. CP 1929 Moreover, the City also violated TMC 13.05.040 B (9)[13] which closely tracks *Nollan.*

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[13] In regard to the conditions requiring the dedication of land or granting of easements for public use and the actual construction of other provisions for public facilities and utilities, the Director shall find that the problem to be remedied by the condition arises,

The Director made no finding of nexus and proportionality required by this ordinance nor could he under these facts. It is critical to note this prong of the statute pertains to the "final decision" of the agency, not some other recommendation such as the March 7, 2014 letter from Craig Kuntz. Nor is the Kammerzell memo based on any nexus to a development created problem in any event. At trial staffers were probably coached to talk about "nexus" but their testimony belies understanding much less proper application of the principle.

Beyond that, if this were not an objective test the Church communicated in writing to the City on several occasions in "supplements" explaining in a lawyer like fashion precisely why the right of way dedication condition violated established legal precedent, citing published decisions directly on point, federal and state, as well as legal commentary. There was no evidence these documents were even read. Nor was there was any substantive response from the City other than a simple and absolute denial of the waiver request from Director Huffman.

Of course an unconstitutional act, or one in violation of the municipal code, is one that is unlawful as well as beyond lawful authority. Liability for

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in whole or significant part, from the development under consideration, the condition is reasonable, and is for a legitimate public purpose.

damages under RCW 64.40 should be determined as a matter of law under RCW 64.40 and the trial court must be reversed.

3. Findings 5 and 16 as well as Conclusions 2, 3, 4, and 5 are not relevant and/or not supported by substantial evidence or are legally erroneous

Finding 5, CP 2401, states Review Panel meetings conducted a *Nollan/Dolan* analysis. This is not a fact but a legal conclusion. In fact the minutes of the first meeting, P 46, state "The proponent shall dedicate area abutting the site along to provide *consistent right-of-way widths* along East B Street...in order to *stay consistent* and provide safe street and sidewalk area, a dedication of 30 feet is required." (italics added) No nexus is claimed. Pretrial the Court granted the Church's motion in limine that "the City is ordered not to produce evidence that the right of way dedication was imposed for any reason other than uniformity of right of way on East B Street in the area." CP 1929 The only way to reconcile this order in limine with the claim that the City conducted a proper *Nollan* analysis is to conclude a right of way not uniform for over one hundred years justifies a condition on new development, which was apparently the court's position.[14] If so, the Church would contend same is *clearly* a violation of *Nollan.* The proposed project did not alter the right-of-way and there is no proof this replacement single family residence impacted vehicle or pedestrian traffic. Nor was there a traffic study to

[14] "I'm not willing and not making the finding that the City should have known the dedication requirement with regard to uniformity was unlawful." RP 1204

compare existing traffic with what if anything this residence would add. The Finding goes on to say this was a "vacant" lot which is only true in the sense that one single family residence was demolished to allow for construction of another. There can be no impact on preexisting public facilities when one house merely replaces another. Nor were there plans to build out the new right of way, which is also an independent *Nollan* violation, because the exaction solves no problem. See *Burton*, 91 Wn. App. at 528-9 This finding should be set aside as not supported by substantial evidence.

Finding 16, CP 2403, states staffer Kuntz on March 7, 2014 denied the waiver request but "did modify the right of way dedication." Once again this is a conclusion of law. Under the municipal code only the Director had the authority to modify the condition. This March 7 memo was not the "final decision" of the City, was not read by the Director, who on April 28, 2014 rendered his final appealable decision which denied the waiver request in every respect and modified nothing. The Hearing Examiner Summary Judgment order states this March memo was later "revised" by the Amended Huffman Declaration to 30 feet. P 105 p. 5, para. 10 The finding is an erroneous conclusion of law if read to mean the March 7 memo was the "final decision" of the City. At most it was Mr. Kuntz's and Ms. Kammerzell's recommendation.

Conclusion 1, CP 2407, states the "final decision" of the City for RCW 64.40 purposes was the Hearing Examiner decision. P 105 The Church argued the "final decision" was Huffman's Letter Decision of April 28. P84 The reasons to support that view are set forth under denial of the Church's motion to amend although it is important to note ***both*** decisions set the dedication at 30 feet *to make the right of way uniform*. This conclusion is erroneous as a matter of law but helpful to highlight the required dedication was 30 feet from any perspective.

Conclusion 2, CP 2408, claims the City acted within lawful authority imposing development conditions. This is an error of law. The City has no "lawful authority" to violate its own code, state statute and the U.S. Constitution.

Conclusion 3, stating the City did not act arbitrarily to require the dedication is an error of law for the reasons set forth above. The conclusion references 8 feet *or* 30 feet however the court prohibited the Church from offering evidence on 30 feet and specifically refused to make a conclusion *one way or the other* on a 30 foot dedication. RP 1241-42 "Arbitrary" is discussed above. This was.

Conclusion 4, CP 2408, claiming the City "reasonably believed" the exaction had a nexus to the project, is irrelevant and legally wrong. RCW 64.40.020 sets the standard as "it should reasonably have been known" not

"reasonably believed." The latter is subjective, the former is objective. As set forth above, the law was clear, the City is presumed to know the law, and requiring a 30 foot dedication for the sake of uniform right of way, or any other consideration not caused by the project, is an obvious violation of *Nollan.*

Conclusion 5, CP 2408, is similar to Conclusion 4 but uses the statutory wording that should not have "reasonably known that the requirement for a dedication of right of way would be considered violative (sic.) of *Nollan/Dola*n by the superior court." First, what dedication? Throughout the trial the City argued the decision of the city to be reviewed was for an 8 foot dedication, not 30. All of the City's "reasonableness" testimony related to 8 feet. E.g. RP770, 772, 914, 931, 1034, 1090 If this conclusion relates to 8 feet it is irrelevant to 64.40 which only relates to the "final decision "of the agency. Second, what the City might predict a court might do is also irrelevant. It is not the 64.40 standard. Who knows what courts might do? Certainly not your undersigned.

B. The trial court abused its discretion when it denied the Church's Motions to Amend

1. Denial of Church's Motion to Amend to add a 1983 claim was an abuse of discretion

LUPA appeals, RCW 64.40 and 42 USC 1983 claims are routinely joined. See e.g. *Lutheran Day Care*, *Mission Springs*, *Sintra,* and *Hayes v.*

Seattle, 131 Wn.2d 706, 934 P.2d 1179 (1997) In fact the government has argued they *must* be joined to avoid res judicata. *Hayes*, 131 Wn.2d at 711 No doubt that would be Tacoma's argument if the Church filed a separate 1983 action.

In May 2015, a full year before trial and before the City had even filed an answer to the Church's complaint, the Church moved to amend to add a cause of action under 42 USC 1983 for violation of the unconstitutional conditions doctrine previously discussed. CP 492 There were no special circumstances prompting denial, no prejudice to the City, it was timely and merely alleged an additional cause of action relating to the same common core of facts.

CR 15(a) provides:

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires.* [italics added]

The purpose of Rule 15 is to "facilitate a proper decision on the merits." *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). CR 15 facilitates the amendment of pleadings unless the amendment would prejudice the opposing party.

Washington's liberal rule regarding amendments "declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be

heeded.... If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant....the leave sought should, as the rules require, be 'freely given.'" (quoting *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)) *Walla v. Johnson*, 50 Wn. App. 879, 883, 751 P.2d 334 (Div. 1, 1988) (reversing denial of leave to amend as an abuse of discretion)

The Church's prompt request to amend the Petition to conform to the evidence and subsequent events should have been granted as a matter of course. It was an abuse of discretion to deny it.

Only allowing 24 hours for reply, the City filed a lengthy response claiming the motion to amend should be denied because "the claim is contrary to law under the facts of this case, and is futile," CP 522, citing *Doyle v. Planned Parenthood*, 31 Wn. App. 879, 883, 751 P.2d 334 (1988) for the proposition futility is a ground to deny a motion to amend. However in *Doyle* the motion to amend came after the case had been dismissed on summary judgment based on the statute of limitations. The case at bar is far different. The City characterized the claim as one for "taking" which wasn't ripe, citing a mishmash of inapposite regulatory takings cases, rather than unconstitutional condition cases where no taking had occurred, such as this. Such are ripe

immediately because they are based on due process principles. Based on a claim of "futility" the court denied this motion to amend. CP 573 This was an abuse of discretion because it was exercised on untenable grounds for untenable reasons, an error of law.

The Church moved to reconsider, CP 577, setting forth the elements of a 1983 claim: violation of a federal right while acting under color of law. See e.g. *Lutheran*, *Sintra, Mission Springs.*

Here, as Judge Martin found with preclusive effect in the final LUPA judgment, the City acting under color of law deprived the Church of its constitutional rights. Therefore the Church is entitled to prevail against the City in a 1983 action as a matter of law, not the other way around. The analysis need go no further. This however need not be determined on the merits to grant leave to amend. The court plainly abused its discretion when it denied this motion to amend and reconsider. CP 639

2. The Motion to Amend to add reference to sidewalks was erroneously denied because the trial court made an error of law by concluding (Conclusion of Law 1) that the "final decision" of the City was the Hearing Examiner Decision of August 19 rather than the Director's Letter Decision of April 28

In the same motion to amend the Church sought a technical amendment to its previous 64.40 claim to reference the building permit condition of "offsite improvements such as sidewalks and curbs" as arbitrary and contrary to law.

CP 501, para. 1 The City responded this was improper (or futile) because the sidewalk condition referenced in the final Letter Decision of April 28, 2014 had been dropped by Huffman in his Amended Declaration of July 9, before the Hearing Examiner made his decision on August 19. The City argued the Hearing Examiner decision was the "final decision" or "act" of the City for purposes of 64.40 and therefore anything before that wasn't compensable in damages. See RCW 64.40.010 (4) and (6). [This is also important for remand.] The Church requested the opportunity to make its case that the "final decision" was the Letter Decision of April 28, 2014 and prove recoverable damages from that date rather than August 19. Once again, the court abused its discretion by denying the motion to amend preventing the sidewalk claim from being determined later on the merits CP 573 based on untenable grounds, i.e.an erroneous interpretation of law.

The court abused its discretion denying this motion based upon an erroneous legal conclusion that the "final decision" of the City was the Hearing Examiner decision of August 19 rather than the Director's Letter Decision of April 28. According to the Tacoma code, the *Director's decision* is *final* and appealable to the hearing examiner. TMC 13.05.040 A[15] Only the Director has authority to act upon interpretation, enforcement, administration or waiver of

[15] "The Director's decision shall be final; provided...an appeal may be taken to the Hearing examiner..."

the City's land use regulatory codes. TMC 13.05.030 A[16] The hearing examiner only has authority to hear an administrative appeal of a *final decision* of the Director, and did so here. TMC 13.05.050[17] No building permit shall issue without the Director's approval. TMC 13.05.090[18]

RCW 64.40.010 defines "Damages"[19] and "Act"[20]. RCW 64.40.030 provides any action under this chapter shall be commenced within 30 days of the exhaustion of administrative remedies[21] (which the Church did.)

"Damages" are recoverable after a "cause of action arises" and must be caused by the "act" of the agency. 010(4) An "act" is the "final decision" of an agency. 010(6) According to *Birnbaum v. Pierce County*, 167 Wn. App. 728, 732, 274 P.3d 1070 (2012) "a cause of action arises only when there is a 'act'

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[16] "The Director shall have the authority to act upon the following matters...(1). Interpretation, enforcement and administration of the City's land use regulatory codes...;(5) applications for waivers..."

[17] "D....Any final decision or ruling of the Director may be appealed..."

[18] "No building or development permit shall be issued without prior approval of the Director..."

[19] (4) "Damages" means reasonable expenses and losses, other than speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses...[1919]

[20] (6) "Act" means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date the application is filed....[20]

[21] "RCW 64.40.030 was not intended to serve simply as a limitations provision but that it also required exhaustion before a claim could be filed...No exhaustion requirement arises, however, without the issuance of a final appealable order." *Smoke v. Seattle*, 132 Wn.2d 214, 222, 937 P.2d 186 (1997) Smoke found there was no adequate administrative remedy and therefor there was no applicable administrative remedy to be exhausted. Here the final appealable order was the Huffman letter of April 28, 2014.

that ...is 'a final decision by an agency which places requirements, limitations, or conditions upon the use of real property...'" Under the statute only an "act" subject to an adequate administrative remedy requires exhaustion of that remedy, but the administrative remedy cannot be the "act" by definition. Even an informal agency letter from the agency may be a "final decision" if it "is clearly understandable as a final determination of rights...[D]oubts as to the finality of such communications must be resolved in favor of the citizen." *Smoke,* 132 Wn. 2d at 222, quoting *Valley View*, 107 Wn.2d at 634 The commission of the "act" by the agency is when the cause of action arises, not when the Hearing Examiner rules on an administrative appeal of the act. *Birnbaum* continues:

> The statutory language is unambiguous. An act occurs when there is either a final decision or a failure to act within established time limits. RCW 64.40.010(6).

Ibid. 167 Wn. App. at 733-4 The appealable "final decision" was the Huffman letter of April 28, 2014 and that is when the "cause of action" arose. The City even argued in its LUPA brief "the Letter Decision [of 4/28] was a final decision as to the Church's requested waiver." CP 233 Refusal to allow the amendment was an abuse of discretion based on an error of law.

C. The trial court erred when it granted the City's pre-trial motion in limine to exclude evidence offered for the purpose of disputing that the right-of-way condition at issue was 8 feet.

This is perhaps the most fundamental error of the case which goes to the very heart of the RCW 64.40 claim.

Prior to trial, Judge Hogan entered the City's proposed Order "to exclude evidence offered for the purpose of disputing that the right of way condition at issue was 8 feet." CP 1927 This was based solely on the interlineated 8 feet LUPA judgment. RP 318 But the same trial Judge later Concluded the "final decision" for the purposes of 64.40 was the Hearing Examiner decision, which also called for 30 feet. CP 2407 Thus the Church was precluded from offering evidence the dedication sought was 30 feet for the purpose of uniform right of way and arguing the City "should have known" the 30 foot exaction violated *Nollan*. Not only that, but by entry of this order the court literally announced before she heard the first word of testimony she had made up her mind that the exaction was 8 feet. RP345 During the course of the trial the court repeatedly sustained City objections to direct or cross examination of City witnesses on this basis.[22]

This turned judicial estoppel, a doctrine which precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position, on its head. *Miller*, 164 Wn.2d at 539

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[22] See e.g. RP 666-676 where the court repeatedly sustained objections to cross examination of their witness, Jeff Capell, dealing with 30 feet vs. 8 feet. She based her ruling on the order in limine. RP 674 Counsel for the Church made an offer of proof. RP 675-676

The only possible legal basis for this order in limine based on the "8 feet" interlineation was "the law of the case", or collaterally estoppel.

The City argued "the law of the case" doctrine was a proper basis to exclude Church evidence. CP 1693, 1932 However this doctrine only pertains to subsequent review of a previously appealed decision or jury instructions to which there is no objection. *Roberson v. Perez*, 156 Wn.2d 848-859, 123 P.3d 844 (2005), see also RAP 2.5 But this case had no previous appeal and there were no jury instructions.

"[C]ollateral estoppel, or issue preclusion, seeks to prevent relitigation of previously determined issues between the same parties." *Malland v. Dep't of Ret. Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985) The party asserting it has the burden to prove it. *Bradley v. State*, 73 Wn.2d 914, 917, 442 P.2d 1009 (1968) It applies to *issues* determined, i.e. the unconstitutionality of the exaction, not every superfluous and unnecessary factual recitation in the order such as whether the exaction was 8 feet or 30, which didn't matter.[23] The City did not appeal the LUPA judgment and the Church couldn't because it was not an "aggrieved party." RAP 3.1[24]

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[23] The doctrine of collateral estoppel bars relitigation only of substantial issues; it does not bar relitigation of tangential or inconsequential issues. *Barr v. Day*, 69 Wn. App. 833, 843, 854 P.2d 642 (1993), aff'd in part, rev'd in part, 124 Wn2d 318, 879 P.2d 912(1994)

[24] "Only an aggrieved party may seek review by the appellate court." In the LUPA hearing the court determined the condition was unconstitutional regardless of its width because any right-of-way exaction lacked nexus to the project. Inability to appeal forecloses issue preclusion. 1 Restatement of Judgments (Second) 273, Sec. 28 (1)

Finally, even if collateral estoppel arguably could apply in some fashion to the interlineation, it would be unjust to do so here because the Church was not given "an unencumbered, full and fair opportunity to litigate" the City's new found claim, literally pulled out of a hat, that the decision of the hearing examiner was "now"[25] 8 feet rather than 30. See *Rains v. State,* 100 Wn.2d 660, 666, 674 P.2d 165 (1983) This was an unmitigated and unanticipated lie from the opposing lawyer which is also a basis to avoid preclusion. See Restatement of Judgments (Second) at Sec. 28 (5) 274 The trial court must be reversed because it abused its discretion when it entered the order in limine based upon untenable grounds and reasons contrary to law. See e.g. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); *Miller*, 164 Wn.2d at 539

D. The trial court erred when it dismissed the Church's PRA claim

At issue are assigned errors to Findings 29, 30, 31, 33, 34, Conclusion 6, 8, 9, 10 as well as the court's refusal to strike one or more claims of exemption based on in camera review. The essential facts are the Church made a PRA request to the city in October, 2014 for documents relating to the subject property's building permit application. The city closed its request in January, 2015 claiming it had disclosed all documents within the request. However in

[25]Jeff Capell: "It's only 8 feet now." RP 14 Is Mr. Capell trying to change the City's decision to require 30 feet to 8 feet for tactical reasons during an oral argument he was apparently losing? Capell was later to admit on the stand that the only reason for a LUPA hearing was review of the hearing examiner decision. RP 671-2

October, 2015 the City produced and disclosed for the first time Frantz notes from October 10, 2013 and a video of a site visit in January 2014. The City "defense" was it performed an "adequate" and "reasonable" search but missed these documents by honest "mistake,[26]" or human error. However good faith, or "mistake," or human error is no defense to a PRA suit as a matter of law (although that might affect the penalty.)

The other assigned errors pertain to the court's orders after in camera review which upheld claims of work product and attorney client communications, even for documents which did not originate from or to the attorney and did not contain legal advice. The Church submits the trial court erred as a matter of law when it denied the Church relief under the PRA.

1. The PRA is to be liberally construed in favor of the requestor; its exemptions are to be strictly construed against the agency; and strict compliance is required, and mistakes or human error are no defense.

In general, the legislature commands the PRA be "liberally" construed to promote the goals of open government. RCW 42.56.030 The PRA is "a strongly worded mandate for open government." *Federal Way v. Koenig*, 167 Wn. 2d 341, 344, 217 P.3d 1172 (2009), quoting *Rental Housing Ass'n of Puget Sound v. Des Moines*, 165 Wn. 2d 525, 527, 199 P.3d 393 2009).

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[26] RP 1238 Elofson: "she made a mistake."

The statutory requirements of the PRA are clear-prompt production of documents is required: "...agencies shall, upon request for identifiable public records, make them *promptly* available..."(italics added) RCW 42.56.080 Rules of agencies "shall provide for the fullest assistance to inquirers and *the most timely possible action on requests for information.*" RCW 42.56.100 (italics added) "*Responses to requests for public records shall be made promptly by agencies...*" RCW 42.56.520 (italics added) The burden is on the agency to demonstrate timely compliance. RCW 42.56.550(2) "Administrative inconvenience or difficulty does not excuse strict compliance' with the PRA." *Zink v. Mesa,* 140 Wash. App.328, 337, 166 P.3d 738 (2004) Inadvertent loss of the document, such as losing it in the copying machine, is no defense to a PRA action. *Tobin v. Worden,* 156 Wn. App. 507, 233 P.3d 906 (2010)

Strict enforcement of the PRA discourages improper denial of access to public records and adherence to the goals and procedures dictated by the statute. *Zink*, 140 Wash. App. at 338, citing *Hearst Corp. v. Hoppe,* 90 Wn. 2d 123, 140, 580 P.2d 246 (1978) The City's good faith or reasonableness does not determine whether it complied with the PRA. Id. at 340

"Agencies can act only through their employee-agents. With respect to an agency's obligations under the PRA, the acts of an employee

in the scope of employment are necessarily acts of the 'state and local agenc[ies]' under RCW 42.56.010(3)." *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45, 54 (2015)

> An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal.

PAWS v. UW, 125 Wn.2d 243, 269, 884 P.2d 592 (1994)

2. City's search for video and notes was not "adequate"

Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119 (2011) holds "the search must be reasonably calculated to uncover all relevant documents...Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested." The burden is on the agency to show compliance, and each case is to be decided on its particular facts. But here there is plenty of evidence why the City search was unreasonable regarding the three videos and the notes. "Obvious leads" such as personal knowledge of the existence of the document or video, routine, and existing known documents referencing those not

produced were not followed up. If mistakes and human error were a defense, what agency would fail to assert it?

a. The video was not produced because the search was inadequate

Generally speaking the City's search system, according to the City, "depends upon the accuracy of those individual employees and/or the coordinator to make sure the production is in response to the request and is full and complete." RP 997 However the record shows those charged with responsibility to identify and produce this video failed to act on their personal knowledge of the video, failed to follow up on routine procedure which calls for filming site visits before Review Panel meetings where those films are downloaded to the same drive indexed by date, and failed to follow up on documents reviewed and produced to the Church which referenced the video. Moreover the September video was produced which was kept in the same file as the January video, indicating human error in a system which depended on humans to do their job by conducting a thorough search of a known drive.

The facts *presented by the city* show (1) City personnel had actual knowledge of the filming[27], (2) filming immediately prior to Review Panel

[27] RP 808 Staffer Kuntz asked staffer Wells to do the filming. That was part of Wells' assigned duties. RP 831 By email Kuntz directed Wells to do the filming and Wells reserved a City car. RP832, A16 Email produced to Church by City identifies filming. RP 984 Film was reviewed by Review Panel. P141 p. 9

meetings was routine[28], (3) those films were routinely filed in the same electronic file location[29] by date[30], (4) city documents reviewed in the contest of the Church's PRA request disclosed an e-mail "Re: Filming" of this property which the City reviewed prior to disclosure;[31], (5) absolutely no effort was expended to retrieve the video even though it was the subject of several depositions and the possible existence of the film *was disclosed* in the deposition of the city employee, Craig Kuntz. P135 p.10 The Kuntz video was stored in the same file as Wells, as was the custom. The Kuntz video was produced, but the city can't explain why the Wells video wasn't other than miscommunication between staff, i.e. each staffer thought another staffer was going to produce it.[32]

These were not only obvious leads but actual knowledge that reasonably should have been followed up by the City, but wasn't. This was a breakdown of the City's system and unreasonable. City PRA staff negligently failed to follow up on the Kuntz email of January 13, 2014. A16 Jennifer Ward was specifically aware that filming site visits prior the Review Panel meetings was routine yet negligently failed to follow up. P143 p.8 City PRA personnel were specifically aware that the City filed

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[28] RP 807, 829, P143 p. 8, 17
[29] RP 829, P143 p.13
[30] P 143 p. 21
[31] RP 998, A16 But city personnel didn't follow up as they should have. City witness Anderson testified she didn't know why video not produced. RP 999
[32] P143 p.13, 14, 20-21

these films electronically under date, P143 p.21, yet they negligently didn't search the dates immediately prior to the review hearing. The City has the obligation to make and follow reasonable procedures to comply with PRA requests. All of this is unreasonable; recall the City has the burden to prove it *isn't* unreasonable.

b. The Frantz notes were not produced because the search was inadequate

Much as above, facts presented by City witnesses demonstrate the Frantz notes of October 10, 2013, P54, were not produced because of human error in a system which relies on each individual doing their job. These notes were stored by permit number in a program called SAP. P143 p. 22 According to the City's CR 30(b)(6) witness Jennifer Ward they were not produced because of "miscommunication between staff." P143 p. 22 Shanta Frantz sent an email to the coordinator specifically identifying the notes and their location. RP 881 The coordinator typically pulls the notes. RP 885 Heather Croston (the coordinator) testified she thought she printed them out but due to operator error she did not. RP 1006 But later she discovered what she did wrong and testified "I know now" how to do it. RP 1006-1008 As a result she has now revised the system so it doesn't happen again. RP 1012 She could have recognized the problem at the time if she read what she printed out, but didn't. RP 1014 Human error is no defense.

3. Challenged PRA Findings and Conclusions are not supported by substantial evidence or are contrary to law

Finding 29 states the City "searched in all places reasonably likely to contain responsive documents." The evidence shows that the drive which held the video was not searched for the Wells video; otherwise it would have been produced. The SAP drive was searched for the notes but due to operator error they were not printed.

Finding 30 says all drives were searched but doesn't say they were thoroughly searched or that located notes were produced.

Finding 31 Search terms did not include date, the term needed in the City system to locate videos.

Finding 33 If the search was indeed "complete and detailed" of the SAP drive and the drive which held the videos they would have been located and produced.

Finding 34 The coordinator *assumed* the notes had been printed but did not print them because of operator error and inadequate training and didn't read what was printed to verify they did.

Conclusions of Law 6-9 are adequately addressed above. Conclusion 10 (there was no silent withholding) is obviously erroneous by definition since the video and notes were neither produced nor disclosed at the close of the City's

response. See *PAWS*, 125 Wn.2d at 270-271; *Zink v. Mesa*, 162 Wn. App. 688, 711, 256 P.3d 384 (2011)

4. Trial Court erred when, after in camera review; it refused to strike one or more claims of exemption, wholly or partially, based on attorney client privilege and/or work product.

The City redacted or completely withheld various documents under claim of work product or attorney client privilege. The Church requested and the court granted in camera review; however affirmed all claimed exemptions. The Church requests this court conduct an in camera review to determine if the exemptions were properly applied.

The court issued two letter decisions, the first on June 17, 2015, CP 640; the second on July 21, 2015. CP 843 The first letter identified a document which only partially sought legal advice although the court held the fact that it was a communication between client and attorney was enough to put it all within the privilege. In the latter letter decision the court questionably held emails neither written to or by the attorney were exempt work product.

The attorney client privilege is statutory:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

RCW 5.60.060(2)(a)

The statute is facially inapplicable to documents. Especially since under the PRA exceptions to disclosure are to be viewed narrowly, enlarging the privilege to include all attorney client communications, even those not involving legal advice, appears to be error. "The attorney client privilege is a narrow privilege and protects only 'communications and advice between attorney and client'; it does not protect documents that are prepared for some other purpose than communicating with an attorney." *Hangartner v. Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) The burden is upon the party asserting the privilege to prove the attorney client relationship existed and that relevant documents contain privileged communications. *Soter v. Cowles Publishing*, 162 Wn.2d 716, 745, 174 P.3d 60 (2007) But under the trial court's construction an attorney email to a client about a Seahawk game (or visa versa) would be exempt from public disclosure. The issue was raised in *Sanders v. State,* 169 Wn.2d 827, 852, 240 P.3d 120 (2010) where the court assumed only legal advice was privileged.

The work product privilege is also discussed in *Sanders*, 169 Wn.2d 854-857. Judge Martin questioned whether several documents withheld fit the definition. CP 642-643 Ultimately the court held, CP 843, emails or portions thereof were exempt work product even though they were neither authored by or directed to the city attorney. On one the attorney is merely copied. The court is asked to conduct an independent review applying appropriate legal criteria.

VI. CONCLUSION AND REQUEST FOR REASONABLE ATTORNEY FEES

The court is asked to reverse the trial court, determine the City has violated RCW 64.40 and RCW 42.56 as a matter of law, direct that requested amendments be allowed, conduct an in camera review, direct that nonexempt documents be produced, award reasonable attorney fees to the Church pursuant to RCW 42.56.550 and RCW 64.40.020, and remand for further appropriate proceedings.

RESPECTFULLY SUBMITTED this 26th day of May, 2017.

GOODSTEIN LAW GROUP PLLC

By: _____
Richard B. Sanders, WSBA #2813
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Jeff H. Capell, Deputy City Attorney Margaret Elofson, Deputy City Attorney City of Tacoma, Office of the City Attorney 747 Market Street, Room 1120 Tacoma, WA 98402 Email: jcapell@ci.tacoma.wa.us margaret.elofson@ci.tacoma.wa.us	☐ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 26th day of May 2017, at Tacoma, Washington.

Deena Pinckney

APPENDIX 1

EXHIBIT P46

PLANNING AND DEVELOPMENT SERVICES

REVIEW PANEL MINUTES

Wednesday, September 25, 2013
10:00 am
Third Floor Conference Room

ATTENDEES:

Craig Kuntz
Shanta Frantz
Jennifer Kammerzell
Larry Criswell
Troy Stevens

1.	
Action:	Construct new one story single family dwelling.
File Number:	CMB2013 - 40000209742
Applicant:	Church of the Divine Earth
Staff Contact:	Craig Kuntz
Location:	6605 E B Street, Parcel Number 5860000030

Comments:

1. The proponent shall dedicate area abutting the site along to provide consistent right-of-way widths along East B Street, to the approval of the City Engineer. East B Street is currently a 60 foot wide right-of-way. In order to stay consistent and provide adequate street and sidewalk area, a dedication of approximately 30 feet is required. Prior to recording, the applicant shall contact Real Property Services to prepare the deed for dedication, and then record the deed with the Pierce County Auditor. Once the deed is recorded, it shall be noted on the site plan. For more information, please contact Real Property Services at (253) 591-5260. Dedication is required prior to building permit issuance.

   NOTE: An additional dedication of right-of-way was considered by staff along East 66th Street north of the site. It was noted that a structure is currently being constructed along that right-of-way and that dedication would not be practical with the obstruction. Should the garage permit expire, not be completed, and/or be cancelled, then the garage may need to be removed and additional dedication along East 66th Street would be considered.

2. Cement concrete sidewalk shall be constructed along East B Street and East 66th Street, abutting the site, meeting Public Right Of Way Accessible Guide-lines (PROWAG) and Americans with Disabilities Act (ADA) requirements, and be installed to the approval of the City Engineer.

3. An asphalt wedge curb shall be constructed abutting the site along East B Street and East 66th Street, constructed in its place to the approval of the City Engineer.

4. Any damage or cuts associated with the proposal to City Right-of-way, abutting the site(s), shall be removed and replaced per City Restoration Policy. The restoration of paving abutting the site must also accommodate the required asphalt curbing.

5. The driveway must be accessed from East 66th Street. The driveway would not be allowed from East B Street as proposed due to traffic intersection concerns with East B and East 66th Streets. Traffic Engineering staff indicate that it is practicable to access the rear of the lot since there is an existing garage at the rear already.

6. All street work shall be accomplished as stated herein unless otherwise approved by the City

	Engineer. A licensed professional civil engineer shall submit the street plans for review and approval following the City's work order process. To initiate a work order, contact the Public Works Private Development at 253-591-5760 and note that a work orders required a performance bond per TMC 10.22.070.F. 7. Environmental Services will provide separate review and comments.

APPENDIX 2

EXHIBIT P50

FW: Parsonage (Residence) for Pastor - 6605 East B Street - 40000209742 - ** Land Use HOLD Notice**
Terry Kuehn
Thu 10/3/2013 12:57 PM
To: admin@thechurchofthedivineearth.org <admin@thechurchofthedivineearth.org>; The Church of the Divine Earth <thechurchofthedivineearth@hotmail.com>;
1 attachment (45 KB)
RPM-2013-09-25.doc;

From: shanta.frantz@ci.tacoma.wa.us
To: terrykuehn@hotmail.com
Date: Thu, 3 Oct 2013 12:49:02 -0700
Subject: Parsonage (Residence) for Pastor - 6605 East B Street - 40000209742 - ** Land Use HOLD Notice**

Good Afternoon, Mr. Kuehn:

Per our discussion this morning, the house permit for your church's parsonage at 6605 East B Street is On Hold for Land Use until the Site Plan may be resubmitted with the following reasons:

1) The land use code requires that vehicular access on corner lots be from the rear side of the site, not the front side to accommodate for safer and more consistent pedestrian access along street frontages. In this case, East B Street (the property's front side), is also designated as a school walking route. As such, the Site Plan needs to be revised to show a side facing driveway from East 66th Street to the detached garage under construction; and

2) Per the Review Panel Minutes you received last week (and attached to this e-mail for your convenience) a right-of-way dedication is required for East B Street. As we discussed this morning, if you decide to pursue this application and the right-of-way dedication is approved, the dimensions of the site will change, thereby requiring a change to the Site Plan.

a. Your contact for the right-of-way dedication process is Ronda Cornforth. You may contact Ronda at (253) 591-5052 / rcornfor@cityoftacoma.org.

However, please do not submit the revised Site Plan until the right-of-way dedication is approved and recorded (as I will have to check the Site Plan against the recorded legal description).

Please feel free to contact me anytime for questions about the land use review of this application.

Sincerely,

Shanta Frantz

City of Tacoma | Planning and Development Services

747 Market Street, Room 345

Tacoma, WA 98402-3769

(253) 591-5388 (Direct Line)

shanta.frantz@cityoftacoma.org

APPENDIX 3

EXHIBIT P57

CITY OF TACOMA
PUBLIC WORKS DEPARTMENT
BUILDING AND LAND USE SERVICES DIVISION

Tacoma

Built Right

OFF-SITE IMPROVEMENT WAIVER REQUEST

Submittal Requirements (unless modified by Staff):

- ☐ Completed Application Form
- ☐ Site Plan (unless one has already been provided)

Please print or write legibly

Date of Application: 9/20/2013

Project Site Address: 6605 East B Street, Tacoma, Washington, 98404

Parcel Number: 5866000030

Property Owner: The Church of the Divine Earth Address: c/o 2026 East Wright

City, State, ZIP code: Tacoma, Washington, 98404 Phone No.: 253-272-1755

Applicant/Contact: Terry Kuehn Address: 2026 East Wright

City, State, ZIP code: Tacoma, Washington, 98404 Phone No.: 253-272-1755

Building Contractor: Property owner Address:

City, State, ZIP code: Phone No.:

Give a brief description of your proposal: Construction of Single Family Dwelling - Parsonage

Permit/application under which the off-site improvements were determined:

CMB 2013 - 40000209742

Specific improvement(s) requested to be waived: Items #1 thru #6 of Review Panel meeting of September 25, 2013.

Why do you feel that a waiver should be granted? Proposed Demands by City of Tacoma are unlawful Exactions and are Oppressive, Inordinate and Substantial Burdens In the Church's Pursuit of Its Religious Freedom which Also Run Afoul of Constitutional Protections Afforded It. See Attachments #1, #2 and #3 and #4

Signature of Applicant: Date: 11/12/2013

APPENDIX 4

EXHIBIT P75

City of Tacoma
Planning and Development Services

March 7, 2014

Mr. Terry Kuehn
The Church of the Divine Earth
Tacoma, Washington USA
www.thechurchofthedivineearth.org

Re: Request for Improvement Waiver at 6605 E 'B' Street
Combination Permits No.: CMB2013 - 40000209742

Mr. Terry Kuehn,

Pursuant to your off-site improvement request dated November 12, 2013 staff has reviewed the submittal and subsequent supplements 1 through 6 and your request to waive all required frontage improvements adjacent to this site. The proposed activity is the construction of a single-family dwelling. After careful consideration of the situation, it was determined that the improvements are required and this single family dwelling is not exempt from development conditions.

Under the original waiver review of supplements 1 through 4, it was unclear if the proposal was for a religious assembly structure/area or a single family home. The submittal makes frequent references to religious rights afforded the applicant for development of a structure for religious activities. However, your proposal is for a single family dwelling. This distinction between the two uses results in different permitting requirements for land use codes and different construction requirements for building codes. However, it should be noted that in either case the structure would necessitate development conditions per Tacoma Municipal Code (TMC) section 2.19. City staff has been trying to convey the difference between the two uses so that proper permitting requirements could be completed by the applicant.

In your subsequent email dated January 07, 2014 at 1:36 PM, you clearly indicate the use to be as a single family dwelling. As a result, the construction of a single family dwelling would be subject to development conditions as required per TMC 2.19.040.

If you have questions about the original conditions placed on this property for the proposed development, then please contact the associated department listed with the requirement below:

1. Pedestrian access must be provided adjacent the site. Sidewalks along East B Street and along East 66th Streets are required to address the increased pedestrian trips created by this development. A school walking route is identified near the site and safe walking routes are required for children. In addition, development located two properties west of the site is installing sidewalks and this will create more walkway connectivity for pedestrian paths. The requirement for sidewalks is consistent with Municipal Code regulations per section 2.19.040 and has been required for other single family dwellings in the area. For questions about this requirement, contact Site Development at 253-591-5760.
2. For questions about the requirement for wedge curbing, contact Site Development at 253-591-5760.
3. For questions about the requirement for accessible ramps, contact Site Development at 253-591-5760.
4. A Work Order permit is required for the work within the right-of-way, as required by the Public Works Department. A performance bond is required for all work orders per TMC 10.22.070.F. To initiate a work order, contact the Public Works Construction Division at 253-591-5760.
5. The dedication of the right-of-way along East B Street is addressed by Public Works Engineering. See the separate letter attached from Jennifer Kammerzell.

If I can be of further assistance, please feel free to contact me at (253) 594-7820.

Sincerely,

Craig Kuntz
City of Tacoma
Planning & Development Services
253.594.7820/ Fax 253.591.5433

CC: Steve Standley, Public Works, Site Development
David Johnson, Planning and Development Services
Shanta Frantz, Planning and Development Services
Jennifer Kammerzell, Public Works, Engineering

City of Tacoma
Public Works Department

Memorandum

TO: Craig Kuntz

FROM: Jennifer Kammerzell

SUBJECT: 6605 East B Street Pedestrian Access

DATE: March 5, 2014

The City Engineering Division has reviewed the applicant's proposal to construct a single family dwelling at 6605 East B Street. The site is bounded by East 66th and B Streets. This memo addresses off-site improvements specific to East B Street.

Currently, the right-of-way width along East B Street is 30 ft and in proper alignment on the west side of the right-of-way. The right-of-way widens to 52 ft or 60 ft adjacent to the site. Typically, the City would require a minimum dedication of 22 ft on the east side to meet City of Tacoma Design Manual Standards (page 1-5) for a 52 ft public street rights-of-way that accommodates a travel lane, on-street parking, sidewalks, planting strips, and pedestrian buffer from private property. After consideration of the applicant's proposed and existing improvements, the City will allow a modification to the City of Tacoma Design Manual Standards for off-site improvements on East B Street. An 8 ft dedication along East B Street would be acceptable.

The 8 ft dedication would result in a 38 ft right-of-way that provides the necessary width for a 10 ft vehicular travel lane, 9 ft parking lane on the west side, 5 ft planting strip on the west side, 5 ft pedestrian pathways on both sides, and 2 ft pedestrian buffers on both sides. The reduced right-of-way width would eliminate parking on the east side of East B Street, which will have to be signed *No Parking* by the applicant. A 5 ft pedestrian pathway adjacent to the roadway would be required within the 8 ft dedication.

The pedestrian pathway and dedication is consistent with the Transportation Element General Goals and Policies to "achieve a multimodal transportation system that efficiently moves people and goods with optimum safety and speed". It is also consistent with Transportation Element policies T-MS-1 Transportation Demand Management and T-MS-12 Complete Streets. TMC 13.06.512.B.1 states that residential homes are required to provide a walkway between the front entrance and the nearest public street right-of-way. The public pedestrian pathway will provide a connection to the required new private walkway from the residential dwelling. In addition, the dedication will eliminate adverse future impacts, such as removal of parking or realignment of the roadway, to the properties at 143 East 66th and 6602 East B Streets.

If circumstances change and the project scope is modified then the City reserves the right to reconsider this recommendation. If you have any questions, please contact me at (253) 591-5511 or jkammerzell@cityoftacoma.org.

APPENDIX 5

EXHIBIT P84

Tacoma City of Tacoma
Planning and Development Services

April 28, 2014

Mr. Terry Kuehn
2026 East Wright Avenue
Tacoma WA 98404

Dear Mr. Kuehn:

I am writing in response to your latest letter, dated April 14, 2014, in order to answer the questions posed therein. In doing so, of a certain necessity, I am also addressing contentions you have made in your prior correspondence with the City of Tacoma ("City") as also referenced in your latest letter. In answer to your initial question, as the Director of Planning and Development Services, your letter was not inappropriately addressed to me.

As regards your request for "reconsideration of what Planning and Land Use Personnel have stipulated [as] requirements..." there is really nothing that I am able to reconsider at this time because no final decisions have been issued by the City in regard to your intended land use. In other words, reconsideration is only available after a final land use decision has been issued in some form, most often a permit issuance or denial. My understanding is that, to this point, you have only been given direction by Planning and Development Services staff concerning two alternative permit application paths you can go down depending on your intended use of the real property located at 6605 E. B Street ("Property"). Staff has also advised you of additional off-site improvement requirements necessary for you to build as you intend.

If, as your latest letter indicates, you intend to use the Property only as a "parsonage" without conducting religious services there, your building permit application will be, and is being, treated like any other application to build a single family residence. No Conditional Use Permit ("CUP") should be necessary, but without the CUP, religious services are not authorized to be conducted on the Property. It should also be noted that the Religious Land Use and Institutionalized Persons Act ("RLUIPA") does not necessarily come into play where the Property is not used for religious worship services.

The religious land use aspects of RLUIPA were designed by Congress to forbid or prevent *disparate treatment* of religious organizations, and RLUIPA requires that a "religious assembly or institution" be treated on "*equal terms* with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1) (2006). With that as the backdrop, your permit application should be processed in the same manner as any other single family residential application. RLUIPA does not necessarily bestow superior rights upon a religious use applicant that are not available to a non-religious use applicant, but it does ensure equal treatment.

747 Market Street, Suite 345 | Tacoma, Washington 98402 | Fax (253)591-5433
Phone (253) 591-5030 | http://www.cityoftacoma.org

The "stipulated requirements" you mentioned in your letter are all things the City would require of the development of any similarly situated residential real property. As such, I cannot grant your requested reconsideration in this context.

Pursuant to *TMC* 1.23.050.B.2, an appeal of this decision may be filed with the Hearing Examiner. The procedures for appeal are set forth on page 3.

Sincerely,

Peter Huffman
Director

NOTE: Pursuant to *RCW* 36.70B.130, you are hereby notified that, as an affected property owner receiving this notice of decision, you may request a change in valuation for property tax purposes consistent with Pierce County's procedure for administrative appeal. To request a change in value for property tax purposes you must file with the Pierce County Board of Equalization on or before July 1st of the assessment year or within 30 days of the date of notice of value from the Assessor-Treasurer's Office. To contact the board, you may call 253-798-7415 or by e-mail at www.co.pierce.wa.us/boe.

APPEAL PROCEDURES

APPEAL TO HEARING EXAMINER:

Pursuant to Section 1.23.050 of the *Tacoma Municipal Code*, the Director's decision may be appealed to the Hearing Examiner within 14 days of the decision date. If an appeal is filed, it shall be accompanied by a letter setting forth the alleged errors contained in the decision. The Hearing Examiner shall consider the appeal and shall issue a final decision concerning the request.

An appeal of the Director's decision in this matter must be filed with the Office of the Hearing Examiner, Seventh Floor, Tacoma Municipal Building, on or before May 12, 2014, together with a fee of **$315.09.** THE FEE SHALL BE REFUNDED TO THE APPELLANT SHOULD THE APPELLANT PREVAIL.

APPENDIX 6

EXHIBIT P96

BEFORE THE HEARING EXAMINER
CITY OF TACOMA

THE CHURCH OF THE DIVINE EARTH, Appellant, v. CITY OF TACOMA, Respondent.	NO. HEX 2014-016 DECLARATION OF PETER HUFFMAN IN SUPPORT OF THE CITY OF TACOMA'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION

I, Peter Huffman, under the laws of the State of Washington and under penalty of perjury, declare and state as follows:

1. I am over the age of 18 and competent to testify in this matter.
2. I am currently employed as the Director of the Planning and Development Services Department of Respondent, City of Tacoma, and I have been employed in that position since January 1, 2013. I have worked for the City of Tacoma for the past 20 years approximately.
3. I have personal knowledge of the proceedings and interaction regarding Appellant's desire to build a parsonage on the real property located at 6605 East B Street in the City of Tacoma (the "Subject Property"). I personally issued the letter decision dated April 28, 2014 (the "Letter Decision") to Appellant's representative, Mr. Terry Kuehn, that is now the subject of this appeal.
4. Subsequent to issuing the Letter Decision, City staff has revised its position regarding this development and the previously required off-site improvements, and

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

the City is now merely requiring Appellant to dedicate a small area of approximately 659.20 sq. ft. at the front of the Subject Property in order for the Subject Property and surrounding area to have uniform right-of-way ("ROW") width for street frontage (see map attached as Exhibit A showing current configuration of the Subject Property). This dedication will allow Appellant to proceed with its needed permit applications.

5. Appellant will access the Subject Property off of East B Street, as will all City services. It is important to the City that the ROW in all City streets be uniform.
6. Based on a cost assessment of recent property transactions and values in the area, the requested ROW area for dedication is valued at approximately $1,300.
7. Appellant has represented to the City that the Subject Property will be used only for a parsonage and not to conduct religious services. As a result, the City anticipates Appellant only needing a residential building permit and not a conditional use permit for a religious use as is required for churches, synagogues and the like.

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

Signed and dated at Tacoma, Washington this 3rd day of July, 2014.

PETER HUFFMAN

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

EXHIBIT A

Assessor-Treasurer electronic Property Information Profile

Parcel Summary for 5860000030

07/03/2014 02:08 PM

Property Details	
Parcel Number:	5860000030
Site Address:	6605 E B ST
Account Type:	Real Property
Category:	Land and Improvements
Use Code:	9100-VACANT LAND UNDEVELOPED

Taxpayer Details	
Taxpayer Name:	CHURCH OF THE DIVINE EARTH
Mailing Address:	2026 E WRIGHT AVE TACOMA WA 98404-4957

Appraisal Details	
Value Area:	PI4
Appr Acct Type:	Residential
Business Name:	
Last Inspection:	07/15/2013 - New Construction

Tax/Assessment	
Current Tax Year:	2015
Taxable Value:	0
Assessed Value:	50,700

Related Parcels

Group Account Number:	n/a
Mobile/MFG Home and Personal Property parcel(s) located on this parcel:	n/a
Real parcel on which this parcel is located:	n/a

Tax Description

Section 28 Township 20 Range 03 Quarter 12 MILLERS ACRE TRACTS: MILLERS ACRE TRACTS N 82.4 FT OF TR 1 EXC W 10 FT & N 82.4 FT OF 2

I acknowledge and agree to the prohibitions listed in RCW 42.56.070(9) against releasing and/or using lists of individuals for commercial purposes. Neither Pierce County nor the Assessor-Treasurer warrants the accuracy, reliability or timeliness of any information in this system, and shall not be held liable for losses caused by using this information. Portions of this information may not be current or accurate. Any person or entity who relies on any information obtained from this system does so at their own risk. ***All critical information should be independently verified.***

Pierce County Assessor-Treasurer
Mike Lonergan
2401 South 35th St Room 142
Tacoma, Washington 98409
(253)798-6111 or Fax (253)798-3142
www.piercecountywa.org/atr

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WEBSITE INFORMATION

Privacy Policy
Copyright Notices

APPENDIX 7

EXHIBIT P100

RE: Building permits
Capell, Jeff (Legal)
Wed 7/9/2014 10:55 AM
To: The Church of the Divine Earth <thechurchofthedivineearth@hotmail.com>;
Cc: Ward, Jennifer <jward@ci.tacoma.wa.us>; admin@thechurchofthedivineearth.org <admin@thechurchofthedivineearth.org>; Webster, Jeff <JWebster@ci.tacoma.wa.us>; Cornforth, Ronda <rcornforth@cityoftacoma.org>; Legg, Louisa <LLegg@ci.tacoma.wa.us>;

I met with City Real Property Services and the City Surveyor this morning. The City Surveyor's proposed legal description is correct. My statement regarding the sq. footage was incorrectly taken from an earlier e-mail that just had the square footage set out for the area that would be necessary for the frontage sidewalk only. That was my error. As I have represented to you for the last two weeks plus, the City is requiring dedication of the area at the front of the Church's parcel that would make the dedicated ROW match up with either side of the Church's property. That area is actually approximately 2,472 sq. ft. I will notify the Hearing Examiner of the error, but the error does not change anything in the City's position.

From: The Church of the Divine Earth [mailto:thechurchofthedivineearth@hotmail.com]
Sent: Monday, July 07, 2014 9:30 AM
To: Capell, Jeff (Legal)
Cc: Ward, Jennifer; admin@thechurchofthedivineearth.org; The Church of the Divine Earth
Subject: RE: Building permits

Mr. Capell, over the weekend, I have reviewed the legal description for the proposed right-of-way area that the City Surveyor put together. Unless I am incorrect, what he put together is quite in error.

The following is a rendition of what is now, what I suspect the proposed dedication might look like, and then what I suspect the new legal description might look like. Please run this by the City Surveyor and get his or her thoughts on what is put forth here.

'CURRENT LEGAL"

Real property in the County of Pierce, State of Washington, described as follows:
The North 82.40 feet of Tracts 1 and 2 Miller's Acre Tracts, as per map thereof recorded in Book 7 of Plats at page 54, records of Pierce County Auditor.

Except the West 10 feet of said Tract 1.

Tax Parcel Number: 586000-0030

Situs Address: 6605 East B Street, Tacoma, WA 98404

"LAND TO BE DEDICATED"

The west 18 feet of the North 82.40 feet of Tract 1, MILLER'S ACRE TRACTS, as recorded in Volume 7 of Plats at Page 54, records of Pierce County Auditor.

Except the West 10 feet of said Tract 1.

Situate in the City of Tacoma, County of Pierce, State of Washington

---

"NEW LEGAL"

Real property in the County of Pierce, State of Washington, described as follows:
The North 82.40 feet of Tracts 1 and 2 Miller's Acre Tracts, as per map thereof recorded in Book 7 of Plats at page 54, records of Pierce County Auditor.

Except the West 18 feet of said Tract 1.

Tax Parcel Number: 586000-0030

Situs Address: 6605 East B Street, Tacoma, WA 98404

"FOOTAGE DEPTH OF 6605 EAST B STREET"

129.95 = Tract 1 footage
129.95 = Tract 2 footage
259.90 = Tract 1 and 2 total footage
-10.00 = Current 10 feet for right-of-way from Tract 1
249.90 = Net currrent depth of 6605 East B Street
-8.00 = Contemplated 8 feet for right-of-way from Tract 1
241.90 = Contemplated depth of 6605 East B Street

Thank you.
Terry Kuehn

The Church of the Divine Earth
Tacoma, Washington USA
www.thechurchofthedivineearth.org

From: jcapell@ci.tacoma.wa.us
To: thechurchofthedivineearth@hotmail.com
CC: admin@thechurchofthedivineearth.org; jward@ci.tacoma.wa.us
Date: Tue, 1 Jul 2014 14:36:59 -0700
Subject: RE: Building permits

I hope that information will be available very shortly. In the meantime, in answer to your question yesterday, our City Surveyor has put together a legal description for the right-of-way area at the front of your lot (see attached which also has the vesting deeds for your property). Please let me know your position on the City revised requirement only for the right-of-way dedication in order for your permits to move forward. Thanks.

30'

From: The Church of the Divine Earth [mailto:thechurchofthedivine
Sent: Tuesday, July 01, 2014 9:56 AM
To: Capell, Jeff (Legal)
Cc: admin@thechurchofthedivineearth.org; The Church of the Divir
Subject: Building permits

Mr. Capell, I understand from Jennifer Ward that a list of residential building permits issued for the twelve-month period prior to the end of May 2014 for residential construction here in Tacoma will be made available to you and that you will coordinate with me in my receiving a copy of that list. May I please inquire as to how that process might be coming to fruition?

Thank you

Terry Kuehn

The Church of the Divine Earth
Tacoma, Washington USA
www.thechurchofthedivineearth.org

APPENDIX 8

EXHIBIT P98

BEFORE THE HEARING EXAMINER
CITY OF TACOMA

THE CHURCH OF THE DIVINE EARTH, Appellant, v. CITY OF TACOMA, Respondent.	NO. HEX 2014-016 AMENDED DECLARATION OF PETER HUFFMAN IN SUPPORT OF THE CITY OF TACOMA'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION

I, Peter Huffman, under the laws of the State of Washington and under penalty of perjury, declare and state as follows:

1. I am over the age of 18 and competent to testify in this matter.
2. I am currently employed as the Director of the Planning and Development Services Department of Respondent, City of Tacoma, and I have been employed in that position since January 1, 2013. I have worked for the City of Tacoma for the past 20 years approximately.
3. I have personal knowledge of the proceedings and interaction regarding Appellant's desire to build a parsonage on the real property located at 6605 East B Street in the City of Tacoma (the "Subject Property"). I personally issued the letter decision dated April 28, 2014 (the "Letter Decision") to Appellant's representative, Mr. Terry Kuehn, that is now the subject of this appeal.

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

4. Subsequent to issuing the Letter Decision, City staff has revised its position regarding this development and the previously required off-site improvements, and the City is now merely requiring Appellant to dedicate an area of approximately 2,472 sq. ft. at the front of the Subject Property in order for the Subject Property and surrounding area to have uniform right-of-way ("ROW") width for street frontage (see map attached as Exhibit A showing current configuration of the Subject Property). This dedication will allow Appellant to proceed with its needed permit applications.
5. Appellant will access the Subject Property off of East B Street, as will all City services. It is important to the City that the ROW in all City streets be uniform.
6. Based on a cost assessment of recent property transactions and values in the area, the requested ROW area for dedication is valued at approximately $4,770.96.
7. Appellant has represented to the City that the Subject Property will be used only for a parsonage and not to conduct religious services. As a result, the City anticipates Appellant only needing a residential building permit and not a conditional use permit for a religious use as is required for churches, synagogues and the like.

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

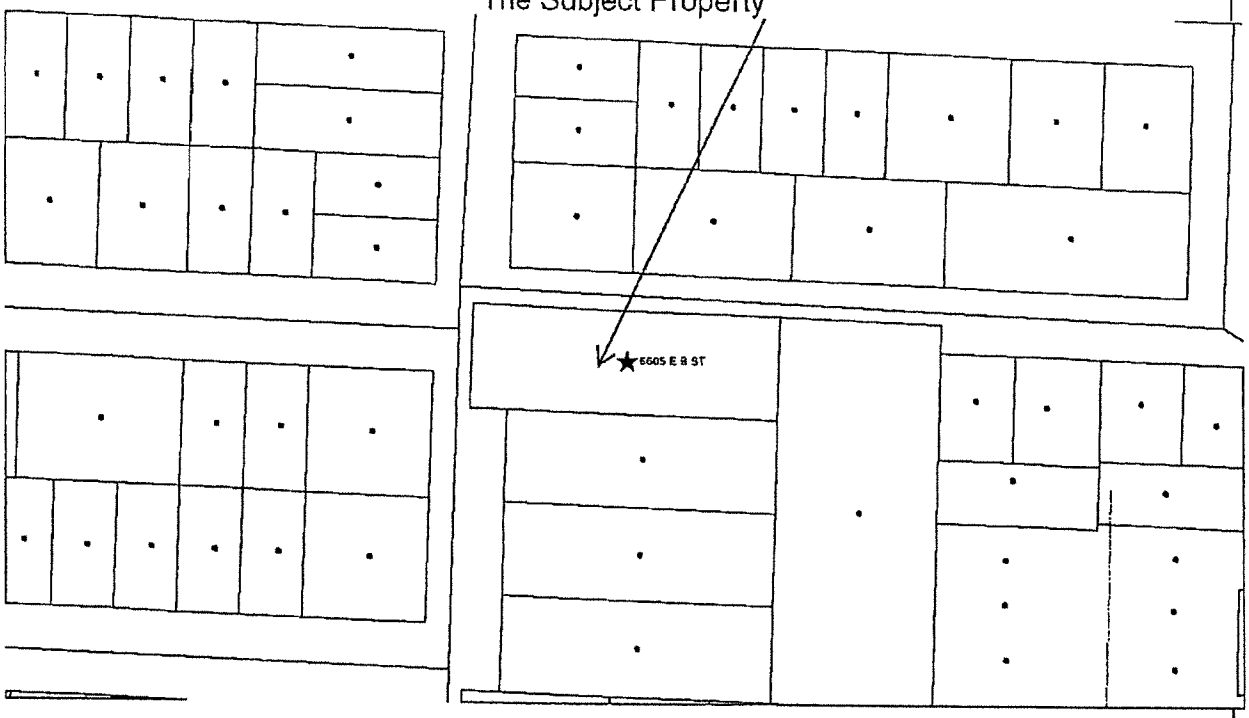
Signed and dated at Tacoma, Washington this 17 day of July, 2014.

PETER HUFFMAN

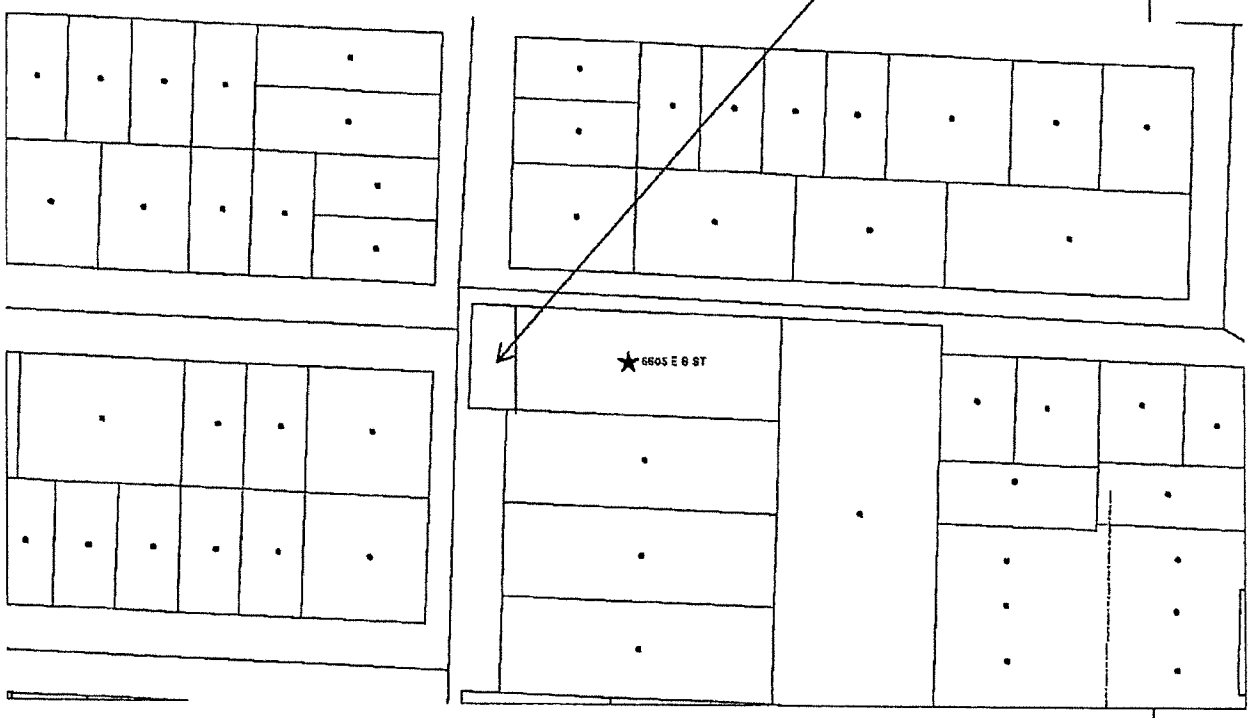
Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
(253) 591-5885 / Fax 591-5755

EXHIBIT A

The Subject Property



Area to be dedicated (approximately)



Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3767
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APPENDIX 9

EXHIBIT P105

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

THE CHURCH OF THE DIVINE EARTH, **Appellant,** **v.** **CITY OF TACOMA,** **Respondent.**	**FILE NO. HEX 2014-016 (CMB2013-40000209742)** **ORDER ON MOTION FOR SUMMARY JUDGMENT**

THIS CASE involves an appeal by The Church of the Divine Earth (Appellant) of dedication and improvement requirements imposed by the City of Tacoma (Respondent) in connection with a building permit for a residential structure at 6605 East B Street within the City.

In this proceeding the Appellant is represented by Terry Kuehn who is a spokesman for The Church of the Divine Earth but who is not a lawyer. The Respondent is represented by Jeff Capell, Deputy City Attorney.

Procedure:

Tacoma, through its Director of Planning and Development Services, affirmed the City's requirements for dedication and improvements in connection with the proposed construction at 6605 East B Street by letter on April 28, 2014. Appellant filed a Notice of

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Appeal on May 12, 2014, asserting that the requirements violated its rights under the Constitution of Washington State.

After a telephone conference, a Prehearing Order was issued on May 23, 2014, providing, among other things, for the submission of dispositive motions by July 3, 2014. Pursuant thereto, Appellant filed a Motion for Summary Judgment on June 9, 2014.

The Respondent filed a response on July 3, 2014, amended on July 9, 2014. Appellant replied to Tacoma's Response on July 14, 2014. The City replied further on July 16, 2014. Appellant filed an additional reply on July 21, 2014.

Along with the motions and briefs, the following exhibits were submitted. With the pleadings and briefs, these items constitute the record considered on the Motion for Summary Judgment:

1. Tacoma Planning and Development Services Review Panel Minutes, Wednesday, September 25, 2013, regarding File No: CMB2013-40000209742, containing requirements for development on new one story single-family dwelling at 6605 East B Street, Parcel No. 5860000030.

2. Tacoma Planning and Development Services's letter decision of April 28, 2014.

3. Affidavit of Steven Weinman, dated June 9, 2014.

4. Assessor's Parcel Summary for 6605 E, B Street.

5. Corporations Division's registration data for Church of Divine Earth.

6. Declaration of Peter Huffman in Support of City's Response to Motion, dated July 3, 2014.

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7. WSBA Lawyer Search showing no listing for Terry Kuehn.

8. Aerial photograph and drawing of lots in subject neighborhood.

9. Amended Declaration of Peter Huffman in Support of City's Response to Motion, dated July 9, 2014.

10. Tacoma Public Works Department Memorandum (Kuntz to Kammerzell), dated March 5, 2014 regarding improvements specific to East B street, dated March 5, 2014.

11. Tacoma Planning and Development Services's letter (Craig Kuntz), to Terry Kuehn, dated March 7, 2014.

12. Various scenarios put forward by City, through July 9, 2014, for development at 6605 East B Street. (Exhibit E to Appellant's Amended Reply dated July 14, 2014)

Uncontested Facts:

1. The Appellant's proposal is to build a single-family residence at 6605 East B Street in Tacoma. The property is owned by The Church of the Divine Earth. The proposed residence is to be used as a "parsonage" for the church and not to conduct religious services.

2. The Appellant church describes itself as "a non-denominational solemn spiritualistic earth-centered Baltic-influenced Pagan church," and as "a religion that focuses on the sanctity of trees, rivers, stones and other outpourings of the gods and the veneration of ancestors." It is a non-profit corporation registered with the State of Washington.

3. On September 20, 2013, the Appellant, through its representative Terry Kuehn, applied for a single-family residential building permit for 6605 East B Street. Mr. Kuehn is not an attorney. In its review, the City proposed a number of permit conditions pursuant to

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Tacoma Municipal Code (TMC) Section 2.19, including dedication of right-of-way and construction of frontage improvements.

4. Discussions ensued, eventuating in the issuance of a letter decision dated April 28, 2014, from the City. In it, the City declined to issue the permit without the imposition of the conditions, stating that it was treating the development application like that for "any similarly situated residential real property."

5. In its Notice of Appeal, dated May 12, 2014, the Appellant church asserted that the requirements the City seeks to impose will "subject the church to substantial burdens in having to destroy and decimate the sanctity of an unspecified amount of lineal footage of its coveted and sacred tree line."

6. There are no sidewalks, curbs and gutters, or wedge curbing along East B Street on either side of the street from East 64th Street to within approximately 100 feet of the southwest corner of East 72nd Street (approximately 2,600 feet). This street segment includes the frontage at 6605 East B Street, as well as the frontage area at 6453 East B Street.

7. In connection with the subject building proposal, the City initially specified the following conditions of approval (Review Panel Minutes, September 25, 2013, File No. CMB2013 - 40000209742):

a) Dedication of approximately 30 feet right-of-way along East B Street to provide consistent right-of-way widths along East B Street.

b) Construction of cement sidewalk along B Street and East 66th Street abutting the site.

c) An asphalt wedge curb constructed along East B Street and East 66th Street abutting the site.

d) Removal and replacement of any damage or cuts to the City right-of-way abutting the site. Restoration of paving abutting the site must also accommodate required asphalt curbing.

e) Driveway access from East 66th Street, not East B Street.

f) Submittal of street plans by a licensed professional civil engineer for review and approval following the City's work order process.

8. The residence at 6453 East B Street, approximately 480 feet north of 6605 East B Street, was permitted and constructed during the time period in which Appellant submitted its building permit application, without requirements like those required of Appellant

9. By letter dated March 7, 2014, the City denied Appellant's request for waiver of all required frontage improvements, but amended the right-of-way dedication required to that stated in the Public Works Memo of March 5, 2014. The latter reads (in part):

> "After consideration of the applicant's proposed and existing improvements, the City will allow a modification of the City of Tacoma Design Manual Standards for off-site improvements on East B Street. An 8 ft dedication along East B Street would be acceptable. . . . A 5 ft pedestrian pathway adjacent to the roadway would be required within the 8 ft dedication. "

10. Subsequently, the City further revised its requirements for off-site improvements at 6605 East B Street, stating:

> "[T]he City is now merely requiring Appellant to dedicate an area of approximately 2,472 square feet at the front of the Subject Property in order for the Subject Property and surrounding area to have a uniform right-of-way ('ROW') width for street frontage. . . .

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> Appellant will access the Subject Property off of East B Street, as will all City services. . . .Based on a cost assessment of recent property transactions and values in the area, the requested ROW area for dedication is valued at approximately $4,770.96." (Huffman Amended Declaration of July 9, 2014.)

11. Through its Amended Reply to the City's Amended Response to Appellant's Motion for Summary Judgment and Cross Motion, dated July 14, 2014, Appellant declined to accept the City's revised requirements.

Discussion

1. Standing

The City argues that Appellant lacks standing to bring this appeal, citing Ahmad v. Town of Springdale. 178 Wn. App 333 (2013) and Cottinger v. Employment Security Department, 162 Wn. App. 782 (2011) for the proposition that a corporation must be represented in court by an attorney. However, that limitation does not apply in these administrative proceedings, which are governed by the *Rules of Procedure for Hearings, Office of Hearing Examiner, City of Tacoma.* Under Section 2.09(b) of the *Rules*, any authorized person designated as a representative may speak for an association, corporation or other collective entity.

The Examiner takes notice that laymen often speak for groups in matters of this kind at this level. He concludes that Appellant has no problem with standing here.

2. Issues

After reviewing all the pleadings and briefing, the Examiner has concluded that the only issues raised in this case are Constitutional issues. The Appellant principally relies on

Article I, Section II of the Washington State Constitution which states that "no one shall be molested or disturbed in person, or property, on account of religion." The argument is simply that the proposed requirements for the dedication of property and frontage improvements constitute an unconstitutional molestation or disturbance of religious "property."

Tacoma's proposed imposition of conditions is based on *TMC 2.19.040* which addresses development standards requiring off-site improvements. Appellant argues that the ordinance, as applied to the Church's project, is impermissibly in conflict with the State Constitution and therefore cannot validly be used as the basis for the conditions.

Reference is also made to the allowance of another residence nearby along the same street front without conditions similar to those being proposed for Appellant. This appears to be a form of equal protection argument, also constitutional in nature.

Appellant contends that the Tacoma's building permit system represents "a system of individual exemptions" which it may not refuse to apply to cases of religious hardship without compelling reason, relying principally on First Covenant Church v. City of Seattle, 114 Wn.2d, 392 (1990) and 120 Wn.2d 203 (1992).

Further, Appellant asserts that the requirement for dedication of property constitutes an unconstitutional taking of private property contrary to the holdings in Nollan v. California Coastal Commission, 483 U. S. 825 (1987) and Dolan v. City of Tigard. 512 U.S. 374 (1994).

3. Jurisdiction

Administrative tribunals have jurisdiction only over matters expressly granted by legislative authority or necessarily implied. Human Rights Commission v. Cheney School District, 98 Wn.2d 118 (1982); Kaiser Aluminum v. Department of Labor and Industries, 121 Wn.2d 776 (1993). This means that unless authorized by statute or ordinance, a hearing officer may not even apply principals of common law or equity. Chausee v. Snohomish County Council, 38 Wn. App. 630 (1984). *See also,* Skagit Surveyors v. Friends of Skagit County, 135 Wn.2d 542 (1998).

The limitations on administrative jurisdiction apply specifically to deny jurisdiction over matters of substantive constitutional law. Yakima County Clean Air Authority, 85 Wn.2d 255 (1975); Grader v. Lynnwood, 45 Wn. App. 876 (1986).

4. Instant Case

No authority has been cited and the Examiner knows of none which would confer jurisdiction upon him to decide the constitutional issues raised in this case.

On the other hand, no question has been raised concerning whether the City would be acting beyond its authority in imposing the proposed conditions under the governing ordinances.

Therefore, the Examiner concludes that he is without power to decide the issues raised by Appellant. Yet, there is no contest as to whether the City's proposed conditions are consistent with the relevant City legislation. Thus, as to matters over which the Examiner does

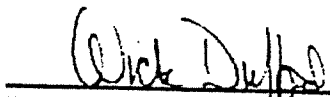
have jurisdiction, there are no issues of material fact and the City is entitled to judgment as a matter of law.

Conclusion:

The Appellant's Motion for Summary Judgment is denied. Summary Judgment is granted to the City. A building permit, subject to the conditions set forth in the Amended Declaration of Peter Huffman, dated July 9, 2014, may be issued.

The Examiner notes that the issues on which he has declined to rule may be raised before the Superior Court.

DONE this 19th day of August, 2014.



Wick Dufford, Hearing Examiner Pro Tempore

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NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code* 1.23.140)

NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision is appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute.

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APPENDIX 10

EXHIBIT P116

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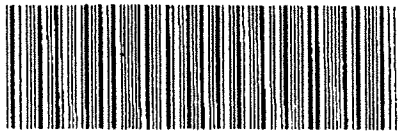

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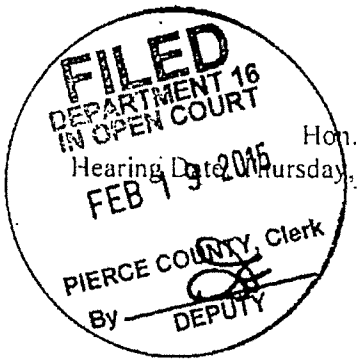

Hon. Elizabeth Martin
Hearing Date: Thursday, January 19, 2015
Time: 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

THE CHURCH OF THE DIVINE EARTH Petitioner, vs. CITY OF TACOMA, Respondent.	NO. 14-2-13006-1 ORDER GRANTING LUPA APPEAL

The undersigned judge of the above entitled Court conducted a hearing on the Petitioner's LUPA appeal, considered the administrative record, and the arguments of counsel. Wherefore this Court does now:

ORDER, ADJUDGE, and DECREE as follows:

1. This Court has jurisdiction to consider Petitioner's LUPA appeal;

2. The City of Tacoma violated the Petitioner's due process rights as secured by the Fourteenth Amendment and the Takings Clause of the United States Constitution by requiring a ~~30~~ 8 foot dedication of land to the City as a condition to issuance of a single family residential building permit for property located at 6605 East B Street, Tacoma, Washington and by failing to carry its burden to prove the condition complied with the requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) and related authority;

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3. Petitioner's appeal is GRANTED.

4. The decision of the Hearing Examiner is reversed as it relates to a taking, based on the factual record & cross-motions for summary judgment before the court.

5. The City of Tacoma is ordered to process Petitioner's building permit application without imposing the subject dedication condition;

6. The Petitioner is awarded its taxable statutory costs, including those costs incurred in the administrative proceeding and before this Court, in an amount to be determined; and

7. This Court finds that the entry of this judgment as a final judgment pursuant to CR 54 (b) is justified because the LUPA portion of the proceeding has been bifurcated from other pending claims by prior orders of this Court, there is no just reason to delay entry of the judgment, and this Court does now expressly direct entry of the judgment as a final appealable judgment.

Done in Open Court this 19th day of February, 2015.

Judge Elizabeth Martin

FILED
DEPARTMENT 16
IN OPEN COURT
FEB 19 2015
PIERCE COUNTY, Clerk
By DEPUTY

PRESENTED BY:

GOODSTEIN LAW GROUP PLLC

Richard B Sanders, WSBA # 2813
Attorney for Petitioner

Approved as to form:

CITY OF TACOMA

By:
Jeff Capell, WSBA # 25207
Attorney for Respondent City of Tacoma

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May 26, 2017 - 11:43 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49854-5
Appellate Court Case Title:	Church of the Divine Earth, Appellant v. City of Tacoma, Respondent
Superior Court Case Number:	14-2-13006-1

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