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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 REPLY BRIEF

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Falsehood flies, and truth comes limping after it…

-Jonathan Swift

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By way of introduction, Respondent's Brief is not only remarkable for what it says (in 87 pages!!) but what it doesn't. For example there is no effort to defend the City Attorney's lie at the LUPA hearing that the exaction was eight feet rather than 30. Nor does the City claim Judge Martin's eight foot interlineation on the order has any preclusive effect—although that was its position before and during trial (which the court adopted). Nor does the City even attempt to defend a 30 foot exaction imposed for the purpose of uniformity. Nor does it claim whatever the exaction to widen the road right- of-way, for whatever the reason, it had any plans to build out the road in any event—which *in itself* is fatal to such a condition, or even an eminent domain proceeding with just compensation. Nor does it present any authority that failure to disclose documents subject to a Public Records Act request because of employee error is a defense to a PRA claim. Nor does it defend a claim of the attorney client privilege to withhold documents which do not seek or deliver legal advice.

I. REPLY TO CITY'S STATEMENT OF THE CASE

Much of the City's brief, overtly or not, seems to spin or create facts to justify an exaction without clarification about which what exaction it is talking. For example it claims junior staffers conducted a *Nollan* analysis at Review Panel meetings, e.g. Brief p. 3. References to the

record, however, do not support that claim. There may be conclusory references to "discussions" however there is nothing on what was actually said. More fundamentally, it doesn't matter who said what. What does matter is only whether "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 64.40.020 This requires an understanding of what the "final decision" is and a legal conclusion by the court whether it was unlawful and the City should have known it. Here, for example, by any account, the "final decision" was a 30 foot exaction to make the road right of way platted more than a hundred years before uniform, with no plans to improve the road in any event. See App. 8 and 9[1] Should the City have known this violates *Nollan* and related legal authority or not? The Church believes the answer is pretty obvious and no amount of discussions between City staffers can change that.

The Brief claims construction plans had not been corrected by the time of trial. Brief p. 4 True but irrelevant. They are now and the permit has issued.

Brief 4-5 interjects some City confusion about whether the project was to be a single family residence or a Church (notwithstanding the plans

[1] All references to an appendix are to documents attached to Appellant's Opening Brief.

submitted were for a single family residence, not a church). This however was clarified within two weeks of submittal as evidenced by the Frantz notes which the City silently withheld from disclosure. P54 Irrelevant.

Respondent's Brief 8 admits even the Public Works director believed the 30 foot exaction was excessive. The City never tried to defend the 30 foot exaction at trial although the court concluded the Hearing Examiner decision incorporating the 30 feet was the "final decision" for the purpose of RCW 64.40.020. Conclusion of Law 1, CP 2407

Brief 13 claims the Amended Huffman declaration affirming imposition of a 30 declaration was "error." If this was an "error," the City never corrected it to either the Church or the Hearing Examiner RP 574-77 and, according to Director Huffman, the City would have fully enforced it against the Church had the Church not successfully prosecuted its LUPA appeal. RP 582 The City continues its constant pattern of deception.

The Church's Opening Brief contains an objective and fully referenced description of the record and the Church stands by it.

II. REPLY TO ARGUMENT

A. The City violated 64.40

Collateral estoppel

The City argues the February 19, 2015 LUPA judgment (App. 10) should be given no preclusive effect based on RCW 36.70C.130(2)[2] The City cites no authority to construe this statute to preclude collateral estoppel[3] whereas *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 115-116, 829 P.2d 746 (1992) expressly applies it under nearly identical circumstances. Typically, local governments invoke collateral estoppel to bar a damage action if the claimant loses his LUPA appeal, and courts agree. Is the City now arguing the doctrine is misapplied in that circumstance? The text of the statute belies the City's argument. The first sentence references "under this chapter", i.e. the LUPA chapter. RCW 36.70C.030 makes clear LUPA itself doesn't provide a damage remedy but other claims for damages or compensation may be joined in the land use petition, as is the case here. In other words, while LUPA does not serve as an independent basis for a damage award, it expressly recognizes that other causes of action do.

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[2] "In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages and compensation."

[3] Collateral estoppel is the Church's claim, Opening Brief 27, not res judicata, as the City claims.

The second sentence, upon which the City seems to rely, states: "A grant of relief *by itself* may not be deemed to establish liability for monetary damages or compensation." (italics added) In other words, LUPA does not provide a damage remedy, which is not to say other statutes or doctrines don't. Additionally, whether or not the specific grounds upon which the petitioner prevailed under LUPA may establish an element of a damage claim depends on the issue upon which the petitioner prevailed and the element required in the damage action. Here the LUPA judgment established that the exaction imposed on the Church by the City violated the Church's constitutional rights. Collateral estoppel precluds that issue from relitigation; however, as this case illustrates, that does not necessarily "establish liability for monetary damages and compensation."

Unconstitutional action collaterally estoppes the City as a matter of law to deny it acted arbitrarily as defined in RCW 64.40, violated a federal right actionable under 42 USC 1983, and acted "unlawfully" under 64.40 if the City knew or should have known it. Nothing about RCW 36.70C.130(2) precludes the application of collateral estoppel to finally determine whether the City's exaction was unconstitutional.

Unlawful

Brief, p. 21, erroneously claims "the term 'unlawful' incorporates an element of intent." No, "or it reasonably should have known to have been unlawful" is an objective legal standard to be applied by the court.

Nothing was "taken"

On the next page the City tries to impeach the final judgment without appealing it claiming Judge Martin didn't really mean what she said. Too late for that. That Judge Martin commented later in the proceeding that there wasn't an actual taking, Brief 23, did not contradict her Final LUPA Judgment which found a Due Process violation and a violation of the "Takings Clause." As explained in *Koontz v. River Water Management District*,__ U.S.__, 133 S. Ct. 2586, 2594-96, 186 L. Ed. 2d 697 (2013) (Opening Brief 28) an improper permit condition is not a taking but a due process violation which frustrates "the Fifth Amendment right to just compensation." Judge Martin's LUPA judgment is right on. See also *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 2087, 161 L. ed. 2d 876 (2005) (which distinguishes a *Nollan/Dolan* due process violation from a taking.) Judge Martin also dismissed an inverse condemnation claim—to which the Church has assigned no error. This is perfectly consistent with the due process violation found in her LUPA Judgment.

Briefing Unconstitutional Conditions

Incredibly the City claims "…the doctrine of unconstitutional conditions was not briefed to either Judge Martin or Judge Hogan." Brief 26 Nothing in this case was so thoroughly briefed at virtually every stage of the proceeding. Pastor Kuehn quoted the relevant cases in his supplements to the City supporting his waiver request. This same case law was briefed in the LUPA appeal. See e.g. CP 224-29; 265 ("the City departs from a proper analysis of unconstitutional condition cases."); every time there was a motion or cross motion for summary judgment these cases were briefed[4]; Amended Petitioner's Trial Brief referenced the *Nollan* rule. CP 1896. The Respondent's Brief even quotes Judge Martin's comments on *Koontz*, p. 25-6.

"Should have known" is a question of law

The City brief loosely claims "When responding to Mr. Kuehn, the City staff did provide the basis for the development conditions and advised Mr. Kuehn that the City felt the requirements were proportional See e.g. RP 847; P55; RP 456" Brief p. 31 First, it doesn't matter what the City told Kuehn since the test relates to whether the City "should have known" its final decision was unlawful: a question of law for the court. Second, although staffer words sometime include "proportional," the

[4] E.g. "But here, the claim is that a condition on development violated the doctrine of unconstitutional conditions." CP 578

justification doesn't come close to a proper *Nollan* analysis, even a wrongheaded one. For example, language in P55 referenced at RP 847 justifies the road exaction because "The current right-of-way does not meet development standards…" Obviously this would be true even if there was no improvement of the property at all. No nexus to the development is even argued.

1. The Church argues that an unconstitutional exaction is arbitrary and capricious as a matter of law

Yes, it is. Violation of the constitutional rights of a land use applicant is simply not an option to be considered by the official and is "inherently" arbitrary as a matter of law to do so. Plenty of authority is cited in the Church's Opening Brief 30-32 to support this proposition. That some of the case law predates the adoption of LUPA is irrelevant since the definition of arbitrary hasn't changed. *Mission Springs v. Spokane*, 134 Wn. 2d 947, 962, 954 P. 2d 250 (1998) is post-LUPA authority that refusal to properly process a land use permit according to law is arbitrary because it is "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action (citing authority)." Here the law is crystal clear and well established that the government cannot constitutionally demand an exaction of real property as a permit condition unless the government

can carry its burden to prove the exaction is necessary to cure some problem caused by the proposed development and the government is actually going to affect the "cure." The City's 87 page brief doesn't even try to justify this as meeting the *Nollan* test. If the City has some good reason to take the property in eminent domain it must pay for it; however even such an action would fail absent plans to build out the right of way, which there weren't. See *Burton v. Clark County*, 91 Wn. App. 505, 525-529, 958 P. 2d 343 (1998) The City has not a leg upon which to stand.[5]

2. The Church also asserts the City Violated RCW 64.40 because City should have known the exaction was unlawful

Indeed it does. Under this heading the City once again attempts to convert an objective legal "should have known" test to a subjective one. The text of RCW 64.40.020 isn't a subjective test. It is very true that Pastor Kuehn told the City chapter and verse why it was violating his legal rights, it is very true the City ignored him and did it anyway. It doesn't matter there was a disagreement. That is no defense if the court concludes the City should have known it was violating the law. The City convinced the trial court judge that the City should *not* have known it was unconstitutional and otherwise unlawful to demand a right-of-way exaction condition to make a road platted 100 years before "uniform,"

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[5] "Ending a sentence with a preposition is something up with which I will not put." Winston Churchill

even when it didn't even have any plans to build it out. The City cites some cases where exactions were based on proven impacts of the project—but here impacts of the project according to the City's "final decision" have nothing to do with it: it was simply based on previously platted right-of-way.

The City claims "Like the applicants in *Sparks, Isla Verde, Trimen* and *Town and Country,* the Church proposed a project that would make worse an already existing problem of insufficient right-of-way." Brief 42 This is complete nonsense. The Church's proposed single family residence didn't change the preexisting right-of-way; the City didn't prove the preexisting right of way was a "problem;" the City's final decision was not premised on any impact from the small replacement house; and the City had no plans to correct the "problem" in any event.

The City's brief continues (p. 43) to talk about problems with tapering streets and width to accommodate sidewalks. The trial court made no finding of any of this. First, this street may not be uniform in right-of-way but on the ground it is straight as an arrow and uniform in width. There are plenty of photo exhibits, e.g. see P 3-23, or perhaps the court would take a look. Second, there are no sidewalks in the area. Third, these problems, if they are problems, were not caused by the proposed construction. Fourth, stealing the Church's property will not cure these

"problems" because the City has no budgeted plan to build out the street or install sidewalks in any event.

a) The City claims the goal of the dedication requirement was safety, which exempts it from RCW 64.40

This argument was not raised at the trial court and cannot be first introduced on appeal. RAP 2.5 (a) Nor is it supported by a finding of the trial court. Moreover this was not a "lawful decision" of the City "designed to prevent" a dangerous condition.[6]

This argument would seem to justify taking the Church's property without just compensation even if the Church planned to build nothing at all. That *is* obviously an unconstitutional taking, and therefore unlawful. Moreover the trial court didn't find the street was "dangerous." The street has been there for more than 100 years and there is no problem. Finally even if there were a problem taking the Church's property would not cure it. The City is throwing in the kitchen sink to punish this pastor who had the gall to resist violation of his constitutional rights.

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[6] "'Act' shall not include lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the health, safety, welfare or moral of residents in the area." RCW 64.40.010

3. Findings 5 and 16, and conclusion 1, 2, 3, 4, and 5 are not supported by substantial evidence and are not legally correct

a) Finding No. 5

This Finding ("At the Review Panel meetings, City staff conducted a *Nollan/Dolan* analysis…") is discussed in the opening brief at 35-36 and the Church will try not to re-plow that field. Although the finding is not supported by the record, more fundamentally it is a legal conclusion and irrelevant. It simply doesn't matter what the Review Panel said or thought. The only issue for the unlawfulness prong of RCW 64.40.020 is whether the city "should have known" its final decision was unlawful. The Review Panel didn't make the final decision, and even if it did it would be irrelevant to answer the objective question of law. Beyond that the record contains no direct testimony of what was actually said. For example the Brief cites RP 810 where the staffer is prompted to say "yes, the code is considered. I mean, it's always part of the discussion along with nexus and proportionality." And what was that discussion? At trial the witness, Craig Kuntz, testified he could not recall what was said. RP 809 In his deposition read into the record he testified the reason he convened the Review Panel was to discuss right-of-way. P 135 p. 7 The fact is, as clearly stated in the Huffman amended declaration and by the hearing examiner, App. 8 and 9, the reason for the 30 foot exaction was to make the right-of-way uniform. It had nothing to do with impacts of a small

replacement house. There is no substantial evidence that the Review Panel conducted a *Nollan* analysis. Period.

The Respondent's Brief 49 also references testimony from Jennifer Kammerzell that her traffic manual states a single family residence might generate 10 trips per day and "This additional vehicular burden is part of what established the nexus between the dedication requirement (of 30 feet) and the Church's project." However that quotation is from the brief, not Kammerzell. Kammerzell testified she imposed the 30 foot condition generally to make the right of way uniform, RP 1083, something which had nothing to do with the project, and she admitted the prior house replaced would generate the same traffic as the new one according to the manual. RP 1083

The Church didn't challenge Finding 3 that the Review Panel "considered the impacts created by the proposed development, including to (sic) the pedestrian traffic" etc. because "considering" something doesn't tell us anything about whether the City should have known its final decision was contrary to law. Nor does it tell us how or what they considered. Simply considering something doesn't mean it passes constitutional muster. Maybe they "considered" with what they could get away. A cost benefit analysis would likely conclude the City could extort the Church's property and not be held accountable in court because small

private litigants cannot afford the hundreds of thousands of dollars it takes to fight city hall. The remaining arguments in this section are more than adequately addressed the Church's Opening Brief.

b) The Church challenges Finding of Fact 16

The City's response demonstrates this Finding is irrelevant.

c) Conclusion of Law No. 1

This conclusion claims the Hearing Examiner decision is the "final decision" of the City for the purpose of 64.40. This conclusion is adequately addressed in the Church's Opening Brief pp. 37 and 41-44. The City counters the Church's citations to Supreme Court authority with a Court of Appeals decision, *Brower v. Pierce County*, 96 Wn. App. 559, 566, 984 P.2d 1036 (1999). *Brower* concerned a situation very unlike the case at bar where Brower successfully pursued his administrative remedies before a hearing examiner who had jurisdiction to grant relief, and did so. But here the Examiner held he had no jurisdiction to grant relief to the Church and in fact granted none.[7] (App. 9) So the final decision of Director Huffman on April 28, 2014 (App. 5) was left intact and enforced. Although the Church disagrees that a decision subject to administrative review can never be the "final decision" of the agency for the purpose of RCW 64.40 as a matter of law, here the Church had no administrative

[7] For the reasons indicated *Brower* should be distinguished; however if not it should overruled for the reasons set forth in the Opening Brief.

remedy to enforce from the Director's final decision, and the "final decision" for the purposes of RCW 64.40.020 must be that of the Director even if a hearing examiner with jurisdiction *could* otherwise have made the "final decision." See *Smoke v. Seattle*, 132 Wn.2d 214, 222, 937 P.2d 186 (1997)

Moreover, if the City is correct that the "final decision" is that of the hearing examiner, virtually everything the City claims about how it conducted a *Nollan/Dolan* analysis and reasonably should *not* have known that was an unconstitutional condition goes out the window because we know for certain *exactly* what the hearing examiner considered from the administrative record CP 34-219 and that he exclusively relied on the Amended Declaration of Huffman which attempted to justify the 30 foot exaction solely on the ground of right-of-way uniformity. App. 8 and 9

d) Conclusion of Law 2

The court's Conclusion of Law 2 states the City "acted within its lawful authority in applying development conditions to the Church…" The City's only argument to support this conclusion is that the Church did not specifically cite the code, state statute and U.S. constitutional provisions which the city violated. Respondent's Brief p. 61 But it did. Opening Brief p. 30, 33, 42 specified the City violated TMC 13.05.040B(9), A 45 p. 13-48, which incorporates the *Nollan* standard for land use exactions

imposed by the Director; Opening Brief p. 29-30 specified the City violated RCW 82.02.020 which also incorporates the *Nollan* standard; Opening Brief p. 5, 6, 7, 11, 27-29, 30-5, specified the City violated the Due Process Clause of the 14th Amendment by imposing the unconstitutional exaction.

e) Conclusion of Law No. 3

The court erred when it concluded the City did not act arbitrarily or capriciously. See Opening Brief p. 30 The City claims this is supported by "overwhelming evidence." However this is not an evidentiary question but rather one of law: does a 30 foot exaction imposed by the City as a permit condition to make a preexisting right of way uniform, without a City plan to build it out, violate Due Process, TMC 13.05.040B(9) and/or RCW 82.02.020 mean the City arbitrarily "acted without lawful authority in unreasoning and willful disregard of the permit applicant's lawful entitlements"? *Mission Springs,* 134 Wn.2d at 964-5 says yes.

Moreover the Conclusion is self-contradictory because it says the City action was not arbitrary "whether 8' or thirty feet in width…" Which was it? It can't be both and whatever the facts and circumstances the City cannot carry its burden to prove both were justified under one set of facts. Elsewhere the City claims its "correct" decision was 8 feet, Brief 64, although it successfully urged the trial court to conclude it was 30 feet as

set forth in the Hearing Examiner decision.[8] Unfortunately the trial judge left it up to the City attorney to draft findings and conclusions which the court then uncritically signed. This conclusion is *itself* arbitrary.

In addition, Respondent's Brief 62 claims "there was substantial testimony that supports the trial court's conclusion that neither the requirement for an eight foot dedication or a 30 foot dedication...were arbitrarily" applied. Again, this is a legal conclusion, not a matter of evidence, to be reviewed de novo. The whole trial was an effort by the City to impeach the 30 foot dedication requirement imposed for the sake of uniformity, although that was its final decision by any definition which it did not and could not defend.

f) Conclusion of Law No. 4

This conclusion ("The City reasonably believed that the development conditions" had nexus and were proportional) is irrelevant since it doesn't matter what the "City reasonably believed." Reasonable belief is not a defense to a 64.40 claim and the City's claim that it is supported by "substantial evidence" is equally irrelevant since legal conclusions are reviewed de novo. Further the City's citation to *Redmond v. Kezner*, 10 Wn. App. 332, 343, 517 P.2d 625 (1973) that ambiguous findings should be construed to support the judgment is inapposite since

[8] The City claimed at the trial court that the "final decision" was "outlined in Peter Huffman's Amended Declaration of July 9, 2014." CP 528

this is a *conclusion of law*, not a finding of fact. And it's not ambiguous anyway. The bottom line is that the City persuaded the Court to construe RCW 64.40.020's text "or it should reasonably have been known to have been unlawful" to be a subjective/good faith standard rather than an objective one. The City should know the law and there was nothing unclear about the application of the *Nollan* standard to this real property exaction.

g) Conclusion of Law No. 5

This conclusion basically says the City "should not have reasonably known" that the "Superior Court" would find the exaction violates *Nollan.* Once again this is irrelevant since that is not the test. The City claims "the Church's challenge to Conclusion of Law No. 4 is that it could have been worded more clearly." Brief 64 No it isn't. The city drafted this conclusion and it is clear. Moreover it doesn't state whether it is referring to an 8 or 30 foot exaction. And now the truly outrageous part:

> However, RCW 64.40 analyzes the permit application at the time of the final decision. Here, the superior court found that the dedication was eight feet at the time of the final decision, despite the error made in the second declaration of Peter Huffman. There is substantial evidence to support the court's conclusion on this point.

Respondent's Brief 64

Recall Judge Martin interlineated "8 feet" because the Deputy City Attorney lied to the court about what the hearing examiner decision

was, not because Huffman made the "mistake" of signing a declaration *under oath* prepared by the City Attorney. The record shows this is facially false. Judge Hogan, at the request of the City Attorney, concluded (No. 1) "The Hearing examiner's decision was the 'final decision' of the City for the purposes of RCW 64.40." If Huffman signed a false declaration he may be a perjurer suborned by the City Attorney; however that doesn't change the fact that the Hearing Examiner decision, at the request of the City Attorney, affirmed a 30 foot exaction specifically based on the Amended Declaration of Peter Huffman.[9] And the validity of that Hearing Examiner decision was the only issue in the LUPA appeal.

Then the City again tries to mislead the court by claiming "the Church itself argued on multiple occasions at trial" that the size of the dedication was irrelevant. What the Church argued at the LUPA hearing

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[9] Mr. Huffman may be a liar however the real time documentary record shows his Amended Declaration of July 9, App. 8, P98, was absolutely consistent with the original Review Panel minutes, App. 1, P 46, his final Letter Decision of April 28, App. 5, P84, the Capell "my error" email string to the Church of July 9, App. 7, P100, the briefs filed by the City in the Hearing Examiner proceeding, CP 129, the Hearing Examiner decision, App. 9, P105, and the City briefs filed in the LUPA review, CP 230, 233, 272. However after Deputy City Attorney Jeff Capell lied to the Superior Court Judge Martin that the Examiner Decision was for 8 feet rather than 30 (as he was losing the oral argument), and the City was facing a damages action, the City strategy changed to justify an 8 foot exaction rather than 30. Huffman then lied in his deposition that at some unspecified point in time, without documentary support, he changed his decision from 30 feet to 8, and repeated this at trial. Mr. Huffman signed an interrogatory verification under oath which verified an answer which stated he signed the Amended Declaration of July 9 because a female staff person had made a mistake. In his testimony at trial however he admitted the amended declaration was presented for his signature by Jeff Capell of the City Attorney's office, not a female staffer. RP 569-70

after the City Attorney lied to the court that the exaction was 8 feet rather than 30 was *any* exaction for any amount that bore no nexus to the proposed development violated *Nollan*, and Judge Martin agreed.

If Conclusion 5 means what it says it is irrelevant.

B. The trial Court improperly denied the Church's motions to amend

1. The Church's Motion to amend was proper in form and was not futile

Although precedent suggests motions to amend are reviewed for abuse of discretion, when the motion is denied for "futility" rather than prejudice a question of law is presented which should be reviewed de novo.

First the City claims the motion to amend to state a 42 USC 1983 claim was properly denied because the proposed amendment was not specific enough. Brief 66 However that was not the City's argument before the trial court; rather the City's objection was the claim was "futile." CP 522-27 Arguments raised for the first time on appeal may not be considered. RAP 2.5 (a) If the argument had been raised before the trial court, the Church could have easily rephrased the allegation if required; however that is not the reason the motion to amend was denied.

In any event, the proposed amendment was properly drafted and properly pleads all elements of a 1983 claim. CP 501-3 (attached)

> Washington is a notice pleading state and does not require a petitioner do more than state "a short and plain statement" of the party's entitlement to relief along with a request for appropriate judgment. CR 8(a) There are methods of challenging an inadequate pleading. *E.g.* CR 12(b)(6); CR12(c). A party also can always ask that a pleading be made more definite. CR 12(e)

Parental Rights of F.M.O., 194 Wn. App. 226, 232 n. 3, 374 P.3d 273 (2016) *See also Thomson v. Jane Doe,* 189 Wn. App. 45, 59, 356 P.3d 727 (2015) "Our liberal notice pleading rules are intended 'to facilitate the full airing of claims having a legal basis.'" *State v. LG Elecs., Inc.,* 186 Wn. 2d 169, 183, 375 P.3d 1035 (2016), quoting *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977)

Next the City contends even if the court erred the error was harmless "because a claim under the doctrine of unconstitutional conditions would not have been successful." Brief 69 But the City doesn't tell us why not, apparently basing its assertion on its claim the Church wasn't damaged.[10] However the proposed amendment specifically alleged "Petitioner has been damaged by this civil rights violation as shall be proved at the time of trial which includes economic and general damages as well as reasonable attorney fees and costs of litigation." CP 503 The court clearly erred when it denied this amendment. A section

[10] The City claims by the time of trial the Church had not picked up its approved building plans. So what? That was a year after the court denied the motion to amend and there was plenty of time thereafter to do it, as all permits have now been approved, issued, fees paid, and picked up by the Church. The unconstitutional condition delayed the permit 18 months for which the Church proved damages.

1983 cause of action is much broader than RCW 64.40 and provides more relief. The Church had every right to assert it and was denied its day in court to protect its constitutional rights.

2. The court improperly denied the motion to amend to add a sidewalk claim.

The language referencing sidewalks is clearly stated in the proposed amendment. CP 501 (attached) The City's argument against this amendment at trial was that the sidewalk condition had been dropped prior to the Hearing examiner decision, claiming that was the "final decision" for the purpose of RCW 64.04.040. CP 527-8 That claim is discussed elsewhere in this brief as well as the Opening Brief. But now, for the first time on appeal, the City argues it may impose a sidewalk requirement even when not supported by ordinance. Arguments advanced for the first time on appeal may not be considered. RAP 2.5 (a) Moreover, the City is wrong again since "The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit." *Norco Const. v. King County,* 97 Wn.2d 680, 684, 649 P.2d 103 (1982). Land use ordinances are strictly construed against the government[11], and there is no code authority to require the property owner

[11] "It must also be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be

to install sidewalks unless code criteria is met, which it wasn't. TMC 2.19.040D(1)

C. The trial Court improperly granted the City's Motion in Limine to exclude evidence of a 30 foot exaction

This error was as fundamental as they come: denying the plaintiff the opportunity to prove the nature of the unlawful and unconstitutional exaction. That Judge Martin recited in her judgment the exaction was 8 feet is only relevant if it has preclusive effect. Opening Brief 44-47 demonstrates it doesn't. And the City does not argue to the contrary.

The City then claims it was harmless. However it was most harmful because the Church was prohibited from arguing and offering evidence that the exaction was 30 feet to make the road right-of-way uniform, an obvious violation of *Nollan*. For example when the City called Jeff Capell to the stand the court barred rigorous cross examination on his misrepresentation to Judge Martin that the Hearing Examiner's exaction was 8 feet rather than 30 based on its order in limine. See e.g. RP 666-76 Counsel for the Church then made an offer of proof to properly preserve the error for review. RP 675-76 The City also claims Judge Hogan was not persuaded "that the City had lied." Brief 76 Of

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extended by implication to cases not clearly within their scope and purpose." *Sleasman v. Lacey*, 159 Wn.2d 639, 643 n.4, 151 P.3d 990 (2007), quoting *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956)

course not, she wouldn't allow the Church to present its evidence. That's the point.[12]

D. The trial Court erred when it concluded the City didn't violate the PRA

1. The City did not conduct an adequate search due to employee error

The city promotes a rather obvious legal error in its argument:

> Importantly, as soon as the City realized it possessed these two documents, the City immediately provided them to the Church, even though the request had been closed and the City did not have a legal obligation to reopen the request and produce the documents. *Sargent v. Seattle Police Dept'*, 167 Wn. App. 1, 10, 260 P.3d 1006 (2012), aff'd in part, rev'd in part on other grounds, 179 Wn.2d 376, 314 P.3d 1093 (2013).

Brief 78-9 Of course the City has an obligation to produce documents it silently withheld. What *Sargen*t says is that an agency which initially responds by claiming proper exemptions need not update the response if the exemption later ceases to apply, such as where an active investigation terminates. Here, however, the documents were silently withheld and not subject to any claim of exemption. A clearer violation of the Act can scarcely be imagined.

The leading case on an "adequate" search is *Neighborhood All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011).

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[12] As a throwaway line the City claims "substantial evidence supports the trial court's ruling." Brief 76 This is truly incoherent since exclusion of proper evidence cannot be based on "substantial evidence" but rather is a question of law whether the evidence is admissible.

This case was extensively discussed in the Opening Brief and little can be added here. The "adequate" search defense is a narrow one and the agency bears the burden to prove it. Ibid. at 721 The search must follow "obvious leads" and may not be limited to one source or record system if there are others.

Here the record shows the documents were not recovered because of human error.

2. The appellate court should conduct an in camera review

Same is clearly allowed by RCW 42.56.550 (3).

III. CONCLUSION AND DENIAL OF CITY REQUEST FOR ATTORNEY FEES

The trial court should be reversed and remanded for further proceedings with appellant Church recovering its reasonable attorney fees and expenses; however even if the trial court is affirmed the City is not entitled to any reasonable attorney fees. A similar request for fees was denied by the trial court in her discretion under RCW 64.40.020, CP 2282, and RCW 42.56.550 (4) does not provide any legal basis to award fees to an agency in a PRA case.

RESPECTFULLY SUBMITTED this 18th day of September, 2017.

GOODSTEIN LAW GROUP PLLC

By: _____

Richard B. Sanders, WSBA #2813
Attorneys for Appellant

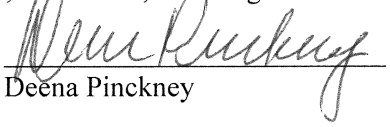
CERTIFICATE OF SERVICE

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 18th day of September 2017, at Tacoma, Washington.



Deena Pinckney

APPENDIX

I. Claim for Damages under Chapter 64.40

1. The actions of the City of Tacoma conditioning issuance of this land use permit on the uncompensated dedication of a 30 foot strip of land and offsite improvements such as sidewalks and curbs is arbitrary, capricious, unlawful, and/or exceed lawful authority within the meaning of RCW 64.40.020(1).
2. The Decision of the City to demand this exaction and conditions were 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.
3. The identified actions of the City have damaged petitioner within the meaning of RCW 64.40.030(4).
4. These damages include the inability to use the property for uses permissible under the law and City zoning, reasonable expenses and losses, and do not include speculative losses or profits.
5. The exact amount of damages will be calculated at the time of trial.
6. The Court should award Petitioner its costs, expenses and attorney fees in addition to the damages described above.
7. The Court should enter an order bifurcating the cause of action under Chapter 64.40 RCW from the LUPA claim.

J. Claim for Violation of Public Records Act

1. On October 15, 2014, petitioner, The Church of the Devine Earth, delivered a Public Records Act request for documents to the respondent, City of Tacoma. A copy of same is attached.

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2. On October 22, 2014, the City responded by denying disclosure until November 12, 2014. A copy of same is attached. On the same date, the Church through its attorney requested immediate production of the requested documents, without further response from the City. See attached.

3. The petitioner believes the City's estimate of delay until November 12 is unreasonable and requests the court pursuant to RCW 42.56.550(2) to order the City to show that the delay is reasonable and to award petitioner further relief under the statute including ordering production of the requested documents, awarding all reasonable attorney fees and expenses of litigation as well as statutory penalties in an amount to be determined.

4. The City's delay of full document production until January 8, 2015 was not prompt and violated RCW 42.56.080, .100,.520, and .550.

5. The City refused inspection or did redact documents without providing a brief explanation of how the exemption applies to the record withheld contrary to RCW 42.56.210(3).

6. The Church is entitled to judgment against the City for penalties and reasonable attorney fees and expenses.

K. Civil Rights claim

1. The City of Tacoma acting under color of law, subjected, or caused to be subjected, the Petitioner herein to deprivation of rights under the Federal Constitution and laws by conditioning his request single family residential building permit on the dedication of a 30 foot strip of land to the City without compensation and without nexus to any problem caused by the proposed development.

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2. This constitutional deprivation was done as the City's official act and through its official policy and custom.
3. On February 19, 2015, Judge Elizabeth Martin of the Pierce County Superior Court in this action entered a final judgment finding: "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 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..." The Final Judgment is attached.
4. That final judgment has not been appealed by the City and is binding on the City as a matter of law.
5. Petitioner has been damaged by this civil rights violation as shall be proved at the time of trial which includes economic and general damages as well as reasonable attorney fees and costs of litigation.

L. Conclusion and request for relief

Petitioner hereby requests the Court enter the following relief:

1. Grant this appeal.
2. Direct that all land use permits requested by Petitioner issue without being conditioned on issuance of a 30 foot dedication of land to the City.

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