FILED
8/18/2017 4:34 PM
Court of Appeals
Division II
State of Washington

NO. 49854-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHURCH OF THE DIVINE EARTH

Appellant,

v.

CITY OF TACOMA,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. STANDARD OF REVIEW 18

III. ARGUMENT 19

A. The City did not violate RCW 64.40 19

1. The Church argues that an unconstitutional exaction is arbitrary and capricious as a matter of law but superior court properly found that there was no constitutional violation and no arbitrary and capricious conduct. 32

2. The superior court properly found that the City did not reasonably know that the dedication requirement was unlawful and/or beyond lawful authority. 37

a. The dedication requirement did not violate RCW 64.40 because it was a safety issue. 44

3. Findings 5 and 16, and Conclusions 1, 2, 3, 4 and 5 are supported by substantial evidence and are legally correct. ...47

(a) Finding 5 - The review panel conducted Nollan/Dolan analysis. 47

(b) Finding 16 - Mr. Kuntz provided the City's response to the Church's waiver request. 54

(c) Conclusion 1 - The hearing examiner's decision was the final decision for purposes of RCW 64.40. 55

(d) Conclusion 2 - The City was within its lawful authority to attach a development condition to the Church's permit application. 60

(e) Conclusion 3 - The City did not act arbitrarily and capriciously. 61

(f) Conclusion 4 - The superior court properly found that the City did not reasonably know that the dedication requirement was unlawful and/or beyond lawful authority. 62

(g) Conclusion 5 - The superior court clearly found that the City reasonably believed that the dedication requirement complied with the Dollan/Nolan analysis. ..64

B. The trial court properly denied the Church's motions to amend 65

1. The Church never clearly requested to add a §1983 claim based on the doctrine of unconstitutional conditions. Even if it had, the amendment would have been properly denied because there was no basis for such a claim. 65

2. The court properly denied the Church's request to amend the complaint to add a claim regarding the sidewalk requirement, which had been withdrawn prior to the final decision of the City. 70

C. The trial court properly granted the City's motion in *limine* to exclude evidence offered to dispute the prior judge's finding that the dedication request at the time of the Hearing Examiner was 8 feet. 72

D. The trial court properly found that the City did not violate the PRA. 76

1. The City conducted an adequate search.....80

2. The search was adequate even though it did not initially locate a second video. 82

3. The search was adequate even though the City did not print out 1-2 pages of Shanta Frantz's notes. 84

4. There is no reasoned bases to ask the appellate court to re-do the trial court's in camera review of documents withheld for attorney client privilege and work product doctrine. 85

IV. CONCLUSION AND REQUEST FOR ATTORNEY'S FEES.....86

TABLE OF AUTHORITIES

CASES:

Bennett v. Seattle, 22 Wn.2d 455, 461, 156 P.2d 685 (1945)…….. 75

Block v. City of Gold Bar, 189 Wn. App. 262, 270-71, 355 P.3d 266 (2015)……..…… 77, 78, 80, 81

Breuer v. Fourre, 76 Wn.2d 582, 584, 458 P.2d 168 (1969)…… 27

Bridle Trails Cmty. Club v. Bellevue,
45 Wn. App. 248, 251, 724 P.2d 1110 (1986)……..…… 33

Brown v. Spokane County, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)...69

Brower v. Pierce County,
96 Wn. App. 559, 566, 984 P.2d 1036 (1999)……..... 55, 56

Buck Mountain Owners' Ass'n v. Prestwich,
174 Wn.App. 702, 713, 308 P.3d 644 (2013)…….…….. 19

Callfas v. Dep't. of Constr. & Land Use,
129 Wn. App. 579, 592-93,120 P.3d 110 (2005)……..…..... 59

Cingular Wireless v. Thurston County,
131 Wn. App. 756, 768, 129 P.3d 300 (2006)…….. 19

City of Federal Way v. Town & County Real Estate, LLC,
161 Wn. App. 17, 44, 252 P.3d 382 (2011)……... 3, 41, 48

Colonial Imports, Inc. v. Carlton N.W. Inc.,
121 Wn.2d 726, 730 n.1, 853 P.2d 913 (1983)……. 52

Del Guzzi Constr. Co. v. Global Nw Ltd.,
105 Wn.2d 878, 888, 719 P.2d 120 (1986)……... 65

Dewey v. Tacoma Sch. Dist. No. 10,
95 Wn. App. 18, 25, 974 P.2d 847 (1999)…… 66

Dore v. Kinnear, 79 Wn.2d 755, 489 P.2d 898 (1971)……..…. 32, 33

Doyle v. Planned Parenthood of Seattle King County,
31 Wn. App. 126, 130, 639 P.2d 240 (1982)…… 65

DuPont-Fort Lewis Sch. Dist. No. 7 v. Bruno,
79 Wn.2d 736, 739, 489 P.2d 171 (1971)……...…. 28

Fisher Broad. V. Seattle, 180 Wn.2d 515, 522, 326 P.3d 688 (2014)…...81

Fisher Props., Inc. v. Arden-Mayfair, Inc.,
115 Wn.2d 364, 369, 798 P.2d 799 (1990).……..…… 18

Forbes v. City of Gold Bar,
171 Wn. App. 857, 866, 288 P.3d 384 (2012), review denied,
177 Wn.2d 1002 (2013)……..…….. 78

Frank Coluccio Constr. Co. v. King County,
136 Wn. App. 751, 761, 150 P.3d 1147 (2007)…… 18

Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992)…….. 78

Hayes v. City of Seattle,
131 Wn.2d 706, 716, 934 P.2d 1179 (1997)……. 56

Holland v. City of Tacoma,
90 Wn. App. 533, 538, 954 P.2d (1998)……... 61

Isla Verde Int'l Holdings, Ltd. V. City of Camas,
147 Wn. App. 454, 467, 196 P.3d 719 (2008)……..21, 27, 28, 39, 40
42, 43, 45, 47

James S. Black & Co. v. P & R Co.,
12 Wn. App. 533, 537, 530 P.2d 722 (1975)…… 69

J. L. Storedahl & Sons, Inc. v. Cowlitz County,
125 Wn. App. 1, 11, 103 P.3ed 802 (2004)…….. 19

Koontz v. St. Johns River Water Mgmt. Dist.
133 S. Ct. 2586, 2591, 186 L. Ed. 2d 697 (2013)……..…25, 26, 68

Kozol v. Dep't of Corr., 192 Wn. App. 1, 366 P.3d 933 (2015), review denied, 185 Wn.2d 1034 (2016)……80

Ladenburg v. Campbell,
56 Wn. App 701, 703, 784 P.2d 1306 (1990)..... 19

Landmark Dev. v. City of Roy,
138 Wn.2d 561, 573, 980 P.2d 1234 (1990)……..……. 19, 28

Lewis v. Bell, 45 Wn. App. 192, 197, 724 P.2d 425 (1986)……. 66

Lingle v. Chevron,
544 U.S. 528, 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2002)……...…..68

Lutheran Day Care v. Snohomish County,
119 Wn.2d 91, 829 P.2d 746 (1992)……. 60

Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir 1986)……...78

Merriman v. Cokelev, 168 Wn.2d 627, 631, 230 P.3d 162 (2010)……... 18

Mission Springs v. City of Spokane,
134 Wn.2d 947, 954 P.2d 250 (1998)…….....34, 35, 36, 61

Mitchell v. Wash. State Inst. of Pub. Policy,
153 Wn. App. 803, 814, 225 P.3d 280 (2009)…….. 18

Neighborhood Alliance of Spokane County v. Spokane County, 172,
Wn.2d 702, 719, 261 P.3d 119 (2011)……..…… 77, 78, 80

Nieshe v. Concrete Sch. Dist.,
129 Wn. App. 632, 127 P.3d 713 (2005)..... 33

Nollan v California Coastal Commission,
483 U.S. 825, 107 S. Ct. 3141 (1987)……..……. 22

Nulankeyutmonen Nkihtagmikon v. Bureau of Indian Affairs, 493 F.
Supp. 2d 91, 113-14 (D. Me. 2007)…….. 78

Orion Corp. v. State,
109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987)…… 40

Orsi v. Aetna Ins. Co., 41 Wn. App. 233, 247, 703 P.2d 1053 (1985)..... 66

Presbytery of Seattle v. King County,
114 Wn.2d 320, 330, 787 P.2d 907 (1990)……... 35

Redmond v. Kezner, 10 Wn. App. 332, 343, 517 P.2d 625 (1973)…….. 63

Sargent v. Seattle Police Dep't., 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)……...79

Shooting Park Ass'n v. City of Sequim,
158 wn2d 342, 352, 158 Wn.2d 342 (2005)……. 66

Simpson Timber Co. v. Aetna Casualty & Sur. Co.,
19 Wn. App. 535, 539, 576 P.2d 437
(1978)……...… 20

Smoke v. City of Seattle, 132 Wn. 2d 214, 937 P.2d 186 (1997)...… 56, 59

Sparks v. Douglas County,
127 Wn.2d 901, 908, 904 P.2d 738 (1995)……... 27, 31, 37, 38, 42

State v. Rice, 174 Wn.2d 884, 897-98, 279 P.3d 849 (2012)..... 72

Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)……..... 69

Trimen Dev. Co. v. King County,
124 Wn.2d 261, 877 P.2d 187 (1994)……..…40, 41, 42, 50

Weden v. San Juan County,
135 Wn.2d 678, 706, 958 P.2d 273 (1998)……..... 40, 72

West v. Thurston County, 168 Wn. App. 162, 187,……. 61

STATUES:

RCW 36.70C.130(2)……. 20

RCW 42.56……..……. 17, 76, 86

RCW 42.56.550…….86

RCW 64.40……..17, 19, 20, 21, 27, 30, 32, 34, 37, 39, 40, 44
45, 47, 51, 55, 56, 58, 59, 64, 70, 71, 86

RCW 64.40.020…….…. 52, 86

RCW 64.40.020(1)…….…. 21, 63

RCW 64.40.010(6)…… 45

RCW 4.36.240…….. 69

OTHER AUTHORITIES:

Olympic Stewardship Found. V. Envtl. & Land Use Hearings Office ex rel W. Wash. Growth Mgmt. Hearings Bd., 2017 Wash App. LEXIS 1475 * 94 (June 20, 2017) Sanchez v. County of San Diego, 464 F.3d 916, 931 (2006)……... …… 69

TMC 1.23.050……... 71

TMC 1.23.050.B.2……..…….. 58

TMC 1.23.060(A)……. 58

TMC 1.06.710……... 72

TMC 2.19.040…….……...…10, 14, 72

TMC 13.05…….. 9

TMC 13.05.010(J)(3)…… 58

TMC 15.05.040A…….. 71

CR 7…….……. 65

5 C. Wright & A. Miller, *Federal Practice* § 1192
(1969 & Supp. 1985)……...…….. 65

I. STATEMENT OF THE CASE

The plaintiff in this case is the Church of the Divine Earth (Church). In 2012, Mr. Terry Kuehn incorporated the Church, declared himself a priest of the Romuva religion, and purchased a vacant residential lot at South 66th Street and East B Street in Tacoma.[1] Report of Proceedings (RP) 412. Mr. Kuehn submitted an application to the City of Tacoma to build a parsonage on the property, along with a set of plans he had drawn himself. RP 185-86. The application was accepted and processed as "a new structure on vacant lot." RP 940-41. See also, RP 1037; 1049; 1066; 1083- 84.

As with most applications for new construction, the Church's application was routed to the City of Tacoma Review Panel. RP 579- 80. The Review Panel was comprised of City staff from various departments that met weekly to review permit applications and determine what, if any, development conditions would be placed on a permit. RP 557; 806; 810. Review Panel was a way to streamline the permit process so that multiple departments

[1] Mr. Kuehn was also the only board member and he drafted a "priestly agreement" hiring himself as the priest. RP397. Mr. Kuehn describes Romuva as a religion that focuses on the sanctity of trees, rivers, stones, and other outpourings of the Gods in the veneration of ancestors. RP 413.

could review an application at the same time rather than the more time-consuming process of routing the application from department to department.

At the time, Review Panel was administered by Craig Kuntz. RP 845, 896, 905. He created the agenda that listed the applications to be discussed; took video of the properties to be reviewed at the meeting, if necessary; routed the agenda to those that would attend; and facilitated discussion at the meeting. RP 845. After the meeting, Mr. Kuntz typed up minutes that reflected some of the discussion that occurred during the meeting and forwarded copies of the minutes to City staffers involved in the application. RP 808; 840.

Review Panel staff discussed the Church's application at the meeting on September 25, 2013. RP 1064- 065; P46. Staff reviewed the application and the site, applied the Tacoma Municipal Code, and considered what conditions were justified by the proposed project. RP 809-10. The focus of the discussion was "to try and figure out what improvements are needed to make it a safe interaction between the development and the private property and the public property." RP 810. This discussion involved consideration of the impacts created by the Church's new project

to the existing infrastructure, whether proposed development conditions would be effective in addressing the impacts, and whether or not the conditions placed on the application were too burdensome. RP 556, 573, 590-94; 844, 847. This discussion is what is called a Nollan/Dolan analysis. City of Federal Way v. Town & County Real Estate, LLC, 161 Wn. App. 17, 44, 252 P.3d 382 (2011).

Review Panel staff determined that six development conditions were applicable. They were: 1) dedication of 30' right of way easement; 2) installation of concrete sidewalk; 3) installation of an asphalt wedge or berm to protect from stormwater; 4) repair of any damage done to the right of way by the Church during construction; 5) location of the driveway on the East 66th Street side of the property as opposed to the East B Street side of the property; and 6) preparation of plans by a licensed engineer. P46; RP 472-74.

The development condition primarily at issue in this case is the requirement for dedication of right of way. A right of way dedication would give the City an easement for public passage. RP 801-02. With such an easement, the City would not own the property but it would have access to that portion of the property

needed for safe passage of pedestrians and vehicles, including emergency vehicles. RP 802. The Review Panel minutes indicate that the Panel determined that a dedication was necessary "[i]n order to stay consistent and provide adequate street and sidewalk area." P46. Craig Kuntz forwarded the Review Panel's comments to Mr. Kuehn. RP 872.

Mr. Kuntz was also the City of Tacoma staffer that was reviewing Mr. Kuehn's plans for compliance with the building code. RP 806, 898; 873. Mr. Kuntz provided his review of the building plans to Mr. Kuehn on October 2, 2013, within two weeks of the application's submission. RP 813. The Church's plans were so deficient that Mr. Kuntz informed the Church that the plans were considered "incomplete." RP 475-76; 813. It is uncontroverted that at the time of trial in May 2016, the Church still had not remedied the deficiencies noted by Mr. Kuntz in October, 2013. CP 2406- Finding of Fact (FOF) 27.

After receiving a copy of the development conditions, Mr. Kuehn called the City and talked with Shanta Frantz, a senior planner and the land use division designee on the Review Panel. RP 861; 873. Mr. Kuehn told Ms. Frantz hat he had decided to build a church building on the property. RP 867-68. Ms. Frantz

then suggested that they meet in order to discuss the next steps in applying for the conditional use permit (CUP) that would be required to build a church in a residential zone. Id. Ms. Frantz also discussed the land use hold on the project and advised Mr. Kuehn that he should continue with his building plans while the land use hold was in place. RP 871; 899. See also, RP 585.

Ms. Frantz, Mr. Kuntz, and Mr. Kuehn met the next day, on October 10, 2013. During the meeting Mr. Kuehn stated he had changed his mind and the building would be used only as a parsonage after all. [2] RP 869. Mr. Kuehn asked about challenging the development conditions and City staff provided a form to Mr. Kuehn for seeking a waiver of the conditions. RP 371.

Mr. Kuehn submitted the waiver request on November 12, 2013. RP 419. As a part of his waiver request, Mr. Kuehn also submitted memoranda he referred to a "supplements." There would be a total of 11 supplements, and supplements 1-4 accompanied the waiver request. The primary argument lodged by Mr. Kuehn in supplements 1- 4 was that the development conditions violated the Church's religious liberties and were contrary to the Religious

[2] Mr. Kuehn sought tax-exempt status for the property by indicating that he intended to build a church on the property. RP 168; 468-69; Ex. A49. However, Mr. Kuehn testified at trial that this was an error and he never meant to indicate that he intended to build a church building. Id.

Land Use and Institutionalized Persons Act (RLUIPA). RP 416, 427, 444. Upon seeing the legal arguments, Ms. Frantz contacted Deputy City Attorney Jeff Capell for advice about the application of RLUIPA and other aspects of the Church's application. RP 875. Ms. Frantz and Mr. Capell also discussed how *Nollan* and *Dolan* applied to the off-site improvements that the City was requesting of the Church. RP 631.

Ms. Frantz then drafted the initial response to the Church's waiver request. RP 876; P 67. Ms. Frantz explained that RLUIPA did not apply if Mr. Kuehn intended to build a single family home or parsonage, and that RLUIPA applied only if the Church's structure would be used as a religious facility, which would also require a conditional use permit. P 67.

While the waiver request was being processed, Mr. Kuehn continued to submit materials to City staff with arguments that his project was exempt from development conditions under RLUIPA. RP 835, 877. Mr. Kuehn's supplements referred to the Romuva religion as one that conducts services in an open-air environment. RP 412-14. Therefore, the land use department still felt a need to clarify with Mr. Keuhn what type of use he intended for the property. See, e.g. RP 822-24; 848-49; 875. The use would

determine which particular building code would apply and whether a conditional use permit would be required. RP 838-39. The confusion about the proposed use of the property kept the land use department involved in the project even though the development conditions had been applied under the building code as part of a residential permit, not the land use code. RP 556-57; 562-563; 579-80.

In the meantime, Mr. Kuntz was dealing with the waiver request's arguments that all development conditions should be dropped. RP 816; 826. Mr. Kuntz circulated the waiver request to the Review Panel members and asked them to review their specific conditions in light of Mr. Kuehn's complaints. RP 816, 826. See also, P 74. Mr. Kuntz also put the Church's application back on the agenda for the weekly Review Panel meeting of January 25, 2014 for discussion of the waiver request. P 71.

Mr. Kuntz went to the City of Tacoma Building Official, David Johnson, who had the authority to waive development conditions that are attached to a project under the building code. RP 826-28; 904-05; 910. See also, RP 816. Mr. Johnson and Mr. Kuntz discussed the basis for requiring off-site improvements (nexus) and the scope of improvements being requested

(proportionality). RP 826-27; 906-10; 931. Mr. Johnson believed that nexus was clearly shown but he asked Mr. Kuntz to discuss with others and re-evaluate proportionality. RP 910-13.

Mr. Kuntz had forwarded a copy of the waiver request to Jennifer Kammerzell, Senior Engineer, who was the Public Works designee on the panel and primarily responsible for the dedication requirement. RP 557; 873; 898; 1065. Ms. Kammerzell discussed the dedication requirement with the Public Works Director, Kurtis Kingsolver, because right of way is under the Public Works Director's authority. RP 557, 1068. Mr. Kingsolver expressed his opinion that the 30 foot dedication was excessive. RP 772. Ms. Kammerzell and Mr. Kingsolver agreed that eight feet was the minimum right of way width that would provide for safe passage of pedestrians and vehicles, and that this condition was proportional. Id.

Ms. Kammerzell incorporated the reduced dedication requirement into a memo dated March 7, 2014. RP 1066-67. In the memo, Ms. Kammerzell explained that the dedication requirement was being reduced to eight feet from 30 feet and that the concrete sidewalk requirement was being changed to a gravel footpath. RP 1066-67. The memo outlined the City's rationale for requiring the

eight foot dedication. RP 451-58. Ms. Kammerzell cited to the American Association of State Highway Transportation Officials (AASHTO) guidelines, which provide best practices for the safe and efficient transportation systems, particularly related to pedestrians. RP 1073. She also cited to various City policies and standards concerning infrastructure required for the safe and efficient movement of people and vehicles. RP 1068-69;1072-73.

Mr. Kuntz went back to Mr. Johnson, the Building Official. Mr. Johnson reviewed Ms. Kammerzell's memo and determined that, as modified, the City's requirements met the nexus and proportionality tests. RP 914; 930. During this process, Mr. Johnson also informed his superior, Peter Huffman, the Director of Planning and Development Services, about the Church's request for a waiver and about Mr. Johnson's decision regarding the waiver. RP 906; 915. Mr. Huffman had authority under TMC 13.05 to review the waiver request as to land use and whether or not the Church would be required to apply for a CUP. RP 554-55. However, Mr. Huffman relied on the City's Department of Public Works and staff to address that portion of the waiver request that dealt specifically with dedication of right of way. RP 555-56.

Mr. Kuntz then sent the City's response to the waiver request to the Church in a letter dated March 7, 2014. CP 108- 110. The letter once again explained that the Church's permit was being processed as a residential permit for a single family dwelling despite the Church's continued references to the religious rights of applicants that are constructing religious facilities. CP 108. The letter explained that development conditions would be required whether the permit was for a residence or for a religious use structure, but that the conditions would be different depending on the code that was being applied. Id. Mr. Kuntz stated that the current conditions were attached for the construction of a single family swelling per TMC 2.19.040. The letter directed Mr. Kuehn to contact the appropriate department for each of the conditions attached to the permit. Id. In addition, Mr. Kuntz attached the memo of Jennifer Kammerzell that specifically addressed the dedication requirement. CP 110.

Mr. Kuehn continued to object to having to comply with any development conditions whatsoever. RP 458. Mr. Kuehn submitted additional "supplements" which outlined his arguments. The supplements were routed to the appropriate personnel for review. RP 818; 875. See also e.g., P 79. Those that contained

constitutional arguments and other legal arguments were forwarded to the City Attorney's Office for review and comment. RP 799- 800(Kingsolver);1088 (Kammerzell) RP 796; 799-800; 877; 906-907; 926; 1088.

Mr. Kuehn then sent a letter to Peter Huffman, asking Mr. Huffman to reconsider the denial of his waiver request that all development conditions be dropped and to review what the Planning and Land Use staff had been requiring of the Church, because the Church believed the land use requirements to be unconstitutional. P 80, 81. In response, Mr. Huffman wrote a letter dated April 28, 2014 which explained that there had not been an application for a land use permit, and thus no denial or issuance with conditions of a land use permit, so there was no land use condition to reconsider. RP 583. Mr. Huffman explained why RLUIPA did not apply to the permit for a parsonage and again advised Mr. Kuehn to submit an application for a CUP if the Church was going to be used a religious facility. Id. Mr. Huffman went on to explain that the Church's application was being processed as a building permit for a single family dwelling. Mr. Huffman did not have the final say regarding the development conditions imposed under the building code. RP 784, 932. In the

letter, Mr. Huffman advised Mr. Kuehn that those conditions could be challenged by appealing to the City's hearing examiner. CP 2405 (Finding of Fact 22). Mr. Huffman's letter included the procedures for appealing to the hearing examiner, who would issue a "final decision concerning the request." P 84.

The Church filed an appeal to the City of Tacoma hearing examiner on or about May 12, 2014. P 85. Mr. Kuehn met with Deputy City Attorney Jeff Capell about the reduced conditions that were still attached to the permit. Mr. Kuehn continued to object to each and every condition. RP 637-38, 646. Mr. Kuehn and Deputy City Attorney Capell discussed the nexus between the Church's project and the development conditions but they could not agree. RP 506.

The Church filed a motion for summary judgment before the hearing examiner. CP 167-178. The City filed a response and cross-motion. CP 140-162. Attached to the City's cross-motion was the declaration of Peter Huffman. The declaration explained that the City was dropping all development conditions except for the dedication of right of way, and that the dedication requirement had been reduced to 659.20 square feet at the front of the property. CP 159-160. It is uncontroverted that after the Church filed its

appeal with the hearing examiner, the City removed all of the development conditions except for the dedication of right of way. CP 2405 (FOF 24).

As part of the process for acquiring a dedication of an easement, the City sent to Mr. Kuehn a legal description for the area to be dedicated. Mr. Kuehn emailed Mr. Capell and told Mr. Capell that there was an error in the legal description of the easement area prepared by the City. RP 641. Mr. Capell forwarded the email to the City's surveyor and to the Real Property Services Department to review Mr. Kuehn's complaint and to determine if there was an error in the legal description. RP 642. Unfortunately, Real Property Services was unaware that the right-of-way dedication had been changed to eight feet and the description sent back to Mr. Capell from Real Property Services had a square footage amount that corresponded with a 30 foot dedication. RP 640-44; 663-64. Had Mr. Capell done the math computation, or had Real Property Services provided the description in terms other than square footage, the error probably would have caught. As it was, however, Mr. Capell took the information provided by Real Property Services and incorporated it into a revised declaration for

the signature of Peter Huffman, the Director of Planning and Development Services. RP 643-44.

Mr. Huffman was told that his first declaration had an error and he was asked to sign a second declaration. RP 551-52. He did so. Mr. Huffman did not read the declarations thoroughly and did not do the math. RP 566-570. Mr. Huffman was not aware that the second declaration contained an error. RP 553-54. Mr. Huffman did not become of aware of the error until it was pointed out to him during his deposition in the instant litigation. RP 570. Mr. Huffman believed that his declarations reflected the City's positon that the City was requiring only an eight foot dedication. RP 570-73.

On August 19, 2014, the City hearing examiner ruled in favor of the City at summary judgment. CP 73. The hearing examiner's decision stated that "Tacoma's proposed imposition of development conditions is based on TMC 2.19.040 which addresses development standards requiring off-site improvements." CP 72. The hearing examiner concluded that "no question had been raised concerning whether the City would be acting beyond its authority in imposing the proposed conditions under the governing ordinance" and "there is no contest as to whether the

City's proposed conditions are consistent with the relevant City legislation." CP 72. The only other issues were constitutional in nature, which was beyond the jurisdiction of the hearing examiner. CP 72. Therefore, the hearing examiner granted summary judgment to the City. CP 73.

The Church then filed its LUPA appeal with the Superior Court on October 2, 2014. On February 19, 2015, Judge Elizabeth Martin granted the appeal, ruling that on the limited record in front of her, the City had failed to meet its burden to prove the required right of way dedication, regardless of size, complied with the nexus and rough proportionality requirements of *Nollan/Dolan* analysis. CP 2049; 2061-62. Judge Martin also ruled that the permit could issue without the right-of-way dedication although the Church was still required to rectify the deficient building plans and complete the permit application process. CP 2405-06 (FOF 26).

Therefore, by February 2015, as a result of the superior court's decision and the City dropping all other development conditions, there were no development conditions attached to Mr. Kuehn's permit. RP 473- 74. However, as of the time of trial in

May 2016, the Church still had not remedied the deficiencies in the building plans and had not obtained its permit. CP 2406 (FOF 27).

The other part of this lawsuit has to do with a claimed violation of the Public Records Act. Shortly after filing its LUPA appeal in October 2014, the Church filed a request for records under the Public Records Act. The request was submitted to the City on October 15, 2014. The City timely acknowledged the request and estimated that the records would be available by November 12, 2014. CP 314. However, less than two weeks after making the request for records, the Church filed its first amended complaint, adding a claim for violation of the PRA based on an allegation that the City had denied the request. CP 486-87.

The City proceeded to respond to the plaintiff's request for records. In just 90 days, the City produced 3,477 pages, along with other sources such as weblinks, in a series of six installments. Approximately 37 employees were contacted for records and 17 actually produced records. CP 431. Employees searched computers and paper files at three separate facilities. They used search terms such as address, name of applicant, permit application number and parcel number. They even searched under the misspelled name provided by the Church. RP 1194. Production was complicated by

the fact that the documents included plan drawings, photographs, videos, web links, as well as documents that existed only in paper form. CP 431.

Some of the documents produced to the Church had been redacted for attorney client privilege. The Church sought *in camera* review of those redactions. Judge Martin reviewed the redactions and ruled that the redactions were proper. CP 640-643; 843-844.

As discovery proceeded in the RCW 64.40 case, the City came across two documents that had not been provided to the Church in response to its PRA request. The City immediately provided the documents to the Church even though the PRA request had been closed. CP 1080. The two documents were: 1) a 2 minute video of the Church's property that had been taken for the second Review Panel meeting in January 2014, and 2) approximately 1-2 pages of computer diary notes of the land use planner, Shanta Frantz.

At a bench trial of the case in May 2016, Judge Vicky Hogan ruled that the City had not violated RCW 64.40 and that the City had not violated the PRA, RCW 42.56. This appeal by the Church followed.

The Church has alleged 21 assignments of error, each with sub-issues. Because of the number of assignments of error and because of the overlapping issues, the City's responsive brief will follow the organization and format of the Church's opening brief.

II. STANDAR OF REVIEW

The appellate court reviews the trial court's findings of fact for substantial evidence. Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). Substantial evidence is that which would persuade a fair-minded, rational person of the declared premise. Id. A reviewing court will not disturb findings of fact that are supported by substantial evidence, even if there is conflicting evidence. Id. "There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." Frank Coluccio Constr. Co. v. King County, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007)(citing Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990)).

In reviewing the facts, the appellate court defers to the fact finder and will "consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." Mitchell v.

Wash. State Inst. of Pub. Policy, 153 Wn. App. 803, 814, 225 P.3d 280 (2009) (quoting Cingular Wireless v. Thurston County, 131 Wn. App. 756, 768, 129 P.3d 300 (2006)). The appellate court will "reserve credibility determinations for the fact finder and do[es] not review them on appeal." J. L. Storedahl & Sons, Inc. v. Cowlitz County, 125 Wn. App. 1, 11, 103 P.3ed 802 (2004). Unchallenged findings are verities on appeal. Buck Mountain Owners' Ass'n v. Prestwich, 174 Wn. App. 702, 713, 308 P.3d 644 (2013). Id.

The next step is determining whether the findings of fact support the trial court's conclusion of law. Landmark Dev. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1990).

The appellate court may affirm on any basis supported by the evidence. Ladenburg v. Campbell, 56 Wn. App 701, 703, 784 P.2d 1306 (1990).

III. ARGUMENT

A. The Church contends that the City violated 64.40 by acting arbitrarily or capriciously, in excess of lawful authority, or unlawfully when it knew or should have known that its action unlawful. However, all the facts demonstrate otherwise.

Plaintiff's primary argument in this section of his brief seems to be that the Superior Court's decision at the LUPA hearing was *res judicata* as to liability under RCW 64.40. Brief, at 27.

However, plaintiff's argument on this point is contrary to Washington law. The LUPA statute expressly prohibits the plaintiff's argument. It provides, in pertinent part:

> (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.

RCW 36.70C.130(2)(emphasis added). Contrary to the Church's argument, the LUPA court's grant of relief, by itself, cannot be used to establish the City's liability for damages under RCW 64.40.

Moreover, *res judicata* requires an identity of issues. Simpson Timber Co. v. Aetna Casualty & Sur. Co., 19 Wn. App. 535, 539, 576 P.2d 437 (1978). Here, the decision made at the LUPA hearing is not the same as the decision made by the superior court at trial. At the LUPA hearing, the superior court did not determine whether the City's right-of-way dedication requirement was "lawful", as that term is used in RCW 64.40. The definition of "unlawful" is defined by the statute:

> 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 64.40.020(1). Thus, for purposes of the statute, the term "unlawful" incorporates an element of intent. The plaintiff must show that the City "knew or reasonably should have known that such a condition was an 'unlawful act.'" Isla Verde Int'l Holdings, Ltd. V. City of Camas, 147 Wn. App. 454, 467, 196 P.3d 719 (2008). Certainly there was no consideration, much less a finding, of any such intent by the superior court when it decided the LUPA appeal.

In addition, the record before the Superior Court at the LUPA hearing was far different from the evidence presented at trial of the RCW 64.40 claim. No discovery is generally allowed for a LUPA appeal and no discovery was done in this case for the LUPA appeal. See e.g., City's Reply Re: Motion for Summary Judgment on Inverse Condemnation and RCW 64.40, p. 9, n. 5 (filed 1-4-16).CP 1337. Indeed, at the LUPA appeal, the superior court mentioned several times on the record that it was hampered by the lack of a factual record. CP 2049; 2061-62. After the LUPA had concluded, the facts were developed during discovery in the RCW 64.40 case and were presented to the superior court at trial.

In addition, the *res judicata* argument fails because the LUPA court did not find a constitutional violation. Despite the language of the Court's order on the LUPA decision, the LUPA court clarified on the record many times that it had not actually found a constitutional violation. Judge Martin made clear that she had removed the dedication requirement from the permit on constitutional grounds but that the Court was not and could not find that the dedication constituted an unconstitutional "taking."

The order states that 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 an 8 foot dedication of land to the City as a condition to issuance of single family residential building permit for property located at 6605 E 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." Later, Judge Martin agreed that the order "wasn't as clear as it could have been. And to that extent, perhaps a clarification is appropriate." CP 1975. Judge Martin expressed her concern that the Church's counsel was using the LUPA order as evidence that she had found

a constitutional violation when, in fact, she had not. When counsel for the Church stated that he was merely relying on the wording of the LUPA order, Judge Martin replied, "Well, what I fear in this case, is that there is some inartful drafting in that order that's being taken advantage of. I was here. I know what I meant." CP 1987.

Judge Martin reiterated numerous times that she had not found a constitutional violation. For example, on May 22, 2015, when the Court heard the Church's first motion to amend its complaint to allege a constitutional violation, the Court denied the request, stating, "Here is my question on that: There wasn't an actual taking. This was a permitting process, which they had a condition attached, which I found impermissible, and therefore, no taking had ever occurred. . . . the bottom line is that there was no taking." CP 1941. The court explained that amending the complaint would be futile "when there was in fact no taking." Id., CP 1942. Thus, the court denied amendment on the basis of futility because the facts would not support a claim for a violation of the takings clause. CP 1943.

The court again clarified this point when it heard the Church's second motion to amend its complaint. Plaintiff argued that it was entitled to add an inverse condemnation claim based on

a temporary taking of the property. The court stated, "Where I am struggling is that there has not ever been a taking." CP 1973. The Court explained that "There hasn't been a taking and there can't be a taking because your client's property, he is allowed now to proceed without those conditions attached. " CP 1974; 1975. The Court continued, "I mean, somehow there has to have been an actual taking, and all there was a proposed condition attached to the permit which I've essentially removed." CP 1976.

The Church argued that it should be allowed to amend its complaint to add a claim for inverse condemnation "because I am very convinced there was a temporary taking in this case." CP 1976- 78. Counsel for the Church argued that many cases, including Sintra, supported his argument that a temporary taking had occurred. CP 1975- 77;1987- 89.

Ultimately, the Court agreed to allow the amendment, stating "If you want the opportunity to have it fully briefed and argued, I guess I am going to give you that opportunity, but I think we are gonna be right back where we are. . . . but I guess I want to give Mr. Sanders the full opportunity to have it fully briefed before I determine that in fact it's futile. After amending its complaint, the Church brought a motion for summary judgment, asking that

Court to find as a matter of law that a taking had occurred for purposes of its inverse condemnation claim. The Court denied the motion. The Court explained that inverse condemnation requires a taking and that no taking had occurred. In explaining why she did not find a constitutional violation, Judge Martin stated:

> I have read Koontz. I think Koontz has to be read in its entirety as to what it says. It talks about, yes, that the Nollan/Dolan analysis arises under the Takings Clause, but it doesn't amount to a taking, and I cannot find that a taking has occurred for the purpose of an inverse condemnation claim.
>
> No taking did occur because it was condition attached to a permit which, through a LUPA appeal, was rejected, and therefore, the taking never occurred, and therefore I cannot grant summary judgment on an inverse condemnation claim.
>
> * * *
>
> And whether there should be a cross-motion on inverse condemnation I leave for another time, but my finding is there is no taking."

CP 2019-20.

And again, when the court heard the City's motion for summary judgment, on January 8, 2016, the court pointed out that the Church's argument in response to summary judgment amounted to whether a "proposed taking can be a basis for damages." CP 2040. The Court then explained that it had already

considered the issue of whether a taking occurred and had found that there had been no taking. Judge Martin stated:

> All right. On this issue, I looked at this all last time. I read Koontz. Koontz, I think, has a very insightful discussion because it distinguishes between the temporary taking and a condition attached to a permit and is perhaps and undue burden under Nollan/Dolan under the constitution, but it does not constitute a taking. There is a lengthy discussion in Koontz about this. And I don't think this is the same scenario as Sintra. I don't find there has been a taking for purposes of inverse condemnation, and I will grant summary judgment on that issue.

CP 2053. The Court thus granted summary judgment to the City on the issue of whether or not a taking had occurred.

It is clear that the Court did not intend its order to be read as having found a constitutional violation in the form of a taking. On appeal, the Church now contends that Judge Martin found that the City violated the doctrine of unconstitutional conditions. Brief, at 28. However, the doctrine of unconstitutional conditions was not argued or briefed to either Judge Martin or Judge Hogan. To suggest that the Superior Court ruled on such a doctrine is not supported by any evidence in the record. Thus, the Church's argument that the LUPA court's order can be used to establish a

constitutional violation and that the constitutional violation is *res judicata* for purposes of RCW 64.40 is without merit.

Nor did the LUPA court determine that the City's actions were arbitrary or capricious. In fact, when denying the Church's motion for summary judgment, Judge Martin, who also heard the LUPA appeal, stated that she could not find that the City's actions were arbitrary or capricious. CP 2019-20. Thus, the Church's argument that the City's violation of RCW 64.40 was established as a matter of law via the LUPA hearing is incorrect.

On the other hand, the evidence presented to the trial court clearly established that the City had not acted arbitrarily or capriciously. "A decision reached after due consideration on a matter upon which there is room for differing opinions is not arbitrary or capricious. This is so even though a reviewing court may believe the decision is erroneous." Sparks v. Douglas County, 127 Wn.2d 901, 908, 904 P.2d 738 (1995). An action is arbitrary or capricious when the legislative body reaches its decision "willfully and unreasonably, without consideration and in disregard of facts or circumstances." Sparks, at 908, quoting Breuer v. Fourre, 76 Wn.2d 582, 584, 458 P.2d 168 (1969). See also, Isla Verde, 149 Wn.2d at 769 ("'Where there is room for two

opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration . . . .'" Landmark Dev., 138 Wn.2d at 573 (quoting DuPont-Fort Lewis Sch. Dist. No. 7 v. Bruno, 79 Wn.2d 736, 739, 489 P.2d 171 (1971)).

For example, in Isla Verde, the developer alleged the city acted arbitrarily and capriciously by requiring the developer to build a secondary access road to the development. The appellate court disagreed, pointing out that in making its decision, the city considered all the evidence, including the Fire Marshal's testimony and recommendations, and the testimony of residents about the poor road conditions of existing road during winter weather, and additionally considered the problems posed by the topography of the site. Isla Verde, at 770. The record showed that the City's concerns about public safety in the absence of a secondary access road were legitimate. Id. Thus the court concluded that the city made a reasonable decision and did not act arbitrarily or capriciously in requiring the construction of an access road.

In our case, as in Isla Verde, City staff gave careful consideration to the dedication requirement (and all other development conditions). The development conditions applied to this site were discussed many, many times at all levels, from the

plan reviewers on up to the department directors. RP 556; 579-580; 586; 592-93. The Church complains that not all City staff read Mr. Kuehn's "supplements", which were multi-page, single-spaced discourses laying out Mr. Kuehn's understanding of state and Federal constitutional law. See e.g., P 58 (Plaintiff's Supplement Number 1, pages 1-26). While it is true that not every City staff person read each of Mr. Kuehn's submissions, the testimony at trial was that each submission was routed to the appropriate person and the appropriate staff reviewed each supplement. See, e.g.,RP 559; 596; 904; 817. For example, submissions that contained Mr. Kuehn's legal analysis and argument were forwarded to the City's legal department. RP 796; 796-800; 877; 906-907; 926; 1088.

The Church complains that department directors did not review the minutes of the Weekly Review Panel, implying that the directors could not have reached a reasoned decision without reviewing such minutes. The suggestion that this is evidence of arbitrary or capricious conduct is simply groundless. Mr. Kingsolver supervises 250 people and Mr. Huffman has a staff of 85. RP 590; 758. To assert that personnel at the level of a department director would read the minutes of each and every meeting is not reasonable. Rather, as each director and supervisor

testified, they rely on their professional staff members to read such documents, and bring issues forward as they arise. RP 555- 559; 796-800. And that is the process they followed in this case. The directors then engaged in discussions with the staff about each of the development conditions, the impacts created by the Church's project and whether the conditions were proportional. See e.g., RP 559, 564, 573, 579-80, 827-28, 847, 592-93. Later in the process, the three directors had a meeting for the specific purpose of evaluating the development conditions placed on this permit. RP 585- 86.

Furthermore, the content of the Review Panel minutes are not relevant to this case except to the extent that they lay out the first iteration of the development conditions that the City originally required. RP 587. It is undisputed that the City altered those conditions. For purposes of RCW 64.40, the relevant conditions are those in place at the time of the final decision. It is the status of the application at the final decision that may give rise to liability. Certainly liability for egregious permitting behavior does not arise at the first level of plan review in the application process. It is only if the City reaches its final decision and maintains that position, "willfully and unreasonably, without consideration and in

disregard of facts or circumstances" that liability may arise. Sparks, at 908.

In addition, the Church complains that there were not enough written explanations of the City's decision and that the City's memoranda to Mr. Kuehn did not provide a specific legal analysis of U.S. Supreme Court cases. 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; P.55;.RP 456. But as to providing a specific legal analysis of Nollan and Dolan and of an applicant's constitutional rights, City staff does not usually provide legal analysis to applicants. As all City witnesses testified, when legal issues arise, they are forwarded to the City Attorney's office for review.

It is unreasonable to expect that conversations be documented in written memoranda. The City processes over 9,000 permits a year. RP 934. Most of the interactions between City personnel regarding an application are verbal, not written. Id. To suggest that the lack of written memoranda reflects a lack of discussion and consideration is simply unreasonable and is contrary to the evidence.

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

The Church contends that an unconstitutional exaction is arbitrary or capricious as a matter of law, apparently relieving the Church of having to prove one of the essential elements of its claim under RCW 64.40. Brief, at 30.

Similar to its argument in the previous section, the Church argues here that the LUPA court found a constitutional violation and that a constitutional violation is arbitrary and capricious as a matter of law. However, as set out above, the court did not find a constitutional violation and did not find the City's actions to have been arbitrary and capricious.

In addition, the cases cited do not support the Church's argument. Interestingly, the Church relies on cases that pre-date the adoption of LUPA and the creation of a cause of action under RCW 64.40 in 1982. For example, in Dore v. Kinnear, 79 Wn.2d 755, 489 P.2d 898 (1971), the court found that the county's actions were "such a radical departure from the programmed plan for revaluation of the taxable property of King County, and was so grossly contrary to the systematic revaluation of taxable property required by the statute, *supra*, all within the full knowledge of the

assessor, that it was *inherently* arbitrary and capricious conduct." Dore, 79 Wn.2d at 765. Dore simply does not apply to our case.

The Church relies on Bridle Trails Cmty. Club v. Bellevue, 45 Wn. App. 248, 251, 724 P.2d 1110 (1986) in which the appellate court remanded to the trial court for a determination of whether this was the rare land use case for which the court should choose to exercise its inherent power to review an administrative decision, the process available before the creation of LUPA.[3]

The Church cites to Nieshe v. Concrete Sch. Dist., 129 Wn. App. 632, 127 P.3d 713 (2005), in which the court held that the plaintiff had failed to show that her high school's alleged arbitrary decision to prohibit her from participating in graduation ceremony constituted a violation of her substantive due process rights. The quotation in the Church's brief is taken from the following paragraph:

> Substantive due process generally asks whether the government abused its power by arbitrarily depriving a person of *a protected interest* or by basing the decision on an improper motive. An

[3] Plaintiff also quotes from Zehring v. Bellevue, 99 Wn.2d 488, 493, 663 P.2d 823 (1983) but this citation is believed to be in error as Zehring deals with the appearance of fairness doctrine rather than constitutional violations or the standard of arbitrary and capricious governmental action.

> administrative agency's failure to follow its own procedure violates the constitution only when (1) the agency violates minimal constitutional requirements [in violation of procedural due process], or (2) its resulting decision is so arbitrary and capricious that it amounts to a violation of substantive due process."

Nieshe, at 640-41. In Nieshe, the court found the plaintiff had no proected interest in the graduation ceremony. The Nieshe case does not apply to the facts of our case and does not provide any support to the Church's argument.

Finally, plaintiff cites large portions of Mission Springs v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998). But again, our case is not like Mission Springs. In that case, the developer had met all the conditions of the grading permit it sought, but the City Council and/or the City Manager, who knew that the project was unpopular, refused to process Mission Springs' grading permit application, even though the City Attorney advised that the permit should be processed and even though the developer had vested rights in the permit. Mission Springs, at 953.

The Court held that the developer was entitled to the permit, having satisfied all the conditions of the application. Mission Springs, at 962. After addressing the standards of RCW 64.40, the Mission Springs court considered the developers

substantive due process claim, noting that the "criteria to establish a 'taking' are quite different from that requried to establish a deprivation of property for want of due process, and the Supreme Court has instructed there is 'no reason' to believe they are the same." Id., at 964 (qutoing Nollan, 483 U.S. at 835, n.3). The inquiry to be made in a substantive due process case is whether the police power, rather than the eminent doman power, had exceeded its constutional limits. Presbytery of Seattle v. King County, 114 Wn.2d 320, 330, 787 P.2d 907 (1990). To answer this question, the court performs a balancing test, asking 1) whether the regulation is aimed at achieving a legitimate public purpose; 2) whether it uses means that are reasonably necessary to achieve that purpose; and 3) whether it is unduly oppressive on the landowner. Id.

The reason that the witholding of the permit was arbitrary in Mission Springs is that the Council or City Manager withheld the permit for no legitimate reason and could provide no evidence of having considered the delay for any legitimate reason. Its action was "willful and unreasoning" and taken without consideration of the facts and circumstances of the particular application. Mission Springs, at 962. That is nothing like our case. In our case, there was thorough discusion of the facts and circumstances all along the

process. Legal counsel was sought and followed. And, contrary to the Church's brief, the Mission Spring court did not say that "as a matter of law impostion of an unconstitutional condition on a bulding permit is arbitray and capricious." Brief, at 31. While a finding of a substantive due process violation may involve a finding of arbitrary and capricious conduct, the LUPA court made no such findings. And, the court did not engage in a substantive due process balancing test. Mission Springs has no application in our case on the proposition for which it is cited.

As pointed out above, in our case, the City considered all the evidence and made a reasoned decision. When the Church requested a waiver of the conditions, the City staff engaged in numerous discussion at all levels of management in order to reach an appropriate decision. The City met with the Church's Pastor and Board Director, Terry Kuehn, on multiple occasions to discuss the specific concerns and objections that Mr. Kuehn had to the dedication request. E.g., RP 506; 562; 836; 868. The City had significant communication with the Church by email and phone. Under these circumstances, even if the City's decision was ultimately found to be wrong, it cannot be said that the decision

was reached "willfully and unreasonably, without consideration and in disregard of facts or circumstances." Sparks, at 908.

2. The Church also asserts that the City violated RCW 64.40 by requiring the right-of-way easement dedication because, according to the Church, the City knew or should have known that the requirement, if imposed, would be unlawful and/or beyond lawful authority.

The Church's argument is based on the fact that it had told the City that the Church believed the off-site improvements were too onerous and that the conditions violated Nollan and Dolan. In addition, the Church argues that the City knew that the insufficient right-of-way in front of the Church's property pre-existed the Church's application, and that therefore the City should not have considered the Church's project as adding any additional impacts to the infrastructure. However, neither argument is supported by Washington law.

The Church's argument is that Mr. Kuehn had already pointed out to the City that he believed that the right-of-way dedication did not meet the Nollan-Dolan test. However, a genuine disagreement as to the evaluation of the Nollan-Dolan test of nexus and rough proportionality is insufficient to establish the requirement that the City should have known that the requirement would be deemed to fail the Nollan-Dolan test. The City had no

reason to suspect that the dedication requirement would be deemed as violating the Nollan-Dolan analysis, because, as was argued to the trial court, Washington case law clearly supported the City's right-of-way request.

For example, in Sparks v. Douglas County, 127 Wn.2d 901, 904 P.2d 738 (1995), the property owner filed four short plat applications. In reviewing the applications, the county determined that the width of existing streets bordering the plats were too narrow to accommodate modern road design and would thus prevent future construction of street improvements. The county required dedication of additional right-of-way, and the property owner appealed. The supreme court affirmed the county's requirements, holding that the county had established the nexus and rough proportionality requirements of Nollan and Dolan. Id., at 916-17. In affirming the right-of-way exaction, the court noted that the county had documented the deficiencies in the existing road width and had recorded its evaluation of how and why it determined that the new plats would increase vehicular traffic. Thus, the county had fulfilled its requirement to make an individualized assessment of nexus and to make a decision as to

rough proportionality. The Supreme Court concluded that the right-of-way dedications were constitutional.

Similarly, the plaintiff in Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 49 P.3d 867 (2002) made the same argument about the construction of a secondary access road as the Church made in this case. In justifying its requirement that the applicant construct a secondary access road, Camas presented evidence that the current access road was "inadequate under current code requirements for emergency vehicle use." Isla Verde, at 767. In addition, the existing access road could become impassable in inclement weather. Id. Isla Verde objected to the development condition, arguing that "the problem of inadequate access via the [the existing access road] existed prior to its proposed development, and it has not contributed to the need for a secondary access road." Id., at 768. In addition, Isla Verde characterized the "decision to request a secondary access road as the City's 'mere desire' to have a second road." Id., at 766. Isla Verde contended that placing the requirement on Isla Verde was oppressive, violated substantive due process and violated RCW 64.40. Id.,at 767, 769.

The appellate court acknowledged that "while a municipality has authority to make appropriate provisions for the public health, safety, and welfare, and to condition plat approval accordingly, it does not have authority to require a developer 'to shoulder an economic burden, which in justice and fairness the public should rightfully bear.'" Weden v. San Juan County, 135 Wn.2d 678, 706, 958 P.2d 273 (1998)(quoting Orion Corp. v. State, 109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987)). The court acknowledged that the inadequate access pre-existed Isla Verde's development. However, the court pointed out that Isla Verde's development would contribute to the existing problem. Isla Verde, at 767. And, the evidence showed that the City had legitimate safety concerns about the absence of a secondary road. Id. Thus, the "City made a reasonable decision when it required Isla Verde to provide a secondary access road for emergency vehicles" and the court held that the requirement did not violate RCW 64.40. Id., at 770.

Similarly, in Trimen Dev. Co. v. King County, 124 Wn.2d 261, 877 P.2d 187 (1994), the developer challenged the county's development permit condition that Trimen dedicate land for park space or pay a fee in lieu of the dedication. Trimen argued that the

county's deficit of park space pre-existed Trimen's development, as evidenced by the county's assessment of park needs done in 1985. The court did not dispute that the deficit pre-existed Trimen's proposed development. But, the court indicated that the Trimen development would contribute to the deficit and that the dedication requirement was therefore made reasonably necessary by Trimen's development, establishing the nexus required by Nollan. Trimen, at 274. And, the court found that the amount of park space required of Trimen, or the in lieu fee, bore a "rough proportionality" as required by Dolan to the impact that Trimen's development would have on the already existing parkland deficit. Id.

Again, in City of Federal Way v. Town & Country Real Estate, LLC, 161 Wn. App. 17, 252 P.3d 382 (2011), the court rejected the developer's argument that the problem pre-existed its proposed development and that its development should not be responsible for alleviating a pre-existing problem. In Town & Country, the cities of Tacoma and Federal Way required that the developer provide a traffic mitigation payment to offset the impacts that the new development would cause to both cities. The developer pointed out that the cited traffic problem pre-existed his

planned development and that the cities had actually developed plans to address that specific traffic problem long before Town & Country ever submitted its application. Town & Country, at 51. The hearing examiner had agreed with this argument, but the appellate court pointed out that "[o]ur Supreme Court has held otherwise." Id. The court reversed the hearing examiner's decision, citing to Trimen for authority that developers can properly be required to rectify pre-existing deficiencies if their projects will contribute an additional burden to the deficiency. Town & County, at 51. In addition, the court held that the required mitigation met the "analysis embodied in the *Nollan/Dolan* standard." Id., at 45.

Like the applicants in Sparks, Isla Verde, Trimen, and Town & Country, the Church proposed a project that would make worse an already existing problem of insufficient right-of-way. The Church's project will add to the existing problem. The Church has already constructed a garage and plans on installing a driveway, neither of which existed on the property when the Church purchased it. Furthermore, the Trip Generation Manual used by traffic engineers established that residential construction like the Church's parsonage will generate a minimum of 10 additional journeys per day. RP 1065. Thus, the Church's project

would have created additional impacts on the already insufficiently narrow roadway.

Like the plaintiff in Isla Verde who complained that the City's requirement for an access road was a "mere desire" for a new road, the Church in this case has complained that the City's requirement for the right-of-way dedication is merely to make the roadway "uniform," as if the requirement were some aesthetic consideration. However, safe streets require a uniform width. See e.g., CP 959. Tapering of streets to narrow widths poses dangerous conditions for emergency vehicles as well as normal traffic. Id. Insufficient right-of-way to accommodate sidewalks forces pedestrians into the street. Id. The City required a uniform street width as an important safety component of street system, not just a mere desire to have rights-of-way appear uniform. See e.g. CP 894-895; 959-960; RP 451-458.

Given that Washington law and the City's municipal code supported the City's right-of-way request, and given that the City altered the requested right-of-way to the bare minimum that would allow for safe pedestrian passage under applicable national transportation standards, the City could not have known that ultimately the court would find, on a very limited record, that the

City right-of-way request would violate Nollan and Dolan. The record at the LUPA hearing was scant. Numerous times the court commented that the factual record was insufficient to make a decision that took into account all the facts and circumstances. CP 2049, 2061-62. Nevertheless, the court was forced to make a decision based on the record before it. Had the record been more fully developed, the City believes the LUPA court may have come to a different conclusion. By the time of trial on the RCW 64.40 claim, the facts had been developed and they amply supported the court's decision that the City could not reasonably have known that the request for a right-of-way dedication would violate Nollan and Dolan.

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

Another basis for finding no violation of RCW 64.40 is that the imposition of the right of way dedication was not an "act" for purposes of RCW 64.40 because the purpose of the dedication was for the safety of the residents in the area. The definition of "act" for purposes of RCW 64.40 expressly excludes "lawful decisions of an agency which are designed to prevent a condition which

would constitute a threat to the health, safety, welfare, or morals of residents in the area." RCW 64.40.010(6).

For example, in Isla Verde Int'l v. City of Camas, 99 Wn. App. 127, 990 Wn. App. 429 (1999), the developer, Isla Verde, sought damages under RCW 64.40 for the County's requirement that Isla Verde construct a secondary access road that would be available to emergency vehicles, including fire trucks. The County contended that the secondary road was necessary because there was a single route by which fire trucks could access the development. The developer objected, saying the condition was unduly burdensome and impossible to satisfy because he could not get residents to grant easements for right-of-way. The trial court agreed with the developer, saying that the condition was arbitrary and capricious and violated RCW 64.40.

The appellate court reversed that decision, explaining that "the City imposed the secondary road requirement because of concerns over Dove Hill's vulnerability in case of fire and the need to enhance access by emergency services." Isla Verde, 99 Wn. App. at 136. Thus, conditioning the permit on the requirement that Isla Verde provide a secondary access road was not an "act" that could give rise to liability under RCW 64.40. Id.

So too in in our case, the requirement of dedication of right-of-way was imposed to prevent a condition which would constitute a threat to the health, safety, and welfare of the residents in the area. As the City explained to the Church, the dedication was necessary in order to provide a pedestrian pathway adjacent to the roadway along with a pedestrian buffer zone, for the protection of pedestrians on the roadway. P75. The right of way dedication was required by the City's Transportation Element of the Comprehensive Plan which is designed to provide for transportation with "safety and speed." P75. Safety considerations included the fact that the Church's property was on a school walking route and "safe walking routes are required for children." P74; See also, RP 1074. In addition, the City told the Church that the right of way was necessary for visibility for safe vehicular traffic at the intersection. P55; RP 472. Without an easement, this conditions could be made even worse because the Church could install a fence all the way out to the edge of the street, forcing pedestrians into the street and further restricting the visibility of vehicles at the corner. RP 782; 802.

There was a significant amount of testimony at trial that the primary consideration in seeking the right of way dedication was

safety. E.g., RP 827; 1090. For example, Ms. Kammerzell testified that in imposing the dedication requirement she relied on AASHTO safety standards when imposing the dedication requirement. RP 1073-74. Ms. Kammerzell testified that visibility for both pedestrians and automobile drivers was a safety consideration, particularly where a driveway is going to be installed and particularly when an applicant proposes to install the driveway on a corner, as the Church had done. RP 861-62; 1075. Indeed, numerous witnesses testified that safety was the primary consideration. See, Kingsolver testimony at RP 763, 767, 782-83, 801; Kammerzell testimony at RP 1066-67, 1073; 1099- 1100; Frantz testimony at RP871; Kuntz testimony at RP 809; Johnson testimony at RP 917-18.

As in Isla Verde, this court should find that the right of way requirement was imposed to prevent an unsafe condition and thus is not an "act" that could give rise to liability under RCW 64.40.

3. Findings 5 and 16, and Conclusions 1, 2, 3, 4 and 5 are supported by substantial evidence and are legally correct.

a) Finding No. 5

Finding No. 5 states that the Review Panel did a *Nollan/ Dolan* analysis. CP 2401. "A *Nollan Dolan* analysis is also called

"the 'nexus' and 'rough proportionality' tests, after the United States Supreme Court's decisions" in those two cases." City of Federal Way v. Town & County Real estate, LLC, 161 Wn. App. 17, 44, 252 P.3d 382 (2011). In this case, there was abundant evidence presented at trial that City staff conducted *Nollan/Dolan* analyses at the Review Panel meetings as well as outside of those meetings.

In this case, the testimony at trial was that the Review Panel considered the nexus and proportionality tests of Nollan and Dolan when the Review Panel first applied the development conditions. Craig Kuntz, the administrator of the Review Panel, testified that Review Panel always considers the Code along with nexus and proportionality. RP 810. That is one of Review Panel's primary functions. RP 578.

In fact, plaintiff has not challenged Finding of Fact No. 3 which states that the Review Panel "considered the impacts created by the proposed development, including to the pedestrian traffic, vehicular traffic, parking, sidewalks, and driveway access. CP 2401. These are the impacts which established the nexus required by Nollan.

Plaintiff argues that a proper analysis could not have been done because the Review Panel had no evidence of the impact created by the Church's project. However, as Jennifer Kammerzell testified, the Panel did discuss the specific impacts. RP 1064- 66. One of the impacts they reviewed is the vehicular traffic that would be generated by new development and whether additional right of way might be needed to accommodate that increase in vehicular traffic. Id. Ms. Kammerzell testified that the standard tool used by traffic engineers to determine vehicular impact is the Trip Generation Manual published by the Institute of Transportation Engineers. RP 1065. See also, RP 762. According to the manual, the construction of a single family home on a vacant lot adds ten vehicular trips per day to the infrastructure. RP 1065. This additional vehicular burden is part of what established the nexus between the dedication requirement and the Church's project.

Ms. Kammerzell testified they also consider other safety measures such as adequate sidewalks, planting strips, sufficient parking, and other factors. RP 1065-66. Ms. Kammerzell testified that she recommended that the City ask for a dedication of 30 feet so that the roadway would be in compliance with the City's

Comprehensive Plan, which includes the City's design guidelines for streets. Indeed, Ms. Kammerzell testified to a multitude of potential impacts caused by the development of this vacant lot into a single family home with a driveway that were the bases for her request for a 30' dedication. RP 1099.

The Church also contends that the Review Panel had insufficient information because the City had not done a traffic study. Brief, at 35. However, the testimony of the Public Works Director was that traffic studies are rarely required for single family residential development because of the cost involved. RP 762-63; 766. Rather, the standard in the industry is to use the Trip Generation Manual. Id. And, Washington case law confirms that municipalities do not need to do a site specific study in each case. Trimen, 124 Wn.2d at 274. The Church also complains that not all City staff visited the site of the Church's proposed construction. However, the information relevant to the dedication requirement cannot be observed during a site visit. RP 762-63; 1071-72. Right of way can only be viewed using aerial photographs with an overlay showing the right of way lines. RP 763. Thus, there was no reason to do a site visit in this case.

The Church also makes the argument that the trial court ruled that the City could only present evidence of uniformity and that if the court considered any evidence beyond uniformity, such evidence would violate the court's own order. Brief, at 35. However, when the court ruled on the Church's motion in limine regarding uniformity, the court specifically stated that in considering the RCW 64.40 claim for damages, the court would have to look beyond the word uniformity when determining whether the City's actions were arbitrary or capricious. RP 49. Counsel for the City asked Judge Hogan whether the ruling as to uniformity would "limit the City's testimony in regards to why they placed this right of way dedication on this property." RP 49. Judge Hogan responded, "Well, it may. And I'll have to see how the testimony develops." RP 50. Judge Hogan clearly did not foreclose all testimony as to why the City applied the conditions it did and the process the City went through in evaluating and modifying those conditions. The court admitted considerable evidence of the City's basis for attaching the development conditions to the permit and evidence of the City's process, including multiple Nollan and Dolan analyses. As the trial court stated when giving its oral ruling:

> And while the requirement for the right-of-way dedication may have seemed to focus merely on uniformity, this Court cannot find that the City disregarded Nollan and related cases under a damages analysis. The City gave consideration to the right-of-way dedication requirement that went beyond mere uniformity, and the Court awards no damages under RCW 64.40.020. CP 1192
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In addition, the Church's complaint about "uniformity" reveals a misunderstanding as to how that term is used by traffic engineers. RP 919. For example, there was significant testimony that uniformity encompasses safety considerations. The driving public has an expectation that roads will be consistent and that "type of uniformity is a safer environment for all people using the street system." RP 801-02. See also RP 1084-85; 686.

Appellate courts will not overturn a trial court's finding of fact if it is supported by substantial evidence in the record. Colonial Imports, Inc. v. Carlton N.W. Inc., 121 Wn.2d 726, 730 n.1, 853 P.2d 913 (1983). Here, there was substantial evidence supporting the court's finding.

The Church also lists as a sub-issue that the Court erred in finding that the lot was vacant at the time of the Church's application for a permit. It is undisputed that the lot was vacant when Mr. Kuehn purchased it and submitted his application for a

permit to build a parsonage. RP 512-13. The Church did not provide to the trial court, and has not provided in its appellate brief, any legal basis for a contrary finding. Again, the church did not provide to the trial court, and has not provided in its appellate brief, any legal or factual basis requiring the City to tack on the prior use for purposes of a Nollan Dolan analysis. Moreover, Ms. Kammerzell testified that prior to the demolition of the home, "the house had been vacant for quite some time" and that Ms. Kammerzell took "into consideration how long a property's been vacant and how trips or traffic changes over time." RP 1083.

It appears that Plaintiff's argument is directed at the fact that the prior house built about one hundred years ago if occupied today would generate the same number of trips as the Church's parsonage. Even if that were true, the right of way requirements have changed considerably. Certainly the plaintiff does not believe that the City should allow electricity to be installed using 100 year old codes. The fact that right of way requirements have evolved over the years is no different. See e.g., RP 513. In 2017, best practices as well as local and national standards have different recommendations than they did 100 years ago.

Finally, the Church contends that this factual finding should be reviewed as a conclusion of law. However, this Finding of Fact asserts that an activity occurred. It does not go on to state the outcome of the activity or the legal consequences of the activity. Therefore, it was properly presented as a factual finding.

b) The Church challenges Finding of Fact 16

The Church also challenges Finding of Fact No. 16, which states, "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 it did modify the right of way dedication." CP 2403. The Church asserts that Mr. Kuntz and Ms. Kammerzell did not have the authority to make the change to the right of way dedication. However, this finding does not state that they had such authority. Rather, the finding indicates that Mr. Kuntz "provided" the City's response; the Finding does not say that Mr. Kuntz made the decision. The Church also argues that the March 7, 2014 letter and memo should not be interpreted as constituting the "final decision" of the City. Again, the City agrees. The final decision is the hearing examiner's decision.

The Church provides no basis for challenging Finding of Fact No. 16.

c) Conclusion of Law No. 1.

The Church contends Conclusion of Law No. 1 is erroneous because it identifies the Hearing Examiner's decision as the final decision for purposes of RCW 64.40. Brief, p. 37. Plaintiff contends the final decision should be Mr. Huffman's letter of April 28, 2014. However, the case law, the Tacoma Municipal Code, as well as a review of Mr. Huffman's letter makes clear that Mr. Huffman's April 28, 2014 letter is not the final decision for purposes of RCW 64.40.

The Legislature created the cause of action under RCW 64.40 only for those landowners who receive inadequate relief through the administrative process. Brower v. Pierce County, 96 Wn. App. 559, 566, 984 P.2d 1036 (1999). The statute authorizes damages that are incurred after a cause of action accrues. Brower, at 566. The cause of action accrues when the administrative process fails to provide the relief the applicant seeks. Id. If the applicant is successful during the administrative process, the applicant can have no cause of action even if the agency did act arbitrarily during the processing of the permit. Id. "As the court

held in Smoke, 'One of the primary purposes of the doctrine to exhaust administrative remedies is to provide a more efficient process and allow the agency to correct its own mistakes.'" Brower, at 566 (quoting Smoke, 132 Wn.2d at 226). Thus, the final decision is the agency's last opportunity to correct any preceding errors. That occurs at the final issuance or denial of the permit or at the hearing examiner. See, Brower. See also, Hayes v. City of Seattle, 131 Wn.2d 706, 716, 934 P.2d 1179 (1997) ("Underlying our decision is a recognition of the fact that the final action that an administrative body can take in this area is the issuance or denial of the sought after permit."). Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 829 P.2d 746 (1992), cert. denied, 113 S. Ct. 1044 (1993)((final decision challenged under RCW 64.40 was hearing examiner's denial of conditional use permit).

For example, in Birnbaum, 167 Wn. App. 728, 274 P.3d 1070 (2012), the applicant sought damages for costs and delays that occurred while the county processed the application, before the permit issued. The Court stated that Birnbaum was seeking damages for a time during which the permit was being processed, before the final decision had been reached, and before the permit

issued. Birnbaum, at 735-36. Thus, Birnbaum's claim was premature and damages were not available because the City had not taken its final action on the permit and the applicant is not entitled to damages for any actions that occur prior to the final decision. Id. at 736-37.

Similarly, in Coy v. City of Duvall, 174 Wn. App. 298 P.3d 134 (2013), review denied,178 Wn.2d 1007 (2013), the plaintiff sought damages for "conduct during the application process, not the hearing examiner's final decision approving the application." Coy, at 298. The court held such damages are not recoverable. Relying on Birnbaum, the Coy court stated that because Coy "challenges the agency's conduct prior to the final decision, he has not stated a viable claim for relief pursuant to that statute" and the appellate court held that the trial court properly dismissed his claim. Coy, at 280.

Under Washington case law, it is clear that the final decision is the hearing examiner's decision, which is the City's last opportunity to correct any mistakes it might have made in the permitting process up to that point.

Furthermore, the language of Mr. Huffman's letter negates any argument that the letter is the final decision for purposes of

RCW 64.40. In the letter, Mr. Huffman told the Church that as to the development requirements placed on the parsonage project, the Church could appeal the decision to the Hearing Examiner "pursuant to TMC 1.23.050.B.2", who "shall issue a final decision." P 84. The Church proceeded to appeal, and received the final decision from the Hearing Examiner.

Mr. Huffman's reference to "final decision" was based on the Tacoma Municipal Code, which explicitly refers to the Hearing Examiner's decision as the final decision. In Title 1, the Code provides:

> Appeal of those matters in which the Hearing Examiner enters a final decision as set forth in Subsection B of Section 1.23.050 . . . may be brought any party to the adjudicative proceeding which led to the decision entered.

TMC 1.23.060(A) (emphasis added). Similarly, a final land use decision is defined in Title 13. It provides:

> A decision under Title 13 is considered final at the termination of an appeal period if no appeal is filed, or when a final decision on appeal has been made pursuant to either Chapter 1.23 or Chapter 1.70.

TMC 13.05.010(J)(3).

In this case, both the LUPA court and the trial court determined that the hearing examiner's decision, not the April 28, 2014 letter from Peter Huffman, was the final decision for

purposes of RCW 64.40. Judge Martin pointed out that the letter "was a preliminary discussion." RP 13. "He said there is no final decision, so basically, this appeal came up from a letter which wasn't a final decision." RP 13.

A plaintiff in a RCW 64.40 lawsuit is not free to select an interim point in the application process as a final decision, and in essence, create a continuing violation from some point prior to the final decision. See, Callfas v. Dep't. of Constr. & Land Use, 129 Wn. App. 579, 592-93,120 P.3d 110 (2005).

Nevertheless, relying on Smoke v. City of Seattle, 132 Wn. 2d 214, 937 P.2d 186 (1997), the Church contends that Mr. Huffman's letter of April 28, 2014 was the final decision. But, Smoke is inapposite. The issue in Smoke was whether the applicant had exhausted its administrative remedies. Smoke, at 217. The applicant argued that a letter from the City constituted a final decision for purposes of RCW 64.40 because in the letter, the City stated: "This letter represents the DCLU position regarding development potential of the property . . . It is not an appealable legal determination." Id. at 219. In Smoke, the City's code expressly stated that the determination was non-appealable. Id., at 227. The Court adopted the letter as the final decision for purposes

of finding that the applicant had exhausted all administrative remedies because there was no further process available to the applicant. Id. The Court noted that if a "letter clearly fixes a legal relationship *as a consummation of the administrative process*" and is "so written as to be clearly understandable as a formal determination of rights," then the letter may serve as the final decision. Id., at 222 (emphasis added).

That is not the same as in our case. Here, the City's letter specifically stated the decision was *not* a consummation of the administrative process and, in fact, stated the decision was appealable and outlined the process for the administrative appeal. In our case, the City's code expressly provided for such an appeal, and the Church actually proceeded with the appeal and received what it had been told would be the final decision. Thus, the trial court's Conclusion of Law No. 1 correctly stated that the final decision was the decision of the hearing examiner.

d) Conclusion of law No. 2

The Church argues that the trial court erred in finding that the City "acted within 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." CP 2408. The Church

provides no argument, only the statement that the "City has no lawful authority to violate its own code, state statute and the U.S. Constitution." Brief, at 37. It is unclear what the Church is arguing here, and the City asserts that the Church is required to provide actual argument to which the City can respond and which the appellate court can consider. Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 1998 ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."); see also, West v. Thurston County, 168 Wn. App. 162, 187, (In making bald assertions lacking cited factual and legal support, [the appellant] has failed to present developed argument for our consideration on appeal".). Without any specific argument provided by the Church, the City assumes that the Church's argument here is the same as its arguments previously presented in sections A and B of its brief.

e) Conclusion of Law No. 3

The Church contends the trial court erred when it concluded that the City did not act arbitrarily or capriciously. However, as set out above, arbitrary action is willful and unreasoning, without consideration of the facts and circumstances of the individual application. Mission Springs, at 962. Here, the

City re-evaluated the Church's development conditions in light of the Church's situation and arguments on many, many occasions. See, e.g., RP 556, 564, 579-80, 586, 847; CP 2404- FOF 18, 19, 20, 21. The court's conclusion naturally flows from the overwhelming evidence presented to the trial court.

The Church also challenges this conclusion because the conclusion mentions both the eight foot dedication width and the 30 foot dedication width. Despite the trial court's statement at the outset of trial that the court was not going to redo Judge Martin's decision that the dedication request was for eight feet, the trial court did proceed to hear substantial testimony about how the two figures came about, how and when they were communicated to the Church, and the error that occurred in the second declaration of Peter Huffman. RP 37; 617. 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, or any of the other development conditions, were arbitrarily or capriciously applied.

f) Conclusion of Law No. 4

The Church contends the trial court's conclusion is "legally wrong" because the conclusion states that the City "reasonably

believed" that nexus had been shown and that the conditions were proportional, while the language of the statute is 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 64.40.020(1) (emphasis added). The Church does not contend that the conclusion is unsupported by substantial evidence or the findings of fact. The only complaint is that the wording does not mirror the statute. Interestingly, the Church did not raise this issue with the trial court when the Church submitted its Memo on Presentation of Findings, which addressed the Church's concerns with the proposed findings. CP 2284-89.

Furthermore, the "general rule is that when the language of findings is equivocal and susceptible of a construction which will support the judgment, though also susceptible of another construction, the findings will be given that meaning which sustains the judgment, rather than defeat it." Redmond v. Kezner, 10 Wn. App. 332, 343, 517 P.2d 625 (1973). Here, the City argues that the meaning is clear. But even if the court's conclusion is not clear, it is susceptible of a construction that supports the judgment.

g) Conclusion of Law No. 5

Similar to the previous conclusion, the Church's challenge to Conclusion of Law No. 4 is that it could have been worded more clearly. The Church does not contend that the conclusion is not supported by the findings of fact.

The Church is concerned that the conclusion does not call out whether the dedication requirement was eight feet or 30 feet at the time of the final decision and that, therefore, there may be some confusion. 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.

In addition, as the Church itself argued on multiple occasions at trial, for purposes of the Church's *Nollan/Dolan* analysis, which focused on nexus and proportionality, the size of the dedication was irrelevant. Again, the trial court heard considerable evidence on both the eight foot dedication and the 30 foot dedication. The court heard evidence as to why the 30 foot dedication was desired, how it complied with the City's standard

plans for a safe and efficient roadway, that the staff believed nexus had been shown, that proportionality was later reconsidered and the right of way dedication was reduced. The Church's complaint as to clarity is not enough to warrant reversal of the court's Conclusion of Law No. 5.

B. The trial court properly denied the Church's motions to amend.

1. The Church never clearly requested to add a §1983 claim based on the doctrine of unconstitutional conditions. Even if it had, the amendment would have been properly denied because there was no basis for such a claim.

The trial court's decision to deny a motion to amend the pleadings is reviewed for an abuse of discretion. Del Guzzi Constr. Co. v. Global Nw Ltd., 105 Wn.2d 878, 888, 719 P.2d 120 (1986).

CR7(b) requires a party to state with particularity the grounds for the proposed amendment. Doyle v. Planned Parenthood of Seattle King County, 31 Wn. App. 126, 130, 639 P.2d 240 (1982). It is a "basic premise that every motion must specify the grounds and relief sought 'with particularity', CR 7(b)(1); 5 C. Wright & A. Miller, *Federal Practice* § 1192 (1969 & Supp. 1985), and courts may not consider grounds not stated in

the motion." Orsi v. Aetna Ins. Co., 41 Wn. App. 233, 247, 703 P.2d 1053 (1985).

Even in a notice pleading state, a complaint must give sufficient notice of the claim to be asserted. Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 25, 974 P.2d 847 (1999). It must at least identify the legal theories upon which plaintiff seeks recovery. Id. Complaints that fail to give the opposing party fair notice of the claim asserted and the ground upon which it rests are insufficient. Shooting Park Ass'n v. City of Sequim, 158 wn2d 342, 352, 158 Wn.2d 342 (2005); Lewis v. Bell, 45 Wn. App. 192, 197, 724 P.2d 425 (1986).

The Church claims it sought to amend its complaint with a cause of action alleging a §1983 claim based on the doctrine of unconstitutional conditions. Brief, at 39. However, that is not accurate. In this case, when the Church sought amendment to add a §1983 claim, the Church sought to base the claim on an alleged taking, not on a violation of the doctrine of unconstitutional conditions. Indeed, the Church's proposed amended complaint does not mention the doctrine of unconstitutional conditions. CP 502. Rather, the constitutional violation set out in the proposed amended complaint is that 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 law by conditioning his request singled 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." CP 502-03. And, in the briefing provided to the court on the motion to amend, the Church consistently referenced a violation of the takings clause. CP 492- 94. In fact, the Church attached to its motion the full text of an article entitled "Regulatory Takings," by William B. Stoebuck. CP 764-79.

Interestingly, the Church now complains that the City briefed, and the Court heard argument on and discussed case law relevant to a takings analysis but irrelevant to a cause of action under the unconstitutional conditions doctrine. RP 40. The Church seems to suggest that both the court and the defendant did not understand the basis of the Church's motion. If that were the case, the Church could have redirected the court and the defendant, but the Church did no such thing. For example, the Church filed a reply to the City's response, but nowhere in the reply did the Church call out the doctrine of unconstitutional conditions. Rather, the reply was once again focused on a takings. CP 570-72. The

Church repeatedly referenced the cases of Nollan and Dolan, neither of which contain an express discussion of the doctrine of unconstitutional conditions. Rather, both cases deal with constitutional claims for a taking of private property without compensation. Such claims have been described as a subset of the doctrine of unconstitutional conditions based on a Fifth Amendment takings analysis. Koontz v. St. Johns River Water Mgmt. Dist. 133 S. Ct. 2586, 2591, 186 L. Ed. 2d 697 (2013)(citing Lingle v. Chevron, 544 U.S. 528, 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2002). If the Church sought to add a claim based on the doctrine of unconstitutional conditions apart from a takings, the Church should have stated such. Instead, the Church's first specific mention of the doctrine of unconstitutional conditions appears in the Church's motion for reconsideration. But even there, it is coupled with a takings analysis and is not clearly identified as a claim based on the doctrine of unconstitutional conditions apart from a takings. CP 575-85. It was incumbent on the Church to specify with particularity the grounds for its proposed amendment and it did not do so.

Even if the court erred in not allowing amendment, the error was harmless because a claim under the doctrine of unconstitutional conditions would not have been successful.

If error occurs at the trial court, the question on appeal is "whether the error was prejudicial, for error without prejudice is not grounds for reversal. Brown v. Spokane County, 100 Wn.2d 188, 196, 668 P.2d 571 (1983); Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). "Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." James S. Black & Co. v. P & R Co., 12 Wn. App. 533, 537, 530 P.2d 722 (1975); RCW 4.36.240.

Under the "unconstitutional conditions" doctrine, the government may not require a person to give up a constitutional right in exchange for a benefit. A plaintiff alleging a violation of the unconstitutional conditions doctrine, however, must first establish that a constitutional right is being infringed upon. Olympic Stewardship Found. V. Envtl. & Land Use Hearings Office ex rel W. Wash. Growth Mgmt. Hearings Bd., 2017 Wash App. LEXIS 1475 * 94 (June 20, 2017); Sanchez v. County of an Diego, 464 F.3d 916, 931 (2006).

Here, the court repeatedly stated that it could not find a constitutional violation because the dedication never came to fruition. To the extent that the plaintiff claims it nevertheless suffered harm because it could have started its project sooner but for the dedication requirement being on the permit for several months, the overwhelming evidence at trial was that the Church could not establish that the dedication actually caused any delay at all. For example, the Church was advised to continue with revisions to its building plans but at the time of trial, but almost three years later, those revisions still had not been accomplished. CP 2406 (FOF 27).

2. The court properly denied the Church's request to amend the complaint to add a claim regarding the sidewalk requirement, which had been withdrawn prior to the final decision of the City.

The Church agrees that the requirements for sidewalk and curbs had been dropped by the time of the hearing examiner but that the trial court erred in finding that the hearing examiner's ruling was the final decision for purposes of RCW 64.40. The Church argues that the final decision was the Huffman letter of April 28, 2014 and that if that letter is construed as the final decision, the sidewalk would properly be part of the case. As set

out above, the final decision for purposes of RCW 64.40 was the decision of the hearing examiner. Thus, sidewalks were not relevant to the case and the trial properly refused to amend the complaint to add a futile claim.

In addition, the Church argues that the TMC 15.05.040A supports the Church's argument that Mr. Huffman's letter of April 28, 2014 as the final decision, but those provisions do not apply here. Brief, at 42-43. The provisions highlighted by the Church are provisions that pertain to land use decisions made under the land use code. But, as Mr. Huffman's letter specifically stated, there had not been a final land use decision and that to date, the Church had only been given "direction," no final decision on land use issues. Mr. Huffman confirmed that it appeared that the Church was building a parsonage, which would not require a land use permit. RP 558; 562. Mr. Huffman's letter then goes on to direct the Church to TMC 1.23.050 for a final decision from the hearing examiner as to the conditions placed on the permit under the building code, including the condition that the Church dedicate right of way.

The Church has argued that "the sidewalk condition was arbitrarily imposed without code authority." Brief at 8. However,

the City contends that the Church's property meets the requirements of TMC 2.19.040, under which sidewalks were required. But even if the Church is correct that its property does not match the circumstances outlined in TMC 2.19.040 where sidewalks are required, that code provision does not limit the City to just those circumstances. The code provision identifies where sidewalks "shall" be required. The "word 'shall' is presumed to be used in the mandatory sense." State v. Rice, 174 Wn.2d 884, 897-98, 279 P.3d 849 (2012). Thus, the ordinance sets out the circumstances when sidewalks are mandatory but the ordinance does not limit the City to only those scenarios. The city has broad police powers that allow it to require sidewalks in a variety of circumstances and is not limited to the circumstances where sidewalk installation is mandatory under the building code. See e.g., TMC 1.06.710. See also, Weden v. San Juan County, 135 Wn.2d 678, 692, 958 P.2d 273 (1998). Thus, even if the court erred in denying amendment, the error was harmless.

C. The trial court properly granted the City's motion *in limine* to exclude evidence offered to dispute the prior judge's finding that the dedication request at the time of the Hearing Examiner was 8 feet.

Trial court determined at motions *in limine* that it would not be redoing any of the findings made by the prior judge, Hon. Elizabeth Martin. RP 37. The trial court indicated that it had reviewed Judge Martin's ruling and the record pertaining to the ruling and had decided that she was not going to allow relitigation of the issue. RP 75. The trial court was within her authority to do so.

The Church's primary argument on this point is that the superior court at the LUPA hearing determined that the dedication was 8 feet based solely on what the Church refers to a an intentionally misleading argument by the City. That is not correct.

At the LUPA hearing, the Church's counsel referred to a 30 foot easement. CP 549. Judge Martin stated, "I thought it was only 8 feet. Did I miss something?" CP 549. The Judge observed that she "thought it was only 8 feet, not 30 feet. I thought they changed it" Id. Counsel for the Church agreed that it "seems a little confusing in the record." Id.

In fact, the administrative record provided to Judge Martin for the LUPA appeal contained numerous references by the Church to the reduced 8 foot dedication requirement. The Church confirmed that "the city was originally requiring Appellant to

dedicate a 30-foot (an later revised downward) right-of-way along East B Street abutting the site. " CP 45 (Appellant's Motion for Reconsideration of Motion for Summary Judgment of August 19, 2014). The Church's briefing asserted that he was seeking a reversal of the development conditions in the "memorandum from Jennifer Kammerzell, Senior Engineer", which contained the reduced requirement for 8 feet of right of way. CP 94 (Appellants Amended Reply to City of Tacoma's Amended Response to Appellant's Motion for Summary Judgment and Cross Motion). There were many, many references in the Church's pleadings and memoranda to the hearing examiner that reflected the reduction of right of way to 8 feet. See e.g., CP 12; CP 62; CP 69. Thus, when Judge Martin started with the question, "I thought it was only 8 feet. Did I miss something?", which preceded any representations by the City's attorney, Judge Martin was clearly referring to the administrative record before her. At that point, she could not have been relying on any representations of counsel at the hearing.

Even if the court's ruling were in error, the error would be harmless. Counsel for the Church specifically represented to the LUPA court that "for the purpose of this hearing, it doesn't matter" whether the dedication was for 8 feet or 30 feet. RP 14-15. Again

at trial, counsel for the Church asserted that in terms of whether the dedication requirement was constitutional, it did not matter whether the City was requesting 8 feet or 30 feet. RP 72; 743. And, Mr. Keuhn testified at trial that it did not matter to him whether the request was for 8 feet or 30 feet because neither was acceptable to him. RP 465.

When reviewing the question of whether the exclusion of particular evidence is harmless error, "the court must of necessity review all the evidence relation to that which the rejected testimony relates; and if it appears form the record that the same, or substantially the same, evidence was given to the jury, then it can and should say that the error was not prejudicial." Bennett v. Seattle, 22 Wn.2d 455, 461, 156 P.2d 685 (1945). The court's ruling was also harmless given that, despite its ruling in limine, the court proceeded to hear a tremendous amount of testimony and admit a substantial number of exhibits on the issue of whether the dedication sought by the City was eight feet or 30 feet. See, e.g., RP 547- 554; 566- 576; 585-587; 597-98. Indeed, Judge Hogan commented that despite her ruling in limine, "Obviously both of you have taken this that we're going to be redoing the entire

process of what's already happened.. . . But I am letting you put on your cases." RP 617.

Here, the Church argued many, many times that the City was lying about the eight foot dedication requirement. Neither Judge Martin or Judge Hogan was persuaded that the City had lied. Substantial evidence supports the trial court's ruling.

D. The trial court properly found that the City did not violate the PRA.

This case also concerns the plaintiff's request for public records under RCW 42.56, the Public Records Act (PRA). The request was made on October 15, 2014 and the City provided approximately 3,500 pages, along with other sources, by January 8, 2015, or about 90 days after the request was made. Later on, the City discovered that it had not included in its response about 1-2 pages of computer notes of one of the planners, Shanta Frantz, and had not provided a brief two minute video of the Church's property taken by an intern, Ben Wells. It is uncontroverted that it was the City that discovered the omission and that the City immediately notified the Church of the omission and provided the notes and video. RP 487. The Church contends that the trial court erred in

determining that the City did an adequate search when it responded to the request of October 15, 2014. [4]

In Washington, the adequacy of a search is determined according to the standards used in the Federal Freedom of Information Act (FOIA). Block v. City of Gold Bar, 189 Wn. App. 262, 270-71, 355 P.3d 266 (2015)(citing Neighborhood Alliance of Spokane County v. Spokane County, 172, Wn.2d 702, 719, 261 P.3d 119 (2011)). Under the FOIA, the focus

> is not whether responsive documents do in fact exist, but whether the search itself was adequate. The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of the case. When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found.

[4] The plaintiff also made a separate request for records under the PRA on November 19, 2014 concerning the history and intent of several City ordinances. That request was fulfilled and closed within 24 hours. The plaintiff made another separate request under the PRA for records on January 20, 2015, requesting "[a]ll documents relating to or evidencing city activities to comply with PRA request 14-7815." Responsive documents and a privilege log were provided to the plaintiff and the request was closed on May 7, 2015. In addition to the two PRA requests, the plaintiff made a request of the Planning and Development Services Department for all residential building permits from May, 2013 to May, 2014. The City fulfilled that request in July, 2014. Only the two documents responsive to the October 15, 2014 request are at issue in this litigation.

Block, at 271. A "search need not be perfect, only adequate." Id. at 276, quoting Neighborhood Alliance, 172 Wn.2d 702, 720, 261 P.3d 119 (2011)). A court's review focuses on "the agency's search process, not the outcome of its search." Forbes v. City of Gold Bar, 171 Wn. App. 857, 866, 288 P.3d 384 (2012), review denied, 177 Wn.2d 1002 (2013). The adequacy of a search is determined according to a reasonableness standard, "not whether responsive documents do in fact exist." Neighborhood Alliance, 172 Wn.2d at 719,720. Ultimately, the adequacy of an agency's search turns on "'the reasonableness of the effort in light of the specific request.'" Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992)(quoting Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir 1986))(failure to uncover one tape does not mean that overall search was inadequate or performed in bad faith, especially in light of the agency's explanation and its efforts to correct the error by producing the document later). See also, Nulankeyutmonen Nkihtagmikon v. Bureau of Indian Affairs, 493 F. Supp. 2d 91, 113-14 (D. Me. 2007) (no violation for simple inadvertent nondisclosure).

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 Dep't., 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).

Contrary to the courts' discussion of reasonableness, the Church argues that the PRA is strictly enforced, citing Zink v. Mesa, 140 Wn. App. 328, 337, 166 P.3d 738 (2004). Brief, at 49. However, the court's statement of strict construction concerned the statutory requirement that a request be acknowledged within five days. Here, it is uncontested that the City responded to the Church's request within the statute's five day requirement.

The Church also argues that the City seeks to rely on a defense of good faith and honest mistake. That is incorrect. While there was good faith and an honest mistake, the City argued, and the superior court agreed, that the City did an adequate search, as required by the law, and that the existence of two missed documents does not preclude a finding of an adequate search.

1. The City conducted an adequate search

In this case, the City conducted an adequate search. A search is not per se inadequate simply because it fails to retrieve a particular document or simply because a particular document is overlooked. "A reasonable search need neither be exhaustive or successful." Kozol v. Dep't of Corr., 192 Wn. App. 1, 366 P.3d 933 (2015), review denied, 185 Wn.2d 1034 (2016). "The fact that the record eventually was found does not establish that the agency's search was inadequate." Kozol, at 8 citing Neighborhood All. of Spokane County v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119 (2011).

As indicated in Block v. City of Gold Bar, supra, the focus is not on the existence of a particular document but rather on whether or not the search for documents was reasonably calculated to locate all documents. In Block, Ms. Block made two requests for records from the City of Gold Bar. The first request was on December 9, 2008 and the second one was on February 13, 2009. The City produced a total of 750 pages in response to both requests, completing its production on February 27, 2009. Subsequently, Ms. Block obtained additional responsive records from other sources or as a result of later requests for

records from the City. Then, in February 2010, Ms. Block commenced her PRA action against the City.

The City moved for summary judgment and Block cross-moved for partial summary judgment. Block argued that she was able to obtain records from other sources or in response to other requests that should have been produced to her in response to her first two requests, making it obvious that the City's search was inadequate. Block, at 268. The trial court disagreed, and granted summary judgment to the City. The appellate court affirmed stating that the evidence supplied by the City established that the City's search was reasonably calculated to uncover all relevant documents. Block, at 274.

The Church argues that the fact that the City's initial search did not return the video clips or the diary entries of Ms. Frantz, establishes that the City's search was not adequate. However, that is not the standard. A search is not per se inadequate simply because it fails to retrieve a particular document or simply because a particular document is overlooked. The PRA requires that an agency "make a sincere and adequate search for records." Fisher Broad. V. Seattle, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). This standard necessarily recognizes that occasionally, despite sincere

efforts, a document may not be located at the time of the production. But the failure to produce a particular document does not render the search inadequate. The trial court heard extensive evidence of the City's PRA program and search efforts in response to the Church's request. The trial court appropriately determined that the City conducted an adequate search.

2. The search was adequate even though it did not initially locate a second video.

The initial search did not return the video clip of January 2014 because video clips were stored by date and not according to the applicant's name, address, or permit number. Mr. Kuntz produced the video he took in September 2013 but did not recall that at the time of the Church's request for records that the department had an intern named Ben Wells in January 2014 and Mr. Wells took a second video of the property. In addition, at the time of the plaintiff's records request, the City had changed its permitting process and was no longer using the Review Panel format or taking video clips to be displayed to the Panel. So when the Church's request came in, the standard search did not turn up the video and no one recalled that there had been an intern who had taken a second video.

The Church contends that the City failed to follow up on obvious leads because the video was mentioned in an email. Indeed, that is how counsel for the City discovered the existence of the second video- by reading an email that been produced to the Church as part of the records request. It is unknown why the Church did not make the same discovery. Instead, the Church criticizes the City for not reading through the 3,500 pages before producing them to the Church just in case there were leads for other documents in those 3,500 pages. That is a completely unreasonable argument. The City gets over 10 requests for records each day. The records request coordinator has 50 to 100 open request at any given time. She cannot read through all documents produced to requesters. RP 998. Moreover, even if she could, she would not be able to discern whether the records produced by the various departments are complete. The testimony was that if the records coordinator becomes aware of a lead, she follows that lead and looks for any responsive records. 998-999. In addition, the coordinator specifically asks each responding person to provide leads for other documents if they think that there might be other sources out these. RP 979-81. Given these procedures, the City adequately searched.

In addition, the Church contends that although the City searched according to multiple search terms, the City should have also searched according to date. That is not reasonable. A search using the date as search term will return all documents, correspondence, and other activity on that date, the majority of which would not be responsive. Such a search would futile and overwhelmingly inefficient.

3. The search was adequate even though the City did not print out 1-2 pages of Shanta Frantz's notes.

Ms. Frantz testified that she kept dome diary notes in the SAP operating system, along with copies of correspondence and permit application documents. When the Church's request came in, she searched her computer and files for all documents responsive. She notified her division's PRA coordinator, Heather Croston, that the computer notes existed on the operating system.

Ms. Frantz, Ms. Croston, and many other employees searched the operating system as well as the five to six drives utilized by the various departments and divisions. RP 1003-04. The search returned many electronic documents. Ms. Croston was unaware that the Frantz notes, which were attached to an electronic report, did not get printed out when the report was printed out. RP

1004-09. Given the testimony of City witnesses as to the complexity and thoroughness of the computer search, there is substantial evidence to support the trial court's conclusion that the City did an adequate search.

After the documents had been produced to the Church and the request closed, Ms. Frantz met with the City's attorney in preparation for her deposition, Ms. Frantz brought copies of the notes. RP 881-82. The City's attorney did not recognize the notes and immediately suspected that they had been missed in the PRA production. RP 882. The City's attorney immediately called the Church's attorney to disclose the notes. Id.

The Church argues that the failure to print the notes is evidence of a lack of training. However, there was a significant amount of evidence at trial that established that the City has a thorough PRA training program. See. E.g., RP 977-88; 990-91.

4. There is no reasoned bases to ask the appellate court to re-do the trial court's in camera review of documents withheld for attorney client privilege and work product doctrine.

The Church asked Judge Martin to conduct an *in camera* review of the redactions that the City made to documents on the basis of attorney client privilege and work product doctrine. The

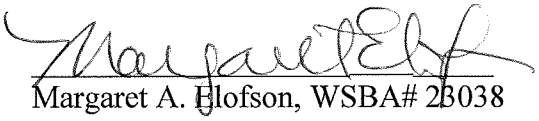
City did not object. The court proceeded to review the documents and found that the redactions were proper. The court provided a thorough explanation for its decisions. CP 640-43; 843- 44. The Church asks the appellate court to re-do the *in camera* review. There is no reasoned basis for the Church's request.

IV. CONCLUSION AND REQUEST FOR ATTORNEY'S FEES

The City asks this court to affirm the decision of the trial court on the plaintiff's claims under RCW 64.40 and RCW 42.56, and award reasonable attorney fees to the City pursuant to RCW 42.56.550 and RCW 64.40.020.

Dated this 18th day of August, 2017.

WILLIAM A. FOSBRE, City Attorney

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 2017, I filed, through my staff, the foregoing with the Clerk of the court for the Court of Appeals, Division II, for the State of Washington via electronic filing.

A copy of the same is being emailed and mailed, via U.S. mail, and/or via ABC Legal Messenger to:

1. COURT OF APPEALS, DIVISION II

2. Richard B. Sanders
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EXECUTED this 18 day of August, 2017, at Tacoma, WA.

MARGARET ELOFSON

CITY OF TACOMA

August 18, 2017 - 4:34 PM

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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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