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STATE OF WASHINGTON
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NO. 34808-0-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST

Appellant,

v.

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

Respondents.

APPELLANT'S BRIEF

ORIGINAL

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2. The trial court erred in determining Defendants' actions in fining Appellant/Plaintiff penalty assessments for civil infractions imposed pursuant to TMC 2.01.060 was not abusive and excessive in violation of the Eighth Amendment of the U.S. Constitution and Article I, Section Fourteen of the Washington State Constitution. 1

3. The trial court erred in determining there were no factual disputes regarding issues of whether Defendants' actions in fining Appellant/Plaintiff were excessive and dismissing the complaint without trial. 1

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A. ASSIGNMENTS OF ERROR.

Assignments of Error:

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5. The trial court erred in determining Defendants' action in daily penalty assessments did not constitute an unconstitutional deprivation of civil rights in violation of 42 U.S.C. § 1983.

6. The trial court erred in determining the penalties imposed by TMC 2.01.060 did not exceed the authority granted the City by the State of Washington pursuant to RCW 7.80.010 et seq.

7. The trial court erred in determining TMC 2.01.060 was not in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section Nine of the Washington State Constitution that protects Appellant/Plaintiff from being placed in double jeopardy.

8. The trial court erred in determining Appellant/Plaintiff failed to comply with the procedural requirements of RCW 36.70C by failing to file an action for injunction, declaratory judgment, and damages within 21 days of the issuance of the penalty assessments pursuant to notice of civil infractions.

Issues Pertaining to Assignments of Error:

1. DOES THE CITY ORDINANCE AUTHORIZING DAILY FINES OF $250.00 PER DAY EXCEED THE AUTHORITY GRANTED BY THE STATE LEGISLATURE (RCW 7.80.010 ET SEQ.) REGARDING PENALTIES FOR MINOR OFFENSES? (Assignment of Error No. 1 and 6)

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B. STATEMENT OF THE CASE.

This case involves whether the Tacoma Municipal Code 2.01.060 (hereinafter referred to as TMC 2.01.060) is in violation of the state statute authorizing the City to institute a civil penalty in violation of a municipal

ordinance; whether the ordinance is in violation of the Washington State and U.S. Constitutions prohibiting excessive fining; whether the city ordinance is in violation of the rules prohibiting double jeopardy in violation of the U.S. and Washington State Constitutions; whether the ordinance is in violation of the substantive and procedural due process clauses of the U.S. and Washington State Constitutions; and whether the implementation of the daily fining system by the building department inspectors against Plaintiff is in violation on a factual basis of the excessive fining clause of the U.S. and Washington State Constitutions. (CP 444)

Appellant/Plaintiff Paul Post owns numerous rental properties located within the city limits of the City of Tacoma, most of which are located in the Hilltop area. Said rental properties were purchased between 1960 and 1998. Nearly all the properties were in various states of disrepair at the time of purchase (CP 213-214). After purchasing said properties, Appellant/Plaintiff initiated a process to repair the properties at the same time as maintaining previously repaired properties. Appellant/Plaintiff works continuously to upgrade the properties and has brought 27 of 41 into satisfactory condition. Several of the buildings had to be completely gutted and rebuilt, involving major time and expense. (CP 213-214) In the early 1990s, neighbors

complained because Mr. Post was not repairing and cleaning the exterior of the properties fast enough. (CP 138)

Approximately six years ago, the Respondent/Defendant City of Tacoma, in accordance with a newly passed code, initiated action against Appellant/Plaintiff requiring him to repair the properties faster than he was capable of repairing the same. No properties were purchased after that time. In or about the year 1999, the Respondent/Defendant City and Appellant/Plaintiff agreed on a schedule to repair properties that the City either claimed were substandard or derelict. (CP 1-4, CP 37-41, CP 213-229) The Respondent/Defendant City's fines for properties being substandard or derelict were without regard to how serious the violations were in violation of the City's code. (CP 214-230)

In the year 2000, the Respondent/Defendant City began a process of fining Appellant/Plaintiff on many of his properties in the approximate amount of $250.00 per day per property allegedly pursuant to Amended (TMC) 2.01.060. (CP 3, CP 92-394) Said fines were imposed pursuant to Notice of Civil Infractions by inspectors Dan McConaughy, Brad Dorman and Nick Stephens under the supervision of Gary Pederson and Charles Solverson. (CP 213-233; CP 138-182; CP 103-137; CP 42-102) Since TMC 2.01.060 was enacted, much as a result of neighborhood complaints, Mr. Post

approached Gary Pederson (department head) and proposed cleaning up all exteriors Said suggestion was denied. (CP 214).

The ordinance was amended in 2000 to deprive persons charged with a $250.00 fine the right to a hearing. (CP 24, CP 138, and CP 393) Said fines were turned over for collection to Respondent/Defendant Risk Management Alternatives, Inc. Since then Respondent/Defendant City has been fining Appellant/Plaintiff at a rate of from $750.00 to $84,000.00 per property.

Pursuant to TMC 2.01.060, the first notice of civil infraction served upon a property owner declares his property to be substandard or derelict and imposes a fine of $125. The initial notice also attaches a copy of TMC 2.01.060 which indicates to the property owner he or she may appeal the fine or assessment of the condition of the property within 30 days. (CP 415-419) Subsequent assessments of daily fines are given pursuant to identical notices with the exception that no hearing is allowed and no further reasons stated as to why the property is not in compliance with the ordinance. (CP 392-394, CP 415, and CP 429)

Appellant/Plaintiff has completed repairs on several buildings (CP 44; CP 105, and CP 139) and Respondent/Defendant City refuses to remove the Certificate of Complaint for Substandard Building. (CP 26) Said certificate acts as a lien and Respondent/Defendant City prevents Appellant/Plaintiff

from refinancing his own property or selling it. Appellant's/Plaintiff's inability to obtain funds to repair his properties has resulted in a decrease in the value of said properties. (CP 26) Said is the case even though Appellant/Plaintiff has paid approximately $300,000.00 in fines. (CP 1-4, CP 23-26)

As stated above, the City imposes fines on substandard and derelict properties. Substandard property is that which is inhabitable (CP 104), but has violation points of 50 or more. Points are assessed for anything the City determines to be a code violation, building or otherwise (Supplemental CP – City's Memorandum of Authorities dated May 2, 2005, Page 7), including painting the interior (3 points), tenant created clutter (10 points), exterior painting (2 points), interior floor covering (25 points), chip in porcelain sink (15 points). (CP 39-40) Derelict properties are those considered uninhabitable. None of Plaintiff's/Appellant's properties have been determined to be dangerous. The City does not differentiate in its fines between substandard and derelict buildings. (CP 43, CP 104, CP 139, CP 415-429, CP 215-260)

The City moved for summary judgment asking the court to dismiss all claims brought by Appellant/Plaintiff. (CP 194-195 and Supplemental CP – Motion for Summary Judgment dated February 8, 2006) Appellant/Plaintiff

moved for summary judgment asking the court to declare the ordinance, the fining practice and the charges to Appellant/Plaintiff for the civil infractions unconstitutional. (CP 436-437)

Judge Thomas P. Larkin granted the Defendant City's motion and denied Plaintiff's/Appellant's motion in its order dated April 14, 2006. (CP 511-515) The court determined Defendants' actions in fining Paul Post penalty assessments for civil infractions imposed pursuant to TMC 2.01.060 was not abusive and excessive in violation of the Eighth Amendment of the U.S. Constitution and Article I, Section Fourteen of the Washington State Constitution; Defendants' ordinance authorizing daily penalty assessments did not violate the Fifth Amendment of the U.S. Constitution and Article I, Section Nine of the Washington State Constitution by depriving Appellant/Plaintiff his property without substantive or procedural due process of law; Respondents'Defendants' action in daily penalty assessments did not constitute an unconstitutional deprivation of civil rights in violation of 42 U.S.C. § 1983; The penalties imposed by TMC 2.01.060 did not exceed the authority granted the City by the State of Washington pursuant to RCW 7.80.010 et seq.; TMC 2.01.060 was not in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section Nine of the Washington State Constitution that protects Appellant/Plaintiff from being placed in double

jeopardy; Appellant/Plaintiff failed to comply with the procedural requirements of RCW 36.70C by failing to file an action for injunction, declaratory judgment, and damages within 21 days of the issuance of the penalty assessments pursuant to notice of civil infractions; The court's ruling also determines there were no factual issues raised regarding the excessiveness of the fines. (Supplemental CP – Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment dated April 14, 2006)

Additionally, the imposition of fines does not differentiate between substandard properties that have such a designation as a result of accumulating 50 points and those having accumulated 300 points. Even when a building has been substantially completed (such as the properties at 1301 to 1311 South 8th Street; (CP 215-219), the fines are continued at the same rate of $250.00 per day. The fining also continues where there is no problem with the exterior. (CP 221) Also, among the individual inspectors, two are extraordinarily aggressive, while the others are much more lenient in varying degrees. There is nothing objective about what properties will be fined at what rate. (CP 213-260) There are no fines less than those authorized even for the very minor violations. The points accumulated to reach the 50 point cut-off include essentially cosmetic items such as tenant

clutter in the yard, chipped sinks and counter tops, painting, and floor covering that has deteriorated. As a result, the systematic fining is totally arbitrary both on the face of the ordinance and in its implementation. (CP 39-40)

To date, the fines continue and exceed $600,000. The continuing of the fines together with the liens placed on the title to Appellant's/Plaintiff's properties greatly impact his ability to continue to fix his properties.

In July through September 2005, the Building Department of the City of Tacoma through its inspectors issued numerous notices of fines on at least 14 different properties Appellant/Plaintiff owns in the City of Tacoma. (CP 434-435) As can be seen from the notices, the fines were issued in the amount of $250.00 per day per property. Said notices had no instructions as to whether an appeal was allowed or how to appeal the fines. (CP 415-429) Knowing that the appeal on the original $125.00 fine and finding of substandard and derelict property by the Building Department investigators had to be filed within 30 days of the notice of the finding and the fine, Appellant/Plaintiff appealed all of the notices of fines within 30 days of said appeals. Appellant/Plaintiff had been notified both verbally and through the declarations of Charles Solverson that he has no right to appeal the daily fine. (CP 274-277, CP 434-435) The City takes the position that there are no

appeals from the $250.00 fines allowed. Large amounts of work have been done on all the properties following the $125.00 fine and finding of substandard or derelict by the City inspectors. (CP 218-260) No credit is given by the City inspectors for the work completed. Instead, the fines continue based upon the original finding of properties being either substandard or derelict. The City only stops the daily fines in the event the work they allege that needs to be done is totally completed. Even if only a minor defect remains, the $250.00 daily fines continue. (CP 213-229) Appellant/Plaintiff is totally at the mercy of the individual inspectors as to the appropriateness of the fines or need for the same. (CP 42-152) As can be seen from the dismissal of Appellant's/Plaintiff's appeals by the Hearings Examiner and the declarations of Charles Solverson, Appellant/Plaintiff has no right to appeal the daily fines after they have been issued. The City's Building Department inspectors do not issue said $250.00 fines until the time for appealing the original finding and $125.00 fine has expired.

C. ARGUMENT.

1. THE FINES ASSESSED AGAINST PLAINTIFF ARE IN EXCESS OF THE CIVIL PENALTY AUTHORITY GIVEN IT BY THE STATE OF WASHINGTON.

The City's ordinance (TMC 2.01.060.C.4.e) does not envision that it would be interpreted to allow the City's building department to fine an

alleged violator $250.00 per day forever. The cited ordinance states that the City shall file a certificate of complaint in the event the penalties accumulate in excess of $1,000. The inference behind the language in the ordinance requiring the certificate of complaint is that the City will be cut off from continuing the process of daily fining after one week of assessment of penalties and filing the certificate of complaint with the auditor's office. Since the certificate of complaint attaches to the property, the certificate acts as a lien on the property and may be foreclosed or enforced. However, the City in this case continues to fine up to an amount that exceeds $70,000.00 on several properties and $84,125.00 on one property delineated as substandard.

The City justifies systematic fining on the basis they can do the same thing under the Tacoma Municipal Code, which makes said violations a misdemeanor. (Supplemental CP - see City's Memorandum dated May 2, 2005, page 2 and 7) The misdemeanors are fined in the amount of $500.00 to $1,000. The misdemeanor the City is talking about is that of a public nuisance which deals with the condition of the property. The maintenance of property in a manner that amounts to a public nuisance is not a condition that can be determined to be a daily violation. If a property is a chronic nuisance under TMC 8.30A.010, the City would be restricted to one charge. The

maximum penalty would be $1,000.00 total. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 222 (1977). Therefore, using the City's own analogy, since the maximum penalty under the criminal misdemeanor section of the Tacoma Municipal Code being used to justify the amount of the penalty, the similar amount would be a total of $1,000.00, not the thousands upon thousands of dollars in daily penalties that the City is assessing under TMC 2.01.060.

The City cites RCW 36.70C giving authority for its final notice of substandard or derelict conditions. (CP 394) However, this statute does not authorize fines or imposing civil infractions. Therefore, said authorization must be found elsewhere. The only reference to the statutes authorization to be referred to by the City is in its brief filed May 2, 2005 wherein it cites RCW 7.80.120 as giving the City hearing examiner authority to hear civil infractions and impose fines. (Supplemental CP – City's Memorandum dated May 2, 2005, Pages 7-9)

The authority to establish a system of civil penalties is found in RCW 7.80. As the Court may remember, the Courts of Limited Jurisdiction were being flooded with demands for jury trials in cases involving minor offenses. The legislative enactment establishing civil infractions stated the purpose of the statute in RCW 7.80.005 as follows:

> The legislature finds that many minor offenses that are established as misdemeanors are obsolete or can be more

> appropriately punished by the imposition of civil fines. The legislature finds that some misdemeanors should be decriminalized to allow resources of the legal system, such as judges, prosecutors, juries, and jails, to be used to punish serious criminal behavior, since acts characterized as criminal behavior have a tremendous fiscal impact on the legal system.
>
> The establishment of a system of "*civil infractions*" is a more expeditious and less expensive method of disposing of minor offenses and will decrease the cost and workload of the courts of limited jurisdiction.

RCW 7.80.005

RCW 7.80.010 is the statute that gives jurisdiction to courts to hear civil infractions. As set out in full, RCW 7.80.010 states:

> (1) All violations of state law, local law, ordinance, regulation, or resolution designated as civil infractions may be heard and determined by a district court, except as otherwise provided in this section.
>
> (2) Any municipal court has the authority to hear and determine pursuant to this chapter civil infractions that are established by municipal ordinance and that are committed within the jurisdiction of the municipality.
>
> (3) Any city or town with a municipal court under chapter 3.50 RCW may contract with the county to have civil infractions that are established by city or town ordinance and that are committed within the city or town adjudicated by a district court.
>
> (4) District court commissioners have the authority to hear and determine civil infractions pursuant to this chapter.
>
> (5) Nothing in this chapter prevents any city, town, or county from hearing and determining civil infractions pursuant to its own system established by ordinance.

RCW 7.80.010

As can be seen from the notices imposing fines (CP 415-429), the offenses are referred to as "Civil Infractions" lifting the reference directly from RCW 7.80 allowing fines for minor offenses.

Section 5 only gives the City the right to determine the hearings examiner system may be used to determine whether an infraction has been committed and what the fine should be up to a maximum of $250. Nowhere in the statute (either 7.80.010 or 7.80.120) is there any allowance by the state that a daily fine may be imposed. In fact, the statute must be interpreted to allow one fine of $250. As the reading of the legislative finding found in RCW 7.80.005 states, "... a system of civil infractions is a more expeditious and less expensive method of disposing of minor offenses and will decrease the cost and workload of the courts limited jurisdiction."

The daily fines of $250.00 per day are not a method of dealing with minor offenses that the State contemplated when it enacted the civil infractions statute. This is especially true where there is no limit to the number of fines as can be seen in the instance of the fines on one property reaching the amount of $84,125. When the City enacted the standards in the minimum building code in 1999, it clearly exceeded its authority when it authorized fines in the amount of $250.00 per day. This is even more so

when one year later the City removed the right to a hearing on subsequent fines.

According to RCW 7.80.120(1) "the maximum penalty and default amount for a class 1 civil infraction shall be $250.00, not including statutory assessments..." However, the City has fined Appellant/Plaintiff tens of thousands of dollars for the same infractions.

The City cites RCW 35.22.280 as giving it authority to deal with chronic nuisances in the manner in which they have been treating the Appellant/Plaintiff. (Supplemental CP – City's Memorandum dated May 2, 2005, Page 7) Nowhere does that statute allow the authorization for public nuisances to be fined at the rate of $250.00 per day. The statute merely states:

> (30) To declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist;

RCW 35.22.280.

The City passed TMC 8.30A.010 pursuant to authority given it by RCW 35.22.280. Appellant/Plaintiff has not been charged with violating TMC 8.30.010, although theoretically he could be. The City derives its very existence from RCW 35 and may only exercise authority granted under said statute. For example, RCW 70.93.090 authorizes a penalty of $10.00 per day

for businesses not having appropriate litter receptacles. A local government could pass a like ordinance with like fines, but not more. See: *Rivett v. City of Tacoma*, 123 Wash.2d 573 at 582, 870 P.2d 299 (1994); and *Allen v. Norholk*, 196 Va 177, 83 S.E.2nd 397 (1954). The Supreme Court in *Rivett* states:

> " . . . the words 'impose fines' cannot be read to mean that the City may impose upon an abutting property owner a requirement for indemnification . . . "

Rivett, at 582.

Said practice was ruled both by the trial court and the Supreme Court to be in violation of the due process clause of the Washington State Constitution, Article I, Section 3. The City seems to justify its fines by a practice that would "indemnify" it for the cost of inspecting Mr. Posts properties. (CP 138).

If the City brought an action for a misdemeanor to Municipal Court, they would be restricted to the maximum fine the state authorizes municipal courts to impose, not the $250.00 per day presently being imposed. In addition, the court could have threatened jail time if the nuisance was not corrected within a year.

The City claims their intent for imposing the fines is to encourage Appellant/Plaintiff to take action on these properties and fix them up, but the

fines have not achieved this result, and have instead been punishing him far in excess of the amounts authorized by the statute.

The City uses RCW 7.80.120 to justify the $250.00 daily assessment of fines. (Supplemental CP – City's Memorandum dated May 2, 2005, Page 7 and CP 266-267 referring to prior brief wherein City justified daily fines as being within parameters of RCW 7.80.120) This interpretation of said statute is an extraordinary distortion of the language in the statute. RCW 7.80.120 states:

> Monetary penalties – Restitution
>
> (1) A person found to have committed a civil infraction shall be assessed a monetary penalty.
>
> (a) The maximum penalty and the default amount for a class 1 civil infraction shall be two hundred fifty dollars, not including statutory assessments, except for an infraction of state law involving potentially dangerous litter as specified in RCW 70.93.060(4) and an infraction of state law involving violent video or computer games under RCW 9.91.180, in which case the maximum penalty and default amount is five hundred dollars;
>
> (b) The maximum penalty and the default amount for a class 2 civil infraction shall be one hundred twenty-five dollars, not including statutory assessments;
>
> (c) The maximum penalty and the default amount for a class 3 civil infraction shall be fifty dollars, not including statutory assessments; and
>
> (d) The maximum penalty and the default amount for a class 4 civil infraction shall be twenty-five

dollars, not including statutory assessments.

(2) The Supreme Court shall prescribe by rule the conditions under which local courts may exercise discretion in assessing fines for civil infractions.

(3) Whenever a monetary penalty is imposed by a court under this chapter it is immediately payable. If the person is unable to pay at that time the court may grant an extension of the period in which the penalty may be paid. If the penalty is not paid on or before the time established for payment, the court may proceed to collect the penalty in the same manner as other civil judgments and may notify the prosecuting authority of the failure to pay.

(4) The court may also order a person found to have committed a civil infraction to make restitution.

RCW 7.80.120.

2. THE FINES ASSESSED AGAINST PLAINTIFF ARE GROSSLY DISPROPORTIONATE TO THE GRAVITY OF OFFENSES CHARGED IN VIOLATION OF THE U.S. AND WASHINGTON STATE CONSTITUTIONS.

Article I Section 14 of the Washington State Constitution and the Eighth Amendment to the United States Constitution guarantee the right to be free from excessive fining:

"Excessive bail shall not be required, excessive fines imposed nor cruel punishment inflicted."

Washington State Constitution Article I Section 14.

"Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishment be inflicted."

U.S. Constitution, Amendment VIII.

The City's penalties in this case are "excessive and therefore unconstitutional." Even if the city has gone through a stated process of increasing the fines, as they assert, the issue here is whether it is excessive to fine one person $250.00 per day per property.

The City compares the fairness of the $250.00 per day per property fines to the City's criminal fines, saying criminal fines are even higher so Appellant's/Plaintiff's fines are reasonable. (CP 266-277) Appellant/Plaintiff is not being charged with any crime, and imposing on him civil penalties in the amount of $750.00 to $85,000.00 on one property is punishment that is constitutionally excessive.

The court has held in order to find that fines were unconstitutionally excessive under the Eighth Amendment to the U.S. Constitution, they must be "grossly disproportionate to the gravity of the implicated offenses." The type of offense is relevant in order to determine whether the fines are grossly disproportionate or not. *State of Washington v. WWJ Corporation*, 138 Wn.2d 595, 980 P.2d 1257 (1999). The standard was established by the U.S. Supreme Court in *U.S. v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (U.S.Cal., 1998). The seriousness of the offense is factually disputed. (CP 213-260) In the case at hand, neither Appellant/Plaintiff nor the court can

determine from the "notice of civil infraction" the condition of the property as of the date of the notice. The only determination regarding the condition of the property comes before and at the time of the original notice of civil infraction imposing a fine of $125. Subsequent improvements to the property's condition have no effect on the imposition of daily fines. (CP 393) Only the individual inspectors determine subsequent property condition and the notices do not even reflect whether the property was actually inspected.

In *State v. WWJ*, supra, a civil penalty of $500,000.00 was imposed by the Superior Court when WWJ was found to have violated the Mortgage Brokers Practices Act (MBPA) and Consumer Protection Act (CPA). This included 250 fines of $2,000.00 each. The court said in order to find a fee excessive, the amount of the fine must be compared with the actual and potential harm caused by WWJ's conduct, and it must be shown that the offender had fair notice the offensive conduct could potentially incur such a high amount of penalties or damages.

The issue regarding excessive fines was actually not raised at the trial court level, but instead was raised for the first time at the Court of Appeals. *State of Washington v. WWJ Corporation,* 88 Wn.App. 167, 941 P.2d 717 (1997). The Court of Appeals ruled only that the issue could not be raised for the first time on appeal. The Washington Supreme Court (supra) held in

review of the appellate court decision that an issue of constitutional magnitude could be raised on appeal. However, the court was unable to compare the fine to the offenses since the issue was not raised with the trial court.

The court held that "the record contains insufficient data to enable this court to grasp the total gravity of Johnson's offenses, we cannot determine the merits of Johnson's excessive fines claim. As such, the claimed error has not been shown to be manifest, and review is not warranted under RAP 2.5(a)(3)." *State of Washington v. WWJ Corporation*, supra, at 606.

Unlike *State of Washington v. WWJ Corporation,* Appellant/Plaintiff raised the issue of the excessiveness of the fines in his declarations and legal arguments. (CP 34, CP 209, CP 211, CP 461-462, CP 213-260)

The trial court in this case should have found the City's fining of Appellant/Plaintiff and that the ordinance is unconstitutional if it is in fact allowed to be used to fine on a daily basis as it was so enacted. The fines are not only excessive in their application (See Declaration of Paul Post dated September 9, 2005) (CP 213-260), but are also excessive on the face of the ordinance.

Fines and costs in the $2,000.00 range have been found to not be excessive when they are penalties for nuisances related to criminal activity of

a much more serious nature than unpainted houses. In *Ross v. Duggan*, 402 F.3d 575, [C.A.6 (Mich., 2004.)] when a taxi driver's car was impounded as a penalty for an occupant soliciting a prostitute, the court found that the fines and fees ranging from $900.00 to $2,000.00, imposed for release of vehicles impounded pursuant to Michigan nuisance abatement law, were not unconstitutionally excessive. The court held:

> Solicitation of prostitution, lewdness, public indecency, and other sexual vice crimes of the types material to the subject litigation may impact adversely the health, safety, welfare, and morals of the affected neighborhood and the larger community. Those lascivious and irresponsible activities offend law-abiding citizens; degrade the moral fiber of their participants as well as society; rend bonds of marriage and family; transmit dreaded social diseases including AIDS, syphilis, and other often-incurable degenerative and/or deadly venereal diseases; attract and facilitate the abuse of, and trafficking in, dangerous controlled substances; and incite other violent felonies including common street crimes.
>
> Consequently, those activities cannot be tolerated in a civilized and well-regulated commonwealth. The civil fines and fees alleged herein, which did not exceed approximately $2,000 in any single instance, manifestly were not grossly disproportionate to the gravity of the deterred and/or punished offenses.
>
> *Ross* at 589.

It should be noted the fines were imposed and the cost or fees being litigated were those regarding the forfeiture. The plaintiff in *Ross* had the opportunity to litigate all costs.

Appellant's/Plaintiff's offenses have been determined by the city to be a civil infraction which is the name of a minor offense pursuant to RCW 7.80. The impound fee drove up the cost of the charge drove the cost up to $2,000.00 in *Ross v. Duggan*. There has been no cost assessment or fee in this case.

The purpose of the M B S C (MBSC), as claimed by the City, is to "encourage the maintenance and improvement of the City's existing buildings..." (TMC 2.01.020 b) and "avoid the closure or abandonment of buildings and the displacement of occupants" (TMC 2.01.020 c). Appellant/Plaintiff is being fined for substandard housing conditions while he is making efforts to upgrade these conditions in order to work with the City on meeting standards. By piling excessive fines onto a landlord, the City is actually doing the opposite of the purposes stated in its ordinance. Appellant/Plaintiff is not able to pay these fines as well as pay for the improvements and avoid closing buildings and displacing tenants.

It is contrary to the City's goal of remedying the situation of substandard properties, and is so excessive as to prevent Appellant/Plaintiff from funding any future improvements while he continued to be swamped with new fines. The fact the City has imposed multiple fines for the same conduct is in and of itself excessive.

3. THE CITY'S IMPOSITION OF DAILY FINES WITH NO RIGHT TO CONTEST THE SAME VIOLATES PLAINTIFF'S RIGHT TO PROCEDURAL DUE PROCESS UNDER THE 5TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 3 OF THE WASHINGTON STATE CONSTITUTION.

There is no question in the case at hand that the imposition of daily fines on Plaintiff (by the City's own statements) deprives Plaintiff of any right to appeal or to have a hearing on whether he has committed the offense of which he has been charged and what a reasonable fine is under the circumstances. (CP 274-277 – Affidavit of Charles Solverson) In order to be valid, a statutory prohibition must be reasonable. *State v. Day*, 96 Wn.2d 646, 638 P.2d 546 (1981). The constitutional elements of procedural due process, and thus a fair hearing are notice, opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case, an opportunity to know the claims of opposing parties and to meet them, and reasonable time for preparation of one's case. *Dudly v. State Department of Public Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968). A governmental agency can meet its obligation under an individual's rights to due process if it gives said person a notice of the assessment and the rights to hearing. *Peters v. Sjoholm*, 95 Wn.2d 871, 631 P.2d 937 (1981). As late as April 2005, the Washington Court of Appeals has stated that procedural due process requires notice and an

opportunity to be heard prior to final agency action. U.S. Constitution, Amendment 14; *Motley-Motley, Inc. v. State of Washington,* 127 Wash.App. 62, 110 P.3d 812, Wash.App. Div. 3, (2005). The *Motley* court went on to say that to establish a procedural due process violation in administrative proceedings, the party must establish that he or she is deprived of notice and opportunity to be heard prior to a final, not tentative, determination. The *Motley* court also stated that to constitute a violation of due process in administrative proceedings, a party must be prejudiced with regard to preparation or presentation of a defense. In the case at hand, there is no question that Plaintiff has been prejudiced in defending against the City's notice of a fine when the notice does not even indicate the basis of the fine or any right to a hearing. In this case, Appellant/Plaintiff not only did not receive notice of the offense he is charged with, but he also had no opportunity to be heard. As a result, the City's ordinance on its face is in violation of the 14th Amendment of the U.S. Constitution and Article I Section 3 of the Washington State Constitution.

4. THE CITY OF TACOMA'S DAILY FINES FOR THE SAME OFFENSES ARE UNCONSTITUTIONAL VIOLATIONS OF DOUBLE JEOPARDY BEING IN VIOLATION OF THE WASHINGTON STATE AND U.S. CONSTITUTIONS.

When an action occurs over a period of time, courts have held the Double Jeopardy Clause protects against multiple punishments for the same offense. *U.S.C.A. Const. Amend. V* and Article I Section 9 of the Washington State Constitution.

The United States Supreme Court created a "same-elements test" that inquires as to whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution. *Blockburger v. U.S.,* 284 U.S. 299, 52 S.Ct. 180 (U.S. 1932). The constitutional guaranty against double jeopardy protects a defendant from multiple punishments for the same offense. The sanction to be imposed must be punitive in nature so the proceeding is essentially criminal even though a civil proceeding in designation. *U.S. v. Bajakajian*, supra.

Application of the 5th Amendment was illustrated in *Brown v. Ohio*, supra, when a defendant had been convicted of both stealing an automobile following prosecution and then a few days later, during the same nine-day period that he had the stolen automobile, was charged with operating the same vehicle without the owner's consent. The Court found that joyriding was not a separate offense for each day the vehicle was operated without the owner's consent and that because the two indictments each specifying a

different date on which the offense occurred did not require different proof, the multiple punishments were not allowed. *Brown v. Ohio*, supra.

This same constitutional limitation has been applied to conspiracy charges. When defendants agreed to work together to eliminate free competition of trade within the sugar industry, the court found that even though their agreement resulted in on-going efforts to limit trade, the defendants could only be penalized for one count of conspiracy. The court held that a single agreement to commit an offense does not become several conspiracies because it continues over a period of time. *United States v. Kissel*, 218 U.S. 601, at 607, 31 S.Ct. 124 (U.S. 1910).

The court came to the same conclusion in *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99 (U.S. 1942), where petitioners had been convicted of seven counts of conspiracy resulting from their partnership involving manufacturing and distributing alcohol in violation of a statute. Because they originally put the plan together at one time, the on-going actions could not be seen as on-going violations of the law against conspiracy. The court found there had been one conspiracy, and the petitioners should only have been convicted of that, rather than seven counts. The court held the single agreement was the prohibited conspiracy, and however diverse its objects, it violates but a single statute, and for such a violation only the single penalty

prescribed by the statute can be imposed. *Braverman v. United States*, supra.

The City claims each day is a separate occurrence. As can be seen by the Declarations of Steve Nichols (CP 48, CP 53, CP 59, CP 65, CP 71, CP 76, CP 83, CP 88, CP 102) and Paul Post (CP 213-215) and second Declaration of Charles Solverson (CP 276-277), each day is not a separate occurrence. The City doesn't even inspect on a daily basis. As can be seen from Appellant's/Plaintiff's declaration (CP 215), the City does not even recognize any work that has been done to improve the situation. As Mr. Solverson says in his second declaration (CP 274-277), the City imposes the daily fines of $250.00 while not even giving the opportunity to the property owner to appeal any of the $250.00 fines. The City is therefore not even pretending to be fining for separate occurrences, but is fining the $250.00 per day on the initial determination of a property being determined to be substandard or derelict.

Several cases deal with the issue of whether a penalty for each repetition of each day's reoccurrence is allowed and have allowed the same under certain circumstances. The first is a 1916 Louisiana case, *City of New Orleans v. Mangiarisina*, 139 La. 605, 71 So. 866 (1916); and the second is *Wright v. City of Guthrie*, 150 Okla. 171, 1 P.2d 162 (1931). It is important to read both of those cases. First in the *New Orleans* case the city was dealing

with the bubonic plague and the ordinance was extraordinarily thorough in describing the crisis involved in the city. Secondly, the reading of the ordinance shows that the City of New Orleans had to file a separate charge in court, which required a trial and a determination by a judge or jury that each offense had occurred. In the present case, the only ones determining that the $250.00 daily fines are to be charged are the building department inspectors of the City of Tacoma from whose decision no appeal is allowed. The third difference in the *New Orleans* case is that the issues involved in the present case involving due process, double jeopardy, and excessive fining were not raised. The *City of Guthrie* case is also interesting in its difference from the case at hand. In that case, the offender was actively engaged in the skinning of firs, which created a huge stink. It was the activity of skinning the firs on a continuous basis that was disallowed under the zoning ordinance. The daily fines were against the activity, and each created a separate criminal offense, which could be contested in court unlike the Tacoma city ordinance, which creates only one offense for which multiple fines were created. Interestingly, the Oklahoma Supreme Court stated that equity would enjoin proceedings under an invalid ordinance, which would destroy property rights and inflict irreparable injury. This is what is occurring in this case. The case of *City of Cincinnati v. McKinney,* 101 Oh.App. 511, 137 N.E.2d 5389 (1955)

distinguishes between a first and subsequent offense. That case involved habitual criminal acts. The case of course not only involved several offenses of which the defendant had been convicted but also a full court proceeding to determine that McKinney was a habitual offender. In the case at hand, there is no charge which regards an offense committed each day for which Appellant/Plaintiff has been convicted nor is there a hearing to determine whether he is a continuing or a habitual offender. Instead, he is being fined over and over again for the same offense.

5. THE CITY IS UNREASONABLE AND UNDULY OPPRESSIVE IN REQUIRING APPELLANT/PLAINTIFF PRIVATE LANDOWNER TO PAY THE CITY, WITHOUT LIMITATION, $250.00 PER DAY IN VIOLATION OF THE SUBSTANTIVE DUE PROCESS CLAUSE OF THE STATE CONSTITUTION RCWA CONST. ARTICLE I SECTION 3 AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The case of *Rivett v. Tacoma*, supra, sets the classic elements to determine whether a regulation violates substantive due process by 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. In *Rivett*, the Supreme Court said the third element is usually the difficult and determinative one. In *Rivett*, the City passed an ordinance that required the

abutting landowner to City sidewalks to indemnify the City for all damages and costs the City may be required to pay to a person injured or damaged by defects in the sidewalk. A state statute, RCW 35.22.280, authorized the City to declare what shall be a nuisance that allowed the City to "impose fines" but that did not allow the City to require full indemnification for a landowner to pay all damages and costs. Likewise, neither RCW 35.22.280 nor RCW 7.80.120 authorizes daily fines in an unlimited amount. This practice is unduly oppressive in violation of Apellant's/Plaintiff's substantive due process rights.

The fact the fines against Appellant/Plaintiff have been delineated to be a civil penalty rather than criminal does not preclude protection from being deprived of constitutional rights. *U.S. v. Bajakajian*, supra. A fine is punishment for some offenses.

Appellant's/Plaintiff's situation is comparable to these cases because he has been fined multiple times, day after day, for the same offenses. He has not continued to contribute to the downgrading of his properties every day, and yet he has been penalized on a daily basis for the same properties that remain in the same conditions, amounting to unconstitutional double jeopardy.

The case of *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993) is

illustrative of the Supreme Court's standard regarding whether an ordinance is violative of rules against substantive due process. " ... even though said statute had legitimate purpose of providing assistance to low income persons seeking housing, imposition of fees on small class of landowners was oppressive." The City claims its penalties against multiple properties are not excessive. Appellant/Plaintiff is claiming the individual assessments against each of 17 different properties are excessive.

Respondent/Defendant City goes on to give other hypothetical situations such as a person driving negligently, a person selling violent computer games, and a person distributing violent videos to minors. Why the City cannot differentiate between charges being filed regarding certain activities and certain and subsequent hearings on those charges and a condition existing and fined without charges being filed and a hearing being allowed is not understandable.

The City also claims in defense of its daily fines that although it has other legal means to solve the problem they have no statutory mandate to use the other processes. (Supplemental CP – City's Memorandum dated May 2, 2005, Page 7) However, if a process is as blatantly unconstitutional in several ways, they certainly should use the other processes. The Court asked, "What is the City supposed to do if they don't fine on a daily basis?" The

question is answered in the Defendant City's own reply brief saying that they may use the other types of procedures. Why they don't use these procedures as they have in the past against Appellant/Plaintiff is not understandable.

The next analogy the City used in its reply brief is the allowance of forfeitures in drug sale cases. Large civil forfeitures were allowed under single event occurrences. Although the present case is not a forfeiture case, if it were Appellant/Plaintiff would be allowed the opportunity to contest the amount of the forfeiture as was done in all the forfeiture cases. In this case, there has been no hearing allowed to determine whether what in fact is actually a forfeiture is excessive. The only forum in which the Appellant/Plaintiff has to determine the excessiveness is this particular lawsuit.

6. THE PROCEDURAL REQUIREMENTS OF THE LAND USE PETITION ACT (RCW 36.70C) DO NOT APPLY TO APPELLANT'S/PLAINTIFF'S CHALLENGE TO THE CONSTITUTIONALITY OF THE CITY'S ORDINANCES.

The City cites the case of *James v. Kitsap County*, 154 Wash.2d 574, 115 P.3d 286 (2005), which it claims requires the Plaintiff to challenge the constitutionality of the city's ordinances within the 21-day statute of limitations prescribed by RCW 36.70C.040. There are several problems with the City's application of the *James* case to the facts of the present case. First,

RCW 36.70C.030 states that LUPA and its procedural requirements replace the pre-LUPA appeal process of land use decisions. Specifically excluded are claims for monetary damages. RCW 36.70C.030 states in part:

> (1) The chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:
>
> . . .
>
> (c) Claims provided by any law for monetary damages or compensation. . . .

This case clearly involved a claim for monetary damages as a result of the fines being collected from the Plaintiff under an unconstitutional ordinance. As can be seen in the complaint (CP 292-301) Appellant/Plaintiff sued for damages for the return of fines collected under an unconstitutional ordinance. The Appellant/Plaintiff failed to file a claim and the cause for money damages was dismissed without prejudice. A claim and lawsuit were subsequently filed under Pierce County Superior Court Cause No. 06-2-08153-1. The *James* case involved the collecting by Kitsap County of an impact fee that was imposed upon developers pursuant to RCW 82.02, which statutorily allowed building permit applicants to challenge the fee by paying the fee under protest or to immediately appeal the fee before continuing with the building pursuant to the permit conditions. The developers in *James* did neither. RCW 82.02 specifically allows enforcement under LUPA. TMC

2.01.060 on the other hand neither allows a challenge of the civil infraction daily fine nor pay the fine under protest. Impact fees are a condition of the building permit and are obviously a process involved in the land use decision process. RCW 7.80 authorizes only the imposition of a monetary penalty for a civil infraction (or as stated in the statute for a minor offense [RCW 7.80.005]). Nowhere in the record does the City claim authorization for imposing fines or penalties from any other statutory source than RCW 7.80.

The City has attached to the Declaration of Charles Solverson the form by which it imposes the $250.00 daily fines. (CP 415-429) The city ordinance takes away the states prescribed notice requirements and further takes away the right to a hearing. The case of *WCHS, Inc., v. City of Lynnwood*, 120 Wn.App. 668, 86 P.3d, *review denied*, 152 Wn.2d 1034 (2004), deals with the effect of a defective notice regarding the issues of exhaustion of remedies and statute of limitations. *WCHS* held that LUPA does not apply to an interim decision made in the process of, but prior to reaching a final decision on a permit. In other words, LUPA does not apply to interlocutory decisions. *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn.App. 777, 964 P.2d 1211 (1998). In *WCHS,* the Lynnwood Municipal Code required that the final decision regarding the denial of a building permit required a notice that the applicant must appeal,

the time limits for the appeal and the process for making an appeal. Said notice provisions were much less stringent than those required of the City under RCW 7.80.070. There is no question that *WCHS* application for a building permit fell under LUPA. Although the subject matter was a LUPA subject matter, the failures of the notice required by law took the action out of the LUPA requirements. Therefore, *WCHS* action for declaratory judgment and damages was granted and Lynnwood was required to process the application for the building permit. The case at hand asks the court for a declaratory judgment that TMC 2.01.060 is invalid and an injunction from future enforcement of the ordinance. The issue regarding past use of the ordinance is no longer before the court. The need for an injunction can be seen by the action of the City issuing multiple daily fines and infraction notices when the court denied Appellant's/Plaintiff's motion for a preliminary injunction. (CP 434-455) The fines only stopped when Appellant/Plaintiff raised the procedural due process issue.

A further reason LUPA does not apply is that for purposes of imposing penalties for civil infractions, the City hearings examiner is a court of limited jurisdiction. RCW 7.80.020 states: "... a court of limited jurisdiction having jurisdiction over an alleged civil infraction may issue process anywhere within the state." RCW 7.80.010 gives jurisdiction to

District Courts, Municipal Courts, and by its own system established by ordinance. In essence, if a City does establish a civil infraction system established by its own ordinance, it is still limited to the fine allowed under RCW 7.80.120. Said statute is void of any reference to enforcement under LUPA. In effect these ordinances are making the City system established by its own ordinance to hear civil infractions a court of limited jurisdiction. It is obvious that the State did not intend the allowance of municipalities to impose penalties for civil infractions to follow under the LUPA procedural requirements. It is only under the auspices of RCW 7.80.010 that the Tacoma Hearings Examiner process has the right to hold hearings on civil infractions and determine monetary penalties pursuant to the authority given the hearings examiner under RCW 7.80.120. The procedures required by the statute must be followed and not the procedures under RCW 36.70C. Authority for hearing cases involving minor offenses or civil infractions is designated by RCW 7.80.020. There is no requirement in this statute that the penalties be subject to LUPA.

All other forums given said authority under RCW 7.80.010 are either district or municipal courts. As a result, for the singular purpose of determining penalties under civil infractions imposed by the city ordinances, the city hearings examiner becomes a court of limited jurisdiction. RCW

36.70C.020 (1) (c) states as follows: "The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter." Since RCW 7.80.020 limits the amount of a fine to $250.00, the hearings examiner is also limited to said amount. As can be seen in *James,* supra, the hearings examiner is not normally a court limited in its jurisdictional amounts. In the case of civil infractions it is a court of limited jurisdiction and thus exempt from LUPA.

7. THERE ARE FACTUAL ISSUES REGARDING THE GRAVITY OF THE OFFENSE THAT MUST BE DETERMINED AT TRIAL.

In the motion for preliminary injunction, there was no factual dispute. The only issue was whether or not the City's practice of fining on a daily basis should be enjoined. Appellant/Plaintiff and Respondents/Defendants agreed that the City inspectors were fining on a daily basis and that a City ordinance allowed such a fining procedure. The Declaration of Paul Post outlining what happened to him on each property in the past presents the facts that the City's practice of daily fining is excessive. (CP 214-230) This was only if the Court refused to determine that the practices of the City are unconstitutional for several reasons stated by Appellant/Plaintiff and in derogation of the authority given it by the State. Appellant/Plaintiff firmly

believes there is substantial case law precedent as well as the factual basis to determine the City ordinance is unconstitutional on its face. However, the Court declined to so rule and the matter should have gone to trial to determine whether or not the fining practice of the City is excessive under the facts of this case.

Summary judgment is proper if the pleadings, affidavits, depositions, and admissions before the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Ray v.Cyr*, 17 Wn.App. 825, 565 P.2d 817 (Wash.App. 1977). As can be seen in the Declarations of Paul Post, there are significant issues of material fact in dispute. The history of each property shows that many of the properties are being fined in large amounts for minor offenses. The trial court should have determined the City's ordinance and practice of fining are constitutional and the issue of excessiveness should have been determined at trial.

8. WHETHER THE DEFENDANTS' ACTION IN FINING PLAINTIFF $250.00 PER DAY IS A DEPRIVATION OF APPELLANT'S/PLAINTIFF'S CONSTITUTIONAL RIGHTS IN VIOLATION OF APPELLANT'S/ PLAINTIFF'S CIVIL RIGHTS PURSUANT TO 42 U.S.C. § 1983.

In the event the Court determines Appellant's/Plaintiff's constitutional rights as stated above have been violated, the

Respondents/Defendant and Charles Solverson have de facto violated Appellant's/Plaintiff's civil rights under 42 U.S.C. § 1983.

D. CONCLUSION.

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

Respectfully submitted,

DATED:
September 5, 2006

EVERETT HOLUM, P.S.

By: _____

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STATE OF WASHINGTON
BY _____
DEPUTY

NO. 34808-0-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST, Appellant, vs. CITY OF TACOMA; CITY OF TACOMA DEPARTMENT OF PUBLIC WORKS BUILDING AND LAND USE SERVICES DIVISION; RISK MANAGEMENT ALTERNATIVES INC.; and CHARLES SOLVERSON, Respondents.	NO. 34808-0-II DECLARATION OF SERVICE

Everett Holum states:

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

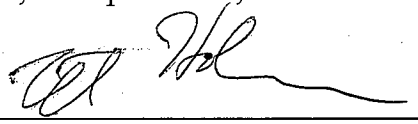
ORIGINAL

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

On September 5, 2006, I filed an original and one true and correct copy of Appellant's Brief and Declaration of Service at *The Court of Appeals of the State of Washington, 949 Market Street, Suite 500, Tacoma, Washington 98402.* In addition, I served one true and correct copy of Appellant's Brief and Declaration of Service to *Mr. Kyle J. Crews 747 Market Street, Rm 1120 Tacoma WA 98402-3767.*

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

DATED at Tacoma, Washington, on September 5, 2006.



Everett Holum