

No. 80684-5

THE SUPREME COURT
STATE OF WASHINGTON

PAUL W. POST,

Petitioner,

vs.

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

Respondents.

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**SUPPLEMENTAL BRIEF OF RESPONDENTS -
CITY OF TACOMA, DEPARTMENT OF PUBLIC WORKS,
BUILDING AND LAND USE SERVICES DIVISION, AND
CHARLES SOLVERSON**

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I. INTRODUCTION

For at least 20 years, the Respondents, City of Tacoma, et al. (“City”) has received complaints about Appellant Paul Post’s properties. Post has at least 22 properties within the City that are classified as either substandard or derelict, and often uninhabitable. Post’s buildings present a significant public health and safety concern. The City encourages property owners to comply with minimum building standards by imposing penalties when they fail to comply with those standards. Post was given the opportunity to challenge the initial penalties imposed against him. Further, he was fully aware that his failure to comply with the building code would result in more penalties. Post did not timely appeal the penalties. Thus the Land Use Petition Act (LUPA), codified as RCW 36.70C, bars all of his claims.

II. COUNTERSTATEMENT OF ISSUES

1. Did the Court of Appeals correctly dismiss Post’s requests for declaratory and injunctive relief when LUPA provides an adequate and exclusive remedy?
2. Did the Court of Appeals properly hold that all of Post’s claims are barred when Post failed to exhaust his remedies as required under LUPA?
3. Did the Court of Appeals correctly hold that the City is authorized to impose fines to encourage property owners to maintain buildings in safe condition?
4. Did the City violate Post’s due process rights when Post failed to timely appeal either the notices of violation or the first civil penalties?

5. Do civil penalties, which are imposed for “remedial” purposes only to encourage property owners to comply with the City’s minimum building code, violate the Excessive Fines Clause?

III. STATEMENT OF THE CASE

A detailed statement of the case is contained in the City’s Answer to Appellant’s Petition for Review. To avoid redundancy, the City incorporates those facts into this supplemental brief.¹

IV. ARGUMENT

The Land Use Petition Act (LUPA), codified in RCW 36.70C, dictates how a party is to seek review of a land use decision. In the instant case, Post failed to comply with LUPA. The Court of Appeals correctly held that all of Post’s claims were thereby barred. The City requests this Court to affirm the Court of Appeals decision.

A. Because LUPA provides an adequate remedy, Post’s request for declaratory and injunctive relief is inappropriate.

Washington Courts have consistently held that a request for declaratory or injunctive relief is not available when LUPA applies. Declaratory relief is generally available only when a court determines that other available remedies are unsatisfactory. Reeder v. King County, 57

¹ Although color copies of Post’s properties were provided to the Superior Court, in the transmission of clerk’s papers, only black and white copies were provided. For the Court’s convenience, the City is attaching color copies of some of the color photographs it supplied to the Superior Court. See Appendix.

Wn.2d 563, 564, 358 P.2d 810 (1961).² LUPA is “the exclusive means of judicial review of land use decisions.” RCW 36.70C.020(1). Therefore, declaratory and injunctive relief is inappropriate.³

As recently as two years ago, this Court held that a declaratory judgment action and the county’s interpretation of its ordinances are “the kind[s] of action contemplated for review under LUPA. RCW 36.70C.130(1)(b) grants relief if the ‘land use decision is an erroneous interpretation of the law’ or ‘is a clearly erroneous application of the law to the facts.’” Chelan County v. Nykreim, 146 Wn.2d 904, 929, 52 P.2d 1 (2002). Thus, because LUPA provides an adequate remedy at law, declaratory relief is inappropriate. E.g. Habitat Watch v. Skagit County, 155 Wn.2d 397, 404, 409, 120 P.3d 56 (2005) (holding that a request for declaratory and injunctive relief was barred because petitioner did not

² Although CR 57 provides that “[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate,” this Court has indicated that review of land use decisions are not situations in which “it is appropriate” to proceed by declaratory judgment. See e.g. Chelan County v. Nykreim, 146 Wn.2d 904, 929, 52 P.2d 1 (2002). Moreover, while a declaratory judgment action may, in the non-land use arena, be appropriate when one challenges the facial and constitutional validity of a statute, it is not appropriate in a challenge of the application or administration of a statute, as Post does here. See e.g. Seattle-King Cy. Coun. of Camp Fire v. Dep’t of Rev., 105 Wn.2d 55, 57-58, 711 P.2d 300 (1985); Pet. for Rev. p. 10, 14.

³ Post incorrectly asserts because the City continued to fine Post after the complaint was filed, declaratory judgment action is appropriate. Post filed his lawsuit in March 2005. CP 293, 567-575. By the time Post filed this case, the City stopped fining him on most of his properties. In fact, the City imposed only \$10,000 worth of fines after March 2005. CP 13, 48, 53, 59, 65, 71, 76, 83, 88, 95, 102, 107, 114, 122, 131, 134, 136, 142, 150, 157, 165, 173, 181, 317-34. No fines have been imposed since July 2005.

timely file a LUPA action); Sheng-Yen Lu v. King County, 110 Wn. App. 92, 106, 38 P.3d 1040 (2002) (same).

Post offers no authority for his argument that declaratory and injunctive relief are not barred by LUPA. Nor does he argue why the above cases do not apply here. Accordingly, this Court should affirm the Court of Appeals' dismissal of Post's declaratory and injunctive claims. Even if Post's declaratory and injunctive relief requests were appropriate, as demonstrated herein the City should prevail on the merits.

B. LUPA bars all of Post's claims.

Post argues that since his appeal rights were limited to the initial notice of violation and first penalty—which were issued as far back as 1999—and not any penalty issued after that, then LUPA cannot bar his claims on the later penalties. Pet. for Rev., pp. 7-8, 9-10. Post is wrong. LUPA requires Post to exhaust his administrative remedies. His deliberate failure to do so means that all of his claims are barred.

LUPA mandates how a party can appeal a land use decision, such as a hearing examiner decision on penalties imposed for violating the Minimum Building and Structures Code, TMC 2.01. See RCW 36.70C.020(1).⁴ A land use petition is barred if a petitioner fails to

⁴ A hearing examiner's decision is the final level of administrative review. TMC 2.01.060.D.7 and E.6. The City does not claim that a notice of violation or a penalty assessment are "final" land use decisions, because Post was required to exhaust his

exhaust his administrative remedies. RCW 36.70C.060(2)(d); Nykreim, 146 Wn.2d at 938. And it is barred unless the petition is filed within “within twenty-one days of the issuance of a land use decision.” RCW 36.70C.040(2); James v. Kitsap County, 154 Wn.2d 574, 583, 115 P.3d 286 (2005).

If Post disagreed with the notice of violation or first penalty, he needed to request a review by the Building Official. TMC 2.01.060.D.6, E.5. If he disagreed with *that* decision, Post needed to appeal to the City’s Hearing Examiner. Id. After exhausting his administrative remedies, Post could timely seek judicial review under LUPA.

In every instance but one, (CP 150) Post failed to timely appeal the initial notices of violation or the first penalty. CP 9, 139, 315, 394.⁵ Despite actual notice of his appeal rights, Post merely chose not to appeal them. When Post filed his complaint in March 2005, his opportunity to appeal the later penalties that directly related to the original violations was

administrative remedies prior to receiving a “final” land use decision by the hearing examiner. But see Richards v. City of Pullman, 134 Wn. App. 876, 881, 142 P.3d 1121 (2006)(stating that a notice of violation is a “final” decision).

⁵ In the one case he did appeal, the hearing examiner affirmed the City’s decision and the Superior Court dismissed the case. Post did not appeal the dismissal. See Pierce County Superior Court Cause No. 04-2-13665-8; CP 9. Res judicata bars Post from challenging penalties on that property. See e.g., In re Estate of Black, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). Moreover, exhausting his administrative remedies and timely filing a LUPA action in this one case shows that Post knew full well how to comply with LUPA.

long over.⁶ CP 567-575. Because Post failed to exhaust his administrative remedies, LUPA now bars Post's claims.

Post was not entitled to appeal the continuing penalties because they all related to the original notice of violation, which Post deliberately ignored and chose not to appeal. Whether or not Post received any further penalties was solely within his control. He deliberately chose whether or not to comply with TMC 2.01. He repeatedly chose not to.

Moreover, to allow a property owner to appeal each subsequent penalty—penalties that are based only on the original violations—means an owner could re-litigate the same underlying violations indefinitely. During the last two decades, because of the serious violations related to Post's repeated failure to comply with TMC 2.01, the City sent 6, 23, and even up to 79 penalty notices. CP 53, 76, 107-09. The penalty notices often spanned a period of nearly 4 years as the City waited for Post to repair his derelict properties. CP 122-24, 131-32, 165-66, 173-74. If Post were correct that LUPA does not bar an appeal on subsequent penalties, he could then file

⁶ Post focuses on one property where he claims he fixed everything except for "painting the gables" but the City still fined him. CP 223. The City stopped fining Post on this property in February 2005. CP 173-74. Post did not present any evidence about whether everything was essentially fixed before or after that date. Moreover, many of the violations at this property were interior violations. Post never arranged for an interior inspection to allow the City to confirm that the repairs were completed. So to the extent the Court of Appeals, in a footnote, expressed some concern about the possibility of "arbitrary and capricious action" and that "it could be unreasonable to continue to impose" fines if the owner had repaired most of the problems, (Paul W. Post v. City of Tacoma et al., 140 Wn. App. 155, 165, n.7, 165 P.3d 37 (2007)) that factual scenario is not before this Court.

nearly 80 appeals on one property alone all relating directly to one original notice of violation. Since LUPA is intended to provide for an “expedited” and “timely”⁷ review of land use decisions, this would be an absurd result.

C. The City’s penalty system is wholly consistent with state law.

1. First class cities have the authority to impose fines to encourage compliance with a city’s building codes.

State law allows a first class city to regulate buildings to make sure they are safe. RCW 35.22.280(23) authorizes the City:

To establish fire limits and to make all such regulations for the erection and maintenance of buildings or other structures within its corporate limits as the safety of persons or property may require, and to cause all such buildings and places as may from any cause be in a dangerous state to be put in safe condition.

Thus, the City “has direct legislative authority to regulate in order to maintain safe housing.” Margola Assocs. v. City of Seattle, 121 Wn.2d 625, 635, 854 P.2d 23 (1993). This authority granted by the state legislature under RCW 35.22.280(23) has existed for well over 100 years. See Laws of 1890, p. 221, § 5.

Because there are no cases addressing RCW 35.22.280(23) and the issue presented here, the Court should review the statute as a whole and glean the legislative intent from the words of the statute itself. United States v. Hoffman, 154 Wn.2d 730, 737, 116 P.3d 999 (2005). In addition, the

⁷ See RCW 36.70C.010.

Legislature clearly expressed that the powers in RCW 35.22 “shall be liberally construed.” RCW 35.22.900.

RCW 35.22.280(23) specifically permits the City to “cause” all such buildings which are dangerous “to be put in safe” condition. This language confers the City with authority to enforce the building standards. Otherwise, the City could not “cause” dangerous buildings to be safe. By using such broad language to permit enforcement, the state legislature authorized the City to enforce compliance as it reasonably sees fit. Here, the City chose to establish a penalty system to encourage compliance and protect the public.⁸

2. The City’s police power authorizes the imposition of fines.

TMC 2.01 was adopted pursuant to the City’s police power to protect the health, safety and welfare of its citizens as granted by the Washington State Constitution, Article XI, § 11.⁹ That constitutional provision states that a city “may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”

⁸ An additional source of authority for the City to impose fines is RCW 35.22.280(35). This statute allows, among other things, the City to impose civil penalties for violations of its ordinances or for all practices dangerous to public health or safety.

⁹ In his Petition for Review, Post mentions that TMC 2.01 violates Article XI, § 11. Pet. for Rev., p. 9. But not only does Post present no argument for this bald assertion, but he does not identify this as an issue in his Petition. Pet. for Rev., p. 1-2. As a result, this Court should not address this argument. See RAP 13.7(b).

The City's police power is broad. *"It is universally conceded to include everything essential to the public safety, health, and morals...."* Weden v. San Juan County, 135 Wn.2d 678, 691, 958 P.2d 273 (1998) (emphasis in original; citation omitted). The police power is firmly rooted in the history of this state, and its scope has not declined. Weden, 135 Wn.2d at 692. As a result of such broad authority, courts will find an ordinance consistent with Article XI, § 11 unless: (1) the ordinance conflicts with some general law; (2) the ordinance is not a reasonable exercise of the City's police power; or (3) the subject matter of the ordinance is not local. Id. at 692-93.

There is no question that minimum building standards are a local matter. Thus, the issue is whether TMC 2.01.060 conflicts with a general law or whether it is not a reasonable exercise of the City's police power.

As explained above herein, TMC 2.01.060 does not conflict with any general law. No state statute specifically prohibits the City from imposing penalties to encourage building code compliance. Nor does any state statute specifically address how a city is to enforce building code compliance. In fact, numerous other local jurisdictions engage in the same practice of imposing daily fines for various building code violations.¹⁰

¹⁰ Examples include Seattle Municipal Code 22.206.280.A.1 (authorizing daily penalties); Redmond Municipal Code 15.10.060 and 1.14.090 (same); University Place

Moreover, an ordinance will be upheld unless it is “clearly unreasonable, arbitrary or capricious.” Weden, 135 Wn.2d at 700. Like numerous other local jurisdictions, the City has chosen a reasonable approach of imposing penalties to gain compliance with the building and safety regulations. Although imposing penalties against Post may not have succeeded in gaining compliance with the minimum building code, imposing penalties is usually an effective means of gaining compliance, and for protecting the public and the occupants of these houses. Thus, the City’s broad police power authorizes the City to impose penalties as a means to encourage compliance with building standards.

3. RCW 7.80 does not limit the City’s penalties.

Despite Post’s assertion to the contrary, the City does not rely on RCW 7.80 for authority to impose penalties under TMC 2.01. Pet. for Rev., p. 8-9. RCW 7.80 deals with civil infractions and is intended to permit jurisdictions to decriminalize misdemeanors and to impose civil infractions instead. RCW 7.80.005. The City has consistently asserted that the penalties in RCW 7.80 are “analogous” to the penalties here and that RCW 7.80 does not limit the City’s ability to impose civil penalties. CP 267, 547-48.

Municipal Code 14.05.120 and 1.20.040.E (same); Olympia Municipal Code 16.06.030.B and 16.10.120 (same).

RCW 7.80 does not prohibit, or limit in any way, the amount of penalties the City may impose for building code violations. Moreover, RCW 7.80.010(5) states that “Nothing in this chapter prevents any city, town, or county from hearing or determining civil infractions pursuant to its own system established by ordinance.” That is precisely what the City has done here—it established a separate penalty system to encourage compliance with the building code. As a result, RCW 7.80 does not prohibit the City’s penalties.

D. The City’s imposition of penalties is consistent with the United States and Washington state Constitutions.

Because LUPA bars all of Post’s claims, this Court need not address any of Post’s constitutional issues. It is a “fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues.” See Isla Verde Int’l Holdings, Inc., v. City of Camas, 146 Wn.2d 740, 752, 49 P.3d 867 (2002). Even if the Court did reach these issues, the City still prevails.

Post’s constitutional challenges before this Court are the Due Process Clause and the Excessive Fines Clause. A statute is presumed constitutional, and the party challenging its constitutionality must

demonstrate its unconstitutionality beyond a reasonable doubt. Belas v. Kiga, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998).¹¹

1. TMC 2.01.060 is consistent with the due process clause.

The Fourteenth Amendment of the United States Constitution and Article I, § 3 of the Washington state constitution prohibit state action that would deprive a person “of life, liberty, or property without due process of law.” Because the state due process provision does not provide any greater protection than its federal counterpart, reliance on federal cases is appropriate. See State v. Ortiz, 119 Wn.2d 294, 304-05, 831 P.2d 1060 (1992). Additionally, one complaining of a due process violation has the burden to establish that the legislature has acted in an arbitrary and irrational way. Usery v. Turner Elkhorn, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d. 752 (1976).

a) The City’s penalty system comports with procedural due process.

Post claims that the City violates his due process rights because the City’s ordinance permits only an appeal of the original notice of violation and first monetary penalty, and not any continuing penalties based on the

¹¹ Post’s due process and excessive fines constitutional challenges should be analyzed only under the United States Constitution, and not the state constitution. This is because Post has failed to analyze whether these particular state constitutional provision provides for any greater protection than the analogous federal constitutional provision. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). If a party fails to engage in a Gunwall analysis, then the Court will not review the state constitutional arguments. E.g., In re Personal Restraint of Gronquist, 138 Wn.2d 388, 406, n.12, 978 P.2d 1083 (1999).

original violation. Pet. for Rev., pp. 10-11. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings “as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled.” Anderson Nat. Bank v. Lueckett, 321 U.S. 233, 246, 64 S. Ct. 599, 88 L. Ed. 692 (1944). Measured by this standard, the City fully afforded Post due process.

The reason Post was not entitled to appeal later penalties is because they were imposed based only on those violations cited in the original notice of violation. TMC 2.01.060.D.6.b and E.5.b. As explained above, allowing a property owner to appeal each subsequent penalty would allow them to re-litigate the same underlying violation forever.

In the first letter accompanying the initial notice of violation, the City notified Post that if he did not bring his property in compliance with TMC 2.01, “a civil citation will be issued.” CP 317. Similarly, in the letter accompanying the first penalty assessment, the City again notified Post that if he did not submit a work schedule to the City, the City would impose “further penalties.” CP 335. Later penalty notices stated that failure to comply with the building code or submit a repair work schedule “will result in further penalties being assessed.” CP 341, 345, 347, 349. Each

attachment sent to Post identified the amount of each penalty and stated that subsequent penalties would be \$250 per day. CP 342, 344, 346, 348, 350.

In fact, it is not until the sixth notice for each property (after the initial notice of violation and four penalty notices, and only after Post repeatedly failed to respond to the City or comply with work schedules) that TMC 2.01.060 authorizes the City to impose daily penalties. TMC 2.01.060.D.4.e and E.3.e. Post knew that penalties would continue to accumulate if he failed to comply with the building standards. Post failed to respond or repair his properties. Post was solely responsible for, and in control of, any subsequent penalties he received. The City's response to Post's failure to exercise his rights does not rise to the level of a due process violation.

b) The City's actions comply with substantive due process.

Because Post argues the Eighth Amendment may apply here, the Court should not address Post's substantive due process claim. "Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." Albright v. Oliver, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). This rule applies

when the explicit constitutional provision is the Eighth Amendment, (United States v. Lanier, 520 U.S. 259, 272, n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)) which Post raises here.

Even if the Court were to address Post's substantive due process claim, it is without merit. "Where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for and determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision." Standard Oil Co. v. City of Marysville, 279 U.S. 582, 584, 49 S. Ct. 430, 73 L. Ed. 856 (1929). Because TMC 2.01 is within the scope of the City's police power, for Post to establish a violation of substantive due process, he must prove that the City's action was *clearly arbitrary and unreasonable*, having no substantial relation to the public health, safety, morals, or general welfare." Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926).¹² Post has failed to establish that the City's penalty process is arbitrary or unreasonable. As a result, his due process claim fails.

¹² This Court has also outlined a similar test for substantive due process claims: (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 land owner. Presbytery of Seattle v. King County, 114 Wn.2d 320, 330, 787 P.2d 907 (1990).

The stated purpose of TMC 2.01 is to ensure the health, safety and welfare of building occupants and that of the general public by, amongst other things, establishing minimum standards for equipment and facilities for construction, light, heating sanitation, security, fire, and life safety in structures. TMC 2.01.020.

For at least 20 years, the City has been receiving complaints about Post's properties. CP 8, 138. Post has owned derelict and substandard properties since the 1960s. CP 218, 227, 228, 229. In one case, he purchased a condemned and boarded up building in 1982, and finally, 23 years later, he fixed it. CP 224. Post has repeatedly failed, for years on end, to comply with TMC 2.01 and to comply with work schedules he worked out with the City. CP 9, 13, 17, 43, 103, 188, 341-345.

In order to ensure the general welfare of the public, which includes the safety of the tenants of Post's properties, the City has utilized a reasonable process to gain compliance with TMC 2.01. Under this process, the City sends a letter and a detailed notice of violation and report clearly outlining the problems and requiring the owner to develop a reasonable work repair schedule. The City will then re-inspect according to that schedule (or if no work schedule was submitted) and impose a fine only if the owner does not comply with the schedule. TMC 2.01.060.D.4-5 and E.3-4; CP 317-350.

This process is not quick. It takes months, sometimes years, for the City to follow the process, depending on the level of cooperation from the owner. For example, for one of Post's properties, because Post repeatedly refused to respond to the City's requests for a work schedule, the City imposed approximately \$9,000.00 in penalties over a four year period. CP 71.¹³ This lengthy and detailed process is an effective way to encourage property owners to repair substandard and derelict houses that pose a danger to the public and its tenants. As a result, the City's penalty system wholly comports with substantive due process.

2. The City did not violate the Excessive Fines Clause.

Neither the federal nor state constitutions' Excessive Fines Clauses prohibit the penalties in this case. The Eighth Amendment of the United State Constitution and Article 1, § 14 of the state constitution bar "excessive fines." This Court has held that Article 1, § 14 provides no greater protection than its federal counterpart. State v. Dodd, 120 Wn.2d 1, 22, 838 P.2d 86 (1992). Moreover, since there are no Washington cases interpreting the "excessive fines" portion of Article 1, § 14 as it relates to civil penalties, the Court must rely on federal case law.

¹³ Moreover, the City gives owners a reasonable amount of time to fix their property. One repair schedule showed that Post had 9 months to clean up the yard, repair the foundation, replace the bathroom sink and repair the flooring. Post also had 6 months to paint the exterior, replace doors, and provide heat to the bathrooms. CP 354.

a) The Eighth Amendment does not prohibit the penalties here because they are not punishment.

The Excessive Fines Clause does not prohibit penalties unless the imposition of penalties is intended to punish, rather than serve a “remedial” purpose. Austin v. United States, 509 U.S. 602, 611, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). Here, the City’s code states that the penalties are for “remedial purposes” only. TMC 2.01.064.D.4.b and E.3.b. The code is intended to protect “the health, safety, and welfare of occupants and that of the general public” by establishing minimum building standards. TMC 2.01.020. Thus, since the penalties are remedial, neither the Eighth Amendment nor Article 1, § 14 prohibits them.¹⁴

b) The penalties are not excessive.

Even if the Court were to find that the fines were not remedial, they are not excessive. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture [or penalties] must bear some relationship to the gravity of the offense that it is designed to punish.” United States v. Bajakajian, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). A court must consider the harm that the violation caused, or could cause, and

¹⁴ Post did not present the specific issue of whether the fines are remedial to either the Superior Court or the Court of Appeals. He has merely assumed that the penalties were punishment. As a result, the Court should decline to address this issue. See RAP 2.5(a).

compare the amount of the penalties to the gravity of the offense. Only if the amount of the penalties is grossly disproportional to the gravity of the offense, do they violate the Excessive Fines Clause. Id. at 336-37, 339.

Here, the penalties imposed are not excessive compared to the potential harm to the tenants of Post's derelict and substandard properties. Most of the penalties on Post's properties total less than \$15,000 each. CP 48, 53, 59, 65, 134, 142, 150, 157. One property with only \$3,500 in penalties, for example, had no stairs, broken windows, a structurally unsound foundation, no heat in some rooms, missing smoke detectors, and the bathroom was in complete disrepair and the house was infested with pigeons. CP 319- 328. These violations are serious and affect the safety of the public and the tenants of the houses. Many of Post's properties are in such extreme disrepair as to be uninhabitable. CP 233, 327. The penalties imposed represent a measured response to a pattern of dangerous conduct. Because of these violations and the potential significant harm to the tenants, the penalties are not grossly disproportionate to the offenses.

Courts applying the Eighth Amendment to civil penalties almost uniformly find them to be constitutional. See e.g., and United States v. Mackby, 339 F.3d 1013 (9th Cir. 2003) (upholding a \$759,454.92 judgment after defendant submitted 8,499 false Medicare claims); Traficanti v. United States, 227 F.3d 170 (4th Cir. 2000) (holding that a

\$40,000 penalty for food stamp trafficking was not excessive).¹⁵ Courts invalidate penalties under the Excessive Fines Clause in only rare cases.¹⁶

The violations in this case are serious and they are extreme. Thus, the penalties are not disproportionate, and certainly not “grossly disproportionate,” to the violations.

V. CONCLUSION

Based on the foregoing, the City respectfully requests the Court to affirm the Court of Appeals decision in favor of the City.

DATED this 3rd day of July, 2008.

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¹⁵ See e.g. Balice v. United States Dept. of Agriculture, 203 F.3d 684, 698-99 (9th Cir. 2000) (upholding a \$225,500 civil fine for violations of a federal law dealing with record keeping for almond growers); Vasudeva v. United States, 214 F.3d 1155, 1161-62 (9th Cir. 2000) (upholding civil monetary penalties of \$13,200 and \$39,840 for trafficking in food stamps); Cole v. United States Dept. of Agriculture, 133 F.3d 803 (11th Cir. 1998) (civil penalty of nearly \$400,000 against a tobacco farmer where the penalty was proportional to a legitimate governmental purpose); United States v. Emerson, 107 F.3d 77 (1st Cir. 1997) (civil penalty of \$185,000 imposed on a pilot for taking unauthorized flights not excessive, even though there was no serious personal injury).

¹⁶ In United States ex rel. Smith v. Gilbert Realty Co., Inc., 840 F.Supp. 71 (E.D. Mich. 1994), the court reduced a civil penalty under the False Claims Act from \$290,000 to \$35,000, where the actual loss was only \$1,630. The Court held that the full penalty, at a ratio of 178 to 1, was excessive, and reduced it to \$35,000—still a ratio of 21 to 1.

APPENDIX









