NO. 96613-3

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals, Division II, No. 49854-5-11

CHURCH OF THE DIVINE EARTH

Petitioner,

v.

CITY OF TACOMA,

Respondent.

RESPONDENT'S RESPONSE TO PLAINTIFF'S PETITION FOR DISCRETIONARY REVIEW

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This court should deny discretionary review of the Court of Appeals opinion because the decision is not in conflict with any decision of the Supreme Court or a decision of one of the other divisions of the Courts of Appeal; does not raise a significant question of law under either the state or federal Constitution, and does not involve an issue of substantial public importance. RAP 13.4 (b).

A. **The Court of Appeals' decision affirming the trial court's discretionary ruling on a motion in limine is not in conflict with a decision of this court or of any published decision of the Courts of Appeal.**

In its petition for discretionary review, the Church of the Divine Earth (Church) argues that the Court of Appeals' decision is in conflict with a number of cases. However, a reading of those cases reveals that this is not so. The Church cites a number of cases for the proposition that the trial court erred in exercising its discretion on a motion in limine to exclude evidence and argument concerning a decision that had already been made by the court during the LUPA hearing and incorporated in to the LUPA court's ruling. That decision was that at the time of the City's final decision, the City was asking for an 8 foot dedication of right of way rather than a 30 foot dedication of right of way.

The evidence before the LUPA court at the time of its decision was the complete administrative record, which was replete with documentation reflecting the City's modification of the right of way from 30 feet to 8 feet. Indeed, some of that documentation consisted of correspondence and briefing prepared by the Church. Nevertheless, there was one document that

contained an error in it and once that document was discovered, the Church began its campaign to convince the two trial court judges that heard this matter, as well as the appellate court, that the City's error was in fact evidence of deceit. Both of the superior court judges and the Court of Appeals rejected this argument.

Here, the Church argues that the trial court and the appellate court erred in their decision to apply collateral estoppel to preclude the relitigating of the issue of whether the right of way was 8 feet or 30 feet. The Church argues this application of collateral estoppel violates a number of published opinions, such as Schibel v. Eyman, 189 Wn.2d 93, 98, 399 P.3d 1129 (2017). Pet. for Rev., p. 11. The issue in Schibel was whether the plaintiff in an attorney malpractice action was "collaterally estopped from relitigating whether Attorneys' withdrawal was proper" under circumstances where the court had approved the withdrawal before trial. Schibel, at 100. The Court affirmed application of collateral estoppel, holding that the "fact of withdrawal by court order is dispositive in a later malpractice suit" and the plaintiff is barred from relitigating or challenging that issue in the subsequent lawsuit. There is no conflict between the Court of Appeals decision in our case and this court's decision in Schibel. And, the Church's pinpoint citation does not refer to any aspect of the issues in our case.

Similarly, the Church argues that the trial court's application of collateral estoppel conflicts with the application of collateral estoppel in

Barr v. Day, 124 Wn.2d 318, 325, 879 P.2d 912 (1994). Pet. for Review, p. 12. Again, a review of the Barr case reveals that there is no conflict. In Barr, this Court explained that collateral estoppel only applies when the two issues are identical. If the issue is only collateral and insubstantial and thus not actually determined according to the evidence presented, then collateral estoppel does not apply because the issue had not been fully and fairly litigated. However, in our case, the issue of the right of way was determined according to the evidence in the administrative record, briefing, and argument submitted to the trial judge. The issue was identical, was actually litigated, and Barr is not in conflict with the Court of Appeals' decision in our case.

To the extent that the Church argues that it should have been able to present more evidence on the issue of whether the right of way was 8 feet or 30 feet at the time of the final decision and that application of collateral estoppel is therefore unfair, as the Court of Appeals pointed out, the Church "could have argued whether the dedication was 8 feet or 30 feet, but specifically chose not to do so in the LUPA action." The Court of Appeals quoted the Church's counsel's statement at the LUPA hearing that "it doesn't matter" whether the dedication was for 8 feet or 30 feet. Church, 5 Wn. App.2d at 487. Thus, it was not unfair to apply collateral estoppel given that the Church expressly notified the court that the issue was not relevant.

The Church also argues that collateral estoppel is unfair because, according to the Church, it was the prevailing party and thus there was no

avenue for it to appeal the trial court's determination. However, there were several opportunities for the Church to seek to have the determination revised, such as by filing a motion for amendment of the judgment under CR 59(h). And, if the Church really believed that there had been a fraud, as the Church has so often argued, then the Church could have filed a motion under CR 60(b)(4). The Church did not avail itself of either of these options.

The Church also argues that "[i]nability to appeal forecloses issue preclusion" and cites to a number of sources. Pet for Rev. at 12. However, these sources do not necessarily support the Church's argument. For example, in Olympic Tug, the court held that it cannot be said that the litigant has not had an opportunity to fully and fairly litigate an issue if it cannot seek judicial review of the Department's informal decision. Olympic Tug & Barge Inc. v. Dep't. of Revenue, 162 Wn App. 298, 259 P. 338 (2011)At 303. The court held, "A party may not be denied the chance to litigate an issue if it was *statutorily* denied an opportunity to appeal." Id. (emphasis added) (citing State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 309, 57 P.3d 300 (2002) (citing Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, 827 (1985) RESTATEMENT OF JUDGMENTS § 28(1) & CMT. A (1982)). In our case, the Church was not statutorily denied an opportunity to appeal.

The Church also continues to argue that the City deceived the superior court and somehow tricked the superior court into thinking that the

City was still requiring a 30 foot dedication as opposed to the modified 8 foot dedication. The Church raised this argument to the two superior court judges on myriad occasions. Neither of the superior court judges accepted the Church's argument, nor was Division Two persuaded that the City sought to deceive the court. There is no evidence to support the Church's arguments concerning this supposed deception.

B. There is substantial evidence to support the trial court's and appellate court's determination that the City of Tacoma did not act arbitrarily.

Under RCW 64.40.020, "[o]wners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority." The Church contends that the trial court and the appellate court erred in finding that the City's actions were not arbitrary or capricious. The trial court heard abundant testimony concerning the City's process in arriving at the developments conditions initially imposed as well as the process undertaken in response to the Church's objections and the City's subsequent alterations of the development conditions. Given this evidence, both the trial court and the appellate court found that there was substantial evidence that the City's actions were not arbitrary and capricious because "the City's decision was not willful and it did not act unreasonably." Church, 5 Wn. App2d at 491.

Here, the Church argues that the appellate court's decision conflicts with Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 954 P.2d

250 (1998). Pet. for Rev., at p. 14. However, Mission Springs is not even remotely analogous to our case. In Mission Springs, it was undisputed that the applicant had satisfied all the requirements of the application process and had vested rights in the application. Nevertheless, the agency withheld the permit because of citizen opposition to the project even though the agency's legal counsel advised that the agency had no legal authority to withhold the permit and that such withholding would constitute a constitutional violation.

In our case, the Church had no vested rights in its permit because it is undisputed that the application was not complete. The City thoroughly considered the Church's objections to the development conditions on multiple occasions using a Nollan/Dolan analysis and then altered the conditions. The City's position was reviewed by the City's legal counsel and explained to the applicant by the City's legal counsel. The applicant appealed and the matter went to the hearing examiner, who affirmed the City's positon. Under these facts, there is no basis to argue that the Court of Appeals' decision in our case conflicts with Mission Springs.

The Church argues that the City's actions violated the City's code provisions, citing to TMC 15.05.040B(9). Pet. for Rev., at p. 15. There is no such TMC provision and the City assumes that the Church may have been referring to TMC 13.05.040(B)(9). However, that provision applies to "Conditioning Land Use Approvals." In our case, the development

conditions were applied as part of a building permit, not a land use permit, and this provision is not applicable for the purpose argued by the Church.

The Church's last argument in this section of its petition is that the Court of Appeals' decision conflicts with Burton v. Clark County, 91 Wn. App. 505, 958 P.2d 343 (1998), review denied, 137 Wn.2d 1015 (1999). Again, there is no conflict. First, the applicant in Burton did not bring a claim under RCW 64.40. In addition, in Burton, the developer's application was complete. And, the agency in Burton had conditioned the permit on the applicant building a road that would not connect up to any other road. As the appellate court pointed out, "It will, in short, be a road to nowhere." Burton, 91 Wn. App. at 528. Under those circumstances, the development condition should have been removed from the permit because the condition violated a Nollan/Dolan analysis. In our case, the application was not complete. The development conditions were subjected to multiple Nollan/Dolan analyses at multiple levels of management and the conditions altered as a result of that review, all while the application was still incomplete. Thus, there is no conflict between the Burton decision and the Court of Appeals' decision in our case.

C. The Court of Appeals properly affirmed the trial court's finding that the City had authority to place development conditions on a building permit.

The Church argues that Division II's opinion in our case "makes the unprecedented claim that an agency has the 'lawful authority' to act in a manner inconsistent with the constitution from which all its powers are

derived." Pet for Rev., at p. 16. However, the appellate court did not make such a statement and interpretation of its opinion in that manner is inconsistent with the actual opinion. Rather, the court concluded that "the City acted within its realm of power to impose conditions on building permits." Church, 5 Wn. App. 2d at 492. Thus, it was not "in excess of lawful authority." RCW 64.40020(1). The appellate court decision did not state that an agency can lawfully violate the constitution and this argument asserted by the Church does not support discretionary review.

D. The Church's statement that the City is presumed to know the laws has no application to the facts of this case and is not an argument that supports Supreme Court review.

The Church contends that the Court of Appeals' decision "disregarded precedent holding the City knew or should have known the law." Pet. for Rev., at 17. However, the Court of Appeals' decision thoroughly analyzed and disagreed with this argument. See, Church, 5 Wn. App. 2d, at 493- 95. As the Court of Appeals pointed out, the Church's argument essentially nullifies that portion of RCW 64.40.020 that requires a plaintiff to show that the agency acted with "knowledge of its unlawfulness" or that the agency acted even though its unlawfulness "should reasonably have been known." Id. at 494. According to the Church, because the City is charged with knowledge of the law, the City cannot argue that it believed its actions to be lawful. However, this is contrary to the plain language of the statute and the argument does not support this court's acceptance of discretionary review.

E. The Court of Appeals properly affirmed the trial court's denial of plaintiff's request to amend its complaint.

The Church argues that the appellate court erred in affirming the trial court's exercise of discretion to deny the Church's motion to amend its complaint to add a claim under 42 USC 1983. Here, the Church makes the same argument it made at the Court of Appeals: that the Courts continue to misunderstand the nature of the claim the Church sought to add. The Church argues that it sought to add a claim for a violation of the doctrine of unconstitutional conditions, not a violation of the takings clause. However, the appellate court and both trial court judges, as well as the defendant, understood that the Church sought to add a §1983 claim based on a violation of the takings clause. That is what was presented in the Church's pleadings and briefing and what was argued orally. Now the Church argues that the claim it sought to add was for a violation of the unconstitutional conditions doctrine.

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).

In this case, when the Church sought amendment to add a §1983 claim, the Church based 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. Nowhere did the Church call out the doctrine of unconstitutional conditions.

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. Indeed, 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 Church had properly identified and pleaded a claim under the unconstitutional conditions doctrine, such a claim would not have been successful and the court properly denied amendment. 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 San 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 the dedication requirement being on the permit for several months, there was overwhelming evidence at trial that the Church could not establish that the dedication actually caused any delay at all. The Church was advised to continue with revisions to its building plans but at the time of trial, almost three years later, those revisions still had not been accomplished.

The Court of Appeals agreed that the trial court properly exercised its discretion to deny amendment of the complaint with a §1983 claim because that claim would have been futile. There is no basis under RAP 13.4 for accepting discretionary review on this issue.

F. The Court of Appeals properly affirmed the trial court's determination that the "final decision" in this case for purposes of RCW 64.40 was the hearing examiner's decision.

The Church argues that the appellate court erred in affirming the trial court's determination that the final decision for purposes of RCW 64.40 was the decision of the hearing examiner. The Church argues that this determination is in conflict with Durland v. San Juan County, 182 Wn.2d 55, 340 P.3d 191 (2014). Once again, the Church cites to a case that does not support its argument.

In Durland, the appellate court stated that Durland's lawsuit failed because he had not obtained a final decision, which would have come from

the hearing examiner. The court stated that "Durland's failure to seek review with the hearing examiner is doubly fatal to his LUPA suit: it meant that no final land use decisions had been made." Durland, 182 Wn.2d at 63. For purposes of LUPA, a "land use decision is a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on . . . an application for a project permit." Id., at 64. If "the permitting authority creates an administrative review process, a building permit does not become final for purposes of LUPA until the administrative review concludes." Id. at 64-65. While Durland dealt with a LUPA appeal and not a claim under RCW 64.40, it is nevertheless consistent with the appellate court's determination in our case that the final decision is the decision of the hearing examiner. There is no conflict which justifies discretionary review.

The Church also argues that the appellate court's decision is our case conflicts with Smoke v. Seattle, 132 Wn.2d 214, 937 P.2d 1997 and Birnbaum v. Pierce County, 167 Wn. App 728, 274 P.3d 1070 (2012). The Church made this same argument to both superior court judges as well as to Division II, with no success because there is no conflict with either of these cases. In Smoke, the issue was whether the applicant had exhausted its administrative remedies. The applicant argued that a letter from the City constituted the final decision because the letter stated, "[t]his letter represents the DCLU position regarding development potential of the

property . . . It is not an appealable legal determination." Id. at 219. Seattle's Code also expressly stated that the determination was non-appealable. The Smoke court explained 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 a final decision. Id. at 222. Thus, the Smoke court was able to say that under the facts of that case the City's letter decision was a final decision.

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, expressly stated that there had not been a final decision on the application. In our case, the letter stated that a final decision could be obtained by appealing to the hearing examiner "pursuant to TMC 1.23.050.B.2", who "shall issue a final decision." In our case, the 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. Under these circumstances, there can be no question but that the final decision was the Hearing Examiner's decision of August 19, 2014. Thus the facts in our case are not at all analogous to Smoke and there is no conflict with Smoke which might justify discretionary review.

As far as Birnbaum, there is no conflict with that case either. In Birnbaum, the plaintiff sought damages for a delay in the processing of its permit, before the final decision on the permit was issued. The court

confirmed that the cause of action under RCW 64.40 accrues at the final decision of the agency and that the plaintiff must exhaust all administrative remedies before a valid cause of action under RCW 64.40 arises. Birnbaum, 167 Wn. App. at 732-33. The Court held that the final decision prong of RCW 64.40 provides only for damages incurred *after* the final decision. The Court stated, "Simply put, the statute does not contemplate damages—for delay or otherwise—under the final decision prong that occurred *prior* to the final decision." Id., at 737. There is no conflict between the appellate decision in our case the Birnbaum court's decision.

G. The Court of Appeals properly affirmed the trial court's decision that the City conducted an adequate search in responding to the Church's request for public records.

The Church argues that the trial court's determination that the City did an adequate search for records, which was affirmed by the Court of Appeals, is in conflict with Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011), justifying review by this Court. Pet. for Rev., at p.25. However, there is no conflict with Neighborhood Alliance. In fact, the Court of Appeals' opinion correctly states that it is the Church's argument that is in conflict with Neighborhood Alliance. As the Court of Appeals stated, "However, the Church's argument completely disregards all the case law regarding adequate searches. See, e.g., Neighborhood Alliance, 172 Wn.2d at 720". See, Church, para. 81, (additional citations omitted).

The Church's argument is essentially that a search is necessarily inadequate if a document is not located during the search. However, that is

not what the case law, including Neighborhood Alliance, provides. "The fact that the record eventually was found does not establish that the agency's search was inadequate." Kozol v. Dep't. of Corr., 192 Wn. App. 1, 8, 366 P.3d 933 (2015), review denied, 185 Wn.2d 1034 (2016)(citing Neighborhood Alliance, 172 Wn.2d at 720).

The appellate court properly affirmed the trial court's determination that the City conducted an adequate search and there is no basis for discretionary review on this issue per RAP 13.4(b).

H. The appellate court properly awarded the City its attorney fees on appeal.

The City requested and was awarded its reasonable attorney fees on appeal per RCW 64.40.020. The appellate court noted that fees were statutorily authorized. Church, 5 Wn. App. 2d, at para. 84, although the trial court had, in its discretion, declined to award fees. Here, the Church simply makes the argument that the appellate court should have done what the trial court did. However, the fees are authorized by the statute and the Church cites no authority for its argument. Once again, the Church's argument on the issue of attorney fees does not justify discretionary review under RAP 13.4(b).

//

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Dated this 4th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2019, I filed, through my staff, the foregoing with the Clerk of the Supreme Court, for the State of Washington via electronic filing to the following:.

1. SUPREME COURT

2. Richard B. Sanders
Carolyn A. Lake
Goodstein Law Group, PLLC
510 South G Street
Tacoma, WA 98405

EXECUTED this 4th day of January, 2019, at Tacoma, WA.

_____
MARGARET ELOFSON

CITY OF TACOMA

January 04, 2019 - 3:54 PM

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